IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 003 of 2018

In the matter between

1. OTIKA CHARLES }
2. ALOYO JACINTA TOO } ……………………………………APPELLANTS

VERSUS

OKELLO JAMES ………………………………………………………… RESPONDENT

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

***Land Law** —Boundary disputes — the weight and order of priority given to boundary features in case of conflicting evidence, in the determination of a true boundary.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for a declaration of ownership of land measuring approximately 30 acres, situate at Opete village, Lukwor Parish, Amida sub-county in Kitgum District. He sought a declaration that he is the rightful owner of the land, an order of vacant possession, a permanent injunction restraining the appellants from further acts of trespass to the land, *mesne profits*, general damages for trespass to land, and the costs of the suit. His claim was that he inherited the land in dispute from his late father Okello Terensio. He enjoyed quiet possession and user of the land until the year 2006 when the appellants trespassed onto it. They laid bricks, constructed huts and established gardens on approximately 5 - 6 acres of the land.

[2] In his written statement of defence, the first respondent contended that the land in dispute originally belonged to his father Okeny Janani who later gave him part of it. It is his father that ought to have been sued. He prayed that the suit should therefore be dismissed with costs. In her written statement of defence, the second appellant contended that she moved onto the land in dispute in 1960 together with her husband Tom Too. They lived on the and peacefully until 1997 when they were forced into Kitgum town by the insurgency. They continued to sneak back periodically and cultivate the land until the year 2002 when they eventually returned to occupy it. The boundary between her land and that of the respondent is marked by a palm (Tugu) tree. It is during the year 2012 that the respondent, without any claim of right, began laying claim to the land. The respondent encroached onto her land by laying bricks and cultivating sorghum. She prayed that the suit is dismissed with costs.

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

[3] In his testimony as P.W.1 the respondent Okello James testified that the appellants are his neighbours, one to the South and the other to the North of the land. He inherited the land from his late father Okello Terensio who died in 1987. In 2006, and IDP Camp was established on the land. It is in the year 2009 that the appellants began trespassing on the land by laying bricks and growing crops. The second appellant and her husband were neighbours and the boundary was marked by an anthill and an oduku tree. Although he ordinarily lived in Luzira as a prisons officer, he had established a hut on the land in dispute before the insurgency but now does not have any development on the land.

[4] P.W.2 Akio Regina testified that the land in dispute belonged to Okello Terensio. At one time an IDP Camp was located on the land. It is in the 1980s that the second respondent came to Kitgum town as a shop attendant for her father in law. She was allowed to live on the land temporarily and signed an undertaking to vacate. She left the land in 1986 for Kitgum Town and the house she used to

occupy was demolished. P.W.3 Obiya Morish, testified that the land in dispute belonged to the respondent's father Terensio Okello and when he died in 1987, the respondent took over the land. Both appellants are neighbours to the land. Both of them began encroaching on the respondent's land in 2007 after the IDP Camp. The boundary was a road. The Tugu tree is within the respondent's land. The second appellant has trespassed on approximately two and a half acres of the land.

The appellants' evidence;

[5] In his defence as D.W.1, the first appellant Otika Charles testified that he occupies two acres of land given to him by his late father Jeromiya Okeny in 1962. He planted varieties of trees on the land during 1980 and has his house on the land. The second respondent occupies land that belonged to her father in law. It is in 2013 that the dispute with the respondent began. The boundary between his land and that of the respondent is the Lakgo and Odya trees. D.W.2 Okeny Janani, testified that he gave the land in dispute to the first appellant. The boundary between that land and the respondent's is marked by an anthill, palm tree, and an acacia tree. The first appellant lives on the land and has three grass thatched houses on it. The dispute with the respondent began in 2013.

[6] D.W.3 Okeny Janani testified that he is the father of the first appellant, Otika Charles. He obtained the land in dispute from his late father and gave part of it, an area measuring 38 feet by 14feet to the first appellant. By that time the respondent's father was dead, having passed on during 1987. It is in 2013 that the respondent began complaining, alleging that the first appellant had trespassed onto his land. The boundary between the first appellant's and the respondent's land is an anthill, a palm tree and an acacia tree.

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

[7] The court then visited the *locus in quo* where it obtained evidence regarding the history of the land from "the community," both parties demonstrated the boundaries of the land in dispute, being an anthill on the side of the first appellant and a Kalira tree on the side of the second appellant.

Judgment of the court below;

[8] In his judgment, the trial magistrate observed that while at the *locus in quo*, the community members gave a long history of the land in dispute. The boundary between the first appellant and the respondent's land is an anthill. The boundary between the second appellant and the respondent is a Kalira tree which was cut by the second appellant. Both appellants crossed their respective boundaries and that constituted acts of trespass onto the respondent's land. The respondent was declared lawful owner of the land in dispute. The appellants were declared to be trespassers on the land. A permanent injunction was issued against both appellants. The appellants were ordered to meet the respondent's costs of the suit.

The grounds of appeal;

[9] 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 when he held that the respondent was the owner of the suit land.
2. The learned trial magistrate erred in law and fact when he held that the appellants were trespassers on the suit land.
3. The learned trial magistrate failed to properly evaluate the evidence on record thereby reaching a wrong decision.

Submissions of counsel for the appellants;

[10] The appellants' counsel argued that the respondent did not explain by what process he inherited the land yet he had several siblings. He had no *locus standi*. He did not define the boundaries of the land he claimed yet the appellants did. The respondent had not lived on the land and did not know its boundaries. The respondent claimed the entire land occupied by the appellants yet he had no activity on the land. None of the appellants had exceeded the boundaries they described in court.

Submissions of counsel for the respondent;

[11] In response, counsel for the respondent submitted that the evidence given by the first appellant was contradictory and unreliable regarding the size of the land given to him. The trial magistrate correctly found that the anthill and the Kalira tree respectively formed the boundaries and each of the appellants had crossed their respective boundaries. The appeal ought to 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 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.

<u>The general ground of appeal is struck out</u>;

[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 accordingly struck out.

<u>Dealing with conflicting evidence in the determination of a true boundary position;</u>

[15] Grounds 1 and 2 will now be considered concurrently in so far as they challenge the trial court's finding relating to ownership of the land and trespass to that land. The essence of the dispute between the parties was as to the location of the

boundaries between their respective adjacent pieces of land. When the court is faced with contradictory or inconsistent evidence as to the location of a boundary between two adjacent pieces of land will look to extrinsic evidence when seeking to determine the true position of a boundary.

[16] Regulation 21 (1) of *The Land Regulations, 2004* provides the following sources as a guide;- a statement on the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land matters in the parish or the urban area; (ii) simple or customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects; (iii) human activities on the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land; (iv) maps, plans and diagrams, whether drawn to scale or not, which show by reference to any of the matters referred to in sub-paragraph (ii) or (iii) the boundaries of the land. In short, there are any number of factors which a court may consider when determining the true boundary between two properties, and the court is entitled to give what weight it feels appropriate to each element in order to reach a decision on all the evidence.

[17] In his book, *Law Relating to Land Boundaries and Surveying*, published by the Association of Consulting Surveyors Queensland, (1980) at page 155, Brown Allan suggest the following hierarchy of giving weight to evidence of cadastral boundaries to guide the reinstatement of cadastral boundaries; (i) the greatest weight must always be given to lines actually marked on the ground; (ii) next most important are natural monuments mentioned in the deed; (iii) Adjoiners, "a well established line of adjacent survey," often rank as natural monuments; (iv) artificial monuments rank next; (v) maps or plans actually referred to in the deed rank after artificial monuments; (vi) unmarked lines which are well recognised rank next to maps and plans in importance (vii) bearings and distances will over-ride other calls only, in most cases, where there is no trustworthy evidence of such other calls; (viii) as between bearing and distance, neither is given overall

preference, if they are inconsistent with each other the circumstances dictate which is preferred; (ix) Area, will in general be the least valued evidence, but may in some cases be the key to the problem; and (x) finally, but most important of all, any one of these rules may be of more (or less) weight in one case than another. The rules set out are for cases of conflict, they are general rules, to be used as a guide but not as a straightjacket (see also *Donaldson v. Hemmant (1901) 11 QLJ 35 at p41;*) *Fulwood v. Graham, 1 Rich. 491 (1844)* and *Walsh v. Hill 38 Cal. 481 (1869)*.

[18] The hierarchy is merely an indication and it should yield to the particulars of a case. The location of a boundary is primarily governed by the expressed intention of the originating party or parties or, where the intention is uncertain by the behaviour of the parties. Therefore one of the keys to ascertaining the intention of the parties is resolving how it was expressed in the actions of the parties.

[19] The visit to the *locus in quo* by a trial court is meant to determine whether or not the physical evidence of boundaries is in accord with the oral testimony of the boundaries. Evidence of occupation that is contemporary with the boundary creation may resolve the boundary position. A long occupation authorised by the original owner, and acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which was conveyed to the occupant. In such cases the occupier is not to be driven to rely on a mere possessory title; but has a right to assert that the land he or she holds is the very land granted (see *Equitable Building and Investment Co. v. Ross (1886) NZLR 5SC 229* often referred to as the *Lambton Quay Case*). Boundary positions publically agreed to and observed by neighbours over long periods of time by neighbours, will be binding even when found later to be inaccurate (see *South Australia v. Victoria (1914) AC 283*).

[20] Since none of the parties adduced evidence of maps, plans and diagrams, whether drawn to scale or not, capable of showing the true boundary of the

disputed land, the trial court was left with the option of considering oral testimony on the boundaries by persons it considered trustworthy and knowledgeable about land matters in the area, visual identification during the *locus in quo* visit of customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects actually seen on the land, or evidence of human activities on the land such as the use of footpaths and the placing of boundary marks on the land that have existed thereon for a considerable period of time, particularly those that existed before the dispute flared up.

[21] In the instant case, it was the testimony of the respondent Okello James that the second appellant and her husband were his neighbours and the boundary between his land and theirs was marked by "an anthill and an oduku tree." Instead, based on evidence gathered "from the community" while at the *locus in quo*, the court found that the boundary between the second appellant and the respondent was a "Kalira tree which was cut by the second appellant." That finding is not only inconsistent with the respondent's testimony and is therefore not supported by any evidence adduced in court, but is also a violation of the purpose and procedures for the conduct of proceedings at a *locus in quo*.

[22] 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)*. It was an

error for the court to have recorded evidence from "the community" and proceed to rely on it, in total disregard of the testimony of witnesses who testified in court.

[23] 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.

[24] 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.

[25] Having done so, I am of the opinion that this error occasioned a fundamental misdirection that resulted in a miscarriage of justice. Had the court properly directed itself, it would have found that the respondent failed to demonstrate to the court while at the *locus in quo*, the anthill and an oduku tree which he claimed in his testimony in court to be the monuments demarcating the boundary between his land and that of the second respondent and her husband.

[26] As regards the boundary between his land and that of the first appellant, the respondent did not adduce any oral evidence. On his part, P.W.3 Obiya Morish, testified that the boundary was a road. To the contrary, the first appellant testified that the boundary between his land and that of the respondent is the Lakgo and Odya trees. D.W.2 Okeny Janani, testified that the boundary between that land and the respondent's is marked by an anthill, palm tree, and an acacia tree. None of these witnesses demonstrated to court the boundaries as stated in their testimony. Instead the court relied entirely on evidence from the community, none of whom was identified on record, testified on oath, was cross-examined or had testified before in court. The trial court entirely overlooked and did not evaluate this part of the evidence.

[27] An appellate 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.

[28] It turns out therefore that had the trial court properly directed itself, it would have found that the balance of probabilities as to the location of the boundaries favoured the appellants. They adduced evidence of such a quality that a tribunal properly directing itself on the law would say "we think it more probable than not" the burden is discharged (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). For that reason the appeal succeeds.

Order :

[29] The judgment of the court below is set aside. Instead judgment is entered against the respondent dismissing the suit. The costs of the appeal and of the court below are awarded to the appellants.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellants : Mr. Lloyd Ocorobiya.

For the respondent : Mr. Brian Watmon.