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The Republic of Uganda

In The High Court of Uganda at Soroti

Civil Appeal No. 0026 of 2022

*(Arising from Civil Suit No. 013 of 2021)*

*(Arising from High court Civil Appeal No. 0015 of 2017)*

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*(Arising from Bukedea Civil Suit No. 029 of 2013)*

Osaire John:.....Appellant

Versus

Imalingat John:.....Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

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Judgement

1. Background:

This appeal arises from the judgement and orders of the Chief Magistrates Court of Kumi, holden at Kumi delivered on the 29<sup>th</sup> of June 2022 by H/W Maloba Ivan, Magistrate Grade One.

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The background which led to this appeal is that Imalingat John who is the respondent herein filed Civil Suit No. 029 of 2013 in the Magistrates Court of Bukedea against Osaire John who is the appellant herein seeking for declarations that the latter is a trespasser on the land forming the estate of the late Opus to which the respondent is customary heir.

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After the respondent had presented his case and witnesses in the lower court, the appellant failed to turn up in court to present his witnesses to court resulting in the respondent's counsel moving court under Order 17 rule 4 of the Civil Procedure Rules for the matter proceeds *ex parte*. That prayer was allowed by



5 court and the matter proceeded ex parte resulting in the lower court, after satisfying itself that the respondent had proved, entering a judgment in favour of the respondent.

The appellant was dissatisfied with court's decision and appealed to this court vide High Court Civil Appeal No. 0015 of 2017 on the grounds that the trial court  
10 erred in law and fact when it passed judgment in favour of the respondent without giving him and his witnesses the opportunity to testify before passing judgment and that that decision occasioned a miscarriage of justice.

This appeal of the appellant in High Court Civil Appeal No. 0015 of 2017 was allowed with the High Court after considering the merit of the appeal passing  
15 judgment in the favour of the appellant then and the appellant now. The High Court in its decision, among the various orders it issued, directed that a retrial of Civil Suit No. 029 of 2013 which was filed and adjudged in the Magistrates Court of Bukedea be conducted before a different trial magistrate within the Chief Magistrate's Court of Kumi.

20 From the record, it appears that a fresh filing of the said suit was made at the Chief Magistrate's Court of Kumi as is evidenced by the records of proceedings in Civil Suit No. 0013 of 2021 though with the same pleadings and the same parties.

In the newly filed suit, still the respondent herein claimed inheritance of land situate at Abileap Parish, Kolir sub-county, Bukedea District measuring  
25 approximately 72 gardens from his grandfather, the late Opus as a gift *inter vivos* in 1982 and that the appellant herein lived on a different piece of land but adjacent to the suit land.

In the case before the fresh trial court, the respondent averred that he enjoyed peaceful possession of the suit land till 2012 when the appellant took advantage



5 of his absence, entered onto it and trespassed on part of the land measuring 4 gardens.

The appellant, in his pleadings and testimony denied these allegations contending that he was given the alleged trespassed suit land in 1980 by his grandmother called Ikareut Estheri.

10 The trial magistrate after evaluating all the evidence on record entered judgment in favour of the respondent and gave the following orders;

- (i) The land in dispute belongs to the plaintiff.
- (ii) The defendant is a trespasser on the suit land.
- (iii) General damages of Ug. Shs. 10,000,000/= to the plaintiff.

15 (iv) Costs of the suit.

The appellant was dissatisfied with the judgement and orders of the lower trial court and so he once more appealed to this court.

2. Grounds of Appeal:

The grounds of the appeal are that;

- 20 a) *The Trial Magistrate erred in law and fact when he failed to properly evaluate the entire evidence on record and thereby arrived at a wrong conclusion that the suit land belongs to the respondent.*
- b) *The Trial Magistrate erred in law and fact when he visited locus and included land which was not in dispute.*
- 25 c) *The Trial Magistrate erred in law and fact when he failed to find that the suit of the respondent was barred by the law of limitation.*
- d) *The decision of the Trial Magistrate occasioned a miscarriage of justice.*

5      3. Duty of the first appellate court:

This court in as far as the new retried case is concerned in a first appellate court with its duties well laid down in the case of *Kifamunte Henry vs Uganda SCCA No. 10/1997* where it was pointed out that;

10                    *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

Furthermore, in the case *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*, the obligation of a first appellate  
15 court was pointed as being;

*"... 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".*

The above legal positions in regard to the duty and legal obligation of tis first  
20 appellate court are taken into account while considering this appeal.

4. Representation:

In this appeal, the appellant was represented by M/s Natala & Co. Advocates while the respondent was represented by M/s Obore & Co. Advocates. Counsels representing parties argued this appeal by way of written submissions. The  
25 submissions and the whole record of the lower court including pleadings, proceedings and judgment and orders are taken into account while resolving this appeal.

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5      5. Determination:

Ground 1: The Trial Magistrate erred in law and fact when he failed to properly evaluate the entire evidence on record and thereby arrived at a wrong conclusion that the suit land belongs to the respondent.

The overview of the submissions of counsel for the appellant shows that it  
10      majorly focused on the land sold to one Okwii B. It was submitted that the  
appellant's neighbour was one Okwii B and not the respondent and there is no  
logical way the appellant would have crossed his boundary into the respondent's  
land without affecting Okwii's land. That this fact was confirmed during the locus  
in quo visit where it was noted that the appellant owns the land on the right side  
15      of the suit land and had sold the one on the left to it to one Ekamole and as such  
he must have owned the entire suit land.

Counsel for the appellant further faulted the trial magistrate for finding that the  
appellant's grass thatched house on the suit land was fairly new indicating he had  
just moved there a few years ago and for finding that the late Ikareut's grave was  
20      on Okwii's land yet the appellant had explained how the grave was found to be  
there.

Counsel for the respondent in response submitted that the judgment of the trial  
magistrate was spot on for even the Appellant's own witness Okiring Tedero  
(DW2) admitted during cross examination that the suit land was given to the  
25      respondent in 1982.

Counsel further submitted that in his considered view the Respondent discharged  
the legal burden upon him through PEX1 which is a document in regard to the  
suit land which showed that the suit land was gifted to him which document was  
capably corroborated by all his witnesses including even the Appellant's own

5 witnesses such as Okiring Tedero (DW2) who chaired the meeting when the respondent was gifted the suit land by his forefathers in 1982.

The fact of the document (PEX1), which is the basis upon which the Respondent claim is based, was not contested by even the Appellant. That being the case, it is evident to this court that the document (PEX1) being uncontested document  
10 for which the respondent claims rights to the suit land confirms the fact that indeed the suit land rightfully belongs to the Respondent.

On the other hand, the Appellants claim to the suit land is premised on conjecture and speculation for he failed to lead any iota of evidence which would confirm that the suit land was gifted to him by Ikareut Esteri in 1980. The lie that the  
15 appellant was gifted the suit land by Ikareut Esteri in 1980 was unmasked by his very own witnesses, who during cross-examination, confirmed that though the appellant was gifted the said suit land by Ikareut Esteri in 1980, he was staying with his father called Ongino, yet as testified by Okiring Tedero (DW2) as of 1982 the appellant was still residing in his father's land.

20 On the other hand, Imalingat John (the respondent) who testified as PW4 told the lower trial court that he got the suit land through three elders called Opus, Iboliat and Kedi who were all sons of Olemugole on 11<sup>th</sup> July 1982 and this fact was documented, more so by the sub-county chief and that even the appellant were present during this meeting when the suit land was handed to him with the  
25 elders giving him 72 gardens including the suit land and that he had the minutes of the meeting which he tendered in evidence as P.E.X1 without objection from the appellant.

The respondent further stated that after he was given the land there was no problem and no one complained and he used the land peacefully from 1982 to  
30 2010 when the appellant trespassed on the same and started cultivating.

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5 He told court that upon the appellant trespassing on the suit land, he reported the matter to the LC2 court which issued summons to the appellant to appear in the court but the appellant declined resulting in the LC2 court referring the respondent to Magistrate Grade 1. That even in the magistrate's court the appellant once more refused to attend court leading to the magistrate's court proceeding with the case ex parte and subsequently declaring that the suit land which measures 8  
10 gardens to be his. That the said decision was appealed against and the matter was heard afresh with both parties tendering evidence.

During cross-examination the respondent maintained that the appellant was not using the suit land at the time it was given to him and there was no grave on the  
15 suit land of the late Ikareut Esteri, the old woman who allegedly gave him the appellant the suit land in 1980. The respondent further stated that the only home on the suit land in the 1980's was the one given to him by his fore fathers in 1982.

The evidence the respondent who testified as PW4 is corroborated by those of Imalingat Lawrence (PW1), Akol Francis (PW2) and Atipany Musa (PW3) who all  
20 maintained that the appellant at first encroached on 4 gardens by the time the original suit was filed in 2013 but further encroached on 8 gardens even after the original suit was filed yet the suit land belonged to the respondent who was gifted the same in their presence.

Osaire John, the appellant, while testifying as DW1 stated that the land was given  
25 to him by Ikareut Esteri in 1980, but that the gifting was not documented because he was their first son. That after being given the suit land he proceeded to construct his home thereon in the same year and that later when Ikareut Esteri died he buried her on the suit land in 1990. That during the insurgency which covered Teso Sub region, including his home area, he fled to Kampala and only  
30 returned in 2008 and that was when he constructed his second house on the suit



5 land. He told court he was acquainted with the fact that the respondent's father had sold land to one Okwii Benjamin Boaz whose land was between him and that of the respondent and Okwii's wife returned to the area in 2007 and wanted to utilise that piece of land but was refused to do so by the respondent who claimed the land had not been sold to Okwii but that the said dispute was settled at LC2  
10 level and at that point the respondent then encroached on his land and gave some of it to Okwii's widow and up to now this part has not been given to him. During cross-examination he denied that his biological brothers Okaso and Omuria live where his father Ongiro was buried but admitted that his brothers do not have homesteads on the suit land but earlier did.

15 He stated further that Ikareut Esteri was given land by her brothers and denied selling land to one Oluk Martin. He also denied that his original homestead is where Oluk Martin bought and is currently occupying.

DW2 Okiring Tedero testified that Ikareut Esteri was a niece in the home of Olemugole and she requested Olemugole for land to construct her home in 1948.  
20 That Olemugole accepted her request and in the presence of clan leaders, a piece measuring 10 gardens was given to Ikareut Esteri. That in 1978, Opus s/o Olemugole sold his land to Okwii and in 1982 Opus brought the respondent as the heir, and he witnessed this as he was the sub-county clan chief of Ikomolo clan.

25 During cross-examination he stated that the land given to the respondent was vast as it encompassed the upper part to the lower part of the suit land and that by the time this land was given to the respondent, the appellant was staying with at his father called Ongino with his brothers Okaso and Omuria. That the latter two were still staying at their late father's land. He further confirmed that Oluk  
30 bought land from the appellant who had constructed his house on before shifting



5 to the disputed land. He also confirmed that the land occupied by Okwii's widow does not form part of the disputed land.

DW3 testifies mainly on the land sold to Okwii by Opus s/o Olemugole, he also added that the appellant was given land by the late Ikareut Esteri.

10 During cross-examination he stated that he does not know the size of the land in dispute and he also confirms that the appellant sold land (2 gardens) to Oluk Martin and prior to this sale the appellant was staying in that land.

During locus, the parties showed court the disputed land and it was confirmed that the late Esteri Ikareut's grave was on Okwii's garden.

15 The trial court observed that the appellant was in possession of the suit land and the houses on the land were approximately 8 to 14 years old and there were no graves on the suit land for the relatives of the appellant.

From the above evidence, the lower court concluded that the respondent was given 72 gardens by his three elders in 1982 and this fact was documented vide PEX1 which is also not disputed by the appellant.

20 The appellant claim that he was given the suit land in 1980 by Ikareut Esteri is an allegation which bore no fact as it was speculative and not proven as the appellant has no documentation of this event and his witnesses could not give any personal account of that event. The appellant's claim that the late Ikareut was buried on the suit land was also trashed at locus when the late Ikareut grave  
25 was found to be in Okwii's land.

The appellant claimed that the land was given to him in 1980 and in that same year he constructed a house thereon. According to DW2 during cross-examination, he testified that in 1982 when the respondent was given his 72 gardens, the appellant was staying on his father's land. DW2 was also a witness

5 to the respondent's being gifted the suit land among others by the sub-county clan chief at the time meaning that if indeed the appellant had been given the suit land in 1980 and he immediately constructed a house thereon DW2 would have seen him on the suit land in 1982 when the respondent was being given land.

10 This this was not so, is proof that the appellant moved recently on the suit land which fact is corroborated the respondent's testimony that he enjoyed peaceful occupation of the suit land unperturbed from 1982 till 2010 when the appellant encroached on the same.

Another interesting issue is that while the appellant denied selling land to a one  
15 Oluk Martin and that this was the land where his original homestead was, his witnesses DW2 and DW3 in their testimonies stated otherwise. Indeed, both admitted that the appellant himself sold land to Oluk Martin and this was the land where his original homestead was before he moved and encroached on the suit land.

20 This uncontested evidence once again proves that the appellant's not only encroached on the suit land which was not his but move to the suit land recently as opposed to his that he moved into it in the 1980's.

After assessing the evidence adduced in court, I am satisfied with the finding of  
25 the trial court that the grass thatched houses on the disputed land which are claimed by the appellant are relatively new which are an indication that the appellant had just recently moved onto the disputed land in order to lay claim on the suit land.

I am also satisfied that though the appellant had testified that there were graves on the suit land, the locus finding found otherwise that there were no graves

5 whatsoever of the appellant's relatives on the suit land and even the grave  
alleged to be of the late Ikareut Esteri was found to be located on the land  
currently owned by Okwii Benjamin Boaz not the suit land.

Furthermore, the appellant in his testimony denied that his brothers Okaso and  
Omuria were stay where his father was buried yet DW2 stated otherwise during  
10 cross-examination and while this piece of evidence is not necessary to prove his  
claim, it still shows that the appellant has the habit of lying to court.

This is because while he admitted that his brothers do not have homesteads on  
the suit land he claimed that at an earlier time they did so. However, he opted  
not to call them to testify to this effect. This all goes to show that the appellant  
15 has no claim on the suit land whatsoever.

The appellant in his testimony focused on the land sold to Okwii by Opus and his  
witnesses testified to it too, however as testified by DW2 the land sold to Okwii  
does not form part of the suit land and even that the dispute on the said land was  
resolved at LC II level and the appellant cannot claim that the respondent took  
20 part of his land when Okwii's widow came to reclaim her late husband's land. The  
appellant bringing it up in evidence is clearly a diversion from the main issue.

DW2 in his testimony stated that he was around when the land was given to the  
respondent and it was vast from the upper part to the lower part and when giving  
a description of the boundaries he stated that as they moved on the upper side  
25 on the right hand direction there was Ingabata's land with Osaire's on one side  
and Ingabata's on the other.

Also the *locus in quo* map indicates that Ingabata's land neighbours the suit land  
on the left and Okwii's on the right and given that Okwii bought his land from  
Opus through whom the respondent claims, it is clear that the suit land was part

5 of the 72 gardens given to the respondent by Opus, Iboliat and Kedi, who were all sons of Olemugole.

During locus visit the appellant showed court land he sold to Ekamole, this land borders the suit land and borders Ingabata's land to the north. This fact corroborated DW2's evidence that when they moved around the respondent's  
10 land in 1982, Ingabata was on one side and Osaire on the other.

From all these pieces of evidence, it is evident that the suit land forms part of the respondent's land and the appellant had indeed trespassed on the same.

Consequently, I am inclined to agree with the finding of the trial magistrate that basing on the evidence adduced by both parties, the plaintiff, now the  
15 respondent acquired interest in the suit land on 11<sup>th</sup> July, 1982 when his three relatives gifted him and that gift was reduced into writing as shown by PEX 1 as opposed to allegations by the defendant, now appellant that are not supported by any documentary evidence. This ground would thus fail.

*Ground 2: The Trial Magistrate erred in law and fact when he visited locus and*  
20 *included land which was not in dispute:*

Counsel for the respondent submitted that the respondent claimed four gardens in his pleadings but while at locus the trial magistrate allowed the respondent to show more than four gardens. Counsel submitted that parties are bound by their pleadings and it was irregular for court to allow the respondent amend his claim  
25 at locus.

Counsel for the respondent submitted that this matter was initially filed at Bukedea Magistrate's court vide Civil Suit No. 29 of 2013 at the time this honourable court ordered a retrial which took place in Kumi Magistrate's Court vide Civil Suit No. 0013 of 2021, a lot had changed on the suit land. That PW1 in

5 his testimony stated that the defendant had kept encroaching on the plaintiff's land and this is the justification for the respondent to claim 10 gardens. That the respondent could not restrict his claim to 4 gardens yet the appellant had encroached on more land as confirmed by the locus proceedings.

In regard to these assertions, the trial Magistrate in his judgement found as  
10 follows;

*"At locus the Plaintiff showed court the boundary and size of the disputed land, the extent of trespass committed by the Defendant which the Defendant did not controvert save for insisting that the same land was his and that it was given to him by the late Ikareut Esteri in 1980.....The plaintiff  
15 informed court that at the time of filing the suit in Bukedea Magistrate's court the Defendant had only trespassed on four gardens but as of to date, the Defendant has trespassed on about eight gardens by cultivating and building homesteads".*

While it is true that the respondent originally pleaded 4 gardens, from the above  
20 conclusion, it is clear that the appellant continued to trespass on the land despite the suit being in court.

The appellant as noted by the trial magistrate did not dispute the extent of his trespass save for insisting that the land was his.

Given that the appellant did not deny that he had cultivated or constructed on  
25 this suit land, I would conclude and find that it was not irregular for the trial magistrate to determine the ownership of the originally pleaded gardens but also the ones later trespassed on by the appellant.

It would have been unjust for the trial magistrate having taken note that the appellant had trespassed further on the suit land and upon further noting that



5 the appellant was not denying the same, to ignore this later trespass and make  
judgement on only the 4 gardens as pleaded as that would not bring to an end  
the dispute between the parties herein. In my considered view, the trial  
magistrate while faced with the appellant's disregard of the suit in court, made  
judgement basing on the evidence before him and came to the right conclusion  
10 that the appellant had trespassed on all eight gardens.

I would further find that given that claim of acquisition by both parties does not  
change for the extra gardens; the appellant still claims through Ikareut Esteri and  
the respondent through his forefathers.

No injustice was therefore occasioned to either party, had the magistrate not  
15 made a finding on the further trespass injustice would have been occasioned to  
the respondent. This ground accordingly fails.

*Ground 3: The Trial Magistrate erred in law and fact when he failed to find that  
the suit of the respondent was barred by the law of limitation.*

Counsel for the appellant submitted that the appellant stated that he has been  
20 in occupation of the suit land since 1980 and the complaint was filed more than  
30 years later without the respondent showing any protestations and actions  
taken by him to challenge the appellant's occupation before the 12-year period  
elapsed.

Counsel prayed this court finds that the suit was time barred and the trial  
25 Magistrate was wrong in finding that the appellant could not benefit from the  
statute of limitation.

Counsel for the respondent in reply submitted that respondent in his testimony  
stated that he started utilising the disputed land peacefully from 1982 until 2010  
when the Defendant trespassed on his land and started cultivating.

5 It should be noted that the original suit filed in Bukedea Court was in 2013 *vide* Civil Suit No. 29 of 2013 which implies that only three years had passed before the suit was filed in Bukedea court and as such the suit was not time barred as Counsel for the Appellant would want this court to believe.

The Kumi Chief Magistrate's Court Civil Suit No. 0013 of 2021 was a retrial that  
10 had been ordered by the High Court in Civil Appeal No. 15 of 2017 and as such the original suit was never time barred.

Counsel for the appellant further submitted that the Appellant's allegations that it was in the 1980 when he acquired the suit land from his late grandmother were not proved by any documentary evidence or any witnesses. Also the trial  
15 magistrate noted that at locus that the grass thatched houses seen on the disputed land stated to be owned by the appellant/ defendant were relatively new and only indicated the fact of a recent moving on to the disputed land.

As already concluded in ground 1, it is my considered view that the appellant has failed to prove that he was given land in 1980 but more importantly there is no  
20 corroborated evidence that he at all moved onto the suit land in 1980 and it is the uncontroverted evidence of the respondent and his witnesses that the appellant began his encroachment in 2010 when the respondent fell sick and was admitted in Mulago for an extended period.

The appellant having failed to adduce any evidence that he was on the land  
25 earlier than 2010, it was factual for the trial magistrate to find that the suit was not barred by the statute of limitation. This ground thus fails.

Ground 4: The decision of the Trial Magistrate occasioned a miscarriage of justice.

Having determined grounds 1 to 3 in the negative it follows that no miscarriage of justice was occasioned to the appellant. This ground accordingly fails.

5 This appeal is accordingly dismissed for lack of merit with costs to the respondent.

6. Orders:

- This appeal fails as it lacks merits.
  - The cost of this appeal, the previous appeal and the costs of the trial and
- 10 retrial in the lower court are awarded to the respondent.

I so order.



.....  
Hon. Justice Dr Henry Peter Adonyo

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Judge

5<sup>th</sup> May 2023