IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 045 of 2014

In the matter between

OKENY DAVID **APPELLANT**

And

OYAT JOHN BOSCO **RESPONDENT**

Heard: 4 March 2019

Delivered: 1 April 2019

Summary: Appeal from order that decreed land under customary tenure, to the respondent.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of approximately 50 acres out of approximately 200 - 800 acres of Lukwor clan land situated at Lajul-Owiny village, Otok Parish, Pajule sub-county, Pader District; an order of vacant possession, a permanent injunction, and costs.

[2] The respondent's case was that since the year 1911, the land in dispute has been occupied by the Lukwor clan. The respondent's father, Laboke Bicensio later left Pukor Padwong in Parabongo sub-county, Agago District and settled at Oryang village on land that belongs to the Oryang Clan, neighbouring the Lukwor

clan. During or around the 1990s during the insurgency, the appellant trespassed onto the respondent's land while members of the Lukwor clan had taken refuge in an IDP Camp. When the camp was disbanded, members of the Lukwor clan found the appellant occupying their land.

[3] In his written statement of defence, the appellant contended that is father Laboke Vincent inherited the land in dispute from his father Nyiraba in 1938 and lived on that land henceforth. They planted mango trees on the land. The appellant was born on that land, and has lived there on since then.

The respondent's evidence:

[4] Testifying as P.W.1 Adyero Madalena, the respondent's wife stated that she lived on the land in dispute with her husband since their marriage in 1975. There are mango trees planted by the ancestors of her husband and the graves of her husband's ancestors are visible on the land in dispute. During or around 2008 after the IDP Camp was disbanded, the appellant trespassed onto the land and let out parts of it to other persons and there are around twelve houses in all occupied by trespassers. Before the rightful occupants of the land were displaced into the IDP Camp, the appellant was resident at Pukor Padwong in Parabongo sub-county, Agago District. the path that separated the land in dispute from that of the appellant was a footpath that has since widened into a road.

[5] P.W.2 Omwony Agaa, neighbour to the North of the land in dispute, testified that the respondent's grandfather Rwot Wulli used to cultivate the land in dispute and upon his death he was buried on that land. The appellant used to occupy the land to one side of the main road at Juina Hill, on the area occupied by the Oryang Clan. The appellant and his relatives trespassed onto the land and the appellant forcefully buried her aunt on the land during the course of trial of the suit.

[6] P.W.3 Omona Vitirino, a neighbour to the South of the land testified that following the disbanding of the IDP Camps, the appellant trespassed onto approximately 50 acres of the land in dispute, out of which 10 acres belong to the respondent. He continues to expand the area under trespass. Originally the boundary between the appellant and the respondent's land was a footpath that has since widened into a road. The appellant never used to undertake any cultivation South of that road. P.W.4 Awola Donasiano testified that the appellant is a neighbour, separated by a stream, resident at Oryang village. The appellant trespassed onto approximately ten acres of the respondent's land in Lajul-Owiny Ward.

The appellant's evidence:

[7] In his defence as D.W.1, Okeny David, the appellant, testified that he was informed that his late father Laboke Vincent inherited the land in dispute from his father Nyiraba in 1938 and lived on that land henceforth. They planted mango trees on the land, the appellant was born on that land, had live thereon since then and has multiple graves of his relatives situated on the land. It is during the year 2008 that the respondent began claiming the land as his. He has since forcefully constructed six huts on the land and is hewing down trees for charcoal. His house is about one kilometre from Lajul-Owiny Ward. It is separated by Lajul-Owiny Stream. His grandfather migrated from Pukor Padwong in Parabongo sub-county, Agago District but settled on the land in dispute and it is where he was born and had lived all his life. He presumes the trees on the land were planted by his father. He was an anthill on the land where he was told the respondent's grandfather Rwot Wulli was buried, before the appellant's grandfather acquired the land.

[8] D.W.2 Labeja Dominico testified that the land in dispute measures approximately 100 acres and is situated in Oryang village. It originally belonged to Nyeraba who acquired it by prescription in 1930. Later it was inherited by the appellant's father Laboke Bicencio who utilised it until 1971 when it passed to the appellant. The

dispute over it erupted in 2008 upon the disbanding of Oguta IDP Camp. The respondent's land is in Ora Otuito and has never lived on the land in dispute. There are mango trees planted by the appellant's grandfather and graves of the appellant's relatives on the land in dispute. Rwot Wulli was buried on the land in dispute.

[9] D.W.3 Faustino Otto testified that the land in dispute measures approximately 100 acres and is situated in Oryang village. The appellant inherited the land form his father Laboke who in turn inherited it from his father Nyeraba before the year 1952. Before his death, Nyeraba had planted mango and Kituba trees on the land. Deceased relatives of the appellant were buried on the land. The respondent's land is in Ora Otuito and had never lived on the land in dispute where he occasionally went to perform rituals but he eventually settled on the land. The appellant has no land in Lajul-Owiny..

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

[10] The court then visited the *locus in quo* where it recorded evidence from two other persons; (i) Abwola Constantino, who stated that the respondent resides on the land in dispute in Lajul-Owiny while the appellant is resident in Oryang village. The land in dispute measures approximately 100 acres; (ii) Akena Richard, who testified that the land in dispute measures approximately 50 acres and belongs to the appellant. The respondent's father used to perform rituals on the land. The respondent began his occupation in 2008. The court then inspected the boundaries whereupon it established the size of the land in dispute to be 1,260 metres x 1,800 metres. The court observed a mango tree, two old Kituba trees, graves of the appellant's deceased relatives and an old homestead, all to the North of Wang Dyang Stream. Across the road to Te-got, there were gardens established by relatives of the appellant. It prepared a sketch map.

Judgment of the court below;

[11] In his judgment, the trial Magistrate found that features observed on the land in dispute matched the respondent's testimony in court. The respondent's cultural site associated with their late grandfather Rwot Wulli was intact on the land. The mango tree, two old Kituba trees, graves of the appellant's deceased relatives and an old homestead, were all situated to the North of Wang Dyang Stream. It therefore deduced that the appellant had crossed over and established a new home to the South of Wang Dyang Stream on the land now in dispute. The appellant was found to be a trespasser on that part of the land. The land in dispute was decreed to the respondent, an order of vacant possession was issued, a permanent injunction too was issued against the appellant, and an order of costs made.

The ground of appeal;

[12] The appellant was dissatisfied with the decision and appealed to this court on one ground, namely; the trial court failed to properly evaluate the evidence on record and reached the wrong conclusion as to the right of ownership, hence causing a miscarriage of justice.

Submissions of counsel:

[13] Counsel for the appellant did not file any submissions within the time accorded to her. On their part, Counsel for the respondent M/s Ladwar, Oneka & Co. Advocates submitted that the appellant filed a memorandum of appeal with one imprecise ground of appeal which ought to be struck out. In the alternative, the decision of the court below was arrived at after a careful evaluation of the evidence and should be upheld. The court rightly found that the appellant had crossed Wang Dyang Stream and encroached onto the respondent's land. The appeal should therefore be dismissed with costs

The duties of this court as a first appellate court;

[14] 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*).

[15] 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.

The sole ground of appeal is struck out;

[16] The only ground presented in the appeal is too general and 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.

[17] That result alone should have disposed of the appeal but for the sake of completeness and in a bid to discharge its obligation to re-evaluate the evidence, this court has gone ahead to scrutinise the thereof. It is evident that the trial court misdirected itself in the manner it conducted proceedings at the *locus in quo*.

[18] 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)*. I have perused the record and have found that the trial magistrate recorded evidence from two people who had not testified in court. This was an error.

[19] 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.

[20] 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. Having done so, I have decided to disregard the evidence of the two additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those witnesses.

[21] Both parties to these proceedings claimed to have inherited the land from their respective ancestors. In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in (see *DPP v. Kilbourne [1973] 1 ALL ER 440; [1973] AC 720*). Secondly, the corroborating evidence must also be credible and independent. It should not be mere repetition of the evidence on record.

[22] The presence of the mango tree, two old Kituba trees, graves of the appellant's deceased relatives and an old homestead, all to the North of Wang Dyang Stream as observed by the trial court during the visit to the *locus in quo*, corroborated the respondent's evidence that it was from there that the appellant crossed over Wang Dyang Stream to encroach onto his land. The observations at the *locus in quo* by the trial court were more consistent with the respondents' version than the appellant's claim. Therefore the trial court came to the correct conclusion.

Order :

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

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Ms. Kunihira Roselyn.

For the respondents: Mr. Geoffrey Boris Anyuru.