IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeals No. 055 and 64 of 2016

In the matter between

1. OKELLO CHRISTOPHER }
2. OKOT JOHN } …… APPELLANTS
3. ODWONG WALTER }
4. AYELLA SIBIRINO }

VERSUS

OLAK ANTHONY …… RESPONDENT

Heard: 17 April, 2019.
Delivered: 16 May, 2019.

Land Law *— Visits to the Locus in quo — not everything said in court needs to be verified during the visit to the locus in quo — Only those aspects in respect of which there is conflicting evidence of both sides as to the existence or non-existence of a state of material facts relating to the land need to be verified— Abandonment— Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before.*

Evidence *— Burden of proof —In our legal system, there cannot be a "draw" in litigation — Evaluation of evidence —The plausibility of oral testimony may be determined by how it does or does not fit in with the available physical evidence.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for a declaration of ownership of land measuring approximately 100 acres, situate at Laboto Lwonga village, Ogule Parish, Lapul sub-county, in Pader District. He sought a declaration that he is the rightful owner of the land, a permanent injunction

restraining the appellants from further acts of trespass to the land, special, general and punitive damages for trespass to land, interest and the costs of the suit. His claim was that he and his late brother Obol Casto settled on the land in dispute in the 1975 as the first settlers thereon while in was vacant land. Later a one Casciano Latigo settled on land to their East and became their neighbour. They with their respective families lived in quiet enjoyment of the land until their possession was disrupted by the LRA war which in 1997 forced them to migrate into Kitgum Town. During or around the year 2012 after their return to the land, the appellants, claiming to grandsons of the late Casciano Latigo, trespassed onto their land. They have since established gardens and constructed houses on the land which they have refused to vacate despite repeated demands that they do so. They have since deprived the respondent of his quiet enjoyment of the land.

[2] In their joint written statement of defence, the appellants averred that the land in dispute originally belonged to their late grandfather Kasiyano Latik Otek. Upon his death in 1974, it was inherited by their father who occupied it until his death in 1990. Both their grandfather and father were buried on that land. Their mother the late Adong Margaret then inherited and lived on the land until her death on 9th March, 2013. It is after her death that the respondent began claiming the land as his.

The respondent's evidence;

[3] Testifying as P.W.1 the respondent Olak Anthony testified that the road from Pajule Catholic Mission was constructed in 1980 to form the boundary between Casciano Latigo's land and theirs. Constructed one dam, a permanent building near the Pruoyo tree and buried relatives on the land. He has never returned to the land since 1997. P.W.2 Awidi Juliana testified that the road from near Koro to the land in dispute was constructed by the respondent's brother Obol Casto. P.W.3 Kidega Francis testified that before the insurgency, the appellants were

resident about seven miles away from the land in dispute. the respondent and his brother established a football pitch, dam and road on the land. Remnants of the respondent's old homestead are visible near the Pwo tree. P.W.4 Oryem Ben testified that the land in dispute belongs to the respondent, who acquired it in 1975. The appellants are neighbours to the North of the land. Casciano Latigo is the appellants' grandfather. The appellants encroached onto the respondent's land.

The appellants' evidence;

[4] In his defence, the first appellant Okello Christopher testified as D.W.1 and stated that Wansebo stream joining Awal Stream is the boundary to the West of their land. The road claimed by the respondent was a path used by their grandfather. D.W.2 Rufina Blue Ayaa testified that she was born and lived on the land all her life save for the period of insurgency. It measures approximately 159 acres and there are about eighteen mango trees on it that were planted by their grandfather. There is no dam on the land and they have never trespassed onto the respondent's land. D.W.3 Okech Jakario testified that although he lives two miles away from the land in dispute he has known it as belonging to the appellants since the time of their grandfather. It is bordered by Awal Mon Stream to the North and Wang Cebo Stream to the East. The respondent was displaced from the land in 1978 and never returned. The land used to serve as grazing land at the time the respondent occupied part of it.

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

[5] The court then visited the *locus in quo* and convened under the Pwo tree that had been mentioned by P.W.3 Kidega The court observed that the land in dispute was bordered by Wang Cebo Stream to the South and Awal Mon Stream to the West. Cutting across it is a footpath to Pajule Mission. Near the Pwo tree, the court observed the respondent's old homestead. Both the first and third

appellants had established their homes within a short distance there from. The appellants' land was to the East of the land in dispute.

The judgment of the court below;

[6] In his judgment, the trial Magistrate found that the evidence before him had established that the respondent indeed lived on the land in the 1970s and vacated at the height of the LRA insurgency. The appellants too lived on the land in dispute and have a stake in it. They live on that side of the land in dispute neighbouring their other land while the Western side bordering Awal Mon Stream is vacant. When both parties have a stake in the land, the state of affairs should be maintained. Since the land measures approximately 100 - 150 acres, the parties are entitled to and shall take equal shares in it. The respondent is to take the side neighbouring Awal Mon Stream and the respondents the side where their current homesteads are. They are to jointly engage a surveyor who is to subdivide the land to ensure that they each secure and equal share. Since the appellants have a stake in the land, they are not trespassers and since each of the parties has a stake in the land each party is to bear their own costs.

The grounds of appeal;

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

1. The learned trial magistrate erred in law and fact in holding that the disputed land be divided in equal proportions without due regard to the evidence of the appellants and their witnesses.
2. The learned trial magistrate erred in law and fact when he failed to conduct proceedings at the *locus in quo* properly, hence causing a miscarriage of justice.

3. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion.

[8] The respondent too was dissatisfied with the decision and appealed to this court on the following ground, namely;

1. The learned trial magistrate erred in law and fact when he ordered for equal division of the land between the parties without considering witness testimonies and findings at the *locus in quo*.

Submissions of counsel for the appellants;

[9] In his submissions, counsel for the appellants abandoned the third ground for being too general. In respect of the rest of the grounds he argued that the evidence of the appellants was to the effect that the respondent has never established a dam on the disputed land. It also established that the respondent does not own any land near the one in dispute and that the boundaries of the appellants' land are streams on all sides. Although the respondent had lived in the area at one time, he had vacated the area in 1978 and had never returned. The trial magistrate was wrong in ordering a subdivision yet there was no evidence to show that the respondent ever acquired any art of the land in dispute. In his judgment, the trial magistrate placed a lot of weight on features he saw during the *locus in quo* such as the old homestead of the respondent, that the appellants were neighbours to the land in dispute and that there was vacant land to the West of the land in dispute, which were not alluded to in evidence. He did not pick interest in features like the dam, the football field, the fish pond, the graves and the road which were mentioned by the witnesses. The trial Magistrate failed in his duty to use the *locus in quo* visit for verification of the oral testimony. He prayed that the appeal be allowed and the cross-appeal dismissed with costs.

Submissions of counsel for the respondent;

[10] In response, Mr. Louis Odong counsel for the respondent argued that raised a number of grounds which were in neither memorandum of appeal. Those aspects should be disregarded. With regard to the errors in procedure at the *locus in quo,* he submitted they were not fatal since the aspects that the court observed were sufficient to guide the court's decision.

The duties of this court;

[11] 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*).

[12] 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.

Not everything said in court needs to be verified during the visit to the *locus in quo*;

[13] In ground two of the appeal, the trial court is faulted for the manner in which it conducted proceedings at the *locus in quo*. It is argued for the appellants that the trial Magistrate did not pick interest in features like the dam, the football field, the fish pond, the graves and the road which were mentioned by the witnesses. The law permits the trial court to carry out an inspection of the *locus in quo*. According to Order 18 rule 14 of *The Civil Procedure Rules*, the court may at any stage of a suit inspect any property or thing concerning which any question may arise.

[14] Therefore, where it appears to the court that in the interest of justice, the court should have a view of any place, person or thing connected with the case the court may, where the view relates to a place, either adjourn the court to that place and there continue the proceedings or adjourn the case and proceed to view the place, person, or thing concerned. The purpose of visiting the *locus in quo* is for the court to view the place where issues that led to the case before the court arose, in order to enable it 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. It is also for the proper determination of the case before the court in the interest of justice.

[15] Visiting the *locus in quo* is necessary to enable the court understand the evidence better by harnessing the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony, having regard to the nature of the evidence and of the circumstances of the case before it. The purpose of a visit to the *locus in quo*, as has been stated repeatedly, is not to recite the evidence already led but to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to the land, and such a conflict can be resolved by visualising the object, the res, the material thing, the scene of the incident or the property in issue. Where there exists such conflicting evidence as aforesaid, it is

expected that the trial Magistrate will apply the court's visual senses in aid of its sense of hearing by visiting the locus in quo to resolve the conflict.

[16] It follows therefore that not everything said in court needs to be verified during the visit to the *locus in quo*. Only those aspects in respect of which there is conflicting evidence of both sides as to the existence or non-existence of a state of material facts relating to the land need to be verified. There could be multiple conflicting pieces of evidence as to the physical facts on the land but not every one of them may be material to the decision. In the instant case, verification of the existence of the Pwo tree that had been mentioned by P.W.3 Kidega, the Wang Cebo Stream to the South and Awal Mon Stream to the West, the footpath to Pajule Mission cutting across the land in dispute, the respondent's old homestead near the Pwo tree, were sufficient to corroborate the respondent's version of having been in occupation of the land until he was forced to vacate by eruption of the insurgency and not in 1978 as claimed by the appellants.

[17] 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 account of faults in the manner in which the trial court conducted proceedings at the *locus in quo*, it must be demonstrated that the irregularities occasioned a miscarriage of justice. All that is required for the validity of proceedings at the *locus in quo* is substantial compliance with the purpose and the principles that guide such visits. Substantial compliance means a level of compliance that meets the essential requirements that satisfy the purpose or objective of visits to the *locus in quo*, even though some of its formal requirements are not complied with. I find that on the facts of this case, the proceedings conducted by the trial Magistrate at the *locus in quo* met the essential requirements and no injustice was occasioned. This ground of appeal therefore fails.

The plausibility of oral testimony may be determined by how it does or does not fit in with the available physical evidence;

[18] In ground one of the appeal and the sole ground of the cross-appeal, the trial court is faulted for having directed that the land be sub-divided between the parties. The trial court in essence was unable to decide the issues submitted to it and came out with a neutral decision. No wonder none of the parties was satisfied with the outcome. In our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other. If a judicial officer finds it more likely than not that something did take place, then it is treated as having taken place. If he or she finds it more likely than not that it did not take place, then it is treated as not having taken place.

[19] A judicial officer is not allowed to sit on the fence. He or she has to find for one side or the other. Generally speaking in most cases a judicial officer is able to make up his or her mind where the truth lies without expressly needing to rely upon the burden of proof. However, in the occasional difficult case, sometimes the burden of proof will come to his or her rescue. "If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). When left in doubt, the party with the burden of showing that something took place will not have satisfied the court that it did.

[20] When evaluating the evidence, the court makes a determination as to which of the versions presented to it is more plausible. It does that by way of an assessment of qualities in the evidence that make the version apparently valid, likely, or acceptable, such as;- whether it is true, convincing, logical, coherent, consistent, plausible, reliable, honest, sound, concrete, verifiable, authoritative, vivid and credible. Since the burden of proof rests on the plaintiff, the question is whether there are sufficient factual allegations to make the plaintiff's version plausible. It requires court to draw on its judicial experience and common sense

(anchors as external benchmark i.e. for apparent reasonableness or truthfulness of the version).

[21] There are two parts to plausibility; one is the establishing of the plausibility of a proposition, and the other is the testing of that plausibility by subsequent process of examining it, i.e. whether there is sufficient evidence to support the factual allegations. The magnitude of the probability of the argument may either decrease or increase, according the weight of evidence. An accession of new evidence increases the weight of an argument. The court examines the witnesses' statements for internal and external consistency with other available evidence, or other statements by the same witnesses made earlier. A statement is more likely to be true if it accords with known facts, available physical evidence, or other evidence from a source independent of the witness.

[22] 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 ruled 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.

[23] In the instant case, D.W.3; Okech Jakario acknowledged that the respondent had lived on the land at a point in time but was displaced and never returned. Although it is trite law that all rights and interests in unregistered land may be lost by abandonment, it generally requires proof of intent to abandon; non-use of the land alone is not sufficient evidence of intent to abandon. The legal definition requires a two-part assessment; one objective, the other subjective. The

objective part is the intentional relinquishment of possession without vesting ownership in another. The relinquishment may be manifested by absence over time. The subjective test requires that the owner must have no intent to return and repossess the property or exercise his or her property rights. The court ascertains the owner's intent by considering all of the facts and circumstances.

[24] When the respondent vacated the land as a result of the insurgency, that did not terminate his ownership of the land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before (see *John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*). Similarly, the passage of time in and of itself cannot constitute abandonment. For example, the non-use of an easement for 22 years was insufficient on its own, to raise the issue of intent to abandon in the case of *Strauch v. Coastal State Crude Gathering Co., 424 S.W. 2d 677*. The temporary abandonment of the land by the respondent in the instant case not having been voluntary, his rights as owner were revived when he re-asserted them after the insurgency.

[25] D.W.1 Okello Christopher further acknowledged the existence of the road claimed to have been graded by the respondent's brother only that his version was that it was a path that was used by their grandfather in the past. There is no suggestion that the physical evidence seen by court during its visit to the *locus in quo* was fabricated or staged. The trial court examined and compared that physical evidence was with the witnesses' testimony. The court looked at the physical evidence determined how it fit into the overall scenario as presented in the contending versions, on basis of which it determined the reliability of the respective accounts of the parties. It found that the physical evidence was supportive of the respondent's rather than the appellants' version. Since the appellants' version rested only on the word of witnesses, the trial court rightly accorded a lesser weight to that version in the face of the respondent's version which could be independently and objectively verified by the physical evidence found at the *locus in quo*.

[26] The respondent's version was corroborated by the court's observations at the *locus in quo* regarding all material aspects. The respondent's witnesses were more plausible by proximity to the land and source of knowledge. 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 wrong conclusion when it ordered a sub-division of the land.

Order :

[27] The judgment of the court below is accordingly set aside. Instead judgment is entered in favour of the respondent, Olak Anthony, against the appellants and in his favour on the cross-appeal, in the following terms;

a) A declaration that the respondent is the owner of the land in dispute.

b) The road from near Koro to the land in dispute that was constructed by the respondent's brother, Obol Casto, constitutes the boundary between the respondent's and the appellants' land.

c) An order of vacant possession against the appellants who should re-locate to their land which is situated East of the land in dispute.

d) A permanent injunction restraining the appellants, their servants, agents and persons claiming under them from further acts of trespass on the respondent's land.

e) The costs here and of the Court below.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellants : Mr. Owor Abuga Denis.

For the respondent : Mr. Louis Odong.