IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 105 of 2018

In the matter between

HANNINGTON OPIRA **APPELLANT**

And

1. **DR. SUNDAY OKELLO**
2. **ALFRED ALUTA**
3. **CHARLES OPIRA ANGOMA**
4. **JOHN KIDEGA** **RESPONDENTS**

Heard: 22 August, 2019.
Delivered: 12 September, 2019.

Land law *— Determination of the location of a common boundary — Long, acquiescent and undisturbed occupation consistent with one or other of a recognized natural or artificial boundary, is considered the most convincing evidence of a boundary between properties — it is not even necessary that the parties specifically consent to the line so defined. It is sufficient that their actions consistently honoured the boundary — When owners of adjoining unregistered land treat an imaginary line as being the boundary between them, though that line may be different from the boundary described in their deeds, or any other officially recognised boundary that existed hitherto, and when those actions continue uninterrupted for twelve years or more, (whether by a single owner or a succession of owners), the parties are deemed to have established the line as the boundary, through recognition and acquiescence, regardless of the boundary described in their deeds or any other officially recognised boundary that existed hitherto.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents jointly and severally sued the appellant seeking a declaration that they are the rightful customary owners of approximately 500 acres of land situated at Kako village, Pagwok Parish, Namokora sub-county, Chua County in Kitgum District, 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, interest and the costs of the suit. The respondents' claim was that since 1926 and for generations thereafter, the respondents have enjoyed quiet possession of the land in dispute. It is during the year 2014 that the appellant encroached onto the land without their consent or any claim of right whatsoever, proceeding therefore to establish gardens thereon. He thereafter rented out the gardens to a one Mrs. Samali Odongo hence the suit.

[2] In his written statement of defence, the appellant denied the respondent's claim in toto. He averred that he inherited approximately 100 hectares of land from his late father Cira Odongo. He later applied for and was granted a lease offer. He litigated issues related to ownership of the land before with a one Ociti Walter and obtained a decision in his favour. The respondents have no claim to the land and the suit should be dismissed with costs.

The respondent's evidence in the court below:

[3] The 3rd respondent, Charles Opira, testified as P.W.1 and stated that he was born and raised on the land which is approximately 500 acres in total. The appellant's father owned land across the road which formed the common boundary between the two adjacent pieces of land. The appellant's land is in the left hand side of that road while that of the witness is on the right hand side of that road. P.W.2 Alfred Aluta, the 2nd respondent testified that he owns approximately 150 acres of the approximately 500 acres in total, which he inherited from his late father Zebidayo Aluta. The appellant owns land to the

West and all his relatives are in that direction. The appellant's father Cira Odongo, though, was buried on the Eastern side, on land occupied by this witness. This was because at the time of his father's death, the appellant was too young to look after the grave.

[4] P.W.3 John Kidega, the 4th respondent testified that he owns approximately 200 acres out of the approximately 500 acres in total, which he inherited from his late father Okoya Caesar. Their homesteads, graves of deceased relatives, a kraal and gardens exist on that land. It is during the year 2016 that the appellant trespassed on this specific part of the land as a continuation of acts of trespass that began in 2014 in respect of the rest of the land. P.W.4 James Akera, a neighbour to the respondents, testified that the respondents own land to the West of the road to Namokora. The appellant's father Cira Odongo was buried on the land in dispute. P.W.5 Sezi Kalende Otim testified that he lives about a mile or two away from the land in dispute. The appellant owns the land in dispute. He at one time offered to act as mediator in disputes over the land. The appellant's father Cira Odongo was not buried on the land in dispute but on his own land. He was not buried at the home of P.W.2 Alfred Aluta.

[5] P.W.6 Dr. Sunday Okello, the 1st respondent testified that he occupies approximately 300 acres together with P.W.1 Charles Opira out of the approximately 500 acres in total, which he inherited from his late father Livingstone Alia Angoma. The appellant's father Cira Odongo was buried on the land in dispute at the home of P.W.2 Alfred Aluta. It is when they saw the lease offer issued to the appellant that they got concerned. The litigation that the appellant was involved in with Ociti Walter was in respect of a separate piece of land that is South of the one now in dispute. P.W.7 Juliana Ayat corroborated the testimony of P.W.6 Dr. Sunday Okello in similar terms. P.W.8 Can Akaka Mario, another neighbour to the land in dispute, testified that the appellant's father Cira Odongo was buried on the land in dispute at the home of P.W.2 Alfred Aluta.

The appellant's evidence in the court below:

[6] In his defence, the appellant Opira Hannington testified as D.W.1 and stated that he is a former Chairman of the District Land Board and later a member. He applied for a lease on 26th July, 2002 and subsequently on 20th November, 2003 secured an offer for a lease for 100 hectares. The land was surveyed and there a deed plan issued. It is in 2016 that the respondents began trespassing on his land. P.W.2 Alfred Aluta trespassed onto three acres of the land. His father Cira Odongo had granted temporary rights of user to P.W.2 Alfred Aluta's father Zebidayo Aluta, of the land to the East for grazing and that is where he buried the father of D.W.1 the late Cira Odongo. The father of P.W.2 Alfred Aluta the late father Zebidayo Aluta was buried on the land occupied by D.W.1, West of the road. The land lying both to the East and West of the road belonged to his late father Cira Odongo and he could be buried on either side.

[7] D.W.2 Ochaya Franco testified that he is not a neighbour to the land in dispute, since he lives about six miles away. The respondents had not lived on the land in dispute. D.W.3 Lujino Oloo, a friend of the appellant who lives four miles from the land in dispute, testified that Cira Odongo used to hunt on the land in dispute as way back as 1949.

Proceedings at the *locus in quo*:

[8] The court then visited the locus in quo on 3rd September, 2018 where it was shown eight graves of deceased relatives of P.W.4 James Akera that were buried on the land in dispute between 1988 and 2004. The appellant stated that he was not claiming any land in the area shown to the court. P.W.2 Alfred Aluta showed court the location of his former homestead and his current crop gardens. P.W.6 Dr. Sunday Okello and P.W.1 Charles Opira too showed court land they possess with homesteads and recently planted crops in gardens. The appellant showed the court the area in respect of which he received a lease offer and

indicated that he had no claim over the land occupied by the respondents. The court prepared a sketch map illustrating those observations.

Judgment of the court below:

[9] In his judgment, the trial Magistrate found that each of the respondents inherited a distinct piece of land from their respective fathers, that was handed down from their forefathers over generations. At the *locus in quo*, they demonstrated to the court their current and former homesteads, graves of their deceased relatives, kraals and crop gardens. The appellant owns land West of Namukora-Orom Road while the respondents own that Eastern side. The appellant's father was buried on the Eastern side of the road and it is on that basis that the appellant claims that part of the land. At the *locus in quo*, the appellant renounced his claim over land occupied by the respondents yet he had hitherto been interfering with their quiet enjoyment of that land, to the extent of being prosecuted and convicted for his criminal acts in that respect. The appellant thereby trespassed onto the respondent's land by interfering with their quiet enjoyment. He entered judgment in favour of the respondents, awarded them shs. 4,000,000/= in general damages, issued an order of vacant possession and a permanent injunction against the appellant. He awarded the costs of the suit to the respondents.

The grounds of appeal:

[10] 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 respondents are the owners of the suit land.
2. The learned trial Magistrate erred in law and fact when he held that a cause of action accrued against the appellant yet he denied using the suit land.

3. The learned trial Magistrate erred in law and fact when he failed to properly address his mind to the law and facts thereby reaching a wrong conclusion.
4. The learned trial Magistrate erred in law and fact when he decided that as a single witness the appellant's evidence lacked weight.

Arguments of Counsel for the appellant:

[11] In his submissions, counsel for the appellant, submitted that the trial court erred when it decided that the respondents were the customary owners of the land in dispute ye they did not prove the custom under which they claimed to have acquired the land. They only claimed to have been born and raised on that land. There is no evidence regarding the size of the land nor the user. In contracts, the appellant adduced evidence regarding his application for s lease over the land. He received a lease offer on 1st December, 2013 and that evidence was uncontroverted. The respondents never pleaded nor proved that the appellant's acquisition was fraudulent. The appeal therefore ought to be allowed.

Arguments of Counsel for the respondent:

[12] In response, counsel for the respondents, submitted that the third ground of appeal is too general and ought to be struck out. The respondents adduced evidence showing that they and their ancestors had been in continuous possession of the land in dispute since the year 1926 until the year 2014 when the appellant began his trespass onto the land. Most of the witnesses called by the respondents shared common boundaries with the land in dispute and were consistent in proving that the land belongs to the respondents while that of the appellant lies across the road, to the West of the land in dispute. Their testimony was corroborated by the observations made by the trial Magistrate during the visit to the *locus in quo*. The decision was arrived at after a review of all the available evidence. The appellant sought to claim land owned by the

respondents on basis of the fact only that his father had been buried there. The circumstances of that burial were explained and accepted by the trial court. The trial court came to the correct conclusion and therefore the appeal should be dismissed.

Duties of a first appellate court:

[13] 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*).

[14] 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.

The first ground of appeal is struck out for being too general:

[15] In agreement with counsel for the respondents, I find the third 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 one, two and three

[16] By the 1st , 2nd and 4th grounds of appeal, the trial Magistrate is faulted for the reasoning behind his finding in favour of the respondents. The respondent's case was that the appellant owns land West of Namukora-Orom Road while the respondents own that on Eastern side. It was land East of that road that was in contention. The only fact linking the appellant to that side of the road was that his late father, Cira Odongo, had been buried there. Apart from this fact, all gardens, homesteads, pasture and other activities on land located that side of the road were exclusively undertaken by the respondents. This fact was verified by the court during the visit to the *locus in quo.*

[17] At one point in his testimony and during the visit to the *locus in quo*, the appellant denounced his claim to land located that side of the road, yet when he applied for a lease on 26th July, 2002 and subsequently on 20th November, 2003 secured an offer for a lease for 100 hectares that were surveyed and a deed plan issued, he did so on the basis of his claim that his father, the late Cira Odongo, had granted

temporary rights of user to P.W.2 Alfred Aluta's father Zebidayo Aluta, of the land to the East for grazing. It is on that account that he contended that it was during the year 2016 that the respondents began trespassing on his land, particularly P.W.2 Alfred Aluta who trespassed onto three acres of that land. The appellant therefore was blowing hot and cold over that land and it became imperative for the court to make a decision regarding that claim.

[18] It emerged that part of the 100 hectares offered to the appellant and subsequently surveyed, included land East of Namukora-Orom Road in respect of which the appellant claimed that his father, Cira Odongo, had only granted temporary rights of user to P.W.2 Alfred Aluta's father Zebidayo Aluta, yet P.W.2 Alfred Aluta, the 2nd respondent, claimed that it formed part of the approximately 150 acres which he inherited it from his late father Zebidayo Aluta. The appellant in effect sought to reclaim that land from the 2nd respondent yet the evidence of the respondents and their witnesses was to the effect that during his lifetime, all activities of the late Cira Odongo were exclusively on land West of Namukora-Orom Road and it only happened that upon his death, he was buried at the home of his brother, the late Zebidayo Aluta East of Namukora-Orom Road. The court then had to decide whether on basis of that evidence Namukora-Orom Road formed the common boundary between the appellant's and the respondents' land.

[19] Since the location of a boundary is primarily governed by the expressed intention of the originating party or parties, subject to any evidence to the contrary, Courts have consistently ruled in favour of long, acquiescent and undisturbed occupation consistent with one or other of a recognised natural or artificial boundary, as the most convincing evidence of a boundary between properties. Most weight should be given to those points on which the parties at the time were least likely to be mistaken. Proof of external and visible acts and conduct serves to indicate, more or less forcibly, the particular recognition of a feature as a boundary, since an owner of land and a person intruding on that land without his

or her consent cannot be both in rightful possession of the land at the same time. The respondents and the witnesses they called were immediate neighbours who shared common boundaries with the land in dispute. They were consistent in proving the fact that the land belongs to the respondents while that of the appellant lies across the road, to the West of the land in dispute. Their testimony was corroborated by the observations made by the trial Magistrate during the visit to the *locus in quo*.

[20] When court has to make a determination based on the conduct of the parties, it is not even necessary that the parties specifically consent to the line so defined. It is sufficient that their actions consistently honoured the boundary. The fact (if true) that the parties' beliefs as to ownership that guided that conduct were based on inadvertence, ignorance, or mistake is irrelevant *(see Sledge v. Peach County, 624 S.E.2d 288 (Ga.App.2005)* and *Watcham v. Attorney-General of the East Africa Protectorate [1919] AC 533)*. It may therefore be possible to take into account the behaviour of the parties to interpret what was intended as the boundary, by determination of who between the two had over the years had a sufficient degree of exclusive physical control of the land either side of that boundary. Long standing occupation often affords very satisfactory evidence of the original boundary when no other evidence is attainable or credible.

[21] Although the appellant claimed that before his death, his father, Cira Odongo, had only granted temporary rights of user to Zebidayo Aluta, father to the 2nd respondent P.W.2 Alfred Aluta, there was no evidence that Cira Odongo had at any time owned or undertaken activities on that part of the land. When owners of adjoining unregistered land treat an imaginary line as being the boundary between them, though that line may be different from the boundary described in their deeds, or any other officially recognised boundary that existed hitherto, and when those actions continue uninterrupted for twelve years or more, (whether by a single owner or a succession of owners), the parties are deemed to have established the line as the boundary, through recognition and acquiescence,

regardless of the boundary described in their deeds or any other officially recognised boundary that existed hitherto (see *Nicholson v. Halliday (2005), 193 O.A.C. 240 (CA*). The boundary is binding even when it is not reflected in a writing.

[22] The evidence before court showed that the parties had since the time of their respective fathers' holding of the respective tracts of land, adjusted their activities on the land to reflect that the Namukora-Orom Road was the recognised common boundary between them. Save for the burial of their fathers on opposite sides of the road, each of the parties exclusively possessed the land on the party's side of that road. This shows that the parties had for long harboured a perception of the Namukora-Orom Road being the boundary, and it explains why their respective physical activities never crossed that boundary until the year 2014 when the appellant began to claim land on the other side of the road and to commit acts of trespass thereon. Recognition of the Namukora-Orom Road having continued uninterrupted for twelve years or more it acquired the status of the true boundary by "recognition and acquiescence."

Order :

[23] In the final result, the appeal lacks merit. It is accordingly dismissed. The costs of the appeal and of the trial are to be met by the appellant.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Ocorobiya and Co. Advocates.

For the respondent : M/s Abwang, Otim, Opok and Co. Advocates.