IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 060 of 2017

In the matter between

OKENY MELODY NYERO **APPELLANT**

And

1. **OKUN JACKSON**
2. **OJWE ALEX** **RESPONDENTS**

Heard: 22 July 2019

Delivered: 29 August 2019

Land Law *— Compulsory acquisition of land — An acquiring entity cannot legally compulsorily acquire a person's property without payment of compensation as this will constitute a violation of the Constitutional right to property — a grantor of land cannot give away what he or she does not possess .*

Judicial bias- *For an allegation of 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 appellant sued the respondents jointly and severally for recovery of a plot of land measuring 27 x 75 meters located at Tumato village, Ocettoke Trading

Centre, Ocettoke Parish, Labongo Layam sub-county in Kitgum District, a declaration that the appellant is the rightful owner of the land in dispute, an order of vacant possession, general damages for trespass to land, a permanent injunction and the costs of the suit. His claim was that on 22nd December, 1995, he was allocated the plot in dispute by the sub-county authorities. Without his consent or any claim of right, the respondents on 13th December, 2015 forcefully entered onto the plot, cut down his fruit trees and began making bricks. The appellant was deprived of the use and enjoyment of the land, hence the suit.

[2] In their joint written statement of defence, the respondents refuted his claim and averred that the plot in dispute formed part of land that belonged to their late grandfather, Omonya Sole under customary tenure. Upon his death, it was inherited by their father Jeremiah Opwonya from whom they inherited it, in turn. The appellant could not and did not acquire any interest in that land. Their activities on the land did not constitute trespass, since they rightfully own it. The appellant occupied the land temporarily during the time it hosted an IDP Camp. In 2009 following the end of the insurgency, all temporary occupants, save the appellant, vacated the land. The appellant has since made unsuccessful attempts to dispossess the respondents of the land by claiming ownership.

The respondent's evidence in the court below:

[3] The first respondent Okun Jackson testified as D.W.1 and stated that the land belonged to them and previously it was used for farming. At the time of allocation, he was living on the land and had constructed a hut on it. He did not object to the allocation because the sub-county Chief had announced that the allocatees were to compensate the original owners of the land.

[4] The second respondent, Ojwe Alex, testified as D.W.2 and stated that the land in dispute belonged to their forefathers who used to grow crops on it. His uncle Jibidayo Adyelo was the last to occupy the land from where he operated a shop

and also planted a Muvule tree that exists to-date. He was present during the allocation of the land to the appellant and did not object to the allocation since it was conditional on the appellant compensating him first. The respondent has lived on the land for over ten years.

[5] D.W.3 Mateo Ocaya testified that the land belongs to the respondents but he was not aware of the allocation that was made to the appellant. D.W.4 Lakima Charles testified that the land in dispute was originally owned by a one Ajel who gave part of it to Jibidayo Adyelo and then the late Jeremiah Opwonya, father of the two respondents. The land did not belong to the sub-county. The appellant was given part of it by the Labongo Layamo sub-county officials on condition that he compensates the original owners first. He was then the Parish Chief of Pajimo Parish and took part in the exercise of allocation.

The appellant's evidence in the court below:

[6] The appellant, Okeny Melody Nyero, testified as P.W.1 and stated that the land in dispute was allocated to him on 22nd December, 1995 by the officials of Labongo Division after he was informed that there was vacant land near Ocettoke Trading Centre, free for allocation. He has since then been paying ground rent for the land.

[7] P.W.2 Oluku Dick testified that the appellant was allocate a plot measuring 50 x 150 meters. He was one of the 30 or so other people who benefited from that allocation. The land at Ocettoke Trading Centre belongs to Layamo sub-county and the allocattees pay ground rent for the land. The appellant took possession, established gardens and constructed grass thatched house on the land.

[8] P.W.3 Obita Dick testified that the land in dispute originally belonged to one Ajel and when he vacated it was allocated to the appellant during the year 1995, by the sub-county officials. P.W.4 Okello Albino testified that land in dispute

originally belonged to one Ajel and when he vacated it was allocated to the appellant by the sub-county officials, but on the understanding that he was to compensate the owners.

Proceedings at the *locus in quo*:

[9] The court then visited the *locus in quo* where it found that both parties are in physical possession of the land. The appellant has one house on the land while the respondents have seven houses thereon. The appellant occupies approximately 7 x 15 metres of the land and the rest is in possession of the respondents. The Court prepared a sketch map of the area in dispute.

Judgment of the court below:

[10] In his judgment, the trial Magistrate found that there was evidence of an exercise of distribution of land within the trading centre that was undertaken by the Labongo Layam sub-county authorities. The respondents were present at the meeting during which the distribution was done. The respondents hoped that they would be compensated by the allocatees before they would be required to vacate the land. It was the evidence of P.W.4 Okello Albino and D.W.4 Lakima Charles that the sub-county did not own any land within Ocettoke Trading Centre. To gain the support of the community, the sub-county authorities assured the customary owners of the land that they would be compensated by the allocatees of the land. The sub-county authorities had no legal mandate to undertake a distribution of land that did not belong to the sub-county. The court therefore found that the land belongs to the respondents. They were declared its rightful owners and the suit was dismissed with costs.

The grounds of appeal:

[11] 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 properly 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, demonstrated bias arising out of his erroneous judgment.
3. The learned trial Magistrate erred in law and fact when he denied one of the appellant's witnesses opportunity to testify thus occasioning a miscarriage of justice.
4. At the *locus in quo*, the trial Magistrate erred in law and in fact when he saw the boundary but ignored it thus arriving at an erroneous decision.
5. At the *locus in quo* the learned trial Magistrate erred in law by rejecting the testimony of the appellant's witnesses thus occasioning a miscarriage of justice.
6. At the *locus in quo* the learned trial Magistrate erred in law and fact when he rejected the appellant's homestead thus arriving at an erroneous decision.

Duties of a first appellate court:

[12] None of the parties filed submissions and neither did they turn up at the hearing of the appeal. This being a first appeal, this court is under an obligation 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).*

[13] In a case of conflicting evidence the court has to make due allowance for the fact that it did neither saw 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)*. It may interfere with a finding of fact if the trial court is

found 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 as the court proceeds to do now.

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

[14] I find the third ground of appeal to be too general that it offends the provisions of Order 43 rr (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.

Judicial Bias

[15] The second and third grounds of appeal attribute judicial bias on the part of the trial Magistrate and fault the court for rejection of the appellant's witness. 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 an allegation of judicial bias, there has to be a proper and appropriate factual foundation for any reasonable apprehension of bias. In the instant case nothing has been advanced to show that the trial magistrate failed the test of impartiality. The record does not 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 him but that instead he relied on stereotypical undue assumptions, generalizations or predeterminations. There is nothing to show that the appellant presented any witnesses who thereafter were unjustifiably rejected by the court. 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. For that reason, both grounds of appeal fail.

Grounds 4 , 5 & 6

[17] Grounds 4, 5 and 6 all fault the trial Magistrate regarding the manner in which he conducted proceedings at *locus in quo* and the resultant findings of fact. 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 visualizing the object, the *res*, the material thing, the scene of the incident or the property in issue. Where there exists such conflicting evidence as aforesaid, 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.

[18] It is now well settled that the inspection of a *locus in quo* is strictly not necessary where the area of land in dispute is clear to the court and the parties, since in such a case the trial court must arrive at its judgment not on the impressions from the *locus in quo* but upon its impressions from the evidence led before the court. The dispute between the parties was not about the location of a common boundary but rather the manner in which the appellant acquired the land.

[19] It is trite that a grantor of land cannot give away what he or she does not possess *(see Mwebesa and three others v. Shumuk Springs Development Limited and three others, H.C. Civil Suit No. 126 of 2009).* The principle of *nemo dat quod non habet* applies (no-one can give something they do not possess). It was the testimony of both P.W.4 Okello Albino and D.W.4 Lakima Charles that the sub-county did not own any land within Ocettoke Trading Centre. In effect the allocations made by the sub-county officials had the effect of depriving the lawful owners of that land.

Compulsory land acquisition

[20] The power of compulsory acquisition springs from a recognition that a government cannot rely on land markets alone to ensure that land is acquired when and where it is needed. Compulsory acquisition requires finding the balance between the public need for land on the one hand, and the provision of land tenure security and the protection of private property rights on the other hand. Hence according to article 26 (2) of *The Constitution of the Republic of*

Uganda, 1995 no person may be compulsorily deprived of property or any interest in or right over property of any description except where; (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property.

[21] Compulsory acquisition is the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society. In the instant case, there is no evidence to show that the allocations made by the sub-county officials were necessary for public use or in the interest of defence, public safety, public order, public morality or public health; that they were made under a law which makes provision for prompt payment of fair and adequate compensation, and that such compensation was made prior to the taking of possession or acquisition of the land. The holder of land compulsorily acquired by government is entitled to know the ground(s) for the government's acquisition of his interest in the land.

[22] An owner of land can legitimately protest the acquisition if the purpose for which the land was b acquired is not within the confines of "public purpose" as defined in article 26 (2) of *The Constitution of the Republic of Uganda, 1995* and *The Land Acquisition Act (see for comparison Olatunji v. Military Governor of Oyo State (1995) 5 NWLR (Part 397).* In general, an acquiring authority can only compulsorily acquire a person's land in accordance with the procedures in *The Land Acquisition Act*, which sets out the general process for compulsory acquisition that involves two key steps; first the acquiring authority needs to reserve the land under a planning enactment for a "public purpose," to ensure that affected parties are notified of the acquisition well in advance, and have an opportunity to seek reasons for and contest the acquisition where the acquisition is considered unnecessary, undesirable or contrary to the public interest. The

acquiring authority cannot divest one citizen of his or her interest in land only to vest the same in another. A body authorised to take land compulsorily for specific purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the courts will interfere.

[23] After the reservation of the land, the mechanism set out in *The Land Acquisition Act* for acquisition and compensation then applies. Compensation is an integral part of the process of compulsory acquisition of land. Its importance cannot be over emphasised as failure to compensate the occupier renders the acquisition a nullity. An acquiring entity cannot legally compulsorily acquire a person's property without payment of compensation as this will constitute a violation of the Constitutional right to property *(see Marquess of Clanricarde v. Congested District Board for Ireland (1914) 79 JP 48; Ahmadu Falke v. Billiri Local Government Council and others [2016] LPELR-40772 (CA); Clifford Ebere and others v. Imo State University and others, 2016] LPELR-40619 (CA*) and *National Universities Commission v. Oluwo [2001] 3 NWLR (Pt. 699) at 90; [2001] 3 NWLR (Pt.542) 438).* Therefore any compulsory acquisition of land made in contravention of article 26 (2) of *The Constitution of the Republic of Uganda, 1995* is illegal and does not have the effect of transferring title.

[24] In the instant case, it was the evidence of P.W.4 Okello Albino, D.W.2 Ojwe Alex and D.W.4 Lakima Charles that the allocations were made subject to the appellant compensating the original owners, which he has never done. Where one enters upon land, but with knowledge that he or she is doing so upon a certain contingency, he or she does not acquire title when the contingency is not realised. An occupant under such conditions should reasonably expect that his or her title might be defeated and therefore he or she makes improvements on the land at the risk of losing them. The mere hope of someday securing the title will not be sufficient to give the occupant the necessary good faith to enable him or her to receive compensation *(see Gibson v. Hutchins, 12 La. Ann. 545 (1857).*

[25] Furthermore, originally at common law, a person was under no obligation to pay for unauthorized improvements made upon his or her land. One making improvements without the owner's knowledge or consent was not entitled to compensation, even though he or she acted in good faith, under a bona fide belief of ownership. The strict common law rule was modified under two well known equitable theories. One, the principle of unjust enrichment, and the other proprietary estoppel. In the instant case, the principle of proprietary estoppel does not arise since equity follows the law.

[26] Secondly, an occupying claimant who improves land with knowledge that he or she does not own title to the land is not usually entitled to compensation because he or she is in bad faith. The test used by the courts is whether or not the occupant improved the land under an honest belief he or she owned the title. He or she is also required to have based this honest belief on reasonable grounds. There was no reasonable explanation advanced by the appellant on basis of which he believed the land in issue was vested in the sub-county. The test is whether or not the occupant knew of the defect in title at the time the improvements were made. One who shuts his or her eyes to things which might have been discovered upon examination cannot be considered to have acted in good faith.

[27] The appellant in this case did not occupy the land in good faith since he did not possesses under an honest belief in his right or title. Good faith requires existence of an honest belief in his right or title. He has actual notice of the respondent's previous ownership of the land and the circumstances show that diligence might have shown him that the sub-county had no title to the land. An occupant who has constructive notice of an adverse claim holds possession of the land in bad faith *(see Anglin v. Pennington, 296 Ky. 142, 176 S.W.2d 277 (1943).* Where one enters upon land under a title, but with knowledge that he is obligated under a contingency to compensate the owners thereof, he will not be allowed compensation when he fails to satisfy the contingency. An occupant

under such conditions should reasonably expect that his title might be defeated upon failure to compensate the owners, and therefore he makes improvements at the risk of losing them. Good faith being a prerequisite to the equity of compensation, bad faith will preclude a recovery for the improvements.

[28] Therefore having found 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, these grounds of appeal too fail.

Order :

[29] In the final result, I find that the appeal has no merit. It is accordingly dismissed and the costs of the appeal as well as those of the court below are awarded to the respondents.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Mr Okeny Melody Nyero (Appellant)

For the respondent : Mr. Okun Jackson and Mr. Ojwe Alex (Respondents)