IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 019 of 2014

In the matter between

OCEN ANDREW ATUDU **APPELLANT**

And

OBOL JOHN **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Land Law*- exclusive possession without evidence of any restrictions imposed on a donee's user of land is more consistent with a gift inter vivos than a licence for temporary use.*

Evidence -*What constitutes a major contradiction depends on the question whether or not the contradictory elements are material, i.e. "essential" to the determination of the case - A statement is more likely to be true if it accords with known facts, available physical evidence, or other evidence from a source independent of the witness.*

Civil Procedure*- The contents of the record limit the issues and information that the parties can use in their arguments and that the appellate court will consider as it reviews the case.* For the purpose of appellate review, any parts of the trial that are not included in the record do not exist, will not be examined or considered by the appellate court, and cannot be used by either side to support their cases.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for the recovery of land measuring approximately two acres situated at Oyuru village, Akwero Parish, Labongo Amida sub-county, Kitgum District, a declaration that he is the rightful owner of that land, an order of vacant possession, a permanent injunction, general damages for trespass to land and the costs of the suit. His claim was that he inherited the land in dispute from his late father, Okello Peter.

[2] In his written statement of defence, the appellant averred that the land in dispute was acquired in 1961 by his late grandfather, Alimach Lukwazi. It was then inherited by his late father Gaetano Atudu. P.W.1. Yakobo Ojul testified that the land was given temporarily to the appellant's mother Karalina Abonyo by the respondent. The appellant has however blocked the road leading to the home of the respondent.

The respondent's evidence in the court below:

[3] P.W.1. Yakobo Ojul testified that the land was given temporarily to the appellant's mother Karalina Abonyo by the respondent. The appellant has however blocked the road leading to the home of the respondent. P.W.2 Amone Kasalino testified that in 1962 the appellant's mother escaped domestic violence in her marital home and requested the respondent's father to give her land. He gave her the land in dispute temporarily. Following the death of her husband, she handed the land back to the respondent in 1979 and returned to her marital home in Koch where she lives to-date.

The appellant's evidence in the court below:

[4] The appellant Ocen Henry Atudu testified as D.W.1and stated that it is Alimacu Okwachi who gave the land in dispute to his father in 1966. He has lived on the land since he was a baby and it is now over 52 years. The dispute only began in 2012 when residents returned from the IDP Camps. The respondent now intends to exceed the boundary and acquire the land. The dispute was considered by the L.C.II and was decided in his favour. In 1984 his mother went to Dure and has never returned to the land in dispute.

[5] D.W.2 Yasaloni Lajur testified that the land in dispute belonged to Alimacu Lukwazi and he later gave it to his son Gaetano Atudu who built a house thereon in 1962. Gaetano Atudu lived on the land until his death. D.W.3 Karalina Abonyo testified that she gave the land to her son the appellant. She acquired the land from her husband Gaetano Atudu who acquired it from Alimacu Lukwazi. She vacated the land but did not hand it back to the respondent.

[6] D.W.4 Santonino Ojera testified that the appellant's father Gaetano Atudu acquired the land from his own father Alimacu Lukwazi. The appellant has been occupying the land since the year 1961. The dispute over it began in the year 2011 and was resolved by the elders in favour of the appellant, who then decided to sue.

Proceedings at the *locus in quo*:

[7] The court thereafter visited the *locus in quo* where it recorded additional evidence from multiple other persons; (i) Marcilina Lalwedo; (ii) Obonyo Michael; (iii) Ocaya Ajan; and (iv) Otto Abim Mathew. The Court prepared a sketch map of the area in dispute, illustrating the key features that exist on the land.

Judgment of the court below:

[8] In her judgment, the learned trial Magistrate found that the appellant did not know how his parents acquired the land in dispute. The appellant's mother, Abonyo, settled onto the land temporarily after she was embroiled in a domestic wrangle with her husband. She later left the land and returned to the home of her husband in Dure. The land belonged to the late Peter Okello and forms part of his estate. The appellant's land is not situated at Oyuru but at Dure where his family members live. The appellant has trespassed onto the land in dispute by construction of houses, planting trees and cultivation of crops. The court declared the respondent to be the rightful owner of the land, issued a permanent injunction restraining the appellant from further acts of trespass on the land, awarded the respondent shs. 2,000,000/= as general damages and the costs of the suit.

The grounds of appeal:

[9] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence before her and relied on hearsay and contradictory evidence presented by the respondent thereby coming to a wrong decision.
2. The trial Magistrate erred in law and fact when she erroneously declared the respondent as the rightful owner of the suit land and ordering the appellant to vacate the suit land which he has been occupying since 1961 to-date.
3. The trial Magistrate was rude and harsh towards the appellant thereby coming to a wrong decision.

Duties of a first appellate court:

[10] None of the parties filed submissions. Nevertheless, 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*). 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.

[11] 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.

Ground three

[12] In the third ground of appeal, the appellant contends that trial Magistrate was rude and harsh towards him. In exercise of its appellate jurisdiction, the High Court re-considers a subordinate court's judgments on the basis of a closed record, which is limited to materials in the record on basis of which the subordinate court made the decision under review. The appellate court reviews this official record of what happened in trial court to see if the trial court made a legal mistake. The contents of the record limit the issues and information that the parties can use in their arguments and that the appellate court will consider as it reviews the case. For the purpose of appellate review, any parts of the trial that

are not included in the record do not exist, will not be examined or considered by the appellate court, and cannot be used by either side to support their cases. In the instant case, the alleged rudeness and harshness of the trial Magistrate is not reflected on and neither can it be discerned from the record of appeal. This ground of appeal therefore fails.

Ground one

[13] In considering the first and second grounds contemporaneously, the trial record shows that when the court visited the *locus in quo*, it recorded evidence from four other persons who had not testified in court. The purpose 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). Therefore the trial court misdirected itself when it recorded and relied on the evidence of* (i) Marcilina Lalwedo; (ii) Obonyo Michael; (iii) Ocaya Ajan; and (iv) Otto Abim Mathew.

[14] 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. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting the merits of the case or the jurisdiction of the court. Before this court

can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

[15] An appellate 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 five 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 witnesses.

[16] Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions and arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed (See *Peters v. Sunday Post Ltd [1958] E.A. 429*). The decision may be reversed where it is not backed with acceptable reasoning, it is based on a proper evaluation of evidence, or where evidence was not considered in its proper perspective.

[17] It is contended by the appellant that the trial court relied on hearsay and contradictory evidence presented by the respondent. 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.

[18] 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. The contradictions and inconsistencies in this case related to the circumstances in which the appellant's mother D.W.3 Karalina Abonyo came to occupy the land and later vacated it. Considering that the nature of that occupancy, whether temporary or permanent and abandonment were the key issues, the contradictions related to facts essential to the determination of this suit.

[19] However, when there are conflicting versions of a factual matter it does not necessarily follow one or the other is lying. Discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on many occasions is called upon to assess whether such discrepancies affect the very core of a party's case; whether they create a doubt as to the truthfulness of the witnesses. It is possible for people to

perceive and remember events differently. It therefore is generally better to focus on where the truth lies, rather than on who is to be believed. One way of doing that when evaluating a witness's statement is to examine its internal and external consistency with other available evidence, or other statements by the same witness before. A statement is more likely to be true if it accords with known facts, available physical evidence, or other evidence from a source independent of the witness.

[20] When the two versions are considered, the fact that at one time D.W.3 Karalina Abonyo occupied the land is not in doubt. While it was contended by the appellant that it was a gift *inter vivos* to D.W.3 Karalina Abonyo by a relative the respondent contends that it was a permission to live on the land temporarily and that she vacated the land in 1979, and returned to her marital home in Dure only for the appellant, who is the son of D.W.3, to return to the land in dispute later (date unspecified). The nature of this occupancy and the rights accruing there under therefore could only be determined from the available circumstantial evidence.

[21] According to P.W.2 Amone Kasalino, D.W.3 Karalina Abonyo lived on the land from 1962 when she escaped domestic violence at her marital home until after the death of her husband, when she returned to her marital home in 1979. In his own version the respondent stated D.W.3 Karalina Abonyo returned to her marital home in 1984. This would mean that D.W.4 lived on the land for a period ranging between 17 to 22 years. The implication is that the period for which she was to reside on the land was indeterminate but tuned out to be over a decade. That period cannot be described as temporary occupancy.

[22] During her stay on the land, there is no evidence of any restrictions imposed by anyone on her user of the land. The facts suggest that she had exclusive possession since she was able in turn to leave it in the possession of her son, the appellant, who continued to live on the land undisturbed. Considering that the

giving of gifts is a physical symbol of a personal relationship and an expression of social ties that bring individuals together, if the relationship between the donor and the donee at the time of giving is personal, then it is more likely to be a gift (see *Muyingo John Paul v. Abasi Lugemwa and two others, H.C. Civil Suit N0. 24 of 2013*). A gift *inter vivios* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor.

[23] A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift (*Ovoya Poli v. Wakunga Charles, H. C. Civil Appeal No. 0013 of 2014*). Customary law requires no writing for the transfer of land, whether by way of sale or by way of gift. For a gift *inter vivos* to be perfected, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift. I find that the land was given to D.W.3 Karalina Abonyo not for temporary occupancy, but rather as a gift *inter vivos*.

[24] Although it is trite law that all rights and interests in unregistered land may be lost by abandonment, it generally requires proof of intent to abandon; non-use of the land alone is not sufficient evidence of intent to abandon. The legal definition requires a two-part assessment; one objective, the other subjective. The objective part is the intentional relinquishment of possession without vesting ownership in another. The relinquishment may be manifested by absence over time. The subjective test requires that the owner must have no intent to return and repossess the property or exercise his or her property rights. The court ascertains the owner's intent by considering all of the facts and circumstances. Following her occupancy that spanned between 17 to 22 years, there is no evidence of abandonment of the land by D.W.3 Karalina Abonyo since he left it in the hands of the appellant. Had the trial court properly directed itself it would have come to a different conclusion. For that reason, I find merit in the appeal and it is accordingly allowed.

Order :

[25] In the final result, the appeal is allowed. The judgment and orders of the court below are set aside. Instead judgment is entered in favour of the appellant dismissing the suit. The costs of the appeal as well as those of the court below are awarded to the appellant.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Mr. Ocen Andrew Atudu (Appellant)

For the respondent : Mr. Obol John (Respondent)