

**Onyek & Another v Odwar (Civil
Appeal No. 93 of 2018) [2019]
UGHC 41 (29 August 2019)**
[2019] UGHC 41

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JUDGMENT

STEPHEN MUBIRU, J.

[1] The respondent sued the appellants jointly and severally for a declaration that he is the rightful customary owner of approximately 100 acres of land situated at Lukwor Padat Ward, Ogago Parish, Acholi Bur sub-county in Pader District, an order of vacant possession, a permanent injunction and the costs of the suit. His claim was that the land in dispute was acquired by his forefathers long before colonialism. His grandfather Yona Akwo was born on that land, lived and was buried thereon upon his death. The respondent too was born on that land and lived thereon until the death of his father Timoteo Acaye in 1946 whereupon he inherited the land. He continued to live thereon until the year 1952 when he was forced by illness to leave the land, leaving behind some of his family members. Nevertheless, he would periodically return to the land to farm. During the year 1987, the appellants began encroaching on the land and in the year 2007 began claiming it as their own, hence the suit.

[2] In their joint written statement of defence, the appellants refuted the respondent's claim in toto and averred instead that they had been wrongly sued. They prayed for dismissal of the suit with costs.

[3] The respondent Odwar Bonifansio testified as P. W.1 and stated that the land in dispute is approximately 130 acres big, under customary tenure. It originally belonged to his late grandfather Akwo Yona. On his death it was inherited by his father the late Acaye Timoteo who gave part of it to Acholi Bur Health Centre and the other to the police post, retaining the rest of it. During the year 1945, Ojera Oyele the father in law of his grandfather requested him for land. The appellants' father was a son of Ojera Oyele daughter. In 1987, the appellants' father came to visit and never left prompting the late Acaye Timoteo to complain to the L. C. and seek his eviction. The appellants' father had not left by the time of his death in 1990 leaving behind the two appellants on the land.

[4] P. W.2 Maracale Akena testified that the land in dispute belonged to the respondent's father the late Acaye Timoteo who in turn inherited it from his father Akwo Yona. Both were upon their demise buried on the land in dispute. The

appellants came to the land courtesy of Ojera Oyele, a brother in law of Akwo Yona. By the time of the insurgency Ojera Oyele had vacated the land. It is after the insurgency that the appellants occupied the land in dispute.

- [5] P. W.3 Koronelo Okulu testified that the respondent's father the late Acaye Timoteo gave a part of the land to Ojera Oyele. The appellants' father used to live in Lukwo. P. W.4 Faustino Ogali testified that the respondent and his father were both born and lived on the land in dispute their entire lives. The appellants came to the land only as visitors to sister of their grandmother during Idi Amin's regime and only returned after the insurgency.

The appellant's evidence in the court below:

- [6] In his defence as D. W.1, the 1st appellant Onek Simon testified that he was born on that land in 1970 and lived thereon until the insurgency in 1987. The conflict with the respondent only began in 2007 upon their return from the IDP Camp. The second appellant Komakech John testified as D. W.2 and stated that his grandfather and father were all born on that land and were buried on it. There was never any complaint from the respondent until the year 2007. The respondent cut down all the fruit trees that the 2nd appellant's father had planted on the land.
- [7] D. W.3 Odong Janasio testified that the 1st appellant and his father lived on the land in dispute. The two appellants were born on that land and the dispute only began in 2007 upon return from the IDP Camp. D. W.4 Koamakech Godfrey testified that the land in dispute belonged to the 1st appellant's grandfather. The dispute began in 2007. The L. C. II mediated between the parties and decided in favour of the appellants. The respondent never appealed the outcome of that mediation.
- [8] D. W.5 Acaya David testified that the land in dispute belonged to the father of the 1st appellant. It is only after return from the IDP Camp that the respondent began sending his children to cultivate the land and that is when the dispute began. The respondent lost the case before both the L. C. I and the L. C. II Courts. The respondent has never lived on the land nor carried out any activities on it. The appellants have many fruit trees on the land including mangoes and oranges. They also have bananas on the land. Their father was buried on the land.

Proceedings at the *locus in quo*:

- [9] The court then visited the *locus in quo* on 19th June, 2017. The court prepared a sketch map of the area which shows that the land is located between the confluence of Okwere and Lanyadayo Streams. Running diagonally across it is the road from Acholi Bur Trading Centre to Kitgum Municipality. The appellants occupy the land West of that road while the respondent's brother, one of the appellant's brother and graves of some of the deceased relatives of the appellants occupy the land East of that road. The respondent has nothing on the land in dispute. There are mango trees on the side occupied by the appellants, their mother's home, brothers' homes and other graves of more of their deceased relatives.

Judgment of the court below:

[10] In his judgment, the trial Magistrate found that the evidence adduced by the respondent and his witnesses was consistent and unshaken by cross-examination. That of the appellants was riddled with inconsistencies and mostly hearsay. The respondent proved his case on the balance of probabilities. Judgment was therefore entered in favour of the respondent, declaring him the rightful owner of the land in dispute. The appellants were found to be trespassers on the land. An order of eviction was issued against them. A permanent injunction was issued against the appellants restraining them from further acts of trespass onto the respondent's land. The respondent was awarded shs. 6,000,000/= as general damages. The costs of the suit were awarded to the respondent.

The grounds of appeal:

- [11] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;
- 1. The learned trial Magistrate erred in law and fact when he held that the appellants who had been in possession of the suit land, are trespassers yet they were born and raised on the suit land.
- 2. The learned trial Magistrate, by either ignoring and / or overlooking the cogent evidence adduced by the appellants, failed to evaluate the evidence on record and thereby came to the wrong conclusion.
- 3. The learned trial Magistrate erred in law and fact in holding that the appellants did not have a plausible defence thereby occasioning a miscarriage of justice.
- 4. The learned trial Magistrate erred in law and fact in holding that the respondent had adduced sufficient evidence to prove the case.
- 5. The learned trial Magistrate erred in law and fact when he awarded the plaintiff shs. 6,000,000/= as general damages.

Arguments of Counsel for the appellant:

[12] In his submissions, counsel for the appellant, argued that the 1st appellant testified that he was born in 1970 on the land in dispute. When his father Opio Bagalio died in 1993 he was buried on that land. He only vacated the land in 1987 when displaced into an IDP Camp by insurgency. The 2nd appellant gave more or less the same evidence. The respondent in his evidence admitted that the appellants' grandfather settled on the land in 1945 and that the appellants' father settled thereon in 1987, lived there and was buried there. This evidence

was never considered by the trial Magistrate. The trial magistrate as well ignored the appellants' features found on the land and seen during the visit to the *locus in quo,* including graves and fruit trees.

Arguments for the respondent:

- [13] The respondent never pleaded nor led evidence establishing his claim for general damages, yet the court made an award of general damages. They prayed that the appeal be allowed. Counsel for the respondent did not file any submissions in response.

Duties of a first appellate court:

- [14] It is the duty of this court as a first appellate court 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 (see **Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000**; **[2004] KALR 236**). 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 (see **Lovinsa Nankya v. Nsibambi [1980] HCB 81**).
- [15] 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 or she 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.

All Grounds of Appeal considered concurrently.

- [16] All grounds will be considered concurrently. The appellants claimed to have been in possession of the land and their father before them by at least 1945. Although the respondent disputed that claim, even from the respondent's own admission, the appellants and their father had been in possession of the land from 1987 and their possession was only interrupted by the insurgency. By the time he filed a suit against them in 2014, twenty-seven (27) years had elapsed since he had notice of their now contested presence on the land. It is settled law that 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)**.
- [17] According to sections 6 and 11 (1) of **The Limitation Act**, the right of action to recover land is deemed to accrue when adverse possession is taken of the land. Then section 5 of the Act provides that no action may be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her. Finally, section 16 of the Act is to the effect that at the expiration of the period prescribed by this Act for any person to bring an action to recover land the title of that person to the land is

[18] With regard to unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of The Limitation Act. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land *(see for example *Rwajuma v. Jingo Mukasa*, H. C. Civil Suit No. 508 of 2012).* As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto.

[19] When the court visited the *locus in quo*, there was nothing to show that the respondent had ever been in possession of the land. There were mango trees, homesteads and graves all attributed to the appellants' possession, before and after the insurgency. When the appellants vacated the land as a result of the insurgency, that did not terminate their ownership of the land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before *(see *John Busuulwa v John Kityo and others* C. A. Civil Appeal No. 112 of 2003).* The temporary abandonment of the land by the appellants in the instant case not having been voluntary, their rights as owners were revived when they re-asserted them after the insurgency.

[20] I have not found the grave contradictions and inconsistencies the trial Magistrate adverted to as the justification for the finding in the respondent's favour. The hearsay he alluded to related to the appellants' grandfather having been in possession of the land before their father did, on account of the fact that both appellants were born after his death. This did not affect the respondent's admission that since 1987 he was been aware of the appellants' presence on the land. I therefore find that the decision of the trial court is against the weight of the evidence on record. Had the court properly directed itself, it would have come to a different conclusion.

[21] In the final result, the appeal succeeds. The judgment of the court below is set aside. Instead judgment is entered in favour of the appellants dismissing the suit. The costs of the appeal as well as those of the court below are awarded to the appellants.

For the appellants : M/s Oroya and Company Advocates For the respondent : Mr. Kinyera.

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