THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0114 OF 2012
(ARISING FROM PALLISA CIVIL SUIT NO. 006 OF 2010)

1. **OKIA JOSEPH**
2. **OJULONG STEPHEN**
3. **OGWANG SIMON PETER :::::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

IGIRA LAWRENCE::RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellants raised 7 grounds of appeal arising out of the decision of his Worship **H. Zinsanze**, Magistrate Grade I Pallisa.
The Plaintiff/Respondent sued the Defendant/Appellant for recovery of his land approximately 40 acres situated at Kadesoko village, Kibale Pallisa District.

The duty of a first appellate court is to re-evaluate the evidence and reach its own conclusions taking caution that it did not have chance to observe witnesses. See ***Banco Arabe Espanol v. Bank of Uganda SCCA 8/1998*** (unreported).

Before I determine the grounds I must resolve the question as argued by Respondents whether the appeal was filed out of time.

Counsel for appellant addressed this matter and argued that the Notice of appeal was filed on 27th June 2012, and judgment certified on 27th August 2012, wherefore the memorandum was filed on 5th September 2012. This was 8 days after certification of judgment and proceedings, which is within time following section 79 (3) of the CPA.

Respondent's counsel however argued that judgment was delivered on 20.6.2012, and time to appeal as provided under the 30 days rule expired on 20th July 2012. Counsel faulted the appellants' failure to follow timelines of appeal and argued that section 79 (1) (a) is informative on that matter. He invited court to find the appeal incompetent and that it be dismissed with costs.

The position of the law on this matter has been settled.

Appeals are originated by filing a memorandum of appeal under O.43 r. 1 of the Civil Procedure Rules.

In the case of ***Suleiman v. Bwekwaso Muganda (1989) HCB 140***, it was held that it would be anomalous for a party to be required to file a memorandum of appeal before obtaining or having access to the lower court record.

The courts have further guided on the question of time. In the case of ***Godfrey Tuwangye Kazzora v. Georgina Kitari Kwenda (1992-93) HCB 145***, it was held that:

> "*The time for lodging an appeal does not begin to run until the appellant receives a copy of the proceedings against which he or she intends to appeal*."

From the above position of the law, I have cross checked the record and it is true that the appellant was served a certified record of the judgment on 27th August 2012. Time began running on that day, and the memorandum was filed on 5th September 2012 which as well within time.

This appeal is therefore competently before court.

I will not consider the grounds raised on appeal.

Grounds 1, 2, and 3- (Wrong Assessment of evidence)

The evidence on record was as follows.

PW.1 (plaintiff) **Lawrence Igira** said the defendants grabbed his land. He left it in 1986- and returned in 2000 and found when the defendant had grabbed the land. He reported to

defendant's clan leaders, was referred to the sub-county but defendants refused to attend to the summons. He was instead summoned at police and intimidated but he refused to barge. He said the land used to belong to his late father **Omongole S/o Igira**. He inherited it in 1945. The land was 40 acres.

PW.2 Lawrence Akol confirmed that he was the county chief for the defendant's clan. He received a complaint against defendant from the plaintiff. He summoned the defendant but they refused. He advised defendant to proceed to higher authorities. Then plaintiff went to the sub-county, the district, and RDC. All meetings the defendants refused to attend. He stated that in his knowledge that land belonged to the plaintiff.

PW.3 Festino Opedun stated that the plaintiff left his land in 1986 and returned in 2000 only to find the defendants using it. Plaintiff reported to LC.3 Kibale, but defendants refused to attend. He confirmed that the land is for the plaintiff.

PW.4 Anguria Tadeo is chairman LC.III. He confirmed that plaintiff attended his council and reported a case of trespass by defendants. Through RDC a meeting was convened- but twice defendants did not attend. He tendered in the minutes of both meetings (ID.I).

PW.5 Okiso John said defendants are his cousin brothers and they were cultivating plaintiff's land. He confirmed the evidence of PW.3 above and said he grew up on that area and knows that the land is for plaintiff who inherited it from his father **Omongole**.

In defence **DW.1 Okia Joseph** said that the land belonged to his late father **Ojulong Girifasi**, from whom he inherited it in 2004. His father left a Will on which he was appointed heir. The land is 80-88 acres. The Will (translated) was tendered as IDI. He also attempted to tender another document written in Luganda dated 20.08.1943. It was however rejected for being in Ateso and translation not done under acceptable modalities.

DW.2 Kagodo John, also referred to the copy of the Will. He stated that the land used to belong to late Kibale upon whose death on 20.08.1943 his son **Ojulong Girifasio** inherited it. Among

the many people who witnessed the handover of this land to defendant **Ojulong** was **Lawrence Akol**, brother to defendant (page 30 of proceedings).

DW.3 Otagent Ignitius stated that on 19.2.1983 he presided over a hand over function for land to defendant – that **Okia** handed land to **Ogwang**.

A document was written showing that among those present was himself and **Akol Lawrence** (PW.2). The document was admitted for identification as ID.I.

DW.4 Albert Opito, DW.5 Anjera Blita Adongo, both testified that their evidence was on information; that land is for defendant. All confirmed that plaintiff as a young man stayed on the land and left later.

DW.6 Ojulong Stephen confirmed the evidence version of defendants that D.1 inherited the suit land in 2004 from late **Ojulong Girifasio**.

The above was the summary of the evidence. In all civil matters the burden of proof is on a balance of probability. Sections 101, 102 and 103 of the Evidence Act requires that he who asserts a fact proves it.
The appellants have complained under grounds above that the learned trial Magistrate did not evaluate evidence above correctly made wrong conclusions.

They complain that it was wrong to conclude that because the Respondent had ever lived on that land he was the rightful owner.

They also fault the learned trial Magistrate for disregarding their documentary evidence.

From the evidence on record I do find that there was evidence from both plaintiff and defendant in proof of the fact that the plaintiff had ever lived on the land in question before he left in 1986 as stated in his plaint.

Evidence shows by PW.1, PW.2, PW.3, PW.4 and PW.5 that he left due to insurgency and returned in 2000. The defence by their written statement of defence (paragraph 5) alleged plaintiff was a squatter on the land and that the land had been formally surrendered back; and a deed of surrender was executed.

The defendants attempted by evidence to show that plaintiff eloped with his benefactor's wife and had disappeared.

I have carefully examined the evidence as a whole. I have carefully perused the submissions. My opinion is that there was consistent evidence led by plaintiff through his witnesses in proof of his ownership of the land he claims. It is a fact not denied by all witnesses that by the time he left in 1986, he was in possession of the land. I notice that he claims title from 1945. When he inherited from his own father. He utilized the land until 1986 when he left. No witness disputes the fact that he was on that land before he left in 1986. The defendants on the other land claim ownership through their father whom they claim died in 2004. They claim he left a Will naming DW.1 as the heir. That plaintiff was a squatter. I find exception to the evidence of the defendants. It presented itself with bits of contradictions regarding acreages of the land and dates, and names. For instance DW.1 contradicts himself as to the proper names of his grandfather as pointed out by counsel for Respondents. He contradicted himself in evidence in chief and cross-examination that land in issue is 80, 88, and 45 acres.

There are so many other contradictions for example as pointed out by Respondent's counsel where DW.2 denied knowledge of the plaintiff, then gave evidence that he came on the land in 1955. This contradicted DW.1 who stated that plaintiff was brought on the land in 1983.
I notice a major contradiction in evidence of DW.3 and that of DW.1 and DW.2. While DW.3 claimed that defendants got the land after he convened a clan meeting and handed over the same; DW.1 and DW.2 stated defendants acquired the land through a Will left by the defendant in 1943, yet DW.4 stated that they (defendant) inherited the land in 2004 from the late **Ojulong**.

This evidence when tested and weighed against that of the plaintiff, it is found to be more contradictory, yet the plaintiff is consistent. By the submissions of the appellant, no

contradictions were pointed out in the evidence of the plaintiff. Even if the issues in evidence allegedly ignored by the learned trial Magistrate are given their due weight here on appeal, I still do find that the evidential weight tilts in favour of Plaintiff/Respondent.

The documents which were presented by either side were received for identification. They were not exhibited and as such carried no concrete evidential weight. The Will was not exhibited. It was rejected for being in a local language whose translated version court was unable to relay on, since its translator was not called to be examined. The other documents were also taken on record for identification. Even on appeal, they carry no evidential value since they were not admitted in evidence as exhibits. The reasons for their non admission cannot be visited on court. I note from proceedings that counsel did not supply proper documents for exhibition.

I am therefore satisfied that the learned trial Magistrate subjected the evidence on record to proper scrutiny and did not reach any wrong assessment thereof.

I find that ground 1, ground 2 and ground 3 are not proved.

Ground 4, 5, and 6:

In arguing this ground, the appellant alluded to the documentary evidence which had been rejected.

I note that these documents were never exhibited but were received as ID.I, and ID.II. At best they could only be referred to as “unproved”. The evidence of the witnesses of defence though not wholly hearsay as held by the learned trial Magistrate, was of little evidential weight. In most cases defence witnesses contradicted each other and I found that some of the witnesses during cross-examination confessed to hearsay (see evidence of DW.5 and DW.6). I therefore find no merit in these grounds and they also fail.

Ground 7 was abandoned.

In the result I find no merit in this appeal. I find that the learned trial Magistrate reached the right decision. The appeal is dismissed with costs to the Respondent, here and below.

Henry I. Kawesa

JUDGE

28.11.2016