

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0001 OF 2013

(Arising from Paidha Magistrate Grade one Court Civil Suit No. 0013 of 2012)

1. BISENSIO RUBANGA	}	
2. KUBA	}	
3. THOI-RWOTH	}	
4. AGWOKO	}	
5. BINEN	}	
6. ONENCAN HILLARY	} APPELLANTS
7. AJWOBA	}	
8. OTIM DONALD	}	
9. NEREO RUBANGA	}	
10. OKUR-BOTH	}	
11. UKEM	}	
12. ALEX OCWO WUN	}	

VERSUS

TWOMWA STERIORESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellants for trespass to land situated at Nyawir village, Anyola Parish, Atyak Sub-county in zombo District. The respondent sought orders of eviction, a permanent injunction, an award of general damages for trespass and the costs of the suit. In their joint written statement of defence, the appellants denied being trespasser on the land and claimed it belonged to their late grandfather, Amini.

During the trial, the respondent's case was that he inherited the land during the year 2009 from his deceased father who was also the clan chief, Sterio Thomwa alias Kwonga who in turn had inherited it during the year 1940 from a one Alik. During 1989, the first appellant requested the respondent to settle on the land temporarily and the respondent allowed him to. He entered onto

the land and started cultivating the area that he had been allowed to occupy. During the year 2010, the first appellant alienated part of the land to the rest of the appellants whereupon the respondent complained to the elders on the village who resolved the dispute in his favour.

He called three witnesses to support that case. P.W.2, a retired catechist of a local church and nephew of the respondent, corroborated the respondent's line of inheritance of the land in dispute and the fact that the respondent had cultivated the land for over 26 years. He testified that he too had been given a part of the disputed land by the respondent's father and has been living on it for over thirty years. He testified further that the defendants migrated with their respective families from Pulum and trespassed on the disputed land when they started planting a variety of food crops thereon during 2010, without the consent of the respondent, following the death of the respondent's father. The first appellant though had occupied part of the disputed land since the 1980s, which had been given to him by the respondent's late father *inter vivos*. He gave a description of the boundaries of the disputed land. In his view, the dispute sprung from the first appellant's alienation of part of the land to the rest of the appellants without the consent of the respondent. P.W.3, one of the respondent's neighbours, too corroborated the respondent's line of inheritance of the land in dispute. He saw the appellants cultivating the land yet the only person whom he knew to be lawfully living on the land was the first appellant, whom the respondent's late father had given a part thereof during his lifetime. P.W.4, a cousin to the respondent, testified that he had lived with the respondent's father from 1952. He said the respondent had been given the land in dispute by his late father before he died and he was present when this happened. He testified further that the first appellant had been given part of the land by the respondent's late father during his lifetime and he had been living on the land. He had never seen any of the rest of the appellants on the land.

The first appellant's case was that the land in dispute belongs to him since he inherited it from his late father Amini son of Abile, and started using it in 1986 by cultivating a variety of crops, but does not have a house on it. His late father had acquired the land from by a traditional chief called Amula. The first appellant later during 2008 – 2009 apportioned part of it to the rest of the appellants who thereupon started growing crops on the land. The eighth and ninth appellants are his sons and the rest of the appellants his brothers. At the trial, the sixth appellant testified as

D.W.2 and he stated that he acquired the land he occupies with his family, from the first appellant in the year 2008, having migrated from Jangokoro. The eighth appellant testified as D.W.3 and stated that the land in dispute belonged to their late grandfather Amini. D.W.4., a retired teacher and Clan Chief of Patera formerly called Nyawir, testified that the land in dispute belonged to him and the father of the first appellant, called Ocowun son of Amini. When he died, the land was inherited by his grandchildren who do not include the respondent who has no blood relations with the appellants. The appellant's father had remained on the land despite the fact that the rest of the residents had abandoned the land in 1949 when the area was attacked by a strange disease. When he died in 1954, the first and sixth appellants returned to settle on the land. The respondent had never used the land in dispute but resides on another which belonged to his own grandfather, where he grows crops and grazes his cattle. The appellants settled on the disputed land in 2008 and he too joined them during that year. The rest of the appellants did not testify during the trial and the appellants closed their case.

On 17th November 2012 the court convened at the *locus in quo*. All parties attended the proceedings. The respondent showed the trial magistrate the land he occupied and the disputed one, including the boundaries thereto. He also pointed out the area occupied by the first appellant and stated that was not part of the land in dispute since it had been given to the first appellant by the respondent's father.

The first, sixth and eighth appellants then showed the trial magistrate the land each of them respectively occupied. The first appellant pointed it out as the land he had inherited from his late father and in turn distributed to the rest of the appellants. The trial magistrate observed that the first appellant's residence was across the road on land that was not disputed. He also saw a few crops belonging to the appellants, on the disputed land.

In his judgment, the trial magistrate relied on the observations he made at the *locus in quo* alongside the testimony of the respondent and his witnesses and found the appellant's version unbelievable. He found that the appellants only grew crops on the disputed land and did not have dwellings on it. He decided that the first appellants owns only the undisputed part across the road where his house is and that his activities and those of the rest of the appellants on the disputed

land constituted acts of trespass on land belonging to the respondent. He decided in favour of the respondent, ordered the appellants to hand over vacant possession of the disputed land within thirty days, issued a permanent injunction against them restraining them from further acts of trespass and awarded costs to the respondent.

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

1. The learned trial magistrate erred in law and fact when he held that the suit land belongs to the plaintiff / respondent.
2. The trial magistrate erred in law when he held that all the defendants are trespassers on the land.
3. The learned trial magistrate erred in law and fact when he failed to judicially conduct proceedings at the locus in quo, hence arriving at a wrong decision / conclusion, which has occasioned the defendants/ appellants a miscarriage of justice.
4. The learned trial magistrate erred in law and fact when he failed to judicially / properly evaluate the evidence on record, which led him to make erroneous decisions and orders to the prejudice of the appellants.

Submitting in support of the appeal, counsel for the appellant Mr. Madira Jimmy addressed grounds 1, 2, and 4 together and argued that the trial magistrate had disregarded evidence by the first appellant to the effect that he had inherited the land from his late father and had been using it since 1986. He also failed to take into account the rest of the appellant's witnesses' evidence to similar effect. He instead relied on the observations he made at the locus in quo to the prejudice of the appellants. The respondent's pleadings did not disclose a cause of action against the rest of the appellants apart from the first appellant. The respondent could not have been using the land for 26 years when he inherited it in 2009. He argued further that the suit was barred by limitation and should have been dismissed. Lastly, that the first appellant was a bonafide occupant on the land having been in occupation for 23 years. He cited *Uganda Revenue Authority v Uganda Consolidated Properties Limited, C.A. Civil Appeal No. 31 of 2000*, *Eridadi Otabong Waimo v Attorney General S.C. Civil Appeal No 6 of 1990 [1992] V KALR 1* and *Francis Nansio Michael v Nuwa Walakira [1993] VI KALR 14* in support of his submission on the mandatory nature of

limitation periods for civil action. He also cited *Venansio Babweyaka and others v Kampala District Land Board and another, H.C. Civil Suit No. 511 of 2001* and *National Provincial Bank Ltd. v Ainsworth [1965] 2 All E.R, 472*, in support of his submissions on bona fide occupancy.

Regarding the third ground, counsel for the appellants argued that the trial magistrate used the proceedings at the locus in quo to fill up gaps in the respondent's case. He never toured the disputed land, he never drew a sketch plan and did not call upon the witnesses who had testified in court to relay their testimony. He relied on *Waibi v Byandala [1982] HCB 29*, quoting *Desouza v Uganda [1967] E.A. 784*, and *Fernades v Noronha [1969] EA 506*, for the point that visiting the locus enables the trial court to check on the evidence given and should not to be used to fill in gaps. He prayed the court to follow the decision in *Opar Edward v Esau Thomas, H.C. Civil Appeal No. 025 of 2007* where the High Court directed a trial magistrate to visit the locus in quo and make observations. In conclusion he prayed that the appeal should be allowed, the decision of the court below set aside.

In reply to those submissions, counsel for the respondent, Mr. Komakech Dennis Atine, supported the judgment and findings of the court below. In respect of grounds 1, 2 and 4 he argued that the respondent and his witnesses produced overwhelming evidence that the land in dispute belongs to the respondent. On the other hand, the evidence adduced by the appellants had many unexplained inconsistencies and could not be believed. He added that the alienation of the respondent's land by the first appellant having started in 2008, the respondent's suit was not barred by limitation. He cited *Hannington Njuki v George William Musisi [1999] KALR 783* in support of his submission that trespass to land is committed upon entry of land belonging to another. The appellants trespassed on the respondent's land when they started growing crops on it without his consent. Citing *Venansio Babweyaka and others v Kampala District Land Board and another, H.C. Civil Suit No. 511 of 2001*, he argued further that the concept of bonafide occupancy relates to registered land and is inapplicable to the land in dispute which is unregistered. That in any case it would not apply to the first appellant who had occupied the land in 1989, a period of only six years before the promulgation of the Constitution in 1995. In respect of the third ground, he argued that the proceedings at the locus were properly conducted and the evidence there from properly evaluated. He prayed for dismissal of the appeal.

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.

Grounds 1, 2 and 4 of the appeal relate to the weight the trial court attached to the evidence adduced by the parties during the trial. The appellant faults the trial Court in the manner in which it evaluated the evidence and argues that it did not give due weight to the appellants' evidence while at the same time ignoring weaknesses in the respondent's case. The respondent on the other hand argues that the court came to the right conclusion after proper evaluation of the evidence before it.

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.

I have subjected the entire evidence of the on record to a fresh scrutiny and observed that the respondent's evidence and that of the witnesses who testified in support thereof was to the effect that the respondent inherited the land during the year 2009 from his deceased father who was also the clan chief, Sterio Thomwa alias Kwonga who in turn had inherited it during the year 1940 from a one Alik. During 1989, the first appellant requested the respondent to settle on the land temporarily and the respondent allowed him to. He entered onto the land and started cultivating the area that he had been allowed to occupy. During the year 2010, the first appellant alienated part of the land to the rest of the appellants who started growing crops on it, whereupon the respondent complained to the elders on the village who resolved the dispute in his favour. PW.2. testified as a neighbor who had lived on the land for over thirty years and gave a description of the boundaries of the disputed land. Evidence of the appellants' acts of trespass was corroborated by P.W.3 and P.W.4. However, P.W.4, who claimed to have lived with the respondent's father from 1952, came up with an entirely inconsistent explanation of the respondent's ownership of the land in dispute. He said the respondent had been given the land in dispute by his late father before he died and he was present when this happened. I have decided to reject this evidence because of its inconsistency with the respondent's case and considering that it is not corroborated by any other evidence. However, the fact that P.W.2, said the respondent had cultivated the land for over 26 years is not an inconsistency since this witness did not say the respondent began cultivation after the death of his father.

On the other hand, all other appellants traced their ownership of the land in dispute to the first appellant. The first appellant's case was that the land in dispute belongs to him since he inherited it from his late father Amini son of Abile, and started using it in 1986 by cultivating a variety of crops, but does not have a house on it. His late father had acquired the land from a traditional chief called Amula. The testimony of D.W.4 was to the effect that when the first appellant's father died in 1954, the first and sixth appellants returned to settle on the land. The rest of the

appellants settled on the disputed land in 2008 and he too joined them during that year. There are as number of unexplained aspects of the appellant's case. During cross-examination by the 6th Appellant at page 23 line 22 of the record of appeal, the appellants advanced the theory that the disputed land was abandoned land. This was repeated by D.W.4 under cross-examination at page 42 lines 10-11 of the record of appeal. The other theory presented by D.W.4 was that the land belonged to the appellants' grandfather and upon his death the appellants, as grandchildren, inherited it (see p 40 lines 19 – 20 of the record of appeal). It was not clear therefore whether their claim was on the basis of the abandonment of the 1940s or through inheritance. Furthermore, at page 38 lines 3-4 of the record of appeal, the sixth appellant who testified as D.W.2 stated that the first appellant and his family lives on the disputed land where he has a grass-thatched hut yet when the court visited the *locus in quo* it discovered that the first appellant did not live on the land and had no house on it but rather lived across the road (see page 44 lines 13 – 16 of the record of appeal). At page 36 lines 18-19 of the record of appeal, the first appellant stated that all the appellants had houses on the disputed land yet when the court visited the *locus in quo* it discovered this testimony to have been untrue (see page 44 line 17 of the record of appeal).

The trial court was faced with two versions tracing the history of ownership of the disputed land. It had to determine whether there were equal degrees of probability in the two versions so that the choice between them was a mere matter of conjecture, in which case the respondent would have failed to prove his case. Upon evaluation of the evidence though and upon comparing and balancing probabilities as to their respective value, the court came to the conclusion that the respondent had presented more credible evidence. Proof on the balance of probabilities is satisfied if upon considering the evidence adduced by plaintiff, alongside all the other evidence before it, the court believes that the existence of the facts 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 they 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 was whether the respondent adduced before it evidence which showed a greater probability capable of satisfying a reasonable man that the appellants had encroached on land which belonged to the respondent. I have subjected the evidence to a fresh scrutiny and found, for additional reasons to those given by the court below, that a reasonable man might hold that the more probable conclusion is that for which the respondent contended, and therefore the trial court was justified in deciding in his favour.

This is because the respondent's version was hardly shaken in cross-examination by the appellants. The conduct of the first appellant in alienating parts of the land only after the death of the respondent's father could not have been a mere coincidence. The first and sixth appellants, parties to the proceedings, proved to be unreliable when they lied about the existence of huts on the disputed land as compared P.W.2 a mere witness in the proceedings. The respondent acknowledged the part which rightly belonged to the first appellant and indeed the court found his house on that part when it visited the locus in quo. The first appellant could not remember the year in which he allegedly inherited the land (see page 36 lines 7 – 8 of the record of appeal). I therefore find that the respondent proved his case on the balance of probabilities. The trial court did not err in the way it analyzed the evidence and the conclusion to which it arrived. Grounds 1, 2 and 4 of the appeal have therefore failed.

Ground 3 of the appeal faults the trial court in the manner it went about its conduct of proceedings at the locus in quo. 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 (see *Waibi v Byandala* [1982] HCB 29; *Desouza v Uganda* [1967] E.A. 784, and *Fernades v Noronha* [1969] EA 506). Counsel for the appellant argued that the court failed to follow the standard procedures.

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 without himself seeing the features of the land mentioned by the witnesses in their testimony in court, such as gardens, dwellings and graves. The trial magistrate was criticized for not touring the whole disputed land and for not drawing a sketch map thereof. I have found a sketch map on the original trial record and apparently it was a failure on the part of the appellants not to have included it in the record of appeal. Considering the details indicated thereon, the map could only have been prepared by a person who toured the entire disputed land. Therefore there is nothing on record to substantiate the appellants' counsel's submission in this regard. The witnesses, both for the plaintiff and the defence, were invited to demonstrate to court the features they had mentioned during their testimony and they did. The trial magistrate allowed for cross-examination of each of the witnesses after their demonstration. The court followed it up by recording its observations at the *locus in quo* as is apparent at page 44 of the record of appeal. No fresh testimony was recorded during the proceedings, from the witnesses or any other person who had not testified before.

Therefore, I have not found anything in the manner in which the trial magistrate conducted the proceedings at the *locus in quo* that violated *Practice Direction No. 1 of 2007* nor the procedure recommended by the precedents cited above. In his judgment following that visit, the trial magistrate correctly analyzed the evidence seen at the *locus in quo* and does not appear to have given it any undue weight. It is clear 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 counsel for the appellants introduced in his submissions matters that were neither raised at the trial nor in the memorandum of appeal, viz, that the suit was barred by limitation.

In the final result, I see no Justification for this Court to reverse the decision on the grounds raised by the appellants, 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 13th day of October 2016.

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Stephen Mubiru
Judge