IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 022 of 2017

In the matter between

MORO ANJELO …… APPELLANT

VERSUS

ODYENI BARAMOI MARSHALL …… RESPONDENT

Heard: 12 April, 2019.
Delivered: 9 May, 2019.

Land Law *— observations at the locus in quo by the trial court verify the oral testimony of witnesses— The better the oral testimony fits in, the more the court will be inclined to believe it.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of approximately ten acres of land under customary tenure located at Odwor Ward, Ongaro Parish, Lukole sub-county in Agago District. He sought a declaration that he is the rightful owner of the land, general damages for trespass to land, an order of vacant possession, a permanent injunction against the appellant and the costs of the suit. His claim was that during or around 1979, by reason of raids by Karimojong, the respondent's father migrated with his family and settled onto the land in dispute, which at the time was virgin, vacant land. Upon his death in 2007, the respondent inherited the land, occupied and continued to cultivate it until the year 2012 when

the appellant trespassed onto it and constructed a grass thatched house thereon and took possession of two acres on which he is growing crops.

[2] In his written statement of defence, the appellant claimed to be the rightful owner of the land in dispute his late father Ongwech Cipirino having allocated it to him. His father acquired the land in 1972 as vacant, virgin forest land. It is in 1984 that the family of the respondent was hosted as internally displaced people on the land by his paternal uncle Matia Ludech and his brother Ojok Alex. He prayed that the suit be dismissed.

The respondent's evidence;

[3] Testifying as P.W.1 the respondent Odyeng Baramoi Marshall stated that the land in dispute was first secured by his father Lapit Quirino in 1984 when it was vacant land. His father later gave the land to him. During the year 1988 he planted four mango trees and a Lira tree on the land. He constructed his house thereon in the year 2009 which the appellant demolished claiming the land as his. The dispute was mediated and the respondent was declared owner of the land. Nevertheless the appellant continued to occupy two acres of the land where he still grows his crops. He eventually forced the respondent off the land and constructed his own huts on it.

[4] P.W.2 Omwony Yusuf testified that the land belongs to the respondent having been given to him by his father Lapit Quirino who acquired it in 1984. The appellant lived about two mile away from the land in dispute but he began his trespass onto the land during the year 2013. P.W.3 Teresa Acung, respondent's sister in law testified that the land in dispute belonged to her father in law Lapit Quirino. The respondent lived on it from 1984. The dispute began after the LRA war. Several relatives of the respondent are buried on the land. The respondent closed his case.

The appellant's evidence;

[5] D.W.1 Amet Julius Aricko testified that the land in dispute was originally acquired by Severino Ongwech who in 1972 distributed it among his sons. The part now in dispute was given to the appellant. D.W.2 Ojok Alex, brother of the appellant, testified that the land in dispute belongs to him. The appellant Moro Anjelo testified as D.W.3 and stated that the land in dispute was given to his brother D.W.2 Ojok Alex by their father and he is the one using it. He prayed that the suit be dismissed.

Court's visit to the *locus in quo* and its judgment thereafter;

[6] The court took note of the boundaries. The respondent showed the court the location of his old homestead. The court saw the Lira tress planted by the respondent. The court also saw remnants of the respondent's house that had been demolished in the year 2009. In his judgment, the trial Magistrate found that the evidence given in court by the appellant regarding the owners of land adjacent to the one in dispute did not correspond to the court's findings at the *locus in quo* while that of the respondent did. The Lira tree planted by the respondent in 1988 was found on the land and it was a huge tree. Remnants of his old homestead and of his house that was demolished in 2009 were seen. The respondent was declared lawful owner of the land, a permanent injunction was issued against the appellant, and order of vacant possession was issued. The respondent was awarded general damages of shs. 2,000,000/= and the costs of the suit.

The grounds of appeal;

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

1. The trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion and occasioning a miscarriage of justice.
2. The trial magistrate erred in law and fact when he held that the suit land belongs to the respondent.

Submissions of counsel;

[8] The appellant did not appear at the hearing of the appeal whereupon a date was fixed for judgment and the parties directed to file their written submissions. Still the appellant did not file any submissions. In their written submissions Mr. Ogik Jude, counsel for the respondent, argued that the trial magistrate considered all the evidence on record. The testimony of the respondent and his witnesses was consistent with the court's observation of the physical evidence at the *locus in quo*. On the other hand, the appellant's evidence was riddled with many contradictions, especially as regards the size of the and the identity of the neighbours. The dispute over the land began only after the end of the L.R.A insurgency when the appellant encroached onto the land. The trial court came to the right decision and the appeal ought to be dismissed with costs.

The duties of this court;

[9] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[10] This court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The first ground of appeal is struck out;

[11] The first ground of appeal presented in this appeal is too general that it offends the provisions of Order 43 rules (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

The respondent's evidence fit in better with the observations made at the *locus in quo*;

[12] The second ground of appeal faults the trial Magistrate for held that the suit land belongs to the respondent. The decision was arrived at after evaluation of the evidence presented by both parties. The two parties presented different versions explaining the root of their respective claims to the land. In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular version of event, one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in (see *DPP v. Kilbourne [1973] 1 ALL ER 440; [1973] AC 720*). Secondly, the corroborating evidence must also be credible and independent. It should not be mere repetition of the evidence on record.

[13] In the instant case, each of the parties described the land by naming the owners of the adjacent land. By accuracy of their versions the court would be in position to know who of the two had in fact lived on the land before. The evidence given in court by the appellant regarding the owners of land adjacent to the one in dispute did not correspond to the court's findings at the *locus in quo* while that of the respondent did. The Lira tree planted by the respondent in 1988 was found on the land and it was a huge tree. Remnants of his old homestead and of his house that was demolished in 2009 were seen. The observations at the *locus in quo* by the trial court were more consistent with the respondents' version than the appellant's claim. Therefore the trial court came to the correct conclusion.

[14] One way of testing the plausibility of oral testimony, is by determining how it does or does not fit in with the available physical evidence. Unless fabricated or staged, physical evidence is not subject to the limitations of lies, impeachment, intimidation, forgetfulness or pursuit of self interest that oral evidence is prone to. Physical evidence only has to be detected, preserved, evaluated, and explained.

Once the possibility of its being fabricated or staged is rules out, it should then be examined and compared with the witnesses' testimony. The court may then determine the reliability of their respective accounts. The court looks at the physical evidence and attempts to determine how it fits into the overall scenario as presented in the contending versions

[15] The respondent's version was corroborated by the court's observations at the *locus in quo* regarding all material aspects. The evidence as a whole shows a significant imbalance that tilts the scale in favour of the respondent and therefore the trial court came to the correct conclusion.

Order :

[16] In the final result, there is no merit to the appeal. It is dismissed and the costs of the appeal and of the court below were awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : unrepresented.

For the respondent : Mr. Jude Ogik.