THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 23 OF 2015

(ARISING FROM CIVIL SUIT NO. 74 OF 2012, KITGUM CHIEF MAGISTRATES COURT)

OTTO JUSTINE.....APPELLANT

VERSUS

1.TABU RICHARD
2.ONGAYA CALVIN
3.OTTO CHARLES
4.LOUM CHARLES
5.OKETTA DENIS
6.SABINA ATARO
7.ANYEK JOJINA
8. ALANYO JACKLINE.....RESPONDENTS

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

This is an appeal from the Judgment and Decree of the Magistrate Grade One of Kitgum Chief Magistrates Court, His Worship Rukundo Isaac, delivered on 19th May, 2015, in Civil Suit No. 74 of 2012, a land matter. The Appellant was the Plaintiff in the trial Court. He sued, seeking vacant possession and declaration of ownership of the land situate in Oryang Ojuma village, Oryang Parish, Labongo Amida Sub County, Kitgum

District, measuring approximately 24 acres. The Appellant claimed to have inherited the suit land and to have enjoyed quiet possession thereof until the year 2000 when he was forced by the insurgency in the region, into an Internally Displaced Persons Camp (IDP). The Appellant averred that he went back to the customary land in 2007, when the Respondents forcibly entered thereon, and cut down trees, and begun cultivating. The Appellant further sought for permanent injunction, general and special damages, mesne profits for trespass, and costs.

In their separate defences, the Respondents denied the claim. They all claimed ownership through the late Orach Lupuda who was alleged to have acquired the suit land in 1920 as customary land. The 1st, 4th and 5th Respondents averred that they are great grandchildren, whereas the 2nd and 3rd Respondents claimed to be grandchildren of Lupuda. The 6th and the 8th Respondents averred they were married to the great grandsons of Lupuda, while the 7th Respondent contended she was married to the son of Lupuda. The grandchildren and the great grandchildren all claim to have been born and raised on the suit land.

After the trial, the trial Court held that the Respondents are the lawful owners of the suit land and could not trespass thereon. Court dismissed the suit but was silent on the issue of costs. Being aggrieved, the Appellant lodged this appeal.

Grounds of Appeal

1. The Learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence before Court and relied on hearsay and contradictory evidence presented by the Respondents thereby coming to wrong conclusion.

2. The trial Magistrate erred in law and fact when he in effect erroneously declared the Respondents as the lawful owners of the suit land.

The Appellant who appear to have personally drawn the Memorandum of Appeal, unaided by Counsel, prayed that the appeal be allowed, and the Judgment and orders of the Magistrate Grade One Court be set aside. He prayed to be declared the lawful owner of the suit land and that the Respondent pays costs of the Appeal. At the hearing however, the Appellant who appeared by Counsel prayed for a retrial.

Representation

During the hearing, the Appellant was represented by Mr. Ocorobiya Lloyd while the Respondents were unrepresented and absent. Court allowed the appeal to proceed to hearing *ex parte*, under Order 43 rule 14 (2) of the Civil Procedure Rules. The Appellant filed written submission. Court has

perused the submission, the material on record, the law, and hence the determination. Court sees that no prejudice is caused by want of submissions of the Respondents.

Arguments for the Appellant

Learned Counsel for the Appellant reminded this Court of its duty as a first appellate Court. Counsel went on to submit that the proceedings in the lower Court were poorly recorded and the evidence recorded by the trial court leaves a lot to be desired. Counsel asserted that the Appellant was unrepresented. He also submitted that even where the Respondents were represented in the trial Court, yet the record was poorly taken. Counsel claimed that the answers that were provided by the Appellant and recorded by the trial Court in cross examination do not provide a clear picture of what was on trial. Learned Counsel wondered whether the trial Court took its judicial responsibility seriously.

The appellant's Counsel further submitted that the trial Court should have assisted the parties to bring out their cases as practicable as possible, especially where a party is unrepresented.

In this case, I understood Counsel to imply that the Appellant should have been assisted by the trial Court since he was not represented by Counsel. For the Respondents, they were represented at the commencement of their

defences. Learned Counsel cited the Book entitled ***"An Introduction to Judicial Conduct and Practice" by B.J Odoki, 3rd Ed***, in support of his arguments, emphasizing that, the lower Court failed in its duty to assist an unrepresented party.

Learned Counsel also cited the case of ***Mukhoda Harriet Vs. Nairubi Angella, HCT-00-LD-CA-0014-2013***, quoting the holding by Kwesiga, J., that it would be dangerous to base any judgment on the type of the record before Court, as it left Court to speculate what the Magistrate was trying to say.

In the above decision by Justice Kwesiga, Court concluded that there was a miscarriage of justice as it was difficult for Court to rely on the record to analyze the evidence and make conclusion.

Learned Counsel then prayed that this Court declares the trial a mistrial and orders a retrial before a Magistrate. Counsel also prayed that the parties bear their own costs in this Court and in the trial Court.

Resolution of the Appeal

As a first appellate court, the parties are entitled to obtain from this court, the court's own decision on issues of fact and issues of law. However, in the case of conflicting evidence, Court has to make due allowance for the

fact that Court has neither seen nor heard the witnesses testify, and make an allowance in that regard. Court must however weigh conflicting evidence and draw its own inference and conclusions. See: **Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002, (per Mulenga, JSC)**.

Before I resolve the grounds of appeal, I have noted that the submissions for the Appellant did not address the formulated grounds of appeal. The arguments relating to the lack of assistance to an unrepresented party, with respect, is attractive but not rooted in any formulated ground of appeal before court. I also note that learned Counsel did not apply to amend the Memorandum of Appeal or seek leave to argue the new point. The omission, in my view, flouted the provision of O.43 rule 2 (1) of the CPR.

In the circumstances this court will not resolve any matters not properly placed before it. Court will however consider the arguments regarding the conduct of Court where a litigant (s) is/are unrepresented only in so far as they may have a slight bearing on the resolution of the first ground of appeal.

Ground one criticizes the manner in which the trial Court dealt with the evidence on record. It is argued that the Court did not properly evaluate

the evidence and allowed hearsay and contradictory evidence adduced by the Respondents. Having not submitted on the framed grounds of appeal this court would have wholly disregarded the grounds, treating them as having been abandoned had it not been for the reason that the Appellant would have suffered a miscarriage of justice by default of learned counsel to address the framed grounds. Court will therefore resolve the grounds although the submissions do not address them.

I will begin with ground 2. The ground faults the trial Court for declaring the Respondents as the lawful owners of the suit land. The ground, I must admit, is vague as it does not pinpoint what error of law or fact the trial Court committed by making the impugned declaration. Be that as it may, I have noted that the trial Court, with respect, made a declaration of land ownership in favour of the Respondents, in the absence of a Counter Claim.

A counterclaim has the effect of a cross action. It is an independent suit. A counterclaim enables court to pronounce a final judgment in the same action where the counterclaim can be conveniently disposed of. If a counterclaim cannot be conveniently disposed of within the same action commenced by the plaintiff, Court will refuse a defendant the right to counterclaim. In such a case, the defendant would be advised to file a separate suit. See Order 8 rule 2 CPR.

Thus, in **Friends in Need Sacco Ltd Vs. Lulume Nambi Norah, Civil Appeal No. 89 of 2019 (Hct),** Justice Emmanuel Baguma held that a counter claim is treated as an independent action.

In the instant case, the issues framed by the trial Court left no room for the court to make the impugned declaration. This is because the Respondents did not make a counterclaim. Therefore, no issue could be competently framed around their alleged ownership. The issues that were framed were thus: *whether the land belongs to the plaintiff (appellant); whether the Defendants (Respondents) trespassed on the suit land;* and *the remedies available.*

In the circumstances, in the absence of a counterclaim, the only remedy available to the Respondents, if any, was an order dismissing the Appellant's suit, as the trial court did. This observation however does not go to the merit or otherwise of the dismissal, which will be resolved shortly.

In the circumstances, I hold that the learned trial Magistrate Grade One erred in law in holding that the Respondents are the lawful owners of the suit land in the absence of a counterclaim.

Accordingly, ground 2 succeeds.

The affirmative resolution of ground 2 would in my view be sufficient to dispose of the appeal. However, I will proceed to resolve the remaining ground for completeness.

Ground 1 challenges the trial court's evaluation of the evidence on record. The ground was framed that the trial Court relied on hearsay and contradictory evidence adduced by the Respondents.

As noted, learned counsel for the Appellant, with respect, failed to demonstrate which pieces of evidence constituted hearsay and which evidence were contradictory. Be that as it may, I have perused the record of the trial Court, and subjected it to a fresh and exhaustive scrutiny, cognizant of the fact that I did not see the witnesses testify.

From the record I note that the trial Court accepted the evidence by the defense that the Appellant's father lived on approximately one acre of the suit land in the year 1967, for two years and died. Court was also told by the Respondents that upon the death of the Appellant's father, the Appellant and his siblings went back to their uncle's home (mother's side). The trial Court was further informed by the Respondents that the Appellant and his brothers were living and cultivating at their uncle's place, as at the time the matter was being adjudicated in the trial Court. The trial Court then accepted the Appellant's testimony that the Appellant

was given the suit land by his father to live on in the year 1978, before the father's death. The trial Court noted that the Respondents testified about signs of their grandfathers' old homestead on the suit land. The Court then reasoned that the Appellant never mentioned any signs to show that he stayed on the suit land, apart from his inheritance.

With respect, the trial Court improperly evaluated the evidence and contradicted itself in material respect. I note that the Respondents' testimonies supported a bit of the Appellant's ownership claim, at least the inheritance from his late father. Whether or not the father had interest in the said land and could pass to the son, was not canvassed in the trial court. Therefore, having found that some of the Respondents, namely, Otto Charles, Ataro Sabinah and Tabu Richard had conceded in cross examination that the suit land was given to the Appellant's father after he requested for it, the learned trial Magistrate should not have purported to disbelieve the Appellant, without cogent reasons, in light of the favourable evidence. Thus the trial Court had no basis for rejecting the evidence that the Appellant inherited one acre of the suit land from his father.

Relatedly, this Court further notes that although the Appellant sued for 24 acres of land, his own evidence was that he inherited four acres only. The Respondents downplayed this evidence, contending, only one acre was inherited by the Appellant. The trial Court nonetheless wholly disbelieved

the appellant and made no affirmative finding for him, in the slightest respect.

It is also clear to me that the Respondents had conceded that the Appellant and his siblings lived on the suit land and had only left after the death of their father. In such a case, the trial Court was therefore, not entitled to hold that there was a further need for the Appellant to prove signs of his father's old homestead on the suit land. In my view, the trial Court should have established the circumstances under which the Appellant and his siblings left the suit land. The court failed in that respect.

I have noted that PW3 (Apoto Rojina) who was the Appellant's aunt, testified that the Appellant was chased from the suit land by the Respondents. PW4 Opua Alfred testified to the same effect, stating that the Appellant took off to his uncle's home, a one John Olanya, in Lemo, out of fear. These pieces of evidence were not challenged by the Respondents before the trial court.

In the circumstances it was not proved that the Appellant left the suit land voluntarily. If he had vacated the land willingly, there is no way he could have turned around to sue the Respondents. I therefore believe PW3 and PW4's testimonies that the Appellant was chased from the suit land by the Respondents.

On his part, DW3 Otto Charles claimed that the Appellant was not living on the suit land but in Lucucu village where the Appellant's mother came from. DW3 did not explain how the Appellant all of a sudden left the suit land, upon the demise of his father and relocated to his mother's side.

I therefore hold that the Appellant's sudden departure from the suit land to his maternal uncle's home on the death of his father, was not voluntary but illegally orchestrated by the Respondents in the absence of a judicial declaration in their favour.

I have also noted that the trial Court accepted the Respondent's testimony that the suit land had been subject of 'adjudication' by the land chief (locally termed 'hoe chief' in Acholi). This was the testimony by DW2 Calvin Ongaya. The trial Court did not attempt to establish from DW2 what the outcome of that 'adjudication' was. In my view, this is a case where the trial Court should have sought clarity where certain pieces of evidence were left hanging by witnesses of an unrepresented parties.

In **Jones Vs. National Coal Board [1957] 2 QB 553, Lord Denning M.R** underscored the role of Court in adversarial system of litigation. The celebrated law Lord had this to say,

"In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a Judge is not a mere umpire to answer the question 'how's that'. <u>His object above all, is to find out the truth, and to do justice according to law</u>." (Underlining is for emphasis.)

The Law Lord continued,

" the Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetitions; to make sure by his wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this he drops the mantle of a Judge and assumes the robe of an advocate; and the change does not become him well. <u>A judge is not only entitled but is, indeed, bound to intervene at any stage of a witness' evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can</u>

properly follow and appreciate what the witness is saying." (Emphasis is mine.)

I must say that what Lord Denning said several decades ago apply to our circumstances with equal force. There is no doubt that Uganda follows an adversarial system of litigation. It is therefore my view that every judicial officer should be aware that he/she performs the role of doing justice and therefore holds the balance between the contestants to litigation without himself/herself taking part in the dispute. If a Judge should however himself conduct the examination of witnesses, he/she, would descend into the arena and his/her vision is liable to be clouded by the dust of the conflict. This however does not mean a Judicial Officer should not intervene, in appropriate circumstances, more especially where a party is unrepresented by Counsel. Even where Counsel appears, a Court may still intervene. A court should however put a limit to the extent of its intervention so as not to compromise the rights of the opposite party.

See: **Mulindwa George William Vs. Kisubika Joseph, Civil Appeal No. 12 of 2014 (SCU)**. See also **Oryema Mark Vs. Ojok Robert, Civil Appeal No. 13 of 2018 (High Court), Stephen Mubiru, J.)**

I hasten to add that the judicial duty reposed in a Judge should apply to all persons exercising judicial duty without exception.

In the instant case, the learned trial Magistrate left hanging, quite a lot of information from witnesses. For instance, the Appellant testified that he had successfully sued a one Oling in the Local Council II and LCIII Courts, a person through whom the Respondents allegedly claim. The Appellant had also testified that he was declared the rightful owner of the suit land and Oling was ordered by the Local Council Courts to vacate the suit land and compensate the Appellant for the trees destroyed for brick burning.

PW3 also testified to the same effect, corroborating the Appellant that the Respondents were successfully sued in the Local Council Court of Amida.

These pieces of evidence, in my view, brought out the plea of *res judicata* but the trial court was never concerned with it. In such a state of affairs, the proper course was for the trial Court to inquire from the witnesses whether they were possessed of copies of the alleged Local Council Court decisions, in light of the importance of the point of law innocently raised by a lay litigant. The point, in my view, potentially was capable of disposing of the dispute by the trial court, if it was canvassed further.

This Court also notes from the record that an issue arose during the opening of the defense case in cross examination. It related to whether DW1 (Tabu Richard) was testifying about the suit land or not. There, DW1 had stated on oath that it was not the same land whereas the Appellant

asserted that it was the same land. The trial Court ruled that, whether or not it was the same land, would be resolved in cross examination. This is one of the many instances of lack of judicial tact, in adjudication.

In my view, this is a matter where the trial Court should have done more, by seeking clarify from the witnesses for the parties, to establish the real truth.

Relatedly, the trial Court should have also resolved the issues surrounding the the so-called gifting allegation of the suit land to the Appellant's father by the late Lupuda Orach. DW3 (Otto Charles) stated in cross examination that suit land (strictly the disputed area) is where the father of the Appellant (Yokoyadi Gero) was staying. He also claimed that the father of the Appellant requested for that area but not the appellant. DW3 also testified that it was in the year 1967 when the parents of DW3 allegedly gave land to the Appellant's father. DW3 claimed that the Appellant's father was given only one acre of the suit land. This view was shared by DW4 Luwum Denis.

I note that in his testimony, the Appellant claimed 4 acres of land yet he had pleaded 24 acres as that being in dispute.

Regarding the gifting allegation, in my respectful view, I find the same bare and not supported. If the Appellant's father was gifted with an acre of the suit land by the late Orach Lupuda, why did the Respondents chase the Appellant therefrom? What were the terms of the gift, if any? Was it temporary? Couldn't the Appellant inherit what was gifted to his father, if it was a mere gift?

The trial Court did not resolve several hanging issues.

I have also found material contradictions in the evidence for the defense. DW4 claimed the Appellant stayed with his father on the 'neighboring' land, not the suit land, in 1986 but left in 1991. On her part, Ataro Sabinah (DW5) testified that the Appellant never stayed on the suit land but his father and an aunt (Akoko Sarah) did.

In my view, DW4 and DW5 did not wish the Appellant to be associated with the suit land at all. DW5 further claimed that when the Appellant's father died, the Appellant and his siblings went back to their uncle's place (maternal side). DW5 however admitted in cross examination that when the Appellant's daughter died, she was buried on the suit land.

The above concession, to my mind, defeated the earlier denial that the Appellant lived on the suit land. DW5 did not know the details of the

alleged land gifting by Orach Lupuda because she conceded that at the time she got married Orach Lupuda was already dead. DW5 therefore failed to tell how the Appellant and his father got onto the suit land.

In my view therefore, the evidence on record proved that the Appellant's father owned four acres of the suit land which the Appellant inherited. Having failed to prove that his father owned 24 acres, the Appellant was still able to prove the ownership of four acres only. Therefore, the Respondent's attempt to downgrade the ownership claim to only one acre, with respect, was designed to show that the Appellant had nothing to lay claim to, after all, the land was allegedly a mere temporary gift which the Respondents could take away any moment. With respect, the Respondents erroneously believed that the Appellant could not inherit land gifted to his father, if at all it was a gift. I however find that the land was not a gift to the Appellants father but the father owned four acres thereof, as testified to by the Appellant.

In conclusion, I find that the Appellant proved on the balance of probability that he owns through inheritance, only four acres of the suit land.

The trial court therefore failed to properly evaluate the evidence on record. Ground one of the Appeal therefore succeeds.

In the upshot, the appeal is allowed. Considering the circumstances of the whole case, I find that whereas errors were committed by the trial Court, I find this not a proper case in which a new trial ought to be ordered. The trial was not necessarily null and void or materially defective to warrant an order of a retrial. With the greatest respect, I reject the invitation by learned counsel for the Appellant that a retrial should be ordered.

I note that this is a 2012 matter because that is when the suit was first lodged in the court below, with the instant appeal having been lodged in 2015. The Appeal was only placed before me recently for hearing.

In the circumstances an order of a retrial would cause a grave miscarriage of justice especially where witnesses and evidence may not be available. See: ***Matayo Okumu Vs. Fransiko Amudhe & 2 Others (1979) HCB 229***; ***Bongole Geoffrey & 4 Others Vs. Agnes Nakiwala, Civil Appeal No. 0076 of 2015 (Court of Appeal)***; ***Oyua Enock Vs. Okot William & 9 Others, HCCS No. 022 of 2014***; ***Alimarina Okot & 4 Others Vs. Lamoo Hellen, High Court Civil Appeal No. 026 of 2018***.

In light of the above findings, I make the following orders;

1. The decision of the Grade One Magistrate of Kitgum Chief Magistrates Court dismissing civil suit No. 74 of 2012 is set aside.

2. The Appellant is declared the lawful owner of only four (04) acres of the land situate in Oryang Ojuma village, Oryang Parish, Labongo Amida Sub County, Kitgum District hitherto claimed by the Respondents.

3. The Respondents shall immediately give vacant possession of four (04) acres of the land situate in Oryang Ojuma village, Oryang Parish, Labongo Amida Sub County, Kitgum District to the Appellant or any person claiming under the Appellant.

4. A permanent injunction issues, restraining the Respondents, their agents, or persons claiming under them from interfering in any manner with the Appellant's repossession, ownership, use, and quiet possession of the four (04) acres of the land mentioned herein above.

5. Each party shall bear its own costs of the Appeal and costs in the trial Court.

It is so ordered.

Delivered, dated and signed in Court this 19th May, 2023

George Okello
JUDGE HIGH COURT

Ruling read in Court

19th May, 2023

11:50am

Attendance

Ms. Grace Avola, Court Clerk.

Mr. Lloyd Ocorobiya, Counsel for the Appellant.

The parties are absent.

Appellant's Counsel: The matter is for Judgment. I am ready to receive the Judgment.

Court: Judgment read in open Court.

George Okello
JUDGE HIGH COURT