



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 0059 of 2017

In the matter between

ODONG ALBINO

APPELLANT

And

1. OCHAN SALIM BOSS

2. OLOO WILSON

3. OTWOMA PATRICK

4. OBUK CHARLES

5. OKOT LIVINGSTONE BAH

6. OGENO WILFRED

RESPONDENTS

Heard: 22 July 2019

Delivered: 29 August 2019

***Civil Procedure** — Record of appeal — The law makes no provision for the hearing of an appeal upon a typed transcript — A court record is considered legible if it can be read by the normal eye, under normal conditions, with reasonable ease — All deficiencies in the typescript may be compensated for and augmented by details in the availed manuscript.*

***Land Law** — possession is good against all the world except the person who can show a good title.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally for recovery of a plot of land measuring approximately 670 metres x 313 metres situated at Obere village, Ngacino Parish, Agoro sub-county, in Lamwo District, a declaration that he is the rightful owner of that land, general damages for trespass to land, a permanent injunction and the costs of the suit. His claim was that the land originally belonged to his great grandfather Otere who occupied it from 1914 - 1933. The appellant and his clan members of the Ayaa Clan enjoyed quiet possession of the land in dispute until the year 2012 when the respondents without any claim of right forcefully entered onto the land, shared it among themselves and established gardens on it, hence the suit.

[2] In their joint written statement of defence, the 1st, 5th and 6th respondents refuted the appellant's claim. They averred that the land in dispute is their customary land which they inherited from their great grandfather, Obwonyo Opele. All of them were born and raised on that land. It was during the year 2007 when the appellant encroached upon it. They prayed that the suit be dismissed. In their joint written statement of defence, the 2nd, 3rd and 4th respondents too refuted the appellant's claim. They averred that the land in dispute is their customary land which originally belonged to their grandfather, Ogwok Pidomoi. On his death, it was inherited by their father Oto Jalon. All of them were born and raised on that land. They enjoyed quiet possession of the land until the appellant filed the suit against them. They prayed that the suit be dismissed.

The respondent's evidence in the court below:

[3] D.W.1, the 1st respondent Ochan Salim Boss testified that the land in dispute measures approximately 13 acres. He occupies approximately eight acres of that land and the 2nd respondent occupies the other five acres. The part he occupies was first occupied by his great grandfather Obojino Opele in 1912. It was then inherited by their grandfather Aterio Munu. It was later inherited by his father Paul Odong and on his death it passed to him in 1988. He has since then

been using the land for cultivation until the year 2007 when the appellant began laying claim to it yet he lives at Ywaya village, Pobar Parish, Agoro sub-county in Lamwo District and has never used the land in dispute.

- [4] D.W.2. Oloo Wilson the 2nd respondent testified that the approximately five acres that form part of the land in dispute he occupies initially belonged to his grandfather Iranga who first occupied it in 1911. When he died, it was inherited by his father Otoo Jalon. The appellant's land is located at Ywaya village, Pobar Parish, Agoro sub-county in Lamwo District, approximately nine miles away from the land in dispute. The appellant has never used the land in dispute. The appellant initially sued the 1st respondent during 2007 for alleged encroachment in light of the eight acres he occupies, which suit did not involve the land occupied by the 2nd respondent. It is when a retrial was ordered in 2012 that he joined the 2nd respondent to the suit.
- [5] D.W.3 Loyira David testified that he is an immediate neighbour to the North of land occupied by the 1st respondent. All the respondents belong to the Lamogi Clan. The appellant belongs to the Obele Clan and comes from Ywaya village, Pobar Parish, Agoro sub-county in Lamwo District. approximately ten miles away. The land in dispute measures approximately thirteen acres and in the past belonged to the respondents' grandfathers of the Lamogi Clan. The 2nd, 3rd and 4th respondents occupy land that belonged to their grandfather Lapuling of the Lamogi Clan. They use it for farming. The appellant has never used the land before and only comes to that village as a visitor.
- [6] D.W.4 Ongwen Celsio Ajack testified that he lives at Luopulingi village, a mile away from the land in dispute, across Okura Stream. The respondents inherited the land in dispute from their forefathers. The appellant lives at Ywaya village and has never utilised the land in dispute. It is only in 2007 that he began claiming it as his land. D.W.5 Ochola Beseleri testified that he is an immediate neighbour to the South of the land in dispute. The land in dispute belongs to the

respondents. The appellant has never cultivated the land in dispute. The appellant's grandfather Otele lived at Ywaya village, about nine miles away from the land in dispute.

The appellant's evidence in the court below:

- [7] P.W.1, the appellant Odong Albino stated that he inherited the land in dispute from his great grandfather Otere who occupied it from 1914 - 1933. The land belongs to the Ayaa Clan. It is during the year 2012 that the respondents encroached onto the land and destroyed the boundary markers.
- [8] P.W.2 Otii Jackson Balmoi testified that he is an immediate neighbour to the land in dispute and a retired Parish Chief of Ngacino Parish. The land in dispute belongs to the appellant who inherited it from his father. The first respondent trespassed onto the appellant's land during the year 2007. He later distributed parts of the land to the rest of the respondents during the year 2012. The 1st, 5th and 6th land is located approximately six kilometres from the one now in dispute. That of the 2nd, 3rd and 4th respondents is located across Okura Stream. They have since crossed that stream and encroached onto the appellant's land. All the respondents now have established gardens on the land.
- [9] P.W.3 Langoya Simon testified that out of the approximately 60 acres, the respondents have encroached upon approximately six acres. The land belongs to the appellant and Okura Stream forms the natural boundary to one side. The first respondent trespassed onto the appellant's land during the year 2007. He later distributed parts of the land to the rest of the respondents during the year 2012. They cut down the trees that marked the boundary.

Proceedings at the *locus in quo*:

[10] The court thereafter visited the *locus in quo* where it found gardens of maize and sunflower belonging to the respondents and prepared a sketch map of the land.

Judgment of the court below:

[11] In his judgment delivered on 20th October, 2017, the trial Magistrate found that there was no evidence to show that the appellant ever had the land in dispute in his possession. He lives at Ywaya village, approximately nine miles away from the land in dispute. It is the respondents who are in possession of the land, using it for subsistence agriculture. Most of the respondents' witnesses are neighbours to the land in dispute. They testified that the land belonged to the fathers of the respondents and that the respondents have been utilising the land for a long time as farmland. They have been using the land for generations and therefore they cannot be declared trespassers on the land. The appellant having failed to prove his case on the balance of probabilities, it was dismissed with costs to the respondents.

The grounds of appeal:

[12] 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 held that the appellant was not the lawful owner of the suit land.
2. The trial Magistrate erred in law and fact when he held that the respondents were not trespassers on the land.
3. The learned trial Magistrate failed to properly evaluate the evidence on record thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[13] In his submissions, counsel for the appellant, stated that the record is ineligible and therefore a retrial should be ordered.

Arguments of Counsel for the respondent:

[14] In response, counsel for the respondent, submitted that there are minor typographical errors on the record which do not affect the legibility of the record. All grounds of appeal raised by the appellant in his memorandum of appeal are too general and ought to be struck out.

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 17 of 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 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.

Legibility of trial record

[17] As regards the legibility of the trial record, legibility means the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. A court record is considered legible if it can be read by the normal eye, under normal conditions, with reasonable ease. Having perused both the handwritten record and typescript, I find that legibility of the trial record is not a question about which reasonable minds might differ. The record is not, as counsel for the appellant asserts, illegible in any material part. It clearly shows, and there is no claim that it is deficient or incorrect in this regard, the substance and the nature of the appellant's case and the substance and the nature of the respondents' case. Readability means the quality of a group of letters or numerals being recognised as complete words or numbers. Apart from minor typographical errors, most especially on the first page of the typescript, both the handwritten record and the typescript can be read by a person of normal eyesight, under normal conditions, with reasonable ease.

[18] The law makes no provision for the hearing of an appeal upon a typed transcript. Although it is desirable that a court record of proceedings should be wholly legible since appeal upon a properly authenticated record is a matter of inherent right and justice, yet some errors may exist in records prepared by the most capable and efficient court officers. Absolute perfection in the preparation of court records is not to be expected. For that reason, minor typographical errors that do not substantially affect the accuracy of a court record ought to be overlooked. A record of proceedings that on the face of it is the correct one obtainable under the circumstances, which in general terms is substantially complete, by way of being an accurate and complete statement of the record of oral proceedings and evidence presented during the trial, is not one, in my view, by which an appellant

may be prejudiced upon appeal. Fortunately, the relevant parts of the record material to the determination of the points in the appeal at hand, are not among the least readable portions of the typescript. All deficiencies in the typescript are compensated for and augmented by details in the availed manuscript. The record is adequate to permit this court to ascertain whether there has been a fair trial and whether there has been any miscarriage of justice.

All three grounds of appeal is struck out for being too general:

[19] I find all three grounds of appeal to be too general that they offend 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 three grounds are accordingly struck out.

[20] It is trite that "possession is good against all the world except the person who can show a good title" (see *Asher v. Whitlock (1865) LR 1 QB 1*, per Cockburn CJ at 5). Possession may thus only be terminated by a person with better title to the land. To be entitled to evict the respondents from the land, the appellant had to prove a better title to the land, which he failed to do. I find that the decision of the

trial court is backed with acceptable reasoning based on a proper evaluation of evidence, which evidence was considered in its proper perspective. In the final result, I find that the appeal has no merit.

Order :

[21] In the final result, the appeal is accordingly dismissed and the costs of the appeal as well as those of the court below are awarded to the respondents

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : M/s Ocorobiya Lloyd .

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