THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0038 OF 2016

(Arising from Kitgum Grade One Magistrate's Court Civil Suit No. 104 of 2014)

OLANYA HANNINGTON …… APPELLANT

VERSUS

ACULLU HELLEN …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent sued the appellant for breach of contract, recovery of approximately 100 acres of land, at Omwonybul village, Lamola Parish, Amida sub-county, in Kitgum District, general damages for trespass to land, *mesne* profits, a permanent injunction, and costs. Her case was that the land in dispute was part of land which originally belonged to her father in law, Olanya Lapok, who before his death divided his land two portions of 100 acres each. He gave the portion now in dispute to the respondent's mother in law, Akech Margherita and the other to the appellant's mother, Auma Percy. The respondent later inherited it upon the death of her mother in law and husband Severino Ojara. In 1992, the appellant trespassed onto the land by building a house and growing crops thereon. The respondent was unable to take action because of insurgency. Upon the end of the insurgency, the respondent during the year 2010 caused the intervention of elders. They mediated the dispute and on 20th March, 2012 a mediated settlement was reached that required the appellant to retain only two acres of the land and return the rest to the respondent. The dishonoured the agreement and refused to vacate the land. He instead turned violent against the respondent.

In his written statement of defence, the appellant denied the claim in toto. He contended instead that he has been resident on the land in dispute for over fifty years. The land originally belonged to Olanya Lapok. His father acquired the land from his brother in law, brought up and raised the appellant from that land and therefore he is not a trespasser thereon.

The respondent Acullu Hellen testified as P.W.1 and stated that the appellant is her brother in law. Her late husband Severino Ojara left her the land in dispute. It is part of the land which originally belonged to Olanya Lapok who before his death divided his land two portions of 100 acres each. He gave the portion now in dispute to the respondent's mother in law and in 1980 her late husband inherited the land from his mother. He was living on this land with his mother at the time he married her. The appellant left the other part of the land given to his mother and encroached on the one in dispute. At a family meeting in the year 2012, it was resolved that the appellant should returns to his mother's part of the land. The understanding was reduced into writing but the appellant has since refused to vacate the land.

P.W.2 Odong Alfred, the respondent's brother in law, testified that the land in dispute originally belonged to Olanya Lapok who obtained it in 1966 as vacant land. He later divided it into two giving one part to the mother in law of the respondent and the other to the mother of the appellant. The appellant is preventing the respondent from cultivating about 3 - 4 acres of the land given to her mother in law. The appellant left the part given to his mother and has crossed into the part given to the respondent's mother in law. P.W.3 Ayella Vincent, a neighbour, testified that the land in dispute belonged to the late husband of the respondent. Olanya Lapok divided his land into two giving the part now in dispute to the respondent's mother in law. The respondent lived on it together with her husband before his death.

In his testimony as D.W.1 Olanya Hannington, the appellant, testified that the land in dispute belonged to his late father Olanya Lapok. When his late brother Severino Ojara married the respondent, they lived together at Lamola. The respondent's mother in law lived on the land for a short time and developed a mental problem. She was being cared for by the appellant's mother and when she died she was buried on her father's land in Lamwo. When the respondent's husband died he too was buried in Lamwo, the appellant took care of her until she left for Westland. It is now her son who lives on a small part of the land in dispute given to him by the appellant to put up a house. The land was never divided and he never agreed to the settlement but was nevertheless forced to sign it.

D.W.2 Alisandro Ongoli, a neighbour, testified that it is Silaka Lapidi, who in 1969 gave the land in dispute to Olanya Lapok who had two wives, one the mother in law of the respondent and the other the mother of the appellant. When the appellant's brother Severino Ojara married the respondent, they lived together in Lamwo. D.W.3 Onguli Christopher, testified that the land belonged to Lapidi, the appellant's uncle. In 1980, the respondent married the appellant's brother Severino Ojara who lived on the land together with the appellant. The respondent's mother in law developed a mental problem and came onto the land to be cared for by the appellant's mother. She later died and was buried in Lamwo. Although the court thereafter indicated that it would visit the *locus in quo*, there is nothing on record to indicate that the exercise was undertaken.

In his judgment, the trial Magistrate decided that whereas in his defence the appellant pleaded that the land belonged to his late father Olanya Lapok, he was raised and has lived on the land for over fifty years, he was contradicted by D.W.2 Alisandro Ongoli who testified that the land belongs instead to the appellant's maternal uncle Lapidi. This was a departure from the pleadings and an indication of fraud and dishonesty. In the memorandum of understanding dated 20th March, 2012, it was agreed that the appellant was to return to his mother's part of the land. The evidence is consistent with the terms of that memorandum in that Olanya Lapok divided the land into two giving one part to the appellant's mother and the other to the respondent's mother in law. The appellant acted fraudulently when he exceeded the boundary of the land given to his mother and intruded into that given to the respondent's mother in law. He therefore decided that the land in dispute belongs to the respondent and her children. The appellant is a trespasser on the land. The respondent was declared rightful owner of the 18 acres in dispute, a permanent injunction was issued against the appellant, the respondent was awarded general damages of shs. 2,000,000/= and the costs of the suit.

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 found that the respondent / plaintiff was the lawful owner of the suit land.
2. The learned trial Magistrate erred in law and fact when he decided that the appellant was a trespasser.

3. Had the trial Magistrate properly addressed his mind to the plaintiff's / respondent's pleadings he would have found it discloses no cause of action against the appellant / defendant.
4. Had the trial Magistrate properly addressed his mind to the plaintiff's / respondent's pleadings he would have found that the suit was time barred.

In his submissions, counsel for the appellant, Mr. Ocorobiya Lloyd, argued that since the respondent pleaded that the encroachment began in 1994 yet she filed the suit in September, 2014, the suit was time barred. The limitation period of 12 years had elapsed and the suit was filed eight years out of time. It is the appellant and not the respondent was in possession of the land. The appellant did not discharge the burden of proof in her claim that she owns the land. The appeal should be allowed.

In response, counsel for the respondents, The Legal Aid Project of Uganda, argued that the appellant's evidence was contradictory as he claimed to have belonged to his father Olanya Lapok yet his witnesses claimed it belonged to his maternal uncle Lapidi. The appellant had no authority to take over the land of his deceased brother, Severino Ojara, husband to the respondent. The respondent has since trespassed on approximately 18 acres of the about 100 acres that his father gave to the respondent's mother in law. The respondent proved her case to the required standard. The appellant committed the trespass complained of in 2009 upon his return from the IDP Camp and a suit filed in 2014 therefore was not time barred. The appeal should be dismissed with costs.

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*). 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. 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.

Grounds 3 and 4 will be considered concurrently in so far as they relate to the existence or otherwise of cause of action and the challenge to the finding that the suit was barred by limitation. A cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Attorney General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8E.P 116* and *Read v. Brown 22 QBD 31*). The pleadings must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E.A 514*). Whether or not a plaint discloses a caution of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it (see *Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72*).

I have carefully perused the plaint and find that it discloses three causes of action; an action for recovery of approximately 100 acres of land, an action for breach of contract arising as a result of a mediated settlement of a dispute over that land, and the tort trespass to the land pursuant to the appellant's failure to honour that agreement. A cause of action arises when a right of the plaintiff is affected by the defendant's act or omissions (see *Elly B Mugabi v. Nyanza Textile Industries Ltd [1992-93] HCB 227*). Limitation begins to run from the date of the cause of action to the date of filing the suit (See *Miramago F. X. S. v. Attorney General [1979] HCB 24*).

With regard to the claim for breach of contract arising as a result of a mediated settlement of a dispute over that land, section 3 (1) (a) of *The Limitation Act*, provides that actions founded on contract may not be brought after the expiration of six years from the date on which the cause of

action arose. It was averred in the plaint that it is on 20th March, 2012 that a mediated settlement was reached that required the appellant to retain only two acres of the land and return the rest to the respondent. A breach occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. The breach therefore occurred after that date and considering that the suit was filed during the year 2014, it was filed within two years of the alleged breach. Hence it was not barred by limitation.

With regard to the claim for the tort trespass to the land pursuant to the appellant's failure to honour that agreement, it was averred in the plaint that the mediated settlement of 20th March, 2012 required the appellant to retain only two acres of the land and return the rest to the respondent. Trespass to land consists not only in making an unauthorised entry upon private property of another, but also in refusing to leave after permission to remain has been withdrawn. A trespass can thus take place by failing to leave another's property after permission to enter has been first given, then revoked or ended, or after the purpose for which permission to enter was given, has ended. Unauthorised entry and refusal to leave are of equal consequence. When the appellant held onto the rest of the land which under the terms of the settlement he was supposed to vacate as alleged, he technically became a trespasser thereon. The tort thus occurred after 20th March, 2012 and considering that the suit was filed during the year 2014, it was filed within two years of the alleged trespass. Hence it too was not barred by limitation.

With regard to the claim for recovery of approximately 100 acres of land, section 5 of *The Limitation Act*, provides that no action may be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her. It was averred in the plaint that the mediated settlement of 20th March, 2012 required the appellant to retain only two acres of the land and return the rest to the respondent. According to section 6 (1) of *The Limitation Act*, the right of action is deemed to have accrued on the date dispossession or discontinuance of possession. When the appellant held onto the rest of the land which under the terms of the settlement he was supposed to vacate as alleged, the respondent was technically dispossessed of the land and this triggered the respondent's right to recover the land. The dispossession having occurred after 20th March, 2012 and considering that the suit was filed

during the year 2014, it was filed within two years of the alleged dispossession. Hence this cause of action too was not barred by limitation. Consequently these two grounds of appeal fail.

Grounds 1 and 2 will as well be considered concurrently in so far as they relate to the trial court's evaluation of evidence and its failure to deal with contradictions in the respondent's evidence. It was common ground between the parties that the land in dispute formed part of a bigger tract of land that originally belonged to a one Silaka Lapidi who gave approximately 200 acres of it to the appellant's father Olanya Lapok. Before his death, Olanya Lapok divided the approximately 200 acres into two equal parts, giving about 100 acres each to his two wives; the respondent's mother in law, Akech Margherita and the other to the appellant's mother, Auma Percy. The appellant occupied that of his mother, Auma Percy, while his step-brother, Severino Ojara occupied his mother Akech Margherita's. The appellant's step-brother, Severino Ojara, married the respondent and from around the year 1980 lived together with her as husband and wife, on the 100 acres or so that had been given to his mother, Akech Margherita. It is upon this land that the respondent alleged the appellant encroached onto, without any claim of right.

In the determination of the question as to whether the appellant's presence on that land constituted an act of trespass, the trial court relied on a document entitled "memorandum of understanding" that was the outcome of a mediated settlement by the elders, between the appellant and the respondent. A settlement contained in a memorandum of understanding is nothing more than a contract to be analysed under standard principles of the law of contract. Whether a memorandum of understanding is an enforceable contract depends both on the intent of the parties and on whether the terms contain the necessary certainty and definiteness to be enforced. The key is intent. If the parties intend memorandum of understanding to reflect their agreement, a contract exists.

There is a common misconception that memoranda of understanding are always non-binding. This is because they are usually written statements detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement or committal writings preliminary to a contract. Most often a memorandum of understanding is used in cases where parties either do not imply a legal commitment, in which case it is considered as a document of

goodwill made before a formal contract is entered into, or in situations where the parties cannot create a legally enforcement agreement. To the contrary, memoranda of understanding can in fact be binding, non-binding or partly binding and partly non-binding, it all depends on the intention of the parties and the exact wording of the memorandum of understanding. In the Kenyan case of *Eldo City Limited v. Corn Products Kenya Ltd and another [2013] eKLR,* it was stated that "as to the question of whether memoranda of understanding are legally binding, I would state that the same is partly a matter of construction of the particular document and partly a question of legal analysis." It is, therefore, a question of fact and the party seeking to rely on the memorandum of understanding has the burden of persuading the court that such an agreement exists and was in the circumstances binding.

For a contract to come into existence on basis of a memorandum of understanding, there must be an intention to create legal relations (see vol.1 *Chitty on Contracts,* at 198 (H.G. Beale ed., 29th ed. 2004; and *Balfour v. Balfour [1919] 2 K.B. 571at 579*). The test is an objective one; if a reasonable person would consider that there was an intention so to contract, then the promisor will be bound (see *Ermogenous v. Greek Orthodox Community of SA Inc [2002] HCA 8, 209 CLR 95 at [25*]. The parties' manifest intent is a question of fact, to be answered by looking at the totality of the circumstances. Each case is to be determined on its facts. These circumstances can include the type of agreement, the completeness and specificity of the terms, the nature of the parties' relationship, as well as more general consideration of the parties' reasonable background beliefs (see *Edwards v. Sky-ways Ltd.[1964] 1 W.L.R. 349, 355 (Q.B.*); *Home and Overseas Ins. Co. v. Mentor Ins. Co. (UK) [1989] 1 Lloyd's Rep. 473 (Q.B.);* and *Home Ins. Co. v. Administratia Asigurarilor de Stat [1983] 2 Lloyd's Rep. 674, 676 (Q.B.*).

In order to be enforceable, a memorandum of understanding must reflect the parties' agreement on all material terms, leaving none of them for future consideration. All terms must be identified with such certainty and definiteness that the court can clearly ascertain the precise act which is to be done. If the terms that are not yet agreed upon are merely "incidental details" that do "not go to the heart of the settlement agreement, or impair its enforceability," the court will find the memorandum of understanding to be a settlement agreement binding on the parties. On the other hand, when the language is susceptible to differing interpretations, it will be found to be fatally

uncertain and, therefore, that there was no mutual consent. For example in *Goodrich Corp. v. Autoliv ASP, Inc., A106077 (Cal. App. 1st Dist. 2005)*, even though the parties signed a memorandum of settlement after mediation stating that their agreement was binding and intended to settle all issues, the California Court of Appeals concluded that the parties had failed to agree to the "same thing" on one material point and thus there was no enforceable settlement agreement.

The fact that the parties refer to an agreement as a memorandum of understanding does not prevent the existence of a binding contract. The nature of the document is not decided on the heading but on the content that is written (see *Nanak Builders And investors Pvt. Ltd. v. Vinod Kumar Alag [1991] AIR 315*;). The enforceability and binding nature of a memorandum of understanding depends upon the content, nature of agreement, language and intention of the parties to it. In cases where the memorandum of understanding is in the nature of a contract and fulfils its essentials, it is held to be enforceable (see *Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th793*). An agreement will usually fall into this category if it is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable. There is also a longstanding maxim of equity that "equity looks at the substance rather than form". In the same vein, if the agreement is described as memorandum of understanding but in substance and from all indications is an enforceable contract, the courts will enforce the apparent memorandum of understanding as a contract with its attendant legal consequences.

The terms of the agreement will be assessed objectively, and intention will be assessed by the content, not the title or label of the document. A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. One of the cardinal principles of construing non-statutory documents is deciphering the intention as expressed in the document or as can be gathered from the four corners of the document. Having perused the memorandum of understanding relied upon by the respondent, I find that it contains all the essential terms and that it is devoid of vagueness. All terms can be identified with such certainty and definiteness that the court can clearly ascertain the precise acts

which were to be performed by both parties. It is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable.

The memorandum of understanding in the instant case is in the nature of a contract and fulfils its essentials. It did not give any room for further negotiations, it left nothing for future negotiations and it has no non-binding parts. Where a memorandum of understanding satisfies all the essential conditions of a valid contract, namely: the presence of an offer and acceptance, intention to create legal relations, the capacity of the parties to contract and consideration, it will be enforced in the same way as a contract. There is a strong presumption that parties intend to create a legally binding contract if the terms are certain, clearly defined and supported by consideration. The court below therefore was justified to treat is as such and to enforce it against the appellant.

In his testimony as D.W.1 the appellant, Olanya Hannington, testified that he never agreed to the settlement but was nevertheless forced to sign the memorandum of understanding. It is trite law that when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not (see *L'Estrange v. F Graucob Ltd [1934] 2 KB 394* and *Steel Makers Ltd v. AB Steel Products (U) Ltd, H. C. Civil Suit No. 824 of 2003*). It is generally accepted that a person who signs a lawful contractual document may not dispute his or her agreement to the terms which it contains, unless he or she can establish one of five defences; fraud, misrepresentation, duress, undue influence or *non est factum*.

Where a person enters into a contract as a result of threats of physical violence, the contract may be set aside provided the threat was a cause of entering the contract. There is no need to establish that they would not have entered the contract but for the threat (see *Barton v. Armstrong [1976] AC 104*). There are three requirements for the defence of physical duress; (i) it must be shown that some illegitimate means of persuasion was used, (ii) that the illegitimate means used was a reason (not the reason, nor the predominant reason nor the clinching reason), and (iii) third that his evidence is honest and accepted. In the instant case, the force the appellant alleged to have been subjected was never described. There is no evidence of the illegitimate means of persuasion allegedly used against him. It was a mere unsubstantiated assertion. Grounds fail.

A contract recognises a legal duty in that, if a party fails to comply with his or her side of the bargain, the other party can enforce the contract in the courts for a remedy in the form of damages and equitable remedies like specific performance and injunction. The trial court thus came to the right decision when it decided in favour of the respondent, on basis of the terms of the memorandum of understanding. In the final result, the appeal has no merit. It is dismissed with costs to the respondent.

Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.