IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 53 OF 2011

(ARISING FROM KUMI MAGISTRATE'S COURT CIVIL SUIT NO. 23 OF 2010)

EILAR JUVENTINE……..APPELLANT

V

1.APERIO JOSEPHINE

2. PEDUN CHIRSITNE

3. OCOM JOSEPH

4.OKURUT S/O OKELLO

BEFORE: HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant through his advocates Echipu & Co, appealed the judgment of HW Opio Belmos Ogwang Magistrate grade one dated 14th December 2011 sitting at Kumi on six grounds of appeal that I will revert to latter in the judgment.

The respondent was represented by Erabu & Co. Advocates.

Both counsel made written submissions that I have carefully considered.

As emphasized in **Fr. Narsensio Begumisa v Eric Tibagaga Supreme Court Civil Appeal No. 17 of 20012**, on first appeal, parties are entitled to obtain from the appeal court its decision on issues of fact and law through a re- evaluation of the evidence adduced in the trial court.

The appellant's case was that he inherited the suit land of 12 gardens from his late father Ariko in 1959. According to the appellant who testified as PW1, the twelve gardens were given to the defendants by his in law Bonifice Omalinga on terms that the appellant never knew. It was the evidence of the appellant that Omalinga was husband to the appellant's sister .

The date when Omalinga allegedly gifted land to the defendants is not disclosed by the appellant.

Suffice it to say that the appellant shifts position when he testifies that when his sister Apio Gabudesiana left her first marriage, she was married by another man who paid eight cattle that where given to the first husband as dowry refund leaving a balance of eight cattle.

It was the appellant's testimony that the suit land was attached by the parish chief and sold to realize the balance of dowry refund of eight cattle.

There is yet another shift in position when the appellant testifies that Okello Juventine, predecessor in title to the defendants bought the suit land when it was attached .

The appellant again shifted position when he testified that he was told by his in laws Okwaput , Ekellot Robert , and Okwii Alex that the suit land was mortgaged by their father Okwaput to Okello Juventine.

While all this was happening, the appellant relocated to Gweri in 1985 and returned to Ongino in 1995 where he settled on five gardens that he said were donated by his brothers Abuya, Emukat and Olupot.

In spite of returning to Ongino, between 1995 and 2010 , the location of the suit land, the appellant never checked on the suit land .

According to the appellant, in 2010, he offered eight head of cattle to Okello's family to redeem the land but the family declined the offer.

It is noteworthy that in the plaint, the appellant avers that he refunded his in laws eight cattle and handed Okwaput husband of his sister twelve gardens as security for the balance. That subsequently, Okwaput died and in 2010, the appellant handed Kolastica Among, the balance of eight cattle.

The different versions of how the defendants came to occupy the suit land renders his testimony unreliable as the court is burdened to figure out which version is correct .

An analysis of the appellant's testimony is that he is evasive about the origin of how the respondents came to occupy the land in dispute. This notwithstanding, the fact that he was in control of the land since 1959 when he inherited it from his late father Ariko implies that he had capacity to deal with trespassers if any.

That the appellant claims to have migrated to Gweri in 1985 and returned to be donated land by his brothers is intended to pre-empt the obvious conclusion that he did nothing as Boniface Omalinga or the parish chief or Okello Juventine concluded transactions on his land only for him to wake up latter in 2010 to challenge the possession.

It was the testimony of PW2 Obwongo Appollo that the defendants got the land by fraudulently claiming Okello bought it from Okwaput whereas the latter was given the land in lieu of eight cattle dowry refund.

According to PW3 Among Scholostica, her brother Okwaput was married to Apio , appellant's sister. In 1974, her brother Okwaput attached the suit land and utilized it for eight years until he died in 1982 before the full dowry refund had been made.

According to Among, the land remained vacant from 1982 to 2010 when she realized the defendants had settled on it. She conceded that Omalinga is her brother although she alleges he killed Okwaput, suggesting Omalinga had no moral authority to deal in Okwaput's estate and that she was his customary heir.

It was her testimony that on 9th February 2010, the appellant refunded to her eight cattle he owed late Okwaput.

Noteworthy is that Among sister of Okwaput gives 1974 as the time when negotiations for dowry refund took place, and by implication when Okwaput entered the land.

That the appellant and PW2 Obwongo were evasive about when Okwaput acquired an interest in the suit land means Among's testimony is credible.

From the foregoing analysis, the appellant who had a duty to prove his claim to the land was an unreliable witness whose intention was to hide his knowledge on the origin of how the defendants came to be on the land . That the appellant was in control of the suit land in 1974 when negotiations for dowry refund for his sister Apio took place was attested to by his witness Among PW3.

From the appellant's own testimony, he left Ongin in 1985 which means he was fully aware that Okwaput or his successor was holding the suit land in lieu of dowry refund of eight cattle which

refund the appellant purported to effect in 2010, a period of 36 years after entry into possession in 1973 or 1974.

The 1st respondent Aperi Angella Jennifer's case was that her late husband Okello Juventine bought the suit land of four gardens from Omalinga Bonifance for a consideration for three cows and twenty thousand shillings vide a sale agreement dated 27th September 1998 Dexh. 1 and Dexh. 2 dated 15.11.1998.

It was her evidence that the appellant is a brother to her mother in law which means Okello Juventine was nephew to the appellant.

The 1st respondent further testified that she had built a home on the suit land .

The 1st respondent also confirmed the position that the suit land was secured from the appellant for failure to refund dowry and later, her husband bought it after the appellant failed to pay.

The third respondent Dw2 Ocom Joseph and son of Okello Juventine confirmed what 1st respondent testified with respect to the year when his father bought the land from Omalinga in 1998.

The 2nd respondent Pedum Chistine who testified as DW3 also confirmed what the other two respondents testified and added that her late husband Okello Juventine was buried on the suit land

The fourth respondent Okurut who was 21 years old testified that his father Okello died in 2010.

DW6 Owaput Simon Peter clarified that his late uncle took possession of four gardens in 1972 in lieu of unpaid dowry refund and that Okwaput was killed in 1980 and his brother Omalinga took over the land and used it until 1998 when it was sold to Okello Juventine, a sale agreement he witnessed.

Muron David, son of Omalinga confirmed what the defence witnesses testified.

In summary, the respondents' case is that their title is based in a 1998 sale agreement in which Omalinga brother of late Okwaput sold four gardens to the respondents' predecessor in title, Okello Juventine.

The respondents' claim to the land depends on whether their title is clean.

I find that Okello bought land from Omalinga in 1998 who in turn inherited title from Okwaput in 1980 . Okwaput was brother to Omalinga . Although Among PW3 attempted to cast doubt on this inheritance on the grounds that Omalinga killed Okwaput, this piece of testimony is not supported by appellant and his other witnesses. Such a grave allegation ought to have been supported by other witnesses which was not the case.

Among PW3 further testified that she was heir to Okwaput yet she never visited the suit land until 2010 when she heard that the respondents had settled on it.

This gives credence to the conclusion that Among did her best to tilt evidence in favour of the appellant but unsuccessfully.

I find that Okwaput acquired an equitable interest in the land because he was in uninterrupted possession from 1973 till his death in 1980 and later his brother Omalinga utilized the land uninterrupted from approx. 1980 to 1998 when he sold to Okello who also enjoyed uninterrupted possession until 2010 when the appellant challenged their title to the land.

The result of this uninterrupted possession by Okwaput and his successors in title from 1973 to 2010 , a period of 37 years gives rise to an equitable interest by adverse possession. A possession gained by permission becomes adverse possession if the person remains in possession after the permission is not extended. **In Colchester Borough Council v Smith All.ER 1991 vol.2 page 28,** it was held that a defendant who was permitted by the council to occupy land but did not renew the licence for a period of twelve years implied that the defendant became a trespasser and his possession of the land was adverse to the council . That by 1st January 1980, he had established both the necessary intention to possess the land to the exclusion of all and the statutory twelve year period of adverse possession.

It was in 2010 when the appellant attempted to pay the dowry refund but this was coming too late as title to the land had passed to Okwaput and his successors in title. The appellant sat on his rights and therefore he is estopped from challenging the respondents' title to the land under the common law doctrine of adverse possession for equity aids the vigilant and not the indolent.

Under the statutory doctrine of limitation , the appellant was statute barred from bringing an action after the expiry of twelve years from the date cause of action arose. Section 5 of the Limitation Act provides:

‘ no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her, or if it first accrued to some person through whom he or she claims..’

I now turn to the grounds of appeal.

Grounds one

The trial magistrate erred in not visiting the locus when the appellant claimed twelve gardens while purchase agreement indicates four gardens purchased and location of land in the agreement is Akisum parish yet disputed land is in Ongin which was a contradiction.

There are several limbs to this ground. The first one is that while the appellant claimed twelve gardens, the purchase agreement mentions only four gardens were purchased by Okello. Counsel for the appellant submitted that this called for the trial magistrate to visit the locus to ascertain location and extent of land.

I have examined the purchase agreement and the address on df.exh. 1 is Ongin parish while the text in the agreement shows that the seller Omalinga is a resident of Akisum parish who sold four gardens to the buyer Okello for a consideration of three head of cattle and ten thousand shillings. The agreement is witnessed by several people including Okurut DW4, Omoding John parish chief of Ongino, and a clan chief . While the agreement is silent on location of the land sold, the fact that Okello took possession means that both seller and buyer were certain of the subject matter of the agreement. The appellant in his testimony describes location of land as Ongino which area he left in 1985 but returned to in 1995. The fact that the parish chief of Ongino witnessed the sale implies the land was located in his area of operation. I do not see what value a locus visit would have added to the appellant’s case.

The other part of the ground one is that there is uncertainty on whether it was twelve gardens or four gardens sold. The key issue for resolution was whether the suit land belonged to the appellant. The respondents’ case is that Okello bought four gardens. What is crucial is whether the land under dispute belonged to the appellant and not its extent. In any case, the appellant had to prove that he owned twelve gardens which he failed to do .

I note from both the appellant's evidence and respondents' evidence that Okello was a son of appellant's sister and therefore a nephew.

By implication all parties knew the suit land very well.

While it is recommended that a trial magistrate visits the locus, in this case failure to do so was not fatal as both parties knew the extent and location of the suit land and the appellant who had a duty to prove his claim failed to prove it .

Counsel for the appellant submitted that defence exhibits 1 and 2 are forgeries because they mention location of land as Ongin when seller was based in Akisum. I see no contradiction because the evidence clearly shows that the seller Omalinga was an in law to the appellant and therefore hailed from a different village.

I find no merit in ground one and it fails.

Ground two

Ground two is not very clear to me. It seems the appellant complains that the trial magistrate erred in believing the respondents' case that Omalinga rightly sold Okello the suit land.

I have found above that Omalinga inherited an interest from Okwaput that he then passed on to Okello and his descendants. The length of time the respondents and their predecessors in title Okello, Omalinga and Okwaput possessed the land without hindrance from the appellant for a period of thirty six years conferred on the respondents a title by adverse possession. This ground fails.

Ground three

The trial magistrate erred in not recognizing that the two estates of Ariko and Okwaput were inherited by the appellant and Amog Scholastica who entered into as redemption agreement that freed the suit land from encumbrance.

I have found that the alleged redemption came too late after the persons in possession had acquired title to the land by adverse possession. Ground three fails.

Ground four.

The trial magistrate erred in law and in fact in failing to see that the alleged earlier sale was inconsistent with the latter redemption.

This ground is covered by ground three.

Ground five

The decision of the trial magistrate is against the weight of the evidence.

I find that the trial magistrate arrived at a correct conclusion on the facts.

Ground six

The decision of the trial magistrate has occasioned a miscarriage of justice. I find no merit in this ground.

In conclusion, I dismiss this appeal and confirm the orders of the trial magistrate.

The appellant and his agents are restrained from interfering with the quiet possession of the suit land which is decreed to the respondents.

Costs of this appeal and the court below to the respondents.

Obiter

Before I take leave of this appeal, while I have found in this judgment that Okwaput took possession in lieu of unpaid balance of dowry refund, I did not recognize that the refund was lawful.

My decision is based not on the dowry refund arrangement but on the cumulative time Okwaput, Omalinga and Okello possessed the land and therefore acquired an interest while the appellant sat on his rights.

The Supreme court this month in **Mfimu and ors v Attorney General and anor Constitutional Appeal 2 of 2010**, ruled that refund of dowry is a custom prohibited by the Constitution as it diminishes the dignity of women as human beings.

Therefore dowry refunds and transactions based on these refunds are unconstitutional as declared by the Supreme Court and they will not be recognized.

DATED AT SOROTI THIS 27TH DAY OF AUGUST 2015

HON. LADY JUSTICE H. WOLAYO