IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 34 of 2016

In the matter between

ODUR NORAH **APPELLANT**

And

ANGELLA AKELLO **RESPONDENT**

Heard: 26 February 2019

Delivered: 1 April 2019

Summary: dispute over a plot of land allocated by a Municipal Council.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant is the younger blood sister of the respondent. She sued the respondent for a declaration that she is the rightful allocatee and owner of a plot of land along Uhuru Drive in Kitgum Town Council that was allocated to her by the General Purpose Committee of Kitgum Town Council on 31st July, 1989. She also sought a permanent injunction against the respondent and the costs of the suit.

[2] The appellant's case was that being ordinarily resident in Sweden at the time, on her behalf and in her name, her brother Odongtoo Alex Tabu applied for and was on 31st July, 1989 allocated an un-surveyed plot of land along Uhuru Drive in Kitgum Town by the General Purpose Committee of Kitgum Town Council.

Odongtoo Alex Tabu alter presented building plans for construction of a building thereon which were duly approved. The respondent was to oversee the construction of that building. From time to time year during the year 1989 up until the year 1993, the appellant remitted funds to both Odongtoo Alex and the respondent, to finance the acquisition of the plot and construction of the building. To the appellant's surprise, upon securing partial completion of the building, the respondent began claiming it as her own and let it out to tenants from whom she collects rent. She as well commenced the process of obtaining a title deed in respect thereof, in her personal name, to the exclusion of the appellant.

[3] In her written statement of defence, refuted the appellant's claim of having been allocated the plot in dispute and the assertion that the respondent was only asked to oversee its development. She contended instead that she applied for and was allocated the plot. She was granted a three year initial term to be extended upon compliance with the building covenant. She constructed the building now situate thereon with her own resources and is thus entitled to collect rent from tenants occupying it.

The appellant's evidence in the court below:

[4] Testifying as P.W.1 the appellant Mary Adong, stated that some time in 1988 while still resident in Sweden, she gave the respondent and her brother Odongtoo Alex verbal instructions to find her land within Kitgum Town Council for development. Later when the land was secured, she remitted funds for its purchase and construction of the foundation. The respondent picked the money from Kampala. To finance the construction of the building, the appellant used to remit money through an intermediary, Mathew Akena Ameda in Kampala, from whom the respondent would pick it until the completion of the building during or around the year 1992. Odongtoo Alex Tabu handled the paper work relating to the plot which was all done in his name but upon the appellant's return to Uganda, he executed a deed of surrender of the lease, dated 10th March, 2008.

The appellant though could not take possession of the building because the respondent was claiming it as her own.

[5] A mason, P.W.2 Hannington Okwera testified that in 1989 he was approached by the appellant's mother who requested him to construct a commercial building for her daughter, the appellant, who at the time was ordinarily resident in Sweden. The respondent would receive the money required to purchase building material and payment for labour, from the appellant. The witness signed a building contract with the respondent, but with the knowledge that she was acting on behalf of her sister, the appellant. The brother of the two parties, Odongtoo Alex Tabu, participated in supervising the construction. In the year 2008, Odongtoo Alex Tabu handed over all documents relating to the land to the rightful owner, the appellant.

[6] P.W.3 Norah Adokorach testified that she is the young blood sister of both parties. At the beginning of 1989, the respondent together with her brother Tabu Odongtoo Alex were asked by the appellant to look for land for purchase within Kitgum Town Council. The appelalnt intended to construct a house for their mother who had been displaced. The two identified and secured a plot along Uhuru Drive. Construction of a building thereon began that same year and P.W.2 Hannington Okwera Lubong was the mason. Construction depended entirely on remittances sent from time to time by the appellant who at the time was living in Sweden. The building was completed in 1991and was let out to tenants. Later the respondent occupied part of the building. In 1992 the respondent began claiming the house as hers and evicted the witness from the premises. She demanded a return of the building plan from Sweden. In 2006 when the appellant came to Uganda, she convened a family meeting at which the respondent denied having any financial interest in the building. The appellant was paying ground rent for the building but the receipts were being issued in the names of the respondent.

[7] P.W.4 Ocen George Albert, the then Town Clerk of Kitgum Town Council testified that before the year 1995, the town council had the mandate to allocate land and this would be done following public advertisement. The Town Council is in possession of official records indicating that in 1989 a plot of land along Uhuru Drive was allocated to Tabu Odongtoo Alex. He heard that during the year 1991, the respondent too was allocated a plot of land but it was along Yakobo Oloya Road.

[8] P.W.5 Tabu Odongtoo Alex testified that some time during early 1989 he was approached by their late mother Lucia Ayaa and the respondent who told him that his elder sister, the appellant, had asked them to find her land to buy in Kitgum Town Council. When he found the plot, both the appellant and the respondent authorised him to have it registered in his names. He obtained the requisite funds from the respondent who told him she had received the money from the appellant. The appellant used to remit the money through an intermediary, Mathew Akena Ameda, from whom the respondent would pick it. At the point of making the architectural drawings, the respondent asked for her name to be included. Later the respondent began claiming the building as hers, even against the advice of a series of family meetings convened to resolve the dispute. Her claim was that she had invested a lot in the building and it should be the appellant to state how much she contributed so that she buys her out

<u>The respondent's evidence in the court below</u>:

[9] In her defence as D.W.1 Akello Angella, the respondent, testified that she was allocated the plot in dispute during the year 1991. She constructed a semi permanent house on the plot which she occupied. It is in the year 2003, one of her daughters brought her corrugated iron sheets to roof it better. Later her sister the appellant came claiming the plot to be hers, which claim the respondent refuted. She never received any money from the appellant for construction of a house.

[10] D.W.2 Opiyo Boniface Yurom, a former member of the General Purpose Committee of Kitgum Town Council, testified that at the Committee's meeting of 30th July, 1991 the respondent was allocated a plot within the Town Council. D.W.3 Odota Charles, another former member of the General Purpose Committee of Kitgum Town Council, testified that the respondent was on 30th November, 1991 allocated an un-surveyed plot of land along Uhuru Drive in Kitgum Town Council. She is occupying the plot.

Judgment of the court below:

[11] In her judgment, the trial magistrate found that both parties were allocated un-surveyed plots of land along the same street. The respondent took possession of hers and developed it but the appellant did not. The respondent presented documents supporting her claim of being the allocatee and developer of the plot in dispute. She was declared the rightful owner of the plot in dispute. A permanent injunction was issued against the appellant restraining her from interfering with the respondent's quiet enjoyment of the plot. The respondent was awarded the costs of the suit.

The grounds of appeal:

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

1. The trial Magistrate erred in law and fact when she failed to properly evaluate the evidence before her thereby arriving at a wrong conclusion hence occasioning a miscarriage of justice.
2. The trial Magistrate erred in law and fact when she failed to address her mind to the principles of law thereby arriving at a wrong conclusion hence occasioning a miscarriage of justice.
3. The trial Magistrate erred in law and fact when she did not resolve all the issues that were raised by the parties during the scheduling conference

thereby arriving at a wrong conclusion hence occasioning a miscarriage of justice.

Duties of a first appellate court:

[13] Although they were directed and given time within which to file their written submissions, none of the advocates did so. Despite that failure, 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*).

[14] As an appellate court, 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. This duty may be discharged with or without the submissions of the parties.

The first two grounds of appeal are struck out:

[15] The first two grounds of appeal presented in this appeal are too general and offend the provisions of Order 43 rules (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*). The two grounds are struck out.

Alleged failure to resolve al the issues at trial:

[16] With regard to the third ground, it is contended that the trial court did not resolve all the issues that were raised by the parties during the scheduling conference. I have perused the record of proceedings and found that only two issues were agreed upon at the scheduling conference, namely; (i) whether or not the land and the development thereon belongs to the plaintiff; and (ii) what are the remedies available to the parties. I find that contrary to the contention raised, both issues were addressed by the trial court in its judgment but the court misdirected itself as to the weight of the evidence, when it overlooked the importance of the testimony of P.W.2 regarding the date of execution of the building contract.

The trial court's misdirection on the weight of evidence:

[17] There is evidence of what the respondent claimed to be allocations of two different un-surveyed plots along the same street, while the appellant claimed it was the same plot of land involved in both allocations. Evidence shows the appellant's allocation was first in time, under Min. 5/89 (32) of 31st July, 1989

(exhibit P.1 at page 15) and that to the respondent came later under Min. 2/91 of 30th November, 1991 (exhibits D.1 and D.2). The allocation under both minutes specifically states that the plot is along Uhuru Drive. There is no evidence to show that the respondent was allocated any plot along Yakobo Oloya Road as claimed by P.W.4 Ocen George Albert, the then Town Clerk of Kitgum Town Council. The only question is whether the two allocations related to the same plot of land along Uhuru Drive as contended by the appellant or to two different plots of land as contended by the respondent.

[18] It is trite that in the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in (see *DPP v. Kilbourne [1973] 1 ALL ER 440; [1973] AC 720* and *Director of Public Prosecutions v. Boardman, [1975] A.C. 421*). Secondly, the corroborating evidence must also be credible and independent. It should not be mere repetition of the evidence on record. As a matter of common sense, in a case such as this where the two versions are so diametrically opposed, something in the nature of confirmatory evidence should be found before the court relies upon the evidence of a witness whose testimony occupies a central position in the determination of the truth of either version.

[19] In the instant case, the testimony of P.W.2 Hannington Okwera, the mason who constructed the building situate on the plot in dispute occupies a central position in the determination of the question as to whom the building belongs. It was his testimony that through the mother of both the appellant and respondent, the appellant instructed him to construct the building and its construction was entirely financed by the appellant. He testified further that he signed a building contract dated 26th July, 1989 for the construction of that building. The respondent did not dispute the fact that the building contract was signed as stated, although she

disputed the fact that it was upon the instructions of the appellant that P.W.2 was engaged as a mason.

[20] The date of execution of that agreement having been established as a fact, then it has to be determined with which of the two versions it fits in best. It emerges as another uncontroverted fact that by the time of execution of that contract, between the two parties, it is only the appellant to whom a plot along that road had been allocated. The other associated uncontroverted fact is that the respondent applied for a plot on 4th March, 1991, two years and four months after the signing of that building contract with P.W.2 on 26th July, 1989. In the circumstances, a judgment call must be made regarding an occurrence of this nature that is different enough to be a significant deviation from average human experience. It is not common experience that one would execute a building contract nearly two and half years before even commencing the process of acquisition of a plot on which the construction is planned to be undertaken, let alone having obtained a guarantee that the land to be applied for will be secured. It is most unlikely that the respondent signed the agreement based on an imaginary plot, existing at the time only in her mind or imagination and in respect of which she had not taken any step leading to its acquisition. The more a version seems removed from common experience the more implausible it is.

[21] On the other hand, the date of execution of that contract, 26th July, 1989, is closer to the formal offer of a plot to the appellant, under Min. 5/89 (32) of 31st July, 1989 (exhibit P.1 at page 15) than it is to that of the respondent, under Min. 2/91 of 30th November, 1991 (exhibits D.1 and D.2). The contract is only five days removed from the offer of a plot to the appellant, compared to the respondent's offer that came two years and four months later, following an application that was made on 4th March, 1991, one year and eight months after the signing of that contract. It is most unlikely that she committed funds to a project without a *situs* at the time.

[22] There is no evidence to show that at the time of signing that building contract, the respondent was in physical occupation of any plot along Uhuru Drive. There is no evidence to show that prior to her application of 4th March, 1991, the respondent had acquired any plot along Uhuru Drive either by inheritance, purchase or gift. It follows therefore that her occupation of any plot along that road can only be attributed to the application of 4th March, 1991. That being the case, then it is more probable than not that when she executed the building contract on 26th July, 1989, it was in respect of the plot that her brother P.W.5 Tabu Odongtoo Alex was about to secure on behalf of his other sister, the appellant. The timing of the execution of this contract corroborates the testimony of both P.W.2 Hannington Okwera and P.W.5 Tabu Odongtoo Alex that the plot in dispute was acquired by the appellant and that she financed the construction of the building thereon. I therefore find as fact that the two allocations related to the same plot.

[23] It is more probable than not, based on the timing of her application, that the respondent devised that subsequent application as part of a calculated scheme to take over possession and ownership of the appellant's plot and building as it neared completion. This is further evinced by the fact that the minute cited in the notice of allocation to the respondent dated 14th February, 1992 (exhibit D.1) is stated as 16/91 (12) whereas the minutes themselves (exhibit D.2) indicate the allocation was done under Min 2/91 (12). The disparity is unexplained but on the face of it is indicative of un-coordinated issuance of documents to support her mischievous design. It is not co-incidental that the respondent applied for a plot, purportedly along the same street, on 4th March, 1991, when the building whose construction she had been assigned by the appellant to oversee, was nearing completion. The allocation to the respondent was a fraudulent phantom.

[24] The fact that it is the appellant who financed the acquisition of the plot and construction of the building thereon is further corroborated by the uncontroverted evidence that even when the building plans were prepared in the joint names of the respondent and her brother, P.W.5 Tabu Odongtoo Alex, they were at one

point shipped to the appellant in Sweden for her inspection. The fact of sending the building plans to the appellant in Sweden for that purpose is inconsistent with the respondent's claim that the appellant had nothing to do with financing the acquisition of the plot and construction of the building thereon. I therefore find as fact that it is the appellant who financed the acquisition of the plot and construction of the building thereon. All payments thereafter of ground rent and other municipal rates, although made in the respondent's names, were in fact paid on behalf of the appellant.

The appellant's ownership is based on a resulting trust:

[25] That being the case, it is trite that a person who provides the money required to purchase property, whose contribution was not intended to be a gift or a loan, intends to obtain the equitable interest in the property acquired. Therefore, when the property is purchased in the name of someone who did not provide the purchase money, he or she will be presumed to hold the legal title on trust for the provider thereof. "The trust of a legal estate....whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name of several; whether jointly or successive, results to the man who advances the purchase-money" (see *Dyer v. Dyer (1788) 2 Cox Eq Cas 92 at 93*).

[26] A resulting trust arises when a person makes a direct financial contribution to the purchase of property which is registered solely in the name of another, where there is evidence to show that this contribution to the purchase was not intended to be a gift or a loan. A resulting trust means that the registered owner holds either all or part of the property on trust for, or for the benefit of the other (see (*Dyer v. Dyer (1788) 2 Cox Eq. Cas. 92; Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669; Air Jamaica v. Charlton [1999] 1WLR 1399* and *Tinsley v. Milligan [1994] 1 AC 340*).

Resulting trusts come into being at the date of acquisition of the property (see *Bernard v. Josephs [1982] Ch. 391*).

[27] Resulting trusts depend on a truism that an advance of significant portions of, or all of the purchase-money for purchase of land by the date of acquisition is a bargain and not a gift. It is therefore a default position that the advance of purchase money from B to A, so that A may purchase the land, will establish a resulting trust in favour of B. In that case, B is presumed to hold a beneficial interest by way of a resulting trust. But this presumption is rebuttable: if evidence can be provided which definitively demonstrates that B never intended to hold a beneficial interest over the land. If a resulting trust is determined to exist, the court will usually calculate the precise share in the property based on the amount of the direct capital contribution, proportionate to the purchase price. Where a person has only contributed a part of the purchase price of property a resulting trust will be presumed in his favour of an equivalent proportion of the equitable interest (see *Midland Bank plc v. Cooke [1995] 4 All ER 562* and *Drake v. Whipp [1996] 1 FLR 826*). In the instant case it was the testimony of both P.W.3 Norah Adokorach and P.W.5 Tabu Odongtoo Alex that it is solely the appellant who financed the entire acquisition.

Award and assessment of general damages:

[28] Before possessing adversely against the appellant, the respondent held all of the property on trust for, and for the benefit of the appellant. From the moment the respondent claimed the plot and building thereon as hers, she became a trespasser on the property. Trespass in all its forms is actionable *per se*, i.e., there was no need for the appellant to prove that she had sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be “at large,” that is to say the Court, taking all

the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.

[29] *Halsbury'sLaws of England*, 4th edition, vol. 45, at para 1403, explains five different levels of damages in an action of trespass to land, thus; (a) If the plaintiff proves the trespass he is entitled to recover *nominal damages*, even if he has not suffered any actual loss; (b) if the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss; (c) where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use; (d) where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded; and (e) if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

[30] In *Halsbury's Laws of England*, 4th Ed., Vol. 45 (2), (London: Butterworth's, 1999, at paragraph 526), the law on damages for trespass to land is addressed thus: "a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use....Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

[31] The defendant's conduct is thus key to the amount of damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was willful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well. Considering that although this was wilful trespass in which the respondent cynically disregarded the appellant's property rights, the appellant did not prove any actual damage apart from loss of income from the premises, I will award nominal damages of shs. 300,000/= per month which translates into shs. 3,600,000/= per annum and for the last twenty seven years of the respondent's wrongful occupancy, shs. 97,200,000/= That sum is awarded as general damages to be the appellant.

Order :

[32] In the final result, the appeal is allowed. The judgment of the court below is set aside and instead judgment is entered for the appellant against the respondent in the following terms;

a) A declaration that the plot in dispute along Uhuru Drive in Kitgum Town Council and the building thereon, belong to the appellant.
b) An order for the respondent to account for rent collected from that property from 1992 to-date, within thirty days from the date of this judgment.
c) An order of vacant possession and a permanent injunction issue restraining the respondent, her agents and persons claiming under her, against interference with the appellant's possession and quiet enjoyment of that land.
d) Nominal general damages of shs. 300,000/= per month for the twenty seven years of wrongful occupancy, hence a total sum of shs. 97,200,000/=
e) Interest thereon at the rate of 8% per annum from the date of this judgment until payment in full.
f) The costs of the appeal and of the court below.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Mr. Jude Ogik.

For the respondent : Mr. Otim Abwang.