

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0029 OF 2016

(Arising from Yumbe Grade One Magistrate’s Court Civil Suit No. 0004 of 2015)

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KAIGA SWADIK **APPELLANT**

VERSUS

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AMBA SIRAJ **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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In the court below, the respondent sued the appellant for recovery of land measuring approximately three to fifteen acres situated at Kondiba village, Aria Parish, Apo County, a declaration that he is the rightful owner of that land, a permanent injunction and the costs of the suit. It was the respondent's case that he inherited the land in dispute from his grandfather, Nuru Adraki. A dispute having erupted over ownership of the land between him and the appellant, the elders convened and decided in favour of the respondent but the appellant has since then refused to vacate the land, hence the suit.

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In his written statement of defence, the appellant refuted the respondent's claim and stated that he inherited land in dispute from his late father Isa Aditamu, during the year 2002. He has since then been in physical occupation of the land and has mango trees, Teak trees, oranges and houses on the land. The land originally belonged to his ancestors and their graves are visible on the land.

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In his testimony as P.W.1, the respondent, stated that the land in dispute measures approximately eight acres. His father, Abu-Bakr Adraki had joined the army and died in 1990. The respondent inherited the land in dispute from his grandfather in 1995. The appellant trespassed on that land by cutting down the respondent's mango trees, growing crops on the land and permitting one of his brothers to settle on it. The respondent sued the appellant before the L.C.1 Court but was referred to the elders, who decided in his favour. The appellant defied the decision and continued

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utilising the land, hence the suit. P.W.2 Abu-Bakr Alahai, the then Chief of Aringa County testified that the land in dispute belonged to a one Nuru, the father of the respondent. He was one of three other sub-county chiefs and elders who in 1979 resolved a dispute over that land between the respondent's father, Nuru and the appellant's father Isa Aditamu. They decided that the land belongs to Nuru. A clear demarcation was put in place between the two disputants' land. The appellant's father did not appeal the decision. Soon after the decision war broke out and they fled to Sudan into exile.

P.W.3 Ingamile Asraf, testified that he was present and minute Secretary on 11th December, 2013 when the elders convened and decided the dispute over the land in favour of the respondent. The respondent had sued the appellant for trespass to land. Both parties and the elders signed a copy of the proceedings and the decision. the appellant never appealed that decision. The appellant refused to vacate the land despite the decision, prompting the elders to advise the respondent to appeal further. P.W.4 Musa Dafala, testified that he was one of the elders who presided over proceedings for resolving the dispute between the two parties over the land. Witnesses summoned by the appellant instead ended up supporting the respondent's claim to the land prompting the elders to decide in favour of the respondent. P.W.5 Alahai Nuru, testified that the land belongs to the respondent who inherited it from his father Nuru Adraki. The respondent's father Abu-Bakr died and was buried on the disputed land. When the appellant's father Isa Aditamu died, he was buried on his respective plot. Both pieces of land are separated by the road to town and Curanga River as their common boundary. Despite they as elders having decided that the land belongs to the respondent, the appellant refused to vacate the land. The appellant did not file an appeal but simply stubbornly refused to vacate the land. the respondent's grandfather had in 1978 filed a suit against the appellant's late father and the chiefs decided in favour of the respondent's grandfather. That was the close of the respondent's case.

In his defence, the appellant who testified as D.W.1 stated that he inherited the land in dispute, measuring approximately fifteen acres, from his father upon his death in the year 2004. Before his death, he had planted coconut threes, one mango tree and had used the land for growing cassava. He had planted sisal plants to mark its boundary. It is the respondent's uncle, Adam Nuru, who planted some teak trees on the land during the time he had a dispute over it with

Alahai. When the dispute was resolved, the land was divided into two portions. The appellant's father planted the sisal plants in 1998 to stop livestock from destroying his crops. He and his other four brothers are occupying and cultivating the land. It is the appellant's grandfather who settled first on the land and later gave a part of it to the respondent's grandfather.

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D.W.2 Bakirida Fala testified that the land in dispute belongs to the appellant. It originally belonged to the appellant's grandfather Ondho. It was then inherited by the appellant's father Ondho Isa who lived on the land until his death, but was buried on a different piece of land located approximately 100 metres from the one in dispute. He was part of the team of elders who attempted to resolve the dispute between the current parties but no resolution was reached as commotion broke out during the proceedings. D.W.3 Khemis Alitabu, the appellant's paternal uncle, testified that the land belonged to his late brother Isa Aditamu. It is his father Nuru Adraki who had planted a coconut tree and a mango tree on the land in dispute and on his death he was buried on that land. D.W.4 Adamu Nasuru, testified that he was one of the elders who convened to resolve the dispute between the parties over the land. Four of them failed to decide in favour of any of the parties. He was among those who decided in favour of the respondent. He was guided by the clear boundary between the two pieces of land. The respondent had not crossed the common boundary. The appellant then closed his case.

10 20 The court then visited the *locus in quo* on 17th August, 2016. The witnesses proceeded to show court the various crops and houses on the land which they had mentioned in their testimony in court. The court drew a sketch map of the land and recorded its observations.

In his judgment, the trial magistrate found that the land in dispute is owned under customary tenure. Considering the fact that all the respondent's witnesses were elderly persons of over 70 years of age, the evidence they gave in court was consistent with their earlier statements during the proceedings before the elders, and considering their veracity, he believed the respondent's version. On the other hand, the appellant and his witnesses had testified that the grave of the appellant's father was situated on this land but during the *locus in quo* visit were unable to point out where it was. He found a number of contradictions in the testimony of the appellant and his witnesses. He found that the land belongs to the respondent and that the appellant was a

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trespasser thereon by permitting a one Ajobe Khemis to occupy it. He entered judgment in favour of the respondent, declared the respondent as lawful customary owner of the land, granted an order of vacant possession, issued a permanent injunction and awarded the respondent the costs of the suit.

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Being dissatisfied with the decision, the appellant appealed on the following grounds;

1. The Magistrate Grade One Court erred in passing judgment by giving the suit land to the respondent besides the fact that the appellant's great grandfather, grandfather and father were born on the suit land, used the land without any complaint when the respondent's parents were around.
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2. The Magistrate Grade One court erred in passing judgment by giving a land (sic) in a case which was first handled in L.C.1, II and III Court who all passed judgment in favour of the appellant in 2014 and the respondent was advised to register his case in L.C.1 Court if he was not satisfied, which he did not but registered a case in Magistrate Grade I Court of Yumbe who ruled in favour of the respondent.
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3. The Magistrate Grade One court erred in passing judgment in favour of the respondent believing in a false statement that the land belonged to the respondent besides the fact that the respondent's late father came to request land from the appellant's father and was given some portion but after the death of the appellant's father the respondent encroached further and sued the appellant in the L.C. Court who ruled in favour of the appellant.
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4. The Magistrate Grade One court erred in passing judgment against the appellant believing in a false statement that the land belongs to the respondent denying the fact that the appellant and the respondent are from different neighbouring clans.
5. The Magistrate Grade One court erred in passing judgment by disregarding evidence of the appellant's witnesses and elders who are over 70 years that they do not qualify to be witnesses and elders.
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6. The Magistrate Grade One court erred in passing judgment against the appellant on grounds that the appellant is from another clan not within and denying (sic) all the appellant's evidence.
- 30 7. The Magistrate Grade One court erred in passing judgment against the appellant on the ground that at the time of hearing, the appellant's witnesses and elders gave correct

evidence which the magistrate did not take into consideration but believed in the statement of the respondent.

8. The Magistrate Grade One court erred in passing judgment against the appellant denying the fact that the majority of the people including L'Cs and neighbouring clans declared ownership of the suit land to the appellant who inherited the same from his father and grandfather, who gave a portion to respondent's father to settle as the respondent's land was swampy.

A number of these grounds offend the requirements of Order 43 rule 1 (1) of *The Civil Procedure rules*. Under that rule, grounds of appeal are required to set forth, concisely the reasons of objection to the decree appealed from, without any argument or narrative. However, since the parties appeared *pro se*, strict application of the requirements of that provision was considered unnecessary in the circumstances.

In his submissions, the appellant stated that he is not satisfied with the judgment because his father and himself were born on that land and he still lives on the land. This matter started from L.C.1 - III but the magistrate overturned the decisions and ruled in favour of the respondent. The boundary between the appellant's land and that of the respondent was sisal but in the judgment the magistrate said it was a stream. The day the magistrate went to locus the witnesses for the respondent gave wrong evidence and that is why at the time of judgment they did not appear. On that day court visited locus, the respondent's witnesses did not appear because they had given wrong evidence.

In reply, the respondent challenged the appellant to produce evidence of all the decisions of the L.C. Courts. He argued that he was the plaintiff in all those lower court levels. The matter did not go the L.C.s. It was before the elders. Before the elders, the respondent had won the case and he has the documents to that effect. Before the elders the appellant refused saying he cannot leave the land. He refused to pay the respondent's costs before the elders. The respondent then brought the matter to the Grade One magistrate who decreed the land to the respondent. Even the costs the respondent was awarded by the magistrate, the appellant has not paid but instead he has come to the High Court. They began the matter in 2013 up to-date the appellant has not paid any costs

to the respondent. Because of this case the respondent has become so poor that his children cannot go to school. He prayed that the appeal be dismissed with costs.

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 17 of 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.

I have considered in detail the evidence on record and the conclusions reached by the trial magistrate upon evaluation of that evidence. I find the decision hinged more or less on determinations of credibility made by the trial magistrate. The trial magistrate cannot be faulted on this account because the weight to be given to a particular item of evidence is a matter of fact which is decided, largely on the basis of common sense, in the light of the circumstances of the case and of the views formed by the court on the reliability and credibility of the witnesses and exhibits (see *Halsbury's Laws of England, 4th Edition Re-Issue, Vol 17 (1), para 417*). Court

only has duty to explain its assessment of the more important pieces of evidence and to provide reasons for choosing to give, as the case may be, no, little, moderate or substantial weight thereto.

5 Where the court finds the evidence of one person more believable than that of another, it should normally be possible to state, briefly and clearly, why. The reason might, for example, be based on a demonstrated inconsistency or inconsistencies on an issue or issues of significance. Alternatively it might relate to the demeanour of a witness or party. If, for instance, it appears to the court that one person was clearly and conscientiously striving to tell the truth, while another
10 was hesitant and evasive in response to questions, this should be stated. Likewise, where a court finds a person's evidence unimpressive or unpersuasive on account of matters such as hesitancy, lengthy pauses, frequent requests to repeat simple questions or a reluctance to engage with the court generally. If any of these considerations or anything comparable constitutes the basis for the court's credibility assessment and findings, care should be taken to say so in the judgement:
15 neither the parties nor the appellate court can be left or expected to guess. The trial magistrate satisfied this requirement by explaining that he found the evidence of the respondent more consistent than that of the appellant. He gave appropriate illustrations of that analysis and I have not found any fault with it.

20 It is trite that findings of fact by a trial court, based on the credibility of a witness, are not to be set aside simply because an appellate court thinks that the probabilities of the case are against, even strongly against, that finding of fact. If the trial court's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial court failed to use or has palpably misused its advantage as a court of first instance or has
25 acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable. An appellate Court could properly overturn the trial court's finding only if it was vitiated by some error of principle or mistake or misapprehension of fact or if the effect of the overall evidence was such that it was not reasonably open to make the finding that the court did.

In this case, the trial court's finding was based on the credibility of the witness and on facts that were not inconsistent with facts incontrovertibly established by the evidence or glaringly improbable. That being so, it is impossible to conclude that the trial court failed to use or has palpably misused its advantage of seeing and hearing the witnesses testify. One of the
5 consequences of the advantage of seeing and hearing the witnesses is that the trial court is in a far better position than an appellate court to know what individual weight should be assigned to the various factors of credibility, matters for and matters against, that must be evaluated in making the ultimate findings of fact in the case. Where a finding is based on credibility and other facts support the finding, the case would need to be exceptional before an appellate court could
10 set aside the finding on the ground that, judging by the transcript, the trial court gave insufficient weight or consideration to other facts and circumstances in the case.

On basis of the evidence on record, no suggestion could reasonably be made that the trial magistrate applied an erroneous principle or mistook or misapprehended the facts of the case.
15 Nor was the overall effect of the evidence such that it was not reasonably open to find that the respondent's evidence was more believable. In the circumstances, the trial court came to the right conclusion when it decided in the respondent's favour. In the final result, I do not find merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the court below are awarded to the respondent.

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Dated at Arua this 11th day of January, 2018

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Stephen Mubiru
Judge,
11th January, 2018.