

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0018 OF 2017

(Arising from Kitgum Grade One Magistrate's Court Civil Suit No. 052 of 2015)

5 1. **OOLA PETER }**
 2. **ADONG JENIFER } APPELLANTS**
 3. **OROMA JOSEPH }**

VERSUS

LANEN MARY RESPONDENT

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Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent sued the appellants jointly and severally for recovery of approximately two acres
15 of land under customary tenure, situated at Kal Central "B" village, Kal Parish, Palabek Kal sub-
county, in Lamwo District, an order of vacant possession, a permanent injunction, general
damages for trespass to land, interest and costs. The respondent's case was that she inherited the
land in dispute from her mother, Sapira Alaroker who in turn acquired it from her brother, John
Lawatim, S/o Rwot Daudi Ocan. The respondent's had quiet enjoyment and possession of the
20 land until the year 1999 when the first appellant forcefully entered onto the land and sold part of
it to the second appellant's late father, Oyet George.

During the year 2004, both the L.C.I and L.C.II ordered the two appellants to vacate the land and
the first appellant to refund the purchase price to the second appellant's father. The appellants
25 never heeded the directives forcing the respondent's mother to take up the issue with the L.C.III
which during 2007 made a similar order. The second appellant completed the building started by
her father and entered occupation. During 2010, the first appellant sold another part of the land to
the third appellant. The respondent's mother died the following year in 2011 and the respondent
inherited the land upon obtaining a grant of letters of administration. The respondents still
30 refused to vacate the land despite her demands that they do so, hence the suit.

In their joint written statement of defence, the first appellant contended that the land in dispute
originally belonged to his grandfather, Rwot Daudi Ocan. The first appellant was born and raised

on that land where he has lived for over fifty three years. The appellant, daughter of his Aunt Sapira Alaroker, has never been in possession of the land. She was only allowed to brew Malwa in one of the houses on the land from 1989 until 1994 when she vacated the land and settled with her husband at a place about two kilometres away and never returned until her death in 2002. In
5 his capacity as Rwot of the area, a building was constructed for him on the land by the Government. On 1st May, 1997 the first appellant lawfully sold part of the land to the second appellant's father, Oyet George William who constructed a permanent house thereon. The third appellant purchased another part of the land on 7th April, 2010 from the first appellant's uncle, Lanek Andrew.

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When the suit came up for hearing, the trial magistrate appointed a mediator and referred the parties to the mandatory court-annexed mediation process. The process resulted in a mediation agreement by which the parties mutually agreed that within two weeks, from 19th October, 2015 the first appellant would return to the respondent, the land he sold to the second and third
15 appellants. The first appellant was to meet the respondent's costs of the suit by offering her a piece of land of specified dimensions within the same area, in lieu thereof. It later transpired on or about 19th October, 2015 that the land the first appellant offered the respondent was far way and it did not belong to him, hence the parties opted to continue with and resolve the suit through litigation.

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In her testimony as P.W.1 Lanen Mary, the respondent, stated that her late mother Sapira Alaroker acquired the land from her brother, John Lawatim, S/o Rwot Daudi Ocan in 1962. She inherited the land from her upon her death in the year, 2011. She was born, raised and lived on the land until the year 1999 when the first respondent sold part of it to the second respondent.
25 Her mother reported a case to the L.C.I which decided in her favour. Both the L.C.II and the L.C.III affirmed that decision. They all decided that both respondents should leave the land and that the first respondent should refund the second respondent's purchase price. P.W.2 Otto Josephine, a neighbour, testified that the land in dispute measures approximately two acres and it belongs to the respondent, who is the daughter of Abwok Sapira. The land originally belonged to
30 the grandfather of the respondent. It then passed to the brother of the respondent's mother, John Lawotum and it is him that gave it to Abwok Sapira. The respondent then inherited it from her

said mother. The dispute began in 1999. The L.C1, L.C.II and L.C.III Courts all decided in favour of the respondent and directed that the land should be given back to her but the appellants never complied with the decisions.

5 P.W.3. Otema Alfred testified that he had seen the respondent live on the land together with her mother Alal K. Sapira since 1962. In 2004 the first appellant sold off part of the land to a one Oyet George. He was sued and the L.C. II Court decided that the sale was void and he should refund the purchase price Oyet George had paid. Following the death of Oyet George, his daughter, the second respondent, began construction of a house on the land. The first appellant
10 subsequently sold another part of the land to the third appellant. The respondent sued the first appellant and up to the L.C. III Court all decisions were in favour of the respondent. The third appellant instead offered to compensate the respondent for the building he had on the land but failed to honour the agreement. The first appellant too undertook to swap land with the respondent but it was discovered that the land he promised to swap with did not belong to him,
15 hence the suit.

P.W.4. Onol Joseph, son of John Lawotum, testified that the land in dispute was given to his father John Lawotum by his grandfather, Daudi Ochan. John Lawotum in turn gave the land to his Aunt Abwok Sapira who lived there on for a long time with the respondent. The first
20 appellant, who is an uncle to the respondent, then sold off the land to Oyet George, father of the second appellant. Decisions were made in favour of the respondent up to the L.C.III decision of 27th November, 2015 but the first appellant refused to hand the land back to the respondent. The appellants instead continued constructing buildings on the land. P.W.5 Odongtoo Samuel, a neighbour, stated that the respondent acquired the land in dispute from her late mother.

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In response, Oola Peter the first appellant as D.W.1. testified that the land in dispute originally belonged to Rwot Daudi Ocan who in turn acquired it from his father Rwot Apete. The respondent's mother sought refuge at the home of the Rwot where she was given a home from where to undertake her local brew business, but not the land. The respondent was born on that
30 village but later got married at Lugwa. She later returned from her marriage to claim and sell off part of the land. She was stopped from selling the land. D.W.2. Adong Jennifer, the second

respondent, testified that during December 2002, her late father Oyet George bought a 90' x 300' portion of the land. The father erected a building on the land in the year 2011 before his death in October of that year. In 2013 she entered onto the land and began occupying the building. On 28th August, 2015 the respondent entered onto the land and placed thereon bricks in the shape of
5 grave. D.W.3. Achol Paska, wife of the third respondent, then testified her husband bought the land she is occupying, measuring 20' x 65' from a one Lanek Andrew in the year 2010. They occupied the land peacefully for the next three years. During the fourth year he respondent came onto the land and began planting eucalyptus trees on the land. She demarcated a boundary and began claiming the land as hers. She then sued her husband. The road to Lamwo constitutes the
10 boundary.

Both parties having closed their respective cases, the court then visited the *locus in quo* where the boundaries of the land were demonstrated to the court. It prepared a sketch map and recorded evidence from the third appellant who stated that he purchased the land he occupies from a one
15 Lanek Andrew on 7th April, 2010. The rest of the land belongs to Rwot Daudi Ochan.

In his judgment, the trial Magistrate found that evidence adduced during mediation proceedings by the clan and the various decisions of the L.C. Courts indicated that it was conceded the land belonged to the respondent. The first respondent did not appeal the decisions but chose to be
20 adamant. The mediation report of 19th October, 2015 shows that the first appellant agreed to returns to the respondent, the land he sold to the second and third appellants. The first appellant by that agreement conceded that the land does not belong to him. The land in dispute therefore belongs to the respondent. The first respondent was incapable of transferring good title since the land does not belong to him. The second and third appellants did not undertake due diligence
25 before purchase of that land, hence they are trespassers on the land. The court thus granted vacant possession of the ,and to the respondent, issued a permanent injunction against the appellants and awarded the costs of the suit to the respondent.

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

1. The learned trial Magistrate erred in law and in fact when he failed or neglected to properly evaluate the evidence before him.
2. The learned trial Magistrate erred in law and fact when he included a mediation report to form the gist of his judgment hence occasioning a miscarriage of justice.
- 5 3. The learned trial Magistrate erred in law and fact when he failed to properly conduct the locus visit and record evidence in a contentious land dispute and delivered judgment in favour of the respondent without the description of the boundary of the suit land hence occasioning a miscarriage of justice to the appellants.
- 10 4. The learned trial Magistrate erred in law and fact when he refused to accept (sic) the appellants' witnesses and failed to record their testimonies on the record hence occasioning a miscarriage of justice to the appellants.

In their submissions, counsel for the appellants, M/s Masaba, Owakukikoru-Muhumuza & Co. Advocates argued that evidence showed that the respondent's mother occupied the land in dispute only temporarily and later got married at Kal "A" village where the respondent was born from. The respondent herself was subsequently married at Lugwa village from where she returned to begin selling off parts of the land in dispute. Her evidence was contradictory in so far as she claimed her mother acquired the land by gift and in the same breath said she acquired it by purchase. The evidence of the first respondent on the other hand showed that he has lived on the land in dispute for all his life and he inherited it from Rwot Daudi Ocan. They prayed that the appeal be allowed wit costs to the appellants. Counsel for the respondent, Mr. Donge Opar did not file any submissions in response.

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 of particular circumstances or probabilities materially to estimate the evidence or if the
5 impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The third and fourth grounds of appeal assail the conduct of proceedings at *locus in quo*, in that the trial magistrate is alleged to have rejected the testimony of some witnesses. I have perused
10 the record of proceedings and I have not found any evidence of rejection of witness testimony. A visit to the *locus in quo* is not designed for recording evidence from additional witnesses. It is for purposes of enabling the witnesses who testified in court to demonstrate the physical and visual aspects of the testimony they gave in court. At the *locus in quo*, it is only the third appellant who was able to do that. There is no evidence to show that any of the other parties or witnesses were
15 precluded from that exercise. This ground is not supported by the record and it therefore fails.

Lastly, the first and second grounds of appeal assail the trial court for having relied on the contents of the mediation report to support its decision and the resultant failure to establish the location of the common boundary. It is trite that consequent to rule 18 of *The Judicature*
20 *(Mediation) Rules, 2013 (S.I. No. 10 of 2013)*, no writing that is prepared for the purpose of, in the course of, or pursuant to mediation is admissible or subject to discovery for purposes of a trial. When parties agree to conduct and participate in a court annexed mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part, except as otherwise provided by those rules, evidence of anything said or of any admission made in the course of the
25 mediation is not admissible in evidence (see also *Foxgate Homeowners Ass'n v. Bramalea California, Inc.* (26 Cal. 4th 1 (2001)); and *Rojas v. Superior Court* (33 Cal. 4th 407 (2004)). Neither a mediator nor a party may reveal communications made during mediation.

This rule is based on a recognition that mediation cannot survive without true confidentiality.
30 Mediation works because parties can safely let down their guard: they can expose weaknesses, explore true interests and motivations, and brainstorm creative solutions. Consequently,

everything that happens in mediation stays in mediation, including documents prepared for mediation that could otherwise be used as evidence in a subsequent suit; they are inadmissible. Confidentiality is essential to effective mediation because it promotes a candid and informal exchange regarding events in the past. This frank exchange is achieved only if participants know
5 that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory process.

Be that as it may, if such evidence is proffered during a trial, failure to object to admission or evidence of events occurring during a prior mediation is appropriately held to constitute a waiver
10 (see *Regents of University of California v. Sumner* (1996) 42 Cal. App. 4th 1209). In that case, the defendant arguing confidentiality was the party who introduced the transcript of a settlement agreement into evidence. The court found there was a waiver. In the instant case, none of the appellants objected to the admissibility of this evidence during the trial.

15 Furthermore, proceedings initiated by a party to enforce a settlement agreement do not encompass confidential mediation communications even though the settlement occurred at the end of the mediation. Moreover, under rule 18 of *The Judicature (Mediation) Rules*, an agreement or partial agreement may be endorsed by the court as a consent judgment. The rule does not exempt evidence of an oral or written settlement which is reached after mediation has
20 successfully concluded. In any event, once a compromise is reached the mediation process is over. An agreement cannot be crafted until after compromise has been reached. Therefore a statement of the terms of the agreement, made after the conclusion of the mediation process, does not fall within the protected communication. Evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement.

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For example in *Tender Loving Things, Inc. v. Robbins*.(2005 Cal. App. Unpub. LEXIS 3470), following a mediation, the parties and counsel entered into a written eight page “Stipulation For Settlement” which “extensively listed numerous detailed terms” of the agreement regarding the disputed subject matter. The stipulation for settlement contemplated a more formal “final
30 agreement” that would contain additional “incidental terms, including an ADR provision, to be agreed upon between parties.” The stipulation also provided that the stipulation itself could be

enforced as a judgment pursuant to *The Code of Civil Procedure*, Section 664.6. After months of unsuccessful negotiation, TLT sought enforcement of the settlement stipulation under the terms of *The Code of Civil Procedure*, sec. 664.6. At the trial court level and on appeal, Robbins argued that the stipulation for settlement was uncertain and that the lack of resolution of certain terms proves the parties did not intend it to be a binding contract. The Court of Appeals found “The language calling for preparation of a final agreement merely reflects the parties’ desire, ascertainable from the stipulation for settlement itself, to flesh out some of the incidental details, including, for example, more specific provisions regarding arbitration of disputes.” Citing *Ersa Grae Corp. v. Fluor Corp (1991) 1 Cal. App.4th 613, 624) 1991 Cal. App. LEXIS 1398*, the court explained that “the fact that an agreement contemplates subsequent documentation does not invalidate the agreement if the parties have agreed to its existing terms. Any other rule would always permit a party who has entered into a contract like this... to violate it.” The absence of a more specific agreement on this item was found not to be fatal. Under the circumstances, the addition of a specific alternate dispute resolution provision as a remedy for a breach of the agreement would be a minor or incidental term that did not go to the heart of the settlement agreement, or impair its enforceability. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is therefore not made inadmissible, or protected from disclosure, by the provisions of rule 18 of *The Judicature (Mediation) Rules, 2013 (S.I. No. 10 of 2013)*.

The implication of that rule is that when parties to pending litigation, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. Moreover, under Order 13 rule 6 of *The Civil Procedure Rules*, any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just.

In the instant case therefore, the trial court had the option of entering a partial judgment and thereafter proceeding with a partial new trial on the issue of whether appellants' failure to perform according to the terms of the mediation settlement agreement constituted a breach of its terms. None of the parties though moved it to take that course. It instead tried the matter as originally filed, choosing only to use the mediation agreement as evidence by virtue of which under section 57 of *The Evidence Act*, since it contained facts which before the hearing, parties had agreed to admit by writing under their hands, did not need to be proved at the hearing. Either way, whether considered as a waiver or as evidence exempted from the exclusionary rules of mediation, the trial Court came to the correct conclusion.

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Furthermore, I find that the Court would have come to the same conclusion even without reliance on that agreement since the contents of the mediation agreement are supported by the evidence on record. In the final result, I find no merit in the appeal and it is dismissed. The costs of the appeal and of the court below were awarded to the respondent.

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Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.