IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 0050 of 2015

In the matter between

1. **LUKA OCIRA**
2. **ALFRED OLOK**
3. **HANNINGTON OKWIR**
4. **OKENY SALAMA CHARLES**
5. **LAM CHARLES** **APPELLANTS**

And

LANGOYA PATRICK **RESPONDENT**

Heard: 22 July 2019

Delivered: 29 August 2019

Land law *— Locus in quo —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.*

Civil Procedure *—law on missing record of proceedings—Court may proceed with a partial record where reconstruction of the missing part of the record is impossible by reason of neither of the parties being in possession of the missing record, but the court forms the opinion that all the available material on record is sufficient to take the proceedings to its logical end.*

Evidence *— At common law, there is a duty imposed on parties to safeguard data, documents, and tangible evidence when litigation is filed, threatened, or is reasonably anticipated - the deliberate loss or destruction of potentially relevant evidence that*

should have been preserved for a civil litigation, ordinarily raises an adverse inference against the spoliating party.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for a declaration that he is the rightful owner of land measuring approximately two hundred fifty acres located at, Katum East ward, at Otop and Lubara Opobo villages, Katum Parish, Padibe East sub-county, Lamwo District an award of general damages for trespass to land, a mesne profits, a permanent injunction, interest and costs. His case was that was his father, the late Oyoo Yowaci Obake who died in 2006, occupied the land in dispute from 1952. His father gave him the land in the year 2006 before he died. The appellants have since the year 2007, evicted him from the land, trespassed onto the land, cut down trees, razed down graves and began farming on it. In the year 2010 they began construction of dwellings on the land.

[2] In their joint written statement of defence, the appellants denied the claim in toto. They averred that the land in dispute originally belonged to the first appellant's grandfather Tido. On his death it passed to his son Ongwen Yuweri, father of the first appellant who died in 1993 and it then passed to the first appellant. He has been cultivating the land since 1943. Oyoo Yowaci Obake came from Putini and began living with the sister of the first appellant, Kacilina, in their home. They used to cultivate the land collectively.

The respondent's evidence in the court below:

[3] The respondent Patrick Langoya Yoawaci testified as P.W.1and stated that his father, the late Oyoo Yowaci Obake who died in 2006, occupied the land in dispute from 1952. His father gave him the land in the year 2006 before he died. The appellants trespassed onto the land, cut down trees, razed down graves and began farming on it. The respondent was born on that land in 1972. During the insurgency, the respondent's family vacated the land in 1998 and re-located into an IDP Camp at Padibe. They returned to the land in the year 2001. They fled back onto the camp in the year 2004 and returned to the land in the year 2007. The appellants then came and evicted the respondents from the land. They demolished the respondent's house he had re-constructed on the land. At the time the respondent filed the suit in the year 2008, the appellants were only cultivating crops on the land. In the year 2010 they constructed houses on the land. Previously during the year 2001, his late father Oyoo Yowaci Obake had sued Ocira Luka (the first appellant) over the same land and the L.C. II Court had decided in favour of his father. He sued on behalf of the estate of his late father as he as a grant of letters of administration.

[4] P.W.2 Arikilao Ogil, a neighbour, testified that his land is separated from the respondent by Lapipi Stream. The first four appellants are brothers and the fifth is a son of the first appellant. They all reside in Katum Central Ward. The fourth appellant is the L.CII Chairperson of Katum Parish. The respondent has been his neighbour since 1975. Originally the land was a hunting ground until the respondent's grandfather Kilamoi occupied it in 1952. Upon his death, the respondent's late father Oyoo Yowaci Obake took over ownership and possession of the land. He named the land "Otop." The appellants began trespassing on the land when people went into the IDP Camp. The appellants currently occupy the land and have established gardens on the land. The Yowachi family had a graveyard, mango trees, oranges and acacia tress on the land and that is all that they have left on the land. The appellants forcefully

evicted the Yowachi family from the land in 2007 when they attempted to reoccupy it on their return from the IDP Camp.

[5] P.W.3 Tibi John, another neighbour, testified that his land is separated from that of the respondent by Lapipi and Kulu Dwong Streams. The respondent's grandfather Kilamoi occupied the land in 1952. Upon his death, the respondent's late father Oyoo Yowaci Obake took over ownership and possession of the land. The witness moved in to occupy the neighbouring land in 1975 and since then the Yowachi family was in occupation of the land in dispute located at "Otop" and Lubara Opobo. The dispute began in the year 2001 between the first appellant and the father of the respondent, the late Oyo Yowaci Obake. It was decided in favour of the latter by the L.CII Court of Dyang Bi Parish. There are graves and mango trees on the land belonging to the family of the respondent. The L.CII decision was made shortly before the people moved into IDP Camps. On return from the camps in the year 2001, the appellants forcefully evicted the respondent's family and occupied the land themselves.

[6] The first appellant Luka Ocira testified as D.W.1 and stated that the land in dispute originally belonged to his grandfather Tido. On his death it passed to his son Ongwen Yuweri, father of the first appellant who died in 1993 and it then passed to the first appellant. He has been cultivating the land since 1943. Oyoo Yowaci Obake came from Putini and began living with the sister of the witness in their home. They used to cultivate the land collectively by the Katum Clan. The first appellant's sister Kacilina who died in the year 2010 was the one supporting the respondent.

<u>The appellant's evidence in the court below</u>:

[7] D.W.2 Olok Alfred testified that the land in dispute belonged to his late grandfather Tido. They use the land for rotational farming. The respondent has never cultivated any part of that land. The respondent was only allowed to

cultivate the part his wife was cultivating. The land in dispute originally belonged to his grandfather Tido. Oyoo Yowaci Obake never owned any land in Padibe East.

[8] D.W.3 Hannington Okwir stated that the land in dispute is at Otop and Lubara Opobo. It originally belonged to his grandfather Tido. It belongs to the Katum Clan. D.W.4 Lam Charles testified that the land in dispute measures 250 acres and originally belonged to his grandfather Tido. The respondent has never lived on the land. D.W.5 Oruni Wellington testified that the appellants are using the land in dispute.

[9] D.W.6 Langoya Celestino stated that Luka Ocira, the first appellant is cultivating the land. He inherited it from his grandfather Tido. The first appellant's sister Kacilina cohabited with the respondent's father Oyoo Yowaci Obake in the 1970s but they never had a child together until her death in year 2010. The couple lived in the house of the first appellant's sister, Kacilina. When he died, Oyoo Yowaci Obake was buried in Putini.

Proceedings at the *locus in quo*:

[10] The court visited the *locus in quo* and found a cemented grave with the names of the deceased erased. Each party claimed it belonged to someone different. There were several other graves in the vicinity. The court also found a newly constructed house of the respondent amidst debris of an old homestead that had been demolished. The appellants' settlement was a distance of about one and half kilometres from the site of the graves and house of the respondent. The appellants tried to silence the respondent at the *locus in quo* and had to be restrained by the police from turning violent.

Judgment of the court below:

[11] In his judgment, the trial Magistrate decided that from the observations made at the *locus in quo,* it was established the respondent had been resident on the land. He came onto the land as a result of his father cohabiting with the sister of the first appellant. He was born on this land and there are graves of his deceased relatives on the land. The appellants admitted that they had used the land alongside the respondent's father, although it had not been apportioned. Considering the period, the respondent has lived on this land, he can no longer be evicted there from. The respondent was therefore declared the rightful owner of the 250 acres. Consequently, a permanent injunction was issued against the appellants. An order of vacant possession was issued as well.

The grounds of appeal:

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

1. The trial Chief Magistrate erred in law and fact when he failed to evaluate the evidence on record thereby arriving at a wrong conclusion.
2. The *locus in quo* was conducted by the learned Chief Magistrate in the absence of the appellants thereby disabling them from verifying the respondent's claim thereat.

Arguments of Counsel for the appellant:

[13] In his submissions, counsel for the appellant argued that the appellants gave a consistent version in their testimonies yet the trial magistrate decided against them. The first appellant has utilized the land since 1943 and the respondent's father came onto the land in 1975 by cohabitation with the firs appellant's sister. The trial magistrate failed to appreciate that the appellant's interest over the land was first in time. The court ought to have directs that the land be shared. The trial

magistrate visited the locus in quo in absence of the appellants and their witnesses. This was a procedural error affecting the validity of the decision. The appeal should be allowed, the judgment of the court below set aside and the costs should be awarded to the appellants.

Arguments of Counsel for the respondent:

[14] In response, counsel for the respondent, argued that at the *locus in quo* it was established that the appellants lived far away from the land in dispute. The appellants therefore were not resident on the land. The argument that the land should be shared does not arise. At the *locus in quo*, the court followed the proper procedure. The appellants and their witnesses attended and participated in the proceedings. Instead of presenting their case, the appellants chose to engage in disruptive conduct. The appeal has no merit and should be dismissed with costs to the respondent.

Duties of a first appellate court:

[15] 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*). 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:

[16] 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.

Ground 2

[17] As regards the second ground, a visit to the locus in quo by a trial court is essentially for purposes of enabling the 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).

Missing record of proceedings

[18] Unfortunately, that part is missing from the record of appeal and from the original trial record. Only the sketch map of the material features that were found on the land during that inspection is available. The law on a missing record of proceedings has long been established. Where reconstruction of the missing part of the record is impossible by reason of neither of the parties being in possession of the missing record, but the court forms the opinion that all the available material on record is sufficient to take the proceedings to its logical end, the court may proceed with the partial record *(see Mrs. Sudhanshu Pratap Singh v. Sh. Praveen (Son), RCA No.32/14 & RCA No. 33/14, 21 May, 2015 and Jacob Mutabazi v. The Seventh Day Adventist Church, C.A. Civil Appeal No. 088 of 2011).* I have formed the opinion that the available material on record is sufficient to take the proceedings to its logical end, and have therefore decided to proceed with the partial record. The relevant part of the judgment reads as follows;

> At this stage, the court visited the *locus in quo* and observed the following; cemented grave whose name was erased and parties disagreed on whose grave it was. The plaintiff said [it was that of] Daktar but the defendants [in chorus] shouted him down but not stating whose grave it was; saw other heaps of soil said to be graves. All parties agreed that they were graves; saw the plaintiff's house newly constructed but also saw debris of soil and broken bricks of [a former] homestead. The plaintiff says [it] belonged to the plaintiffs' relatives but the defendant denied [this]. The court also saw the defendants settled almost 1.5 kilometres from where the graves and house of the plaintiff is. Owing to the observations of the defendants and the violent nature they exhibited, my view was that they were trying to silence the plaintiff. They even tried to cause a fight in the presence of the court save [that] the police restrained them [thanks] to the presence of the police guards, otherwise it would case lawlessness. (Words in parentheses supplied by court as grammatical corrections).

[19] Firstly, the above comments of the trial Magistrate in the judgment do not reflect the appellants' contention that proceeding at the *locus in quo* were conducted in their absence. The appellants were present during the proceedings but chose to engage in disruptive conduct. Parties to litigation have the right to be present during court proceedings and to cross-examine witnesses that give adverse evidence against them. A party though may waive his or her right to be present and to participate in the proceedings. Serious misconduct though during court proceedings may be a ground for effecting a waiver of the right to be present during the trial, after the disruptive party has been warned by the presiding judicial officer that he or she will be removed if he or she continues his or her disruptive behaviour. Given the parties' right to be present, the power to exclude unruly parties is premised on the theory that such a party by his or her disruptive conduct, waives that right. In the instant case, the appellants were never prevented from participating in the proceedings. If they did not effectively present their case, it was because of a completely unilateral decision of theirs when they opted to engage in disruptive conduct instead of an orderly presentation of their case.

Loss or destruction of evidence

[20] Secondly, the deliberate loss or destruction of potentially relevant evidence that should have been preserved for a civil litigation, ordinarily raises an adverse inference against the spoliating party. There was evidence from the appellants explaining the respondent's presence on the land. According to D.W.2 Olok Alfred, the respondent was only allowed to cultivate the part his wife was cultivating. D.W.6 Langoya Celestino testified that the first appellant's sister Kacilina cohabited with the respondent's father Oyoo Yowaci Obake in the 1970s but they never had a child together until her death in year 2010. D.W.1 Luka Ocira testified that his sister Kacilina who died in the year 2010 was the one supporting the respondent. From the appellants' perspective therefore, the respondent is technically not a trespasser on the land. But when the court visited

the *locus in quo*, it found that the grave identified by the respondent as that of his deceased relative, had been defaced.

[21] The evidence at the *locus in quo* showed that the appellants were in exclusive possession of that part of the land, they could thus reasonably foresee that they were under a duty to preserve the *status quo* until the court's visit. They instead suffered that part of the grave to be destroyed, modified, or altered either intentionally or due to their failure to take reasonable steps to preserve it. At common law, there is a duty imposed on parties to safeguard data, documents, and tangible evidence when litigation is filed, threatened, or is reasonably anticipated. The danger posed to the proper administration of justice by the loss, destruction, modification, or alteration of evidence was aptly stated in *United Medical Supply Co. v. United States, 77 Fed. Cl.257, 259 (Fed. Cl. 2007) thus;*

> Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings, erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical [evidence goes] missing, judges and litigants alike descend into a world of adhockery and half measure, and our civil justice system suffers

[22] The common law duty to preserve evidence arises at the moment the litigation in issue is reasonably anticipated. The duty exists if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil suit *(see Ferrel v. Connetti Trailer Sales, Inc. 27 A.2d 183 (R.I. 1999).* A party can spoliate evidence intentionally or through negligence. Intentional spoliation denotes that the spoliating party destroyed, modified, or altered evidence with the intent to deprive another party of that information. To determine a party's intent, courts generally look to the overall facts and circumstances surrounding the loss of that evidence. In the instant case, it was more probable that not that the defacing of that grave was intentional. The

appellants were aware of the potential relevance of that grave and defaced it so as to deny the respondent its evidential value for his case.

[23] When important evidence is lost, destroyed, modified, or altered the ability to correctly decide the case can be seriously impeded. Therefore, the consequence or sanction for spoliating depends on both the culpability of the party at fault and the importance of the evidence in resolving the litigation. When the court finds that the spoliating party acted with the intent to deprive its opponent of the evidence, it may justifiably give rise to an adverse inference against that spoliating party. The common sense observation then is that a party who has noticed that evidence is relatable to litigation and who proceeds to destroy, modify, or significantly alter such evidence, is more likely to have been threatened by that evidence, than a party in the same position who does not destroy, modify, or alter the evidence.

[24] Thirdly, whereas the appellant's evidence suggests that the respondent's presence on the land was merely as a licensee, P.W.2 Arikilao Ogil, a neighbour, testified that originally the land was a hunting ground until the respondent's grandfather Kilamoi occupied it in 1952. Since he became a neighbour to the Yowachi family in 1975, it is that family that has occupied the land. That family has a graveyard, mango trees, oranges and acacia tress on the land and that is all that they have left on the land. P.W.3 Tibi John, another neighbour, testified that since 1975 the Yowachi family was in occupation of the land in dispute located at "Otop" and Lubara Opobo. There are graves and mango trees on the land belonging to the family of the respondent. I find that these activities that began in 1952 are inconsistent with the appellant's contention that the respondent was a mere licensee on the land. It is clear that the appellants are simply attempting to unlawfully bully the respondent off the land, upon their return from the insurgency. The trial court therefore came to the right decision.

Order :

[25] [In the final result, I find no merit in the appeal and it is accordingly dismissed. The costs of the appeal and of the trial are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Odongo and Company Advocates

For the respondent : M/s Komakech-Kilama and Company Advocates.