

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0022 OF 2016

(Arising from Patongo Grade One Magistrate's Court Land Claim No. 0033 of 2012)

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1. **OKUMU ANTHONY** }
2. **OKELLO BOSCO** } **APPELLANTS**
3. **KIDEGA ALFRED** }

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VERSUS

1. **ODONGA ALFRED** }
2. **ALATA VINCENT** } **RESPONDENTS**
3. **AKENA ALFRED** }

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Before: Hon Justice Stephen Mubiru.

JUDGMENT

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In the court below, the appellants sued the respondents jointly and severally for recovery approximately twenty acres of land at Lalworo-Odong Ward, Pacer Parish, Parabongo sub-county, Agago District. They claimed that the land in dispute belonged to their late grandfather, Jikeri Otto under customary tenure, he having settled thereon during 1940. The appellants' father then inherited the land and upon his death, was buried there in 1999. The appellants were born on the land in dispute and grew up there until around 2012 when a dispute erupted between them and the respondents who are their neighbours on the Western side of the land in dispute. An attempt was made at resolving that dispute during the year 2009 by the appellants offering one acre on the northern part of their land to the respondents who despite this offer continued to trespass on the appellants' land. Subsequent attempts by the L.C.1 at stopping this further encroachment by further adjustment of the boundary were unsuccessful, hence the suit.

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In their joint written statement of defence, the respondents contended that their land does not share a common boundary with that of the appellants since the road to Wol sub-county constituted the boundary between the land occupied by their late grandfather and that which was occupied by the appellants' grandfather, Jikeri Otto. By way of a counterclaim, the first

respondent contended that his late father Bicencio Alata first settled on the land in dispute during the year 1967, and was buried there when he died. The first respondent himself was born on that land in dispute, and he has since then had the second and third respondents, his sons, born on that land. It is during the year 2011 that the dispute over the land broke out between him and the
5 appellant when the latter began selling off part of the land. The respondents then sought recovery of the parts sold off by the appellant, a permanent injunction against further acts of trespass, general damages and costs.

In defence to that counterclaim and in reply to the written statement of defence, the appellants
10 contended that the first respondent's father never settled on the land in dispute and was never buried there. The appellants contended further that it was their grandfather, Otto Jekeri that gave the first respondent's father land in the area, which is separate from the one in dispute, although neighbouring it, whose boundaries were demarcated in 2009. Attempts at further mutual adjustment of the boundaries was undertaken on 9th March, 2012 but the respondents had since
15 then exceeded the agreed boundaries. They refuted the claim that the road to Wol sub-county constituted the boundary but contended instead that the true boundary was that demarcated in the year 2009.

In his testimony as P.W.1, the first appellant stated that he inherited the land in dispute in 1990
20 from his late father Otim Orocino who in turn inherited it in 1940 from his father the late Otto Ezekiel. A boundary dispute between his paternal uncle Okweny and the first respondent was in the year 2009 resolved by the L.C.1 officials who then demarcated the proper boundary. A dispute over the same boundary erupted again in 2012 but the old boundary was still visible, comprising trees with nails in them. It was agreed that an extension of one acre beyond that
25 demarcation be made, a process that was never completed. The respondents continued their possession of that portion despite the fact that the demarcation of the new boundary was never completed. Their total encroachment was estimated at eight acres in all. He prayed that the boundary of 2009 be restored.

30 P.W.2, Yokomoi George the L.C.1 Chairman testified that the land in dispute belongs to the first appellant, and before him, it belonged to the first respondent's father. On 13th April, 2009 when a

boundary dispute erupted between the first appellant's father and the first respondent, the elders and the neighbours were summoned and a boundary line was mutually agreed and demarcated. Nails were driven into the trees marking the boundary. Following the death of his father Tarasisio Omwony and considering that the land given to him was small, the first respondent
5 then in 2013 asked for an adjustment of the boundary. He requested the first appellant to give him only one extra acre and the process of demarcation began but the exercise had by nightfall only been partly done and was thus postponed to the following day. The first respondent did not turn up the following day and the exercise was never completed. Instead the respondents took over a big chunk of the appellants' land which they continued to cultivate, hence the suit.

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P.W.3, Okwir Golden, a neighbour to the Eastern side of the disputed land testified that during his childhood he used to see the appellants' father cultivate the land in dispute. He was part of the team that settled the boundary dispute between the appellants' father and the first respondent during the year 2009. Nails were driven into the trees marking the mutually agreed boundary.
15 Two or three years later, the first respondent then disputed that boundary as well. An attempt to adjust the boundary further in the first respondent's favour was never completed. The appellants then reserved one witness to be called at the *locus in quo*.

In his defence the first respondent testified as D.W.1 and stated that his late father had acquired
20 the land in dispute during 1930 as virgin land. The appellants had taken over part of his late father's land and had sold portions of it. The boundary is marked by an Owak tree, Olim tree and very many Yao trees. The appellants grandfather occupied land across the road that belonged to a one Lulyeli. He denied having attended any of the meetings convened in the past for resolving the boundary dispute, but one involving the Rwot.

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D.W.2 Angom Cecilia testified that the first appellant had trespassed onto the land in dispute. The appellants live on Lulyeli's land. The appellant's grandfather had been given part of that land to occupy temporarily, twenty meters away from the land now in dispute. During the year 2012, there was an attempt to resolve the boundary dispute. D.W.3 Maraciliano Oboke testified that the
30 boundary between the land occupied by the two disputants is the road from Aywe to the sub-county headquarters at Wol. The land in dispute belonged to the first defendant's father the late

Alata and all his children were born on that land. The three witnesses denied knowledge of the boundary comprising trees with nails in them.

The court then inspected the *locus in quo* and recorded evidence from a one Adong Erimina who testified that the land in dispute belongs to the second respondent and that the boundary is marked by the road to Wol sub-county. Another witness, Gaborela Akello testified that he obtained the land he occupies from the first respondent and therefore the land in dispute belongs to the first respondent. She too identified the road to Wol sub-county as the boundary. Another witness Oryem John testified that the land in dispute belongs to the second respondent. Odong Celestino too testified that the land in dispute belongs to the appellant. The court then drew a sketch map of the key features observed on the land in dispute and its neighbourhood.

In her judgment, the trial magistrate found that the first occupant of the land in dispute was the first respondent's grandfather who settled thereon in 1930. Later in 1938, the first appellant's grandfather settled in the same area and they lived in harmony with that of the first respondent. There subsequently developed a dispute between them that resulted in an exercise of boundary opening. The court noted that at the *locus in quo* it had observed that the boundary marks on trees indeed existed. However, on basis of a longer occupancy, the trial magistrate concluded that the land in dispute belonged to the first respondent. She therefore declared the respondents the rightful owners of the land in dispute, issued a permanent injunction against the appellants, awarded the respondents damages of shs. 2,000,000/= and the costs of the suit.

Being dissatisfied with the decision, the appellants appealed to this court on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby reaching a wrong decision and judgment.
2. The learned trial Magistrate erred in law and fact by failing to properly conduct the entire trial process and by failing to address himself to the relevant laws thereby reaching a wrong decision and judgment.
3. The learned trial magistrate erred in law and fact by awarding general damages of shs. 2,000,000/= without justifiable cause.

Submitting in support of these grounds, Counsel for the appellant Mr. Egalu Emmanuel Omiat argued that the magistrate did not evaluate the evidence at all. Occupancy was not the issue but this was a boundary issue. The parties had in the past harmonised their boundaries and the court was shown the demarcations when it visited the *locus in quo*. All the appellants' witnesses
5 showed the harmonised boundary. The magistrate did not draw the sketch of the boundary but instead recorded evidence of three witnesses who never testified in court; Adong Germina, Gabriela Akello and Oryem John. It was demonstrated that the respondent had exceeded that boundary. The respondents' witnesses had denied that marking. The appellant had minutes of the demarcation. On 21st March, 2013 when they had agreed to adjust the boundary and complete the
10 process of harmonisation, the process was never completed. The appellants' evidence established the sequence of events in adjusting the boundaries but the trial magistrate chose not to evaluate the evidence but made a blanket statement that the land belongs to the respondents. As regards ground two, there was a procedural error. The locus visit was not properly conducted. The trial magistrate did not indicate the boundary on the sketch that was drawn and evidence was taken
15 from onlookers. The court should determine what is appropriate in light of this error. Regarding the award of damages; the discretion was not exercised judiciously. There was no cause of action disclosed in the counterclaim and it was never evaluated. There is no basis for the award. He challenged the award in principle and the quantum. The prayed that the appeal should be allowed and the lower court judgment be set aside. The appellant be declared the rightful owner of the
20 suit land. In the alternative, a re-trial be ordered.

In response, Counsel for the respondent Mr. Okot Edward David submitted that the issue was trespass to land. The evidence is that the two parties had adjacent land. The appellant on the Eastern and the respondent on the Western part. It is the road to Wol sub-county that separates
25 the two families. The appellant wanted more land on the opposite side of the road and the evidence shows that it was occupied by the family of the respondents in the 1930s. The respondents had possession of the suit land. It is the appellants who were encroaching. The case was about occupation and the date of occupation was thus the determinant. At the *locus in quo*, the magistrate did not receive evidence from onlookers. Adong Germina, Gabriela Akello and
30 Oryem John did not testify. In the alternative, if they did, it was not proper but it was not fatal. The trial magistrate did not rely on their evidence. The locus visit was important. It gave the

magistrate a vision of the land occupied by the people and she had to observe the road. The decision can stand without that evidence, there should therefore not be a re-trial. In paragraph 4 of the counterclaim, it was averred that the appellants were selling off parts of the respondents' land and that would justify an award of damages. In any event the damages are only nominal.

5 The trespass has continued since 2012. He prayed that the appeal be dismissed with costs.

In reply, counsel for the appellants argued that he locus visit was important. The first respondent did not refer to the road as the boundary. The court observed trees with marks. The alleged trespass by the appellant was mentioned in the pleading and in the trial but there was no evidence
10 led at all to establish the trespass. The appellants filed the suit as aggrieved persons. The evidence at locus is part of the evaluation if the judgment is read as a whole.

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
15 coming to its own conclusion (see in *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.

20 It is necessary to begin with the second ground of appeal in so far as it impugns a procedural aspect of the trial. It is contended by the appellants that the trial magistrate failed to properly conduct the entire trial process. This vague ground was clarified in the submissions of counsel when he limited it at impugning the manner in which proceedings were conducted at the *locus in quo*. His argument was that the court received evidence from onlookers who had not testified in
25 court. He specifically singled out Adong Germina, Gabriela Akello and Oryem John. Although this was refuted by counsel for the respondents, perusal of the record of proceedings at trial confirms that this indeed occurred. Evidence was recorded from those named individuals, yet they had not testified in court.

30 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
5 itself a witness in the case. 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.

10 Considering that the visit is essentially for purposes of enabling trial 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. In the instant case, the record of appeal, reveals that during the visit to the
15 *locus in quo*, the trial magistrate failed to observe these principles when it received evidence from three persons who had not testified in court. Where a trial court fails to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relies on such evidence acquired and the observations made thereat in the judgment, it has in some situations been found to be a fatal error which occasioned a miscarriage of justice and a sufficient ground
20 to merit a retrial (see for example *Badiru Kabalega v. Sepiriano Mugangu* [1992] 11 KALR 110 and *James Nsibambi v. Lovinsa Nankya* [1980] HCB 81).

However, if despite the defect in procedure the dispute to be adjudicated is of a nature where the appellate court finds that the visit to the *locus in quo* was a useless exercise and that the case
25 could have been decided without visiting the *locus in quo* such that without reliance on its findings at the *locus in quo*, the trial court would have properly come to the same decision on a proper evaluation and scrutiny of the evidence which was already available on record, a retrial will not be directed. The erroneous proceedings at the *locus in quo* will be disregarded (see for example the case of *Basaliza v. Mujwisa Chris, H.C. Civil Appeal No. 16 of 2003*). According to
30 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. I find that

if evidence of the three witnesses is disregarded, the rest of the evidence is capable of supporting findings of fact on basis of which a decision can be properly reached. Consequently, that procedural error will be disregarded as inconsequential in the instant appeal and the evidence of the three persons is excluded from the re-evaluation.

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As regards the first ground relating to the manner in which the trial magistrate evaluated the evidence, the dispute between the parties to the appeal is not one of ownership of different tracts of land but is rather in essence a boundary dispute whereby the appellants claim that the respondents have exceeded the common boundary agreed upon mutually in the year 2009 and subsequently attempts made, inconclusively though, to adjust it further in the year 2012, sparking off the current dispute. According to the appellants, the common boundary was mutually agreed in the year 2009 comprising trees with nails driven into them. During the year 2012, upon request by the respondents for further adjustment of that boundary, the exercise commenced but was never concluded. On their part, the respondents contended that the boundary is marked by the road to Wol sub-county and the appellants exceeded it by selling off portions of land beyond that common boundary.

In the determination of a land boundary dispute, courts will ordinarily be guided by the visible physical limits of the parcel of land as can be ascertained on the ground by natural boundaries (e.g. rivers, valleys, cliffs), monumented lines (boundaries marked by defining marks, natural or artificial), old occupations, long undisputed abuttals (e.g. a natural or artificial feature such as a street or road), statements of length, bearing or direction (metres, feet or other measurements in a described direction), or similar features as observed by court and verified by credible witnesses. For example, under Regulation 21 (1) of *The Land Regulations, 2004* (which were in force at the time the boundary dispute first erupted), in ascertaining boundaries, Area Land Committees were authorised to;

- (n) accept as evidence on the boundaries of the land the subject of the application-
 - (i) a statement on the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land matters in the parish or the urban area;

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- (ii) simple or customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects;
- (iii) human activities on the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land;
- (iv) maps, plans and diagrams, whether drawn to scale or not, which show by reference to any of the matters referred to in sub-paragraph (ii) or (iii) the boundaries of the land;

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Since none of the parties adduced evidence of maps, plans and diagrams, whether drawn to scale or not, capable of showing the true boundary of the disputed land, the trial court was left with the option of considering oral testimony on the boundaries by persons it considered trustworthy and knowledgeable about land matters in the area, visual identification during the *locus in quo* visit of customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects actually seen on the land, or evidence of human activities on the land such as the use of footpaths and the placing of boundary marks on the land that have existed thereon for a considerable period of time, particularly those that existed before the dispute flared up. It emerges from the record that whereas the appellant relied on marked natural trees as the features that were used to demarcate the common boundary between land occupied by the two disputants, the respondent relied on the existence of a road to Wol sub-county.

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On the part of the appellants, evidence was adduced to the effect that meetings had been convened in 2009 and 2012 intended to resolve the boundary dispute. Minutes of what transpired at these meetings were tendered in evidence, initially for identification only because the record was not in the language of court, but later the translations were provided. The minutes of 13th April, 2009 indicate that in attendance were a total of 46 persons who included the two disputants (No.1 and No.6 respectively on the list of attendance), P.W.2 Yokomoi George (No.37 on the list), P.W.3 Okwir Golden (No.38 on the list), and D.W.2 Ongom Cecilia (No.23 on the list). At that meeting, persons acknowledged in the community as being trustworthy and knowledgeable about land matters in that area helped in defining the boundary which was then marked by driving nails into trees along the ascertained line. These minutes, coupled with the observation made by the trial magistrate at the *locus in quo* as evidenced by the statement in her

judgment that ".....the boundary remains with those marks as seen at *locus* on those trees..." sufficiently corroborated the appellants' testimony as to the true common boundary of the land in dispute being marked by trees into which nails had been driven.

5 On the other hand, whereas the respondents in their written statement of defence claimed that the road to Wol sub-county formed the common boundary and this was supported by the testimony of D.W.2 Ongom Cecilia and D.W.3 Marciliano Oboke, the first respondent in his testimony contradicted them by referring to the boundary as being constituted by an Owak tree, Olim tree and very many Yao trees. The sketch map of the land in dispute that was prepared by the trial
10 magistrate does not indicate the presence of any trees along that stretch of road indicated as leading to Wol sub-county. Compared to the second and third appellants who are children of the first appellant, the latter was in a better position to offer evidence regarding the matter in dispute. This reference by the first respondent to trees as the features demarcating the boundary is rather than the road to Wol sub-county therefore is more consistent with the appellant's version than
15 with the respondents'. Moreover, the contention of D.W.2 and D.W.3 that the road to Wol sub-county constituted the common boundary was not corroborated by any of the features the court found at the *locus in quo*.

Furthermore, whereas the minutes tendered in evidence indicated that D.W.2 was present at the
20 meeting of 13th April, 2009 which defined the boundary, in court he denied having attended that meeting and any knowledge of the common boundary of the land in dispute being marked by trees into which nails had been driven. He did not explain though how his signature found its way onto the list of persons who attended that process and this undermined his credibility.

25 As regards the 9th March, 2012 attempted re-adjustment of the mutually agreed boundary of 2009, that exercise having been incomplete, the evidence relating thereto cannot be relied upon as establishing a new boundary. Overall, instead of analysing oral testimony presented to it by persons considered trustworthy and knowledgeable about land matters in the area, visual identification during the *locus in quo* visit, of customary forms of identifying or demarcating
30 boundaries using natural features and trees or buildings and other prominent objects actually seen on the land, the trial magistrate chose to decide the case based on periods of occupancy, yet

it was not in dispute that each of the parties owned land in the area. What was in issue was the true boundary between the two tracts of land. In that regard the court misdirected itself and came to the wrong conclusion.

5 An appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or
10 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. Having re-evaluated the evidence, I find that had the trial court properly directed itself, it would not have come to the conclusion that it did. This court finds that the boundary between the appellants' and the respondents' land is the line of trees that were marked with nails at the meeting of 13th April, 2009 and not the road to
15 Wol sub-county as contended by the respondents. The first ground of appeal therefore succeeds.

As regards the last ground of appeal, the award of shs. 2,000,000/= was based on what the trial court referred to as the appellants' "constant interference in that land." I construe this to mean general damages for trespass to land. Trespass to land occurs when a person directly enters upon
20 another's land without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Founded on acts constituting an invasion affecting an interest in the exclusive possession of land, it is an action for enforcement of possessory rights whereby the
25 plaintiff must prove a possessory interest in the land.

The gist of a suit for trespass to land is violation of possession, not a challenge to title. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be
30 unauthorised in the sense that the defendant should not have had any right to enter onto plaintiff's land. The plaintiff must prove that; he or she was in possession at the time of the

defendant's entry; there was an unlawful or unauthorized entry by the defendant; and the entry occasioned damage to the plaintiff. Apart from pleading trespass in their counterclaim and making averments to the effect that the appellants had sold off parts of the respondents' land, no evidence of these alleged sales was adduced. It is not evident how many portions of land were sold off, if any at all, the size of land that was sold off, when the sales took place and to whom the land was sold. There is no evidence that the appellants engaged in any activities on land beyond the line of trees that were marked with nails at the meeting of 13th April, 2009.

An appellate court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate or where it is shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion by a trial court unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd.*, S.C.C.A. No. 10 of 1993 (unreported) and *Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises*. S.C.C.A No. 16 of 2006).

In the instant case, I find that the respondents not only failed to discharge the burden of proof but also the trial court did not explain how or what principles guided it in assessing the damages it awarded. Not having proved that the appellants had trespassed on their land, the respondents were not entitled to an award of general damages. The trial court therefore failed to take into account a material consideration as to the burden and standard of proof required to justify an award of general damages for trespass to land resulting in an error in principle. The third ground of appeal succeeds. This award is therefore set aside.

In the final result, the trial court came to the wrong conclusion when it decided in the respondent's favour. That being the case, I find merit in the appeal and it is accordingly allowed with orders that the judgment of the court below be set aside and it is hereby set aside. In its place, judgment is entered for the appellants against the respondents in the following terms;

- a) a declaration that the common boundary between the appellants' and the respondents' land is the line of trees that were on 13th April, 2009 marked with nails and not the road to Wol sub-county.
- b) An order of vacant possession of the area within that boundary.
- 5 c) A permanent injunction restraining the respondents, their servants, agents and persons claiming under them from any acts of trespass on the appellants' land.
- d) The costs of the appeal and of the suit.

Dated at Gulu this 6th day of September, 2018

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Stephen Mubiru
Judge,
6th September, 2018.