**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable

Civil Appeal No. 048 of 2016

In the matter between

1. **OMONA FRANCIS**
2. **OBWOMA GINAYO LUYWE**
3. **OLEBE MALYAMUNGU**
4. **PAUL SIO OMONA** **APPELLANTS**

**And**

**ABODA GEORGE ATINY** **RESPONDENT**

**Heard: 22 July 2019**
**Delivered: 29 August 2019**

***Land law*****:** *— Boundary dispute — A consentable boundary line may be created: by "recognition and acquiescence," and by "dispute and compromise" — Communal Land — A possessor of a usufruct in land communally owned by an extended family has a right to be respected in his or her possession and should he or she be disturbed therein, to be protected in or restored to said possession — for the duration of the usufruct the owners (in this case the extended family) may not interfere with the usufructuary's peaceful possession and use of the property subject to usufruct.*

***Evidence****— Sketch map drawn at the locus in quo — Being only demonstrative evidence, a sketch map is neither testimony nor substantive evidence. The trial or appellate Court is not to draw independent conclusions from it as a demonstrative aid but is only free to utilise it to better understand or remember the evidence of a witness from which the actual conclusions of fact will be drawn. It can never take the place of real or oral evidence.*

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] The respondent sued the appellants jointly and severally for a declaration that he is the rightful customary owner of approximately 45 acres of land situated at Pajimo East village, Pajimo Parish, Akwang sub-county in Kitgum District, general damages for trespass to land, a permanent injunction and the costs of the suit. His claim was that the land ins dispute originally belonged to his grandfather Anyayotic Luywec. It was then inherited by his late father Matiya Atiny and upon the death of his father, the respondent inherited it during 1986. The respondent had quiet enjoyment of the land until after the insurgency when the appellants, on return from the IDP Camp, began encroaching un it. The 1st and 2nd appellants did so during the year 2010 by occupying 20 acres and 4 acres respectively, the 3rd during the year 2012 while by occupying 3 acres, and the 4th did so in the year 2014 by occupying 2 acres. The appellants have occupied a total acreage of 29 acres leaving the respondent with only 16 acres, hence the suit.

[2] In their written statement of defence, the appellants refuted his claim in toto. They instead counterclaimed for a declaration that the land in dispute belongs to the 2nd appellant, the other two appellants being his sons and the last one his grandson. Their claim was that the 2nd appellant acquired the land in dispute as vacant unoccupied land during the year 1950. He lived on that land until the breakout of insurgency when he relocated to an IDP Camp. This land was separated from that of the respondent's father by a footpath. He planted mangos on his land and also buried his wife thereon. Instead it is the respondent who encroached on the land by construction of huts and latrine at the site of the 2nd appellant's other wife's former homestead. They therefore prayed for an order of

vacant possession, general damages for trespass to land, and dismissal of the suit with costs.

The respondent's evidence in the court below:

[3] The respondent, Aboda George, testified as P.W.1 and stated that he has graves of deceased relatives on the land. In 1976 the land was divided between his father and the 2nd appellant, with *Jago* Stream forming the natural boundary between this land and that of the appellants.

[4] P.W.2 Onen Grison Olube testified that the land was inherited by the respondent upon the death of his father Atiny Matiya. Following a dispute between the respondent's late father and the 2nd appellant, he was one of the elders who on 15th April, 1976 established a boundary between the two disputants. he two tracts of land are separated by a stream. The appellants have exceeded that boundary and encroached onto the respondent's land, up to very close to his home.

[5] P.W.3 Yik Zadak stated that there was a division of the land following a dispute between the respondent's father and the 2nd appellant. Thereafter there was no dispute until the current one where the appellants have encroached onto the respondent's land. During the insurgency, part of the land in dispute was occupied by an IDP Camp but it was disbanded in 2007.

[6] P.W.4 Maliyamungu testified that the land originally belonged to their grandfather but was later divided up. The respondent's father and the 2nd appellant were each given a share. The appellants have since the year 2007 encroached onto the respondent's land to the extent of cultivating all around his compound. The elders failed to resolve the dispute.

The appellant's evidence in the court below:

[7] In his defence as D.W.1, the 1st appellant Omona Francis testified that the land in dispute neither belonged to the respondent's father nor grandfather. The respondent's father was given land elsewhere. The respondent had buried a number of his relatives on the land in dispute but only because there was nothing he could do to stop him. He prayed that the respondent should exhume all the bodies. D.W.2 Orouca Paul testified that the land belongs to his grandfather, the 2nd appellant.

[8] D.W.3 Obwona Genayo Luywee, the 2nd appellant testified that has lived on the land in dispute since his birth. The land belongs to him and the parties should not have sued one another over it. He acquired the land in 1949. The land he gave to the father of the respondent is to the East. The land has never been divided.

[9] D.W.4 Lakwobo Nora testified that the land in dispute belongs to D.W.3 Obwona Geneyo. D.W.5 Oyella Sesirina stated that the land in dispute belongs to D.W.3 Obwona Genayo Luywee. The land did not belong to their grandfather. As daughter of the 2nd appellant she was born on this land and lived on it until her marriage, when she left her father on the land.

Proceedings at the *locus in quo*:

[10] The court then visited the *locus in quo* on 5th July, 2016. It observed that the respondent's home is located in the middle of the land in dispute. The 1st and 2nd appellants have gardens close to the respondent's home. It recorded evidence from "independent" witnesses; (i) Obita Lasen; (ii) Onen Johnson; and (iii) a third one who is unnamed. The Court did not prepare a sketch map of the area in dispute.

Judgment of the court below:

[11] In his judgment, the trial Magistrate found that the respondent and the 2nd appellant are related by blood since he is the respondent's paternal uncle. The 1st and 3rd appellants are cousins to the respondent. The court therefore found that the land belongs to the respondent while the 4th appellant is his nephew. Customary ownership allows for shared land use. Each of the parties have crops and gardens on the land except that the appellants exceeded their boundaries and encroached onto the respondent's land, to the extent of digging close to the respondent's home. On basis of the evidence given by the three independent witnesses, the appellants are the trespassers. Judgment was therefore entered in favour of the respondent, declaring him the rightful owner of the land in dispute. A permanent injunction was issued against the appellants restraining them from further acts of trespass onto the respondent's land, They were ordered to harvest their crops then growing on the land within one year and thereafter vacate the land. The costs of the suit were awarded to the respondent.

The grounds of appeal:

[12] The appellants were 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 held that the appellants had trespassed onto the respondent's land adjacent to that of the appellants.
2. The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence in the case and hence came to the wrong conclusion.
3. The learned trial Magistrate erred in law and fact when he failed to properly record evidence at the *locus in quo*.

Arguments of Counsel for the appellant:

[13] In their submissions, Counsel for the appellants, argued that the respondent was inconsistent as regards the date to death of his father saying at one time it was 1986 and the other 1987. Whereas in his testimony he claimed the 2nd appellant trespassed onto his land in 2010 in the plaint he claimed it was in 2007. He was also inconsistent as regards the total acreage trespassed upon. The trial magistrate did not advert to these contradictions in his judgment but instead relied entirely on evidence recorded at the *locus in quo*, yet the proceedings thereat were not properly conducted. He failed to stipulate what the boundary between the disputants is. The trial magistrate ignored the evidence of D.W.3 Obwona Genayo Luywee who testified that he acquired the land in 1949. He gave 20 acres of it to the respondent's father. In his judgment, the trial magistrate relied on evidence recorded at the *locus in quo*, yet it does not form part of the record of proceedings. They prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[14] In response, counsel for the respondent submitted that the appellants' evidence was contradictory and the trial court was correct in not relying on it. Proceedings at the *locus in quo* were conducted properly where the court found that the respondent's home was in the middle of the land in dispute and he had established gardens on the land. She prayed that the appeal be dismissed.

Duties of a first appellate court:

[15] This being a first appeal, it is the duty of this 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*).

[16] 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 second ground of appeal is struck out for being too general:

[17] I find the second ground of appeal to be too general that 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).* The ground is accordingly struck out.

Errors in conducting proceedings at the *locus in quo.*

[18] By the third ground of appeal, the trial Magistrate is criticised for the manner in which he conducted proceedings at the *locus in quo* and reliance on the observations made thereat. The purpose of a visit to the *locus in quo,* as has been stated repeatedly, is not to recite the evidence already led but to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to the land, and such a conflict can be resolved by visualising the object, the res, the material thing, the scene of the incident or the property in issue.

[19] Where there exists such conflicting evidence, it is expected that the trial Magistrate will apply the court's visual senses in aid of its sense of hearing by visiting the *locus in quo* to resolve the conflict. That visit 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).* Therefore, the admission of the evidence from*;* (i) Obita Lasen; (ii) Onen Johnson; and (iii) the other unnamed witness, was a procedural error.

[20] That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. I have therefore decided to disregard the evidence of the "independent witness," since I

am of the opinion that there was sufficient evidence on basis of which a proper decision could be reached, independently of the evidence of those that witness.

[21] A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those three witnesses.

[22] On the facts of this case, the omission of the sketch map is not fatal, since the oral evidence is clear in relation to the necessary detail. Being only demonstrative evidence, a sketch map is neither testimony nor substantive evidence. The trial or appellate Court is not to draw independent conclusions from it as a demonstrative aid but is only free to utilise it to better understand or remember the evidence of a witness from which the actual conclusions of fact will be drawn. It can never take the place of real or oral evidence. The third ground of appeal therefore fails.

First Ground of appeal.

[23] In the first ground of appeal, the trial Magistrate's finding that the respondents were trespassers on the respondent's land is criticised as being erroneous. It was argued by counsel for the appellants that the trial court overlooked material contradictions and inconsistencies in the respondent's evidence regarding the

time of death of his father, the acreage of land encroached upon and the year during which the appellants' trespass onto his land began. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

What constitutes a major contradiction

[24] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. “essential” to the determination of the case. Material aspects of evidence vary from case to case but, generally in a trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

[25] I have perused the respondent's evidence. I construe the main point for determination in the suit to have been the location of the common boundary between the respondent's and the second appellant's land. I have not found any grave contradictions or inconsistencies in the respondents' evidence as regards that fact. Since there are no such contradictions regarding this material aspect of the suit, any other inconsistencies or contradictions there may be are of no consequence to the determination of the key fact in issue that was necessary to be proved.

[26] To the contrary, it is the appellants' case that was hopelessly riddled with contradictions and departure from their pleadings. In the counterclaim it was stated that the 2nd appellant acquired the land in dispute as vacant unoccupied land during the year 1950, yet D.W.3 Obwona Genayo Luywee claimed he acquired the land in 1949 and it belonged to him. Both D.W.4 Lakwobo Nora and D.W.5 Oyella Sesirina corroborated this version and stated that the land in dispute belongs to D.W.3 Obwona Genayo Luywee. Although they acknowledged that the respondent has a number of his relatives buried on the land, they could not explain how this was permitted on land that did not belong to him.

[27] It turned out that the dispute was in essence between persons closely related by blood and sharing a common ancestry, over what was for all intents and purposes prior to 1976, land that was communally used by the family. In *The Land Act, Cap 22* communal "ownership," presents the idea of "collective property." The idea is that the community allocates land for the private use of its members. These determinations are made on the basis of social interest through mechanisms of collective decision-making or collective control, of varying levels of formality; anything from a leisurely debate among the elders of the community to the formation and implementation of strict rules. Usually rights to family garden plots and fields are decided at the household or sub-clan level, while communal resources such as grazing lands and water are regulated communally. Following a dispute between the respondent's late father Atiny Matiya and the 2nd appellant, exclusive usufructuary was created out of what was hitherto a collective property of the family tracing its ancestry to a common grandfather. A consentable boundary was created demarcating land assigned for the use of the respondent from that assigned for the use of the 2nd appellant.

[28] There are two ways by which a consentable boundary line may be created: by “recognition and acquiescence,” and by “dispute and compromise.” When adjoining owners of unregistered land treat a line as being the boundary between

them, though that line may be different from the boundary described in their deeds, or any other officially recognised boundary that existed hitherto, and when those actions continue uninterrupted for twelve years or more, (whether by a single owner or a succession of owners), the parties are deemed to have established the line as the boundary, through recognition and acquiescence, regardless of the boundary described in their deeds or any other officially recognised boundary that existed hitherto. The boundary is binding even when it is not reflected in a writing.

[29] The requirements for establishing a boundary by "dispute and compromise" are;- (i) a dispute as to the location of the boundary, (ii) the establishment of a line in compromise, and (iii) consent by both parties to give up their respective claims inconsistent with the compromise. There was evidence by P.W.2 Onen Grison Olube to the effect that a stream was established as the boundary on 15th April, 1976 following a dispute between the respondent's late father Atiny Matiya and the 2nd appellant. He was corroborated in this by both P.W.3 Yik Zadak who testified that thereafter there was no dispute until the current one where the appellants have encroached onto the respondent's land, and P.W.4 Maliyamungu who testified that the encroachment by the appellants only began during the year 2007. None of the witnesses was discredited by cross-examination and nether was their evidence impeached by other evidence to the contrary.

[30] At the *locus in quo*, the court established by the oral testimony of P.W.2 Onen Grison Olube, P.W.3 Yik Zadak and P.W.4 Maliyamungu that the appellants had exceeded that boundary and encroached onto the respondent's land, up to very close to his home, to the extent of cultivating all around his compound. It is trite that for the duration of the usufruct the owners (in this case the extended family) may not interfere with the usufructuary's peaceful possession and use of the property subject to usufruct. Section 22 (1) of *The Land Act* recognises that even for land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, where the customary law of the area makes provision for it. A possessor of a usufruct in land

communally owned by an extended family thus has a right to be respected in his or her possession and should he or she be disturbed therein, to be protected in or restored to said possession. However, the right conferred are purely of usufruct.

[31] Since the usufruct holder has the right to exclusive possession of the property, the appellants trespassed onto the respondent's land when they crossed the common boundary established on 15th April, 1976 up to very close to his home, to the extent of cultivating all around his compound. The decision of the trial court is accordingly backed by the available evidence. This ground fails.

Order:

[32] 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 : M/s Donge and Co. Advocates

For the respondent : Ms. Otto Harriet