THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0037 OF 2015

(Arising from Gulu Chief Magistrates Court Civil Suit No. 11 of 2011)

OKELLO NOKRACH …… APPELLANT

VERSUS

VERONICA OPIO …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent sued the appellant for recovery of land measuring approximately two and a half hectares at Acoyo Pudyek village, Acoyo Parish, Koro sub-county in Gulu District. Her claim was that she and her husband had occupied and utilised the land in dispute for over fifty years. During the year 1992, the appellant approached her husband, the late Opio Leo, and asked him to permit him an area of that land measuring approximately twenty (20) metres by (50) fifty metres, which her husband acceded to. The appellant grew seasonal crops on that area of land for two years and thereafter vacated during the year 1993. To her surprise, ten year later in the year 2003, the appellant began to claim the entire two and a half hectares of land as his on basis of an alleged purchase from the late Opio Leo who had unfortunately died in 1992. The appellant thereafter forcefully took possession of the land, evicted the respondent and caused her prosecution and incarceration on accusations of criminal trespass, hence the suit.

In his written statement of defence, the appellant refuted the respondent's claim and contended that he acquired the land in dispute by purchase at the price of shs. 380,000/= paid in two instalments on 11th February, 1992 and 26th February, 1992. He therefore rightfully took possession of the land as purchaser. The respondent partook of that price received by her husband and filed the suit in bad faith following the death of her husband.

In her testimony as P.W.1, the respondent stated that the appellant is an uncle to her late husband Opio Leo who died in 1993. The appellant had in 1992 requested her husband for a portion of the land to use temporarily for growing seasonal crops, and he had been permitted to do so. During the year 1997, the appellant forcefully evicted her from the land in dispute claiming it was his, and began growing crops and trees on the land. When she attempted to make bricks on the land during 1998, the respondent stopped her. He initially claimed that her late husband had given her the land for growing seasonal crops but later claimed to have purchased it. The dispute was entertained by the L.C. at the different levels where the appellant produced an agreement by which he purported to have purchased the land. The appellant appeared during the first hearing but when a re-trial was ordered, he refused to submit to the jurisdiction of those courts, hence the suit. During the year 2005, the appellant initiated criminal charges of criminal trespass which were dismissed by court.

P.W.2, Acaye Geoffrey testified that he is the Hoe Chief of the village where the land in dispute is situated. The respondent had complained to him in the past that the appellant was trespassing on her land and he had forwarded the complaint to the L.Cs. The appellant refused to attend those courts. The appellant had been lent a part of that land by the respondent's husband Opio Leo for temporary use as a garden but following his death, the appellant had instead turned round to claim that he had purchased it. He proceeded to plant pine trees on it. P.W.3, Nyeko Michael testified that at he was the L.C.1 Chairman of the village at the time the respondent's late husband had allowed the appellant to use part of the land in dispute for growing seasonal crops, during the period of insurgency that had engulfed Amuru District. He harvested the crops and vacated the land only to return following the death of the respondent's husband to claim that he had bought the land from the deceased. He fenced it off, took over the bricks made by the respondent's sons and presented a suspicious sale agreement.

In his defence the appellant who testified as D.W.1 stated that it was during January, 1992 when he came to learn that part of the land in dispute was up for sale by the respondent's husband, Opio Leo. He later negotiated and agreed upon a purchase price of shs. 380,000/= which he paid in two instalments, the first of shs. 250,000/= on 11th February, 1992 and the second of shs. 130,000/= on 26th February, 1992. Although present at the time of signing the agreement, the

respondent and her mother in law did not sign because they are illiterate. He proceeded to plant seasonal crops and eucalyptus trees thereon. He used the land peaceably until the year 2003 when the respondent's children began making bricks on that land. He reported to the L.C.1 which forwarded the case to the L.C.II which then decided in his favour. The L.C.III Court directed a re-trial. He lodged a criminal case against the respondent but it was dismissed on ground that the complaint should have been made against the respondent's children instead. He now has exclusive possession of the land and continued to use it. He only bought a part of the land and it is clearly demarcated.

D.W.2 Onono Felly testified that on 11th February, 1992 while on his way to school he met the late husband of the respondent who requested him to accompany him to the home of appellant. He wrote the agreement of sale and the appellant paid shs. 250,000/= on that day. None of the parties showed him the land that was the subject matter of that agreement but they agreed that the balance was to be paid within two weeks. Then on 26th February, 1992 they returned to the home of appellant where he wrote another agreement and the appellant paid shs. 130,000/= Neither the respondent nor her mother in law was present or witnessed the agreements, and on both occasions they did not visit the land. He could not tell whether the respondent's husband had sold all or only a part of the land and the sale agreement did not contain a description of the land sold. He commented that on the agreement of 11th February, 1992 someone unknown to him had since made an insertion at the bottom of the agreement, to the effect that the parties had visited the land and also contains a purported description of the boundaries of the land.

D.W.3 Odong Michael testified that he witnessed both agreements of sale of the land in dispute dated 11th February, 1992 and 26th February, 1992 respectively. When the respondent's children made bricks on the land during the year 2003, the appellant sued the respondent. The respondent and her mother in law were present at the signing of both agreements but did not sign. On both occasions, the agreements were signed at the home of D.W.2 Onono Felly. The area sold measure 180 metres by 60 metres. The boundaries were physically inspected before the payment was made. It is him who made the questioned insertions in absence of all other witnesses and the parties.

D.W.4 Mary Okello testified that she is the appellant's wife. The appellant bought the land in dispute from Opio Leo the husband of the respondent and they took possession immediately thereafter. She planted a variety of crops and trees on the land until the year 2003 when the respondent's sons began making bricks on the land. She was not present at bthe execution of the sale agreement but later got to see it.

In his judgment, the trial magistrate found that the evidence adduced by the appellant and his witness had material unexplained contradictions. Secondly, the agreement of sale on which the appellant relied to state his claim did not contain a description of the land to which it related. It also had evidence of unexplained insertions. The trial magistrate therefore believed the respondent's version that the appellant had only been lent a small portion of the land for temporary use. He used that portion temporarily and left. There was never a sale as claimed by the appellant. He therefore declared the respondent the rightful owner of the land in dispute, issued an order of vacant possession, a permanent injunction against the appellant, awarded the respondent damages of shs. 3,000,000/= for trespass to land and the costs of the suit.

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

1. The learned Chief Magistrate erred in law and fact when he found that the appellant had not purchased the suit land from Opio Leo, the respondent's husband.
2. The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus reaching a wrong conclusion and occasioning a miscarriage of justice.
3. The learned Chief Magistrate erred in law and fact when he did not visit the *locus in quo* which caused injustice to the appellant.

At the hearing of the appeal, the respondent was not in court despite being aware of the date. There being no explanation for her absence, court granted counsel for the appellant leave to proceed ex-parte. Submitting in support of these grounds, Counsel for the appellant Ms. Kunihira Roselyn argued that the appellant stated that he purchased the land and paid two instalments for the land. Two witnesses came to court. D.W.2 authored the agreement, D.W.3. was a witness and

they both testified in court. The respondent confessed to the fact that she had no knowledge of the sale but that he had once received money from the appellant. In cross-examination she was not able to explain what the money was for. She prayed that the court finds that it was the price paid for the land. There were contradictions in her statement in court and her pleadings. She tried in vain to allege that the respondent had only been given land for cultivation for a short time and that when the land was given to the appellant he did not use it until 1997. This contradicts the pleadings. P.W.2, P.W.3 and P.W.4 confirmed to court that the appellant had been using the land since 1993 without interruption. It was more than twenty years. She prayed that the court finds that the appellant purchased the suit land and that the respondent was just untruthful.

As regards the third ground, whereas it is not mandatory, the trial magistrate relied on evidence that required confirmation for example in the judgment he held that the appellant's failure to mention the neighbours was enough to prove he did not buy the land. The appellant adduced enough evidence to discharge the burden. She 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 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.

It is necessary to begin with the second ground of appeal presented in this appeal. I find that it 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*). Ground two is accordingly struck out.

The third ground of appeal impugns a procedural aspect of the trial. It is contended by the appellant that the trial magistrate failed to visit the *locus in quo* and that this occasioned a miscarriage of justice. The purpose of a visit to the *locus in quo* 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. 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 trial magistrates understand the evidence better, a magistrate should visit the *locus in quo* only if it is evident that there are matters in issue which require the court to check on the evidence given by the witnesses 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 there were only two issues before court; i.e. (1) whether or not the appellant bought the [disputed] land from the respondent's late husband and (2) the remedies available. That being the case, there were no apparent physical aspects of the oral testimony given in court that required the trial magistrate to harness at the locus in quo with a view to conveying and enhancing the meaning of such testimony. Consequently, that omission is inconsequential in the instant appeal. The second ground of appeal fails too.

As regards the first ground relating to the manner in which the trial magistrate evaluated the evidence, 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. An appellate court generally may reverse the decision of the trial court and render its own judgment if the evidence on record does not support the trial court's finding on an issue, or a finding on an issue erroneously determined, such as on a question of law. In particular this court is not bound necessarily to follow the trial magistrate'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 demeanour of a witness is inconsistent with the evidence in the case generally. Having re-evaluated the evidence, I find that the trial court properly directed itself, in coming come to the conclusion that it did.

In evaluation of the evidence, the trial magistrate properly directed himself regarding the material unexplained contradictions in the appellant's evidence. He singled out four major ones; - whereas the appellant stated that the land was inspected before the sale, D.W.3 stated that it was long after the sale; whereas the appellant stated that the first instalment was paid in Gulu Town and the other at the home of D.W.2, the latter stated that both were made at the home of the appellant; whereas the appellant stated that the respondent and her mother in law were present at the signing of both agreements, D.W.2 stated that they were not; whereas D.W.2 stated that the appellant's wife was present at the signing of both agreements, she herslef as D.W.3 refuted this.

It is trite law that grave contradictions unless satisfactorily explained may, but will not necessarily result in the evidence being rejected and minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

The inconsistencies and contradictions that were highlighted in the submissions of counsel for the appellant relate to the circumstances surrounding the execution of the agreement of sale. I have considered the range and character of the contradictions so highlighted. I have found them to be grave in so far as they relate to a matter which are central to the key issue in the case. i.e. whether or not the appellant bought the disputed land from the respondent's late husband. They are suggestive of deliberate untruthfulness on the part of the witnesses to whom they are attributed. I therefore have not found any error occasioned by the view the trial court took of these contradictions and the importance it attached to them.

Secondly, in order to be enforceable, a contract must clearly and sufficiently set out the subject matter of the agreement. The three essential elements of a contract of sale are; - (a) the thing sold, which is the object of the contract; (b) the consideration or price to be paid for the thing sold; and (3) the consent of the parties to exchange the thing for the price. The general requirement is that the thing sold must be definite or ascertainable and not vague at the time of the conclusion of the contract. If an alleged agreement is so indefinite as to make it impossible for a court to fix the legal obligations and liabilities of the parties, or to define or ascertain the subject matter, it cannot constitute an enforceable contract. If a contract is not clear and certain as to all essential terms, it will fail for indefiniteness.

The subject matter of an agreement of sale will be definite if described in sufficient detail, but may also be ascertainable if mentioned by type alongside such particulars of description as the number, weight, dimensions or other forms of measurement. In the instant case, the agreement on which the appellant relied to sustain his claim did not contain a description of the location or the dimensions of the land allegedly sold, or other descriptive feature. The subsequent attempt to insert those dimensions was unilateral by D.W.3 and there is no evidence that they were acknowledged by the purported seller nor the buyer. The agreement is so indefinite as to make it impossible for a court to fix the legal obligations and liabilities of the parties, or to define or ascertain the subject matter. It could not constitute an enforceable contract. Again I have not found any error occasioned by the view the trial court took of the deficiencies in this agreement and the importance it attached to them. This ground of appeal too fails.

Finally, the conduct of the appellant cast doubt on the credibility of his claim. Although he claimed to have paid the last instalment on 26th February, 1992, he did not take possession until after the death of the respondent's husband. His conduct is more consistent with the respondent's version that the deceased had allowed him use of only part of the land, only for him to return after the death of the deceased to claim the whole. This is further evidenced by that fact that although D.W.2 testified that the land the appellant purchased measured only 180 metres by 60 metres, in his testimony the appellant claimed to have bought the entire piece of land.

The burden of proof lay with the appellant. To decide in his favour, 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 respondent, such that the choice between his version and that of the respondent would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondent's, might hold that the more probable conclusion was that for which the appellant contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials. He failed to discharge that burden.

In the final result, I find that the trial court came to the right conclusion when it decided in the respondent's favour. That being the case, I find no merit in the appeal and it is accordingly dismissed with costs to the respondent.

Dated at Gulu this 20th day of September, 2018

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Stephen Mubiru
Judge,
20th September, 2018.