IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 049 of 2016

In the matter between

AKENA VINCENT **APPELLANT**

And

AYAA ESTHER **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Land Law**:** *— Visiting the locus in quo — It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only.*

Civil Procedure *— Fair trial — Judicial Bias — There has to be a proper and appropriate factual foundation for any reasonable apprehension of bias.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for the recovery of approximately six out of 100 acres of unregistered land situated at Bipong village, Orang Parish, Amida sub-county in Kitgum District, a declaration that he is the rightful owner of the

land in dispute, general and special damages for trespass to land, a permanent injunction and the costs of the suit. Her claim was that the land in dispute originally belonged to her late father Oloya Ibrahim. Following his death in 1979, her four brothers, who included the late Alberto Ogwang, father of the appellant, in 1987 brought her back home from Dure where he was married by then, and gave her the approximately six acres of land in dispute as her share of her late father's land. She occupied and used the land together with her children henceforth until the year 2014 when the appellant, who is the son of one of his late brothers, Alberto Ogwang, stopped them claiming the land to be his. The appellant has his own share he inherited from his father yet he was attempting to deprive her of her share of the land as the then only surviving child of the late Oloya Ibrahim.

[2] In his written statement of defence, the appellant refuted the respondent's claim. He stated that the land in dispute belonged to his late father, Alberto Ogwang. Prior to the death of the appellant's grandfather, the late Ibrahim Oloya, he had shared the land among his five sons who included the late Alberto Ogwang. The children and grandchildren of each of the five siblings henceforth occupied the land given to their respective progenitor. The respondent never lived on the land since she was married at Pagwa where she has lived since the year 1968. The appellant has not trespassed since his activities are restricted to the land that was given to his late father, Alberto Ogwang.

The respondent's evidence in the court below:

[3] The respondent, Aya Esther, testified as P.W.1 and stated that her bothers, one of whom was the appellant's father, gave her the land in dispute, measuring approximately six gardens, in 1988 as her share of her late father's estate, when she left her marital home. She occupied it and used to cultivate cripes thereon for feeding her children until the year 2014 when the appellant began claiming it. P.W.2 Ocen Maxwell testified that the land belongs to her mother, the

respondent. It was given to her by her brothers as her share of her late father's estate. They have since 1989 used the land for growing crops. The land shares a common boundary with the appellant marked by Auch Stream. The appellant has since restricted their activities to one garden, while he proceeds to construct a house on another.

[4] P.W.3. Nyeko David testified that the appellant is his brother while the respondent is her aunt. The respondent owns the land in dispute. It was given to her by her brothers, who included the appellant's father, Alberto Ogwang, in 1988. The appellant has since violently stopped the respondent and her sons from using the land. P.W.4 Oyet Odoki testified that the respondent owns the land in dispute but the appellant has since violently stopped the respondent and her sons from using the land. P.W.5 Ojok Marino testified that the respondent' brothers gave her the land in dispute in 1988. It was only in 2014 that the appellant began interfering with her possession and enjoyment of the land.

The appellant's evidence in the court below:

[5] In his defence, the appellant Akena Vincent testified as D.W.1 and stated that he inherited the land in dispute from his late father Alberto Ogwang, in 1985. His father planted various species of trees on the land including mango trees, Cira trees, Tamarind and Ocupa Mimu. The appellant has food crops like cassava, sim sim and sorghum on the land.

[6] D.W.2. Anna Atero testified that the land in dispute belongs to the appellant since he inherited it from her father Ibrahim. Alberto Ogwang with his brothers gave land to the respondent, but it is located in Akwaro Techwa. D.W.3. Onono Bosco testified that the land in dispute belongs to the appellant. D.W.4 Obol Peter testified that the respondent has no land on the village. The land in dispute belongs to the appellant. D.W.5 Ocaya Wellborn testified that the respondent has no land on the village. Her land is at Akwaro Techwa village.

Proceedings at the *locus in quo*:

[7] The court visited the *locus in quo* and found millet planted by the appellant in an area where the respondent claimed to have previously had a cassava garden, which was uprooted by the appellant. In the second field, the court found sorghum planted by the respondent. In two other fields the court found groundnuts planted by the respondent.

Judgment of the court below:

[8] In his judgment, the trial Magistrate found that the respondent was given the land in dispute as a gift *inter vivos* by her late brothers. Ownership of land can be acquired by gift. The appellant appears to have an intention to deprive the respondent of land only because she is a woman. Women have a Constitutional right to own land. The respondent was declared owner of the land in dispute and the appellant a trespasser thereon. A permanent injunction was issued restraining the appellant's further acts of trespass onto the land and the costs of the suit were awarded to the respondent.

The grounds of appeal:

[9] 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 failed to evaluate the evidence before him thereby arriving at an erroneous decision against the appellant thus occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when he denied the appellant a chance to be heard together with all his witnesses hence occasioning a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact when he demonstrated bias in arriving at his judgment and effectually denying the appellant justice.

4. The learned trial Magistrate erred in law and fact when he failed to evaluate the opinion of the independent witness at the locus in quo in a case whose subject matter is land and as such arrived at an erroneous decision.

Arguments of Counsel for the respondent:

[10] The appellant did not present any submissions. Counsel for the respondent, argued that the evidence presented by the respondent was consistent and unshaken by cross-examination. To the contrary, the evidence presented by the appellant was contradictory. There is no evidence to show bias on the part of the trial Magistrate. They prayed that the appeal be dismissed with costs.

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] 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 impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The first ground of appeal is struck out for being too general:

[13] I have considered the first ground of appeal and found it to be too general. It offends the provisions of Order 43 r (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*). This ground is accordingly struck out.

Fourth Ground of appeal

[14] By the fourth ground of appeal the trial magistrate is criticised for not considering the evidence of an "independent" witnesses at the *locus in quo*. Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA*

506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28 and *Nsibambi v. Nankya [1980] HCB 81)*. It would therefore have been an error had the court considered such evidence. This ground of appeal is accordingly found to be misconceived.

Grounds 2 and 3 of appeal

[15] In the second and third grounds of appeal, the trial Magistrate is faulted for having been biased in the conduct of the trial as manifested by his rejection of the appellant's witnesses. It is trite that all litigants are entitled to objective impartiality from the judiciary. It is for that reason that Principle 2.4 of the *Uganda Code of Judicial Conduct, 2003* requires a judicial officer to "refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned." A judicial officer is "impartial" when he or she is free of bias or prejudice in favour of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before him or her.

[16] For a litigant alleging bias on the part of the presiding judicial officer, there has to be a proper and appropriate factual foundation for any reasonable apprehension of bias. In the instant case there is no evidence on record to show that the trial magistrate failed the test of impartiality. There is nothing to demonstrate that he failed to proceed with an open-minded, dispassionate, careful, and deliberate investigation and consideration of the complicated reality of the case before and that instead he relied on stereotypical undue assumptions, generalizations or predeterminations. A reasonable person who is fully informed of and understands all facts and circumstances surrounding this case and seeing the outcome of the case, may not reasonably question the trial magistrate's impartiality in the matter.

[17] The respondent's case rested on proof of having been given the land in dispute by his brothers. For perfection of gift *inter vivos*, the donor must have done

everything which was necessary to be done in order to transfer the property. The evidence showed that the respondent had enjoyed exclusive possession and user of the land from 1988 until the year 2014 when the appellant began making his unfounded and violent claims. The findings of court are therefore supported by the evidence on record.

Order

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

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Unrepresented.

For the respondent : M/s Otto Harriet and Co. Advocates