THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL APPEAL No. 0031 OF 2017

(Arising from Adjumani Grade One Magistrate's Court Civil Suit No. 0030 of 2014)

ABUDALA SEBI KALA ….……..……..……..…… APPELLANT

VERSUS

MISIA MAHMIDI ANDI ……..……..……..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellant seeking a declaration that she is the rightful owners of land under customary tenure, an order of eviction, an award of general damages for trespass to land and the costs of the suit. The respondent's claim was that she is the administrator of the estate of her late father, Mohamud Andi. Her late father acquired the land during the 1930s and lived there on until his death in 1964 and he was buried on that land. Before his death, Mohamud Andi gave a portion of the land lying across Moyo road, to the appellant's father. During 1989, the appellant's father requested and was permitted by Mohamud Andi to cross over and settle on Mohamud Andi's land. He was supposed to stay there temporarily and not supposed to construct a permanent house. During the year 2010, the appellant sold off portions of that land to divers people and that sparked off the current dispute. Construction that had commenced was stopped. She contended that the appellant should return to the land that was given to his father across the road to Moyo.

In his defence, the appellant contended that the land in dispute was given by the Palanywa Clan to his late father Sebi Kala during the 1920s. The appellant was born on that land in 1958 and has lived thereon since then. He was surprised to be sued by the respondent. He refuted the respondent's claim that it is her father who had given the land to his father.

At the hearing, the respondent, Misia Mahimudi Andi testified as P.W.1 and stated that her father settled on the disputed land in 1930. It is her father who allocated the land in dispute to the appellant's father upon his migration from Adjumani District as a teacher of Islam in a Madrasa. During 1979, both families vacated the lend and fled into exile in Sudan. They returned from Sudan in 1986. In 1989, the respondent left the land that had been given to his father across the road to Moyo and settled on the land now in dispute. The respondent and her brothers allowed him to stay on the land temporarily on compassionate grounds but cautioned him not to put up any permanent structures. During his occupancy, the respondent repeatedly reminded the appellant that the land was not his. Surprisingly in 2010, the appellant sold off a portion of the land to the headmaster of Oligo Secondary school and this annoyed the respondent. She and her brother stopped the purchaser form constructing on the land. P.W.2 Adam Abudulah testified that when disputes erupted between the appellant and his brother's wife, he left the land that had been given to his father and settled on the land now in dispute, with the permission of the respondent's father.

P.W.3 Jimiya Kaje testified that it is the respondent's father who allowed the appellant's father to occupy the land in dispute on the understanding that he would eventually vacate it. When the respondent's father died he was buried on that land and so were her deceased siblings. P.W.4 Dafala Kamu testified that the respondent's father acquired the disputed land in 1952. Around 1954, the respondent's father gave the appellant's father land to settle on where he lived until the 1979 war when they both fled into exile. The respondent's father Sebi Kala died in exile and was buried there. When the appellant's father returned from exile, he settled on the same land but encroached on that of the late Mohamud Andi. Hearing of the evidence of this witness was concluded at the *locus in quo*. P.W.5 Ramathan Kamo testified that the respondent's father Mohamud Andi was the first to settle on the land in dispute and later during the 1950s permitted the appellant's father Sebi Kala to stay on land across the road to Moyo since he was a preacher. When Mohamud Andi died in 1964, he was buried on the land in dispute. It is in 1987 that the appellant requested the brothetr of the late Mohamud Andi, a one Drapaga Brohan, to reside on the land now in dispute and he was permitted to do so temporarily. He was given an area measuring approximately a quarter of an acre just enough for the construction of his house. That was the close of the respondent's case.

In his defence, the appellant testified as D.W.1 and stated that his father, the late Sebi Kala settled on the land in dispute before 1920 having acquired it by gift from Dralobu, the then Clan head of the Palanywa Clan. The appellant was born on this land in 1958 and has lived there ever since. He refuted the claim that his father acquired the land from the respondent's father. Their family has lived on that since then. His father planted mango trees on the land. His father died in exile, in Sudan. The appellant reoccupied the land after his return from exile in 1987 having found it vacant at the time. D.W.2 Idrifua Charles Moi testified that the land in dispute belongs to the Palanywa Clan and that it is the then clan head, Ben Dralobu and his brother Severino Moyima, who gave it to the appellant's father. It measures slightly less than an acre. It is the appellant who has been using it since 1976. He could not explain though why its boundaries were not marked. D.W.3 Waigi Dralobu Noel testified that the land originally belonged to Ben Dralobu and Severino Moyima as elders of the Palanywa Clan. It was given to the appellant's father Sebi Kala in the 1920s and the appellant was born on that land. That was the close of the appellant's case.

In his judgment, the learned trial magistrate found that the appellant had not explained how the respondent came onto the land in dispute or why her father was buried thereon in 1964. At the *locus in quo*, the court had observed the respondent's burial ground and building material which had been abandoned at the site of the portion the appellant had sold to the headmaster of Oligo Secondary School in 2010 yet the suit was filed in December 2014 by the respondent. On basis of that evidence, he satisfied on the balance of probabilities that the land in dispute belonged to the respondent and therefore entered judgment in favour of the respondent. Considering that the appellant had been in possession of the area occupied by his house, he ordered that the appellant retains only that part but granted vacant possession of the rest of the land to the respondent. He directed each party to bear their own costs.

Being dissatisfied with the decision the appellant raised two grounds of appeal, namely;-

1. The learned trial magistrate erred in law and fact when he failed to judiciously evaluate the evidence on record thus occasioning a grave miscarriage of justice.
2. The learned trial magistrate erred in law and fact when he failed to consider evidence at the locus in quo in his judgment tp the detriment of the appellant.

In his written submissions, counsel for the appellant, Mr. Nasur Buga Mohammed argued that the trial magistrate failed to take into account evidence that showed the appellant was in possession of the suit land. The respondent herself admitted that she allowed the appellant to settle on the land in 1991 to re-arrange himself. The appellant adduced evidence that he had been in occupation of the land since 1987 when he returned from exile. The trial magistrate placed too much reliance on the testimony of the respondent without testing it against the rest of the evidence on record. the appellant had lived on the land with the knowledge of the respondent from 1989. The more than twenty years residence on the land cannot be described as temporary. Whereas P.W.1 claimed to have given the land to the appellant, both P.W.2, P.W.3 and P.W.4 testified that it is the respondent's father who had allowed that of the appellant to settle on the land while P.W.5 stated that it was a one Dropaga who gave the appellant the land. This contradiction was never explained. The appellant having been in possession of the land for over thirty years, a finding that he was a trespasser thereon was therefore erroneous. He prayed that the appeal be allowed with costs to the appellant.

In reply, counsel for the respondent, Mr. Kassim Ahmed argued in his written submissions that the trial court did not overlook any material evidence. Whereas the appellant had settled on the land across the road upon his return from exile in 1987, during 1989 he crossed over onto the respondent's land. In 1991, the respondent ratified that occupancy by letting the respondent continue in occupation for as long as he did not put up a permanent structure. It is the appellant's dishonest act of selling off a portion of the land that sparked off the dispute culminating into the current proceedings. There is no contradiction in that evidence since P.W.1 was referring to the land in dispute while P.W.2, P.W.3 and P.W.4 referred to the land originally given to the respondent's father across the road. The trial court upon visiting the *locus in quo* found features on the land consistent with the respondent's version and not that of the appellant. Having considered the evidence as a whole, the trial magistrate came to the correct conclusion for which reason the appeal should be dismissed with costs to the respondent.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before

coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

> It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The two grounds raised by the appellant are all essentially concerned with the manner in which the trial magistrate evaluated the evidence before him and for that reason will be considered concurrently. In order to decide in favour of the appellant, the trial court had to be satisfied that appellant had furnished evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by the respondent, might hold that the more probable conclusion is that for which the appellant contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*). the burden of proof was on the appellant to prove on the balance of probabilities that he had a better claim to the land than the one made by the respondent.

Having re-evaluated the evidence, I find that although the appellant in his testimony claimed to have been born on that land in 1958 and has lived thereon since then except for that time when he was in exile and was corroborated in this by D.W.3 Waigi Dralobu Noel, his version was inexplicably contradicted by his other witness D.W.2 Idrifua Charles Moi who the appellant had been using it since 1976. This witness as well could not explain though why its boundaries were not marked. On the other hand, the evidence adduced by the respondent and her witnesses was consistent in explaining how the appellant came to occupy the land in dispute. The observations of the trial court made at the locus in quo are more consistent with the respondent's version than the appellant's. On that account, the trial magistrate cannot be faulted for having preferred the respondent's evidence t that of the appellant.

Although the appellant had been allowed to stay on the land temporarily, the period of time he continued in occupation cannot be described as temporary. The question then is whether or not he acquired proprietary interest in the land by only that long period of occupancy. Although uninterrupted and uncontested possession of land for a specified period, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see *Perry v. Clissold [1907] AC 73, at 79*), in this case the appellant's occupancy was not hostile to the rights and interests of the true owner, the respondent, by virtue of having been permitted to stay there. Therefore he could not acquire title by prescription.

On the other hand, title could be acquired by proprietary estoppel. In equity, if a stranger begins to build on another person's land supposing it to be his own, and the owner, perceiving the stranger's mistake, abstains from setting the stranger right, and leaves the stranger to persevere in that error, a Court of equity will not allow the owner afterwards to assert his or her title to the land on which the stranger had expended money on the supposition that the land was his or her own. It considers that, when the owner saw the mistake to which the stranger had fallen, it was the owner's duty to be active and to state his or her adverse title; and that it would be dishonest for the owner to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which the owner might have prevented (see *Ramsden v. Dvson (1866) L.R. 1 H.L. 129*).

In the instant case, there is nothing to show that throughout the time of his occupancy, the respondent did anything that could have led the appellant to believe that he had acquired interest in the land. She categorically stated that he was not to construct any permanent house on the land and this was found to be the case when the court visited the *locus in quo*. When he engaged in conduct appearing to assert title over the land, i.e. disposing off a portion of it by sale, the respondent immediately took issue with him and commenced litigation. The appellant therefore neither acquired title by operation of the doctrine of proprietary estoppel.

For all intents and purposes, the appellant's status on the respondent's land was that of a licensee whose occupation could be terminated at the will of the respondent. She did that the moment the appellant attempted to alienate part of the land. From that moment on, the appellant became a trespasser on the land since trespass includes refusing to leave another person's land when permission has been withdrawn (see *Davis v. Lisle [1936] 2 KB 434, [1936] 2 All ER 213*).

In the final result, the trial magistrate cannot be faulted in the conclusion he reached. I find no merit in the appeal and it is hereby dismissed with the costs in this court and those of the court below being awarded to the respondent

Dated at Arua this 26th day of October 2017. ……

Stephen Mubiru
Judge
26th October, 2017