

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0064 OF 2017**

(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 33 of 2013)

5 **OLANYA JAMES APPELLANT**

VERSUS

1. **OCITI TOM }
2. **OBWONA S/o ONYING }
10 3. **OKENA S/o ONYING } RESPONDENTS
4. **AKONGO HELLEN }********

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The appellant sued the respondents jointly and severally for a declaration that he is the owner of approximately 200 acres of land under customary tenure and recovery of fifteen acres of it, situated at Kalamomiya village, Paidwe Parish, Bobi sub-county, Omoro County in Gulu District. His claim was that he inherited the land in dispute in 1984 from his own father Onyac Jaramoi who died in 1972, who in turn inherited it from his own father the late Kwoyo Akeny. The appellant was born on that land and he at all material time grew crops and grazed livestock on it. He joined the army during the year 1970 and later after leaving the army returned to the land in 1989. He found that the respondents had occupied part of the land and they did not heed his demand to vacate the land. Because of the war that was still raging at the time, he left them remain on the land. Around the year 2002 during the insurgency, they all vacated the land and relocated into an I.D.P Camp. At the end of the insurgency in 2006, they returned to the land and began agricultural activities thereon. The respondents later constructed dwelling houses on the land and have effectively occupied approximately fifteen acres of his land to-date, hence the suit.

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In their joint written statement of defence, the respondents contended that they are the customary owners of the land in dispute having been born and raised on that land. They acquired the land

by way of inheritance from their respective deceased fathers. They counterclaimed for a declaration that they own the land, an eviction order and permanent injunction against the appellant, general damages for trespass to land, and costs.

5 In his testimony as P.W.1, the appellant stated that he inherited the land from his late father Opio Cambo in 1984 but the respondents entered onto his land in 1989, he initially demanded that they leave but he later allowed them to stay on the understanding that they would vacate after the war. P.W.2 Akello Kijja testified that the land in dispute measures approximately fifteen acres and originally belonged to the appellant's grandfather Koya Akeng upon whose death it passed to the
10 appellant's father Agen Onyac and later to the appellant. During the insurgency, the respondents left their land at Kasubi and occupied the land now in dispute. They only grow crops on the land. The respondent's father, the late Edward Onying, was buried on the land in dispute during the insurgency. P.W.3 Lalam Saida testified that the respondents occupied the land in dispute in 1989 during the insurgency and have since then refused to vacate. The appellant inherited the
15 land from his late father Opio Acama, who in turn inherited it from his own father Nyaramoi in 1972. P.W.4 Okello Alfred too testified more or less in similar terms. The court then visited the *locus in quo*.

In his judgment, the trial magistrate found that P.W.2 Akello Kijja had contradicted the
20 appellant's claim that he had inherited the land in dispute from his late father Opiyo Cambo when she testified that the plaintiff's father was Agen Onyac. In paragraph 4 of the plaint and 6 of the reply to the written statement of defence, and defence to the counterclaim, the appellant had claimed that his father was Onyac Jaramoi. It not only cast into doubt the true identity of the appellant's father but also the person from whom he acquired title to the land. The two again
25 contradicted one another as to the identity of the appellant's grandfather, the appellant referring to him as Onyac Jaramoi while P.W.2 referred to him as Koyo Akeny. The appellant's father's root of title was thus as well cast in doubt as well. Whereas in his testimony he claimed to have lived on the land together with his family, during the visit to the *locus in quo* he stated that he only used the land for cultivation and for grazing livestock only. These were unexplained major
30 contradictions in so far as they related to his root of title.

On the other hand, the evidence of the respondents was consistent and unshaken by cross-examination. They were born and raised on the land in dispute. At the visit to the *locus in quo*, the court found that all respondents are resident on the land in dispute and have their dwellings on it, with evidence of long occupancy as deduced from the size of trees growing in their
5 respective courtyards. The appellant claimed to have found the respondents in unlawful possession of the land in 1989 but never took any steps to evict them until seventeen years later in 2006 when he filed the suit before the L.C. Court and in 2013 before the Chief Magistrate's Court. His action was not only time barred but he had not adduced evidence to the required standard of proof. He dismissed the suit with costs to the respondents, entered judgment in
10 favour of the appellants on the counterclaim, declared them customary owners of the land in dispute, issued a permanent injunction, and directed that each party was to bear their own costs of the counterclaim. Being dissatisfied with the decision, the appellant appealed to this court on one ground as follows;

1. The trial Magistrate erred in law and fact when she failed to properly evaluate the
15 evidence on record to proper scrutiny (sic), thus reaching a wrong conclusion and occasioning a miscarriage of justice.

In his written submissions on this ground, counsel for the appellant Mr. Joseph Sabiiti Omara argued that the trial Magistrate occasioned a miscarriage of justice when he failed to hold a
20 scheduling conference before commencement of the trial. Furthermore, the evidence of the respondents and their witnesses was full of contradiction which were not properly evaluated by the trial court. The trial court even at the *locus in quo* failed to establish the boundaries of the land in dispute. The trial court instead placed too much weight o the minor contradictions in the appellant's case which in any event are explainable. The majority are misspellings of names and
25 the rest arose as a consequence of old age of the witnesses. The respondents were permitted to stay on the land until the end of the war. The war having ended in 2006, a suit filed in 2013 was not time barred. He prayed that due to the irregularities in the proceedings of the trial court, the court orders a re-trial.

30 In response, counsel for the respondents Mr. Boris Anyuru argued that the sole ground of appeal should be struck out and the appeal dismissed as it offends the provisions of Order 43 r (1) and

(2) of *The Civil Procedure Rules*. The parties opted to proceed by way of a joint memorandum of scheduling which was duly filed in court on 10th April, 2014. Evidence at the trial showed that the appellant claimed not been on the land in dispute from 1970 until 1989 when he found the respondents in possession. The evidence of the respondents was that they had been born on the
5 land in the mid and late 1940s and mid and late 1950s respectively and had lived on that land ever since. There was no evidence that the war had prevented the appellant from filing a suit. The finding that the appellant's suit was barred by limitation was therefore a correct finding. Evidence of the respondents' user observed at the locus was inconsistent with the appellant's claim of temporary use having been given to the respondents. The trial court came to the right
10 decision and therefore the appeal should be dismissed with costs.

This being a first appeal, 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 in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court
15 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.

The court finds the sole ground of appeal is too general and offends the provisions of Order 43 r
20 (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
25 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*
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Appeal No. 79 of 2003). Accordingly the sole ground of appeal presented in this appeal is struck out.

That on its own would have disposed of this appeal but I think it necessary to consider the arguments presented by counsel for the appellant on the merits of appeal. His first argument is that failure to conduct a scheduling conference was a fatal irregularity. However 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. This is more especially important since article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995* requires the courts to consider the rules of procedure as existing to help the courts expedite court business but not as ironclad obstacles to all causes of action in all circumstances. Substantive justice prevails over flaws in procedure that do not occasion a miscarriage of justice. In *Byaruhanga and Company Advocates v. Uganda Development Bank, S.C.C.A No. 2 of 2007, (unreported)* it was left to the discretion of the judge to decide whether in the circumstances of a particular case and the dictates of justice, a strict application of the laws of procedure, should be avoided. A litigant needs only to satisfy the court that in the circumstances of the particular case before the court, it was not desirable to pay undue regard to a relevant technicality and the irregularity will be overlooked or disregarded.

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An appellate court will set aside a judgment of a trial court, 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 on that account. The general principle that the rules of procedure are “intended to serve as the hand-maidens of justice, not to defeat it.” (See *Iron and Steel Wares Limited v. C.W. Martyr and Company (1956)* 23 *E.A.C.A. 175 at 177*). In a deserving case, the court may rightfully exercise its discretion to

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overlook the failure to comply with rules of procedure, upon such conditions as it may deem fit intended to guard against the abuse of its process.

5 In the instant case, it is true that Order 12 rule 1 (1) of *The Civil Procedure Rules* mandatorily requires trial courts to hold a scheduling conference before the commencement of any trial. The declared purpose of such a conference is "to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement." This provision came into existence as the result of *The Civil Procedure (Amendment) Rules. S.I. No. 26 of 1998* (which came into force on 24th July, 1998). The amendment was part of the process designed to reduce
10 on technicalities and to allow more expedient justice for those with legitimate claims, by making the process of adjudication swift, fair, just, certain and even-handed. This is consistent with the requirement of Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* to the effect that in the determination of civil rights and obligations, a person shall be entitled to a fair and speedy hearing. I have not found that there was any delay occasioned by failure to undertake a
15 process meant to expedite a civil trial and to promote efficiency.

The other argument is that the evidence of the respondents and their witnesses was full of contradictions which were not properly evaluated by the trial court. The trial court instead placed too much weight on the minor contradictions in the appellant's case which in any event are
20 explainable. The majority are misspellings of names and the rest arose as a consequence of old age of the witnesses. It is trite that there is no particular format required in the evaluation of evidence. The task may be carried out in different ways depending on the circumstances of each case since judgment writing is a matter of style by individual judicial officers. A Judgment will be valid once it is the court's final determination of the rights and obligations of the parties based
25 on the evidence adduced and gives reasons or grounds for the decision (see *British American Tobacco (U) Ltd v. Mwijakubi and four others, S.C. Civil Appeal No. 1 of 2012; Bahemuka Patrick and another v. Uganda S.C. Criminal Appeal No. 1 of 1999* and *Tumwine Enock v. Uganda S.C. Criminal Appeal No. 11 of 2004*).

30 The question as to whether the plaintiff has discharged the burden of proof on a balance of probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of

probabilities but, firstly, on a qualitative assessment of the truth and / or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. The enquiry is two-fold: there has to be a finding on credibility of the witnesses; and there has to be balancing of the probabilities. Application of judicial experience requires the
5 court to reject factual allegations if the hypothesis put forward to account for the proved facts is in itself extremely improbable. The court may reject any hypothesis in the absence of evidence supporting it. When the law requires proof of any fact, the court must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality (see *Wigmore*
10 *on Evidence* (2nd ed. 1923) v, s. 2498).

It is the law of evidence that the party who bears the burden must produce evidence to satisfy it, or his or her case is lost. The probabilities must be high enough to warrant a definite inference that the allegations are true. In a civil suit, when the evidence establishes conflicting versions of
15 equal degrees of probability, where the probabilities are equal so that the choice between them is a mere matter of conjecture, the burden of proof is not discharged (see *Richard Evans and Co. Ltd v. Astley*, [19U] A.C. 674 at 687). The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied (see *Bradshaw v. McEwans Pty Ltd*, (1959) 101 C.L.R. 298 at 305). The law does not
20 authorise court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others.

I have neither found the contradictions alluded to in the respondent's case nor an explanation of the appellants' claim of his father's names to have been Onyac Jaramoi and Opiyo Cambo in the
25 same trial, which names are not in any way phonetically similar as to justify an explanation that this was simply a spelling mistake by a magistrate unfamiliar with such names. The trial was about each party's root of title and not about boundaries such that the court trial court at the *locus in quo* did not need to establish the boundaries of the land in dispute. Having re-evaluated the evidence, I find that the trial court properly directed itself, and it came to the right conclusion.
30 This appeal lacks merit and it is consequently dismissed with costs to the respondents.

Dated at Gulu this 11th day of October, 201

Stephen Mubiru

Judge,

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