IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0044 of 2018

In the matter between

OKELLO ELFRIS **APPELLANT**

And

1. **KOMAKETCH ALEX**
2. **MALANG**
3. **ORACH PETER** **RESPONDENTS**

Heard: 19 August, 2019.
Delivered: 26 September, 2019.

Evidence *— Reliability of testimony — Where the two versions are so diametrically opposed, something in the nature of confirmatory evidence had to be found before the court relies upon the evidence of a witness whose testimony occupies a central position in the determination of the truth of either version— In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent seeking recovery of approximately 50 acres of land situated at Tegwiri village, Akobi Parish, Omiya Anyima sub-county, in

Kitgum District, a declaration that he is the rightful customary owner of the land, general damages for trespass to land, a permanent injunction restraining the respondents from further acts of trespass onto the land, and the costs of the suit. The appellant's claim was that the land in dispute belonged to his late father Okeny Paul. He inherited the land in dispute on 17th August, 2005 by virtue of a grant of letters of administration to the estate of the deceased. He enjoyed quiet possession of the land until the year 2014 when the respondents without his consent or any colour of right trespassed upon it. The respondents have since then refused to vacate the land, hence the suit.

[2] In their joint written statement of defence, the respondents denied the appellant's claim. They averred that the land in dispute belonged to their late grandfather. Before his death, their grandfather had given the land to their late father William Wilson Opiyo, who on 25th April, 1983 proceeded to acquire a five year lease title over the land comprised in LRV 1234 Folio 7, land at Palwo, Omiya Anyima, Nam-Okora being 57.02 hectares. It is instead the appellant who trespassed onto the land and has since constructed a grass-thatched house onto it and established gardens on the land. The appellant has refused to vacate the land. They prayed that the suit be dismissed with costs.

The appellant's evidence in the court below:

[3] P.W.1 Okumu Maulisiyo testified that the appellant's grandfather owned the land in dispute. When the appellant's grandfather died, he was not buried on the land in dispute but on that of his sister neighbouring the land in dispute. The appellant's father was born and raised on that land. When his father died, he inherited the land. When the appellant's father Paulo Okeny died, he too was buried on the land of his sister Regina Akongo neighbouring the land in dispute. The 1st appellant is occupying the land.

[4] The appellant, Okello Elfris, testified as P.W.2 and stated that he inherited the land from his late father Okeny Paulo in 1984. When the appellant's father died, he was not buried on the land in dispute but on that of his sister neighbouring the land in dispute. That is where the reset of his deceased relatives were buried. The dispute began in 2008 when the late William Wilson Opiyo claimed the land as his. In 2014 the respondents began trespassing on the land claiming to possess a registered title to it. P.W.3 Okot Puchewel testified that the appellant inherited the land from his late father who died during the 1980s. The appellant's father was buried about one mile away from the land in dispute. The dispute began only after the death of the appellant's father. The late William Wilson Opiyo has a house on the land. The appellant then closed his case.

The respondents' evidence in the court below:

[5] In the respondents' defence, D.W.1 Alobo Anna, the 1st respondent's mother, testified that the land in dispute was initially customary land but subsequently her late husband, William Wilson Opiyo, obtained a title deed to the land before his death in the year 2003. On 29th November, 2017 Kitgum District Land Board allowed their application to convert the land in to a freehold. There is a building on the land and gardens established by the respondents. They also keep livestock on the land (not subjected to cross-examination). D.W.2 Oketch George, a cousin to the respondents and neighbour, testified that he has lived in the neighbourhood all his life. The land in dispute belonged to the late father of the respondents who acquired it when the respondent's grandfather distributed the land he had among his sons. This was the share given to the respondent's father the late William Wilson Opiyo. Before his death, he had planted mango trees, orange trees, Kidit and Chwa trees.

[6] D.W.3 Lakot Pulichema, wife of Okello Livingstone S/o Yayeri testified that the land originally belonged to a one Yayeri, father of the late William Wilson Opiyo. Yayeri distributed the land he had among his sons and the land in dispute is what

he gave to the respondent's father the late William Wilson Opiyo. It is the sons of the late William Wilson Opiyo and their mother that are now in possession of the land. The respondents closed their case without taking the stand themselves.

Proceedings at the *locus in quo*:

[7] The court took then visited the *locus in quo* on14th May, 2018 where it took note of the features shown to it by the parties. It also recorded what a neighbour to the West, a one Okwera, stated about the land. The court then prepared a sketch map illustrating the observations made. In his judgment, the trial Magistrate found that none of the appellant's relatives live on the land in dispute. None of his deceased relatives has ever been buried on the land in dispute. None of his neighbours corroborated his claim. On 29th November, 2017 Kitgum District Land Board allowed the application by D.W.1 to convert the land in to a freehold. The appellant did not plead nor prove any fraud involved in the respondents' acquisition of that title and under the law a title deed is conclusive evidence of title.

Judgment of the court below:

[8] The court further observed that the land in dispute is surrounded by relatives of the respondents, save the neighbour to the West, a one Okwera, who however during the visit to the *locus in quo* confirmed that the land belongs to the respondents. During the visit to the *locus in quo*, the respondents were able to show the court the spot where the house of their former caretaker, Owing Timothy, stood in the past and ruins of the house were visible. The appellant had planted trees on the land only recently in the year 2006. There was nothing on the land that the appellant could show court during its visit to the *locus in quo* that indicated his relatives had ever lived on the land in dispute. By constructing grass-thatched house on the land and planting crops the appellant committed trespass onto the land. The court dismissed the suit, declared that the land

belongs to the respondents, granted the respondents an order of vacant possession, awarded them general damages of shs. 5,000,000/= exemplary damages of shs. 500,000/= for the appellant having filed the suit yet he is the trespasser on the land, and 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 erred in law and fact when he failed to properly evaluate the evidence before him thereby arriving at an erroneous decision against the appellant, hence occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when he denied the appellant a chance to be heard together with all his witnesses hence occasioning a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact and demonstrated bias in arriving at his judgment and actually denying the appellant justice.
4. The learned trial Magistrate erred in law and fact when he did not allow the appellant to cross-examine the first two defendants and thus arrived at an erroneous decision.

Arguments of Counsel for the appellant:

[10] In their submissions, counsel for the appellant, submitted that there was evidence to show that the appellant took possession of the land as way back as 1984 and established a ranch thereon long before the respondents began trespassing onto the land. During the visit to the *locus in quo*, the court was able to see trees that were planted by the appellant. In light of that evidence, the trial court erred when it found that the appellant was a trespasser on the land. During the hearing, the appellant was never given the opportunity to cross-examine the

respondents. The trial Magistrate was biased in favour of the respondents. The appeal should therefore be allowed.

Arguments of Counsel for the respondents:

[11] In response, counsel for the respondents, submitted that the first ground is too general and should be struck out. The appellant was afforded an opportunity to call his witnesses which he did. Their evidence was considered by the court. There is no evidence on record that any of his witnesses were prevented from testifying. There is nothing evident on the record from which any reasonable person could infer that the court was biased. The decision of the court is supported by the evidence on record and therefore the appeal should be dismissed with costs to the respondents.

Duties of a first appellate court:

[12] 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 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.

Proceedings at the *locus in quo*

[14] Before addressing the merits of the appeal, it is pertinent to comment on the record of proceedings of what transpired at the *locus in quo*. The purpose of a visit to the *locus in quo*, as has been stated repeatedly, is not to recite the evidence already led but to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to the land, and such a conflict can be resolved by visualizing the object, the res, the material thing, the scene of the incident or the property in issue. Where there exists such conflicting evidence as aforesaid, it is expected that the trial Magistrate will apply the court's visual senses in aid of its sense of hearing by visiting the locus in quo to resolve the conflict.

[15] Visiting the *locus in quo* is to check on the evidence by the witnesses, 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).* Admission of the evidence of a one Okwera was an error.

[16] 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 that 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 that witness.

[17] A 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 three 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 three witnesses.

<u>First ground of appeal struck out for being too general.</u>

[18] In agreement with counsel for the respondents, I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous

times *(see for example Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621; Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003).* The ground is accordingly struck out.

Grounds two, three and four

[19] In grounds 2, 3 and 4 of the appeal, the trial Magistrate if faulted as having been biased, based on the fact that he denied the appellant opportunity to be heard and a chance to cross-examine the respondents. I have perused the record of proceedings and found that these complaints are not borne out by the record. All defence witnesses; D.W.1 Alobo Anna and D.W.3 Lakot Pulichema were cross-examined. Only D.W.2, Oketch George was not cross-examined but there is nothing to show that the appellant was prevented from doing so. None of the respondents testified and therefore the appellant could not cross-examine any of them. The accusation of bias is thus unfounded.

[20] As a matter of common sense, in a case such as this where the two versions are so diametrically opposed, something in the nature of confirmatory evidence had to be found before the court relies upon the evidence of a witness whose testimony occupies a central position in the determination of the truth of either version. In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The physical evidence at the *locus in quo* was supportive of the respondents' rather than the appellant's version.

[21] I note though that the title deed tendered in evidence by the respondents (exhibit D. Ex.1) concerned a lease of that land granted to the respondents on 1st May, 1983 to run for five years. It was an expired title but the resolution to grant the respondents' application for conversion from customary tenure to freehold, was

not based on that title. The title was only presented as prima facie evidence of customary ownership.

Order :

[22] In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the trial are awarded to the

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Legal Aid Project of the Uganda Law Society

For the respondent : M/s Nimungu Associated Advocates