IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0035of 2018

In the matter between

1. AKENA JABINA

2. ODONG MALLON **APPELLANTS**

And

ODONG BENJAMIN **RESPONDENT**

Heard: 28 August, 2019.
Delivered: 12 September, 2019.

Land Law *— locus in quo — A sketch map drawn at the locus in quo is not substantive evidence but only demonstrative of the oral evidence given thereat.*

Civil Procedure *—The Civil Procedure rules should be followed and only for the most persuasive of reasons may they may be relaxed to relieve a litigant of an injustice not commensurate with the degree of his or her failure to comply with the procedure prescribed — While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to insure an orderly and speedy administration of justice —The Civil Procedure rules exist essentially to enhance equity and fairness in civil trials rather than create an obstacle thereto — The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his or her evidence to the issue disclosed by them — Waiving strict compliance with the rules of procedure in the "interest of justice" should therefore be extraordinary relief granted for the most compelling reasons where in the circumstances of the case, strict application of the rules would yield a result that is contrary to the spirit, intent or purpose of the administration of justice whose overriding objective is the just, expeditious, proportionate, efficient and affordable resolution of civil disputes.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally seeking a declaration that he is the rightful owners of approximately 700 hectares of land situated at Latinyer village, Abuturu sub-ward, Idobo Parish, Lalogi ub-county, Omoro County in Omoro District, general damages for trespass to land, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the suit.

[2] The respondent's claim was that from time immemorial, he and his family have been in possession of the land in dispute. The appellants owned and occupied land adjacent to the one in dispute, separated by Lamino-Onger Stream serving as a natural common boundary between the two tracts of land. The respondent and his family occupied and utilised the land in dispute peacefully until they were displaced into an IDP Camp by the insurgency, in 1997. At the end of the insurgency, they returned to the land in 2008 but the appellants without any claim of right crossed the stream and trespassed onto the land. The appellants embarked on cutting down trees for charcoal, constructed a hut on the land and have since refused to vacate despite intervention by the local civic leaders, hence the suit.

[3] In their joint written statement of defence, the appellants denied the respondent's claim in *toto*. They averred that the respondent has never been a resident at Latinyer village. They prayed that the suit be dismissed with costs.

The respondent's evidence in the court below:

[4] The first appellant Odong Benjamin as P.W.1 testified that his late father Latigo Nicodemus Okech, acquired the land in dispute from his uncle, Bulasio Obong in 1972. The respondent in turn inherited the land from his late father following his death in 1996. At the time of his death, his late father had constructed a house on the land. The respondent has since planted pine trees thereon. The appellants during the year 2008 took possession of about 100 acres of the land and are now tilling it. P.W.2 Omony Peter testified that the respondent inherited the land in dispute from his late father Latigo Nicodemus Okech. The deceased acquired the land from the respondent's uncle Bulasio Obong in 1972. The 1st appellant entered onto the land in 1977 and the 2nd appellant in 1985.

[5] P.W.3 Olanya Martin testified that he was present in 1972 when Bulasio Obong gave the land in dispute to the respondent's late father Latigo Nicodemus Okech. The boundaries were clearly demarcated and the one to the West is the Lamino-Onger Stream. P.W.4 Okidi Quinto testified that the respondent inherited the land in dispute from his late father Latigo Nicodemus Okech and its boundary to the West is the Lamino-Onger Stream. The land that belongs to the appellants is across that stream.

The appellant's evidence in the court below:

[6] In her defence, D.W.1 Akena Jabina testified that the land in dispute belonged to his late father Iyasoni Langol. It is during the year 1972 that Okello gave him the part he is currently occupying. At that time the respondent was resident in Omokokitunge, two miles away from the land in dispute. D.W.2 Odong Mallon testified that he occupies approximately ten acres he inherited from his late father, Yusito Twin who first occupied it when it was vacant.

[7] D.W.3 Martin Okello testified that he is elder cousin-brother of the respondent. The land in dispute belongs to the 1st appellant but he did not know when he acquired it. The land that belonged to their late uncle Latigo Nicodemus Okech did not include the parts occupied by the two appellants. The appellants occupy their own land and have not crossed the Lamino-Onger Stream. D.W.4 Odur Alfred testified that a one Okello Lego gave the land in dispute to the 1st appellant in 1979.

Proceedings at the *locus in quo*:

[8] The trial court visited the *locus in quo* on 21st March, 2018 where it observed the location of Lamino-Onger Stream. The court also recorded evidence from; (i) Kitara Lapson; (ii) Okot Santo Anuka; (iii) Okot Nelson. The court prepared a sketch map of the area in dispute.

Judgment of the court below:

[9] In his judgment, the trial Magistrate found that the evidence adduced by the respondent was credible and believable. The appellants' witnesses, especially D.W.3 Martin Okello, were untruthful. They testified that Lamino-Onger Stream did not exist on the land in dispute yet the court found that it did when it visited the *locus in quo*. The respondent is the rightful owner of the land having acquired it by inheritance. The appellants could not explain how their respective fathers acquired the land they currently occupy. The appellants therefore became trespassers on the land when they occupied it in the year 2008. The respondent was declared lawful owner of the land in dispute, a permanent injunction was granted restraining the appellants from further acts of trespass onto the land, the respondent was awarded shs. 10,000,000/= in general damages and the costs of the suit.

The grounds of appeal:

[10] The appellants were dissatisfied by 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 respondents had trespassed onto the land in the year 2008 while the respondent was in possession.
2. The learned trial Magistrate erred in law and fact when he failed to record evidence from witnesses and drawing a sketch map of the suit land.
3. The learned trial Magistrate erred in law and fact when he failed to determine the boundary between the parties.

Arguments of Counsel for the appellant:

[11] Submitting in support of those grounds, counsel for the appellants argued that the plaint and the respondent indicated the land in dispute is located at Latinyer village, in their testimony they also stated that it is located at Latinyer village. The appellants testified that the respondent's land is located about two miles away from the land in dispute at Omukitunge village and not Latinyer village. The two villages are distinct and therefore there could not have been a common boundary between the appellants' and the respondent's land. Had the trial court considered the discrepancies in the location of the land in dispute, it would not have come to the decision it did. The appellants have occupied their land since the 1970s. It was wrong therefore for the court to have found the appellants to be trespassers on the land. It was wrong for the court while at the *locus in quo* to have taken evidence from persons who had not testified in court. The Magistrate did not inspect the land and hence did not prepare a sketch map of the land. Had the court inspected the land it would have found that the appellants' and the respondent's land is miles apart. The appeal should therefore be allowed.

Arguments of Counsel for the respondent:

[12] In response, counsel for the respondent, submitted that the appellant testified that his and the appellants' home is about one mile apart. Lamino-Onger Stream is the natural common boundary between the land he owns and that occupied by the appellants. The same boundary was attested to by P.W.3 Olanya Martin and P.W.4 Okidi Quinto. His claim was that the appellants had during the year 2008 crossed that stream and occupied part of his land. That was confirmed when the court visited the *locus in quo*. Irregularities in the proceedings conducted at the *locus in quo* did not occasion a miscarriage of justice. Therefore, the appeal should be dismissed.

Duties of a first appellate court:

[13] 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*).

[14] 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.

[15] The document that purported to have commenced this appeal is a "Draft Memorandum of Appeal" dated 22nd May, 2018 and filed in this court on the same day. A draft memorandum of appeal is not a document ordinarily capable of commencing a civil appeal since it is “unknown” to the law. In *Mayanja Grace v. Yusufu Luboyera [1977] HCB 133* where the appellant purported to lodge and appeal by filing a "Provisional Memorandum of appeal" and later filed the Memorandum of appeal but out of time, the court held that the provisional memorandum of appeal was not a proper document to be considered in computing the time. Similar decisions can be found in *Muhutu George v Mpengere Bulasiyo [1982] HCB 55 and Westmont Land (Asia) BHD v The Attorney General [1998-2000] HCB 46*.

[16] When the appeal came up for hearing, the court allowed counsel for the appellant to file an amended memorandum of appeal despite that irregularity and undertook to provide the reasons in this judgment. The reasons are that like all rules, *The Civil Procedure rules* should be followed and only for the most persuasive of reasons may they may be relaxed to relieve a litigant of an injustice not commensurate with the degree of his or her failure to comply with the procedure prescribed. *The Civil Procedure rules* exist essentially to enhance equity and fairness in civil trials rather than create an obstacle thereto.

[17] The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his or her evidence to the issue disclosed by them (see *Esso Petroleum Company Limited v. Southport Corporation [1956] AC 218*). The rules on pleadings require the parties to set out fully the nature of the question to be decided by stating the facts upon which the parties rely and the orders which they seek, otherwise the courts risk embarking on a roving enquiry. Compliance with the rules is a precondition for meaningful justice since conducting trials on broad principles of justice without regard to technicalities may well lead to uncertainty and injustice. Procedural rules are not to be belittled

or dismissed simply because their non-observance may not have resulted in prejudice to a party's substantive rights. While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to insure an orderly and speedy administration of justice.

[18] However on the other hand, courts ought to be mindful of the "interest of justice" relief under article 126 (a) of *The Constitution of the Republic of Uganda, 1995* which allows for relaxation of the rules in pursuit of substantive justice. Waiving strict compliance with the rules of procedure in the "interest of justice" should therefore be extraordinary relief granted for the most compelling reasons where in the circumstances of the case, strict application of the rules would yield a result that is contrary to the spirit, intent or purpose of the administration of justice whose overriding objective is the just, expeditious, proportionate, efficient and affordable resolution of civil disputes. Procedural legal technicalities should be applied to enable rather than restrict access to justice in courts.

[19] Where the matter at hand touches issues of jurisdiction or the need for finality in litigation and the need to discourage stale claims, strict application of the rules would be justified while in others, the hardship likely to be occasioned by waiving the rule is far lighter compared to the effect of denying a party access to the court to afford the parties the opportunity to fully ventilate their cases on the merits, for example where failure to comply with the rules does not affect the substance of the dispute or deprive the other party of a substantive defence. Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.

[20] The document filed in this court on 22nd May, 2018 although titled "Draft Memorandum of Appeal," meets all the other requirements of section 79 of *The Civil Procedure Act* and Order 43 rules (1) and (2) of *The Civil Procedure Rules,*

save for the single word "Draft" that appears in its heading. On the facts of this case, strict application of the rules would be tantamount to having undue regard to technicalities as opposed to the administrative of substantive justice (see article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*). In modern times, courts do not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They exist to secure the inexpensive and expeditious completion of litigation before the Courts.

[21] Order 6 rules 9, 18 and 31 of *The Civil Procedure Rules* give the Court a wide discretion to allow either party, at any stage of proceedings, to alter or amend his or her pleadings in such a manner and on such terms as may be necessary for the purpose of determining the real question in controversy as between the parties. The paramount guiding principle in the exercise of this discretion is that the intended amendment should enable court to determine the real questions in controversy between the parties, without causing injustice to the other party (see *Gaso Transport Services (Bus) Ltd v. Obene [1990-94] EA 88*). I was satisfied that the amendment proposed by counsel for the appellants, although executed without leave of court, was intended to bring into focus the real question in controversy as between the parties. It is on that account that the amended memorandum of appeal filed in this court on 23rd August, 2019 was validated and the costs of that amendment were awarded to the respondent in any event.

Ground two of the appeal

[22] In the second ground of appeal, the trial court is faulted for having recorded evidence from persons who had not testified in court, and for failure to draw a sketch map of the land in dispute. In the first place, a sketch map drawn at the *locus in quo* is not substantive evidence but only demonstrative of the oral evidence given thereat. Being only demonstrative evidence, it is neither testimony nor substantive evidence. The Court is not free 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. Failure to prepare one therefore is not fatal if the oral evidence is clear. However, in this case, the court prepared a sketch map that indicates the location of land occupied by the respondent, the area in dispute and Lamino-Onger Stream. I find that the map prepared by the court serves the purpose adequately since it indicates the location of the area in dispute as well as the common boundary between the respondent's and the appellants' land.

[23] As regards the fact that the court recorded evidence from persons who had not testified in court, it is settled law that visiting the *locus in quo* is meant to check on the evidence by the witnesses, and not to fill gaps in their evidence for them, 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).* Admission of the evidence of; (i) Kitara Lapson; (ii) Okot Santo Anuka; (iii) Okot Nelson was an error.

[24] 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. 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.

[25] 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 three 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. Accordingly, the two grounds of appeal fail.

Grounds one and three of the appeal

[26] In grounds one and three of appeal, the trial court is faulted on its finding as to the location of the common boundary between the appellants' and the respondent's land and that the appellants had trespassed onto the respondent's land. It was argued by the appellants that the land claimed by the respondent is located about two miles away from the land in dispute at Omukitunge village and not Latinyer village. Therefore, that the two villages are distinct and there could not have been a common boundary between the appellants' and the respondent's land. On the other hand, it was contended by the respondent that although his home and those of the appellants are about one mile apart, Lamino-Onger Stream is the natural common boundary between the land he owns and that occupied by the appellants.

[27] It is apparent from the two versions that each of the parties occupies a relatively vast tract of land, with a common boundary, Lamino-Onger Stream. Whereas the actual physical location of their respective homes may be situated on different villages geographically, common sense compels the conclusion that the two are separated by a common geographical feature, Lamino-Onger Stream. Where land is described by its geographical location or such other similar physical features, when there is a discrepancy between such description and the actual land shown to court during its visit to the *locus in quo*, the latter prevails. When

the verbal description contains details that cannot be reconciled with the physical features on the ground, the latter will prevail. Therefore, the question as to whether the land in dispute was located at Omukitunge village or Latinyer village was settled when the court visited the *locus in quo*. The parties demonstrated that they were all referring to the same parcel of land, despite the variance in attribution of the name of the village where it is located. The name of the location thus ceased to be of any importance.

[28] The question of what is a boundary line is a matter of law, but the question of where a boundary line, or a corner, is actually located is a question of fact (see *Walleigh v. Emery, 163 A.2d 665, 668 (Pa. Super. 1960*). The witnesses called by the respondent all identified Lamino-Onger Stream as the boundary. The appellants never pleaded a common boundary between their land and that of the respondent and neither did they in their testimony describe the boundary of the land they claimed. At the *locus in quo*, none of the appellants' witnesses demonstrated a common boundary between the land claimed by the respondent and that in possession of the appellants. The sketch map shows that the area in dispute is across Lamino-Onger Stream, and the appellant's activities complained of are on the respondent's side of that stream, hence justifying the finding of trespass. The respondent pleaded that the trespass began in 2008. Having filed the suit four years later in 2012, it is not time barred.

Order :

[29] In the final result, the appeal lacks merit. It is accordingly dismissed. The respondent's costs of the appeal and of the trial are to be met by the appellants.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Ms. Kunihira Roselyn

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