IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 041 of 2018

In the matter between

1. OPOKA WILLIAM OTII

2. OOLA JACKSON **APPELLANT**

And

NAFTALI DAN OKUNA **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Land law: *— Equity of possession — A long period of possession of former public land gives rise to an equitable right to first option to the occupant in the event of grant of a lease — The occupant has the right to be heard if the land is to be alienated to another person or for public use — If the deed print clearly defines the land to which the title deed relates, then extrinsic evidence is not admissible to contradict the extent of the land to which the title relates.*

Evidence: *— Documentary evidence — For a contested document to be admitted, there must be evidence from a witness to establish that it accurately and fairly depicts what it purports to show — unless admitted by the consent of both parties, or by affidavit or upon return of evidence recorded on a commission issued by court, a document cannot be ordered to form part of evidence unless the author thereof, or a person competent to tender it in evidence, enters the witness box and confirms that the contents of the document are as per his or her testimony.*

Civil Procedure: *— Pleadings — Pleadings ensure that each side is fully alive to the questions that are likely to be raised. They give each party an opportunity of placing the relevant evidence before the court for its consideration — any evidence adduced in a matter must be in consonance with the pleadings —A departure occurs where a party introduces in evidence something new, separate and distinct, which is not a mere variation, modification or development of the facts that were pleaded.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for general damages for trespass to land comprised in LRV 1211 Folio 24 Plot 77 Pager Crescent Road situated in Kitgum Municipality, a permanent injunction and the costs of the suit. His claim was that in 1977, the then Kitgum Town Council allocated him the plot in dispute under a lease. In 1982, he acquired documents of title to the land and constructed a building thereon. The respondent enjoyed quiet possession of the land until the year 1989 at the height of the insurgency when the appellants migrated to Kitgum Town Council. On humanitarian grounds, the respondent allowed them temporary stay on the plot. In 1999, the respondent asked the appellants to vacate the land but they refused to, hence the suit.

[2] In their joint written statement of defence, the appellants refuted the respondent's claim. They averred that they had since 1965 been in possession of the land in dispute together with their deceased father Samwiri Obwoya. Before his death, their father had constructed a building on the land which unfortunately collapsed in 1972, leaving only its foundation. The appellants thereafter, with the permission of their father, undertook diverse developments on part of the land including a carpentry and welding workshop. In 1999 the 1st appellant sought and was granted approval by the Urban Council to construct a permanent building on the land, which he did. Following the death of their father in the year 2003, the respondent during the year 2009 began tampering with the boundary markers and claiming the land as his. They contended that the land they occupy is not that reflected in the respondent's documents of title and thus prayed that the suit be dismissed.

The respondent's evidence in the court below:

[3] The respondent Napthali Dan Okuna Ongwen testified as P.W.1 and stated that he acquired the land in dispute in 1982 when he was granted a lease by the urban authority, Kitgum Town Council. He was granted a lease over one plot the measure 50 metres by 100 metres. The appellants are his neighbours but he trespassed onto his plot 77 Pager Crescent road in Kitgum Municipality. They had taken over almost half of his plot. They constructed a carpentry workshop, a welding workshop, toilet, store and a stall on that part of his land.

The appellant's evidence in the court below:

[4] In his defence as D.W.1, the 1st appellant Opoka William Otti testified that the land in dispute belonged to his father who by 1965 had constructed a building thereon. The 1st appellant demolished that building in 1999 after it had become obsolete. In its place, he sought and secured the permission of his father and that of the Town Council to construct a building the latter of whom approved his building plan on 22nd January, 1999. He constructed a pit latrine at the common boundary in 1978 and when it collapsed the respondent began using it as a rubbish dump. It is only during the year 2009 that the respondent began complaining of encroachment onto his land.

[5] The 2nd appellant Olaa Jackson testified as D.W.2. and stated that the land in dispute was occupied by his late father. The respondent settled in the area later and became their neighbour. The boundary between the two families was a line of *Soga* trees. The respondent caused a survey of his land and mark stones were planted to demarcate his land.

Proceedings at the *locus in quo*:

[6] The court visited the *locus in quo* on 9th April, 2018 where it observed that both parties own adjoining plots with buildings thereon. The land in dispute, measuring 13 metres in width, lies in-between the two holdings as a "no man's land." There is a lone *Soga* tree standing in the middle of the disputed area. While the respondent claimed it constituted the boundary mark between his and the respondent's plot, the appellants contested this. The court noted that it stands in line with several other *Soga* trees on the other side where there is no dispute. The court though did not prepare a sketch map to illustrate its observations.

Judgment of the court below:

[7] In his judgment, the trial Magistrate found that the respondent's land is titled while the appellants' is unregistered. The land in dispute lies between the respondent's titled land and the one occupied by the appellants. The respondent claimed to have annexed it to his titled land with the permission of the Urban Council, for purposes of construction. The respondent was using the land in dispute and therefore it formed part of his land. The mature *Soga* tree constituted the boundary mark separating the respondent's from the appellants' land. Since the contested area was vacant, there was no evidence of trespass by the appellants. The respondent therefore was not entitled to an award of general damages. Judgment was entered in favour of the respondent. A permanent injunction was issued restraining the appellants from acts of trespass on the land and each party was ordered to bear their costs.

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 neglected to properly evaluate the evidence on record and ruled that the suit land is no man's land but declared the respondent as the lawful owner, thereby occasioning a miscarriage of justice to the appellant.
2. The trial Magistrate erred in law and fact when he ignored the evidence adduced by the appellants that the suit land was part of their ancestral land since 1965 and they had permission to take possession thereby arriving at a wrong decision.
3. The learned trial Magistrate erred in law and fact when he declared the respondent as the lawful owner of the suit land when he relied on the Soga tree as constituting the boundary between the appellants' and the respondents' land instead of the mark stones on the respondent's land thereby arriving at a wrong decision.
4. The learned trial Magistrate erred in law and fact when he disregarded the evidence ad report of the surveyor and ruled that the respondent is the lawful owner of the suit land thereby arriving at a wrong decision.

Arguments of Counsel for the appellant:

[9] In his submissions, counsel for the appellant argued that having characterised the land in dispute as a "no man's land" the trial court erred when it subsequently held that it belongs to the respondent. The land lay outside the physical boundaries of plot 77 owned by the respondent yet his claim was that the appellants had trespassed on plot 77 Pager Crescent road. To the contrary, the appellants' evidence that the land in dispute constituted part of land they had occupied since 1965 was uncontroverted. The respondent sought to rely on a natural boundary of *Soga* trees, that was inconsistent with the surveyed boundary reflected in the deed print. In his pleadings, the respondent did not advert to the natural boundary of *Soga* trees being the true boundary of plot 77 Pager Crescent road he claimed the appellants had trespassed onto. The court commissioned surveyor furnished a report to the court indicating that the area in

dispute lies outside the boundaries of plot 77 Pager Crescent yet it was ignored by the trial court. He prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[10] In response, counsel for the respondent argued that the respondent adduced evidence to show that he applied for a preliminary survey seeking extension of plot 77 Pager Crescent road to cover the area now in dispute. He was granted permission in the meantime to use it for construction of a toilet and kitchen. The land in dispute by virtue of *The Public Lands Act* and *The Land Reform Decree* belonged to Kitgum Town Council as a controlling Authority with powers to authorise its use. Customary tenure was abolished from urban areas and therefore the appellants could not claim the land as their ancestral land. They had no authorisation from the Controlling Authority to occupy and use that land. The trial court evaluated all evidence and came to the correct conclusion. The appeal should be dismissed.

Duties of a first appellate court:

[11] 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*).

[12] In exercise of its appellate jurisdiction, 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.

The Fourth Ground of appeal

[13] The fourth ground of appeal faults the trial Magistrate for not having considered the survey report submitted to court by the Court commissioned surveyor. It is trite that for a document to be admitted into evidence there should be evidence that the document tendered is the one that was signed and that it has not been altered. It should be free from distortion and misrepresentation which could affect the admissibility and weight afforded to it. There must be evidence from a witness to establish that it accurately and fairly depicts what it purports to show. It is best if the evidence is sought to be introduced through a witnesses who is the primary source for all of the facts depicted or conveyed in it. Consequently, any document being offered in evidence must be authenticated: a witness must offer evidence establishing that the document is what that witness claims it is.

[14] According to Order 18 rule 5 of *The Civil Procedure Rules*, the evidence of each witness has to be taken down in writing by or in the presence and under the personal direction and superintendence of the judge (or magistrate), not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge (or magistrate). The provision envisages recording of evidence of a witness present in open Court. The implication is that unless admitted by the consent of both parties, or by affidavit or upon return of evidence recorded on a commission issued by court, a document cannot be ordered to form part of evidence unless the author thereof, or a person competent to tender it in evidence, enters the witness box and confirms that the

contents of the document are as per his or her testimony and that statement is made on oath to be recorded by following the procedure prescribed under this rule. Since the author of the report never testified in court, the trial court did not err when it disregarded it. This ground of appeal accordingly fails.

The 2nd Ground of appeal

[15] The second ground of appeal faults the trial Magistrate for failure to declare the land as the appellants' ancestral land. It is settled that proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure (see *Bwetegeine Kiiza and Another v. Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009; Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009; Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of 2010; and Abner, et al., v. Jibke, et al., 1 MILR 3 (Aug 6, 1984*). Possession or use of land does not, in itself, convey any rights in the land under custom. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative. The appellants did not lead such evidence, neither by themselves nor of persons who would be likely to know of the existence of such customs as they claimed, that guided his acquisition of the land that they claimed to be held under customary tenure.

[16] In any event, by virtue of section 1 of *The Land Reform Decree of 1975*, all land in Uganda had been declared public land to be administered by the Uganda Land Commission in accordance with The Public Lands Act of 1969, subject to such modification as were necessary to bring the Act into conformity with the Decree. Regulation 1 *The Land Reform Regulations 1976 (S.I 26 of 1976),* stipulated that any person wishing to obtain permission to occupy public land by customary tenure had to apply to the sub county chief in charge of the area where the land is situated. The applicant then had to be registered as a customary occupant of land by the sub-county Land Committee according to Regulation 3.

[17] Since there was no evidence that the appellants nor their father before them undertook any of those processes, the appellants were barred from claiming the land to be their ancestral land by section 24 (1) (a) of *The Public Lands Act, 1969* which categorically abolished customary tenure in urban centres (*see Kampala District Land Board and another v. Venansio Babweyaka and three others, S.C. Civil Appeal No. 2 of 2007).* They were also precluded from acquiring a new interest in the land of a customary nature by section 5 (1) of *The Land Reform Decree* which prohibited the occupation of unoccupied public land by customary tenure without permission of the prescribed authority. Section 6 specifically made it an offence for one to do so *(see Paul Kisekka Saku v. Seventh Day Adventist Church Association of Uganda, S. C. Civil Appeal No. 8 of 1993).* Any customary occupation without consent of the prescribed authority was declared unlawful *(see also Tifu Lukwago v. Samwiri Mudde Kizza and Nabitaka S. C. Civil Appeal No. 13 of 1996 and Paul Kiseka Ssaku v. Seventh Day Adventist Church S. C. Civil Appeal No. 8 of 1993).* The appellants therefore could not claim this as their ancestral land. What the appellants' evidence established is a long period of occupancy that dates back to 1965.

[18] By virtue of that long period of possession, the appellants acquired an equitable right to first option in the event of grant of a lease. Under this right, the Controlling Authority then was obligated to offer, in good faith, to lease the land to the appellants before offering it to third parties on terms no more favourable than those offered to the appellants. Equity may be invoked to protect rights of occupancy against persons who acquire title for the dominant or sole purpose of evicting such occupants, whether described as squatters, tenants of a tentative nature, licensees with possessory interest, or bonafide *occupiers (see Kampala District Land Board and Another v. Venansio Babweyaka and three others, S.C. Civil Appeal No.2 of 2007).* The occupant has the right to be heard if the land is to be alienated to another person or for public use *(see Matovu M., Mulindwa J. and Munyanga J. v. Sseviiri and Uganda Land Commission [1979] HCB 174).* Nevertheless, the trial Magistrate cannot be faulted for failure to declare the land

as the appellants' ancestral land. The appellants are mere holders of an equitable right of possession. This ground too fails.

First and third Grounds of appeal

[19] The first and third grounds of appeal fault the trial Magistrate for having declared the respondent as the lawful owner of the land in dispute. The respondent's claim was for trespass to land. A claim in trespass to land must be brought by a person with a legal interest in the land. The law of trespass protects two quite distinct interests in land; one is ownership, the other is possession. These interests may be united in one person, but sometimes they are not. But even when the interests in possession and ownership are joined in one person, it is important for practical reasons to distinguish them because rules of pleading and proof are much affected according to which legal interests are involved. Substantively as well, the possessor is an owner of a limited estate, and the protections extended to full ownership do not necessarily extend to the limited "ownership." Since suits for trespass to land protect only ownership or possession of land, any interest that does not fall in one of these two categories is not protected, except as it may be incidental to a protected interest.

[20] A true owner of land who is also a possessor has a cause of action in trespass. However, if the true owner is not in possession, for example where he or she has leased the land to a tenant, his or her interest in the land is an ownership interest only and not a possessory interest. Consequently, in such a case he or she recovers against the trespasser only if the trespasser has in fact invaded an ownership interest. If the trespasser causes no pecuniary harm at all, he or she clearly invades only the possessor's interest, if the true owner is not in possession, then his or her cause of action is premised on permanent damage to the freehold or leasehold title. However, title is not an issue at all in a trespass case where the plaintiff sues only to vindicate his or her possessory rights. The "essence of trespass" is disturbance of possession, where possession rights are

being vindicated. Where ownership rights are asserted, the "essence of trespass" is injury to ownership.

[21] In the instant case, the respondent's case was that the appellants trespassed onto his land comprised in LRV 1211 Folio 24 Plot 77 Pager Crescent Road. He exhibited as P. Ex.6 a photocopy of the title deed showing that he became registered owner thereof on 23rd November, 1984 for 49 years with effect from 1st December, 1982. The plot measures 0.29 hectares and its boundaries are properly delineated as illustrated on the deed plan (rectangular in shape measuring 27.9 x 104.8 on sheet 15/2/18/.../3). In the plaint, he stated that he is true owner of that land who is also in possession.

[22] However, at the hearing of the suit, it turned out that his claim was not in respect of the land constituted in that title, but in regard to land adjacent to it, which the respondent claimed to have annexed to the titled land with the permission of the Urban Council, for purpose of construction. He claimed that since he was using that potion of land now in dispute, therefore it formed part of his titled land. He then sought to rely on a mature *Soga* tree located in the middle of that part of the land as the boundary marker separating the part annexed to his titled land from the appellants' land. When the court below visited the *locus in quo*, it found that contested area to be vacant. This constituted a departure from his pleadings.

[23] It is by now well settled that parties are bound by their pleadings. Pleadings are the bedrock upon which all the proceedings commence. The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his or her evidence to the issue disclosed by them (see *Esso Petroleum Company Limited v. Southport Corporation [1956] AC 218*). The rules on pleadings require the parties to set out fully the nature of the question to be decided by stating the facts upon which the parties rely and the orders which they seek, otherwise the courts risk embarking on a roving enquiry.

[24] It follows that any evidence adduced in a matter must be in consonance with the pleadings. A departure occurs where a party introduces in evidence something new, separate and distinct, which is not a mere variation, modification or development of the facts that were pleaded (see *Waghorn v. Wimpey (George) and Co. [1969] 1 WLR 1764*). Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. The test is whether the opposing party's conduct of the case would have been any different had the adversary pleaded the impugned aspect of their case. The question is if the allegations made in evidence had been made in the pleadings in the first place, the opposing party's preparation of the case, and conduct of the trial, would have been any different.

[25] I find that had the respondent averred in his pleadings in the first place that the area in dispute lies outside but is adjacent to LRV 1211 Folio 24 Plot 77 Pager Crescent Road, the appellants' preparation of the case, and conduct of their defence, would have been substantially different. That parties are not allowed to depart from their pleadings enables them to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation. Pleadings ensure that each side is fully alive to the questions that are likely to be raised. They give each party an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to permit one party to adduce evidence on an issue not arising on the pleadings. By this oversight, the court below allowed what was filed as a suit alleging trespass onto land comprised in LRV 1211 Folio 24 Plot 77 Pager Crescent Road, to turn into a suit over un-registered land outside but adjacent to the titled land.

[26] Apart from the departure from his pleadings, the respondent failed to adduce evidence of possession of the un-registered land lying outside but adjacent to his

titled land. The respondent had sometime in the past temporarily used the land in dispute during construction undertaken on LRV 1211 Folio 24 Plot 77 Pager Crescent Road. At the time the court below visited the *locus in quo*, it found only one mature *Soga* tree standing in the middle of that otherwise vacant land. The court below rightly found that since the contested area was vacant, there was no evidence of trespass by the appellants. However, it misdirected itself when it found that the land formed part of that comprised in LRV 1211 Folio 24 Plot 77 Pager Crescent Road.

[27] A deed print is a drawing that constitutes a graphic illustration of surveyed lines which define the limits of a land constituted in a title deed. It illustrates the physical limits of the specific parcel of land to which it relates as well as its dimensions in length and width. It also shows the details around a specified plot. The fact that the boundary is shown in a particular place on an ordnance map is in itself no evidence of what the true boundary is as between the parties, but where the party's title is derived from a document which refers to the ordnance map, it is necessary to look at the ordnance map and ascertain where the boundary shown on that map is truly positioned (see *Fisher v. Winch [1939] 1 KB 666; Dunning & Sons v. Syke & Sons Ltd [1987] 1 All ER 7*00 and *Scarfe v. Adams [1981] 1 All ER 843 at 845H*).

[28] The process of identification of land that passed under a particular conveyance, is in fact the process of discovering what land was intended to pass under the conveyance, and that is the precise purpose which the deed print is said to serve (see *Wigginton & Milner Ltd v. Winster Engineering Ltd [1978] 1 WLR 1462 at 1473G*). If the deed print clearly defines the land to which the title deed relates, then extrinsic evidence is not admissible to contradict the extent of the land to which the title relates. The deed print contained in LRV 1211 Folio 24 Plot 77 Pager Crescent Road does not include the land in dispute. The *Soga* tree could not constitute the boundary between the appellants' and the respondents' land

but rather the survey mark-stones, since the respondent's land is surveyed, registered land.

[29] A suit for trespass to land is designed to protect possessory interests, the right to possess and control land. It can only be maintained by a person who has the right to possess and control land. The respondent had no right in law to claim land beyond the boundaries of the land leased to him and comprised in LRV 1211 Folio 24 Plot 77 Pager Crescent Road. The key to a suit for trespass to land is “possession.” The respondent could not maintain a suit intended to restrain the appellants from intruding (trespassing) on land and interfering with possession in respect of which he neither had ownership nor possessory rights. There was no evidence to show that any of the appellants interfered with the respondent's right of ownership or possession of land comprised in LRV 1211 Folio 24 Plot 77 Pager Crescent Road. The trial court therefore came to the wrong conclusion when it found to the contrary. The first and third grounds of appeal therefore succeed.

Order :

[29] In the final result, the appeal is allowed. For the foregoing reasons, the judgment of the court below is set aside. It is instead substituted with one dismissing the suit, and the suit is accordingly dismissed. The costs of the appeal as well as those of the court below are awarded to the appellants.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Masaba, Owakukiroru-Muhumuza and Co, Advocates

For the respondent : M/s Donge and Co. Advocates