Hon: Justice Tsekoko

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

H.C.C.A.NO.4 OF 1991

ERIYASAFU MUDULBA:::::::::::::::::::::::::::::::::::::::APPELLANT

V E R S U S

WILBERFORCE KULUSE :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE:- THE HON. MR. JUSTICE C.M. KATO

JUDGMENT

This is an appeal by the appellant Eriasafari Musumba against the judgment of magistrate Grade I, his worship Paulo Badagawa sitting at Kamuli court. The appellant was the defendant. The appellant through his counsel Mr. Mutyabule gave 7 grounds of appeal which are as follows:-

1. That the trial magistrate erred when he disregarded the overwhelming evidence in favour of the appellant/plaintiff.
2. That the trial magistrate erred when he failed to give reasons why he believed the evidence of the respondent/ defendant which was full of contradictions and was discredited in cross-examination.
3. The trial magistrate erroneously relied upon the Limitation Act and misdirected himself when he failed to address his mind to the period during which the appellant had been in occupation of the land in dispute which is over 53 years and he has a permanent house built with bricks and corrugated iron sheets;
4. The trial magistrate failed to take into consideration evidence at the locus in quo in arriving at his judgment.
5. The decision of the trial magistrate occasioned miscarriage of justice.
6. The Hon. chief magistrate erroneously ordered the case to be re-instituted by the appellant who was the defendant in civil suit No.3/87 at Nawanyago court when a retrial had also been ordered and as a result the instant respondent used the appellant's defence of Limitation against him.

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7. The Hon. Chief Magistrate in her letter to the grade I magistrate Kamuli Ref. Civil Appeal No.79/88 dated 6/5/91 a copy of which is hereto annexed and marked annexture "A" misled the appellant into reinstituting the suit in his names when it should be the instant respondent.

The first two grounds of this appeal are closely related and I feel no harm will result in my dealing with them together, as indeed the learned counsel for the appellant Mr. Mutyabule did when he was arguing this appeal. The gist of the two grounds was two fold namely: that there was no reason as to why the learned trial magistrate believed the respondent and his witnesses but not the appellant and his witnesses. Secondly there were contradictions in the evidence as tendered by the respondent's witnesses. Mr. Mutyabule argued these two issues at a great length.

This court being first appellate court is entitled to subject the evidence as adduced in the lower court to fresh and exhaustive scrutiny and come to its own conclusion: J.W. Ononge v Okalang (1986) HCB 63 and Williamson Diamonds Ltd and another v Brown (1970) EAI at page 15. It is in the light of this principle of our law that I propose to consider the evidence as it appears on record bearing in mind that the trial magistrate had the advantage of seeing the witnesses and observing their demeanour while in court.

The appellant/plaintiff testified before the court and called 3 independent witnesses in the names of: John Zirabamuzale (PW2) who told the court that the plaintiff/appellant had been given the land by his father in 1930 and that the plaintiff built there his house in 1938 and he built another house (permanent) in 1950. The next witness was Paulo Kitamirike (PW3) who described the boundaries of the land in dispute but he admitted that he did not know how the plaintiff/appellant got the land. The last witness to testify on behalf of the plaintiff/appellant was George Patrick Mutibwa (PW4) whose evidence as to how the plaintiff got the land was just hearsay and the learned trial magistrate rightly in my view, described this evidence as hearsay and he could not rely on it.

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On the other hand the defendant/respondent adduced evidence from 7 independent witnesses in addition to himself. Four of these witnesses gave their evidence at locus in quo after the defendant had given notice to the court that those witnesses would testify at the locus in quo. Amisi Balyokwangu (DW2) was the first witness to be called by the defendant. This old man of 80 years testified that he had sold the piece of land now under dispute to defendant's father called Yusufu Musalirwa at 400/= in 1944, and that when Musalirwa died the defendant as the heir inherited the land. DW3 Mukwaya Mwamuki was the second witness to testify on behalf of the defendant. In his evidence he said that in 1940 Yusufu Musalirwa the father of the defendant got the land from Mutabuza the father of the appellant but in 1959 the appellant built there his house. Yokosani Galusanga (DW4) told the court that in 1940 he was a parish chief and he saw the father of the defendant called Yusufu Musalirwa settling on the land under dispute until his death in 1963 when the defendant took over the land but before that in 1959 Mudumba the plaintiff had built his house on the same land. The four witnesses who testified at the locus in quo were:- William Mugweri (DW5), Sofatiya Bataala (DW6), Minsisera Mubialiwo (DW7) and Difasi Irumba (DW8). They all told the court that the land belonged to the defendant who had got it from his father in 1963 after his death.

In addition to the evidence of those witnesses each of the two litigants gave his own account of how he came to acquire the land now under dispute. The plaintiff (PW1) contends that he got the land from his own father called Mutabuza Kitimbo and that he built a grass thatched hut on that piece of land in 1938. The defendant (DW1) also says he inherited the land from his late father called Yusufu Musalirwa.

It was the above outlined evidence that formed the basis for the learned trial magistrate's judgment. In his judgment he gave reasons why he disbelieved the plaintiff and believed the defendant, he came to that decision after considering all the evidence as given by both sides. His reasons are to be found on pages7 and 8 of the typed copy of his judgment.

With due respect to the learned counsel for the plaintiff/appellant I do not agree with him when he says that the learned trial magistrate never gave reasons for his decision.

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I have examined and considered all the evidence on record and I have come to the conclusion that the decision reached by the trial court was in no way contrary to the weight of evidence as suggested by the learned counsel for the appellant in his submission.

Mr. Mutyabule however, felt that the evidence as adduced by the defendant was contradictory; he cited two examples of the amount of money paid for the land and when the respondent acquired the land. It is true there were some apparent discrepancies in the evidence as given by respondent's witnesses for example the defendant said that his father had paid 300/= to Mutabuza the father of the appellant in order to get the land, but Amisi Balyakwangu (DW2) says he sold the land to the respondent's father at 400/= in 1944. It is unfortunate that the learned trial magistrate did not address his mind to this discrepancy and as such he did not resolve it. The way I understand it, the two witnesses do not seem to be talking about the same thing. The 300/= the respondent/defendant was talking about was paid to Mutabuza to accompay the "Kanzu", since this man Mutabuza was the kisoko chief he got that money in that capacity but the money was never meant to be a purchase price. The 400/= mentioned by Amisi (DW2) must have been paid to him as purchase price for the land which he had apparently acquired after it had been abandoned by somebody. This contradiction therefore did not affect the right of the defendant/respondent to own the disputed land, the position would have been different if the money was purported to have been paid for the same reason.

The other evidence which appeared contradictory was as to when the defendant/respondent acquired the disputed piece of land. Here nearly all the witnesses were in agreement that the defendant acquired the land in 1963 after the death of his father who had acquired it sometime in 1940.

I have failed to discover any material discrepancy in the evidence as established by the defendant's/respondent's witnesses, even if there were some minor contradictions those could be explained away as some of these things happened some 50 years ago. That disposes of grounds 1 and 2 of this appeal, which must fail.

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The third ground of appeal concerns the issue of Limitation Act. It was the case for the appellant that the learned trial magistrate did not address his mind properly on the application of the Limitation Act to this particular case, on this point the learned counsel for the appellant relied upon the case of: Florence Joyce Mutesi v Andereya Kinyamule (1976) HCB 64, the learned trial magistrate also quoted the same case as an authority for his decision that the case was caught up by the Provisions of Section 6 of the Limitation Act. With due respect, I find that case rather unhelpful as it gives two conflicting views on the issue of Limitation Act and the customary law, in the same case it was held that customary tenure knows no Limitation but in the same case it was felt that Section 6 of the Limitation Act affected customary tenure! Be that as it may, I would like to point out here that the learned trial magistrate went wrong in two aspects when he limited this case purely to the Provisions of the Limitation Act without observing certain matters. In the first place although in his judgment he clearly indicated that the case involved the issue of trespass on plaintiff's land, he failed to direct his mind to the fact that trespass is a continuing tort, which continues to exist until abated, therefore in computing time against the plaintiff allowance must be given to that part of time which is not yet caught up by the Limitation Act. In the second place the learned trial magistrate did not take into account the fact that time started running against the appellant from the date the encroachment complained of occured. In his evidence the plaintiff/appellant told the court that the defendant/respondent started encroaching on his land sometime in 1984 and that is the date when the tort complained of commenced, since this suit was filed sometime on 17/5/91 by then only 5 years had expired and that did not offend the Provisions of sections 3 and 6 of the Limitation Act. As the cause of action arose in 1984 the plaintiff was not time barred both for recovery of the land and in his action for the tort of trespass. I hold that the learned trial magistrate was wrong in holding that the plaintiff/appellant was caught up by the Provisions of the Limitation Act. The 3rd ground of this appeal is accordingly upheld.

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I now turn to the fourth and fifth grounds of this appeal. In his submission on these grounds Mr. Mutyabule argued strongly that the learned trial magistrate did not mention anything about his visit to the locus in quo in his judgment and that occassioned miscarrage of justice; his argument was based on the decision of this court in the case of: Ononge v Okalang (1986) HCB 63. It is true that the learned trial magistrate did not directly or expressly state in his long judgment what happened when he visited the locus in quo, but that does not mean he did not address his mind to that matter. According to the record of the proceedings in the lower court, 4 witnesses for the defendant/respondent testified while at the locus in quo and the learned trial magistrate reproduced their evidence in his judgment after having clearly recorded it at locus in quo, which means as he was writing his judgment he was not oblivious of what had happened at locus in quo. The case of Ononge quoted by the learned counsel for the appellant must be clearly distinguished from the present case on a number of grounds. In ononge's case the witnesses did not testify at the locus in quo but in the present case a total of 4 witnesses testified on oath and the plaintiff was given a chance to cross-examine them but he only chose to cross-examine two of them Difasi Irumba (DW8) and William Mugweri (DW5). Both parties were present with all their witnesses who testified in court in addition /some 154 elders /to whose names appear on the record of the proceedings at locus in quo. The learned trial magistrate drew asketch plan of the area under dispute the boundaries of which must have been shown to him by the parties and their witnesses while at the scene. Iam certain that the learned trial magistrate when he decided the case against the appellant he was fully alive to what happened at the locus in quo in view of the above observations which I have just made. With this finding grounds 4 and 5 of this appeal must be rejected.

I propose to deal with the 6th and 7th grounds of appeal together as they are both concerned with the correspondence between the chief magistrate and the lower court. It was Mr. Mutyabule's view that the appellant was misled by the chief magistrate's letter dated 6/5/91 as a result of which he filed the suit which is the subject of this appeal.

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On his part Mr. Liiga who appeared for the respondent argued that this court was not sitting to impeach administrative role of the chief magistrate in this matter and that the matters being complained of now were never raised at the trial. With all due respect to Mr. Liiga, I agree with his line of reasoning on these two last grounds of appeal. The question of the chief magistrate's correspondence was not raised at the trial so it cannot be a subject for determination by the appellate court. As pointed out by Mr. Liiga in his submission, the appellant felt aggrieved and that is why he decided to file this suit; he is estopped from blaming anybody for having misled him as he filed the suit of his own free will. In his pleadings the appellant does not say that he was compelled to file the suit or that he filed the suit as a result of the letter from the chief magistrate's court dated 6/5/91 although in paragraph 8 of his plaint he says a retrial had been ordered, when a retrial is ordered a party does not file a fresh suit but the old or original suit is the one which is proceeded with, so the appellant's decision to file a fresh suit cannot be blamed on the chief magistrate but on the appellant himself. I find no merit in grounds 6 and 7 of this appeal both of which must fail.

Considering the evidence generally as adduced in the lower court, I find that the learned trial magistrate came to the correct decision which should not be disturbed. I find no merit in this appeal which I accordingly do dismiss with costs of this appeal and of the court below to the respondent. The judgment and orders of the court below are to be adhered to. So I order.

C.M. KATO
JUDGE
01/07/93.