THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0028 OF 2018

(Arising from Kitgum Grade One Magistrate's Civil Suit No. 0032 of 2013)

LABEJA TICIYANO …….……..……..……..…… APPELLANT

VERSUS

OLANYA BOSCO …….……..……..……..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellant for recovery of approximately six acres out of thirteen acres of land at Akomo Central Ward, Lakwa Parish, Patronga Town Council, Agago District. The respondent's claim was that the land in dispute in the past belonged to his late grandfather, Okidi Dominico, he having opened it as virgin land during the 1950s and proceeded to establish a homestead, gardens and grazing land for his livestock under customary tenure. Upon his death, the appellant, being one of his two sons, inherited thirteen acres of that land. The other son of the deceased was the father of the respondent, the late Owiny Jenacio. Upon the death of his said father in 2010, the respondent asked the appellant to give him his share of the estate that belonged to his late father. The appellant turned down the request, even with the intervention of the rest of the family and clan members, hence the suit.

In his written statement of defence, the respondent contended that the respondent did not have a cause of action against him. He averred that the late Okidi Dominico had during 1976 before his death distributed the land between his sons, the late father of the respondent, Owiny Jenacio, receiving nineteen acres as a result. Following the death of Owiny Jenasio during the year 2008, twelve acres of that land were occupied by the second wife of the appellant, Acan Kalina who had cared for Okidi Dominico during his last days. The respondent had thus sued the wrong person since the land had been distributed during the lifetime of Okidi Dominico.

In his testimony as P.W.1, the respondent stated that Okidi Dominico died during the year 2010 while his son, Owiny Jenasio father of the respondent, had predeceased him when he died during the year 2006. The appellant had failed to distribute the land equitably. P.W.2, Moro Jovino Akaki, the respondent's brother, testified that the thirteen acres in dispute belonged to their late grandfather, Okidi Dominico, out of which the respondent was demanding his share. P.W.3, Candia Michael, a member of the clan, testified that the late Okidi Dominico had only two sons. Accordingly, the part in dispute belonged to the respondent. That was the close of the respondent's case.

D.W.1 Ocen Mateo, testified that during 1970 he had in his capacity as the Wol Labwor clan chairperson, mediated in a dispute between the respondent's father and the appellant. The respondent's mother had been accused of encroachment. He had resolved the dispute by giving each of the disputants nine gardens. D.W.2 Kalina Acan, the appellant's second wife, testified that she is utilising the twelve or so cares in dispute. Before his death, the late Okidi Dominico had divided the land between his only two sons, who included her husband, the appellant. She has been using the land since she was married yet the respondent demanded for an acre out of it. She obtained twelve acres while her co-wife obtained eighteen acres. The respondent's father, Owiny Jenasio obtained twenty acres. D.W.3 Labeja Ticiyano, the appellant, testified that he acquired the land in dispute in 1970 when it was given to him by his late father as his share. That was the close of the defence.

The court then inspected the *locus in quo,* recorded evidence thereat and drew a sketch map of the key features observed on the land in dispute and its neighbourhood. It indicated that the land in dispute was divided into six distinct portions and the maize, sorghum, sunflower and green peas growing on one of the portions belonged to D.W.2 Kalina Acan. The second portion of that land was under fallow while another part was newly ploughed for planting sorghum. Each of the six portions, apart from the second, was under cultivation by the family of the appellant.

In his judgment, the trial magistrate found that it had been proved that before his death, the late Okidi Dominico had divided his land between his two sons. The evidence suggested that after the death of Okidi Dominico, the appellant gave twelve acres of what ought to have been the share

of the respondent's father, instead to his second wife D.W.2 Kalina Acan on the pretext that she had cared for Okidi Dominico in his last days. By doing that, he had intermeddled in the estate of his late brother, Owiny Jenasio, father of the respondent. He thus decided that the respondent had proved that the land in dispute belonged to the estate of the late Owiny Jenasio. He therefore declared all the six portions of land as belonging to the estate of the late Owiny Jenasio, father of the respondent. He issued a permanent injunction against the appellant and his family restraining them from trespassing on the six portions of land. He issued an order of vacant possession, awarded the respondent general damages of shs. 2,500,000/= and costs.

Being dissatisfied with the decision, the appellant appealed to this court on the following ground;

1. The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence on record thereby arriving at a wrong decision.

At the hearing of the appeal, the respondent was unrepresented while Ms. Elizabeth Nyakwera held brief for Mr. Donge Opar, counsel for the appellant. Both parties were directed to file their written submission before the day fixed for judgment. By the time of writing this judgment, only counsel for the appellants had filed submissions. He argued that the appellant's late father Owiny Jenecio had before his death distributed the land giving the respondent's father Okidi Dominic 19 acres, the appellant's senior wife 15 acres and the second wife 12 acres, now in dispute. He argued that the trial magistrate erred in disregarding the testimony of D.W.1 Ocen Mateo as hearsay. Furthermore, that the trial magistrate erred in rejecting the appellant's evidence to the effect that that his second wife D.W.2 Acan Kalina was a beneficiary of that distribution. At the locus in quo, it was established that D.W.2 was in possession of the land in dispute as she had gardens thereon. He prayed that the appeal be allowed.

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 *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh

the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the 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. This duty may be discharged with or without the submissions of the parties as the court proceeds to do now.

In the first place, even though a first appellate court is required to re-evaluate all the evidence on record, the sole ground of appeal presented in this appeal is too general and 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*).

Counsel for the appellant argued that the trial court did not evaluate the evidence properly. 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 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*).

Guided by the burden and standard of proof, the role of the judicial officer is to ensure that more than a mere scintilla of legally sufficient evidence exists. This burden is met if the level of probity of the evidence adduced by the plaintiff viz-a-viz that by the defendant is such that a reasonable person might hold that the more probable conclusion is that for which the plaintiff contends (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*). The burden of proof is on the plaintiff to prove on the balance of probabilities that he or she has a better claim than the one made by the defendant. The suit should be dismissed only when the evidence presented, viewed in the light most favourable to the plaintiff, is incapable of persuading a reasonable person to hold that the more probable conclusion is that for which the plaintiff contends.

Evaluation of evidence is an exercise involving its interpretation and the assessment of its quality. It involves a determination of which forms of evidence are more reliable than others (be it direct or indirect evidence, weighing the value of particular pieces of evidence against each other), interpreting the evidence in a reliable manner (each piece of evidence is considered as one piece of some larger puzzle or theory. It is the court's responsibility to determine what puzzle or theory it belongs to, how it fits into that puzzle or theory, what portion of the reality puzzle it represents, and what insight it reveals); and drawing sound conclusions from the evidence (since correct reasoning based on incorrect evidence is likely to result in incorrect conclusions). The court determines the credibility of the witnesses, weighs a witness's testimony, and resolves any inconsistencies in the testimony and contradictions in the body of evidence as a whole. It is not a requirement that court should comment on each and every aspect of the body of evidence before it. Court only has duty to explain its assessment of the more important pieces of evidence and to provide reasons for choosing to give, as the case may be, none, little, moderate or substantial weight thereto.

Where the court finds the evidence of one person more believable than that of another, it should normally be possible to state, briefly and clearly, why. The reason might, for example, be based on a demonstrated inconsistency or inconsistencies on an issue or issues of significance where the essential question in determining relevance is: does the item of evidence tend to prove the matter sought to be proved? Alternatively it might relate to the demeanour of a witness or party. If, for instance, it appears to the court that one person was clearly and conscientiously striving to tell the truth, while another was hesitant and evasive in response to questions, this should be stated. Likewise, where a court finds a person's evidence unimpressive or unpersuasive on account of matters such as hesitancy, lengthy pauses, frequent requests to repeat simple questions or a reluctance to engage with the court generally. If any of these considerations or anything comparable constitutes the basis for the court's credibility assessment and findings, care should be taken to say so in the judgement: neither the parties nor the appellate court can be left or expected to guess.

The trial magistrate satisfied this requirement by explaining that he found the evidence of D.W.1 Ocen Mateo unbelievable because it was inconsistent with what he found on the ground when he visited the *locus in quo*. He gave appropriate illustrations of that analysis and I have not found any fault with it. Moreover, it is trite that findings of fact by a trial court, based on the credibility of a witness, are not to be set aside simply because an appellate court thinks that the probabilities of the case are against, even strongly against, that finding of fact. If the trial court's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial court failed to use or has palpably misused its advantage as a court of first instance or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable. An appellate Court could properly overturn the trial court's finding only if it was vitiated by some error of principle or mistake or misapprehension of fact or if the effect of the overall evidence was such that it was not reasonably open to make the finding that the court did.

In this case, the trial court's specific finding was based on the credibility of D.W.1 Ocen Mateo and on facts that were not inconsistent with facts incontrovertibly established by the evidence or glaringly improbable. That being so, it is impossible to conclude that the trial court failed to use

or has palpably misused its advantage of seeing and hearing the witnesses testify. One of the consequences of the advantage of seeing and hearing the witnesses is that the trial court is in a far better position than an appellate court to know what individual weight should be assigned to the various factors of credibility, matters for and matters against, that must be evaluated in making the ultimate findings of fact in the case. Where a finding is based on credibility and other facts support the finding, the case would need to be exceptional before an appellate court could set aside the finding on the ground that, judging by the transcript, the trial court gave insufficient weight or consideration to other facts and circumstances in the case.

The court to found further that the bulk of evidence showed that Owiny Jenecio had before his death distributed the land between his two sons. On that basis, it opined that this was inconsistent with the claim that the appellant's second wife D.W.2 Acan Kalina was a beneficiary of that distribution. I have not found any fault in this finding as it is based on sound reasoning. It further supports the court's conclusion that the appellant had intermeddled in the estate of his late brother, the father of the respondent when he allowed his second wife D.W.2 to occupy and cultivate that part of the land. It does not matter that the intermeddling had been going on for a considerable period of time. Under the common law doctrine of tracing, a beneficiary is entitled to trace estate property and seek to recover it from the person or entity in possession (see *Re Diplock, [1948] Ch.465*). Where estate property is distributed in breach of a fiduciary duty to the beneficiaries of the estate, the possessor although innocent, cannot not take good equitable title to such estate property.

On basis of the evidence on record, no suggestion can reasonably be made that the trial magistrate applied an erroneous principle or mistook or misapprehended the facts of the case. Nor was the overall effect of the evidence such that it was not reasonably open to find that the respondent's evidence was more believable. In the circumstances, the trial court came to the right conclusion when it decided in the respondent's favour. In the final result, I do not find merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the court below are awarded to the respondent.

Dated at Gulu this 6th day of September, 2018

……..
Stephen Mubiru
Judge,
6th September, 2018.