IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 027 of 2017

In the matter between

THE MANAGEMENT COMMITTEE OF
MADUOPEI PRIMARY SCHOOL **APPELLANT**

And

ESTHER AOL **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Land Law**:** *— Determination of a common boundary — It is an established rule that where land is described by its admeasurements, and at the same time by known and visible monuments, the latter prevail. The question of quantity is mere matter of description, if the boundaries are ascertained — if a line has been treated as the boundary by both adjoining owners for many years, an initial agreement between them will be inferred by a court that is deciding on the validity of an alleged boundary agreement.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant jointly and severally with two other persons for the recovery of approximately five acres of land situated at Poyamo village, Kal Parish, Madi Opei sub-county in Lamwo District, a declaration that the respondent is the rightful owner of the land in dispute, an order of vacant

possession, general damages for trespass to land, a permanent injunction and the costs of the suit.

[2] Her claim was that she inherited approximately eight acres of land, five of which are now in dispute, from her late father Pirino Oyugi who acquired it as a gift *inter vivos* from his paternal aunt in 1954, occupied and utilised the land in dispute peacefully until the year 2010 when the appellant with the others she jointly sued, began trespassing upon it, removed boundary marks, constructed school buildings and latrines on approximately two acres of the land. The respondent was deprived of the use and enjoyment of that part of the land, hence the suit.

[3] In its written statement of defence, the appellant refuted her claim. In a defence filed jointly with another, the appellant averred that the school has been occupying and using the land in dispute since the year 1942. The land was given to the school as a gift *inter vivos* by the children of the Apeo Poyamo Clan who had no relations with the respondent. None of the respondent's ancestors has ever owned or occupied the land in dispute. The respondent's father only lived and worked Madi Oepi Health Centre which occupies land to the South of the land in dispute. They prayed that the suit be dismissed.

The respondent's evidence in the court below:

[4] The respondent Esther Aol, testified as P.W.1 and stated that the land in dispute belonged to her late father, Pirino Oyugi who acquired it in 1954. It originally measured approximately 8 acres but the appellants have since trespassed onto three acres, leaving her only five acres. The respondent was born and raised on that land. The boundary between the land and the Health Centre was a *Muvule* tree. A dispute between her father and a neighbour was resolved in 1970 with the planting of a green bottle at the common boundary. The appellants have since then exceeded that boundary mark and encroached onto the respondent's land and constructed school buildings and a latrine thereon.

[5] P.W.2 Ilari Laloka testified that the boundary between the respondent's and the school land was marked by *Mivule* tree. Sometime in 1965 the respondents' family had allowed the appellant's head teacher temporary occupation of the land and when it ended he took the iron sheets of the temporary house he had constructed on the land. In the past when there was a dispute between the respondent's father Pirino Oyugi and the Mission a green bottle was planted in the ground to mark the common boundary.

[6] P.W.3 Johnson Langoya testified that the land in dispute was previously occupied by the respondent's father Pirino Oyugi, a medical assistant at the Mission hospital. Oyugi was given that part of the land by his clan and it is the same clan that gave the other part to the Mission. When a dispute erupted between the respondent's father and the Mission a green bottle was planted in the ground to mark the common boundary. When the school encroached onto the respondent's land by constructing buildings and a latrine, the residents gathered and searched for the bottle. It was established that the school had exceeded the boundary.

[7] P.W.4 Valente Omon testified that the late Pirino Oyugi was given the land in dispute by members of his clan. He occupied it, constructed a house on it and established gardens thereon. He had buried six of his deceased children on the land by the time he died and he too was buried on the land. A green bottle was in the past planted in the ground to mark the common boundary. The school has since exceeded that boundary and trespassed onto the respondent's land.

[8] P.W.5 Maria Lagafa testified that the school trespassed onto the respondent's land. A green bottle was in the past planted in the ground to mark the common boundary and she had seen it while digging in that area. One of the school teachers had been allowed temporary occupation of the land and he had eventually left. P.W.6 Erieza Olebe testified that the late Pirino Oyugi was given the land in dispute by members of his clan. North of the land is the Health Centre

and South of it is the school. When a dispute erupted between the respondent's father and the Mission a green bottle was planted in the ground to mark the common boundary. The school has since exceeded that mark and taken over almost half of the respondent's land. The school then planted a new boundary marker intending to claim that part of the respondent's land as its own. P.W.7 Evaristo Okeny testified that the land in dispute belonged to the late Pirino Oyugi.

The appellant's evidence in the court below:

[9] In defence, D.W.1 Augustine Okwee testified that he is the Chairman of Madi Opei Primary School. The school has existed since 1942 having been started by the missionaries. The boundary is marked by *Mituba* trees. On 26th June, 2010 the respondent sent her agents who began digging in the school compound. The respondent was invited to a meeting but she never turned up. The L.C. officials decided in favour of the school. The land had been occupied by Otim Taracio, one of the teachers at the school way back in 1957. The teachers now use that part of the and fro growing vegetables.

[10] D.W.2 Ayella Fred Lucima testified that the land in dispute belongs to the school. During the year 2010 the respondent began encroaching onto the land and he reported the matter to the authorities. The respondent was summoned but never responded. The school was declared the rightful owner of the land. The boundary is marked by *Mituba* trees. The school had built some houses and teachers have gardens on the land. In the past, one of the school's head teachers, Otim Taracio, had constructed a house on the land. He de-roofed the house and took the iron sheet with him when he was transferred. The respondent's late father Pirino Oyugi worked at the Mission Hospital and had been permitted to build a house on its land. His activities never encroached onto the school land now in dispute. The respondent may have connived with other people to plant a bottle and claim that it is the true boundary.

[11] D.W.3 Okeny Jojimo testified that the respondent occupies land that belongs to the school. It was given to the school in 1920. D.W.4 Okot Angelo testified that the land belongs to the school but the dispute over it began in 2010. The school started in 1942. The boundary is marked by *Mituba* trees. The respondent's father migrated to the village in 1950 and must have acquired the land he occupied, from the mission hospital.

[12] D.W.5 Ocen Mathew testified that the dispute between the respondent and the school began in 2010 when she began stopping the teachers from cultivating part of the school land. The respondent and the school share a common boundary marked by *Mituba* trees. The respondent's late father Otim Taracio occupied land between the school and he hospital. He used to work at the hospital. He was posted to the school in 1985 and during that time both the pupils and the teachers used to grow crops on the part in dispute. When he died he was buried at his home next to the hospital.

[13] D.W.6 Ocaya Henry a former head teacher of the school testified that the common boundary between the respondent's and the school land is marked by a *Cwaa* tree and *Kituba* tree in the same line. Later a road was constructed by the school along that boundary. He had never heard about a green bottle being the boundary marker of that land.

Proceedings at the *locus in quo*:

[14] The court then visited the *locus in quo* where it saw the homestead of the appellant's former head teacher Teraciso Otim, multiple graves and an incomplete wall of a structure raised by the respondent. It recorded evidence from a one Ocula who never testified in court. The Court prepared a sketch map of the area in dispute which indicates both the *Mituba* trees referred to by the appellant and the location of the green bottle boundary marker referred to by the respondent.

Judgment of the court below:

[15] In his judgment, the trial Magistrate found that the land in dispute originally belonged to the family of Ademo. In 1942 part of the land was given to the appellant while the other part was in 1954 given to the late Oyugi who was related to the Ademo family but was also a member of staff of the hospital. When the respondent began her construction on the approximately two acres that were formerly occupied by the late Oyugi, the appellant never stopped her until the appellant filed a suit before the L.CII in proceedings which the respondent never attended. Both parties agree that he late Oyugi lived on the land and his family never had any dispute with the appellant nor the hospital. The appellant committed an act of trespass when it removed a bottle that had been planted in 1970 as a boundary mark and began construction of teachers' houses on two acres of the land belonging to the respondent. The approximately five acres in dispute belong to the respondent. She was declared its rightful owner thereof. The appellant was found to be a trespasser onto the land, and a permanent injunction was issued restraining it from undertaking any further activities on the land. The respondent was awarded general damages of shs. 2,000,000/= with interest at 8% per annum from the date of judgment until payment in full, and the costs of the suit.

The grounds of appeal:

[16] 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 she failed to ascertain the size of the land in dispute in light of the contradictory evidence relating to its size.
2. The learned trial Magistrate erred in law and fact, when she decided in favour of the respondent without first ascertaining the boundaries despite the contradictions relating to its proper boundaries.

3. The learned trial Magistrate erred in law and fact when she found that the land in dispute belongs to the respondent and not the appellant.
4. The learned trial Magistrate erred in law and fact when she failed to conduct proceedings at the *locus in quo* in accordance with the law, when she allowed persons who had not testified in court to give evidence during the proceedings thereat.

Arguments of Counsel for the appellant:

[17] In their submissions counsel for the appellant argued that the respondent's evidence was inconsistent regarding the size of the land; at one point stating that it was five acres, at another seven to eight acres, while at the other stating that it was twelve acres. These were fundamental contradictions and they are inconsistent with the finding of the trial magistrate that it measured five acres. In her judgment, she did not explain how these contradictions were resolved. The respondent neither proved the size nor her ownership of the land in dispute. There were contradictions regarding the year in which the bottle was planted on the land and as to whether it was intended to be a boundary mark. Some of the witnesses instead referred to different species of trees as the boundary marks, while others were silent on this aspect. In her judgment, she did not explain how these contradictions were resolved. The trial magistrate disregarded evidence showing that the appellant acquired the land in dispute in 1942. It was an error for the trial court to have allowed persons who had not testified in court, to give evidence while at the *locus in quo*. He prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[18] In response, counsel for the respondent argued that the evidence showed that the respondent's father was given eight acres but as a result of settlement of subsequent disputes, it was reduced to five acres. It is two acres out of the five that are now in dispute. The discrepancies in size relate only to the size of the

respondent's entire land and not to the area in dispute. Since the respondent's entire land was not in dispute, these discrepancies were minor. The witnesses were giving their honest estimates of un-surveyed land and were not telling deliberate untruths. In the court's own estimation, the area in dispute was approximately two acres. The court resolved the discrepancies when it formed its own opinion. In demarcation of the boundary, a green bottle and multiple varieties of trees planted in a line, were used. Discrepancies as to the year during which the bottle was planted may be attributed to memory lapse. At the locus in quo, these boundaries were demonstrated to the court. The third ground of appeal is too general and should be struck out. In the alternative, the weight of evidence supports the findings of the trial court made in favour of the respondent. The trial court made minimal reference to evidence of one of the three additional witness whose evidence was given at the *locus in quo*. This did not occasion a miscarriage of justice. That evidence related only to the location of the bottle as a boundary mark. When the evidence of that one witness is disregarded, there is ample evidence from other witnesses that explain the location of that bottle as a boundary mark. The appeal lacks merit and should therefore be dismissed.

Duties of a first appellate court:

[19] This being a first appeal, this court is required 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*).

[20] In exercise of its appellate jurisdiction, this 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.

The third ground of appeal is struck out for being too general:

[21] I find the third ground of appeal to be too general that it offends the provisions of Order 43 r (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 accordingly struck out.

Ground Four

[22] Ground four of appeal criticises the manner in which the trial Magistrate conducted proceedings at the *locus in quo*. 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)*. It was an error for the court to have recorded evidence from a one Ocula who never testified in court.

[23] 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.

[24] 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 one additional witness, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of that witness. This ground accordingly fails.

Determination of the boundary dispute

[25] In grounds 1 and 2 of appeal, the trial Magistrate is criticised for making a decision regarding ownership of the land in dispute without ascertaining its proper boundaries. In the first place, the respondent's case was that the land belonged to her late father Pirino Oyugi. In its defence, the appellant did not question Pirino Oyugi's possession but characterised it as a license and that the respondent is therefore a licensee. However the Pirino Oyugi's family's activities on the land are inconsistent with a license. There was an abundance of evidence of exclusive possession including the fact that he constructed a house on the land and buried multiple deceased relatives of his thereon evidenced by the graves seen by the court when it visited the *locus in quo*.

[26] In that regard, the common law doctrine of proprietary estoppel favours' the respondent's claim. This doctrine has been used to found a claim for a person who is unable to rely on the normal rules concerning the creation or transfer (and sometimes enforcement) of an interest in land. In *Crabb v. Arun District Council [1976] 1 Ch.183,* Lord Denning explained the basis for the claim as follows: “the basis of this proprietary estoppel, as indeed of promissory estoppel, is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law.” It will prevent a person from insisting on his strict legal rights, whether arising under a contract, or on his title deeds, or by statute, when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.

[27] When the legal owner stands by and allows the claimant to, for example, build on his or her land or improve his or her property in the mistaken belief that the claimant had acquired or would acquire rights in respect of that land or property then an estoppel will operate so as to prevent the legal owner insisting upon his strict legal rights. It applies where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act (see *Willmott v. Barber (1880) 15 Ch D 96; Ramsden v. Dvson (1866) L.R. 1 H.L. 129* and *Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd[1982] QB 133*). That doctrine is founded on acquiescence, which requires proof of passive encouragement (see *The Law of Real Property (8th Edition)* at pages 710 to 711, para 16-001 and *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850, 884*).

[28] Counsel for the appellant argued further that respondent's evidence was inconsistent regarding the size of the land; at one point stating that it was five acres, at another seven to eight acres, while at the other stating that it was twelve acres, which he characterised as fundamental contradictions. 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.

[29] 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. In the instant case, the inconsistencies and contradictions pointed out are immaterial and explainable.

[30] By virtue of the fact that unaided by precision measuring equipment, no two persons will measure the same thing exactly the same way, monuments must govern over bearings, acreage and distances. No matter how "accurate" a measurement is, it has a lower value than a natural or artificial monument. Any natural object, and the more prominent and permanent the object, the more controlling as locator, when distinctly called for and satisfactorily proved, becomes a landmark is not to be rejected because the certainty which it affords, excludes the probability of mistake (see the Supreme Court of Georgia case of *Margaret Riley v. Lewis L. Griffin and others, (1854) 16 Ga. 141*).

[31] It is an established rule that where land is described by its admeasurements, and at the same time by known and visible monuments, the latter prevail (see . *Howe v. Bass, 2 Mass. 380 (1807)* and *McIver's Lessee v. Walker, 9 Cranch ,13 U.S. 173 (1815) at 178*). If there are conflicting calls as to the size of land, those measurements which, from their nature, are less liable to mistake, must control those which are more liable to mistake (see *Bank of Australasia v. Attorney-General (1894) 15 NSWR 256 at 262* and *Hutchison v. Leeworthy (1860) 2 SALR 152*).The question of quantity is mere matter of description, if the boundaries are ascertained.

[32] The rule is bottomed on the soundest reason. There may be mistakes in measuring land, but there can be none in monuments. When a witness estimates the size of land, he or she naturally estimates its quantity by the features which

enclose it, or by other fixed monuments which mark its boundaries. He or she may be mistaken as to the size but not the monuments. In the instant case the respondent and her witnesses gave an estimate of the size as well as a description of the common boundary of the land, which features were verified during the visit to the *locus in quo*. Therefore, disparities in the approximated description of the size of the land became immaterial once the court was able to verify the boundaries during the *locus in quo* visit.

[33] The dispute between the parties concerns the location of the common boundary between their respective adjacent tracts of land. Adjoining owners can, through words or action, create a “consentable” (or “consentible”) boundary. For neighbours to agree on a permanently binding boundary between their adjoining land, four conditions must be met:- (i) there must be genuine uncertainty as to where the true boundary line runs on the ground; (ii) both landowners must agree on the new line; (iii) the owners must then act as if the new boundary line really is the boundary ("acting in reliance on the agreement"); and (iv) the agreed boundary must be identifiable on the ground.

[34] A neighbours' agreement about an uncertain boundary doesn't have to be in writing to be legal. Sometimes, if a line has been treated as the boundary by both owners for many years, an initial agreement between them will be inferred by a court that is deciding on the validity of an alleged boundary agreement. A court might make this inference when all of the other conditions of an agreed boundary have been met. An agreed upon boundary then literally supersedes any other boundary that existed hitherto. When adjoining owners of unregistered land treat a line as being the boundary between them, though that line may be different from the boundary described in their deeds, or any other officially recognised boundary that existed hitherto, and when those actions continue uninterrupted for twelve years or more, (whether by a single owner or a succession of owners), the parties are deemed to have established the line as the boundary, through recognition and acquiescence, regardless of the boundary described in their

deeds or any other officially recognised boundary that existed hitherto. The boundary is binding even when it is not reflected in a writing.

[35] In the instant case, the appellant was unable to refute the respondent's evidence to the effect that a dispute between her father and the respondent was resolved in 1970 with the planting of a green bottle at the common boundary. The boundary existed since 1970 and could not be crossed forty years later in 2010.

Order :

[36] In the final result, the appeal has no merit. It is dismissed and the costs of the appeal as well as those of the court below are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Komakech Kilama and Co. Advocates.

For the respondent : Geoffrey Ojok and Co. Advocates.