**IN THE HIGH COURT OF UGANDA AT SOROTI**

**CIVIL APPEAL NO. 48 OF 2013.**

**ARISING FROM BUKEDEA CIVIL SUIT NO. 73 OF 2010**

**1.OMERIKOL PATRICK**

**2. OSIRE JUSTINE……APPELLANTS**

**V**

**ANGURIA PAUL……..RESPONDENT**

**JUDGMENT**

The appellants through their advocates Mbale Law chambers appeal the judgment of HW Kaweesa Godfrey Senior Principal Magistrate grade one dated 11th September 2013 sitting at Bukedea on five grounds of appeal that I will revert to later in the judgment.

The duty of an appellate court is to re-evaluate the evidence adduced in the lower court and arrive at its own conclusion bearing in mind that the trial magistrate had an opportunity to observe the demeanour of the witnesses.

The respondent's claim was for trespass to land by clearing bushes, cutting trees and making land ready for cultivation. The appellants denied this allegation in their written statement of defence and raised the defence of claim of right based on inheritance over land in dispute whose acreage they placed at 40 acres.

Two issues were framed for trial.

1. Who of the parties is the owner of the disputed land?

2. Remedies

The basis of the respondent's claim was that he inherited about 700 acres located in Gangama from his late father Anguria Isreal who died in 1999. The witness who was born in 1968, recounted a previous dispute between one Eriongoti Paul and his late father Isreal Angura Civil suit. No. 125 of 1965 , handled by Bukedea grade two court and his father was the successful party for the entire piece of land measuring 40 acres. According to this witness, part of the land measuring 4 acres ,decreed to his father under suit No. 125 of 1965 is now under dispute. As evidence of the suit, the witness tendered Pexh. 2 . This is a letter dated 29th April 1980 by the Chief Magistrate Soroti confirming that Civil Appeal No. 10 of 1967 in respect of civil suit No. 125 of 1965 was dismissed and that the whole piece of land under litigation belonged to Isreal Angura.

The respondent is not quite clear when the alleged trespass by the appellants commenced but he states that it started after his father's death which death occurred in 1999.

According to PW1 Angura, the appellant's father one Omoding Ezekiel was the original cause of the dispute between Eriongoti and the respondent's father Isreal Angura. Apparently, Eriongot as parish chief of Kakere (according to PW2 Elizama Omoding) wanted Omoding to settle on Isreal Angura's land hence civil suit, No. 125 of 1965.

What is strange is that the said Isreal Angura later donated 40 acres to Omoding Ezekiel which land is not in dispute. In other words, the respondent's father donated 40 acres of land to the appellant's father but in spite of this donation,

the appellants encroached on an additional 40 acres after 1999 . While the respondent in his evidence in chief complains of 4 acres as the subject of dispute, in cross examination, it becomes 40 acres.

This observation is corroborated by the evidence of PW2 Elizama Omonding aged 81 years and therefore with knowledge of what transpired in the 1960s. This witness knew both the respondent's father Isreal Angura and the appellants' father Omoding Ezekiel and Eriongot the parish chief.

PW2's account of the dispute between Eriongoti and Isreal Angura somewhat differs but in essence it is that the defendant's father Omoding Ezekiel was given four gardens which was disputed by Angura Isreal who won the case at Bukedea but that Eriongot remained with four gardens.

At page 8 of the typed proceedings, the witness then states

' the plaintiff gave the defendant 4 gardens at Kakere'

I failed to make sense out of this critical piece of evidence. Read together with his evidence in cross examination at page 12 of typed proceedings, PW2 states that the respondent's father gave appellants' father 40 gardens and that the encroachment is on 20 gardens.

This notwithstanding, PW2 goes on to state that the dispute of the 40 gardens started in 2007 when appellants removed boundary marks and he does not know the size of land encroached.

The disparity between four acres as extent of encroachment as stated by the respondent in examination chief, then 40 acres in cross examination is evidence the respondent was not certain about what he was claiming.

PW2 Omoding does not help matters when he does not know the extent of encroachment during examination in chief but puts the size at 20 acres of encroachment in his cross examination .

Contrary to what other witnesses testified, PW3 Okwii states that Isreal, the respondent's father litigated with the appellants' father in Bukedea court and Isreal was the successful party. According to this witness, the appellant's father was donated 20 gardens by the respondent's father although he later states that the respondent's father gave the appellants' father 40 acres located along Kidongole road to the right and that the appellants have encroached on the respondents' 40 acres. An examination of the sketch map drawn during locus visit shows the disputed land as located on one side of Bukedea-Kidongole road. If this land , donated to the appellants' father is not in dispute, then why the suit?

More confusion is created by the respondent when he states in examination in chief that the land in dispute is the same land that was litigated upon by his father and Erionget in 1965. In cross examination, he states 40 acres donated to the appellants' father are not in dispute but rather another 40 acres is in dispute, without describing the location.

Further, the fact that respondent and his witnesses oscillate between acres and gardens brings more confusion to the respondent's case.

Save for the respondent, I observe that the cross examination of the rest of the witnesses took place on different dates from the date of examination in chief. For instance, PW2 Elizama Omoding , PW3 Okwii George, PW4 Obukelein John gave evidence in chief in a row on 27.3.2012 led by counsel Oyoit and in the absence of appellants' advocates Mbale Law chambers . The cross examination of these witnesses by the appellants in person took place on 19.6.2012 in a row . There is no explanation for this strange procedure. The record does not show that the appellants declined to cross examine the respondent's witnesses on the day they testified. If the reason was to enable defence counsel cross examine the witnesses , then the trial magistrate should have recorded that reason. As the record stands, it is the appellants who cross examined the witnesses on 19.6.2012 long after they had testified on 27.3.2012.

While there is uncertainty in the respondent's case on the extent and identity of the land dispute, the appellants and their witnesses are clear about the disputed land. According to the appellants, the disputed land which they state is 40 acres and part of 150 acres inherited from their late father Ezekiel Omoding in 1971 after his death. The 40 acres is located in Gangama , Kakere and on the right of the Bukedea- Kidongole road which separates the 40 acres from 110 acres. This piece of evidence is somewhat supported by PW 3 Okwi George who testified that the respondent's father gave the appellants' father 40 acres along Kidongole road on the right. (page 9 of typed proceedings), a fact that is disputed by the appellants.

According to the appellants, they applied for administration of 150 acres of land

( Dexh.2) and their father inherited the land from their grandfather Omirekol Nathanal. In other words, they dispute the respondent's claim that the latter's father donated 40 acres to their father Omoding.

If Isreal father of the respondent whom the latter claims litigated with Erionget over an alleged alienation of 40 acres/gardens to the appellants' father , the question that arises is whether the respondent is reclaiming the land donated in the 1960s or a different piece of land.

As counsel for the appellants submits , he who asserts a fact must prove it. The above analysis of respondent's case reveals contradictions with regard to size of land in dispute, lack of clarity on its location, the incredible assertion that 40 acres donated by his father to appellants' father is not disputed but rather an additional 40 acres, the assertion that a dispute between Erionget and Isreal Angura, respondent's father in 1965 is linked to the current dispute that I have failed to see, and the reference to acres and gardens interchangeably throughout the respondent's case.

I am mindful that the appellate court should not overturn a finding of fact on appeal unless the trial court was plainly wrong. In light of the foregoing evaluation of evidence, I find that the trial magistrate had no basis for entering judgment for the respondents.

Turning to the grounds of appeal, counsel started with ground four: that the proceedings at the locus in quo were perfunctorily conducted. Counsel Majanga criticized the trial magistrate for a number of failings, but I will focus only on a few of them.

a) The attendance list is a general document listing all those present at the locus as opposed to the parties.

b) Two persons were recorded as court witnesses yet they had not testified in the trial

c) No record of what the parties and witnesses showed the trial court.

d) Features in the sketch do not reflect how the court picked them .

e) The sketch does not indicate who owned the rubble of houses seen.

Counsel Oyoit for the respondent argued that witnesses and counsel were both present at the locus and he defended the conduct of the locus visit by the trial magistrate.

I agree with the authorities cited by counsel on purpose of a locus visit which is to check on evidence given by witnesses and not to fill gaps . **Yaseri Waibi v Edisa Lusi Byandala HCB [1982] 28** cited by counsel Majanga refers. In that case, the High court criticized the trial magistrate for taking into account a show of hands of people who had not testified.

The first failing I discuss is that

a) the trial magistrate did not indicate if parties were present and the attendance list is a general list.

There is merit in this criticism because the magistrate did not record presence of parties whose attendance is critical. While it is apparent from counsel's

submissions that they attended the locus visit, the failure to record presence of parties was a procedural omission on the part of the trial magistrate as he is familiar with his duties.

b) Two persons were recorded as court witnesses yet they had not testified in the trial

The record of the locus visit comprises testimonies of two witnesses whom the court referred to as court witnesses because they did not testify in court. These two persons were made to take oath and then proceeded to make their views known. Although its good practice to listen and record contributions from persons at the locus who did not testify, very little weight should be given to what they say. The practice is to listen to person who point out land marks attested to by witnesses in court but other comments about ownership should be ignored although a magistrate may record them. Therefore , although the two persons should not have given sworn statements, that they were sworn is not fatal. Neither did their statements add any value to the case.

On the criticism that

c) There is no record of what the parties and witnesses showed the trial court.

d) Features in the sketch do not reflect how the court picked them .

e) The sketch does not indicate who owned the rubble of houses seen.

I have taken a look at it and observe that there are no accompanying notes to explain relevance of features like trees, and rubble of houses. As counsel

Majanga points out, the map does not show to which party the undisputed land belongs. The ownership of the ruble of houses is not named.

Such omissions lead me to agree with counsel for the appellant that the locus visit was perfunctorily conducted. Ground four succeeds.

Ground 1, 2,3, and 5 were discussed together . These grounds can be discussed under ground one:

The trial magistrate did not evaluate the properly evaluate the evidence and as a result, he reached decision not supported by evidence.

Counsel Majanga cited sections 101 and 102 of the Evidence Act in support of his arguments. The principle in the two sections is that the burden of proof lies on whoever makes an assertion as to existence of facts. Therefore, the respondent who was the plaintiff had a burden to prove his claim to the land.

The gist of counsel's submissions on these four grounds is that the trial magistrate relied heavily on evidence of past litigation between Erionget and Isreal Angura. Counsel also argued that the dispute was about boundaries.

Counsel for the respondent submitted that the respondent's reference to litigation of 1965 was to bring out the fact that the current 40 acres under dispute was curved out of a larger piece that was under litigation in 1965. Counsel is certainly giving evidence from the bar because the evidence is not as clear as he is making out. If indeed that was the case, the respondent's evidence does not clearly bring out the location of the land. The respondents' witnesses suggest that the land visited during the locus visit was donated to the appellants' father by the

respondent's father. By his own admission, the respondent testified that the land donated was not in dispute. From the respondent's case, I failed to make any linkage between the land in dispute with the 1965 litigation .

I have evaluated both the respondent's and appellants' case and found that the respondent litigated about a piece of land measuring anywhere between 4 acres/gardens to 40 acres/ gardens . In other words, it was not just a boundary but a chunk of land whose location was not clear. I found that the respondent failed to discharge the burden of proof on a balance of probabilities. Grounds 1,2,3, and 5 succeed.

In the premises, I allow the appeal , and make the following orders:

1. Judgment of the lower court is set aside.
2. A permanent injunction shall issue restraining the respondent from interfering with the appellants' quiet enjoyment of the land that was under dispute.
3. Costs both here and the court below to the appellants.

**DATED AT SOROTI THIS 17TH DAY OF OCTOBER 2014.**

**HON. LADY JUSTICE H. WOLAYO**