IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 0025 of 2016

In the matter between

BULADINA ACHOKA **APPELLANT**

And

OKELLO PETER BYELLA **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Land Law *— Land boundaries — the general rule is that in determining boundaries resort is to be had, first, to natural objects or landmarks, because of their very permanent character, next, to artificial monuments or marks, then to boundary lines of adjacent owners, and then to courses and distances — When determining the true position of a disputed boundary, the courts have always been aided by: (i) permanence; (ii) visibility; and (iii) accuracy of the monument - Where the natural boundary no longer exists, there should be other credible means of establishing its former location with reasonable accuracy - If a monument is obliterated, it is controlling only if its former position can be identified by reliable evidence. If a monument has deteriorated beyond recognition, either visual or by witnesses' evidence, the monument itself is no longer controlling.*

Evidence *— A sketch map is intended to illustrate the testimony of a witness or witnesses, summarise or explain oral or documentary evidence. It is intended to make evidence and facts in the case easier to understand, especially as demonstrated, seen and observed at the locus in quo - The Court is not free to draw independent conclusions from it as a demonstrative aid but is only free to utilise it to better understand or remember the evidence of a witness from which the actual conclusions of fact will be drawn. It can never take the place of real or oral evidence -*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of approximately 30 x 40 metres of land under customary tenure, situated at Palaro Rajab village, Laliya Parish, Bungatira sub-county, Aswa County in Gulu District, an order of vacant possession, a permanent injunction, general damages for trespass to land, interest and costs. The respondent's case was that in 1966, the respondent's paternal uncle the late John Achoka, gave the land in dispute to his parents the late Peter Olweny and Paula Alal. the respondent and his siblings lived on the land peacefully from the year 1968 until the death of their father in 1998. It is around the year 2016 - 2007 that the appellant began laying false claims to the land and tilling it. The respondent, his mother and the Rwot of that area tried in vain to stop the appellant's activities on the land, hence the suit.

[2] By her written statement of defence, the appellant contended that the land that was given to the respondent's family is different from the one now in dispute. The one given to them is demarcated by Nsambia trees. The one in dispute belonged to her late husband, John Achoka, and the respondent is only attempting to grab it.

The respondent's evidence in the court below:

[3] The respondent Okello Peter Byella, in his testimony as P.W.1stated that the respondent's paternal uncle the late John Achoka, gave the land in dispute to his parents the late Peter Olweny and Paula Alal. The respondent and his siblings lived on the land peacefully from the year 1968 until the death of their father in 1998. He inherited the land upon his father's death. Nsambia trees and a path constituted the boundary.

[4] P.W.2 Alice Olweny, the respondent's mother, testified that the appellant's husband gave the land in dispute to her late husband, father of the respondent. Its boundary is demarcated by Nsambia trees and a path from Achoka's land. In

2008, a one Odoki began trespassing on the land. That was the close of the respondent's case.

The appellant's evidence in the court below:

[5] The appellant, Buladina Achoka testified as D.W.1and stated that the land was originally owned by her late husband, John Achoka having settled thereon in 1948. When he gave part of it to his brother Peter Olweny, he selected the Olam tree to be the boundary. The late Peter Olweny observed that boundary until his death in 2006. The dispute began in 2008 when the respondent began claiming a portion of land beyond the Olam tree.

[6] D.W.2 Odoki Richard, the appellant's son; he was born and raised on the land in dispute which measure approximately 40 x 40 metres. The Olam tree has always served as the boundary between his mother's land and that of the respondent. It was cut down by Olweny Peter in 1980. The dispute began when the respondent claimed land beyond that tree.

Proceedings at the *locus in quo*:

[7] The trial court then visited the locus in quo where it recorded evidence from "independent witnesses"; (i) Ocen Ben who stated that although he did not know how Peter Olweny acquired the land, he had seen him in occupation since the Obote II government. (ii) Odora Jimmy stated that the land was given to the respondent's father; (iii) Opira Albino stated that the late Peter Olweny and his brother John Achoka lived peacefully as neighbours until their death in the 2000s. It is the appellant's grandchild Kilama Patrick who is causing all the trouble. The court then prepared two sketch maps none of which illustrated the location of the Olam tree referred to in evidence but only located the Nsambia trees.

Judgment of the court below:

[8] In his judgment, the trial Magistrate found that John Achoka gave land to his brother Peter Olweny. Only the appellant claims the Olam tree to have been fixed as the boundary. Evidence shows that the late Peter Olweny utilised the area in dispute from 1968 until his death in 1998 without any challenge. The boundary alleged by the appellant is not corroborated by any other evidence yet she was not around at the time her husband gave the land to his brother, the respondent's father. The court found that the claim that the Olam tree formed the boundary was an afterthought created by the appellant long after the death of Peter Olweny. The land in dispute forms part of the estate of the late Peter Olweny. Judgment was therefore entered in favour of the respondent and he was declared the rightful owner of the land. A permanent injunction was issued against the appellant but since she had not carried out any activities on the disputed land, no damages were awarded to the respondent. The respondent was awarded the costs of the suit.

The grounds of appeal:

[9] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate Grade One erred in law and fact when he failed to determine the boundary between the parties thereby arriving at a wrong decision.
2. The learned trial Magistrate Grade One erred in law and fact when he disregarded the contradictions in the respondent's case thereby occasioning a miscarriage of justice.
3. The learned trial Magistrate Grade One erred in law and fact when he wrongly disregarded the evidence of the appellant on record for want of corroboration thereby occasioning a miscarriage of justice.

4. The learned trial Magistrate Grade One erred in law and fact when he failed to properly conduct the locus visit thus occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[10] In his submissions, counsel for the appellant, argued that the size of the land in dispute and its boundaries were not pleaded. At the *locus in quo*, the trial Magistrate recorded evidence from persons who had not testified. The appellant had activities on the land including a cassava garden and bricks which the trial magistrate did not record but instead found that there were no activities on the land. The features on the map such as houses and trees, are not labelled or named on the first map yet on the second an Oduru tree is identified, which none of the parties referred to in the evidence. Owners of the neighbouring land are not identified.

Arguments of Counsel for the respondent:

[11] In response, counsel for the respondent, argued that whereas the Nsambia trees were seen at the *locus*, the Olam tree was non-existent. The dispute was about a boundary and it was shown to the court. Evidence of independent witnesses was an error but it can be disregarded.

Duties of a first appellate court:

[12] This being a first appeal, it is the duty of this 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 17of 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).*

[13] In exercise of its appellate jurisdiction, this 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 the grounds of appeal will be considered concurrently:

[14] Firstly, visiting *the locus in quo* is intended to enable court check on the evidence given by the witnesses in court, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case *(see Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28 and Nsibambi v. Nankya [1980] HCB 81).* Accordingly admission of the evidence of (i) Ocen Ben, (ii) Odora Jimmy and (iii) Opira Albino, who had not testified in court, was an error.

[15] That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. I have therefore decided to disregard the evidence of the "independent witness," since I am of the opinion that there was sufficient evidence on basis of which a

proper decision could be reached, independently of the evidence of those that witness.

[16] An appellate court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those one witness.

[17] The crux of dispute between the two parties was as to the true location of the boundary between their respective adjacent pieces of land. While the appellant contended it was an *Olam* tree, the respondent contended it was the *Nsambia* trees. The issue therefore was whether *Nsambia* trees or *Olam* tree constituted the common boundary between the two parties respective pieces of land. Two sketches drawn but without a key. It is on account of this omission that, with the consent of both parties, the court directed the trial court to revisit *the locus* in *quo*, prepare a replacement sketch map, which was done, and submitted to this court. This court is mindful of the fact that the omission of detail in sketch map is not fatal if the oral evidence is clear. Being only demonstrative evidence, it is neither testimony nor substantive evidence. The Court is not free to draw independent conclusions from it as a demonstrative aid but is only free to utilise it to better understand or remember the evidence of a witness from which the actual conclusions of fact will be drawn. It can never take the place of real or oral evidence.

[18] Upon examination of the replacement sketch map, this court finds that the key features are in substantially the same position as they were when the original inspection was made. A sketch map is intended to illustrate the testimony of a witness or witnesses, summarise or explain oral or documentary evidence. It is intended to make evidence and facts in the case easier to understand, especially as demonstrated, seen and observed at the *locus in quo*. It provides the opportunity to the trial court and later the appellate courts to harness more of their senses, as a visual aid, in understanding each aspect of the case, so as to bring additional clarity to the issues to be decided by enhancing understanding of oral evidence or documentary evidence so that the court is in a better position to draw conclusions from the oral and documentary evidence.

[19] As a demonstrative aid or illustrative aid, it should therefore be accurate, fair in the sense of an absence of a tendency to mislead, clear and focused to ensure that the information it displays is understandable in order to enhance its potential to make the proper interpretation of the evidence easier for everyone involved. A sketch map is sufficient when it fairly and accurately reflects the witness' testimony and is helpful in assisting the court understand facts and evidence. Omission of a sketch map can only be fatal if proven to be not merely helpful, but necessary in illustrating or explaining other evidence, without which that evidence may not be understood.

[20] This being a boundary dispute, as aptly stated by the Supreme Court of Tennessee in *Pritchard v. Rebori, 135 Tenn. 328, 186 S.W. 121, 122 (1916);* "the general rule is that in determining boundaries resort is to be had, first, to natural objects or landmarks, because of their very permanent character, next, to artificial monuments or marks, then to boundary lines of adjacent owners, and then to courses and distances. But this general rule, as to the relative importance of these guides to the ascertainment of a boundary of land, is not an inflexible or absolute one. It is not true, as appellant supposes, that there is such magic in a monument called for that it will be made to control in construction invariably. If it

controls it is only because it is to be regarded as more certain than course or distance. If it should in a given case be less certain, the rule would fail with the reason for it and the monument would yield to the course and distance and an artificial monument will yield more readily than a natural one."

[21] Natural monuments (things such as trees, large stones, riverbanks, rock outcrops, trees or abrupt changes in topography and other substantial, naturally occurring objects that were in place before a survey was made) usually rank top in priority when a court has to settle the position of a disputed boundary where there is conflicting evidence as to the location of a true boundary position. The more the natural landmark is less liable to change and incapable of counterfeiting, the more conclusive is the evidence it offers. Most weight is given to those features on which the parties at the time were least likely to be mistaken. A natural monument will not prevail over an artificial one mainly where it is clear that the parties concerned intended otherwise. "Any natural object, when called for distinctly, and satisfactorily proved, and the more prominent and permanent the object, the more controlling as a locator, becomes a landmark not to be rejected, because the certainty which it affords, excludes the probability of mistake," whereas "course and distance, depending, for their correctness, on a great variety of circumstances, are constantly liable to be incorrect. Difference in the instrument used, and in the care of surveyors and their assistants, lead to different results" *(see McCullough v. Absecon Beach Co., 48 N.J. Eq. 170, 21 A. 481, 487 (1891).* Natural markers, if verifiable, take precedence over artificial monuments.

[22] A land boundary should be marked on the ground by material monuments placed primarily for the purpose, e.g. fences, roads, and other service structures along the line, or existing natural monuments commonly used as property markers, particular to a given region. Permanence and visibility of corners or lines established by the monument always trumps other forms of evidence. When determining the true position of a disputed boundary, the courts have always

been aided by: (i) permanence; (ii) visibility; and (iii) accuracy of the monument. Natural boundaries possess the qualities of being easily found, highly visible and reasonably permanent. If a monument can be easily seen and can be relied upon year after year, its dimensional relationship to other corners is inconsequential. A natural boundary at any instant is the designated natural feature as it exists at that instant, and the boundary position changes with the natural movements of the feature as long as these movements are gradual and imperceptible from moment to moment.

[23] In the instant case, both parties relied on natural monuments; while the appellant contended it was an *Olam* tree, the respondent contended it was the *Nsambia* trees. Permanence is one of the most difficult challenges, given that natural monuments are subject to erosion and movement. Some natural monuments are more permanent than others. A rock outcrop may be expected to far outlast a tree. Some species of trees may be more lasting than others. Consequently trees that form natural monuments are often protected from destruction or mischief, and replaced when they die. In some regions large stones are jammed into the base of a corner or line tree, or multiple stones are used to surround a corner or line tree, or placed on or near a boundary line to preserve and identify the location of the boundary line on the ground or to further memorialise the corner or line. Where the natural boundary no longer exists, there should be other credible means of establishing its former location with reasonable accuracy (see Curtis M. Brown, Walter G. Robillard, & Donald A. Wilson, *Evidence and Procedures for Boundary Location* (6th ed., John Wiley & Sons 2011). If a monument is obliterated, it is controlling only if its former position can be identified by reliable evidence. If a monument has deteriorated beyond recognition, either visual or by witnesses' evidence, the monument itself is no longer controlling.

[24] Trees are ideal corner and line markers as long as neighbours agree to their accuracy, as long as they are remembered by succeeding generations, and as

long as they stand. Obviously, boundary descriptions can be made to closely fit anything on the ground if some of the dimensions are disregarded and others are modified to achieve a preferred outcome. A monument controls only if it has been undisturbed. While the respondent contended it was the *Nsambia* trees which were still existent and visible to the court, the appellant contended it was an *Olam* tree which was no longer existent and could not be shown to the court. The appellant only showed the court the position where he claimed the *Olam* tree used to stand.

[25] Whereas it would be wrong for a court, unable to find conclusive physical evidence of a boundary line at the location described by one party, to disregard that party's evidence so as to fit a monument at a different location, once a monument is disturbed, its value as a control point ceases. But if a monument is merely obliterated and its former position can be identified, the former position will control. The *Olam* tree relied on by the appellant is non-existent, it could not be seen during the *locus in quo* visit and the accuracy of its purported previous location could not be verified by independent evidence. Of the two boundary lines described by the parties, it is the respondent's that met the three qualities of permanence, visibility and accuracy. Preference had to be towards that boundary which best fit the majority of the available evidence. The trial court therefore came to the correct conclusion.

Order :

[26] In the final result, the appeal has no merit. It is dismissed and the costs of the appeal as well as those of the court below are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Mr. Watmon Brian.

For the respondent : Ms. Kunihira Roselyn