



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 070 of 2018

In the matter between

1. MWAKA CHARLES
2. ACIRO MARIANA

APPELLANTS

And

1. OTTI SIMON
2. OJOK MACAMERI
3. OKOT PA AKOC
4. AYELLA PA AKOC
5. ODOKONYERO OTTO

RESPONDENTS

Heard: 26 September, 2019.

Delivered: 26 November 2019.

Land Law — *Trespass to land — Possession may only be terminated by a person with better title to the land. — Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before.*

Evidence — *Evaluation of evidence — 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 respondents jointly and severally sued the appellants jointly and severally seeking recovery of approximately 20 acres out of 100 acres of land situated at

Labwor-Oyeng village, Wigweng Parish, Acholibur sub-county, in Pader District, a declaration that they are the rightful customary owners of that land, general damages for trespass to land, an order of vacant possession, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the suit. The respondents' claim was that the land in dispute originally belonged to their late grandfather Ojok Emmanuel Omaa who died in 2004. They as a family enjoyed quiet possession of the land until 1997 when they were forced to migrate to an IDP Camp by reason of insurgency. They had planted mango trees on the land and had graves of their deceased relatives on the land. During the year 2010 when they returned to re-occupy their land at the end of the insurgency, they found the appellants occupying approximately twenty acres of it without their consent or any colour of right, hence the suit.

- [2] The appellants denied the respondents' claim. They averred instead that they inherited the land from their grandparents who had lived thereon from time immemorial. The 2nd appellant is a widow who inherited the land she occupies from her deceased husband, Terensio Nono who in turn inherited it from his late father Vitoria Alweny. The latter was a brother to the late Lubwa Dominiko who inherited the land from their late father Liamoi Lagoro who was the first settler on the land while it was vacant unclaimed land. The 1st appellant inherited the land he occupies from his father, the late Lubwa Dominiko. They prayed that the suit be dismissed with costs. They instead counterclaimed for a declaration that they are the rightful customary owners of that land, general damages for trespass to land, an order of vacant possession, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the suit.

The respondents' evidence in the court below:

- [3] The 1st respondent, Otti Simon, testified as P.W.1 and stated that occupation by the respondents' family began in 1925 when the 1st respondent's grandfather Ojok Emmanuel Omaa acquired it as vacant, unoccupied land. When he died

during the year 2004 he was buried at the IDP Camp. The 1st respondent's father Oyet Samson utilised the land for over 50 years. The common boundary between the land in dispute and that of the appellants' is Adiyo-Ocayo Stream. The respondents' land is to the East of that stream while the appellants' is to the West of it. The 1st respondent's father planted 18 mango trees on the land during the 1970s. The relatives of the appellants have never been in occupation of the land in dispute. The appellants began their trespass in 2010 following their return from the IDP Camp.

- [4] P.W.2 Ojok Nathanael testified that both his parents were buried on the land in dispute in 1990 and 1992 respectively. The land originally belonged to their grandfather Ojok Emmanuel Omaa who died in the year 2002 and their fathers used to occupy and cultivate it before the breakout of insurgency. Adiyo-Ocayo Stream was the common boundary between the land and that of the appellants. The land in dispute was to the East while that of the appellants was to the West. On return from the IDP Camp, the appellants constructed house on the respondents' land. P.W.3 Okot Paokoc Kenneth; his late father Akoch Constantino was buried on the land in dispute. The land originally belonged to their grandfather Ojok Emmanuel Omaa who died in the year 2004. On return from the IDP Camp, each of the appellants encroached on approximately five acres of the land. The land in dispute was to the East while that of the appellants was to the West.
- [5] P.W.4 Odokonyero testified that his parents were buried on the land in dispute. The land originally belonged to their grandfather Ojok Emmanuel Omaa who died in the year 2002. The dispute began in 2010 and several attempts were made, but unsuccessfully, to have a mediated settlement because all parties come from the same extended family. The late Ojok Emmanuel Omaa planted mango trees on the land in dispute. P.W.5 Kaggwa Charles testified that a neighbour to the South of the land in dispute. The land originally belonged to the respondents' grandfather Ojok Emmanuel Omaa who died in the year 1994. Due to

insurgency, they all vacated the land in the year 2002 and only returned after the insurgency. The dispute began when the 2nd appellant constructed a house on the respondents' land. A clan meeting advised her to return to the land that belonged to her late father-in-law, the late Vitoria Alweny. The 1st appellant is now occupying 20 - 25 acres of the land while the 2nd appellant occupies about 30 acres of it. The graves of the respondents' deceased relatives are visible on the land. The old homestead of the late Ojok Emmanuel Omaa and the mango tree he planted still exist on the land.

- [6] P.W.6 Otongo Genesio testified that the dispute began in the year 2010 upon return from the IDP Camp, after the respondents had inherited the land from their late father Omar during the year 2004. Before that there was no dispute. There are almost 30 mango trees on the respondents' land, graves of his deceased relatives, his homestead. P.W.7 Abunya Wilson testified the land originally belonged to the respondents' grandfather Ojok Emmanuel Omaa who died in the year 2004 whereupon the respondents' son of Omar inherited it. The dispute began in the year 2010 upon return from the IDP Camp, when the appellants left the land they had occupied before the insurgency and constructed a house on the respondents' land. They currently occupy approximately twenty-five acres of the land. P.W.8 Olanya Justine testified the appellants trespassed onto the respondents' land and currently occupy approximately twenty acres of it.

The appellants' evidence in the court below:

- [7] In her defence as D.W.1 the 2nd appellant Aciro Mariana testified that the 1st appellant is her stepson. Her husband Teresio Nono died during the year 1990 and was buried on the land in dispute. Her late husband acquired it from his father Alweny Victor. She has lived on the land in dispute since the year 1974 when she married Teresio Nono. They resided on the land, used it for cultivation and for grazing livestock. Before the insurgency, the respondent was resident at Lageng village, about two miles from the land in dispute. At the end of the

insurgency she returned and re-occupied her land but the dispute began in 2010 when the respondents violently stopped her from constructing a house on the land. She stopped using the land fearing for her life. The respondents has no mango trees or graves of his deceased relatives on the land.

- [8] D.W.2 Oloya Albino testified that he lives about 200 meters away from the land in dispute. The land in dispute originally belonged to the late Vitoria Alweny. When he died the appellants inherited it. Before the insurgency to-date the respondent was resident at Acholi Bur Trading Centre. The appellants vacated the land in 1991 following massive killings by rebels in the area and moved to La-Pom. The dispute began in 2010 when the respondents began cultivating the land without the permission of the appellants. The mango trees on the land were planted by Willy.

Proceedings at the *locus in quo*:

- [9] The Court visited to the *locus in quo* on 28th April, 2018 where it prepared a sketch map showing that the appellants occupy the entire land in dispute and it lies West of Lageng Stream. D.W.2 Oloya Albino is an immediate neighbour South of the land in dispute. None of the respondents' witnesses is an immediate neighbour to the land in dispute.

Judgment of the court below:

- [10] In his judgment, the trial Magistrate found that the respondents' evidence established their root of title, right from the grandfather of the 1st respondent's to the current ownership. On the other hand, the appellants' evidence was unsatisfactory. It is unheard of in Acholi culture for one to inherit the property of an in-law. The respondents therefore proved their case on the balance of probabilities. The respondents were accordingly declared the rightful owners of the land in dispute. The appellants were declared trespassers on the

respondents' land. The respondents were granted an order of eviction and a permanent injunction was issued restraining the appellants from undertaking further acts of trespass on the respondents' land. The appellants were ordered to meet the costs of the suit.

The grounds of appeal:

[11] The appellants were 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 determine that the dispute between the parties concerned a common boundary and thereby came to the wrong decision.
2. The learned trial Magistrate erred in law and fact when he held that the respondents were not trespassers on the land in dispute.

Arguments of Counsel for the appellants:

[12] In his submissions, counsel for the appellants argued that the trial court misconstrued the nature of the dispute between the parties. It is a boundary dispute in which the appellants described the common boundary as Lageng Stream while the respondents referred to it as Adiyo-Ocayo Stream. When the court visited the *locus in quo*, it found that the correct name is Lageng Stream. This showed that the respondents had no personal knowledge of what they were testifying about. They failed to prove their case and the suit ought to have been dismissed. Counsel for the respondents did not file any submissions in response.

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, S.C. C A No. 17 of 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.

Both grounds of appeal considered concurrently.

- [15] For convenience, both grounds of appeal will be considered concurrently. The trial court found as a fact that the second appellant and the respondents are part of one extended family of the Pawodong Clan that traces its ancestry to a one Odong and his kith. The 1st appellant was married into that family when she married the late Terensio Nono, a member of that family, during the early 1970s. She lived on land belonging to that family until the breakout of the insurgency when in 1991 she together with the rest of the members of the family were forced to flee into IDP Camps.
- [16] The history of ownership of the land in dispute from the perspective of the respondents is disclosed by exhibit P. Ex.1A (minutes of a customary mediation meeting that took place on 27th March, 2010). Way back in history, the Pawondong Clan gave the land West of Lageng Stream (referred to by the

respondents and his witnesses as Adiyo-Ocayo Stream) to a one Bitorio and that East of the stream, extending up to Langdyang Stream, to a one Lagony. Over the years, the late Ojok Emmanuel Omaa inherited the land to the East of the stream from a one Odoch Lagony, which land now vests in the 1st respondent as a grandson of the deceased.

- [17] The current dispute is over land West of Lageng Stream (referred to by the respondents and his witnesses as Adiyo-Ocayo Stream). The respondents insist on a reversion to an earlier status on account of the fact that they used to cultivate the land during 1956. It is not explained how they, as direct descendants of the late Ojok Emmanuel Omaa to whom the clan gave land East of the stream, had during the 1950s established gardens to the West of the stream, on land that was given to Bitorio and not Ojok Emmanuel Omaa under whom they claim.
- [18] On the other hand, the history of ownership of the land in dispute from the perspective of the appellants is that the late Teresio Nono, husband of the 1st appellant and paternal uncle to the 2nd appellant owned the land before his death, which he acquired by inheritance from his father the late Vitoria Alweny. The first settler on that land was Liamoi Lagoro, father of Lubwa Dominico, father of Vitoria Alweny. They lived together as husband and wife together with their children on that land from 1974 until the year 1997 when insurgency forced them into an IDP Camp. On return after the end of the insurgency they re-occupied their land but during the year 2010 the respondents began interfering with their quiet possession and enjoyment of the land.
- [19] In the first place it was never proved that the 1st appellant was an in-law to the family of the respondents. Their respective claims were distinct and diametrically opposed. The respondents' claim was based on allocation by the Pawodong Clan while that of the appellants' was based on original acquisition by their ancestor as vacant unclaimed land and thereafter through a line of succession to themselves.

- [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 should 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.
- [21] The court should have examined the physical evidence and determined how it fit into the overall scenario as presented in the contending versions, on basis of which it would then determine the reliability of the respective accounts of the parties. Had the trial court properly directed itself, it would have found that the physical evidence at the *locus in quo* supported the appellants' rather than the respondents' version..
- [22] None of the mango trees, homesteads or graves of the respondents' deceased relatives, that the respondents claimed existed on the land, were found by the court to exist thereon. Instead the sketch map drawn at the *locus in quo* shows the appellants occupy the entire land in dispute and it lies West of Lageng Stream. D.W.2 Oloya Albino is an immediate neighbour South of the land in dispute. None of the respondents' witnesses is an immediate neighbour to the land in dispute. The testimony of P.W.2 Ojok Nathanael to the effect that Adiyo-Ocayo Stream was the common boundary between the land in dispute to the East of that stream while that of the appellants was to the West, although identified the land in dispute wrongly, is consistent with what the trial court found during the locus visit since the sketch it drew shows appellants occupy land West of that stream (Lageng Stream).
- [23] Since the respondents' version rested only on the word of witnesses, the trial court should have accorded a lesser weight to that version in the face of the

appellants' version which could be independently and objectively verified by the physical evidence found at the *locus in quo*. What the respondents sought to achieve by this litigation was to re-wind the clock of history so as to regain access to the land on basis of some sporadic use they had had during the 1950s, whose circumstances and legal basis was not clearly articulated.

[24] 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 respondents did not prove a better title.

[25] When the appellants vacated the land as a result of the insurgency, that did not terminate their ownership of the land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before (see *John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*). The temporary abandonment of the land by the appellants in the instant case not having been voluntary, their rights as owners were revived when they re-asserted them after the insurgency. Lastly, Order 21 rule 6 of *The Civil Procedure Rules* requires a decree to agree with the judgment by among other things, to specify clearly the relief granted or other determination of the suit. In the instant case there is no award of general damages in the judgment yet a sum of shs.

6,000,000/= was erroneously included in the decree as a award of general damages.

Order:

[26] In the final result, I find merit in the appeal and it is accordingly allowed. The judgment of the court below is set aside and in its place judgment is entered dismissing the suit with costs to the appellant. Judgment is further entered in favour of the appellants against the respondents jointly and severally on the counterclaim in the following terms;

- a) A declaration that the appellants are the lawful customary owners of the land West of Adiy-Ocayo Stream (Lageng Stream) that has hitherto been in dispute.
- b) The respondents are declared trespassers on that land.
- c) The appellants are granted vacant possession of the land.
- d) A permanent injunction issues restraining the respondents, their agents and persons claiming under them from committing further acts of trespass onto that land.
- e) The costs of the suit and of the appeal are awarded to the appellants.

Stephen Mubiru
Resident Judge, Gulu

Appearances:

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

For the respondents : Mr. Michael Okot.