IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 070 of 2016

In the matter between

ACAN RHODAH OKUMU .... APPELLANT

VERSUS

1. OTIM ROBERT }
2. ONEN DENIS } .... RESPONDENTS

Heard: 14 May, 2019.
Delivered: 30 May, 2019.

Civil procedure *— Duty of court to decide disputes — In our legal system, court must make a finding in favour of one of the parties, against the other—Save for matters that are not justiciable, matters over which a court has no jurisdiction or where a conflict of interest arises involving the presiding judicial officer, a judicial officer cannot decline to hear and decide a dispute submitted to the court—A re-trial will be ordered where a vital part of the trial record, such as the notes of proceedings at the locus in quo, is missing.*

Land Law *—Boundary disputes— fixing of a boundary line between adjacent plots where the boundary stipulations in a planning scheme conflict with property descriptions created by long periods of possession — Locus in quo visits —the decision to visit a locus in quo is essentially discretionary. Such a visit will be imperative though where there are conflicting pieces of evidence as to the physical facts in issue that could be easily resolved by viewing through a physical inspection of the land*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant, as administratrix of the estate of her late husband Okumu Sisto, sued the respondents jointly and severally for recovery of a plot of land measuring approximately 46 x 57 metres, situate at Auch village, Gangdyang Parish, in Kitgum Town Council, Kitgum District. She sought a declaration that

she is the rightful owner of the land, an order of vacant possession, a permanent injunction restraining the respondents from further acts of trespass to the land, general damages for trespass to land, and the costs of the suit.

[2] Her claim was some time during the year 1995, the late Sisto Okumu applied for a plot within Kitgum Town Council, which application was approved on 1st July, 1996 whereupon he was allocated plot No. UNS along Fr. Vignato Road. He constructed a permanent building on the plot which he proceeded to occupy together with his family. Following the death of Sisto Okumu in 2003, the respondents on 6th July, 2005 attempted to cause the survey of the plot but were stopped by the Town Council authorities upon the appellant's complaint. The respondents claimed the plot belongs to them and they have since then prevented the appellant from having quiet enjoyment of the land. The respondents went ahead to fence off part of the plot thereby preventing the appellant from accessing it, hence the suit.

[3] In their written statement of defence, the respondents averred that in 1971, their father Kidega Charles acquired a piece of land in Gangdyang. He built houses on the land and fenced it. Later the appellant's late husband acquired an adjacent plot and constructed a permanent house thereon which he eventually occupied together with his family. They denied liability for her claim.

<u>The appellant's evidence</u>;

[4] The appellant Achan Rhodah Okumu testified as P.W.1 and stated that in 1995 at its public notice board, Kitgum Town Council invited applications for plots of land within the Town Council. The late Sisto Okumu applied for the plot in dispute (exhibit P.2). He was allocated the plot and began construction upon the completion of which the building was inspected (exhibit P.1). the respondent's father, Kidega Charles became their neighbour of the left side of the plot (Southward) in 1999. Sisto Okumu died on 11th November, 2011 and it is during

the year 2003 that the defendants began encroachment of the land against the appellant's protestations, first by construction of one grass thatched hut and later multiple unipots on the part of the plot Sisto Okumu had reserved for the compound and future development, and thereafter they fenced it off, forcing the appellant off that part of the land. The Town Council had in 2006 opened the boundary between the two plots but the respondents exceeded it when constructing the hut, unipots and fence, claiming it was part of their land. Temporary mark stones had been planted by the Town Council pending the official survey.

[5] P.W.2 Olaa Yusuf testified that he was a the Land Patrol Man in 1994 when the late Sisto Okumu applied for the plot. It is him who showed the late Sisto Okumu the location of the plot. The application was approved on 14th September, 1994. At the time of the allocation, the plot was vacant but had been previously cultivated by prison authorities. P.W.3 Ochan Charles, the former Vice Chairman of Kitgum Town Council, testified that in the year 2006 he participated in resolving a boundary dispute between the appellant and the respondents. The respondents claimed to have acquired the part of land in dispute from their father Kidega Charles. After the surveyor had opened the boundaries, it was established that the respondents had trespassed onto most of the appellant's southern part of her land. The respondents agreed to rectify the mistake in their site plan.

[6] P.W.4 Achola Iryn Origa, the tehn Physical Planner of Kitgum Town Council, testified that by Town Council minute GPC Min. 28/95 (53) Okumu Sisto was allocated a plot of land along Fr. Vignato Road for residential purposes. A Court Commissioned Witness, a one Nyeko George, upon instructions of court, opened the boundaries of the appellant's and the respondent's respective plots. He discovered that the two plots have never been surveyed. He discovered further that on basis of the Town Council official physical plan of the area I/S No. A4662, there are three occupants on one plot; the appellant, the first respondent and a

one Komakech. The first two have permanent buildings on the plot, separated by bamboo fences.

<u>The respondents' evidence</u>;

[7] The first respondent Robert Otim testified as D.W.1and stated that their father Kidega Charles acquired land in Gangdyang in 1975 and he, the first respondent, was born on that land which they used for cultivation at the time. The appellant has been their neighbour to the North since 1995. The boundaries are marked by a hedge and trees that have existed thereon since the 1980s. His father used to pay ground rent for the plot and has receipts dating back to 1994. In 2003, he received notice that he had trespassed onto the appellant's land. It is him and the second respondent who have semi permanent structures on the area in dispute, the appellant has none.

[8] D.W.2 Kidega Charles testified that the two respondents are his sons. He was informally allocated the land in dispute in 1975. It was an un-surveyed plot. He constructed a house thereon and began payment of ground rent. Later the appellant's late husband acquired a plot adjacent to his on the Northern side. The witness planted a hedge and trees like oranges, acacia and ceriman along the boundary. Okumu Sisto attempted to cause a survey of his plot but since it was encroaching five paces into his land, the witness objected to the survey and both were advised to negotiate. The appellant decided to sue. D.W.3 Okwera Santo testified that some time during the year 1986 when he acquired the plot of land he is occupying from the Town Council, he found D.W.2 was already resident on the plot now in dispute. D.W.2 planted trees to mark the boundary between his plot and that of the appellant's late husband.

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

[9] The court then recorded that it had visited the *locus in quo* (but the proceedings threat are not reflected on the trial record) where it observed that the disputants are neighbours each with structures that have existed on their respective plots for over 20 years. They share the same access road and compound and any bystander would perceive them as members of the same family. In his judgment, the trial Magistrate held that both parties occupy un-surveyed plots which each occupied before seeking formal allocation by the Town Council, hence each of them had a customary interest in the land. The dispute between them was sparked off by the attempt by each of them to survey their respective plots. At the time the Town Council made allocations to each of them, they were both already occupying their respective plots. He found that they needed to resolve their dispute amicably and for that reason the court declined to grant any of them any relief. The suit was dismissed and each party was ordered to bear their own costs.

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 in fact when he dismissed the appellant's claim of ownership of the suit land.
2. The trial magistrate erred in law and fact when he decided that the appellant and the respondents have customary interests in the suit land.
3. The trial magistrate failed to evaluate the evidence before him thereby reaching a wrong decision.
4. The trial magistrate erred in law and in fact when he did not find that the respondents were trespassers on the suit land.
5. The trial magistrate erred in law when he did not conduct a *locus in quo*.

Submissions of counsel for the appellant;

[11] In his submissions counsel for the appellant argued that contrary to the evidence on record, the trial Magistrate erroneously found that the parties owned customary interests in the land in dispute, yet each had been allocated a plot by the designated Town Council authorities. P.W.2 testified that the land was vacant before it was allocated to the appellant. P.W.4 confirmed that the allocation was made to the appellant only. The respondents' trespass only began in 2002. They did not adduce any credible evidence to explain their claim over the land. He prayed that the appeal be allowed with costs. The respondents did not file any submissions.

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 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*).

[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 third 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 struck out.

There cannot be a "draw" in civil litigation.

[15] As regards the second ground of appeal which faults the trial Magistrate for finding that each of parties had a customary interest in the land, when the trial court has reached a conclusion on the primary facts, the appellate court when re-evaluating the evidence may come to a different conclusion where; - (i) there was no evidence to support the finding, (ii) the finding was based on a misunderstanding of the evidence, (iii) it is shown that the Magistrate was clearly wrong and reached a conclusion which on the evidence he or she was not entitled to reach, (iv) the findings of credibility are perverse, or (v) it is a finding which no reasonable court could have reached, based on the evidence on record. Though it ought, of course, to give weight to the opinion of the trial court,

where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge (see *Benmax v. Austin Motor Company Ltd [1955] 1 All ER 326 at 327*). This court is therefore at liberty to evaluate the inferences drawn from the facts by the trial Magistrate.

[16] The appellant's claim was that some time during the year 1995, her husband the late Sisto Okumu applied for a plot within Kitgum Town Council, which application was approved on 1st July, 1996, hence his acquisition of the plot in dispute. On their part, the respondent's adduced the evidence of D.W.2 Kidega Charles testified that the two respondents are his sons. He was informally allocated the land in dispute in 1975. It was an un-surveyed plot. He constructed a house thereon and began payment of ground rent. None of the parties claimed to have acquired the plot in dispute by custom or to have been in possession before the allocation. Both claimed to have acquired it by allocation and their respective claims began with the allocation. Therefore, when the trial Magistrate found that at the time the Town Council made allocations to each of them, they were both already occupying their respective plots, that finding is not supported by any evidence. It was a misdirection by reason of which the second ground of appeal succeeds.

[17] In grounds one and four, the trial Magistrate is faulted for having dismissed the suit and for holding that the respondents were not trespassers on the land in dispute. The dispute between the parties springs from the fact that each claims to have been allocated un-surveyed land as a result of which they occupy adjacent plots. The dispute between them is essentially in relation to the common boundary between their respective holdings. The appellant's claim as to the location of the boundary is based on the town's physical plan while that of the respondents is based on boundaries that have existed physically on the ground and observed and respected by the neighbours, through a relatively long period

of time. The solution to the dispute lay in reconciling physical plan with actual possession. The court abdicated this duty, deciding instead to send the parties back *to* resolve their dispute amicably and for that reason the court declined to grant any of them any relief, yet it dismissed the suit.

[18] The Courts of judicature are Constitutionally mandated to hear cases in order to resolve conflicts of a legal nature. They are mandated to administer justice through resolving disputes between citizens and between the State and citizens, to promote the rule of law and thereby contribute to the maintenance of order in society, to protect human rights of individuals and groups, and so on (see Chapter 8 of *The Constitution of the Republic of Uganda, 1995*). Courts are under a duty to administer justice through resolving disputes of a legal nature by hearing, considering, deciding and disposing of the cases quickly and fairly in accordance with the law. Save for matters that are not justiciable, matters over which a court has no jurisdiction or where a conflict of interest arises involving the presiding judicial officer, a judicial officer cannot decline to hear and decide a dispute submitted to the court. The trial Magistrate therefore abdicated his duty.

[19] In our legal system, 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. 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] The trial magistrate therefore if dissatisfied with the appellant's evidence, ought to have dismissed the suit for that reason but not for purposes of sending the parties back to resolve their dispute amicably and for that reason the court declining to grant any of them any relief. Where he dismissed the suit, the appellant did not adduce credible evidence to prove that the respondents were trespassers on his land. Therefore grounds one and four succeed in only in part.

Discrepancies between the planning scheme and boundaries created by long periods of possession;

[21] In ground five, the trial Magistrate is faulted for not having visited the *locus in quo*. It is curious that although in his judgment the trial Magistrate made reference to observations he made while at the locus in quo, that part of the proceedings is missing from the trial record. The respondents closed their case on 22nd June, 2015 whereupon the Magistrate adjourned further hearing of the suit to 21st July, 2015 at the *locus in quo*. Thereafter nothing was placed on record until delivery of the judgment on 10th November, 2016.

[22] The dispute between the parties was sparked off by a disagreement over the true location of the common boundary between their respective adjacent land holdings. Under section 5 (2) of the law then in force, *The Town and Country Planning Act,* (repealed by *The Physical Planning Act 2010*), the Minister could by statutory order declare an area to be a planning area. When a detailed or planning scheme is brought into effect, the authority empowered in that behalf has an obligation to ensure that land within the planning is developed in accordance with the outline scheme or the detailed scheme. *The Physical Planning Act 2010* does not offer any guidance as to the fixing of a boundary line between adjacent plots where the boundary stipulations in a planning scheme

conflict with property descriptions created by long periods of possession. In such cases compliance with the planning scheme may involve adjustment of the boundary line. The alternative is for the urban authority to award compensation for land taken or otherwise injuriously affected by the operation of any provision of a scheme.

[23] It is this court's view that for the sake of avoiding unnecessary inconvenience such as would arise by separate an accessory dwelling unit from the primary use of the property, minor boundary line adjustments to the plots reflected in the planning scheme, for purposes of maintaining existing physical boundaries, ought to be permitted when no new plots are created through that process. This should be so where the plots so adjusted meet the applicable use and development standards, do not create an unreasonably restrictive or dangerous property access, do not diminish or harm public or private utility easements or deprive a parcel of access or utilities, do not create an unsafe or hazardous environmental condition, comply with the requirements for public or private roads, and other requirements of the urban authority's regulations. Such adjustments ought to be permitted when they do not result in a parcel that contains inadequate area to meet the minimum parcel size requirements. In the case of existing nonconforming plots, the adjustment should not create a new or greater nonconformity with respect to the planning scheme and any of the urban authority's regulations.

[24] In the court below, the Court Commissioned Witness, a one Nyeko George, adduced evidence of the planning scheme for that area labelled as I/S No. A4662. In his report dated 20th October, 2014, he illustrated the plots as per the planning scheme onto which he superimposed the existing activities on the land. It reveals that the land occupied by the appellant lies astride two planned plots, one of which is that now in dispute. Over that plot, the boundary to the land physically occupied by the appellant runs more or less through the middle of the plot planned under the scheme. The part that lies outside that boundary is then

occupied by the two respondents and another Mr. Komakech. This is a case where the boundary stipulations in the planning scheme conflict with property descriptions created by long periods of possession. While the appellant claims she is entitled to the entire plot, the respondents insist that she should be restricted to the area that she physically occupies.

[25] Unfortunately, there is no record of the court's observations at the *locus in quo* or its own verification and illustration of the existing boundaries. Apart from the testimony of the Court Commissioned Witness, Nyeko George, the only other evidence adduced in court relating to the position of the disputed boundary was that of the first respondent Robert Otim who as D.W.1 testified that the boundary is marked by a hedge and trees that have existed thereon since the 1980s. D.W.2 Kidega Charles too testified that he planted a hedge and trees like oranges, acacia and ceriman along the boundary. It is the principle of the law that when two pieces of land are separated by a fence which has stood for many years, on basis of the “hedge and ditch presumption,” it is likely that this would be ruled to be the boundary unless it is clear from the official records of title or town planning drawings that this could not be the case.

[26] On the other hand, boundaries can shift over the course of time via the doctrine of adverse possession. Adverse possession is where a person treats another’s land as if it was his own and assumes possession of it. This happens often with neighbours where a boundary fence will be erected on the neighbour’s land so that physically, a strip of the neighbour’s land is incorporated into one's own. The implication is that, subject to other considerations, the neighbour who has put the fence in the wrong place (the “adverse possessor”) becomes the owner of the land provided a period of 12 years elapses without an objection being raised, or even if an objection is subsequently raised after the 12 years.

[27] It has been said before that the purpose of an inspection of a locus in quo is not to substitute the oral testimony in court but rather to clear any ambiguity that may

arise in the evidence or to resolve any conflict in the evidence as to physical facts. In other words, the purpose of an inspection of a *locus in quo* is primarily for the purpose of enabling the court to understand the questions that are being raised at the trial and to follow the evidence and apply such evidence. Notwithstanding the fact the decision to visit a *locus in quo* is essentially discretionary, such a visit will therefore be imperative where there are conflicting pieces of evidence as to the physical facts in issue that could be easily resolved by viewing through a physical inspection of the land.

[28] In the instant case, there were conflicting pieces of evidence as to the physical facts in issue relating to the location of the physical common boundary. These are facts which could be easily resolved by viewing through a physical inspection of the land and it is therefore understandable why, after the close of the defence case on *22nd June, 2015* the court adjourned the case to *21st July, 2015* for visiting the *locus in quo*. If the visit did take place, what transpired during that visit is not reflected on the record of proceedings, yet the trial Magistrate made reference to his observations while thereat, in his judgment.

[29] 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 failure of the trial court to visit the *locus in quo*, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. Failure to visit the *locus in quo* will not result in a reversal of the decision of the trial court by an appellate court except where it is demonstrated that the principles of a fair hearing were imperilled by that failure in so fundamental a manner, that the trial was rendered a nullity.

A re-trial will be ordered where a vital part of the trial record is missing;

[30] The law on missing parts of a record of proceedings has long been established. Where reconstruction of the missing record is impossible by reason of neither of the parties being in possession of the missing record, but the court forms the opinion that all the available material on record is sufficient to take the proceedings to its logical end, the court may proceed with the partial record (see *Mrs. Sudhanshu Pratap Singh v. Sh. Praveen (Son), RCA No.32/14 & RCA No. 33/14, 21 May, 2015* and *Jacob Mutabazi v. The Seventh Day Adventist Church, C.A. Civil Appeal No. 088 of 2011*). However, where reconstruction of the missing record is impossible and court forms the opinion that all the available material on record is not sufficient to take the proceedings to its logical end, a re-trial would be ordered (see *Mukama William v. Uganda, [1968] M.B. 6; Nsimbe Godfrey v. Uganda, C.A. Criminal Appeal No. 361 of 2014* and *East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-200] HCB 331*).

[31] An order for retrial is an exceptional measure to which resort must necessarily be limited. A trial *de novo* is usually ordered by an appellate court when the original trial fails to make a determination in a manner dictated by law. A retrial should not be ordered unless the following conditions are met; (i) that the original trial was null or defective; (ii) that the interests of justice require it; (iii) that the witnesses who testified are readily available to do so again should a retrial be ordered; and (iv) no injustice will be occasioned to the other party if an order for retrial is made. These conditions are conjunctive and not disjunctive. The context of each retrial is unique, and its impact can only be addressed by taking into account this individual context. None of these bars to a re-trial is evident on the face of the record in the instant case.

[32] For as long as there are no special circumstances in the case as would render it oppressive to put the defendant on trial a second time, an appellate court will order a retrial where it is satisfied that there has been such an error in law or an

irregularity in procedure of such a nature which renders the trial a nullity or makes it possible for the appellate court to say that there has been a miscarriage of justice. A fair hearing lies not in the correctness or propriety of the decision but rather in the procedure followed in the trial and determination of the case.

[33] Where in any proceedings the fundamental principles of a fair hearing are breached, such a breach renders the entire proceedings null and void and the appropriate consequential order is one of retrial before another Magistrate. It is clear from the record of proceedings that learned trial Magistrate relied on observations he made which are not reflected on any part of the record. This Court cannot proceed to re-evaluate that part of the evidence based on mere surmises on what the trial court observed at the *locus in quo* and as to how its observations thereat influenced or did not influence its decision. This error, on the facts of this case, been demonstrated to have affected the trial court's judgment and the outcome. The only way to correct this error is by way of a retrial.

Order :

[34] Consequently, the appeal succeeds. The judgment of the court below is set aside. A retrial is ordered before a different magistrate with jurisdiction over the matter. Each party is to bear their costs of the appeal and of the court below.

Stephen Mubiru
Resident Judge, Gulu

Appearances:

For the appellant : Mr. Lloyd Ocorobiya.

For the respondents: Mr. Donge Opar.