

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0036 OF 2016

(Arising from Kitgum Chief Magistrate's Court Civil Suit No. 191 of 2012)

5 **OGWANG AMOS** **APPELLANT**

VERSUS

1. **ODOCH CHARLES** }
10 2. **LAMUNU SESERINA** } **RESPONDENTS**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

15 The respondents jointly and severally sued the appellant for a declaration that the respondents are the owners of land under customary tenure, situated at Lawuda village, Lalano Parish, Lagoro sub-county, in Kitgum District, an order of vacant possession, a permanent injunction, general damages for trespass to land, interest and costs.

20 The respondents' case was that they jointly inherited that land from the late Abuneri Opio, father of the first respondent and husband of the second respondent. Both enjoyed quiet possession and use of the land from 1973 until the year 2008 when a one Anywar Julius unlawfully encroached onto the land. The respondents sued him and in the year 2009 obtained judgment in their favour from the L.C.II Court. To their surprise, during the year 2011, the
25 appellant trespassed on the same land claiming it to belong to him. He thereafter in the year 2012 rapidly constructed four buildings on the land with the intention of defeating the respondents' interest in the land.

In his written statement of defence, the appellant contended that the suit is *res judicata*, the
30 matters in controversy having been decided before in the appellant's favour by both the L.C.1 of Aloto and the L.C.II of Lagoro. The land in dispute belongs to the Potuke Plyoping clan. It was acquired originally by his grandfather Oryem Akai in 1954. The appellant was born and raised

on the land in dispute and has lived thereon for the past 42 years. The respondents never sued his father and grandfather before him, over this land.

5 Testifying as P.W.1 Odoch Charles, the 1st appellant stated that he obtained the land from his mother, the 2nd respondent to whom it was given by her father, the 1st appellant's grandfather Abuneri Opio, in 1975. The appellant is the son of his paternal uncle. The 2nd respondent's father had shared the land between the 2nd respondent and her brother, the father of the appellant, and their other siblings. During the year 2011, the appellant prevented both respondents from using the land. P.W.2 Lamunu Siserina, 2nd respondent who is a sister of the appellant's father, stated
10 that their late father allocated her the land she is occupying now. The appellant encroached on the respondents' land in 2003 and stopped her from using her land. He constructed houses in her compound and garden.

P.W.3 Obote Tomson, a neighbour, testified that he shares a boundary with the second appellant
15 but he does not know how she acquired it. During the year 2011, the appellant sued the first respondent before the L.C.II Court. The L.C.III Court decided in favour of the appellant. Each of the parties owns a separate piece of land. P.W.4 Odwar Patrick, son of the 2nd respondent, testified that he is resident on the land and has children and grandchildren living with him. The 2nd respondent's father gave her the land in 1975. The appellant has since laid a claim to the
20 entire land and has stopped the respondents from using the land. P.W.5 Okullu Joseph, another neighbour, testified that saw the 2nd respondent build her house on the land in 1975. She has since then been living on the land with the 1st respondent. Lastly, P.W.6 Alberto Olock testified that the land in dispute is his ancestral land he inherited from his father Abuneri Opio. For the last three years the appellant has prevented him from using the land. He is the one who gave the
25 2nd respondent the land in 1975. The appellant came from Bweyale before laying claim to the land. The respondents then closed their case.

In his defence as D.W.1 the appellant Ogwang Amos testified that the land in dispute originally belonged to his grandfather, Oryem Lakai who acquired it in 1958. He had two sons one of
30 whom was Christiano Ogwere, the appellant's father. His father gave that the respondents 80 acres of that land. The boundary is marked by tree stumps and stones. The graves and other items

of the respondents are located within the 80 acres. When he relocated from Bweyale in 2011, he built his house on land that belongs to his late grandfather. D.W.2 Can Kwora Bosco, testified that the appellant's father was the first to settle on the land when it was virgin land in 1958. It is in 1994 that he knew the land belonged to the appellant's father when he organised for its cultivation. In 2008 on their return from the camp, the dispute over the land went before the L.C. Courts and the L.C.III decided in favour of the appellant. The second respondent went before the Grade One Magistrate who dismissed her claim. It is the Jingi tree that separates the appellant's from the respondent's land.

10 D.W.3 Ocana Anthony testified that the appellant's grandfather Lakai was the first to occupy the land. When his wife died in 1959, he left the land and in 1975 the first respondent's father asked Akai's brother, Bariko Oyo, for permission to use the land. Bariko Oyo left the land to his brother Christiano Ogwere, the appellant's father, and settled in Bweyale. D.W.4 Ongom Jackson stated that the appellant's grandfather Oryem Lakai was the first to occupy the land in 1958 until his death in 1974. Oyo Bariko took over the land and in 1978 upon the request of the first respondent's father Yosam Odwar, he gave him approximately sixty acres to the northern part of the land, leaving approximately 100 acres now occupied by the appellant with others. The boundary is the stump of an Oywelo tree. When the first respondent was sued by Julius Kidega Anywar, the first respondent pleaded that the land does not belong to him but to Christiano Ogwere. The first respondent vacated the land in 2010. In 2011, the appellant came from Bweyale and occupied the land that had been given to the first respondent's father. The appellant's father was told to vacate and he did so, moving to the Southern part of the land and now a path is the boundary between them. In 2012, when the appellant returned from Bweyale, he occupied land given to him by Longera Bariko.

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In his judgment, the trial Magistrate found that the respondents had proved that they are the owners of the land. The land in dispute was declared to belong to the respondents, an order of vacant possession was issued against the appellant, a permanent injunction was issued against him as well and the costs of the suit were awarded to the respondents.

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The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence before court and relied on hearsay and contradictory evidence by the respondents thereby coming to a wrong decision.
2. The trial Magistrate erred in law and fact when he in effect erroneously declared the respondents the lawful owners of the suit land.
3. The trial Magistrate erred in law and fact when he failed to visit the *locus in quo* despite the appellant paying court shs. 300,000/= for transportation.

In her submissions, counsel for the appellant, Ms. Otto Harriet, argued all grounds together stating that there is no proper description of the land that was given to the second respondent. As a result, the respondents intended to take more land than the approximately 80 acres that were given to them. The appellant and his witnesses proffered evidence devoid of inconsistencies and contradictions. Had the Magistrate visited the *locus in quo* he would have found that each of the parties had their own separate land. She prayed that the appeal be allowed with costs.

In response, counsel for the respondents M/s Ladwar Oneka & Co. Advocates argued grounds 1 and 2 together submitting that DW2 testified that the land belonged to the appellant's grandfather before but D.W.4 stated that when the appellant came from Bweyale, he occupied land that had been given to the first respondent's father. The appellant's cross-examination dwelt on clan relationship indicating that his motive was to deprive the second appellant of rights to land from her maternal family. With regard to ground 3, they submitted that it is not mandatory to visit the *locus in quo*. The dispute was not about boundaries but ownership of the land. Although the trial magistrate received money but still failed to visit the *locus in quo*, that is not a matter for appeal but an administrative issue. They prayed that the appeal 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
5 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
10 generally.

The first two grounds will be considered concurrently. Whereas in their claim the respondents stated they jointly inherited the land in dispute from the late Abuneri Opio, father of the first respondent and husband of the second respondent, in his defence, the appellant Ogwang Amos
15 conceded that his father Christiano Ogwere gave the respondents 80 acres of the land now in dispute. Whichever the origin of their title, it was a mutual fact that the respondents are not trespassers on the land. The genesis of the dispute was revealed by D.W.3 Ocana Anthony who testified that when the first respondent vacated the land in 2010, during the following year 2011 the appellant came from Bweyale and occupied the land that had been given to the first
20 respondent's father yet the appellant's father had before vacated that part of the land, moving to the Southern part of the land. Whereas before these adjustments the boundary was marked by stumps of Oywelo trees and stones, now a path formed the boundary between them.

Under Order 18 rule 14 of *The Civil Procedure Rules*, the court has power at any stage of a suit
25 to inspect any property or thing concerning which any question may arise. Although this provision is invoked mainly for purposes of receiving immovable items as exhibits, this power includes inspection of the *locus in quo*. The determination of whether or not a court should inspect the *locus in quo* is an exercise of discretion of the magistrate which depends on the circumstances of each case. That decision essentially rests on the need for enabling the
30 magistrate to understand better the evidence adduced before him or her during the testimony of witnesses in court. It may also be for purposes of enabling the magistrate to make up his or her

mind on disputed points raised as to something to be seen there. It is a visit that ought to be made with a clear focus on what it is that the magistrate intends to see or the parties and their witnesses intend to show the magistrate, which evidence is to be tested at the inspection and what the issues are which he or she would decide by that inspection, so as to avoid the likelihood of turning the exercise into a fishing expedition for evidence. It would advance the cause of clarity and transparency if these objectives are clearly set out by the court on the record of the trial, before undertaking the visit.

Since the adjudication and final decision of the suit should be made on basis of evidence taken in Court, the visit to a *locus in quo* 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 visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. It appears that the trial Magistrate had decided to make such a visit but did not follow this through. I have examined the evidence and failed to find specific aspects of the case as canvassed during the oral testimony in court that required testing by a visit to the *locus in quo*. This is because both the appellant and D.W.3 had admitted that when the appellant relocated from Bweyale in 2011, he built his house on land which he claimed to have belonged to his late grandfather, which it turned out the respondents claimed as theirs.

The issue was therefore about the ownership of that land rather than the location of its boundaries. The root of title of both parties could be determined without a visit to the *locus in quo*. The trial court therefore came to the right conclusion based only on the evidence adduced in court. By way of construction of houses in the second respondent's compound and garden, the appellant attempted to re-claim land that had for over four decades been occupied by the respondents, which was an act of trespass onto their land. The appellant did not claim to be occupying land outside the approximately 80 acres that rightly belong to the respondents. The acreage was not in issue and in any event it is a mere estimate of the size land the respondents have been occupying for more than forty years.

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*). The intended visit would not have yielded any physical aspects of the evidence that would have helped in conveying and enhancing the meaning of the oral testimony about the history of ownerships of that land. I find that failure to visit the *locus in quo* was not fatal to these proceedings.

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That notwithstanding, it was wrong for the trial Magistrate though to have received money from the litigants in order to facilitate the planned visit to the *locus in quo*. All judicial activities of courts should be financed by money drawn from the consolidated fund and not directly or indirectly from litigants. Under Principle 4 of *The Uganda Code of Judicial Conduct, 2003*, a Judicial Officer is obliged at all time to conduct himself or herself in a manner consistent with the dignity of the judicial office, to exhibit and promote high standards of judicial conduct. In order to maintain credibility in his or her personal and judicial life, a judicial officer must be above suspicion.

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Judicial Officers are often judged by the public under an appearance of impropriety standard. Considering a rule that is *in pari materia* with ours, The American Bar Association reaffirmed the disciplinary rule in Rule 12 of their 2007 edition of the *Model Code of Judicial Conduct*, thus: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." (emphasis added). Taking money directly or indirectly from litigants, irrespective of the motive, is improper.

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Judicial officers have an obligation to avoid any behaviour which, in fact or perception, reflects adversely on the judicial officer or the judiciary. "To keep the fountain of justice pure and above reproach, the very appearance of evil should be avoided (see *Eastham v. Holt, 27 S.E. 883, 894 (W. Va. 1897)*; and *State ex rel. Attorney Gen. v. Lazarus, 1 So. 361, 376 (La. 1887)*). Any

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conduct that reflects adversely on a judicial officer's honesty, impartiality, temperament, or fitness to serve as a judicial officer, is improper. The standard of conduct which the public demands is an external and objective one, rather than the individual judgment of the judicial officer concerned. The standard used is that of a reasonable person who is fully informed of and
5 understands all facts and circumstances surrounding a suspect act of a judicial officer, good or bad, of the particular actor. From that viewpoint it is determined whether or not an actual impropriety occurred.

In financial matters, a judicial officer is subject to the general prohibitions against activities that
10 tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. For failing to avoid improper appearances, for creating a perception of wrongdoing, or otherwise demeaning the judicial office, judicial officers are liable to be subjected to disciplinary action, even where no actual misconduct occurs. For appearance of impropriety, the question is whether the conduct would create in reasonable minds a
15 perception that the judicial officer's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. From that perspective, it is entirely a matter to be determined by the Judicial Service Commission in case the appellant is disposed to initiate disciplinary proceedings against the trial Magistrate.

In so far as this appeal is concerned, the question is whether this conduct created a situation
20 where his impartiality "might reasonably be questioned." The real test of the impact of that behaviour on the trial is whether or not a reasonable person who is fully informed of and understands all facts and circumstances surrounding this conduct and seeing the outcome of the case, may not reasonably question the trial magistrate's impartiality in the matter. The question is
25 whether the conduct compromised the trial Magistrate's ability to carry out his judicial responsibilities with independence, integrity, impartiality, competence and diligence. A judicial officer is "impartial" when he or she is free bias or prejudice in favour of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before him or her.

Apart from having created a perception of wrongdoing, there is no apparent impact on the impartiality of the trial magistrate. The third ground of appeal therefore fails as well. That being the case, in the final result, the appeal lacks merit and is dismissed with costs to the respondents.

5 Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.

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