



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 054 of 2018

In the matter between
OKOT NELSON OJUK **APPELLANT**

VERSUS

NYEKO ESANUERI **RESPONDENT**

Heard: 23 April, 2019.
Delivered: 16 May, 2019.

Civil Procedure —Filing of pleadings — A pleading or other document is not properly filed unless it is presented to the receiving court clerk at the court registry, stamped, signed, the entry is made on the court file index (usually on the inside of the file cover) is dated with the date of the stamp indicated on the document with a recital describing the nature of the filing, and forwarded to the registrar or other judicial officer for acknowledgment and further processing default — Claims for un-liquidated claims — suit continues "as if the defendant filed a defence" — General damages —Without a counterclaim, a defendant is not entitled to an award of general damages.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for a declaration of ownership of land measuring approximately 60 acres, situate at Lamogi village, Laber Parish, Lagoro sub-county, Kitgum District. He sought a declaration that he is the rightful owner of the land, a permanent injunction restraining the respondent from further acts of trespass to the land, general damages for trespass to land, an order of vacant possession, *mesne* profits and the costs of the suit. His claim was that the land in dispute originally belonged to his late father, Yokana Amoo who acquired it in 1963 as vacant hunting ground. Upon the death of his father in 1970, he took

over possession and began utilising the land. During the month of May, 2014, the respondent without any claim of right forcefully entered onto, occupied and cultivated part of the land. The respondent has since refused to vacate the land despite the intervention of the local elders.

- [2] There is a written statement of defence on the court file in which the respondent averred that the land in dispute forms part of 200 acres that belonged to the respondent's great-grandfather, Mura. The appellant is the son of the respondent's nephew, Yokana Amoo. The said Yokana Amoo migrated from Pacudu village, Laber Parish, Lagoro sub-county, Kitgum District to seek the assistance of the respondent's father to find him a wife. the Pacuda clan allowed the appellant to live on the land and he cultivates it jointly with the respondent. The respondent has never interfered with the appellant's activities on the land.

The appellant's evidence;

- [3] The appellant Okot Ojuk Nelson testified as P.W.1 and stated that the land in dispute measures approximately 30 acres. Its boundaries are marked by Yaa and Ojara trees. His father planted one Kabiriti tree and one Lalano trees on the land. He began utilising the land in 1970 following the death of his father in 1960. The land was vacant hunting ground when he secured it and planted trees along its boundary. It is in the year 2014 that the respondent began his efforts to evict him from the land. P.W.2 Otim Donasiano testified that he lives three miles away from the land in dispute but has a garden sharing a common boundary with the land in dispute which he has been tending since 1961. The land belonged to the appellant's father Yokana Amoo and the appellant began utilising the land in 1974. The appellant returned to the land at the end of the insurgency.
- [4] P.W.3 Celestino Ocaya testified that the appellant's father acquired the land in dispute from a one Pilbato Oryema in 1961. The appellant put up a temporary structure on the land and used the land for cultivation until cattle raiders from

Karamoja forced them off the land. The appellant's father live at the home of Abito Olanya, five miles from the land in dispute, and when he died it is where he was buried. He never put up a house on the land in dispute. The appellant has since put up a house on the land. The dispute began when the respondent encroached onto the land and began growing crops in it. P.W.4. Omwoya Sisto testified that the land in dispute belonged to the late Amoru Yokana and when he died his family migrated to Lamogi and left the land to the respondent.

The respondent's evidence;

- [5] D.W.1; Nyeko John, testified that the land in dispute served as a hunting ground for the Lamogi Clan at Laloo village. Now it is being used by the clan as farmland and no one resides on it. The land in dispute was first secured by his grandfather Muera from the Pacenga Clan. Through a series of inheritances, it passed to the respondent, Nyeko Esenueri. D.W.1 was born in 1962 and his family has been cultivating this land since then. The appellant had his own garden adjacent to the land in dispute. D.W.1 was involved in a multiplicity of boundary disputes with other persons neighbouring the land which were amicably resolved. The appellant had attended all of them and had never claimed any part of the land as his. He produced documentary evidence of these previous boundary dispute settlements. It is during the year 2014 that he began encroaching on the land in dispute. In 2017 he forcefully constructed three grass thatched huts on the land. D.W.2; Isaiah Oyugi testified that the parties share a common boundary. The dispute between them only sprouted two years before the current litigation. The respondent had been growing crops on the land for a long time before the appellant began encroaching on it and later built a house on it.
- [6] D.W.3; Omona Sejario testified that the land in dispute belongs to the respondent and was used only for cultivation of crops. It is only recently that the appellant began growing crops on the same land. D.W.4 Akaka John the Pasango Clan leader, testified that during the year 2016 he was called upon to mediate the

dispute between the two parties over the same land and it was resolved in favour of the respondent, because the appellant could not demonstrate the boundaries of the land. When the appellant forcefully returned to the land he was arrested.

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

[7] The court then visited the *locus in quo* where it was unable to prepare a sketch map of the entire land in dispute because it was vast land. It however was shown the boundary marks that had been put in place in settlement of previous disputes between the respondent and his neighbours. The court observed that the appellant's son had a house on the land in dispute. The appellant showed court what he claimed to be the boundary between his land and that of the respondent.

The judgment of the court below;

[8] In his judgment, the trial Magistrate found the evidence of P.W.2 to be unreliable since it was inconsistent with the observations made at the *locus in quo*. The appellant's testimony was not corroborated by any of his neighbours. The respondent on the other hand had evidence of past settlement of boundary disputes with some of his neighbours to the East and West. The respondent was declared rightful owner of the land and since there was evidence that the appellant had recently settled on the land, an order of vacant possession was issued. The respondent was awarded general damages of shs. 2,500,000/= for trespass to land. He was also awarded the costs of the suit.

The grounds of appeal;

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

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion.
2. The learned trial magistrate erred in law and fact when he entertained and granted the respondent audience in court yet he had not filed a defence to the suit.
3. The learned trial magistrate erred in law and fact when he awarded the respondent general damages when he had not specifically pleaded nor proved the damages since he did not file a counterclaim.

Submissions of counsel for the appellants;

[10] Counsel for the appellant submitted that although there is a written statement of defence on the file purportedly filed by the respondent, neither does it bear a "received" stamp of the court nor the court seal. It does not bear the signature of any court official. The defence should not have been considered. The trial Magistrate further erred when he reproduced the appellant's evidence without analysing it. The respondent did not claim general damages and the court red in awarding them. The appeal should therefore be allowed.

Submissions of counsel for the respondent;

[11] In response, Mr. Louis Odong counsel for the respondent submitted that the first ground of appeal ought to be struck out for lack of precision. At the scheduling conference, it was never raised that the respondent had not filed a written statement of defence. He had filed one and the court was right to consider it. The trial Magistrate properly exercised his discretion in awarding the respondent general damages and the amount awarded was reasonable. The entire decision is justified by the evidence on record and therefore the appeal should be dismissed.

The duties of this court;

[12] 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 17 of 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).

[13] 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 general ground of appeal is struck out;

[14] 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 proper filing of pleadings and documents in court.

- [15] The second ground of appeal faults the trial Magistrate for having considered the respondent's written statement of defence and for having granted him audience when there is no evidence that it had been properly filed in court. Indeed perusal of the written statement of defence on the court record indicated that it does not bear a signature of any court official, it does not bear a court stamp acknowledging receipt nor a court seal. A pleading or other document may be filed by presenting it to the receiving court clerk at the court registry. The court clerk will then stamp the pleading or document presented with the current date. The court clerk may not backdate a filing so made. The entry on the court file index (usually on the inside of the file cover) is dated with the date of the stamp indicated on the document with a recital describing the nature of the filing, and forwarded to the registrar or other judicial officer for acknowledgment and further processing (the filing of any document or pleading in court by a court clerk is done with judicial oversight, hence the recital ought to be signed by a registrar or other judicial officer). A court clerk is only allowed to reject a filing if the applicable filing fee defined by the rules has not been paid or where an incorrect case number has been ascribed to it.
- [16] Therefore, a document or pleading is deemed to be properly filed when the correct case number has been ascribed to it, the applicable filing fee defined by the rules has been paid, it was presented to the receiving court clerk at the court

registry who date stamped it with the current date, signed it and made an entry on the court file index reflecting the date of the stamp indicated on the document, and a recital made describing the nature of the filing. The said entries, stamp impressions and signatures will be *prima facie* evidence of the proper filing of a pleading or document. However if due to oversight there is a failure to affix a date, stamp or sign such a document, the effect of that failure will not in all cases affect the validity of the filing or invalidate processes filed in a court of law. It is an irregularity that can be cured where it is possible to otherwise ascertain that it was duly filed, and in a timely manner. The effect of such failure will depend on the circumstances of each case.

- [17] In the instant case, there is nothing on the face of the responder's written statement of defence to show that it was duly received by the court clerk who placed it on the file. It does not bear any court registry stamp indicating the date of filing, it is not signed by any court clerk, no entry of its filing was made on the court file index reflecting the date filing, and there is no recital made describing the nature of the filing. It does not meet the requirements of filing and yet it cannot otherwise be ascertained that it was duly filed, and in a timely manner. Consequently counsel for the appellant is right to dispute the validity or correctness of the respondent's filing of this written statement of defence.

The suit continues "as if the defendant filed a defence":

- [18] Nevertheless, under Order 9 rule 10 of *The Civil Procedure Rules*, where the suit is not for a liquidated demand, in case a party does not file a defence on or before the day fixed therein, the suit may proceed "as if that party had filed a defence." This phrase means that the court should proceed "as it would if the defendant had filed a written statement of defence." Order 9 rule 11 thereof provides that at any time after the defence has been filed, the plaintiff may, upon giving notice to the defendant, set down the suit for hearing. The implication is that the defendant in such a case is entitled to notice of the hearing (see *Otanga*

v. Nabunjo [1965] EA 384). On appearing in response to the notice, the defendant is entitled to be heard. The trial court therefore did not misdirect itself when it heard the respondent in his defence despite his failure to file a written statement of defence to the suit. Since I have re-evaluated the evidence and found that the decision of the court below is supported by the evidence available on record, the second ground of appeal accordingly fails.

Without a counterclaim, a defendant is not entitled to an award of general damages:

[19] The last ground of appeal faults the trial Magistrate for awarding the respondent general damages. An appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd.*, S.C.C.A. No. 10 of 1993 (unreported) and *Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises*. S.C.C.A No. 16 of 2006).

[20] Order 8 rule 7 of *The Civil Procedure Rules* requires a defendant who has any right or claim, whether it sounds in damages or not, to raise it by way of counterclaim against the claims of the plaintiff, so as to enable the court to pronounce a final judgment in the same action, both on the original suit and on the cross-claim by way of counterclaim. I find that in absence of a counterclaim to the suit, the respondent was not entitled to any affirmative remedies. The award of damages was misconceived. The proper order should have been dismissing the suit for failure to prove the appellant's claim, with an award of costs. For that reason the award of general damages is set aside.

Order:

[21] Instead judgment is entered dismissing the suit and awarding the costs of the suit to the respondent. Since the appeal succeeds only in part, the appellant is awarded half the costs of the appeal.

Stephen Mubiru
Resident Judge, Gulu

Appearances:

For the appellants : Mr. Michael Okot.

For the respondent : Mr. Louis Odong.