IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 022 of 2015

In the matter between

DR. LOUIS OKIO TALAMOI **APPELLANT**

And

1. MATHEW OKELLO

2. MRS.BEATRICE OKETTA **RESPONDENTS**

Heard: 21 August, 2019.
Delivered: 12 September, 2019.

Land Law — *Visits to the locus in quo — At the locus in quo, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court — The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a locus in quo — The record of proceedings and evidence of a witnesses during the visit to the locus in quo should ordinarily be taken down in the form of a narrative —Because its purpose is to illustrate testimony, demonstrative evidence gathered at the locus in quo has no evidentiary value independent of the testimony of the witness.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents jointly and severally sued the appellant seeking recovery of land described as plot 19 Church Crescent Road, located in Kitgum Town Council, a declaration that they are the rightful owners of that land, an order of vacant possession, general damages for trespass to land, a permanent injunction restraining the appellant from further acts of trespass onto the land, and the costs of the suit.

[2] The respondents' claim was that the late John Griffin Oketa applied for and was given a lease offer in respect of that land. The deceased took possession of the land, mobilised construction material which he deposited on the land, submitted his building plan for approval and kept possession of the land until the year 1986 at the fall of General Tito Okello's Government, whereupon he was arrested on 29th August, 1986 and kept in custody at Luzira Government Prison until 31st May, 1987 but died on 23rd June, 1987. Due to that arrest and fear for personal safety, the deceased and the caretaker he had appointed for that land did not return to Kitgum to re-possess the land. It is only in the year 2004 when on return of the respondents to re-possess the land that they found the appellant in possession. He had put up a temporary structure on the land. He had since then refused to vacate the land but was instead permitting other people to put up temporary structures on the land, hence the suit.

[3] In his written statement of defence, the appellant denied the respondents' claim in toto. He averred that he is the administrator of the estate of the late John Okidi Lakalifar who was allocated that land in the 1990s by way of a lease offer from Kitgum Town Council. Before his death, John Okidi Lakalifar had constructed a house on the land and planted Neem trees. He was in possession of that land until the year 2010 when a one Mrs. Margaret Oloya, claiming to be the administrator of the estate of the late Mrs. Martine Oloya, laid claim to the land. The appellant settled her claim by paying her shs. 1,900,000/= He was surprised when the respondents turned up later claiming the same land. He contended that

the respondents had colluded with Mrs. Martine Oloya to defraud him. He prayed that the suit be dismissed with costs.

The respondent's evidence in the court below:

[4] P.W.1 Mrs. Beatrice Oketta, the 2nd respondent, testified that her husband had been allocated the plot and had building materials on the land. P.W.2 Margaret Oloya, a neighbour to the plot and clan sister-in-law to P.W.1 Mrs. Beatrice Oketta. She gave the land to the late John Griffin Oketa. He had deposited construction material on the plot but his plans were interrupted by political instability. During the insurgency, the land was occupied by government soldiers. On return after the insurgency, he found the plot occupied by the relatives of the late John Okidi Lakalifar. When later the late John Okidi Lakalifar returned from abroad, she executed an agreement of sale of part of that plot with him at the price of shs. 1,900,000/= she later gave that money to P.W.1 Mrs. Beatrice Oketta when she demanded to have her husband's entire land back.

The appellant's evidence in the court below:

[5] In his defence as D.W.1, the appellant, Dr. Louis Okio Talamoi testified that he obtained a grant for the estate of John Okidi Lakalifar on 2nd July, 2009. The 1st respondent is the administrator of the estate of the late Oloya. The witness began developing the land in 2002 as it belonged to his late brother John Okidi Lakalifar. It is in April, 2010 that the 2nd respondent began claiming the land as forming part of the estate of her late husband. It was agreed that he pays them the balance left unpaid by his late brother John Okidi Lakalifar, hence the agreement of 18th September, 2010. He then proceeded to process a title for the plot by applying for a lease on 5th November, 2010.

[6] D.W.2 Okidi Milton, the younger brother of D.W.1 Dr. Louis Okio Talamoi, testified that the late John Okidi Lakalifar acquired the land in dispute sometime

before 1985. He took him to see it in 1985. They planted Neem trees, palm trees and later constructed a house on the land. It is now occupied by the family of the deceased. On 18th September, 2010 an agreement was signed in settlement of a claim by P.W.2 Margaret Oloya over part of the land.

Proceedings at the *locus in quo*:

[7] The trial Magistrate then visited the *locus in quo* on 17th February, 2015 but he did not record evidence. He however prepared a sketch map illustrating the position of multiple *Neem* trees, a palm tree, and three buildings belonging to the appellant, on the land in dispute

Judgment of the court below:

[8] In his judgement delivered on 18th May, 2015 the trial Magistrate found that although the appellant pleaded that the land was allocated to the late John Okidi Lakalifar, the documents he produced in evidence were made in his personal names. He did not specify the date of application by the deceased nor produce documentary proof of the claimed allocation to the late John Okidi Lakalifar. The lease offer dated 22nd August, 2011 was issued to him in his personal names and not as administrator of the estate of the late John Okidi Lakalifar. His decision to compensate P.W.2 Margaret Oloya for land which he claimed to belong to him is an indication of his uncertainty as to the propriety of his title to the land. The appellant is therefore a trespasser on the land. Judgment was entered in favour of the respondents. They were declared the rightful owners of the land. They were granted vacant possession of the land and a permanent injunction issued against the appellant. The respondents were granted 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 on record regarding ownership of the suit land thereby arriving at a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he failed to properly conduct the locus visit thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[10] In his submissions, counsel for the appellant, submitted that the appellant's activities on the land having began in 1990 as acknowledged by the 2nd respondent, the suit was time barred when she filed it in 2013, twenty three years after the appellant took possession of the land. The respondents did not plead any disability and therefore the plaint should have been rejected. The 2nd respondent concede that it is the appellant that planted the *Neem* trees found on the land. The appellant proved that he has enjoyed long undisturbed possession of the land yet the respondents did not prove to have a better title to the land. Although the 1st respondent claimed that her late husband had obtained a lease offer over the land, no documentary proof was presented and the oral evidence was contradictory as to the manner in which he obtained it. The trial Magistrate conducted proceedings at the locus in quo in a perfunctory manner as a result of which he failed to observe that the appellant was in physical possession of the land. They therefore prayed that the appeal be allowed. The respondent did not file any submissions in reply.

Duties of a first appellate court:

[11] 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*).

[12] 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.

Errors in conducting proceedings at the *locus in quo*

[13] In the second ground of appeal, the trial Magistrate is faulted for having conducted proceedings at the *locus in quo* in a perfunctory manner. 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. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting

evidence, if any about physical objects on the land and boundaries. Where there exists such conflicting evidence, 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.

[14] It is established law that when magistrate or judge visits a *locus in quo* and makes notes, the parties should be given chance to agree or deny or contradict the notes on oath, if those notes are to be relied upon in judgment. *In Fernandes v. Noronha [1969] E.A 506 at page 508,* Duffus V. P. said: "...in cases where the court finds it expedient to visit a *Locus in quo*, the court should make a note of what took place during the visit in its record and this note should be either agreed to by the advocates or at least read out to them..." Being a procedure undertaken pursuant to Order 18 rule 14 of *The Civil Procedure Rules*, proceedings at the *locus in quo* are an extension of what transpires in court. They are undertaken for purposes of inspection of a property or thing concerning which a question arises during the trial. For the inspection of immovable property, objects that cannot be brought conveniently to the court, or the scene of a particular occurrence, the court may hold a view at the locus in quo. According to section 138 (1) (b) of *The Magistrates Courts Act* and Order 18 rule 5 of *The Civil Procedure Rules*, evidence of a witness in a trial should ordinarily be taken down in the form of a narrative, and this by implication includes proceedings at the *locus in quo*.

[15] Therefore, at the *locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court *(see Karamat v. R [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; [1956] 40 Cr App R 13).* Evidentiary statements made under examination should be noted in the record to the extent they can be assumed to be of significance in the case. The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a *locus in quo*. The record in the

instant case does not disclose if any witnesses were sworn and if any questions were asked by any of the parties at the locus in quo concerning what the court ultimately observed. As matters stand, the illustrations made are hanging, not backed by evidence recorded from witnesses.

[16] However, the physical items found on the land are only demonstrative evidence. They simply demonstrate or illustrate the testimony of a witness. Such evidence will be admissible only when, with accuracy sufficient for the task at hand, it fairly and accurately reflects that testimony and is otherwise unobjectionable. Because its purpose is to illustrate testimony, demonstrative evidence gathered at the *locus in quo* has no evidentiary value independent of the testimony of the witness. It is authenticated by the witness whose testimony is being illustrated. That witness will usually identify salient features of the object and testify that it fairly and accurately reflects what he or she saw or heard on a particular occasion, such as the location of activities, people or things on the land. The purpose of an inspection is not to substitute the eye for the ear, but rather to clear any ambiguity that may arise in the evidence or to resolve any conflict in the evidence as to physical facts. By the nature of the dispute, observations made at the *locus in quo* were not of critical importance to the decision and neither were they relied upon in the judgment.

[17] According to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. 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. I am of the view that there was sufficient evidence to guide the proper decision of this case,

independently of the observations made at the locus in quo, more so, the trial court too did not rely on those observations. This ground of appeal therefore fails.

Ground one; evaluation of the evidence.

[18] In the first ground of appeal the trial Magistrate is faulted for having misdirected himself in the manner he went about the evaluation of the evidence. Having re-evaluated the evidence, I have found that the respondents' claim was premised on a supposed earlier allocation by the Town Council to the late John Griffin Oketa, which claim was not substantiated, hence not proved. The 2nd respondent, Mrs. Beatrice Oketta testifying as P.W.1 had no personal knowledge of the material facts while the conduct of P.W.2 Margaret Oloya is inconsistent with the property having belonged to the late John Griffin Oketa. She would not have signed the agreement of 18th September, 2010 had she had the knowledge that the land had been previously allocated to John Griffin Oketa, husband of the 2nd respondent. The respondents could not succeed by the strength of their own title and instead sought to succeed by reliance on the weakness of the appellant's.

[19] It is trite that "possession is good against all the world except the person who can show a good title" (*see Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5).* Possession may thus only be terminated by a person with better title to the land. To be entitled to evict the plaintiffs from the land, the defendants must prove a better title to the land. If someone is in possession and is sued for recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them *(see Ocean Estates Ltd v. Pinder [1969] 2 AC 19).* Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. The plaintiff must succeed by the strength of his or her own title and not by the weakness of the defendant's. The trial court

therefore misdirected itself by reversing the burden of proof. Had it properly directed itself, it would have dismissed the suit. In the final result,

Order :

[20] In the final result, the appeal succeeds. The judgment of the court below is set side. Instead judgment is entered dismissing the suit. The appellant's costs of the appeal and of the trial are to be met by the respondents.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Odongo and Co. Advocates,

For the respondents: Mr. Ocorobiya Lloyd.