IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 062 of 2018

In the matter between

KOMAKECH WILFRED ..... APPELLANT

VERSUS

1. ANYWAR RICHARD }
2. NONO DENIS } **..... RESPONDENTS**

Heard: 4 April, 2019.
Delivered: 9 May, 2019.

Land Law *— visits to the locus in quo by the trial court— whether the court should take note of features that are not brought to its attention by the parties or their witnesses— actions for recovery of land are premised on proof of a better title than the adversary's.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally for recovery of land measuring approximately 300 metres x 100 meters, formerly described as Chamber Plot 122, located at Key "A" Kasubi Parish, Bar-dege Division, Gulu Municipality. He sought a declaration that he is the rightful owner of the land, general damages for trespass to land, an order of vacant possession, *mesne profits*, a permanent injunction, interest on the decretal amount and the costs of the suit. His claim was that during or around 1955, his father the late Okello John Mwokka acquired the plot as vacant land that did not belong to anyone. He left the land to his wife the late Orusula Lalar who in 1965 began paying fees to the

Town Council authorities by way of Temporary Occupation Licence. The respondents took advantage of the insurgency to occupy the land and to allow other members of their families to occupy it a against the will of the appellant. The appellant applied for survey of the plot but was inhibited by the respondents, hence the suit.

[2] In their joint written statement of defence, the respondents contended that the appellant's attorney has no *locus standi* and in the alternative the appellant's action was misconceived and should be dismissed with costs.

The appellant's evidence;

[3] P.W.1 Atiti Eleveria testified that the appellant once lived on the land in dispute but vacated it leaving behind his wife who upon her death was buried thereon. The appellant sued on behalf of one Okello John Mwokka. The land belonged to the late Okello John Mwokka who purchased it from British American Tobacco Company (BAT). During the insurgency, Okello John Mwokka migrated to Bobi where he had another wife. He left behind his wife Orusula Lalar, mother of the appellant, on the land. When she died she was buried on another piece of land in the neighbourhood that belonged to Okello John Mwokka. The deceased used to grow tobacco on the land in dispute but his wife was buried on the other piece of land where he had his barn used for curing tobacco. The first respondent is one of the neighbours to the land. He trespassed onto the land by constructing a permanent house thereon. None of the respondents had been in occupation nor utilised that land before. The second respondent has no activity on the land and should not have been sued.

[4] P.W.2 Okot Erick testified that Okello John Mwokka was the appellant's father. The first respondent trespassed onto Okello John Mwokka's land during the year 1995. The first respondent has grown seasonal crops on the land, constructed four grass thatched hoses and a permanent house thereon, while the second

respondent used part of it to make bricks. The appellant Komakech Wilfred testified as P.W.3 and stated that he sued both respondents because they trespassed onto his late father's land. His late father Okello John Mwokka acquired the land from BAT. Later his late wife Orusula Lalar began paying ground rent in respect of that land to Gulu Town Council. The respondents were neighbours to the North of that land, separated from it by Lala road. When the respondents began constructing houses on the land they were stopped by the local authorities but they ignored the directives. They destroyed all developments the appellant's family had on the land.

The respondents' evidence;

[5] In his defence, the first respondent Anywar Richard testified as D.W.1 and stated that his late father Michael Onekgiu acquired the land in dispute by purchase from a certain Jaluo from Kenya. His father occupied and utilised the land from 1963 until his death in 1994. During his occupancy, he used to pay ground rent for the land to Gulu Municipal Council. The appellant later falsely claimed his land as the property of his late father Okello John Mwokka. The appellant used to live in the neighbourhood but sold off all his land and no longer lives there. The appellant's mother Orusula Lalar has never lived on the land in dispute. The appellant sold off the land where her late mother used to live. The second respondent Nono Denis testified as D.W.2 and stated that he was born on the land in dispute and has lived there all his life. His father acquired the land in 1955 from the father of the first respondent, Michael Onekgiu. His father constructed a house thereon in 1968 and it is the house D.W.2 occupies to-date. His father used to pay ground rent for the land to Gulu Municipal Council. There are graves of his deceased relatives on the land, including that of his uncle Onen buried thereon in 1983. The appellant used to be his neighbour to the North of his land. It is only during the year 2009 that the appellant began claiming the land as his. He also unsuccessfully attempted to have the land surveyed.

Court's visit to the *locus in quo*;

[6] The court then visited the *locus in quo* where it observed that the appellant does not live on the land in dispute, has no crops or developments thereon. The second respondent too has no developments on the land. The first respondent has a homestead and gardens on the land. There were no visible graves on the land. The court then prepared a sketch map illustrating the various features found on the land.

The judgment of the court below;

[7] In his judgment, the trial Magistrate noted that the appellant did not explain how his father acquired the land. There was no documentary proof of the alleged payment to Gulu Town Council. There was no evidence of occupation by the appellant. On the other hand, the respondents were in possession. The land they occupy is separated from that occupied by the appellant by a road. They produced evidence of payment of rates. The suit was thus dismissed and the costs of the suit awarded to the respondents.

The grounds of appeal;

[8] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial magistrate erred in law and fact when he ignored the evidence adduced by the appellant thereby reaching a wrong conclusion.
2. The learned trial magistrate erred in law and fact when he held that the respondents had not trespassed on the suit land.
3. The learned trial magistrate erred in law and fact when *locus in quo* proceedings were not conducted in accordance with the laid down procedure thereby reaching a wrong conclusion.

Submissions of counsel for the appellant;

[9] In her written submissions Ms. Kunihira Roselyn, counsel for the appellant, argued that the appellant's failure to adduce evidence of receipts is attributable to the advocate who represented him at the trial who failed to submit them in evidence yet the appellant had availed them to him and they had been mentioned in the summary of evidence. It is during the insurgency that the respondent encroached onto the appellant's land, taking advantage of the appellant's absence since at the time he was ordinarily resident in Kampala. At the *locus in quo*, the trial court failed to observe the fact that the appellant's banana and eucalyptus trees that had been destroyed by the respondent. She prayed that the appeal be allowed. Counsel for the respondents did not file submissions in response.

The duties of this court;

[10] 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*).

[11] This 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.

Recording of evidence taken and observations made during the *locus in quo* visit;

[12] In ground three of the appeal, the trial Magistrate is faulted for not conducting proceedings at the *locus in quo* in accordance with the laid down procedure in that he failed to observe the fact that the appellant's bananas and eucalyptus trees that had been destroyed by the respondent. 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.* It is meant to check on the evidence by the witnesses, and not to fill gaps in their evidence for them (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)*. Evidence at the *locus in quo* cannot be a substitute for evidence already given in court. It can only supplement by away of verification of that evidence. All evidence and proceedings at the *locus in quo* must be recorded and form part of court record. The court makes observations at the *locus in quo*.

[13] The parties and their witnesses are entitled to freely lead the court while at the *locus in quo* by demonstrating to it the features and the corresponding description of the land as they had testified to in court. Both parties may point out material features and observations to the court which they wish to be placed on record. I have perused the record and found that although when in court the appellant mentioned that his bananas, eucalyptus trees and house were destroyed by the respondent, there is nothing to show that while at the *locus in quo* he did point out to the court any evidence of these features and that any of them were visible on the ground. The court cannot be faulted for not recording evidence that none of the parties appears to have brought to its attention. The

court was able to put its observations into proper scope and perspective on record without making impermissible assumptions or inferences.

New evidence only exceptionally introduced on appeal;

[14] Appeals do not ordinarily require further findings of fact since the appellate Court is confined to the evidence on record. Appellate Courts have long frowned on the practice of raising matters of new evidence that is not included in the record of appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done do courts permit new evidence to be raised on appeal. It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court's decision (see *Karmali Tarmohamed and Another v. T.H. Lakhani and Co. [1958] EA 567; Namisango v. Galiwango and another [1986] HCB.37*; *Mzee Wanje and others v. Saikwa and others [1976-1985] I E.A 364 (CAK)*; *Attorney General v. P. K Ssemogerere and others Constitutional Application No. 2 of 2004(SCU)*; *Ladd v. Mashall [1954] 1 WLR 1489 at 1491*; *Makubuya Enock William T/a Polly Post v. Bulaim Muwanga Klbirige T/a kowloon Garment Industry, S.C. Civil Application No. 133 of 2014*; *Hon. Bangirana Kawoya v. National Council for Higher Education S.C. Misc. Application. No. 8 of 2013* and *Skone v. Skone [1971] I WLR 817*).

[15] It is submitted by counsel for the appellant that the appellant's failure to adduce evidence of receipts is attributable to the advocate who represented him at the trial who failed to submit them in evidence yet the appellant had availed them to him and they had been mentioned in the summary of evidence. This therefore is not a case where the evidence could not have been obtained with reasonable diligence for use at the trial. It is an invariable rule in all appellate courts that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not

been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given on appeal. Ground three therefore fails.

Actions for recovery of land are premised on proof of a better title than the adversary's.

[16] In ground three of the appeal, the trial Magistrate is faulted for not having properly evaluated the evidence on record in that he ignored the evidence adduced by the appellant thereby arriving at the conclusion that the respondents had not trespassed on the land in dispute. It was critical for the appellant to prove the validity of his claim since actions for recovery of land are premised on proof of a better title than that of the person from whom the land is sought to be recovered. Possession is *prima facie* evidence of ownership and the law always protects the right to possession. If someone is in possession and is sued for recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them (see *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*).

[17] Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. Consequently, the plaintiff must succeed by the strength of his or her own title and not by the weakness of the defendant's. The court's observations at the *locus in quo* by the trial court were more consistent with the respondents' version than the appellant's claim. Therefore the trial court came to the correct conclusion.

Order :

[18] In the final result, there is no merit to the appeal. It is accordingly dismissed and the costs of the appeal and of the court below are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Ms. Kunihira Roselyn.

For the respondent : Mr. Okot Michael.