

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0030 OF 2012

(Arising from Paidha Grade One Magistrates Court Civil Suit No. 0014 of 2012)

1. **OBIYA HILLARY** }
2. **OAIKARI JULIUS** } **APPELLANT**

VERSUS

MUNGU ACIEL RASUL **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the sued the appellants (who are father and son) jointly and severally for recovery of land measuring approximately one acre, located at Ayida village, Pakia Parish, Warr sub-county, in Zombo District, an order of vacant possession, a permanent injunction and costs. His claim was that the land in dispute was given to him by his father, Kasamba Gowa which he began utilising during the lifetime of his father. Upon his said father’s death, the appellants on or about 26th May 2012 unlawfully entered onto the land and began cultivating it. In their joint written statement of defence, the appellants denied the claim but did not advance any explanation of their own. At the scheduling conference, the first appellant that he inherited the land in dispute from his late father Openja Frunanto in 1979 while the second respondent stated the land belongs to his father who permitted him to utilise it for cultivation.

In his testimony, the respondent stated that the land in dispute originally belonged to his late father, Kasamba Gowa, who held it under customary tenure. That was the close of the respondent’s case. Before his death which occurred sometime during the year 2012, his father gave him the land in the presence of several members of the family and the community. Upon his father’s death, the appellant trespassed on the land by planting coffee trees and grazing livestock on it. They as well uprooted some Cyprus and Pine trees he had planted on the land.

P.W.2 Abeka Wilson, a neighbour to the land in dispute for over twenty years, testified that the land originally belonged to the respondent's grandfather, Gowa Petro who subsequently distributed it among his brothers, who included the respondent's father, Martin Kasamba and the first appellant's father. Each of the families began to utilise their respective portions following established demarcations. When the respondent planted trees on his portion, the first appellant uprooted them. He planted sisal instead and began grazing his livestock on it. P.W.3 Valeriano Moses alias Mzee, at times employed as a casual labourer for the respondent, testified that the respondent had planted trees on the land in dispute but the two appellants uprooted them.

P.W.4 Pastol Gowa, testified that the land in dispute originally belonged to Gowa Kendu alias Petro Gowa. After his death, it was inherited by Martin Kasamba, the respondent's father, who later gave it to the respondent, in his presence. At one time in the past, the first appellant's father had planted sisal on the disputed land and attempted to construct a grass thatched thereon. Gowa uprooted the sisal and pulled down the hut because he had not given the land to the first appellant's father. P.W.5 Benin Seremia, testified that he was present at the time the land was given to the respondent by his late father at a family meeting. The respondent began utilising the land in 2005 until the death of his father. The dispute began in May 2012 following the death of the respondent's father. P.W.6 Gabriel Kasamba, a brother to the respondent and neighbour to the land in dispute for the last ten years, testified that the land in dispute originally belonged to Martin Kasamba, the respondent's father. The respondent began utilising the land in 2005 after it was given to him at a family meeting. In June 2012, the appellants stopped the respondent from utilising the land. That was the close of the respondent's case.

In his defence, the first appellant testified that his late father inherited the land in dispute from a one Alwo in 1938, settled on the land in 1962 and constructed a house thereon where he lived until his death in 1984. The land was used for grazing livestock but on 24th May 2012 the respondent authorised some people to begin cultivating the land and the first appellant stopped them. On his part, the second appellant testified that the land belongs to his father and he had nothing to say about it. D.W.3 Terensio Olwora, the first appellant's brother, testified that the first appellant inherited the land in dispute from his father Funato Openja in 1962 who in turn inherited it from Alwo. The boundaries are marked by sisal plants. D.W.4 Ijino Opyel testified

that the first appellant inherited the land in dispute from his father Funato Nyek who had built a house on it in 1962 and was cultivating the land. The boundaries are marked by sisal plants. The first appellant planted a coffee plantation on the land. The respondent trespassed on the land after the death of his father. That was the close of the defence case. The court then visited the *locus in quo* on 24th September 2012 where it received evidence from the respondent. It also prepared a sketch map of the land in dispute.

In his judgment, the learned trial magistrate believed the respondent's testimony that the trespass occurred following the death of his father. He did not believe the first appellant's version that he inherited the land in 1962 which he dismissed as a lie. He found that the appellant's had trespassed on the land. He granted an order of a permanent injunction and awarded the respondent the costs of the suit.

Being dissatisfied with the decision the appellants appeal on the following grounds, namely;

1. The learned trial magistrate erred in law and fact by deciding the suit land for the respondent (sic) despite glaring contradictions and inconsistencies in the evidence of the respondent's witnesses.
2. The learned trial magistrate erred in law and fact by concluding that the appellants were trespassers in total disregard of their evidence as to ownership of the suit land.
3. The learned trial magistrate erred in law and fact by denying the appellants the opportunity to testify and show their boundaries and features at *locus in quo*.

In his written submissions in support of the appeal, counsel for the appellant Mr. Komakech Atine argued that there were contradictions in the respondent's evidence regarding the size of the land as whether it was an acre or two acres, as to whether the trees were destroyed by uprooting or grazing of animals, as to the identity and number of people who were present when the land was given to the respondent, which inconsistencies the trial court overlooked. On the other hand, the appellants presented cogent evidence of the history of ownership from 1938 when it was acquired by the first appellant's grandfather. At the *locus in quo*, only the respondent was given the opportunity to testify, to the exclusion of the appellants. He prayed that the appeal be allowed.

In his oral submissions, counsel for the respondent Mr. Richard Bundu argued that the references to size of the land were mere estimates and the variations were therefore inevitable. There were minor variations in the names of people who were present when the land was given to the respondent which the court rightly ignored. The appellant's evidence was inconsistent as to who his father was. At the locus, features mentioned by the respondent were seen and the appellants confirmed them. It is the appellants' act of planting coffee on the land and grazing on it that sparked off the dispute.

The duty of a first appellate court was appropriately stated in *Selle v Associated Motor Boat Co.* [1968] EA 123, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he 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 the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the 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.

Regarding the first and second ground of appeal, where there are grave contradictions unless satisfactorily explained they may, but not necessarily result in the evidence being rejected but minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually 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. In the instant case, the size of the land had little, if anything at all, to do with the decision as to the true ownership of the land in dispute. The trial magistrate might have overlooked it but in my view it was a minor contradiction which did not point to deliberate untruthfulness of the respondent and the witnesses, since their expressions were mere estimates that do not seem to have been deliberate exaggerations. Moreover, it is open to a trial magistrate, who observed the demeanour of the witness, to find that a witness has been substantively truthful, even though he lied in some particular respect. This ground therefore fails.

With regard to the second and third grounds of appeal, the burden of proof lay with the respondent. To decide in favour of the respondent, the court had to be satisfied that the respondent had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the appellants, such that the choice between his version and that of the appellants would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the appellants, might hold that the more probable conclusion was that for which the respondent contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

At the locus in quo, the first appellant had the opportunity to refute the respondent's version but the trial court recorded him at page 28 of the record of appeal as having responded; "yes those are the boundaries of the suit land." There is nothing on record to support counsel's argument that the appellant's were prevented from advancing their version of features to be seen at the *locus in quo*. The trial magistrate then cannot be faulted on that account in the manner in which he handled the proceedings thereat. Considering the rest of the evidence, it turned more on the veracity of the witnesses than anything else. Findings of a trial court based on the credibility of witnesses are to be considered with caution.

It is trite law that such findings should not be rejected lightly. A Trial magistrate's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court, should ordinarily be deferred to by an appellate court. But, this does not mean that merely because an appellate court has not heard or seen the witness it will in no case reverse the findings of a trial magistrate even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the appellate Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial magistrate and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial magistrate is wrong, the appellate court should have no hesitation in reversing the findings of the trial magistrate on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the appellate court is in as good a position as the trial magistrate and is free to reverse the findings if it thinks that the inference made by the trial magistrate is not justified.

I have scrutinised the evidence presented by both parties before the trial court. I have not found any important considerations bearing on the question of credibility that the magistrate failed to take into account or properly weigh. I have reconsidered the question of probability of the story given by the respondent's witnesses as against that of the appellants and I am satisfied that the view taken by the trial magistrate is right. The credibility of the witnesses lay not only in the demeanour as was considered by the trial magistrate but also the inference is carried by the weight of the primary facts proved by the respondent's witnesses which were neither weakened nor discredited by the appellants' cross-examination. It was clear from the weight of that evidence that this dispute arose only after the death of the respondent's father, lending credence to his claim that the appellant's trespass was an opportunistic act. The two grounds therefore fail. In the final result, I find no merit in the appeal and it is accordingly dismissed with costs to the respondent of both the appeal and the trial.

Dated at Arua this 2nd day of March 2017.

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Stephen Mubiru
Judge