IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 084 of 2018

In the matter between

SANTA OKEMA **APPELLANT**

And

1. OKUMU DAVID }
2. AUGUSTINE WELO } **RESPONDENTS**

Heard: 22 February 2019

Delivered: 1 April 2019

Summary: Appeal from order dismissing suit over claim of a plot of land under customary tenure.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally for recovery of an approximately 30 x 60 metres plot of land under customary tenure, situated at Library Parish, Layibi Division in Gulu District, an order of vacant possession, a permanent injunction, general damages for trespass to land, interest and costs.

[2] The appellant's case was that by an agreement dated 6th July, 1997 the appellant bought the land in dispute from the first respondents' father, the late Nyeko Paul. As part of the agreed terms, the appellant was to compensate all persons by then occupying the land, which she did and took over vacant possession and

enjoyment of the land. During or around the year 2012, the appellant was surprised to learn that the first respondent had sold to the second respondent a portion of that land measuring approximately 7 x 30 metres. The second respondent went ahead to construct a permanent house on that land well knowing that it belonged to the appellant.

[3] In their joint written statement of defence, the first respondent contended that his late father Nyeko Paul let out the land to the appellant on temporary basis during and for the duration of the insurgency and he never sold it to the appellant. Its boundaries were never demarcated. In the same breath he contended that the land he sold to the second respondent did not form part of the land that was let out to the appellant by the first respondent's father. The second respondent too contended that he is a bona fide purchaser of the part now in dispute.

The appellant's evidence:

[3] In her testimony as P.W.1 the appellant Lumunu Santa Okema testified that she bought the land in dispute on 6th July, 1997 at the price of shs. 410,000/= from Nyeko Paul, father of the first respondent. It measures approximately 30 x 60 metres. Following the death of his father, the first respondent during the year 2011 sold part of the land that formed the access to her plot, to the second respondent. Once the second respondent began construction of a foundation on the land, the appellant reported to the L.C.1 and L.CII which directed her to refund the second respondent's costs, she rejected that and instead reported to the police. She has been using the plot as security for loans obtained from her bankers. In the year 2013, she caused a survey of her plot and had mark stones were put in place.

[4] P.W.2 Ocan Abari John Baptist testified that he witnessed the transaction of sale of land between the appellant and Nyeko Paul in 1997. The appellant paid part of the agreed purchase price and the balance was to be paid later. The boundaries

of the land were not described in the agreement. P.W.3 Komakech Kennedy, the appellant's son testified that he witnessed the transaction of sale of land between the appellant and Nyeko Paul in 1997. Later the appellant made payments of compensation to occupants who had temporary structures on the land. Nyeko Paul too was compensated for his house he had on the land and a Mvule tree. Although the demarcations were not specified in the agreement, the appellant used to grow crops on that part where the second respondent later constructed a house. Later Nyeko vacated the land and settled on an area that was later converted into a road reserve until his death in the year 2004. The would be P.W.4 Omonya Samuel, a neighbour was withdrawn and the appellant's case was closed.

The respondent's evidence:

[5] In his defence as D.W.1 the first respondent Okumu David testified that before selling the portion in dispute he approached the appellant and gave her the first option to buy but her offer was too low claiming that it was a road reserve. He then sold it off to the second respondent during the year 2004. The appellant then offered to refund the second respondent's purchase price but failed to honour the undertaking. The second respondent went ahead and constructed a building the ground floor of which is now occupied by tenants.

[6] The second respondent D.W.2 Welo Augustine, testified that he bought the plot in 2010. The L.C.1 Chairman then informed him the appellant as a neighbour had intended to purchase the plot but offered a lower price and now was proposing to buy him out. When the appellant failed to buy him out, the L.Cs advised him to proceed with development of the plot. Later the appellant complained that the second respondent's construction had encroached onto her land by one foot. The second respondent demolished the part complained of. The appellant used some of the second respondent's building material deposited on the land and has installed kiosk from which she collects money. She also misrepresented the

second respondent's building as hers and used it as collateral to secure loans from a bank.

[7] D.W.3 Uhuru Charles, L.C.1 Chairman testified that the appellant's plot was separate from that of the first respondent's father. When Olwoch Road was demarcated by the municipal authorities during the year 2008, most of Nyeko Paul's plot, the first respondent's father, was taken up by the road reserve, leaving a small strip measuring 16.5 meters x 40.2 meters that abutted onto the appellant's land. Twisted iron bars marked the boundary between that strip of land and the appellant's land. Nyeko Paul was compensated for the area taken up by the road and vacated but died the following year, 2009. The appellant expressed interest in purchasing that small strip and annexing it to her land but failed to raise the price. The first respondent and his brothers then sold off that strip to the second respondent. She again offered to compensate the second respondent but failed to raise the money. The second respondent constructed the ground floor of a planned storied building on that strip, but reserved part of it as an access to the appellant's land. She has since set up kiosks on that part meant to be an access to her plot.

The trial court's visit to the *locus in quo*;

[8] The court thereafter visited the locus in quo where it inspected the boundaries, observed the twisted iron bar demarcations that had been mentioned by D.W.3 Uhuru Charles in his testimony, saw the appellant's kiosks and the second respondent's building on the disputed strip of land. The court prepared a sketch map as well indicating the position of those features.

Judgment of the court below;

[9] In his judgment, the trial Magistrate found that the appellant's agreements of purchase did not disclose the size of the land bought. It is not plausible that

Nyeko Paul sold his entire land to the appellant. He remained in occupation of that part of the land and upon demarcation of Olwoch Road it is him and not the appellant who was compensated. The appellant was approached and given the first option to purchase that strip but could not raise the price. She offered to refund the second respondent's purchase price but failed to raise the amount. This conduct is inconsistent with the claim of ownership. After the construction began, she only complained of a small portion that had encroached on her land and the second respondent demolished that part. This was visible at the *locus in quo*. The appellant failed to prove ownership of the land in dispute and the suit was accordingly dismissed with costs. The second respondent granted the appellant only temporary access and her kiosks on the land constitute trespass. She should vacate that part of the land in dispute.

The grounds of appeal;

[10] 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 held that the suit land did not form part of the land purchased by the appellant from the first respondent's father.
2. The learned trial Magistrate erred in law and fact when she ignored the grave inconsistencies and contradictions in the respondent's evidence.
3. The learned trial Magistrate erred in law and fact when he failed to consider the evidence obtained at locus thereby reaching a wrong decision.

The duties of this court as a first appellate court;

[11] When the appeal came up for hearing, the parties were afforded time to file written submissions before the date fixed for delivery of the judgment, but none of them filed their submissions. Nevertheless, as a first appellate court this court is under an obligation 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] As an appellate court, it 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 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. This duty may be discharged with or without the submissions of the parties.

Ground 2 on contradictions and inconsistencies;

[13] It was contended in the second ground of appeal that the trial court overlooked material contradictions and inconsistencies in the respondents' evidence. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

[14] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. “essential” to the determination of the case. Material aspects of evidence vary from case to case but, generally in a trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

[15] I have perused the respondents evidence. I construe the main point for determination in the suit to have been the location of the boundaries of the land sold to the appellant by the first respondent's father. I have not found any grave contradictions or inconsistencies in the respondents' evidence as regards that fact. Since there are no such contradictions regarding this material aspect of the suit, any other inconsistencies or contradictions there may be are of no consequence to the determination of the key fact in issue that was necessary to be proved. The second ground of appeal therefore fails.

Grounds 1 and 3 on proceedings at the *locus in quo* and evaluation of the evidence;

[16] Grounds one and three will be considered concurrently since they relate to the manner in which the trial court dealt with the evidence obtained at the *locus in quo* and the correctness of the finding that the strip of land in dispute did not form part of the land purchased by the appellant.

[17] The dispute arose from the fact that in none of the documents evincing the transaction between the appellant and the first respondent's late father Nyeko Paul in 1997, were the demarcations of the land specified. An agreement of purchase of unregistered land should ideally contain a parcels clause that provides in precise words, a description of what part is being sold and what is not. This is particularly important in the case of sale of a portion that is a part of a

larger block. It is necessary to define the boundaries of the land that is sold; i.e. where one unit ends and the other begins. The parcels clause is at best a description of the size and shape of the parcel of land. The parcels clause in an agreement of sale of land describes the parcel of land with reference to its boundaries. The parcels clause is one of the terms that go to the essence of the bargain. Without it, a court cannot enforce the bargain because identification of the property may be difficult as it cannot be certain what the physical extent of the subject matter actually is.

[18] When the parties to a bargain sufficiently defined to be a contract omit a term that is essential to a determination of their rights and duties, a term that is reasonable in the circumstances is supplied by the court. Material or essential terms may be implied by court in order to give rise to the deemed intentions of the contracting parties by way of validating the express terms. A term is implied in fact when it is implied into the contract in order to give effect to what is deemed by the court to be the unexpressed intention of the parties. The court will use the business efficacy test or the officious bystander test.

[19] In the former, the term in question is essential to include in order to gain business efficacy within the contract (see *The Moorcock (1889) 14 PD 64*), while in the latter the term left to be implied is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common “oh, of course!" (see *Southern Foundries (1926) Ltd v. Shirlaw [1940] AC 701*). I consider that in that instant case, providing for the the specifications of the land that was sold meets both tests.

[20] That being the case, the court is further mindful of the provisions of section 58 of *The Evidence Act*, providing that all facts, except the contents of documents, may be proved by oral evidence. Section 92 thereof stipulates that when the

terms of any contract, grant or other disposition of property, have been proved by production of the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible, then no evidence of any oral agreement or statement can be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. “Oral” is not limited to just that which is spoken, but includes all evidence extraneous to the document itself such as facts implied from the acts and conduct of the parties.

[21] While a court may adopt the business efficacy test or the officious bystander test to fill in such “gaps” in the contract by implying terms, this effectively adds extra terms to the contract. According to section 93 of *The Evidence Act*, when the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. The document is patently detective, if when it is read by an ordinary prudent person, he or she can easily observe the ambiguity of the language of the document. Such ambiguity cannot be rectified by the court or by the parties who are too late to do it. The court is to interpret documents, but it cannot supply the intention of the writer or import words into documents which are incapable of meaning for want of adequate expression. This rule is about both the contents of the contract and its interpretation. Extrinsic evidence cannot be used if the mistake can only be proved by the production of parol evidence in contravention of the parol evidence rule. The implication is that in the instances where patent ambiguity arises, either by the language used being obviously uncertain (though intelligible), or so defective as to be meaningless, no evidence may be given to cure the ambiguity.

[22] Section 93 of *The Evidence Act* applies to an ambiguity where the document on its face is unintelligible and stipulates that such defect cannot be removed by resort to extrinsic evidence. Where the document is ambiguous the language used in the document can decide the question only and not by the parties by

relying upon any extrinsic evidence. This is because the Court will not ordinarily consider evidence outside the four corners of the document being construed if the terms thereof are clear. A Court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words and not to contradict or vary them. If those conditions are satisfied, then resort to extrinsic evidence is made as a matter of construction.

[23] The English courts have over the years been able to relax the parol evidence rule almost to the point of extinction because, unlike the case in Uganda, English evidence law is based on the common law and is therefore more malleable than our statute-based evidence law. Thus, this is to be contrasted with the much narrower approach taken in section 93 of *The Evidence Act*, which still relies on antiquated distinctions, such as that between latent and patent ambiguity, to limit the range of admissible evidence to establish the context needed for common law rectification.

[24] Whereas the general rule is that extrinsic evidence is not admissible to explain patent ambiguities, section 93 of *The Evidence Act* does not affect court's power to fill in blanks or omissions by ordinary rules of construction where the purpose of that extrinsic evidence is not to alter the parties' intentions or rewrite the agreement. The modern view is to admit parol evidence even in these instances. Section 93 of the Evidence Act has been considered to be discretionary (see *Nagoya Co. Ltd v. The Registered Trustees of Kampala Archdiocese H.C. Civil Suit No. 707 of 2015*). This is especially necessary in the light of the accepted view that contractual language cannot be understood in a vacuum. This is explainable on the basis that since such ambiguities arise from an extrinsic fact, extrinsic evidence is admissible to explain away the ambiguity.

[25] One of the exceptions at common law is that extrinsic evidence may be adduced to dispel a patent ambiguity, where the language used in a document is on its face defective as a result of; (i) the existence of facts external to the instrument,

and (ii) the creation by these facts of a question not solved by the document itself. Contractual silence does not necessarily create ambiguity, but an omission as to a material or essential term can create ambiguity and allow the use of extrinsic evidence where the context within the document's four comers suggests that the parties may have intended a result not expressly stated. When extrinsic evidence is admissible, courts generally receive any competent evidence that may bear on the parties' actual or probable intent. Accordingly, courts evaluate the facts and circumstances surrounding the execution and performance of the agreement in order to make a determination as to the parties' intent.

[26] According to Lord Hoffmann's fifth principle in *Investors' Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 W.L.R. 896*, it is open to a court, if it concludes from the face of a contract that the parties thereto have made a mistake (e.g. by including or omitting words in the document), to interpret the relevant document so that it has the meaning which the parties had intended it to have, i.e. corrective interpretation. The remedy of rectification is one permitted by the court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by a mistake in expression, does not accurately reflect their true agreement (see *The Nai Genova [1984]1 Lloyds Rep 353 at 359*).

[27] For the court to apply the corrective interpretation approach, it must be satisfied that; (i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (ii) there was an outward expression of accord; (iii) the intention continued at the time of the execution of the instrument sought to be rectified; and (iv) by mistake, the instrument did not reflect that common intention. In the instant case, the transaction related to a specific parcel of land but by a mistake of omission, the document does not reflect the parties' agreement as to the boundaries of the parcel of land, hence extrinsic evidence was admissible by way of corrective

interpretation for the determination of the location of the boundary, in respect of which the appellant's agreement was totally silent.

[28] One source of extrinsic evidence of boundaries may be by way of a visit to the *locus in quo* for purposes of detection of the topography and material characteristics of the land such as; obvious physical features near to the stated boundary, for example walls, fences, hedges; or old artefacts that may once have marked the boundary, such as old posts, strands of wire, staples where wire was attached to trees, footings of old walls; or "enduring hard detail" which includes brick buildings, walls, road edges, basically anything built of stone, brick, concrete or steel that looks like it will still be there in a couple of decades time; or any other physical features depicted in contemporaneous records or features in place at the date of the conveyance. In doing so, the court allows the physical features of the land in question to influence the interpretation of the agreement.

[29] In the case of a defective parcels clause or a generally ambiguous conveyance, admissible extrinsic evidence has been held to include an objective assessment of the circumstances surrounding the conveyance, including an appreciation of the topography (see *Investors' Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 W.L.R. 896*). In the instant case, when the court visited the *locus in quo* it was able to spot the twisted iron bar boundary marking testified to by D.W.1 Okumu David, the first respondent.

[30] Alternatively, evidence of boundaries may be established by the parties' course of conduct following the agreement or in the performance of the contract. In the case of a defective parcels clause or a generally ambiguous conveyance, admissible extrinsic evidence has been held to include the conduct of the parties subsequent to the conveyance (see *Investors' Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 W.L.R. 896*). A principle of contract interpretation is that the contract must be interpreted in accordance with the parties' understanding as shown by their conduct before the controversy. This

may be used to aid a court in interpretation of an ambiguous contract, and it may also be used to supply an omitted term when a contract is silent on an issue.

[31] The interpretive principle is that parties carry out a contract in accordance with their understanding of it, such that the performance constitutes an outward expression of accord. If the parties carry out the contract for a while before they argue about it, that pre-dispute conduct is a strong indicator of their intent and understanding at the time they entered into the contract. Any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement. A party to a contract that senses a disagreement with the other party's interpretation is expected to speak up promptly.

[32] It was the testimony of the appellant's son P.W.2 Ocan Abari John Baptist that although the demarcations were not specified in the agreement, the appellant used to grow crops on that part where the second respondent later constructed a building. However the appellant's conduct is inconsistent with this assertion. It was her testimony that upon payment of the purchase price, the late Nyeko Paul relocated his residence from the land sold to an area adjacent to it that was eventually demarcated by the Municipal authorities as a road. It is the late Nyeko Paul who was compensated for that area upon the opening of that road and not the appellant, indicating that the land belonged to the late Nyeko Paul. From the circumstances, it is most unlikely that the width of the road coincidentally matched the exact boundaries of the land occupied by the late Nyeko Paul. It is more likely than not that the strip of land now in question was all that was left of the late Nyeko Paul's land upon the opening of the road.

[33] I am fortified in this deduction by the fact that when the second respondent began construction of the building, the appellant complained only about lack of access to her own plot, and not the entire strip of land, in response to which the second respondent demolished one of the corners of the building to allow her

access. She went on further to attempt a re-survey of the two plots to allow a more accommodative use by both parties in a manner that would satisfy the minimum requirements of a titled plot of land within the municipality, to enable each one of them to obtain a title to their respective plots. This conduct is inconsistent with that of a person who claims to have owned the strip of land, one who used to grow crops on it, before the second respondent's purchase.

[34] When deducing the location of a boundary from evidence extrinsic to the agreement of sale of un-registered land, each item of evidence relating to the location of the boundary is first tested and evaluated in isolation to see whether there are reasons to accept its truthfulness or to reject it. Then the court will determine whether a number of pieces of evidence all point to the same position for the boundary and whether or not those pieces of evidence point to alternative positions of the purported boundary, which alternatives should be considered as well. Then the court will determine whether the weight of evidence pointing to one position has greater credibility than the alternatives. I have considered both the evidence of the topography and material characteristics of the land as described by the court below upon its visit to the *locus in quo* alongside the appellant's course of performance as accepted or acquiesced by her, and come to the conclusion that the strip of land in dispute did not constitute part of the land she purchased from the late Nyeko Paul. The trial court therefore came to the right conclusion.

[34] On the other hand, it is one of the principles of the law relating to the construction of contracts that any clause considered to be ambiguous should be interpreted against the interests of the party that requested that the clause is included, i.e. the *contra proferentem* rule. It is a rule of contract law that requires any ambiguous clause to be interpreted with the meaning that is most in favour of the party that did not draft or request the clause. In general *contra proferentem* is a last resort, used only when other language interpretation does not reveal the parties' intent. It is my considered view that this rule ought to be extended to the

construction of an ambiguous contract that is sought to be enforced against a third party. Such a contract ought to be interpreted with the meaning that is most in favour of the third party since the party seeking to rely on the contract had the opportunity to make it more explicit, which opportunity he or she did not avail himself or herself.

Order :

[35] In the final result, there is no merit in the appeal. The appeal is accordingly dismissed with costs of the appeal and of the court below to the respondents.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Ms. Kunihira Roselyn.

For the respondents: Mr. Simon Peter Ogenrwot.