THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0032 OF 2016

(Arising from Miscellaneous Civil Application No. 166 of 2016)

1. ONEK MANACY }

2. DWOKA CHRISTOPHER } …..…… APPELLANTS

VERSUS

OMONA MICHAEL …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent sued the appellants jointly and severally for a declaration that he is the owner of approximately five acres of land under customary tenure, situated at Lawi-Adul "A" village, Atanga sub-county in Pader District, and approximately fifteen acres situated at Lawi-Adul "B" village, Atanga sub-county in Pader District. His claim was that the land was originally acquired by a one Okot s/o Abalur as virgin vacant land and during 1990 he gave a total of 160 acres of it to the respondent's father, Severino Odong, since he himself was returning to his place of origin in Onyama, Gulu District. When his father became weak as a result of advanced age, by a power of attorney he appointed the respondent his agent and manager of the land. Following the disbanding of IDP Camps in 1997, the appellants began claiming the land as theirs and prevented the respondent's father from utilising the land. During the year 2010, they committed acts of trespass on the land which included the destruction of the respondent's crops. They were arrested, prosecuted and convicted for the offence of malicious damage to property. In the year 2014, the appellants again encroached onto the land and began growing crops on it and efforts by the L.C.1 to stop them were futile, hence the suit.

In his written statement of defence, the first appellant claimed to be the rightful owner of approximately three acres of the land in dispute having acquired it as a gift *inter vivos* from a one Okot Bazilio during the year 1990, who in turn inherited it from his own father Abalo Sira who first settled thereon when it was still virgin, empty land. In his written statement of defence, the second appellant claimed to be the rightful owner of approximately seven acres of the land in dispute having acquired the same from his father Latigo Yosam around the year 1942. In 1993, the respondent's father requested the appellants' father to use part of the land temporarily but his activities on the land were disrupted by the LRA insurgency when all occupants sought refuge in an IDP Camp. Upon the restoration of peace, they returned onto the land during the year 2010 only to find that the respondent had planted pine trees on the land.

The defendants not having turned up in court on the day the suit was fixed for hearing, the trial magistrate granted leave to the respondent to proceed ex-parte. In his testimony as P.W.1, Okot Bazil testified that during 1950, his father Abalur settled in the area now in dispute as the then Headman of the Public Works Department (PWD otherwise known as "Piida"). By the time he was born, Abalur had occupied the land for over fifteen years. In 1990, the respondent's father approached him and asked him to give him some of that land which he did in the presence of the local leaders and community members, and he has continued to occupy the land that was given to him to-date. The appellants have no rightful claim to the land. P.W.2 Piki Alfred testified that it was during 1990 that the respondent's father Severino Odong acquired the land in dispute as a gift *inter vivos* from P.W.1 Okot Bazil. Severino Odong lived on the land for over twenty years. P.W.3 Gonya Richard Zagwal testified that the land originally belonged to Abalur. When he died, his son P.W.1. Okot Bazil inherited the land. In 1990 during the insurgency, the respondent's father came to the area and asked Okot Bazil for some land and that is how he obtained it. The appellants subsequently claimed ownership of the land. During the year 2005 the L.C.1 intervened and decided the dispute in favour of the respondent.

On 11th May, 2016, both appellants were present at the court's visit to the *locus in quo* and the respondent showed the trial magistrate his crops growing on the land, trees and established homesteads. He stated that he had occupied the land for over twenty six years. He was cross-examined by both appellants. P.W.2 Piki Alfred too re-affirmed his testimony that it was him

who gave the land in dispute to the respondent's father. He was cross-examined by both appellants. The respondent then closed his case and the appellants were invited by court to present their defences. P.W.3 Okumu John testified that the land in dispute belongs to the respondent who had occupied it since 1990.

In his testimony, the first appellant stated that his father died in 1965 leaving him on the land and he has never lived anywhere else. Okot Bazil was a migrant worker who requested the first appellant's father for land for growing seasonal crops and his father gave him some land for that purpose. Later he returned to his place of origin where he died leaving the land in dispute go revert to the first appellant's family. He was cross-examined by the respondent. The second appellant too testified that he was born on the land in dispute in 1965 and has lived there ever since. The insurgency forced them off the land and the respondent took advantage to plant trees on their land. When peace was restored to the area, the respondent refused to vacate the land, and instead initiated criminal charges against them yet the land does not belong to him. He too was cross-examined by the respondent. D.W.3 Okot Aturlem testified that his father Yosam Latigo settled o the land in dispute when he left his job as Headman with the PWD in 1943. When he died, he left his sons on the land. He too was cross-examined by the respondent. D.W.4 Aboda Erujaino testified that the land in dispute belongs to Yosam Latigo and she did not know how the respondent acquired the land. She too was cross-examined by the respondent.

The court then recorded evidence from three "independent witnesses." Okwera Alex testified and produced documentary evidence of an earlier settlement of the dispute by district officials in favour of Odong Severino. He was cross-examined by the second appellant. Albino Latigo testified that he was born on the land in dispute and at his age of 64 years he had never seen the appellants cultivate crops on the land in dispute. He was cross-examined by both appellants. Otto Charles testified that the land in dispute belongs to Severino. He was not cross-examined.

In his judgment, the trial Chief Magistrate found that on basis of the testimony of both parties and its observations at the locus in quo where the respondent had undertaken extensive farming activities on the land, including tress that had existed on the land for over thirteen years, dwelling houses and gardens, yet the appellants had no activities son the land, the land belonged to the respondent. He found as a fact based on the evidence before him that the respondent's father

Severino Odong had acquired the land from Okot Bazilio and he lived on the land for over fifteen years. The respondent then took it over and has lived on it for over twenty six years. The dispute springs from the fact that the respondent's father was a migrant worker to the area who acquired the land from one of the indigenous settlers and is now considered illegitimate by the appellants, themselves indigenous offspring, yet they have no dwelling or farming activity anywhere near the land in dispute. The appellants were motivated by tribal sentiments in attempting to dispossess the respondent of his land. He found that the respondent was the rightful owner of the land in dispute, entered judgment in his favour to that effect, declared the appellants trespassers on the land, issued a permanent injunction against them and awarded the respondent the costs of the suit.

Being dissatisfied with the decision, the appellants appealed to this court on the following grounds;

1. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence before court, relied on hearsay and contradictory evidence presented by the respondent in absence of the appellants, thereby coming to a wrong conclusion.
2. The trial Magistrate erred in law and fact when he denied the appellants the right to be heard and only allowed them to visit the locus in quo thereby coming to a wrong decision.
3. The trial Magistrate erred in law and fact when he in effect erroneously declared the respondent as the lawful owner of the land.

In his written submissions, counsel for the appellant M/s. Barenzi and Company Advocates argued that the judgment of the trial court is entirely reliant on evidence obtained irregularly at the *locus in quo*, hence there is no evidence to support the decision. The actual hearing of the case took place at the *locus in quo* which was a serious and fatal procedural irregularity. The trial court set aside the ex-parte proceedings and allowed the appellants to participate in the proceedings without any application or motion to that effect. They prayed that the judgment of the court below be set aside and instead entered in favour of the appellants, or in the alternative, a re-trial be ordered.

In response, counsel for the respondent Mr. Michael Okot submitted that the trial court properly exercised its discretion in granting the respondent leave to proceed ex-parte since the appellants' absence from court on the day the suit was fixed for hearing was unexplained, yet they had notice of the date. At the *locus in quo*, again the court properly exercised its discretion on its own motion to allow the appellants participate in the proceedings, cross-examine the respondent and his witnesses on the testimony they had given in court, give their own testimony and call their own witnesses. The weight of the evidence favoured the respondent's version that his father Odong Severino had acquired the land in dispute from P.W.1 Okot Bazilio and he has occupied it to-date and the trial court was right to enter judgement in his favour. The trial court made a proper evaluation of the evidence and came to the right conclusion. The appeal should therefore be dismissed with costs.

This being a first appeal, this court is under an obligation 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 in *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.

The first limb of the first ground of appeal faults the trial court for having ignored contradictions in the respondent's evidence. In his submissions, counsel for the appellant did not illustrate what those contradiction were and the effect they may have had on the respondent's case. I have perused the record of proceedings and have not found the contradictions alluded to. I find that This part of the appellants' argument has not been substantiated and is not supported by the record of proceedings.

The second limb of the first ground of appeal faults the trial court for having proceeded *ex-parte* against the appellants. According to Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the summons or notice of hearing was duly served, it may proceed *ex parte*. In the instant case the court record indicates that the appellants were in court on the

previous occasion, 19th January, 2016 when scheduling was done interparty. Thereafter the matter was adjourned in the presence of both appellants to 19th February, 2016 for hearing.

On 19th February, 2016 the appellants did not turn up in court and there was no explanation for their absence. The court advised the respondent to make a formal application for leave to proceed ex-parte and adjourned the suit to 19th April, 2016 when it heard the application and granted the respondent leave to proceed *ex-parte*. I find this procedure to have been irregular. Whereas Order 9 rule 20 (1) (a) of *The Civil Procedure Rules* permits court to grant leave to the plaintiff to proceed *ex-parte* in the event of unexplained absence of a notified defendant, there is no evidence that the appellants were notified of the hearing that took place on 19th April, 2016. This irregularity though was subsequently cured on 11th May, 2016 when at the visit to the *locus in quo* the court on its own motion informally set aside the ex-parte proceedings, required the respondent and his witnesses to testify afresh and permitted the appellants to cross-examine them. This ground of appeal accordingly fails.

With regard to the second ground of appeal, the main thrust of the appellant's argument is that the proceedings at the *locus in quo* were so irregular that they occasioned a miscarriage of justice. Although not canvassed by counsel for the appellants in his arguments, I observe that at the locus in quo, the court allowed three persons it characterised as "independent witnesses," to testify. There is no indication that any of the parties summoned the three witnesses; Okwera Alex, Albino Latigo and Otto Charles.

The judicial system in Uganda uses the adversary system of trial when resolving disputes. It is a system based on the notion of two adversaries battling in an arena before an impartial third party, with the emphasis on winning. Under the guidance of court, which ensures that rules of evidence and procedure are followed, the two adversarial parties have full control over their respective cases. This means that they are responsible for pre-trial procedures, and preparation and presentation of their respective cases during the trial. It is their duty to gather evidence, to organise and present witnesses. The role of the judicial officer is to decide which evidence is admissible, and what evidence is inadmissible, and therefore to be excluded from the trial. Under Order 18 rule 13 of *The Civil Procedure Rules*, the court may at any stage of the suit recall any

witness who has been examined, and may, subject to the law of evidence for the time being in force, put such questions to him or her as the court thinks fit. Similarly under section 164 of *The Evidence Act*, a judicial officer may, in order to discover or to obtain proper proof of relevant facts, ask any question he or she pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant.

The court is given wide discretionary powers under both Order 18 rule 13 of *The Civil Procedure Rules* and section 164 of *The Evidence Act* to recall witnesses. Such powers must be exercised judicially and reasonably and not in a way likely to prejudice either party. Once the court decides that certain evidence is essential for the just determination of the case, then it may recall a witness or witnesses to give that evidence whatever its effect is likely to be, provided that the parties are allowed to exercise their right to cross-examine any such person, and the court should adjourn the case for such a time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness. This provision is not a license to a court to summon witnesses at its own, motion who have not been summoned by either party. A judicial officer should not *proprio motu* summon witnesses not called by either party.

On the other hand the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*). That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. I have therefore decided to disregard the evidence of the three "independent witnesses," since I ma of the opinion that there was sufficient evidence to justify the decision, independently of the evidence of those three witnesses.

As regards the other aspect of irregularity in the proceedings at the *locus in quo*, it is contended by counsel for the appellants that the trial court erred when it transformed a process designed to check on the evidence by the witnesses given in court, instead to record evidence that ought to have been recorded in court. Indeed it is an established principle that the adjudication and final decision of suits should be made on basis of evidence taken in Court. Visits to a *locus in quo* are essentially for purposes of enabling trial magistrates understand the evidence better. They are intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. That evidence was recorded at the locus in quo in this manner was obviously an irregularity in the trial.

However according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial.

In the instant case, the submission of counsel for the appellants focuses on the validity and fairness of a trial conducted in that manner. The right to a fair trial is guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995*. In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court established by law. These ideals are generally realise within the controlled environment of a court room, for example by restraining the audience from interrupting the proceedings by denying it the opportunity to comment on what is happening, which may not be

easily achieved at a *locus in quo*. The court rooms are designed to minimise distraction, establishing attention towards the bar and bench and thus the case that is being handled, and in that way enable the parties optimum opportunity to present their evidence and arguments.

Bringing people in conflict together in the same location entails risks that are managed by such measures as increased security that are visible at court room premises and sometime inside the court rooms. The purpose and model of court rooms and their interior, can be reflected by Philippopoulos-Mihalopoulos' (Professor of Law and Theory at Westminster University, London) note on courtrooms as "legal hypervisibilisations," (see *Spatial Justice: Body, Lawscape, Atmosphere*, Routledge, (2015) at 176), by which he means that courtrooms are places where law is made visibly present, thus;

> People who enter the setting are reminded about the law through the architecture, the interior, the paraphernalia, the coat of arms, the lighting, the designated seats, the documents, the sounds, the smell, and the hard wooden bench they are assigned to during their stay.

Along with the symbolic representations of justice found in the actual courtroom environment (e.g., the judicial officer's bench being elevated, lawyer behaviour in court such as bowing to the judicial officer) court premises are designed in such a way that entering their space or precincts reminds one of walking into a sacred space and the solemnity of the proceedings that take place inside the court rooms, bringing home the sense of the gravity for the issues at stake. On the other hand, the courtroom environment operates like a neutral space that neutralises the stakes in any conflict through conversion of a direct struggle between parties into more or less a dialogue between adversaries that allows for the resolution of conflicts and dispute. Some consider that the use of symbolism, such as the robing practice of advocates, in the courtroom facilitates a sense of respect for the legal process (see Richardson Christine Rosalie, *Symbolism in the Courtroom: An Examination of the Influence of Non-Verbal Cues in a District Court Setting on Juror Ability to Focus on the Evidence*; PhD Thesis, School of Criminology and Criminal Justice, Faculty of Arts, Griffith University Queensland (February, 2006) .

The court room environment is therefore designed to enhance a public but fair trial for the litigants. For a defendant in any suit, the idea of a fair trial involves the unimpeded right to

present a defence, entailing;- absence of impediments to the calling of witnesses, access to physical and documentary evidence in custody of the adversary, the right counsel, the right to compel the attendance and cross-examination of adverse witnesses and production of documents, the right to present their own witnesses, etc. When the conditions in which these rights may be exercised are replicated at the *locus in quo* as opposed to a court room designed to optimise them, insisting on the fact that they should rather have been exercised within a court room, or that the recording of the evidence should have been a distinctive part of the trial process that should have been followed by the visit to the *locus in quo* rather than the contemporaneous manner in which the court dealt with the two phases, on the facts of this case would be tantamount to having undue regard to technicalities as opposed to the administrative of substantive justice (see article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*).

Having considered the purpose of recording evidence within a court room environment and the purpose of a *locus in quo* visit, I find that the irregularity in procedure in this case did not in any demonstrable way detract from the solemnity of the proceedings, the neutrality of the trial magistrate, or cause an escalation in the conflict rather than a conversion of a direct struggle between the parties into more or less a dialogue between adversaries that allowed for the resolution of the conflict and dispute between them, or in any way impeded the appellants in exercising their rights as defendants, within the meaning of 28 (1) of *The Constitution of the Republic of Uganda, 1995*. Despite the irregularity, no miscarriage of justice was occasioned.

The decision is supported by the evidence on record. The respondent's evidence established the fact that his father Severino Odong acquired the land from Okot Bazilio who lived on the land for over fifteen years before his death. The respondent then took it over and has lived on it for over twenty six years. He had visible developments on the land corresponding to the years of occupancy, yet the appellants had none. Since the decision of the court below is supported by the evidence available on record, in the result this appeal lacks merit and it is consequently dismissed with costs to the respondent.

Dated at Gulu this 4th day of October, 2018

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Stephen Mubiru

Judge,

4th October, 2018.