

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0012 OF 2008
(Arising from Arua Grade One Magistrates Court Civil Suit No. 0058 of 1998)

BUTIA EDWARD **APPELLANT**

VERSUS

1. RICHARD DRATE }
2. GARD EZAYI } **RESPONDENTS**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The two respondents are son and father respectively. The appellant sued them jointly in the court below for trespass to land seeking recovery of land, general damages, interest and costs. The appellant's and the second respondent's fathers were brothers. The appellant's case was that his late father, Elijah Mbiya, had inherited a ten acre piece of land at Eriava village, Ameko Parish, Oluko Division, Ayivu County in Arua District from a one Ngayoa. Upon the death of Elijah Mbiya, the appellant and his elder brother, John Awua, inherited the land. The appellant set up a home on the southern side of this land while it was bordered by the road to Rhino Camp on the northern side. In 1964 the second respondent migrated from Ombacuru, about two kilometres away from the disputed land, following a misunderstanding there, and settled at the home of a one Tikodri Onesmus, in the neighbourhood of the disputed land. Before his death, John Awua gave a 100 x 72 meter area of the disputed land to the second respondent. From there the second respondent began encroaching further on the disputed land, extending by ½ an acre each, on both the eastern and western side of the land given to him. The encroachment took place in 1972. He did not institute a suit against him until 1998. Before that, he had since 1984 attempted to recover the land through complaints to the elders and the L.C. officials. The second respondent's sons, including the first respondent, started construction of houses on the disputed land until they were stopped by the temporary injunction issued by the trial court.

P.W.2 Aritua Grismu, one of the appellant's neighbours, testified that he had known the appellant for about 30 – 40 years as his neighbour. The appellant's brother, John Awua, had before his death given the second respondent half an acre of the disputed land. In 1965, the second respondent constructed a house on the land given to him. A dispute later arose between the appellant and John Awua over the land. The dispute was referred to the local authorities and elders but he did not know how it was resolved. During 1999, another dispute emerged between the appellant and the second respondent which again was referred to the local authorities and elders who decided in favour of the appellant, directing the second respondent to vacate the land. The second respondent refused to vacate the land, hence the suit.

P.W.3 Onesmus Tikodri, another neighbour to the appellant testified that it was during 1964 when the second appellant migrated from a neighbouring village across the river and came to live with him. Later John Awua gratuitously gave him a piece of land measuring approximately $\frac{1}{4}$ of an acre for construction of a house for his family. Around 1970, the second appellant and John Awua developed misunderstandings and in 1974 matters reached their climax when the second respondent exceeded the boundaries of the land given to him prompting John Awua to report to the local authorities. The sub-county Chief fixed the demarcations between the two disputants. In 1984 the second respondent crossed the boundary once more and still John Awua reported to the local authorities. Later in 1997 the second respondent allowed his son, the first respondent to begin laying bricks in the middle of the disputed land. When in 1998 he proceeded to dig a foundation for a house, the appellant filed a suit in the court below.

Mid trial, the court visited the *locus in quo* following a complaint by counsel for the appellant that the respondents had breached the temporary injunction order issued by court. During that visit, the appellant showed the court the boundary between his land and that which John Awua had given to the second respondent. The second respondent disputed the boundaries shown by the appellant.

P.W.4 John Awua, the appellant's brother testified that the appellant has a piece of land measuring approximately ten acres. This witness had in 1964 given a small portion of it, measuring less than a quarter of an acre, to the second respondent after he had been evicted from

Ombasuru village by his father following a misunderstanding. The second respondent later during the mid 1970s exceeded the boundaries of the land given to him and began cultivating on the neighbouring land belonging to the appellant. The witness reported to the local authorities who gave the second respondent a period of eight months to vacate the land, which order he disobeyed. In 1997 the second respondent gave part of the disputed land to his son the first respondent to make bricks.

Unfortunately, the trial magistrate died and the proceedings were taken over by a successor Magistrate Grade One who was first seized of the matter on 12th October 2005. This magistrate adjourned the suit on that day by reason of absence of counsel for the appellant and did so for a similar reason on consecutive dates fixed for further hearing of the suit; on 7th March 2006, 14th March 2006, 3rd April 2006 and 4th May 2006. The next time the suit came up for hearing was on 15th May 2006 and on that day counsel for the appellant raised his concern that the court had visited the locus in absence of the appellant and his counsel. The court responded as follows;

Court: As for the first issue, the defendant (sic) was informed of the date when the Court would visit the locus in quo. He however alleged that he was not aware. Being what it is, it is true that the Court visited the site with the sole intention of harmonising the two parties who were making all sorts of allegations. Since the Court did not make any order or ruling after visiting the locus in quo apart from listening (sic) to the two parties to be together, Court finds that the issue is no danger to the proceedings. As for the injunction order of Court of 5/12/05 that the plaintiff stops making bricks and to stop construction of the structure, that order is hereby set aside by this Court. Let the temporary injunction issued by this Court stand. The case can now proceed.

Counsel for the appellant then closed the appellant's case after informing Court that the would be P.W.5 was dead. The respondents opened their defence with the testimony of D.W.1 Dratele Alioni Richard, the first respondent, who testified that he had not encroached on the appellant's land. He stated that he had acquired the land from his father, the second respondent, under customary tenure who in turn had acquired the same through a line of ancestors, including the second appellant's grandfather, a one Cadri. In 1998 he had began putting up a house on the land

only for the appellant to file a suit against him after he had mobilised over twenty people to destroy his house and crops.

D.W.2. Ezayi Gard, the second respondent testified that the land in dispute originally belonged to his grandfather, Chadri, who gave it to respondent's father, Dratele upon his marriage in 1926. Dratele split the land into two and shared it between his two wives, giving the second respondent's mother the upper section and his step-mother the lower section. The second respondent then lived on the land throughout his entire life. During the early 1940s, the land was taken over by the Local Government for a tree-planting project forcing his father to vacate the land. Later in 1960, the Local Government allowed former occupants to return to the land by which time his father had denied. In 1962, the second respondent and his mother returned to the land and lived there. During 1975 John Awua encroached on the land and the dispute was reported to the chiefs who decided in favour of the second respondent. Later the appellant in 1984 took up the matter and reported to the Sub-county Chief, who decided in his favour. He tendered a copy of the decision in evidence as exhibit D.E. 1. He denied having been chased from Ombacuru as alleged by the appellant.

D.W.3 Onesima Aworunya, a former Parish Chief of Orivu Parish, testified that he was among the local leaders who entertained the dispute between the second respondent and the appellant in 1984. They found that before them, the dispute had been entertained by the Sub-county Chief who had resolved the matter. They followed the earlier decision of the Sub-county Chief and decided in favour of the second respondent. None of them appealed their decision and he was surprised that the dispute had flared up again. D.W.4 Arudria testified that he was directed by the then Sub-county Chief to plant boundary marks of Woro trees after he had resolved the dispute. D.W.5 Azibo Andama, testified that the local authorities had decided the dispute in favour of the second respondent. The boundary between the two is the Woro and Eucalyptus trees. The respondents closed their case after this witness.

In its judgment, the trial court found that the area in dispute was very small and the respondents had enjoyed its peaceful possession from 1972 until 1998, a period of 26 years and could not be evicted there from, more so in light of the evidence that it was P.W.4 John Awua, the appellant's

brother, who had given the second respondent the land in dispute. The court further stated that upon its visit to the locus, it found old homesteads, old trees and the first respondent's bricks on the land which was evidence of long occupation by the respondents. It dismissed the suit with orders that each party was to bear its own costs. The court then directed that the boundary between the parties which would enable them to coexist peacefully would run "from the stream down going up there is a latrine, big tree, guava tree pass by two walls from the upper extreme and to the road."

Being dissatisfied with the decision the appellant appeals on the following grounds, namely;

1. The learned trial magistrate erred in fact and law when he based his judgment and orders for a new boundary line for the disputed land between parties to the suit land on his second independent locus visit conducted without notice to the appellant.
2. The learned trial magistrate erred in fact and law when he held that the appellant's action was time barred and failed to address his mind to the fact that the suit was in trespass which is a continuing tort.
3. The learned trial magistrate erred in fact and law when he failed to properly evaluate the evidence on record this coming to the wrong decision that the plaintiff failed to prove his case.

Submitting in support of the appeal, counsel for the appellant Mr. Richard Bundu argued that the trial magistrate's visit to the *locus in quo* in respect of which he never notified the appellant and never recorded in the proceedings occasioned a miscarriage of justice warranting a re-trial. The trial magistrate's consideration of the respondent's occupation of the land for 26 years was erroneous since trespass is a continuing tort and more especially since there was no evidence that this was a continuous period of undisturbed possession. Counsel was stopped from arguing the third ground because it was stated in very broad terms and lacked the precision required by Order 43 rule 1 (2) of *The Civil Procedure Rules*.

In response, counsel for the respondents, Mr. Paul Manzi argued that the directions regarding the boundaries were not based on the second but rather on the first visit by court to the *locus in quo*. The second visit therefore did not occasion a miscarriage of justice. The appellant's claim having

been for recovery of land, the trial court was justified in observing that the respondents had enjoyed a long period of occupation. He prayed that the appeal be dismissed with costs.

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

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

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

The first ground of appeal faults the trial magistrate for having based his judgment and orders for a new boundary line for the disputed land between parties to the suit land on his second independent locus visit conducted without notice to the appellant. Order 18 rule 14 of *The Civil Procedure Rules* empowers courts, at any stage of a suit, 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, it includes inspection of the *locus in quo*. The purpose of and manner in which proceedings at the locus in quo should be conducted has been the subject of numerous decisions among which are; *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, in all of which cases the principle has been restated over and over again that 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. This was more particularly explained in *David Acar and three others v Alfred Acar Aliro [1982] HCB 60*, where it was observed that:-

When the court deems it necessary to visit the *locus-in-quo* then both parties, their witnesses must be told to be there. When they are at the *locus-in-quo*, it isnot a public meeting where public opinion is sought as it was in this case. It is a court sitting at the *locus-in-quo*. In fact the purpose of the *locus-in-quo* is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he / she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings.

The procedures to be followed upon the trial court's visit to a *locus in quo* have further been outlined in *Practice Direction No. 1 of 2007*, para 3, as follows; -

- a. Ensure that all the parties, their witnesses, and advocates (if any) are present.
- b. Allow the parties and their witnesses to adduce evidence at the locus in quo.
- c. Allow cross-examination by either party, or his/her counsel.
- d. Record all the proceedings at the locus in quo.
- e. Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

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 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. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits 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. Considering that the visit is essentially for purposes of enabling magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony.

Considering the susceptibility of the magistrate upon such a visit perceiving something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party, the magistrate needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record. This should be done not only for maintenance of the court's impartiality but also in order to enable the parties test or rebut the accuracy of the court's observations by making appropriate, timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse opinion formed against such a party, keep it entirely off the record, only to spring it upon the party for the first time in his judgment. Furthermore, in case of an appeal, where the trial Court limits its judgment strictly to the material placed before it by the parties in court, then its judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court. This will not possible where the lower court's judgment is based on personal observations made out of court and off the court record, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.

Upon examination of the record of appeal, it is evident that during the first visit to the *locus in quo*, the then trial magistrate prepared a proper record of proceedings inclusive of a drawing or sketch map of the disputed land indicating features such as the disputed boundaries and developments on the land in dispute. Although the visit was purposely for establishing what existed on the land in dispute to facilitate the grant of a temporary injunction, there would not have been anything inherently wrong if the subsequent magistrate had relied on that record in the determination of the location of the boundary. He instead erroneously relied on his observations to the locus upon what technically was the second visit of the court to the *locus in quo*.

The second visit is most disturbing. There is no indication whatsoever as to when it took place and who was in attendance. It is entirely off the record. Although the first visit was for a specific purpose of establishing the status of land for purposes of issuance of a temporary injunction, which probably did not require strict compliance with the guidelines in *Practice Direction No. 1 of 2007*, the second visit made "with the sole intention of harmonising the two parties" is most bizarre. It is a procedure unknown to the law relating to the conduct of civil trials and the trial

court erred when it relied as it did on observations made in those circumstances to delineate the boundaries, not supported by any evidence on record. These demarcations were decided most arbitrarily. Reliance by the trial magistrate on the observations he made during that visit was clearly a misdirection and the first ground of appeal succeeds.

When there is such a glaring procedural defect of a serious nature by the trial court, the High Court is empowered to direct a retrial if it forms the opinion that the defect resulted in a failure of justice, but from the nature of this power, it should be exercised with great care and caution. It should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. It is possible that the witnesses who appeared and testified during the first trial may not be available when the second trial is conducted and the parties may become handicapped in producing them during the second trial. In such situations, the parties would be prejudiced and greatly handicapped in establishing their respective cases such that the trial would be reduced to a mere formality entailing agony and hardship to the parties and waste of time, money, energy and other resources. Viewed in this light, the direction that the retrial should be conducted can be given only if it is justified by the facts and circumstances of the case.

However, where the time lag between the date of the incident and the date on which the appeal comes up for hearing is short, and there occurred an incurably fundamental defect in the proceedings which affected the outcome of the suit, the proper course would be to direct retrial of the case since in that case witnesses normally would be available and it would not cause undue strain on their memory.

In the instant case, I am of the view that the defect has not occasioned a miscarriage of justice since the case can still be decided on basis of the available evidence without having to rely on comments and observations of the trial court made as a result of the impugned second visit to the *locus in quo*. Furthermore, this is a dispute over land that has been on and off for over four decades and it is almost certain that the parties will be handicapped in producing their witnesses and evidence during a retrial, considering that the key witnesses on both sides were persons of advanced age (mostly in their 70s), over ten years ago when they testified during the trial. The

parties will be prejudiced and greatly handicapped in establishing their respective cases such that a retrial will be a mere formality.

The second ground of appeal questions the trial court's characterisation of the appellant's claim as having been weakened by the period of long occupation of the disputed land by the respondents. Firstly, the trial court misdirected itself on the nature of the occupation. There was abundant evidence of repeated challenges of that occupation by the appellant in various forums of chiefs and local authorities between 1972 and 1984. The occupation has not been quiet for any prolonged period. Secondly, the claim was in the nature of the tort of trespass to land rather than an action for recovery of land and therefore a continuous tort. The court though did not declare the appellant's action to have been time barred as stated in the ground of appeal.

On the other hand though, Article 126 (2) (d) of the Constitution, provides that in exercising judicial authority, reconciliation between parties shall be promoted. This provision not only requires courts to be guided by the principles of alternative forms of dispute resolution including conciliation, mediation, arbitration and traditional dispute resolution mechanisms, but also to give recognition to the outcome of such processes, where they are not repugnant to the law. Courts of law cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which have been resolved through such means and have not been challenged within a reasonable time thereafter. There was evidence that both parties submitted themselves to the jurisdiction of local chiefs and leaders including the Sub-county chief. As a result of those processes, the disputed boundary between them was in 1974 resolved by the Sub-county chief planting Woro trees, through D.W.4 Arudria, thereby effectively resolving the dispute. Any party dissatisfied with that resolution would have been expected to challenge it by commencing formal litigation. The appellant having chosen instead to sit back ought to be deemed to have accepted that resolution and could not be heard thirty four years later to claim that the resolution was wrong. After the dispute was resolved through the alternative dispute resolution mechanism adopted by the parties at the time, the respondents could not be challenged as trespassers on the land after such a long period of apparent deference to that resolution. The appellant's suit for trespass would only be sustainable upon proof of the respondents having exceeded the boundary fixed in 1974. For that reason, the second ground of appeal fails.

Although the trial court arrived at the correct final decision but some of the conclusions arrived at by the trial court in the process of coming to the conclusion it did were not backed by acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective, and this being the first appellate court, I will interfere with those findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings (See *Peters v Sunday Post Ltd* [1958] E.A. 429).

At the trial, the burden of proof lay with the appellant. To decide in favour of the applicant, the court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the respondents such that the choice between his version and that of the respondents would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondents, might hold that the more probable conclusion was that for which the appellant contended.

The appellant and the respondents had varying explanations for the circumstances in which the second respondent came into possession of the land. Although the appellant claimed the second respondent was given the land by the appellant's brother P.W.4 John Awua, the second respondent claimed to have acquired it through inheritance. Both versions converge in acknowledging that the second respondent's occupancy started around 1960 – 1964. The nature of the dispute is not about the second appellant's presence on the land, but rather the boundary that separates his holding from that of the appellant. The gravamen of the appellant's claim is that the second respondent exceeded the boundary and encroached onto his land. All that the court is required to do is to evaluate the evidence relating to the location of this boundary.

At page 28 of the record of appeal, the appellant described the boundary as follows;

The land given by my brother is from this tree (wolo) (cuka) tree to Eucalyptus through the grass-thatched house of D2 to the North....it extends to the north to the Cyprus tree planted by the defendant No. 1.

In the judgment at page 46 of the record of appeal, D.W.4 Arudria is reported to have testified that he was directed by the then Sub-county Chief to plant boundary marks of Woro trees on the

disputed land (in 1974), after the respondent had crossed the boundary. This evidence was not shaken by cross-examination. At page 47 of the record of proceedings, the trial magistrate in his judgment reproduced the observations made by his predecessor magistrate when she visited the *locus in quo*, regarding the location of the boundary, but failed to evaluate those observations in their proper perspective. The testimony of D.W.4 is more consistent with the observation of the magistrate that “the plaintiff is claiming almost all the land occupied by the defendants while the defendants’ boundary stops by the Woro trees.” The appellant’s version is inconsistent with the scope of the claim he presented in the suit. He appeared to have instead sought to have the respondents evicted entirely from the land when at page 19 of the record of appeal, while under cross-examination, he testified that “you do not have land there and even Cadri has no land there.” On the other hand, the respondents’ version is more consistent with the 1974 delineation, made by the then sub-county Chief. In the circumstances, the respondents’ version is more consistent and believable compared to that of the appellant. The order as to boundaries fixed by the trial court was erroneous and not supported by any evidence and it is hereby set aside. In its place, the boundary as fixed by the Sub-county Chief in 1974 as explained by and demonstrated to the trial court by D.W.4 at the first visit to the *locus in quo* as marked by the Woro trees, shall continue to constitute the boundary between the parties’ holdings and should be respected by both parties.

Consequently, although for the wrong reasons, the trial court came to the right conclusion in dismissing the suit. The aspects of this appeal in which the appellant has succeeded are only at the level of technicalities that have not substantially affected the outcome of the case since he has been unsuccessful in respect of the gravamen of the appeal. For that reason the appeal is dismissed.

Considering the long drawn out history of this dispute, the fact that the parties are related by blood and live in close proximity of one another, each party is to bear its costs of this appeal and of the court below.

Dated at Arua this 1st day of December 2016.

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Stephen Mubiru
Judge