

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0024 OF 2017

(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 004 of 2010)

5 1. **PETER TRUEMAN** }
2. **KILAMA ALFRED** }
3. **OCAMGIU LABOTH** } **APPELLANTS**
4. **ONEK MORRIS** }
5. **OKWANGA DAVID** }
10 6. **ODUR JUSTINO** }

VERSUS

1. **KILAMA BENSON** }
2. **OLUBA SABINO** } **RESPONDENTS**

15 **Before: Hon Justice Stephen Mubiru.**

JUDGMENT

The appellants jointly and severally sued the respondents jointly and severally for recovery of
20 approximately 60 acres of land, at Oguru village, Pukony Parish, Awach sub-county, Aswa
County in Gulu District, general damages for trespass to land, a permanent injunction, and costs.
Their case was that they inherited the land in dispute from their grandfather Dementio Oryem.
During or around the year 2009, the respondents encroached onto the land whereupon the first
respondent claimed it as his, on ground that his late father, Vicentino Labong Opira, bought it
25 from a one Mrs. Rose Opira, widow of the late Opira Saverino, whereas what their father bought
was a grass-thatched house, yet the respondents' land is located far from the one in dispute.

In their joint written statement of defence, the respondents denied the claim in toto. Their case
was that the first respondent inherited the land from his late father who had peacefully lived on it
30 until his forced displacement to an IDP Camp by the Kony insurgency. The appellants' land is
located far from the one in dispute, in a different Parish. The appellants are pursuing a scheme by
a one Rose Opiro designed to dispossess the respondents of land that is rightfully theirs.

Testifying as P.W.1 the second appellant, Kilama Alfred, stated that all the appellants are brothers. The first respondent is their uncle and son of Labong Vincent while the second respondent is a cousin. The land in dispute belonged to their grandfather Latigo Apori. The appellants were all born on that land. In 1959, their father gave approximately 20 acres of land to the second respondent's father. They were also given three acres by one of the appellant's brother's wife Akello Rose Opira. It is during the year 2010 that the respondents encroached onto about twenty acres of the land by cutting down trees and undertaking cultivation. Under cross-examination, he stated that the respondents are using the twenty acres that were given to their father. The first respondent is using about five acres while the second respondent is utilising five. The problem is that the respondents don't want the appellants on the land.

The third respondent, Ocamgiu Laboth, who is a brother to the late Opira, husband to Mrs. Rose Opira testified as P.W.2, and stated that the dispute over the land began following the death of Opira in 2010. He has known the first respondent since 1982 and the second since 1979 as they live on the same village. Their fathers came onto the land in the 1950s. The appellants' father gave the respondent's father three gardens, measuring over twenty acres. It is that area that the respondents occupy. The dispute is over land that the respondents were jointly using with the late Opira which the respondents now claim as their own against the protestations of the widow, Akello Rose Opira hence the brothers of the deceased, the appellants, taking up the issue of its recovery. Their mother was buried on the land in dispute. P.W.3 Olango Santo, a neighbour across Lakunyi stream, testified that he witnessed an agreement made on 15th August 1978 by which Vicentino Labong Opira, bought a hut from the late Opira Saverino, the appellants' brother, in exchange for a goat. The respondents then began cultivating the land on which that hut was situated.

In his defence as D.W.1, the second respondent Oluba Sabino testified that he was born on the land in dispute in 1963 and has used it ever since. He inherited the land from his late father in 1989. His grandfather lived and was buried on this land when he died. Although his father was not buried on that land, he has graves of several of his other deceased relatives thereon. He occupies 25 - 30 acres and has not trespassed onto any of the appellants' land. The appellants are not even neighbours to the land. The late Opira Severino, brother of the appellants, at one time

possessed the land in dispute. The first respondent, Kilama Benson, testified as D.W.2 and stated that he inherited approximately 20 acres of land in 1992 from his late father Vincent Labongo who purchased the land from the late Opira Saverino, husband of Rose Opira. He was born on this land and has lived on it since then (by that time 36 years). His father was abducted by rebels
5 in 1990 never to be seen alive again but his clothes were buried on the land in the year 1994 in accordance with Acholi Culture. None of the appellants has ever lived on the land in dispute. Their land is separated from the one in dispute by a road. The appellants' mother was buried on the land in dispute before Opira Saverino sold it to Vincent Labongo. He has graves of several of his deceased relatives thereon. He has not trespassed onto any of the appellants' land.

10

D.W.3 Lalango Cosmas, a clan brother to the second respondent, testified that the land in dispute measured 15 - 20 acres. Three of the appellants live in the area but do not share a common boundary with the land in dispute. The rest of the appellants do not live in the area. The first respondent's father occupied the land in dispute and on his death it passed to the first respondent.

15

In the year 2008 after the insurgency, when two of the second appellant's sons began cultivating the land, a dispute arose and was referred to him for mediation. Rose Opira stated that she was the right person to sue the first respondent and when mediation failed the matter was referred to the L.C. Courts which decided in favour of the first respondent. Rose Opira never appealed the decision. D.W.4 Aloyo Lucy, the elder sister to the first respondent, testified that their late father

20

purchased the land in dispute in 1978 from the late Opira Saverino. The latter was migrating to Ajulu and it was for that reason that he sold off his land. The sale took place in the presence of Rose Opira, the wife of Opira Saverino. There was no dispute over that land during the lifetime of both parties. It was upon their return from the IDP Camp that Rose Opira began seeking recovery of the land but the L.C. Courts decided against her. She never appealed and the
25 appellants decide to take up the issue from her.

The court visited the *locus in quo* and noted features on the land including the home of the first respondent, the grave of the appellants' mother, the land that belonged to the late Opira and neighbouring paths. It also drew a sketch map of the land in dispute. It recorded evidence from
30 additional witnesses; (i) Okot Mikile, the clan leader of Kal Umu Clan who stated that the land was first owned by Gaudensio Oryem who first settled there in 1938. The first respondent's

father Vicensio Labongo died in 1992 after being abducted by rebels; (ii) D.W.3 Lalango Cosmas, who stated that the land belonged to Vicensio Labongo. The home of Opira was to the West of the road and that of the second respondent to the East.

5 In his judgment, the trial Magistrate found that the respondents have resided on the land since birth with knowledge of the appellants. The appellants contend that by the agreement of 15th March, 1978 the first respondent's father bought only a house and not land. The implication is that the respondents have had adverse possession of the land since 1978. The appellants' action was therefore time bared, hence the suit was dismissed with costs to the respondents.

10

The appellants were dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate Grade One erred in law and fact when he ignored the contradictions in the respondents' evidence thereby arriving at a wrong decision.
- 15 2. The learned trial Magistrate Grade One erred in law and fact when he relied on an agreement dated 15th March, 1978 though it was not admitted in evidence thereby occasioning a miscarriage of justice.
3. The learned trial Magistrate Grade One erred in law and fact in taking and analysing the evidence of the second respondent on record thereby occasioning a miscarriage of justice.
- 20 4. The learned trial Magistrate Grade One erred in law and fact when he held that the appellants' suit was barred by limitation thereby arriving at a wrong decision.
5. The learned trial Magistrate Grade One erred in law and fact when he held that the respondents acquired the suit land through adverse possession without any evidence on record thereby occasioning a miscarriage of justice.
- 25 6. The learned trial Magistrate Grade One erred in law and fact when he failed to properly conduct the locus visit thus occasioning a miscarriage of justice.

In their submissions, counsel for the appellant, M/s Odongo & Co. Advocates, argued that it was erroneous for the court to have recorded the evidence of Okot Mikile and Lalango Cosmas at the
30 *locus in quo*. The sketch map was poorly drawn and the dates of construction of the house found thereon are not indicated. The second respondent neither pleaded nor adduced evidence as to

how he came into possession of the land in dispute. Although he testified that there were graves of his parents on the land, during the visit to the *locus in quo* it was found that he had no developments on the land. He could therefore not be an adverse possessor. The portion he occupied was that given to his father in 1959 in respect of which he could not therefore be an adverse possessor. He had trespassed in 2009 but when the suit was filed he vacated the land. Although the agreement of 15th March, 1978 was mentioned, it was not admitted in evidence and therefore could not be relied upon in fixing the date of commencement of the first respondent's possession of the land. The suit cannot be time barred because of the period of insurgency, which the court ought to take judicial notice of. The appeal should be allowed.

10

In response, counsel for the respondents, M/s. Donge & Co. Advocates, argued that the suit was indeed time barred and there were no contradictions in the evidence of the respondents. The agreement of 15th March, 1978 was annexed to the plaint and evidence on it was given by the appellants. Although not tendered in court, the trial court referenced it only for purposes of fixing the date of the respondents' entry onto the land, which date can be ascertained from the testimony of the appellants without reliance on the document. The proceedings at the *locus in quo* did not occasion a miscarriage of justice and the court rightly found that the respondents had been in adverse procession beyond the period of limitation. The appeal should be dismissed with costs.

20

It is the duty of this court as a first appellate court 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

30

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.

5 It is convenient for this court to consider ground 6 of the appeal first. It is argued that the court below erred in recording evidence from persons who had not testified in court and that this occasioned a miscarriage of justice. Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and
10 therefore 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. 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 (see *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). It was an error for the
15 court to have recorded evidence from; (i) Okot Mikile, who had not testified in court, but there was no error in recording that of (ii) D.W.3 Lalango Cosmas who had testified in court.

Notwithstanding the error of recording evidence from Okot Mikile, according to section 166 of
20 *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil*
25 *Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

30 A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for

any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the one additional witness, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of that one witness. This aspect of the ground accordingly fails.

10 The other limb of the argument in respect of this ground is that the sketch map was poorly drawn and the dates of construction of the house found thereon are not indicated. The purpose of a sketch map drawn during a trial court's visit to a *locus in quo* is to illustrate the testimony of a witness or witnesses, and to summarise or explain oral or documentary evidence presented thereat. Although it should be contained in the record of proceedings, this is only for the sake of completeness of record as it does not constitute evidence. It is intended to make evidence and facts in the case easier to understand, especially as demonstrated, seen and observed at the *locus in quo*. It provides the opportunity to the trial court and later the appellate courts to harness more of their senses, as a visual aid, in understanding each aspect of the case, so as to bring additional clarity to the issues to be decided by enhancing understanding of oral evidence or documentary evidence so that the court is in a better position to draw conclusions from the oral and documentary evidence. As a demonstrative aid or illustrative aid, it should therefore be accurate, fair in the sense of an absence of a tendency to mislead, clear and focused to ensure that the information it displays is understandable in order to enhance its potential to make the proper interpretation of the evidence easier for everyone involved. It is sufficient when it fairly and accurately reflects the witness's testimony and is helpful in assisting the court understand facts and evidence. Can only be fatal if proven to be not merely helpful, but necessary in illustrating or explaining other evidence, without which that evidence may not be understood.

The omission of detail in the sketch map is not fatal, if the oral evidence is clear in relation to such detail. Being only demonstrative evidence, a sketch map is neither testimony nor substantive evidence. The trial or appellate Court is not to draw independent conclusions from it

as a demonstrative aid but is only free to utilise it to better understand or remember the evidence of a witness from which the actual conclusions of fact will be drawn. It can never take the place of real or oral evidence. I have examined the drawing and found that it meets the basic requirements of illustrating the testimony of the witness and observations made at the *locus in*
5 *quo*. This aspect of the ground of appeal fails as well.

Grounds 1 and 3 will be considered concurrently in so far as they relate to alleged improper evaluation of evidence and failure to advert to contradictions in the respondents' evidence. It was argued by counsel for the appellants that the portion occupied by the first respondent was that
10 given to his father in 1959 in respect of which he could not therefore be an adverse possessor, while the second respondent did not adduce any evidence of occupation. I have examined the record and found that none of the respondents was cross-examined on the claimed period of occupancy. The appellants' cross-examination instead focused only on that area purported to have been bought from Opira Saverino in 1978.

15

Being the plaintiffs in the suit, the burden was cast on the appellants and not on the second respondent to prove date of commencement of his presence on the land and that his presence thereon constituted a trespass, and not vice versa. At the *locus in quo*, the appellants were unable to demonstrate to the court the extent of the alleged encroachment. It is therefore a self defeating
20 argument to state that the second respondent was not in possession, yet he was being sued for trespass to that land. To the contrary, testifying as P.W.1 the second appellant, Kilama Alfred, under cross-examination stated that the respondents were using the twenty acres that were given to their father. The first respondent was using about five acres while the second respondent was utilising five. I have also not found any contradictions in the respondents' evidence and none
25 were demonstrated by counsel for the appellants in their submissions. I have thus not found any merit in these two grounds of appeal and they too fail.

Grounds 2, 4 and 5 will be considered concurrently in so far as they relate to the trial court's reliance on an agreement dated 15th March, 1978, the respondent's long period of adverse
30 possession to decide that the suit was barred by limitation. It was argued that although the agreement was mentioned, it was not admitted in evidence and therefore could not be relied upon

in fixing the date of commencement of the first respondent's possession of the land. Furthermore, that the suit cannot be time barred because of the period of insurgency, which the court ought to take judicial notice of.

5 In the first place, the appellants not only annexed the agreement to the plaint, but also in his testimony, P.W.3 Olango Santo, a neighbour across Lakunyi stream, adverted to the fact that he witnessed that agreement and that it is the one by which Vicentino Labong Opira, bought a hut from the late Opira Saverino, the appellants' brother, in exchange for a goat. Although the agreement was not tendered in evidence, it was the oral testimony of P.W.3 that the agreement
10 was executed on 15th August 1978. That date is proved not by documentary evidence but by the oral testimony of that witness. Its significance was that it established a date by which the appellants acknowledged having become aware of the respondents presence on the land, an occupation they disputed as being adverse to their title.

15 The general thrust of the appellants case was that their father gave approximately 20 acres of land to the second respondent's father. There is no dispute over that part of the land and the appellants contend it is located far from the one in dispute. It is in respect of an approximately three acre piece of land the respondents claim their late father Vicentino Labong Opira, bought from the late Opira Saverino, that the dispute exists. The appellants claim that whereas what the
20 respondents' father bought from the late Opira Saverino was a grass-thatched house, yet the respondents have since encroached onto an additional approximately twenty acres of the appellants' land by cutting down trees and undertaking cultivation. Considering that at the *locus in quo* the appellants were unable to demonstrate any encroachment, on basis of the sketch map prepared by the court, I am inclined to believe that the respondents are in possession of that area.

25

Regarding the history of ownership of that area, D.W.2 Kilama Benson, the first respondent, stated that he inherited the approximately 20 acres of land in 1992 from his late father Vincent Labongo who purchased it from the late Opira Saverino, a brother of the appellants. D.W.3 Lalango Cosmas, a clan brother to the second respondent, testified that the first respondent's
30 father occupied the land in dispute and on his death it passed to the first respondent. The dispute arose in 2008 after the insurgency, when two of the second appellant's sons began cultivating the

land. D.W.4 Aloyo Lucy, the elder sister to the first respondent, testified that their late father purchased the land in dispute in 1978 from the late Opira Saverino. The latter was migrating to Ajulu and it is for that reason that he sold off his land. The sale took place in the presence of Rose Opira, the wife of Opira Saverino. There was no dispute over that land during the lifetime
5 of both parties. It was upon their return from the IDP Camp that Rose Opira began seeking recovery of the land but the L.C. Courts decided against her. She never appealed and the appellants decide to take up the issue from her.

The appellants' version is different. The land in dispute belonged to their late brother Opira
10 Saverino, although they too used to grow crops on it. According to P.W.3 Olango Santo, on 15th August 1978 the first respondent's father Vicentino Labong Opira, bought a hut from the late Opira Saverino, the appellants' brother, in exchange for a goat. Testifying as P.W.1 the second appellant, Kilama Alfred, stated that the respondents were also given an additional three acres by Akello Rose Opira, but during the year 2010, the respondents encroached onto an extra
15 approximately twenty acres. P.W.2 Ocamgiu Laboth, the third respondent and brother to the late Opira, stated too that the dispute over the land began following the death of Opira in 2010.

It emerges from the two versions that the respondents' families have been in possession of the land since 15th August 1978 when the first respondent's father Vicentino Labong Opira bought it
20 from the appellants' brother, the late Opira Saverino. Before that, the late Opira Saverino had a grass thatched house and gardens on the land. Whereas the appellants contend that the sale related to only the grass thatched house, and that Rose Opira, the widow of the late Opira Saverino, sold off an extra three acres to the respondents, the respondents contend there was only one transaction in respect of the entire 20 acres and it was by the late Opira Saverino following
25 his decision to migrate to Ajulu. I am inclined to believe the respondent's version as the court below did for the following reasons; the alleged transaction between Rose Opira and the respondents was not proved by adducing evidence relating to such particulars as the parties, the date, the place, and consideration for the transaction; during the *locus in quo* visit by the trial court, there was no evidence of occupancy by any of the appellants or their late brother Opira
30 Saverino; the dispute only erupted following the death of Opira Saverino.

It was argued by counsel for the appellants that the respondents' possession was not adverse so as to trigger the law of limitation. Indeed possession is adverse only if in fact one holds it by denying title of the owner or by showing hostility by act or words as against the owner of the land in question. Possession does not become adverse until the intention to hold adversely is manifested. The owner is neither dispossessed nor discontinued in possession, if a person takes possession with the permission of the owner. It is however true that, if the person in permissive possession changes his or her *animus* and continues to hold with an open and continuous assertion of a hostile title, his or her possession becomes adverse to the true owner. A person holding land by way of adverse possession must publish his or her intention to deny the right of the real owner. The intention of the adverse possessor must be with notice, or knowledge of the real owner. Unless enjoyment of the land is accompanied by adverse *animus*, mere possession for a long period even over the statutory period, is not sufficient to mature the title to the land by adverse possession.

From the record of proceedings, it is clear that the appellants pleaded that it was during or around the year 2009, that the respondents encroached onto the land whereupon the first respondent claimed it as his, on ground that his late father, Vicentino Labong Opira, bought it from a one Mrs. Rose Opira, widow of the late Opira Saverino. Their evidence was to the effect that the trespass they were complaining about began in 2010 following the death of Opira Saverino. Their reference to the agreement of 15th August 1978 was to explain the circumstances in which the respondent's father came to have a claim in respect of the house situated on the land. Their complaint was not in respect of the house, but the land that goes with it. Since the trespass they complained of was alleged to have begun in 2010, the suit was therefore not barred by limitation when they filed it during that very year. The trial court erred in relying on the date used to contextualise the trespass as the date when the trespass occurred.

The only problem the appellants' claim is that the land in respect of which they sued belonged to their late brother Opira Saverino. They did not plead or prove any claim of interest in that land save the mere fact of being brothers to the deceased owner. They did not show that they were beneficiaries of the estate of the deceased. It is trite that save in public interest litigation or except where the law expressly states otherwise, such as article 50 (2) of *The Constitution of the*

Republic of Uganda, 1995 which confers on any person or organisation the right to bring an action against the violation of another person's or group's human rights, for any person to otherwise have *locus standi*, such person must have "sufficient interest" in respect of the subject matter of a suit, which is constituted by having; an adequate interest, not merely a technical one
5 in the subject matter of the suit; the interest must not be too far removed (or remote); the interest must be actual, not abstract or academic; and the interest must be current, not hypothetical. The requirement of sufficient interest is an important safe-guard to prevent having "busy-bodies" in litigation, with misguided or trivial complaints. If the requirement did not exist, the courts would be flooded and persons harassed by irresponsible suits.

10

Moreover, the claim that the dispute over this land began in 2010 is not borne out by the evidence on record. The dispute had been litigated before. P.W.2 Ocamgiu Laboth, the third respondent, stated that the respondents were jointly using the land with the late Opira Saverino but later the respondents claimed it to the exclusion of the widow, Akello Rose Opira. prompting
15 the appellants as brothers of the deceased, to take up the issue of its recovery.

This corroborates the testimony of D.W.4 Aloyo Lucy, who stated that although their father bought the land in 1978 from the late Opira Saverino in the presence of his wife Rose Opira, and that there was no dispute over that land during the lifetime of both parties, it was upon their
20 return from the IDP Camp that Rose Opira began seeking recovery of the land but the L.C. Courts decided against her. She never appealed but the appellants instead decided to take up the issue from her. The dispute had not only been the subject of prior litigation involving the widow of the deceased, but also the appellants clearly had no *locus standi* to pursue its recovery on her behalf. Therefore for slightly different reasons, the decision of the court below is upheld. The
25 appeal is dismissed. The costs of the appeal and of the trial are awarded to the respondents.

Dated at Gulu this 6th day of December, 2018

30

.....
Stephen Mubiru
Judge,
6th December, 2018.