IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 018 of 2018

In the matter between

OPIYA ALENSIO …… APPELLANT

VERSUS

OKWERA WILFRED …… RESPONDENT

Heard: 3 March, 2019.
Delivered: 9 May, 2019.

Land Law *— visits to the locus in quo by the trial court— recording evidence from "Independent Witnesses" while at the locus in quo is an error—A disposition of land by gift that is too vague to be enforced will be void for uncertainty.*

Family law *— Mental Incompetency— Presumption of soundness of mind — evidence required to establish incompetency— Only a person appointed by court as manager of an estate of a person of unsound mind may claim land on his or her own behalf.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for recovery of approximately six acres of land held under customary tenure located at Ogom Akuyam, Puciota Parish, Angagura sub-county, Aruu County in Pader 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 1976, a one Kerodiya Ayero gave the land in dispute to the appellant's mother Juliya Aryemo and it was on that land that the appellant was born and raised. They only left the land in 1982

for Gulu due to insurgency. The appellant returned to the land in the year 2010 and ploughed approximately four acres but was stopped by the respondent, claiming that the land belonged to his father.

[2] In his written statement of defence the respondent contended that the appellant's action is time barred since the respondent's parents Marako Omuda and Kerodina Ayero were at all material time in physical possession of the land which they inherited from their father Oola Lemoi, and when they died they were buried on that land. The respondent inherited the land from them. Save for the period of insurgency, the respondent's family has at all material time been in possession of the land and farming on it. He therefore counterclaimed for a declaration that he is the rightful owner of the land, a permanent injunction against the appellant and the costs of the counterclaim.

The appellant's evidence;

[3] The appellant Opia Alensio testified as P.W.1and stated that a one Kerodiya Ayelo during 1976 gave the land in dispute to his mother. They lived on the land without any troubles until the break out of the insurgency in 1986 that forced them to vacate. He returned to the land from the satellite camp during 2008 and in 2010 when he attempted to plant a pine tree forest on part of the land, he was stopped by the respondent. Although he does not live on the land, remnants of his old homestead are visible on the land. P.W.2 Alal Dorine testified that in 1976 Kerodiya Ayelo gave the land in dispute to Julia Aryemo, the appellant's mother. She was present when this happened together with about four other people. During the insurgency, the vacated the land and fled to a camp in Gulu Town. The dispute between the appellant and the respondent over the land began in the year 2011. The respondent took over and occupied the land but before that he was resident at Wang Olweny Ward.

[4] P.W.3 Otto Paul testified that following the flooding of Julia Aryemo's land following heavy rains in 1976, she was invited by Kerodiya Ayelo who gave her the land in dispute. During the insurgence the area was abandoned. Following the end of the insurgency, all the respondent's relatives returned to their land in Wang Olweny Ward. It is there that all the deceased relatives of the respondent are buried. The appellant had ploughed two acres of the land in preparation for planting pine tree seedlings when the respondent later unlawfully stopped him and took over the land in dispute, claiming it belonged to him.

[5] P.W.4 Akena Denis testified that on 13th September, 2010 the appellant hired his pickup truck for transporting 3,000 pine tree seedlings which he delivered in Angangura. The appellant had prepared about two acres of land for planting the seedlings. He then witnessed a scuffle between the appellant and the respondent as the seedlings were being offloaded. He moved the vehicle to a nearby home from where he offloaded the rest of the seedlings. P.W.5 Opira Santo testified that the appellant and his mother Julia Aryemo settled on the land in dispute at the invitation of Kerodiya Ayelo. The respondent lived in Wang Olweny Ward, about two miles away. During September, 2010 the appellant prepared a garden for planting pine tree seedlings. The respondent stopped him from planting the seedlings. The respondent has since then taken over possession of the land. The appellant closed his case.

The respondent's evidence;

[6] In his defence as D.W.1, the respondent Okwera Wilfred testified that when his father died, he began living on the land in dispute with his auntie Kerodiya Ayelo, who too died later in 1989. He inherited the land in dispute from her. The land originally belonged to his grandfather Oola Lengomoi. His father later inherited the land and when he died he left him with his auntie and he has lived on that land since then. There are mango trees and graves of his deceased relatives on the land. On 6th September, 2010 the appellant claimed to be looking for a place

to plant tree seedlings. On 8th September, 2010 he brought people onto the land to dig holes in preparation of the planting. He reported the matter to the L.C. officials. On 13th September, 2010 the appellant brought tree seedlings for planting. He was stopped by the aL.C.1 Chairman.

[7] D.W.2 Gladys Aber testified that the respondent's parents settled on the land in dispute in 1955. The respondent was born thereon. The respondent was seven years old when his father died and his mother dies later during the LRA insurgency. The appellant's mother Aryemo Julia lived on the land in dispute for only six months after which she left. After the insurgency, the appellant ploughed the land in preparation for tree planting and a dispute erupted between him and the respondent.

Court's visit to the *locus in quo*;

[8] When the court visited the *locus in quo*, it recorded evidence from persons it classified as "independent witnesses," who were; (i) Eromolina Labwot; (ii) Omon Justine; and (iii) Dici Yaconi. It prepared a sketch map of the land in dispute and its neighbourhood. To the North, it is bordered by the Gulu-Kitgum Road. The appellant's home is located across the Gulu-Kitgum Road. To the East, it is bordered by a path leading Southward from the Gulu-Kitgum Road to the Ogok Stream. To the South it is bordered by Ochieng Raymond's land. To the East it is bordered by the Mission land, by then occupied by the Management of the Chinese road Construction company. More or less in the centre of the land are the graves of Marako Omuda, Kerodiya Ayero and two of their other relatives as well as her old homestead. Surrounding that home and scattered at different locations of the land are homes of the relatives of the respondent, their gardens, and mango trees planted by Marako Omuda. To the East of Kerodiya Ayero's homestead, about forty meters away, was another old homestead the appellant claimed belonged to his late mother Aryemo Julia.

The judgment of the court below;

[9] In his judgment, the trial Magistrate found that although the appellant claimed the land was given to him by his mother, there was no evidence of that gift. The appellant claimed that the land belonged to his mother but had no powers of attorney to sue on her behalf. He claimed that the mother is a person of unsound mind but had no grant for the administration of her estate. He did not claim any right in the land and none of his rights had been infringed. The respondent's evidence was that the appellant's mother was given rights of temporary occupancy following the flooding of her land. At the *locus in quo* the appellant failed to demonstrate the boundaries of the six acres that were given to his mother. The respondent to the contrary was able to show court the boundaries, the trees, remnants of the plantation and the graves in accordance with his testimony in court. The respondent was thus declared lawful owner of the land, a permanent injunction was issued against the appellant, an order of vacant possession was issued against the appellant, and the costs of the suit. were awarded to the respondent.

The grounds of appeal;

[10] 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 for the appellant;

[11] In his submissions, counsel for the appellant argued that the evidence before the court showed that the appellant's mother Aryemo Julia had lived with Kerodiya Ayero until the period of insurgency. It is Kerodiya Ayero who gave Aryemo Julia the land that she occupied during that period. Having lived on the land for more than ten years, the grant to Aryemo Julia was not a license but a gift. It is only the insurgency that cut her stay short. The respondent unlawfully prevented the appellant from planting tree seedlings on his mother's land. The court was wrong not to have found that to be an act of trespass. He prayed that the appeal be allowed.

Submissions of counsel for the respondent;

[12] In response, counsel of the respondent Mr. Owor Abuga David submitted that, during his testimony and as reflected in his pleadings, the appellant admitted that his mother was still alive at the time he filed the suit, but was disabled by a fractured leg and was of unsound mind. None of these allegations were proved as facts. He did not present any court order appointing him manager of his mother's estate. The appellant's mother was never adjudged to be a person of unsound mind. P.W.2 Otto Paul testified that the appellant's mother was only shown a place for construction of her house, within Kerodiya Ayero's homestead. She was not given land but rather a place of refuge. At the locus in quo, the appellant failed to demonstrate to court, the boundaries of the six acres of land he claimed belonged to his mother. The trial court correctly found that the appellant had no cause of action, properly evaluated the evidence and came to the correct decision. The appeal should therefore be dismissed.

The duties of this court;

[13] 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*).

[14] 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.

Both grounds of appeal are struck out;

[15] Both grounds of appeal presented in this appeal are too general that they offend 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 two grounds are accordingly struck out.

Recording of evidence from "Independent Witnesses" was an error;

[16] That ought to have been the end of this appeal but for purposes of completeness, the court will proceed to discharge its duty to re-evaluate the evidence on record. It is noted that during the visit to the *locus in quo*, the court recorded evidence from three other persons it classified as "independent witnesses." Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is 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. 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)*. I have perused the record and have found that the trial magistrate recorded evidence from three people who had not testified in court. This was an error.

[17] 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. Furthermore, 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.

[18] 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. Having done so, I have decided to disregard the evidence of the three additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those witnesses.

<u>Only a person appointed by court as manager of an estate of a person of unsound mind may claim land on his or her own behalf.</u>

[19] Whereas the appellant in his plaint did not disclose the fact that his mother was still living at the time he filed the suit, during his testimony he stated so. He justified the decision to file the suit in his name by stating that his mother had become of unsound mind. The appellant neither adduced evidence of the claimed unsoundness of mind nor his appointment as the legal representative of his mother, yet he claimed Kerodiya Ayero had given the land to his mother. The

capacity to enter into legal transactions and to litigate independently is very closely related to a person's mental condition. Therefore any transaction or claim in respect of property of a person of unsound mind may only be made by a person appointed by court as manager of his or her estate (see sections 2 and 4 of *The Administration of Estates of Persons of Unsound Mind Act*). For a legal transaction to be valid the law requires that the parties be able to understand the nature, purpose and consequences of their actions. In the instant case, the appellant claimed land on behalf of his brother who he claimed had a mental problem, who therefore impliedly had no ability to understand the nature, purpose and consequences of the suit.

[20] Before the trial court, the appellant did not adduce evidence to illustrate on what basis his mother Aryemo Julia, was considered to be a person of unsound mind. Mental incapacity is primarily the result of either mental illness (which includes acquired organic brain syndromes such as dementia of which the most common form is Alzheimer's disease) or intellectual disability. Mental incapacity may also be related to the process of ageing in general. Mental illness covers both neurosis (a functional derangement due to disorders of the nervous system, e.g. depression and obsessive behaviour), and psychosis (a severe mental derangement involving the whole personality e.g. schizophrenia and bipolar disorder (also known as manic depression). Making a finding as to the mental capacity of someone therefore is not a simple matter and should not be taken lightly. Brenda M. Hoggett in her book, *Mental Health Law (*4th edn, (1996*)* Sweet & Maxwell, London), makes the following statement:

> Defining mental disorder is not a simple matter, either for doctors or for lawyers. With a physical disease or disability, the doctor can presuppose a state of perfect or "normal" bodily health (however unusual that may be) and point to the ways in which the patient's condition falls short of that.....even if it is clear that the patient's capacities are below that supposed average, the problem still arises of how far below is sufficiently abnormal, among the vast range of possible variations, to be labelled a disorder.

[21] A lay person cannot arrogate to himself the authority to determine another person to be of unsound mind. The general rule is that adults are presumed mentally and legally competent to manage their own affairs until the contrary is proved. As the appointment of a manager of the estate of a person incapable of managing his or her affairs due to a mental illness or deficiency involves a serious curtailment of a person's rights and freedoms, even the courts will not lightly make such an appointment. However, where the court has declared a person to be of unsound mind, and incapable of managing his or her own affairs, such certification creates a rebuttable presumption of incapacity, shifting the burden of proof to the party who wants to hold the certified person bound by a transaction.

[22] When a person becomes incapable of managing his or her own affairs due to mental infirmity, especially the administration of his or her estate, it is imperative that someone be legally appointed to assist the person who has become incapable. In terms of our current legal system no person may manage the affairs of another person without the required authority to do so. Until certified by court to have been a person of unsound mind, the law presumed Aryemo Julia to be mentally and legally competent to manage her own affairs. There was no legal basis for the appellant's assumption of the role of taking decisions on her behalf. Appointing oneself as an administrator to the affairs of another person is an infringement of that person's fundamental right to manage his or her own affairs independently and a court cannot give approval to such conduct. The trial court therefore came to the right decision on that point.

A disposition of land that is too vague to be enforced will be void for uncertainty.

[23] On the other hand, the appellant sued in his own name yet in his testimony he stated that the land was given to his mother. He had no *locus standi* in that regard. He did not claim to have witnessed the grant of gift of the land he claimed to belong to his mother. During the visit to the *locus in quo*, he was unable to

demonstrate the boundaries of the six acres he claimed were given to his mother. In order to make a gift of property, a donor must transfer legal title in that property to the donee.

[24] To render a gift *inter vivos* valid, the donor must have done everything which was necessary to be done in order to transfer the property. Any disposition of property that is too vague to be enforced will be void for uncertainty. A valid gift of land therefore must show certainty of intention, subject matter and objects. "Certainty of intention" means that it must be clear that the donor wished to grant the land as a gift. "Certainty of subject matter" means that it must be clear what land was given as a gift. When a gift of land is made, its boundaries should be ascertained or ascertainable. Land whose boundaries are indeterminable cannot be the subject of a gift since it is practically indistinguishable. "Certainty of objects" means that it must be clear who the beneficiaries, or objects, are. There is therefore no room for evidential uncertainty. Equity will not perfect an imperfect gift (see *Richards v. Delbridge [1874] LR 18 Eq 11; Milroy v. Lord [1862] 31 LJ Ch* 798 and *Re Fry [1946] Ch 312*).

[25] Although Aryemo Julia's old homestead was visible at the *locus in quo*, the land claimed by the appellant was incapable of distinction from that of Kerodiya Ayero. This was more in accord with the respondent's version that Aryemo Julia was only shown a place to build a house for refuge rather than given land as a gift *inter vivos* as claimed by the appellant. The appellant's claim clearly could not succeed based on such evidential uncertainty of subject matter. Where the location of the boundaries of the six acres claimed by the appellant could not be proved with evidence for certain, then it was impossible to delimit its extent and the claim of a gift of land thus had to fail for uncertainty.

Order :

[26] The trial court therefore came to the correct decision on the evidence before it. In the final result, there is no merit to the appeal. It is dismissed and the costs of the appeal as well as those of the court below were awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Mr. Ocorobiya Lloyd.

For the respondent : Mr. Owor Abuga David.