IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 110 of 2018

In the matter between

ODONG JACKSON **APPELLANT**

And

ODONGKARA JOE **RESPONDENT**

Heard: 22 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***.**

Civil Procedure *— Mediation — An agreement resulting from a mediation process is enforceable if it is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable — Evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement — When parties agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part, evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement — Mediated agreements are accorded the same res judicata effect and enforceability as a judicial decree — where the matter in dispute has already been settled by mediation, it should be barred by law as the existence of two enforceable awards on the same issue, between the same parties would be contrary to procedural public policy — Where a point, question or*

subject-matter which was in controversy or in dispute has been authoritatively and finally settled by mediation, the mediation agreement is conclusive as between parties to the mediation proceedings or their privies in subsequent proceedings.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent seeking recovery of approximately 5 acres of land situated at Adak village, Lukwir Parish, Lalogi sub-county, in Gulu District, a declaration that he is the rightful owner of that land, an order of vacant possession, general damages for trespass to land, mesne profits, a permanent injunction restraining the respondent from further acts of trespass onto the land, and the costs of the suit.

[2] The appellant's claim was that the land in dispute originally belonged to his grandfather Okello Olany. On his death in was inherited by the appellant's father Obwona Galdino from whom the appellant inherited it in turn during the year 2001. During the year 2013, the respondent's brother Ogwal David wrongfully occupied the land and following a mediation by the elders was ordered to vacate but refused to do so. Further mediation by the L.C.III Chairman of Lalogi sub-county which on 21st October, 2014 resulted in the division of the land into two, the appellant taking one part and the other was taken by the respondent's brother Ogwal David, who this time round honoured the outcome. During the year 2015, the respondent without any claim of right or consent of the appellant occupied the appellant's part of the land an constructed a hut thereon. The respondent has since then refused to vacate the land and instead established crop gardens thereon, hence the suit.

[3] In his written statement of defence, the respondent denied the respondent's claim in toto. He averred that he inherited approximately 20 acres of land from his late

father Ocaya Nathan. The dispute between his brother Ogwal David and the appellant has never been resolved. The purported mediation never took place since it was done in the absence of his brother by people the appellant brought from Bweyale during April, 2015 who proceeded to forcefully establish a boundary sub-dividing the land between the appellant and Ogwal David, thereby denying the latter access to approximately two acres of his cassava garden. They destroyed two cares of cassava, jack fruit and avocado trees belonging to Ogwal David. The appellant has since planted approximately four acres of pine trees on the land in dispute. The respondent has features on the land including *Madalena* trees (variety of orange), graves of his deceased relatives, and grass thatched huts. He prayed that the suit should be dismissed with costs.

The respondent's evidence in the court below:

[4] In the respondent's defence, D.W.1 Ogwal David, testified that the land in dispute is their family land. He had a dispute with the appellant which ended in mediation. That mediation did not conclude the dispute because he was dissatisfied with the outcome. The appellant was given land to the East and the witness the land to the West. The Olam tree constituted the boundary. There are graves of their relatives on the land in dispute. The land that was the subject matter of the mediation is not the land in dispute now. The respondent attended all three meetings during the mediation. On the day the boundaries were marked, the witness fled from the land because the group that came to mark the boundary was armed with pangas.

[5] D.W.2 Ocaya Margaret testified that the respondent has a house on the land in dispute, which he built during the year 2015. He had no house on that village before that as he lived in town. The appellant's father Obwona Galdino had no land in the area. His homestead is under a mango tree, but not on the land in dispute. Land belonging to Ogwal David is to the East of that in dispute, about

500 meters away. There are no graves on the land in dispute. The respondent and members of his family have homes on the land in dispute.

[6] D.W.3 Ajok Jesca Akumu testified that she lives about one kilometre away from the land in dispute. The land in dispute measures approximately seven acres. It is during the year 2016 that the respondent built a house on the land in dispute but its roof was burnt down and only the walls remained standing. There are five graves on the land in dispute. The appellant's father Obwona Galdino had a house to the West of the land in dispute.

[7] The respondent, Odongkara Joe, testified as D.W.4 and stated that the land in dispute measures approximately 16 acres. Around the year 2013 - 2014 he built a house on the land in dispute, which house has since collapsed. There are five graves, a borehole and two other grass thatched houses on the land in dispute. He is not aware of any mediation that took place between the appellant and D.W.1 Ogwal David over the land in dispute. The one that was the subject of their dispute is to the South, across Moroto Road. The mediation he attended was between the family of his late father Ocaya Nathan and the appellant over land across Moroto Road occupied by the appellant's father. The respondent only had that burnt down structure and a garden on the land. His father the late Ocaya Nathan never had a house on the land in dispute. His grandmother Rebecca Akoyo resides on the land in dispute. Olam trees form the boundary between their land and that of Oringa John and Olweny Michael.

The appellant's evidence in the court below:

[8] The appellant, Odong Jackson, testified as P.W.1 and stated that the land in dispute measures approximately five acres. He inherited it from his late father. He uses the land for growing crops and does not have any structure on the land.

[9] P.W.2 Onono Edward testified that the land in dispute belonged to the appellant's father Obwona Galdino who in turn obtained it from his own father. The appellant acquired in the year 2001. It is during the dispute between the appellant and the respondent's brother Ogwal David that he got to know the size of the land. It lay between Moroto Road and the railway line. There were no graves on the land. To the north the boundary was marked by four *Olam* trees only two of which remain, to the East by three *Olam* trees only one of which remains as a trunk, a railway line to the South and the road to Tegot Onyina on the West. The appellant was cultivating that entire land but the respondent had recently constructed a house on it.

[10] P.W.3 Alima Richard, the former Chairman L.C.III of Lalogi sub-county, testified that he mediated a dispute over the same land that is now the subject of the current dispute. The dispute was between the appellant and the respondent's brother Ogwal David. In those proceedings, the respondent had no land in the area and was only called as a witness for Ogwal David. The *Olam* tree constituted the boundary. The respondent has since occupied put of the land that was assigned to the appellant as a result of that mediation. The respondent attended all meetings held during that mediation and never laid any claim to the land.

Proceedings at the *locus in quo*:

[11] The court then visited the *locus in quo* on 15th October, 2018 and found that in its estimation the land in dispute measures approximately 5 acres. The court did not find any graves on the land. There was an abandoned incomplete structure that the respondent had attempted to put up. *Olam* trees divide the land into two; the respondent and his family occupied the land to the East of those trees. The homestead of the appellant's father Obwona Galdino is to the West of the land in dispute and not connected thereto. There is a cassava garden belonging to the respondent's sister, Adong Doreen. Next to the land is the homestead of the

appellant's sister, Akumu Beatrice. The respondent does not live on the land nor have any garden thereon. The court prepared a sketch map illustrating those observations.

Judgment of the court below:

[12] In his judgment, the trial Magistrate found that the mediation that was undertaken was between the appellant and a one Ogwal David, not the respondent. The result of that mediation was never sanctioned by court and has no force of law since it is not a judgment of court. The description of the land as stated by P.W.2. Onono Edward varied from what the court established upon its visit to the *locus in quo.* This witness had no knowledge of the land in dispute. Although the respondent attended the meetings that preceded the physical sub-division of the land, he was not a party to the outcome. The respondent proved that the land in dispute is part of the 16 acres owned by his family. The homestead of the appellant and that of his mother is across the road. The appellant having failed to prove his case, it was dismissed with costs to the respondent.

The grounds of appeal:

[13] 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 ignored the evidence of P.W.1 as to how he acquired the suit land thereby reaching a wrong conclusion or decision.
2. The learned trial Magistrate erred in law and fact when he failed to properly evaluate and interpret the appellant's exhibits P.E1 and P.E2 thereby reaching a wrong conclusion or decision.
3. The learned trial Magistrate erred in law and fact when he ignored the inconsistencies and contradictions in the respondent's evidence thereby reaching a wrong conclusion or decision.

4. The learned trial Magistrate erred in law and fact in finding that the respondent is not a trespasser, hence dismissing the suit.

Arguments of Counsel for the appellant:

[14] In his submissions, counsel for the appellant, submitted that it was erroneous for the trial Magistrate to have concluded that the land does not belong to the appellant simply because he did not know how his father had acquired it before he inherited it from him. There was a prior successful mediation between the appellant and the respondent's brother, Ogwal David, which should not have been disregarded by the court. That mediation was attended by the respondent and he never challenged the outcome. The respondent and his elder brother Ogwal David had an identical interest in the land since they both claim to derive such interest from their grandfather Okullo Omoi. The outcome of the mediation binds him as well. Although the trial Magistrate noted inconsistencies and contradictions in the respondent's evidence, he never accorded them their due weight.

[15] The respondents and his witnesses estimation of the size of the land in dispute ranged from 17 acres according to D.W.1, to 10 acres according to D.W.2, to 7 cares according to D.W.3 and 16 acres according to D.W.4, yet that of the appellant and his witnesses was consistent at five acres, and this was verified by the court's own estimation at the *locus in quo*. D.W.1, D.W.2, D.W3 and D.W.4 all testified as to the presence of graves and old homesteads on the land. When the court visited the *locus in quo* it did not find any. The trial Magistrate erroneously ignored evidence showing that the common boundary between the appellant's and the respondent's land was marked by a line of *Olam* trees, which were visible during the visit to the *locus in quo*. When the respondent crossed that line and constructed a house on the appellant's side of the land, that constituted an act of trespass onto his land. The appeal should therefore be allowed.

Arguments of Counsel for the respondent:

[16] In response, counsel for the respondent, submitted that the trial court properly evaluated the evidence before it and came to the correct conclusion. The court was right when it disregarded the outcome of the mediation between the appellant and the respondent's elder brother Ogwal David. The land that was the subject of that mediation was not the one in dispute, the other was South of the Moroto-Gulu Road while the one now in dispute is to the North of that road. Since it was not an outcome of a court annexed mediation, it is not binding on third parties. The respondent's presence during the mediation cannot be construed as acquiescence. The respondent was never a party to that mediation. There were no inconsistencies in the respondent's evidence. The respondent's witnesses were referring to the respondent's entire land while the appellant and his witnesses referred only to the area in dispute. The trial court rightly ignored those inconsistencies. The graves and collapsed homesteads were on the un-disputed part of the respondent's land. During the visit to the *locus in quo*, the court found that the appellant did not reside on the land in dispute and had no activity on the land. The homestead of the appellant and his mother were found to be across the road. Since the appellant was not in possession of the land, the court came to the correct conclusion that he had failed to prove his claim for trespass. The appeal should be dismissed.

Duties of a first appellate court:

[17] 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*).

[18] 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 record of proceedings at the *locus in quo*

[19] 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 record of what transpired at the *locus in quo* only lists eight observations made by court. 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*.

[20] 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 the 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 observations made are hanging, not backed by evidence recorded from witnesses.

Admissibility and enforceability of the mediation agreement.

[21] By the first and second grounds of appeal, the trial Magistrate is faulted for having misdirected himself regarding appellant's oral and documentary evidence concerning a prior mediation between the appellant and the respondent's elder brother, Ogwal David. Consequent to rule 18 of *The Judicature (Mediation) Rules, 2013 (S.I. No. 10 of 2013),* no writing that is prepared for the purpose of, in the course of, or pursuant to mediation is admissible or subject to discovery for purposes of a trial. When parties agree to conduct and participate in a court annexed mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part, except as otherwise provided by those rules, evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence *(see also Foxgate Homeowners Ass'n v. Bramalea California, Inc. (26 Cal. 4th 1 (2001);* and *Rojas v. Superior Court (33 Cal. 4th 407 (2004).* Neither a mediator nor a party may reveal communications made during mediation.

[22] However, under rule 18 of *The Judicature (Mediation) Rules*, an agreement or partial agreement may be endorsed by the court as a consent judgment. This is

because once a compromise is reached, the mediation process is over. Therefore, a statement of the terms of the agreement, made after the conclusion of the mediation process, does not fall within the protected communication. Evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is therefore not made inadmissible, or protected from disclosure, by the provisions of rule 18 of *The Judicature (Mediation) Rules, 2013 (S.I. No. 10 of 2013).*

[23] The mediation between the appellant and the respondent's elder brother Ogwal David though was not a court annexed mediation. However, when parties agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part, evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement. An agreement resulting from a mediation process is enforceable if it is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable. A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. It is clear that the parties intended the boundary settlement to be binding and from the *locus in quo,* its location was clear and certain enough so as to be legally enforceable.

[24] By virtue of article 126 (2) (d) of *The Constitution of the Republic of Uganda, 1995*, courts are required to promote reconciliation between parties. It is for that reason that mediated agreements are accorded the same *res judicata* effect and enforceability as a judicial decree. For example in *Hoglund v. Aaskov Plumbing and Heating, 895 A.2d 323, 2006 ME 42 (2006),* the appellant worked as a union plumber. While employed by the respondent, he stepped into a hole obscured by floodwater and injured his knee. He filed a worker's compensation claim. He and the respondent thereafter participated in mediation and reached a written agreement in mediation for the respondent to pay workers' compensation

benefits to the appellant. Nineteen months after execution of the mediated agreement, the respondent filed a petition for review of the appellant's incapacity. The workers compensation court determined that the mediated agreement was "a final order having *res judicata* effect on factual issues" and that the respondent must "demonstrate a change in his economic or medical circumstances since the mediation" to warrant a reduction in benefits. The court determined that the respondent failed to meet this burden and rejected the petition. The appellant appealed to the Maine Supreme Judicial Court.

[25] On appeal, the respondent argued that the mediated agreement in this case, (i) was not the equivalent of a court finding on extent of incapacity, and (ii) was only an agreement for benefits at a certain level. Consequently, the respondent argued, it was entitled to a new hearing on the extent of appellant's incapacity, without reference to the mediated agreement. The Supreme Court chose to recognise the legislative intent to encourage mediation to replace litigation whenever possible. It rejected the idea that a mediating party could enter into a signed agreement and then refuse to comply with its terms. It held that mediated agreements are accorded the same *res judicata* effect and enforceability as a judicial decree.

[26] In that case, the Court gave the terms of a privately negotiated mediated agreement the same effect and enforceability of a judicial or administrative determination. Consequently, the agreement was *res judicata* on the facts surrounding the question of the appellant's incapacity, since his medical and economic circumstances did not change since the mediation. The rationale behind the decision was simple: to require *de novo* proof of the facts after the parties had foregone a hearing and participated in a process intended to finally resolve most disputes, would create a disincentive to settle. And while there are legitimate concerns about the preclusive effect of agreements that represent a compromise, it was held that these concerns could be addressed by careful drafting in the report of mediation.

[27] The import of this doctrine is that where the matter in dispute has already been settled by mediation, it should be barred by law as the existence of two enforceable awards on the same issue, between the same parties would be contrary to procedural public policy. It prevents a party in proceedings from contradicting a finding of fact or law that has already been determined in earlier proceedings between the same parties (or their privies), provided that the determination was central to the decision in those proceedings. A "privy" under common law is one who claims title or right under, through or on behalf of a party bound by a decision. A privy has been held to include persons or entities with an interest, legal or beneficial, in the previous litigation or its subject matter.

[28] It was contended by counsel for the respondent that the land that was the subject of that mediation was not the one in dispute, the other was South of the Moroto-Gulu Road while the one now in dispute is to the North of that road. The appellant described the land in dispute as being bounded by four *Olam* trees to the North, three big *Olam* trees to the East, a railway line to the South and Moroto Road to the West. I have examined the content of the final report on the mediation agreement (P. Ex.4 dated 25th June 2015) and the consentible boundary fixed by mediation was described as "extending from the railway line through the anthill to Hima Stream. The Western side of the land is for Odong Jackson while the Eastern to Ogwal David." The minutes of the mediation meeting of 21st October, 2014 (exhibit P. Ex.3), reflect an agreement to establish a common boundary that runs "straight from the main road, across the railway line up to Hima Stream (swamp)." The actual boundary was to be established and marked on the ground "during the dry season when the bush is cleared / burned as agreed by the parties." That activity was accordingly deferred.

[29] On the sketch map drawn by the trial Magistrate during the proceedings at the *locus in quo*, the land in dispute is illustrated as being East of the Moroto-Gulu Road, and not North of it as contended by counsel for the respondent. The land as illustrated in the sketch map drawn by court matches the description

contained in the final report on the mediation agreement (exhibit P. Ex.4 dated 25th June 2015), and the testimony of the appellant and his witnesses. I therefore find that the land that was in dispute prior to that mediation agreement is the same land that is the subject matter of this suit.

[30] This land was during the year 2013 the subject of a dispute between the appellant and the respondent's elder brother Ogwal David. As reflected in the minutes of the mediation proceedings, the claim was that the land belonged to the late Okulu Omoi, father to both the respondent and Ogwal David. The main witness in those proceedings was the respondent's mother Akech Philomena with whose submissions the respondent is reported to have concurred saying "he would not add anything but accept what Mrs. Okullu Omoi's wife said..." The meeting is reported to have ended with an amicable agreement that the boundary would be fixed on the ground during the dry season, running "straight from the main road, across the railway line up to Hima Stream (swamp)." It is clear from those proceedings, that Ogwal David did not state a personal claim to the land, but rather a claim on behalf of the family of the late Okulu Omoi.

[31] P.W.3 Alima Richard, the former Chairman L.C.III of Lalogi sub-county, who mediated that dispute testified that it concerned the same land that is now the subject of the current dispute. In those proceedings, the respondent had no land in the area and was only called as a witness for Ogwal David, but had since that settlement, defiantly occupied part of the land that was assigned to the appellant as a result of that mediation. It is surged by counsel for the respondent that he is entitled to do this since he was only in attendance and was never a party to the mediation such that he is not bound by its outcome.

[32] Since the terms of a privately negotiated mediated agreement are given the same effect and enforceability of a judicial or administrative determination, the only issue is whether the respondent is bound by that agreement under the principle of *res judicata.* The plea of *"res judicata"* is in its nature an "*estoppel"*

against the losing party from again litigating matters involved in previous action but does not have that effect as to matters transpiring subsequently.

[33] Where a point, question or subject-matter which was in controversy or in dispute has been authoritatively and finally settled by mediation, the mediation agreement is conclusive as between parties to the mediation proceedings or their privies in subsequent proceedings. A final mediation agreement on the merits of the controversy is conclusive of rights of parties or their privies in all later controversies, on points and matters determined in the former mediation. In short, once a dispute has been finally mediated, the same dispute cannot be agitated again in another mediation or suit afresh. For the doctrine to apply to out-of-court mediated settlements, it must be shown that; a) there was a former controversy between the same parties or their privies that was mutually referred to mediation, b) a final settlement on the merits was made in that mediation, and, c) the fresh controversy concerns the same subject matter and parties or their privies. The matter directly and substantially in issue in the subsequent controversy must be the same matter which was directly and substantially in issue either actually or constructively in the former mediation; the former mediation must have been between the same parties or between parties under whom they or any of them claim; the parties must have been claiming under the same title in the former mediation; and the matter directly and substantially in issue in the subsequent mediation or suit must have been finally settled in the former mediation.

[34] In the instant case, the matter of ownership of this land that is directly and substantially in issue in the current proceedings, is the same matter which was directly and substantially in issue in the former mediation of 2013-2014. Although that mediation was between the appellant and the respondent's elder brother Ogwal David, the respondent in the current proceedings is deemed to have claimed under Ogwal David in those previous proceedings since Ogwal David did not state a personal claim to the land, but rather a claim on behalf of the family

and estate of the late Okulu Omoi, to which the respondent belongs and is a beneficiary. In those mediation proceedings, Ogwal David claimed as a son of the late Okulu Omoi while in the current proceedings the respondent too claims as a son of the late Okulu Omoi. The matter now directly and substantially in issue was fully and finally settled in that mediation. Clearly the respondent could not succeed with the defence that the dispute between his brother Ogwal David and the appellant has never been resolved, as a justification for his entry onto that part of the land. Had the trial court properly directed itself, it would have come to different conclusion. The two grounds of appeal accordingly succeed.

Ground three and four

[35] By the third and fourth grounds of appeal, the trial Magistrate is faulted for having misdirected himself regarding contradictions in the respondent's evidence and failure to find that the respondent was a trespasser on the land in dispute. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored *(see Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and Uganda v. Abdallah Nassur [1982] HCB).* The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

[36] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. “essential” to the determination of the case. Material aspects of evidence vary from case to case but, generally in a trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be

proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

[37] In the instant case, the respondent and his witnesses' estimation of the size of the land in dispute ranged from 17 acres according to D.W.1 Ogwal David, to 10 acres according to D.W.2 Ocaya Margaret, to 7 cares according to D.W.3 Ajok Jesca Akumu and 16 acres according to D.W.4 the respondent Odongkara Joe, yet that of the appellant and his witnesses were consistent at five acres, and this was verified by the court's own estimation at the *locus in quo*. D.W.1, D.W.2, D.W3 and D.W.4 all testified as to the presence of graves and old homesteads on the land. When the court visited the *locus in quo* it did not find any. In a suit that concerned a determination as to whether or not that land now in dispute was the same as that which was in dispute previously in the mediation proceedings between the appellant and D.W.1 Ogwal David, these were material contradictions. they were never explained by the witnesses and should not have been ignored by the trial court. They undermined the credibility of the respondent's case in their tendency to point to a deliberate attempt at subterfuge or obscuration of the matters in controversy. Had the trial court properly directed itself, it would have found in favour of the appellant. The respondent was proved to have trespassed onto the appellant's land deliberately and in total disregard of the mediation agreement. Trespass to land being actionable per se and general damages being presumed by virtue of the act of trespass itself, I consider an award of nominal damages of shs. 2,000,000/= per annum hence shs. 8,000,000/= for the four years of trespass, to be adequate compensation to the appellant. Interest is awarded thereon at 8 % per annum from the date of judgment until payment in full.

Order:

[38] In the final result, the appeal is allowed. The judgment of the trial court is accordingly set side. Instead judgment is entered for the appellant against the respondent in the following terms;

a) A declaration that the land in dispute belongs to the appellant.
b) An order of vacant possession against the respondent.
c) A permanent injunction restraining the respondent, his servants, agents and persons claiming under him from further acts of trespass on the appellant's land.
d) General damages for trespass to land in the sum of shs. 8,000,000/=
e) Interest thereon at the rate of 8% per annum from the date of judgment until payment in full.
f) The costs of the appeal as well as those of the court below are awarded to the appellant.

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Stephen Mubiru
Resident Judge, Gulu

Appearances

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

For the respondent : M/s Donge and Co. Advocates