

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0009 OF 2014
(Arising from Yumbe Chief Magistrates Court Civil Suit No. 0001 of 2013)

KALA KARIM VIGA **APPELLANT**

VERSUS

YASSIN AGOBILO **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellant for trespass on a part of his land measuring approximately three acres situated in East Yumbe at Arobwa village, Aringa ward, within Yumbe Town Council. The respondent sought orders of eviction, a permanent injunction, an award of general damages for trespass and the costs of the suit. In his defence, the appellant denied the accusation and prayed that the suit should be dismissed.

During the trial, the respondent's case was that he was born in 1957 on the land in dispute. Sometime in the past, the appellant's mother had approached the respondent's father, Silliman Govule, requesting for a piece of land on which to grow groundnuts. The appellant's mother's request was granted and she began cultivating the piece that was given to her. The boundary was marked to the south by Chaugo Trees. During the year 2005, the appellant exceeded the boundaries of the land that was given to his mother and started encroaching on part of the neighbouring land which belongs to the respondent, and alienating off part of it to another person named as Amin Pale. The appellant proceeded to construct a semi-permanent house and to plant trees on the area he encroached upon. This dispute was apparently subjected to several attempts at resolution. In 2006 the L.C.I up to L.C.III attempted to adjudicate and decided the dispute ex-parte in favour of the respondent. In 2007, the elders had found the appellant in the wrong and

advised him to vacate the area beyond the Chaugo Tree, and restrict himself to the area her mother was given.

He called three witnesses to prove that case. P.W.2, the then L.C.III Chairperson of Yumbe Town Council, who also happens to be a neighbor to the respondent testified that the land in dispute belongs to the respondent and that the appellant had encroached onto a portion of it lying beyond the Chaugo tree. P.W.3 testified that his father Silliman Govule had given the appellant's mother, Khadija, about a quarter of an acre on which to grow groundnuts. When Khadija became too weak to cultivate the land, the appellant began utilizing it but had exceeded the boundary of the land given to his mother and encroached on land belonging to the respondent. P.W.4 a paternal uncle to the appellant, testified that it was the father of this witness, Asuman Odriga who in 1939 had given the land in dispute to the respondent's father Silliman Govule. Asuman Odriga and Silliman Govule were brothers. In 1951, Silliman Govule married Khadija, the appellant's mother and gave her a part of that land on which to grow groundnuts. The appellant had exceeded the boundary of the land given to his mother marked by the Odugo-dugo tree on the upper side and Chaugo tree on the lower side, and encroached on land belonging to the respondent. The respondent then closed his case on 23rd May 2013.

The appellant's case was that he was born on that piece of land, grew up from there and in 1958 came to know that it belonged to his father. He eventually inherited the land in dispute from his deceased father, the late Mohammed Viga, who died in June 1986. He contended that if there was any trespass, then it was committed by his mother, Khadija, who should have been sued instead. In 2006 the L.Cs demarcated the disputed land by laying a boundary whereby the appellant was restricted to the lower side and the respondent to the upper part. He proceeded to construct four buildings on his portion comprising three temporary structures and one permanent one. He was directed by the elders to give part of it to a one Amin Pale and the boundary of that portion is marked by the Chaugo tree. He denied any encroachment beyond that tree.

He called three witnesses to prove that case. D.W.2 a brother to the appellant testified that the appellant's grandfather had occupied the land in dispute from around 1944 or 1946. It is a one Abas who had advised the appellant to go beyond the Chaugo tree. The land in dispute had been

used by the appellant's mother to-date. D.W.3 testified that the land in dispute belongs to the appellant and it is the appellant who had given a part to Arajabu Abale (deceased), the father to this witness. D.W.4. testified that his father had acquired land from the appellant's father which reverted to the appellant upon the death of this witness' father. Disputes over the land started in 2001 and in all instances were decided in favour of the appellant. The boundary is marked by two Chaugo trees, one in the centre and the other on the lower side. The other boundary mark he mentioned was a Lat tree under anthills. The appellant closed his case on 19th June 2013.

Then on 19th February 2014 the court convened at the *locus in quo*. Both parties attended the proceedings but only the respondents' witnesses were in attendance. The respondent, P.W.2 and P.W.3 pointed out the Chaugo tree and proceeded to demonstrate to court the boundary marks they had referred to during their testimony in court. The appellant disputed their version but did not present his. The court then fixed 28th February as the date of judgment. On that day, after reviewing the evidence, the court found that the claim was not barred by limitation and that at the *locus* the respondent and his witnesses were more persuasive regarding the extent of the encroachment. He found the evidence presented by the appellant to have been contradictory. The court found that by going beyond the land given to his mother, the appellant had committed trespass on the respondent's land. For those reasons court delivered judgment in favour of the respondent.

That decision is challenged on the following grounds contained in the appellant's memorandum of appeal, namely;

1. The learned trial magistrate failed to judicially evaluate the evidence on record and acted with biases in favour of the respondent when he ordered (sic) that the suit land belongs to the respondent.
2. The learned trial magistrate erred in law and procedure when he failed to judiciously conduct proceedings at the *locus in quo* by only considering evidence of the respondent thus causing a miscarriage of justice.
3. The trial magistrate erred in law and fact when he held that the respondent's suit was not barred by (sic) limitation Act.

Submitting in support of the appeal, counsel for the appellant Mr. Nasur Buga abandoned the third ground. In respect of the first ground, he argued that the trial magistrate did not subject all the evidence on record to an exhaustive scrutiny. The evidence before the trial magistrate showed that the appellant had lived on the land since 1958. The trial magistrate at the *locus* found that the appellant was using the land together with his mother for cultivation but all this evidence was ignored by the trial magistrate. The trial magistrate gave the testimony of the respondent too much weight compared to that of the appellant. He used the evidence of the respondent as the truth to discredit that of the appellant. Counsel cited *Bogere Moses and another v Uganda, S.C. Cr Appeal No. 1 of 1997* regarding the proper procedure for evaluation of evidence as a whole by a court of law. Counsel argued further that the respondent did not explain how he acquired interest in the land neither was he able to describe its size or boundaries yet the appellant had explained how he acquired the land. He cited *Kasifa Namusisi and others v Francis M.K. Ntabaazi, S.C. Civil Appeal No. 4 of 2005*; and *Kahwa Stephen and another v Kalema Hannington H.C. Civil Appeal No. 07 of 2011* regarding the duties of a first appellate court.

In respect of the second ground, counsel for the appellant argued that although the trial magistrate visited the *locus in quo* in the presence of both parties, only the respondent's witnesses attended the proceedings. The court did not fix a date for the visit and therefore the respondent was unable to summon his witnesses. He argued that this occasioned a miscarriage of justice. The finding that the respondent's witnesses described the land better than the appellant's was therefore not supported by the evidence on record. He cited *Ahmed Dauda Zziwa and another v Dr. Kafumbe Anthony Luyirika, H.C. Civil Appeal No. 033 of 2012*; and *Yeseri Waibi v Edisa Byandala [1982] HCB 28*, regarding the proper procedure for conducting proceedings at a *locus in quo*. He argued that had the trial magistrate conducted proceedings at the *locus* appropriately, he would have come to a different conclusion. He prayed that the appeal be allowed with costs to the appellant.

In reply to those submissions, counsel for the respondent, Mr. Richard Bundu supported the judgment and findings of the court below. He argued that the respondent and his witnesses were able to give specific estimates on the land given to the appellant's mother and that which the

appellant encroached on as compared to the appellant who could not provide such an estimate. The respondent and his witnesses further were able to describe the boundaries that separated the respondent's mother's land from that of the respondent compared to the appellant and his witnesses who were unable to. He therefore argued that the trial magistrate had evaluated the evidence properly and had come to the correct conclusion.

In respect of the second ground, counsel submitted that the proceedings at the *locus in quo* were conducted in accordance with *Practice Direction No. 1 of 2007*. The parties were notified of the date for the visit and both turned up. Failure of the appellant to cause the attendance of his own witnesses cannot be blamed on anyone but himself. The proceedings were conducted in a proper manner and the trial magistrate was justified to rely on the observations he made to come to the decision that he did. He cited *Kahwa Stephen and another v Kalema Hannington H.C. Civil Appeal No. 07 of 2011* in support of his submissions. He finally argued that the appeal was incompetent in so far as it was filed outside time. The judgment was delivered on 28th February 2014 yet the appeal was filed on 2nd April 2014 in contravention of s 79 of *The Civil Procedure Act* which requires appeals to be filed within thirty days from the date of the judgment. Since there was no evidence to suggest that the appellant had obtained any extension or enlargement of time, the appeal should be dismissed. He cited *Board of Governors and the Headmaster Gulu S.S. v Phinson E. Odong, H.C. Civil Appeal No. 02 of 1990*. He prayed that the appeal be dismissed with costs.

The nature of the duty of a first appellate court was appropriately stated in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he 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 the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and in a case of conflicting evidence, remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate 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.

The issues as they emerged during the trial and in this appeal are not so much about the root of title of each of the parties but rather the extent, in terms of a common boundary, of their respective pieces of land, i.e. the boundary between their respective pieces of land. On the one hand, the appellant claimed partly on basis of long occupancy through and with his mother Khadija and through inheritance following the death of his father Mohammed Viga, in June 1986. On the other hand, the respondent claimed through inheritance from his late father Silliman Govule, to whom the appellant's mother's occupancy is attributed in respect of land which was given to her to grow groundnuts, which the appellant had allegedly exceeded. Resolution of the dispute therefore lay on the court's evaluation of evidence fixing the boundary of the adjacent pieces of land, in which case evidence relating to the root of title of each of the parties would provide context within which the boundary was fixed rather than as a pivotal consideration in the determination of rights over the disputed part of the land.

The first ground of appeal turns on the preponderance of evidence that was adduced before the trial court. The appellant contends that the trial Court erred in giving inure weight to the respondent's evidence without any legal justification, whereas the respondent maintains in his reply that the decision is sound in law based on the preponderance of evidence. It is trite law that proof in civil matters which is sufficient to justify a finding of fact is on the balance of probabilities. The meaning of this standard was explained by Lord Birkenhead L.C. in *Lancaster v Blackwell Colliery Co. Ltd 1918 WC Rep 345*, thus:

If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case because it is plain that the onus in these

matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the Arbitrator is justified in drawing an inference in his favour.

This standard is satisfied if, and only if, the Court upon considering the evidence adduced by the party on whom the burden lies, alongside all the other evidence before it, believes that the existence of the fact sought to be proved is so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does exist. Where a reasonable man might hold that the more probable conclusion is that, for which the plaintiff contends, then the court is justified in making a finding in the plaintiff's favour. The question which was before the trial court therefore was whether the respondent adduced before it evidence which showed a greater probability capable of satisfying a reasonable man that the appellant had encroached on land which belonged to the respondent.

A ground of appeal that queries the manner in which a trial court went about the evaluation of evidence must do more than merely ask for a reassessment of the evidence, which the ground as framed by the appellant appears to do. The appellant in this ground of appeal should have shown wherein specifically the evaluation by the trial court went wrong. Nevertheless, despite that shortcoming, this court will re-evaluate the evidence relating to this ground under its general duty as a first appellate court.

The evidence of P.W.4 tracing the history of ownership of the disputed land to a common ancestor, Asuman Odriga who in 1939 devolved it to the respondent's father Silliman Govule, who later gave part of it to Khadija, the appellant's mother, was not seriously challenged by the appellant. This witness was related by blood to both the appellant and the respondent. This evidence was consistent with that of the respondent, that of P.W.2 and PW.3. In comparison, the defence witnesses DW2 and DW3 did not identify the appellant's grandfather by name, to whom they traced the appellant's origin of title, and did not explain the circumstances in which the appellant's mother came to obtain the land. On the preponderance of the evidence before the court, the evidence adduced by the respondent showed a greater probability capable of satisfying

a reasonable man that the appellant's mother had obtained land from the respondent's father Silliman Govule, to grow groundnuts as contended by the respondent.

Once that fact was established, the next question was the determination of the boundary of the land given to her for that purpose. The evidence adduced by the respondent made reference to a series of boundary marks such as that of P.W.2, who mentioned the Chaugo tree and P.W.4 who mentioned the Odugo-dugo tree on the upper side and Chaugo tree on the lower side. Regarding the same issue, D.W.2 as well made reference to the Chaugo tree and so did D.W.4. who said the boundary is marked by two Chaugo trees, one in the centre and the other on the lower side, and the other boundary mark he mentioned was a Lat tree under anthills. From the totality of this, the evidence adduced showed a greater probability capable of satisfying a reasonable man that the boundary of the land given to the appellant's mother by the respondent's father Silliman Govule, to grow groundnuts, was marked by Chaugo trees, an Odugo-dugo tree and a Lat tree.

What remained to be done by the trial court and is now the subject of ground two of the memorandum of appeal, was for the witnesses to identify to court at the *locus in quo*, the various trees they mentioned in their testimony as marking the boundary of this land. The original record of the trial court indicates that a "notice of site visit" dated 17th February 2014 was issued by court appointing 19th February 2016 as the date for court to visit the disputed land. It reads as follows;

NOTICE OF SITE VISIT

Take notice that the court will visit the disputed land on the 19th /02/2014; the LCI of the area is notified. The police are requested to provide security to the visiting team.

.....
MAGISTRATE GRADE ONE

- cc. DPC Yumbe
- cc. O/c Police Yumbe.
- cc. L.C.I of Yumbe
- cc. Office copy

The notice did not specify the location of the land to be visited nor the time for the visit. There is no indication on record when, where and how it was served. Ordinarily, courts allow at least

seven days between the date of service and the day appointed for the court proceedings to allow the parties sufficient time to prepare for court. Although that practice was not followed in this case, the record of proceedings indicates that both parties attended the *locus in quo* visit by court on the appointed day. The record of proceeding at *locus* is at pages 23 – 24 of the record of appeal. Two of the respondent's witnesses, P.W.2 and P.W.3 were present but none of the appellant's witnesses attended the proceedings. The appellant did not complain about the short notice nor object to the court having to proceed in the absence of his witnesses. He did not indicate whether or not he desired any of his witnesses to attend those proceedings. He is on record only as having disagreed with what the respondent's witnesses were demonstrating to court as the boundary between his mother's land and that of the respondent.

Order 16 rule 1 of *The Civil procedure Rules* casts the burden on the parties to obtain, on application to the court, summonses to persons whose attendance is required either to give evidence or to produce documents. The duty of determining which witness will be required to attend the proceedings is that of the parties and not the court. Upon receiving notification of the date for visiting the *locus in quo*, it was incumbent upon the appellant to cause the attendance of such witnesses who had testified on his behalf as he deemed necessary to enable the trial magistrate understand those aspects of their evidence which would otherwise have been difficult for him to follow or understand in the testimony they gave before him, without himself seeing the features of the land mentioned by the witnesses in their testimony in court. Attendance of *locus in quo* proceedings is not mandatory for every witness who testified during the trial. Knowing well the purpose of the *locus in quo* visit, it is the parties to determine which of their witnesses will be useful to their respective cases during such a visit.

The power of inspection of the *locus in quo* is for the purpose of court understanding the evidence and it must be strictly confined to that and not for adducing fresh evidence. It is not meant for the introduction into the case of matters personally observed by the Magistrate, on inspection or inquiry, in order to test the accuracy of the parties' evidence. It would be obviously unfair for the Magistrate to act on his personal observations without noting them on the record. If a trial magistrate engaged in such conduct, he or she would run the risk of descending into the arena and turning himself into a witness. Counsel for the appellant argued that indeed this is

what happened in the instant case, hence the accusation of bias leveled against the trial magistrate contained in the first ground.

I have perused the record of proceedings and the comments made by the trial magistrate in his judgment concerning the observations he made at the *locus in quo*. I am satisfied that this was a case where the Magistrate had to inspect the *locus in quo* because it would otherwise have been difficult for him to follow or understand the evidence before him regarding the boundary between the appellant's and the respondent's land, without himself seeing the features of the land mentioned by the witnesses in their testimony in court. I have not found anything in the manner in which he conducted the proceedings at the *locus in quo* that violated *Practice Direction No. 1 of 2007* nor the procedure recommended by cases such as *Yeseri Waibi v Edisa Byandala [1982] HCB 28* relating to the conduct of proceedings at a *locus in quo*. In his judgment following that visit, the trial magistrate observed as follows;

At locus, P.W.1 and P.W.2 were able to describe the suit land better than the defendant. They demonstrated their consistency in evidence and how each party came onto the suit land. This shows that the plaintiff owns the land the defendant encroached (sic).

I am unable to agree with the submissions of counsel for the appellant that the trial magistrate acted with bias in the conduct of those proceedings or in analyzing the evidence seen at the *locus in quo*. That inference would have been inevitable if the trial Magistrate had discarded the evidence on the record as unreliable and decided the case entirely upon what he saw, heard and inferred at the *locus in quo*. It appears to me instead that the learned trial magistrate used the visit to the *locus in quo* for the purpose of making himself familiar with the local facts in order that he might understand the evidence adduced by both sides at the trial better, and for no other purpose. For the foregoing reasons, the two grounds of appeal therefore do not succeed.

Lastly the judgment was delivered on 28th February 2014, yet the appeal was filed on 2nd April 2014. Section 79 of *The Civil Procedure Act* requires appeals to be filed within thirty days from the date of the judgment. I have not found any proof that the appellant obtained an extension or enlargement of time. The appeal is incompetent on that account as well.

In the final result, upon perusal of the record and re-evaluation of the evidence, I do not see any obvious error tainting the Judgment of the trial court or affecting its validity. The Judgment was reached on the preponderance of evidence and the law was rightly applied. An appellate Court will not interfere in matters of preponderance unless the holding was flagrantly against the evidence adduced as to amount to an error of law.

Hence, I see no Justification for this Court to reverse the decision on that account, for which reason the appeal stands dismissed as being devoid of any merit. The costs of the appeal and those of the trial are awarded to the respondent. I so order.

Dated at Arua this 6th day of October 2016.

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Stephen Mubiru
Judge