THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 14 OF 2015

(ARISING FROM CIVIL SUIT NO. 03 OF 2013, CHIEF MAGISTRATES COURT OF KITGUM)

AYELLA DAVID.....APPELLANT

VERSUS

KALOKWERA GLADYS.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background

The appeal arises from the Judgment and Decree of the Magistrate Grade One, His Worship Rukundo Isaac, given in Civil Suit No. 03 of 2013. The decision was rendered on 15th April, 2015. The Appellant had been sued in the trial Court. The suit by the Respondent (who shall hereinafter, and to avoid confusion be referred to as "the Plaintiff") was over a piece of land situate in Ayul "B" village, Pager Parish, Kitgum Town Council, Kitgum

District. The Plaintiff averred that she was given land measuring 147 feet by 119 feet by a one Nyeko Simon, for settlement. In appreciation of the gift, the Plaintiff paid Mr. Nyeko shs. 300,000 on 7th August, 1999. The Plaintiff left the suit land in 2005 due to insurgency in the area, seeking refuge in Quarters village, Kitgum Town Council. She returned to her land in 2010. Upon returning, she found when the Appellant had forcibly entered on (portion of) the land, and destroyed boundary marks, planted trees, and started making bricks thereon.

In his Defence, the Appellant denied the claim, asserting that, he acquired the suit land in the year 1980 by way of gift from an Auntie, a one Atto Dolica (since deceased). His land at the time measured 62x 40 metres. The size has since, however, reduced to 48 x 40 metres by a public road (Dr. Olara Otunu Road) which was constructed across part of it, and for which Government compensated him. The Appellant argued that the Plaintiff started making baseless claims to the suit land in 2010.

The proceedings

Before the trial court, each party testified and called two additional witnesses. At the close of her case, the Plaintiff requested the trial court to visit the suit land so as to *"oversee the opening of the boundary"*. The locus visit was scheduled for 24th February, 2015. The brief record at the locus show that court visited the suit land on 25th February, 2015, however, what transpired at the locus is not recorded. There is a locus sketch map which is unhelpful as it bears no key indicating the disputed area and its size. There are no features indicated on the sketch map either.

At the start of the proceedings, it appears no scheduling conference was held as the record is silent about it. No issues were framed prior to the hearing. The trial court, however, belatedly framed issues in its judgment, thus curing the procedural omission and irregularity. Parties were unrepresented by counsel. This, however, did not stop the trial court from framing issues at the earliest and holding a mandatory scheduling conference, to sort out the points on which the parties were in agreement and those on which they disagreed, and the possibility of mediation, among others. It was still the duty of court to hold a mandatory scheduling

conference even where the lay litigants were not represented by counsel. The duty in this regard remains at all times, on court, even in cases where parties are represented by counsel. In practice, however, Advocates do file joint scheduling memorandum ahead of the inter-party conferencing. Even then, a trial court must ensure that the mandatory steps in civil trials are observed. The mandatory scheduling conference is rooted in Order 12 rule 1 of the Civil Procedure Rules (CPR) S.I 71-1. The case of ***Tororo Cement Co. Ltd Vs. Fronika International Ltd, Civil Appeal No. 2 of 2001 (SCU)*** is an authority on the duty of the trial court in complying with this procedural requirement.

Regarding the framing of issues, it is also mandatory for trial courts. It is the duty of trial courts to frame issues although in practice parties frame issues in their joint scheduling memorandum and lodge in court, prior to the scheduling conference. A trial court can then adopt the issues as proposed or modify it during the inter-party scheduling conference. Order 15 rule 5 of the CPR provides that, it is the duty of court to frame issues. The superior courts in the land have held that issues should be framed at the commencement of the trial and before evidence is called. See: ***Jovelyn***

Barugahare Vs Attorney General, Civil Appeal No. 28 of 1991. The framing of issues have a significant bearing on the trial and decision of a case. When framed, issues guide parties in their manner of adducing evidence. Therefore, a point in issue requires proof. See: ***Hadija Nakibuka Vs. Attorney General of Uganda, Civil Appeal No.11 of 1993 (SCU).***

The issues framed in the impugned judgment are three, namely; ***whether the plaintiff is the lawful owner of the land in dispute? Whether the defendant trespassed on the land?*** **And** ***what remedies are available to the parties?***

In his Judgment, the learned trial Magistrate found for the Plaintiff, holding that she is the lawful owner of the suit land. Court held that the suit land measures approximately 147 feet by 119 feet, and is situate in Ayul "B" village, Pager Parish, Kitgum Town Council, Kitgum District. As shall be discussed, the trial court misstated the exact size of the land in dispute. Not all the land the Plaintiff alleges to have acquired, was in dispute. In her own testimony, the Plaintiff had stated that the dispute was of a boundary nature and was restricted to an area measuring 28 feet.

As the record shows, the trial court unfortunately failed to verify this claim during the locus in quo visit. Among others, the trial Court ordered for vacant possession of the suit land. It issued a permanent injunction against the Appellant, his servants and agents; and awarded costs of the suit to the Plaintiff.

Grounds of Appeal

Aggrieved and dissatisfied, the Appellant lodged this appeal. He set out two grounds, namely;

1. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence before court and relied on hearsay and contradictory evidence presented by the Respondent (Plaintiff) thereby coming to a wrong conclusion.

2. The trial Magistrate erred in law and fact when he in effect erroneously declared the Respondent (Plaintiff) as the lawful owner of the suit land.

The Appellant prayed that the appeal be allowed; the judgment and Decree of the trial court be set aside; the Appellant be declared the lawful owner of the suit land; and costs of the appeal be awarded to the appellant.

Legal Representation

At the appeal hearing, the Appellant appeared *prose* while the Respondent (Plaintiff) was represented by learned Counsel Mr. Ocorobiya Lloyd and later, Mr. Canwat Ronald, for whom Mr. Watmon Ronald Brian held brief. Parties addressed court in their written submissions. Since their arguments gravitate largely on aspects of evaluation of evidence leading to the impugned holdings and conclusions, I will not reproduce the parties' submissions but may advert thereto, where necessary.

Duty of a first appellate Court

As the first appellate court in this matter, the parties are entitled to obtain from this court, the court's own decision on issues of fact as well as issues of law. In case of conflicting evidence, this Court must make due allowance for the fact that it has neither seen nor heard the witnesses testify before the trial court. Court will, however, weigh conflicting evidence and draw its own inference and conclusions. See: ***Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002, (per* Mulenga, JSC (RIP).**

Resolution of the grounds of Appeal

I will consider the two grounds together as they relate to the alleged failure of the trial Court to properly evaluate the evidence which, it is alleged, were in any case contradictory and constituted hearsay evidence, thus making the affirmative findings and declaration of ownership in favour of the Plaintiff.

The Plaintiff testified as PW1. She was 39 years at the time (26th November, 2014). She stated that the Appellant is a neigbhour. The Appellant trespassed on a portion of the suit land. The Appellant trespassed on approximately 28 feet. It happened during the years 2008 to 2010. PW1 had left the area in 2005 due to insurgency. She took refuge in 'Quarters' within Kitgum Town. The Appellant made blocks in the area. He also planted trees and erected two grass-thatched houses. PW1 also planted trees in the disputed area. The whole land measure 119 feet by 147 feet but only 28 feet was trespassed on. PW1 had purchased the suit land (including the portion not in dispute as part of the whole) from Mr. Nyeko Simon on 7th August, 1999 when it was vacant. She built a permanent house on it. PW1 reported the case to LCI of Ayul "B" Ward who advised the parties to negotiate but the Appellant never turned up for negotiations. The LCI forwarded the matter to LCII who declined to handle for want of jurisdiction.

In cross examination, PW1 stated that there was no body when she was acquiring the land. It is, however, not clear to this court what PW1 meant by the latter statement. It is probable she meant the land was vacant, as there is evidence that there were witnesses to the transaction. A clarity ought to have been sought by the trial court. This court notes that the trial court did not seek clarity as to when PW1 reported the dispute to LCs. PW1 prayed that she be declared the owner of the disputed land, that is, 28 feet.

PW2 (Lamunu Beatrice) who was 54 years at the time, and who had witnessed the transaction between PW1 and Nyeko Simon, testified that she knew the suit land and it is in Ayul "B" village. She stated that she also knew the boundary mark of the suit land. According to PW2 the (whole) land measures 17x21. PW2 did not, however, mention the unit of measurement of the land.

PW3 (Akony Margaret) who was 52 years old, testified that the parties were disputing over a boundary, and the parties are neighbors. According to PW3, the land was measured in feet (referring to the acquisition by the Plaintiff/ Respondent) and it measures 21 (feet) in length and 17 (feet) in width. PW3 said she was present when the land was 'sold' to the Plaintiff. It was measured in feet. This Court notes that, the document the Plaintiff relies on to prove her acquisition (which I shall comment on in detail) does

not feature PW3 as having been a witness to the transaction. Regarding the trespass allegation, PW3 testified that the Appellant trespassed on the Plaintiff's land by planting trees, thereby reducing the size of the land. Court further notes that PW3 did not explicitly state the exact portion of land allegedly trespassed on by the Appellant in terms of size. Was it the 28 feet talked about by PW1?

In his defence, the Appellant testified as DW1. He was 66 years old as at 26th November, 2014 when he testified. He admitted that he and the Plaintiff are neighbors and he owns land in the area (Ayul "B" village, Pager Parish, Kitgum Town Council). He owns land in the area and it measures 62 metres by 40 metres. DW1 claims it is the Plaintiff who trespassed on his land. DW1 admitted that his land size has since reduced to 48 metres by 40 metres after the road construction, for which he was paid shs. 180,400 by Government. Naming his neighbours, DW1 stated that the Plaintiff was a neighbor to the east, PW3 (Akong Margaret) to the West, Atek Dorothy to the North, to the South is a road and across that road is Otti Teddy. However, in 1999, the neighbours were not exactly as stated, and DW1 does not mention the Plaintiff. The Appellant acquired his land from an Auntie- Atto Dolica in 1980 as a gift, and he was using it as a garden before.

DW2 (Rose Achayo) who was 81 years old as at 18th December, 2014, testified that she knew the suit land and knew both parties. The land is situated in Ayul, Lukung Matidi. DW2 stated that the land boundary is marked by mango trees but did not know the year the Appellant planted them. DW2 found when the mango trees already existed. She did not know each party's land size. In cross examination, the witness stated that there is a mango tree at the boundary, but did not know whether the Appellant had trespassed on the Plaintiff's land or not as DW2 found the Appellant already on the land. DW2 mentions neighbours although not quite clearly as it is not recorded that she was mentioning the neighbours to the suit land.

DW3 (Dorotia Atyek) who was 80 years at the time (18th December, 2014), testified that she knew the land boundary. There are five wood (mango trees) that constitute the boundary mark. It is the Appellant who planted the mango trees. According to DW3, the suit land is the Appellant's. DW3 asserted, she was the first to live in the area, followed by the Appellant. The Plaintiff came to the area after four years. DW3 insisted she knew the boundary mark. She, however, conceded in cross examination that, she could not tell the year when the Plaintiff acquired her portion of the land as DW3 was not invited to witness the transaction.

In his Judgment, the learned trial Magistrate referred to the pleadings and the account of witnesses for both sides. However, the court, with respect, in some instances, misstated the accounts of witnesses. For example, the area alleged to have been trespassed on. The trial court erroneously noted that according to PW1, the area trespassed on was *"28 feet from the eastern part (width) and western side (length)"* yet the underlined words are not borne out of the testimony of PW1. The trial court also observed that the Plaintiff (PW1) contended that the Appellant destroyed boundary marks. However, the record does not show that the Plaintiff or her witnesses testified about the alleged destruction of boundary marks by the Appellant. The Plaintiff was silent about it and thus the allegation remained a pleaded matter and was not proved. In my opinion, the trial court ought to have distinguished between pleaded matters and proven facts, in its judgment.

In his analysis, the trial court believed the Plaintiff and disbelieved the Appellant. The court noted that there was overwhelming evidence adduced by the Plaintiff to show that she acquired the land in issue from Mr. Nyeko Simon. The trial court, going by his analysis, had the 119x 147 feet of land in mind. However, the disputed area, according to the Plaintiff, was only 28 feet. The question that remains is whether the 28 feet in dispute, was part and parcel of the land measuring 119x 147 feet. This is critical because the Plaintiff's witnesses did not speak about 119x147 feet as

having been acquired by the Plaintiff but 21x17 feet. This was a major contradiction which the trial court did not consider.

In his analysis, and to support the affirmative findings for the Plaintiff, the learned trial Magistrate referred to a memorandum of understanding-cum agreement, executed between the Plaintiff and Nyeko Simon. The Court reasoned that, PW2 had witnessed the land transaction, and so, when coupled with the testimony of PW3, the Plaintiffs' case was weightier than the Appellant's. The trial Court further opined that, the evidence of the Defence regarding how the Appellant acquired his land, was very weak.

With due respect, the trial court completely ignored the Defence case and failed to evaluate it side by side with the Plaintiff's case, while bearing in mind the fact that the Plaintiff bore the burden of proof in line with section 101 to 103 of the Evidence Act and as supported by case law. In this case, unlike the Plaintiff, the Appellant and her witnesses were clearer about what constituted the common boundary of the suit land, being mango trees planted by the Appellant. The common boundary mark was not rebutted by the Plaintiff as DW2 and DW3 were not destroyed on their evidence in chief through cross examination. Cross examination is the greatest legal engine ever invented for the discovery of the truth. See: ***California Vs. Green, 399 U.S. 149, 158 (1970)***, cited with approval in ***Apea Moses Vs. Uganda, Crim. Appeal No. 0653 of 2015 (COA)***.

The matter at issue being where the common boundary lie, to begin with, common boundary can be proved by, among others, reliance on features that can be attested to by knowledgeable and credible independent witnesses. In the case of ***Okumu & 2 others Vs. Odonga & 2 Others, Civil Appeal No. 0022 of 2016*, Mubiru, J.,** laid down general guidelines for determining a land boundary dispute by courts. He opined that a court will ordinarily be guided by the visible physical limits of the parcel as can be ascertained on the ground by natural boundaries (for example, rivers, valleys, cliffs), monumental lines (boundaries marked by defining marks, natural or artificial), old occupations, long undisputed abuttals (e.g. natural or artificial feature such as a street or a road), statements of length, bearing or direction) (metres, feet, or other measurements in a described direction), or similar features as observed by court and verified by credible witnesses.

I agree with the above legal proposition. In ***Prof. Henry Kerali Vs. Fatuma Bona & 2 Others, HCCS No. 09 of 2011***, court held that 'marked trees or other natural features' could be used as boundary marks. I, therefore, find that DW2 and DW3 were credible and independent witnesses and knowledgeable about the common boundary between the parties when spoke about mango trees as forming the boundary between the two parties.

From his analysis, the trial court agreed with the Appellant that the size of the Appellant's land was reduced by a road construction, for which he was compensated by Government. From its rendition, it appears the trial Court was influenced by the Appellant's disclosure, to hold against him, thus the impression that, having had his land reduced in size, the Appellant could not be seen to 'encroach' on the Plaintiff's land. I was able to infer from the trial court's loud silence on the Appellant's concession. I also think the trial court shifted the burden of proof on the Appellant yet he had not counterclaimed. All along, it was the Plaintiff who wanted the court to believe in her assertions that the Appellant is a trespasser and had exceeded the common boundary between the two. On the evidence adduced, the evidential burden had not shifted to the Appellant because the Plaintiff had not discharged the legal burden on the balance of probability. My opinion is supported by the analysis that follow.

The trial court believed the Appellant's testimony that he acquired land measuring 62 by 40 metres from an auntie, in the year 1980. The Appellant's witnesses spoke about the boundary mark/ features but the trial court did not make any findings at the locus in quo, to suggest that these witnesses had lied in court. The trial court completely failed to follow the Guidelines in Practice Direction No. 1 of 2007 on the conduct of locus in quo proceedings, as set out and followed in a plethora of cases such as ***Bongole Geoffrey & 4 Others Vs Agnes Nakiwala, Civil Appeal No.***

0076 of 2015 (COA); ***Olum Peter Vs. Modikayo Obina, HC Civil Appeal No. 004 of 2020***, to mention but two.

By way of example, since the Appellant's land had reduced in size to 48 by 40 metres after the road construction, if the trial court doubted the Appellant's version about the common boundary, yet the court was unable to find that the road project affected the Appellant's land from the side of the common boundary. The trial Court merely stated that the Defence evidence was so weak, without pinpointing which aspects of the Defence was weak.

Furthermore, in finding for the Plaintiff, the trial court purported to rely on a memorandum of understanding-cum agreement which was not admitted in evidence. The document was not marked as an exhibit. The document was attached to the Plaint and it seems it was on it that the Plaintiff had founded her cause of action within the purview of Order 7 rule 14 (1) of the CPR. Relying on the extraneous document to hold that the Plaintiff own the disputed area, and the Appellant is a trespasser, was a gross error of law. This flaw is not curable even by article 126 (2) (e) of the Constitution, 1995, because it went to the root of the trial. Relying on a document not tendered in evidence or not admitted and marked as exhibit, is not a technicality but goes to the root of a fair trial. I have nevertheless read the extraneous document and I have formed the view

that, had it been properly adduced in evidence, it would still not have been capable of proving the common land boundary. This is because the land trespassed on, according to the Plaintiff, was 28 feet. The Plaintiff did not prove that the 28 feet was part and parcel of the alleged 147 x119 feet embodied in the impugned document. PW2 and PW3 gave testimonies in stark contrast with the Plaintiff, especially regarding the size of the land she acquired. The two witnesses told court that the Plaintiff acquired 17x 21 feet. The material contradiction was never explained away. Going by the testimony of PW2 and PW3, it meant the area allegedly at issue (28 feet) is much bigger that the area the Plaintiff claims was trespassed on by the Appellant. That is not the end of the confusion.

The impugned document which is hand-written and in photocopy, in the local vernacular (Acholi language) indicates the length of the land the Plaintiff acquired to be 21 and the width as being 17, not the 147x 119 feet claimed by the Plaintiff. After the figures 21 and 17, wide spaces appear in the impugned document. This is suspect. It is thus probable that if its original exist, then it was tampered with. To my mind, it appears as if something was erased or whitewashed from a photocopy, and the photocopy was further photocopied. The photocopy appears faint and some characters thereon are not readable. The unit of measurement is also not indicated. The impugned document has two English versions which are materially different in text. Both English translations differ from the

vernacular version. The English version describe the land acquired by the Plaintiff as ***"length 21 (21x7 feet= 147 feet), width 17(17x7 feet= 119 feet)"***. The English translations bear no date of the translation and no name of the translator. Whereas one version bears a stamp of Ayul "B" LCI Village and the date of 07/08/2014, the other version has no stamp and no date. In stark contrast, the vernacular version indicates the stamp of LCI of Lemo Bongolewic Village. The date on the stamp is not readable. Whereas one set of the English translation has more words, the other is shorter. The translators also differ, going by their hand-writing. The translated documents were not admitted in evidence either.

In my judgment, therefore, since the variations in the size of the land the Plaintiff acquired from Mr. Nyeko was not explained by the Plaintiff, she ought to have clarified how she acquired the 28 feet alleged to have been trespassed on. Was it, therefore, part of the 17x 21 feet? I find it illogical that a person who owns less land, as evidence of PW2 and PW3 show, should claim more land. It is interesting that only the Plaintiff testified that she acquired 147 feet x 119 feet of land. PW2 and PW3 spoke of less land.

In the circumstances, given that neither party was claiming the whole land owned by the other but the dispute was limited to where the boundary lie, the trial court erred in declaring the Appellant a trespasser on the suit land. By so doing, it appears court gave the Plaintiff more land yet as

attested by the Defence, which was not controverted, the mango trees formed the common boundary. Therefore, whereas there is no clear case that the Plaintiff's witnesses gave hearsay evidence, that is, testimony not of one's own knowledge but that which is dependent on what others have said (and yet are not court witnesses), I find that the witnesses of the Plaintiff contradicted the Plaintiff in material respects. This court cannot ignore the material contradictions. I thus find the Plaintiff's story unbelievable, unlike the Appellant's. To that extent, ground one succeeds.

Regarding ground two, given my findings on ground one, I hold that there was no credible evidence to prove the claim of trespass against the Appellant. Since the Plaintiff had failed to show where the common boundary was, and having failed to rebut the common boundary as stated by DW2 and DW3, I hold that the trial court erred in law in holding that the Appellant was a trespasser on the Plaintiff's land. Accordingly, ground two succeeds.

For the foregoing reasons, the appeal wholly succeeds. However, before I take leave of this matter, I wish to comment on how the trial court ought to have dealt with document the Plaintiff wanted to rely on but which he somehow did not, and as a lay person, quite oblivious of how to adduce the document in evidence. If the trial court had formed the view that the impugned document was material in the resolution of the dispute before

it, having been attached to the plaint, court ought to have guided the parties on in its admission, without necessarily descending into the arena of litigation. I think the wise counsel by Lord Denning, MR (RIP), given in **Jones Vs. National Coal Board [1957] 2 QB 553**, should have come in handy. The Law Lord opined:

"In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a Judge is not a mere umpire to answer the question 'how's that'. His object above all, is to find out the truth, and to do justice according to law....A judge is not only entitled but is, indeed, bound to intervene at any stage of a witness' evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying." (Emphasis is added).

The above statement should apply to matters as adverted to herein. The impugned document could still have been properly admitted without compromising the rights of the opposite party, if at all it was relevant in resolving the matter. See: **Mulindwa George William Vs. Kisubika**

Joseph, Civil Appeal No. 12 of 2014 (SCU); Oryema Mark Vs. Ojok Robert, Civil Appeal No. 13 of 2018 (High Court).

In conclusion, since the Plaintiff failed to prove that she owns the disputed strip of land measuring 28 feet and that the Appellant trespassed on it, the decision of the trial court cannot be allowed to stand. The Appeal having succeeded, I make the following orders;

1. The Judgment, decree and orders of the Learned Magistrate Grade One, dated 15th April, 2015, are set aside.

2. Civil Suit No.03 of 2013 filed by the Plaintiff/ Respondent in the trial Court against the Appellant stands dismissed.

3. It is hereby declared that the mango trees planted by the Appellant is the boundary mark separating the land of the Plaintiff from the Appellant's land.

4. Since the parties are neighbors and ought to reconcile, each party shall bear its own costs in the Magistrate court, and in the High Court.

Delivered, dated and signed in Court this 30th January, 2024.

30/01/2024

George Okello
JUDGE HIGH COURT

Judgment read in Court.

Attendance

Mr. Ocorobia Lloyd, holding brief for Ms. Proscovia Akello, Counsel for Kalokwera (Respondent).

Daughter of Appellant in Court – Ayugi Sylivia.

Appellant in court – self represents.

Mr. Ochan Stephen, Court Clerk.

30/01/2024

George Okello

JUDGE HIGH COURT