IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 026 of 2012

In the matter between

ODEM GABRIEL **APPELLANT**

And

OKEE LUCIMA **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Contract Law *— In general, a contract does not need to be in writing to be binding. A contract can also be verbal or implied through actions — generally, to be valid and enforceable, a contract reduced to writing must be signed by all parties. However, depending on the circumstances, an unsigned contract may still be binding and enforceable in court, especially where there is a oral agreement and the writing is only intended to serve as evidence of the agreement, it will be enforced even if none of the parties signs the written contract. An agreement may considered formed and concluded, notwithstanding the fact that the formalities of execution have not yet been complied with, if the conduct of the parties indicates an intention to be bound to the agreement — Where the parties do not intend to be immediately bound, and performance is suspended until they execute a formal contract, that may indicate that the parties do not intend to be bound until a formal agreement is executed. In such situations failure to sign the agreement by one of them may render the agreement unenforceable — All the court needs to ascertain is the presence of a valid offer (and acceptance of that offer); an intention to be bound to the offer; consideration for the agreement; and certainty of terms. The question for the court is whether there was acceptance by conduct and whether that acceptance was effectively communicated to the other party — Except for contracts required by law to be in writing, the existence of a contract and the intentions of the parties to a contract or alleged contract may be ascertained from their words, conduct and surrounding circumstances.— It is therefore a well-established principle that the signature of the parties to a written contract is not a precondition to the existence of contractual relations, as a contract can be accepted equally well by conduct.*

Land Law *— Adverse possession — Possession is the actual physical control over a piece of land. It is constituted by the fact that somebody is in physical control of the land with intention to control it — Possession is a question of fact to be decided on the merits of each particular case. It may be established by evidence of physical residence on the land. It may also be established by a show of some visible or external sign which indicates control over the piece of land in question. Cultivation of a piece of land, erection of a building or fence thereon, demarcation of land with pegs or beacons are all evidence of possession. A person can also be in possession through a third party such as a servant, agent or tenant —In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of The Limitation Act. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land .As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the possessor is vested with title.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent seeking a declaration of ownership of land under customary tenure measuring approximately 12 acres situated at Auch village, Pandwong Parish, Kitgum Municipality in Kitgum District, recovery of that land, general damages for trespass to land, a permanent injunction restraining him from further acts of trespass onto that land, interest and the costs of the suit.

[2] The appellants' case was that his late father Odong Esau acquired the land in dispute way back in 1904 as vacant, unclaimed land. The family of the deceased occupied the land henceforth and had peaceful and quiet enjoyment of it. During the year 1971, Otto Benjamin, an uncle to the late Odong Esau on request was given a part of that land measuring 50 x 50 metres for establishment of a kraal near Auch Stream. Following the death of Odong Esau, the respondent requested Otto Benjamin to permit him use that kraal and the two of them began keeping their cattle together in the same kraal. The respondent later took his cattle away, leaving Otto Benjamin on the land. During the year 2012, the

respondent evicted Otto Benjamin from the kraal claiming to have bought it from him. The L.C.1 officials restrained him from occupying the land. In the year 2016 the respondent returned to the land and began cutting down trees thereon, hence the suit.

[3] In his written statement of defence, the respondent denied the appellant's claim. He contended that the land in dispute measures 8.64 hectares. He stated that during the year 1980, he together with a one Oyat Balmoi bought the land in dispute from Otto Benjamin at the price of shs. 4,500/= which they paid in two instalments in the presence of the Parish Chief of Pandwong Parish. Later Oyat Balmoi relinquished his interest in the land to the respondent, leaving him as sole owner thereof. Otto Benjamin at one point attempted to re-possess part of the land but was stopped and he left. The respondent thereafter utilised the land peacefully until the breakout of insurgency in 1986 whereupon he vacated the land and migrated to Ogako, Padibe East with his cattle. He returned to the land in 1988 and used it for cultivation since his cattle had been rustled. During the year 2003, he caused a survey of the land. He prayed that the suit be dismissed.

The appellant's evidence in the court below:

[4] P.W.1 Odem Gabriel, the appellant, testified that the land in dispute measures approximately 12 acres. It forms part of the land he inherited from his late father Esau Odong. Without his consent, the respondent began cultivating the land in 1989. He was stopped by the L.C.1. Before his death, Odong Esau had in 1977 allowed Otto Benjamin to live on the land temporarily. The appellant's home is opposite the land in dispute. For the period he was not resident in Kitgum, 1989-2012, the appellant had left the land in possession of Otto Benjamin. During the year 2012, the respondent evicted the appellant's caretaker, Oryem Lamton from the land. He had permitted Oryem Lamton to occupy the land during the insurgency. He is not aware of the fact the respondent had caused a survey of the land.

[5] P.W.2 Cengenge Charles testified that the land in dispute belongs to the appellant; he inherited it from his father Odong Esau. In 1980, his father, Oryem Lamton, was permitted by the appellant to cultivate the land and graze his cattle thereon. They vacated the land in 1986. Otto Benjamin permitted the respondent to occupy the land but he too vacated it during 1986 as a result of insurgency. At the end of the insurgency, Oryem Lamton returned to the land and re-established his gardens but did not live on the land. During the year 2012 the respondent too returned and evicted Oryem Lamton from the land. He denied having signed as a wetness to the respondent's agreement dated 21st July, 1980 and on documents executed in the year 2003 authorising survey of the land by the respondent. Under cross-examination, he asserted that the appellant gave his father Oryem Lamton, approximately seven acres out of the twelve claimed by the respondent.

[6] P.W.3 Jemma Nyero testified that before his death in 1979, the appellant's father Odong Esau had been the owner of the land in dispute. It is during the year 1980 that the respondent began trespassing onto the land. By then Otto Benjamin was in possession of the land with permission of Odong Esau. With the permission of Otto Benjamin, the respondent grazed his cattle on the land. It is only in 1986 that the respondent vacated the land but returned later during the same year and established gardens on the land. Odong Esau did not sell the land to Otto Benjamin.

[7] P.W.4 Otto Benjamin testified that the land in dispute belongs to the appellant; he inherited it from his father Odong Esau upon his death in 1989. It is Odong Esau who in 1977 authorised him to occupy the land. He never purchased the land from Odong Esau. Later during the year 1980, in order to save his livestock from cattle rustlers, the respondent brought it and requested him to keep it in his kraal. By that time he had vacated the land. He permitted the respondent to keep his livestock in his then vacant kraal for about six years. The respondent left in 1986, leaving the land vacant. Later on the respondent claimed to have bought the land

from him, yet he had never sold him the land. The signature purported to be his on the agreement dated 21st July, 1980 is a forgery.

The respondent's evidence in the court below:

[8] D.W.1 Basil Okee Lucima, the respondent, testified that during the year 2003 he caused survey of the land in dispute and it measures 8.64 acres. He purchased the land from P.W.4 Otto Benjamin on 21st July, 1980 (exhibit D. Ex.1) at a price of shs. 4,500/= which he paid in two instalments, but did not sign the agreement as purchaser. He originally bought the land jointly with a one Oyet Balmoi who was to contribute shs. 1,000/= Oyet Balmoi later pulled out of the transaction after failing to raise that money, prompting the respondent to pay it. P.W.4 Otto Benjamin had presented an agreement dated 5th June, 1977 (exhibit D. Ex.2) by which he in turn had in 1977 purchased the land from Odong Esau. The originals of both agreements are misplaced. There were two huts, Otto's kraal, and a number of fruit trees on the land at the time of purchase. P.W.4 Otto Benjamin removed his cattle from the land before he sold it to the respondent. After purchasing the land, the respondent moved his cattle into the kraal during the year 1981. Oryem Lamton, father of P.W.2 Cengenge Charles, was his herdsman. In 1986 the respondent vacated the land due to insurgency. He returned to the land in July 1988 and established gardens on the land and has had possession since then. The appellant has never been in possession of the land. During the year 2003, his wife Christine Okee Lucima caused a survey of the land.

[9] D.W.2 Christine Okee Lucima testified that she had never seen the appellant before until his appearance in court. During the year 1980 her husband D.W.1 purchased the land in dispute and paid the price in two instalments. The agreement was witnessed by the Labong Clan Chief and the sub-county Chief of Labong Division but neither she nor the respondent signed it as purchaser. There were two huts, a number of fruit trees and a pit latrine on the land at the time of

purchase. They used the land for grazing cattle until the cattle was stolen in 1988. P.W.2 Cengenge Charles' father was the herdsman. They then used the land for growing crops. She later caused a survey of the land and mark stones were fixed (instruction to survey and survey report exhibited as D. Ex.3). Later the appellant claimed part of the land and began the construction of a building thereon. He was stopped by the L..C officials. The appellant wrote a letter of apology (exhibit D. Ex.4). They have since then utilised the land peacefully.

[10] D.W.3 Abwoo Lawoko Ocol testified that the respondent bought the land in dispute from Otto Benjamin during the year 1980. There were two huts, a kraal, a number of fruit trees, sisal plants, eucalyptus trees and a pit latrine on the land at the time of purchase. Initially it was used for rearing livestock until 1988 when the cattle was stolen by the Karimojong. Oryem Lamton, father of P.W.2 Cengenge Charles, was his herdsman. It was then converted into farmland until the year 2003 when Otto Benjamin attempted to re-possess the land. When the L.C. intervened, he apologised in writing. It is during the year 2015 that the appellant began claiming part of the land.

Proceedings at the *locus in quo*:

[11] The court visited the *locus in quo* on 26th March, 2018 where it observed that the land occupied by the appellant is to the East and is separated from the one in dispute by the road to Lamola. There are stoned showing the location where the granaries were in the past. The court was shown the survey mark-stones that were planted on instruction of the D.W.2. A sketch map for the land in dispute was prepared.

Judgment of the court below:

[12] In his judgment delivered on 16th January, 2019 the trial Magistrate found that the appellant claimed to have inherited the land in dispute in 1979 from his late father

Odong Esau and thereafter entrusted it to P.W.4 Otto Benjamin and Lamton Oryem as caretakers from 1989 until 2012. The respondent then without any claim of right evicted Lamton Oryem from the land in 1983 yet he had been permitted by Otto Benjamin only to temporarily keep his cattle on the land. The respondent's version is that he bought the land from P.W.4 Otto Benjamin. Evidence shows that the respondent has been in possession of the land since 1980, save for the duration of the insurgency. Although P.W.4 Otto Benjamin denied having signed the agreement of sale, exhibit D. Ex.1, the similarity in handwriting proves otherwise. The two witnesses P.W.2 Cengenge Charles and P.W.4 Otto Benjamin are untruthful. At the *locus in quo*, the appellant was unsure of himself and called for assistance from the people in attendance for identification of material features on the land. On the account the court found as a fact that P.W.4 Otto Benjamin sold the land to the respondent in 1980 who has been in possession since then. He is therefore the rightful owner of the land. Having enjoyed undisturbed possession for more than twelve years before 1995, he is a bona fide occupant of the land. The suit was therefore dismissed with costs to the respondent.

The grounds of appeal:

[13] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. Had the trial Magistrate properly scrutinised the impugned sale agreements, he would not have erred in law and fact when held that the respondent was the owner of the suit land by purchase.
2. The trial Magistrate erred in law and fact when he concluded that even if the respondent had not purchased the suit land, the respondent had acquired interest in the suit land through undisturbed possession for more than twelve years before 1995, thereby occasioning a miscarriage of justice.

3. Had the trial Magistrate properly addressed his mind to the law of acquisition of land, he would not have erred in law and fact when held that planting of mark-stones conferred interest in the suit land.
4. The trial Magistrate failed to properly conduct proceedings at the *locus in quo* thus occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[14] In their submissions, counsel for the appellant submitted that the purported agreement of purchase presented by the respondent was invalid since he never signed it as purchaser. Had the trial Magistrate addressed his mid to this he would not have found that the respondent acquired the land in dispute by purchase. Neither the respondent nor his wife lived on the land and it was mostly covered by bush. Between 1986 and 2008 the area was insecure as a reason of insurgency. Before the insurgency, it was the father of P.W.2 in possession. There was therefore no basis for finding of adverse possession. The respondent never submitted proof of compliance with the procedure leading to the issuance of survey instructions. The fact of survey therefore never conferred a registrable interest onto the respondent. The appeal should therefore be allowed.

Arguments of Counsel for the respondent:

[15] In response, counsel for the respondent argued that the trial Magistrate came to the correct conclusion as regards the validity of the agreement after comparison with other acknowledged writings of P.W.4 Otto Benjamin. At the trial the appellant never questioned the validity of the agreement but rather the capacity of P.W.4 Otto Benjamin to sell the land. The respondent had cattle on the land from 1981 until 1986 when insurgency erupted. Thereafter he established gardens. The appellant never had possession of the land at any interval since 1981. He was never formally challenged by the appellant throughout that period. Presence of the survey mark-stones observed during the visit to the *locus in quo*

corroborated the testimony of D.W.2 that she has caused a survey of that land in 2003. Proceedings at the *locus in quo* were properly conducted and there being no argument presented to the contrary, that ground and the appeal altogether should be dismissed.

Duties of a first appellate court:

[16] 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*).

[17] 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.

Ground four; Irregularities in the proceedings at the *locus in quo*.

[18] The fourth ground of appeal regarding the trial court's conduct of proceedings at the *locus in quo* was not substantiated in the submissions of counsel for the

appellant and perusal of the record did not disclose any shortcoming. The ground therefore fails.

Ground one; Findings as regards to the validity of the agreement:.

[19] The first ground of appeal criticises the trial court's finding as regards the validity of the agreement. In general, a contract does not need to be in writing to be binding. A contract can also be verbal or implied through actions. Two of the essential parts of a contract are the offer and acceptance. One party will make an offer and state what they're providing, while the other party will choose to accept the contract's terms, most often in writing.

[20] Generally, to be valid and enforceable, a contract reduced to writing must be signed by all parties. However, depending on the circumstances, an unsigned contract may still be binding and enforceable in court, especially where there is a oral agreement and the writing is only intended to serve as evidence of the agreement, it will be enforced even if none of the parties signs the written contract. An agreement may considered formed and concluded, notwithstanding the fact that the formalities of execution have not yet been complied with, if the conduct of the parties indicates an intention to be bound to the agreement.

[21] For example in *Jatsek Constr. Co. v. Burton Scot Contrs., LLC, 2012 Ohio App. LEXIS 3489*, a subcontractor on a public improvement project claimed that it had performed work pursuant to a subcontract agreement with the general contractor but had not been paid for the work. The general contractor admitted that the subcontractor had performed work and had not been paid, but argued that the subcontract agreement required arbitration of the dispute instead of a lawsuit in court. The subcontract agreement had handwritten changes made by the subcontractor, but none were made to the arbitration provision. The subcontract agreement had been signed and dated by the subcontractor but not by the

general contractor. The trial court held that no contract existed and the defendant general contractor appealed.

[22] On appeal, the subcontractor argued that no contract was formed since the general contractor did not sign the subcontract agreement and, therefore, arbitration was not required. The subcontractor also argued that even if a contract had formed, it was against public policy to enforce the arbitration provision because the lawsuit had already begun. The appeals court, held that where all parties do not sign a proposed contract but one party still performs the work, an implied contract forms under the terms of that proposal. In addition, both parties are considered to have agreed to the contract. Because both parties agreed that the subcontractor had performed the work, the court held that a contract existed between the subcontractor and the general contractor. Because the general contractor had raised the issue of the arbitration agreement early on in the lawsuit, the court stated that enforcing the arbitration provision was not against public policy, even though the lawsuit had already begun. The court also noted that resolving disputes using arbitration is generally favoured by the law. Thus, the court held that the parties must arbitrate the dispute under the terms of the contract (see also *AJ Lucas Operations Pty Ltd v. Gladstone Area Water Board & Anor [2015] QCA 287*).

[23] Similarly in *Lease America.org, Inc. v. Rowe International Corp*. *et al*, *No. 1:15cv-00348 (2015) (W.D. Mich. 2016),* the parties were negotiating a Master Service Agreement, and Lease America's president eventually signed a version of it, indicating next to his signature "(with conditions)." Thereafter, the parties commenced their business dealings. Three years later, disputes arose, and Lease America sued Rowe International. Among other defensive manoeuvres, Rowe moved to have the case transferred to another court based on a forum selection clause in the Master Service Agreement that required all disputes to be litigated in that state. Lease America countered by arguing that Rowe could not invoke the forum selection clause because;- (i) Rowe never executed the Master

Service Agreement and (ii) the "with conditions" language next to Lease America's president's signature rendered the document nothing more than a counter offer (which Rowe never accepted). While the court noted that this was an unusual situation in that the party who had signed the contract was arguing that no binding agreement existed, that really was immaterial. The key was that: "it [was] clear from the record ... that both parties manifested an acceptance to the Master Agreement..." There was no dispute as to what those conditions were and that there was agreement to them. Accordingly, the fact that no one on behalf of Rowe had signed the contract was immaterial; both parties were bound by and could enforce the terms of the Master Service Agreement (see also *Reveille Independent LLC v. Anotech International (UK) Ltd [2015] EWHC 726 (Comm*).

[24] Where the parties do not intend to be immediately bound, and performance is suspended until they execute a formal contract, that may indicated that the parties do not intend to be bound until a formal agreement is executed. In such situations failure to sign the agreement by one of them may render the agreement unenforceable. Once one party has not signed the contract, the presumption is that that party has not accepted the offer. To enforce the agreement, there has to be other evidence to show that such a party agreed to the contract's terms. However, as the above case demonstrates, when parties engage in conduct which indicates an intention to be bound prior to exchange or the formal execution of an agreement, a party not signing the agreement eventually will be of no consequence to the enforceability of the agreement.

[25] All the court needs to ascertain is the presence of a valid offer (and acceptance of that offer); an intention to be bound to the offer; consideration for the agreement; and certainty of terms. The question for the court is whether there was acceptance by conduct and whether that acceptance was effectively communicated to the other party. Except for contracts required by law to be in writing, the existence of a contract and the intentions of the parties to a contract

or alleged contract may be ascertained from their words, conduct and surrounding circumstances. Where by their conduct, objectively viewed, the parties intended to be bound immediately, the fact that the formal document is not executed subsequently will be inconsequential and treated as a mere formality. It is therefore a well-established principle that the signature of the parties to a written contract is not a precondition to the existence of contractual relations, as a contract can be accepted equally well by conduct.

[26] The relevant acts were significant and consistent only with the parties recognising that they were contractually bound. From that evidence it was overwhelmingly clear that the performance by either party envisaged by the agreement had been carried out. The respondent paid the agreed contract price in full and P.W.4 Otto Benjamin handed over physical possession of the land, the subject matter of the agreement, to the respondent. The trial court therefore came to the correct conclusion. Consequently, this ground of appeal fails.

Grounds two and three; courts' finding on adverse possession

[27] By the second and third grounds of appeal, the trial court is criticised for its finding of adverse possession; in favour of the respondent. Possession is the actual physical control over a piece of land. It is constituted by the fact that somebody is in physical control of the land with intention to control it. Possession is a question of fact to be decided on the merits of each particular case. It may be established by evidence of physical residence on the land. It may also be established by a show of some visible or external sign which indicates control over the piece of land in question. Cultivation of a piece of land, erection of a building or fence thereon, demarcation of land with pegs or beacons are all evidence of possession. A person can also be in possession through a third party such as a servant, agent or tenant.

[28] A person asserting title by adverse possession must prove the following six elements; (i) the land was held adverse or hostile to the owner's title; (ii) possession has been actual; (iii) it has been open and notorious (i.e. visible and known); (iv) possession has been exclusive or the use by others has been controlled by the possessor; (v) possession has been continuous for the period of more than twelve years; and (vi) possession has been under claim-of-title or colour-of-title. It was the evidence of both D.W.6 Angom Tokwaro and D.W.7 Alanyo Sabina that since the mid-1960s in the case of the former and 1982 in the case of the latter, each had used the land on which the mast is located, for farming undeterred by the appellants. At the time the court visited the *locus in quo*, that land was still in their possession. They respectively had enjoyed open, continuous, uninterrupted and uncontested possession of the disputed land for over 40 years and 25 years respectively by 2007 when the suit was filed.

[29] In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of “extinctive prescription” reflected in sections 5 and 16 of *The Limitation Act.* Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*). As a rule, limitation not only cuts off the owner’s right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the possessor is vested with title.

Order:

[30] In the final result, the appeal fails. It is accordingly dismissed and the costs of the suit as well as those of the appeal are awarded to the respondent.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

For the respondent : M/s Okello Oryem and Co. Advocates.