



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 049 of 2018

In the matter between

OLANYA DEGOL OKIDI

APPELLANT

And

OLWENY BAPTIST

RESPONDENT

Heard: 30 August, 2019.

Delivered: 12 September, 2019.

***Evidence** — Questions on the weight of evidence are not determined by arbitrary rules, but by common sense, logic and experience — One method for determining truthfulness and reliability of oral testimony is to examine the statement of each witness as regards its internal consistency and external consistency with other available evidence — it may also be tested for how well it accords with known facts, available physical evidence, or other evidence from a source independent of the witness*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant's mother, the late Adong Delfina, seeking recovery of approximately three acres of land situated at Kampala village, Otumpili Parish, Lukole sub-county in Agago District, an order of vacant

possession, a permanent injunction and costs. His claim was that before his death, the respondent's father Odong Kibwoto distributed his land among his children. The respondent took possession of the land in dispute as part of the approximately twenty acres of land given to him by his late father. His land and that of his elder clan brother is separated by a road. The appellant is the wife of the respondent's elder clan brother who has land at Otumpili, about one and a half kilometres away from the land in dispute. During the year 2007 until 2011, the appellant's mother authorised her daughter Acan Hellen, to trespass onto the land allocated to the respondent where she razed three graves of the respondent's deceased children.

- [2] In his written statement of defence, the appellant stated that Dabiliano Okidi, the appellant's late father, husband of the late Adong Delfina, occupied the land in dispute from as way back as 1955. Upon his death, the appellant's mother the late Adong Delfina inherited the land. She is therefore the rightful owner of the land in dispute.

The respondent's evidence in the court below:

- [3] Testifying as P.W.1, the appellant Olweny Baptist stated that his late father Odong Kibwoto gave him the land in dispute and he took possession thereof in 1980 during the lifetime of his father, and was only forced to vacate it by the LRA insurgency. Although he shared common boundaries with the rest of his brothers, he did not share any with the late husband of the appellant's mother. It is in 2011 that the appellant's mother and her daughter began trespassing onto the land.
- [4] P.W.2 Odong Kwirino testified that he owns land to the North of that in dispute and shares a common boundary with the respondent's land marked by a "Yaa" tree and an "Oduku" tree. By the time of displacement by the LRA insurgency, the respondent was in possession of that land. It is after the insurgency that the appellant trespassed onto it by giving a part of it to her son-in-law. The appellant

had no lane in the neighbourhood since her land was at Otumpili, one and half kilometres away from the land in dispute.

- [5] P.W.3 Atuku Celstion testified that he is a neighbour to the South of the land in dispute. The respondent acquired the land in dispute from his late father Kiboto. He took possession of the land soon after his marriage. He occupied it until he was displaced by the insurgency. The respondent's mother and several of his other relatives were buried on the land.

The appellant's evidence in the court below:

- [6] In his defence as D.W.1, the respondent Olanya Degol Okidi testified that he inherited the land in dispute from his father upon his death in 1993. He used it from then until the year 2012 when he was stopped by court injunction. The respondent secretly planted two mango trees on the land in dispute. The respondent has never occupied the land in dispute.
- [7] D.W.2 Okello Yasinto testified that the appellant is his father while the respondent is his paternal uncle. The land in dispute is located in Wikweyo not Kampala village. The appellant acquired the land in dispute from his mother in the year 2006 while the suit was pending in court. Before that he had never undertaken any activity on the land. The late Adong Delfina acquired the land in dispute way back in 1950 from her late husband Okidi Dabiliano. The respondent was stopped by the clan from utilising the land.
- [8] D.W.3 Labanya Ensio testified that the land in dispute is located at Kampala village and measures approximately one acre. It originally belonged to Okidi Dabiliano the husband of the appellant's mother Adong Delfina. The appellant used it only for one year in 2008 with the permission of the late Adong Delfina before her death in 2013. She was buried on her other land. It was vacant land before the insurgency, whose boundary was marked by three anthills on top of

one of which a tree had grown. The respondent had never lived on the land in dispute.

Proceedings at the *locus in quo*:

[9] The court visited the *locus in quo* on 3rd November, 2017 where it found a garden of sorghum belonging to a one Adong Maria to one side (West) and south; while the respondent occupied the other (East) and North of the area in dispute. Further North was the road from Agago Town to Lapono sub-county. It recorded evidence from P.W.2 Odong Kwirino who reiterated to the court that the land belongs to the respondent. The court prepared a sketch map of the land in dispute.

Judgment of the court below:

[10] In his judgment the trial Magistrate found that to the North of the land in dispute is land belonging to the respondent and further North is the road from Otumpili. Beyond that road is land belonging to Odong Kwirino. The respondent owns land as well that is to the East of the one in dispute. On the land in dispute, the respondent showed court graves of his deceased relatives and the location of his former homestead, including stands of granaries that were still in existence. The appellant was unable to show court anything physical connecting him to the land in dispute. The witnesses called by the respondent were elderly, knowledgeable and appeared to be truthful. Witnesses called by the appellant did not appear to be truthful and parts of their testimony was contradictory. Judgment was therefore entered in favour of the respondent. He was declared to be lawful owner of the land in dispute. A permanent injunction was issued restraining the appellant from undertaking any activities on the land. The respondent was granted vacant possession of the land, general damages of shs. 2,500,000/=, interest thereon at 8% per annum from the date of judgment until payment in full, and the costs of the suit.

The grounds of appeal:

[11] The appellant was aggrieved by that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact by either overlooking the cogent evidence adduced by the appellant or failure to properly evaluate the said evidence on record thereby coming to a wrong conclusion that the suit land belongs to the respondent, whereas not.
2. The learned trial Magistrate erred in law and fact when he failed to take into consideration the boundaries of the suit land shown / pointed out by the appellant / defendant during the visit to the *locus in quo*, thereby coming to a wrong conclusion that the respondent is the lawful owner of the suit land.
3. The learned trial Magistrate erred in law and fact and was wrong when he awarded the respondent / plaintiff shs. 2,500,000/= as general damages.

Arguments of Counsel for the appellant:

[12] In his submissions, counsel for the appellant, argued that the appellant adduced evidence showing that in 1993 he inherited two acres of land that belonged to his late father, Okidi Dabiliano through his mother Adong Delfina. He was cultivating that land peacefully until the year 2012 when he was stopped by the court. The respondent had never lived on the land and it therefore was not true that he was in 1989 displaced into an IDP Camp. His evidence was corroborated by that of two other witnesses. The trial Magistrate ignored all that evidence. It was erroneous for general damages to have been awarded against the appellant yet he had been in possession of the land at all material time. At the *locus in quo*, the appellant demonstrated to the court that the land claimed by the respondent exceeded the two acres pleaded, yet it never paid attention to the boundary

shown to it. The court found that land belonging to the appellant was North of the road to Otumpili yet that land belongs to a one Okidi Joseph. The homestead, granary stones and graves mentioned in the judgment were not seen during the visit to the locus in quo. The respondent had never lived on the land and could not show court any evidence to the contrary. It is the appellant who was in possession from 1993 until the year 2012. The trial Magistrate attached too much weight to the minor contradictions and inconsistencies in the appellant's evidence. He prayed therefore that the appeal be allowed.

Arguments of Counsel for the respondent:

[13] In response, counsel for the respondent, submitted that the trial Magistrate evaluated all the evidence properly and came to the right conclusion. The observations made by the court during its visit to the *locus in quo* were consistent with the evidence adduced by the respondent. The court correctly found that the appellant was a trespasser onto the land and therefore the award and quantum of damages awarded was justified. They prayed that the appeal be dismissed with costs to the respondent.

Duties of a first appellate court:

[14] 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 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).

[15] In exercise of 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.

Grounds one and two of the appeal.

[16] In grounds one and two, the trial Magistrate is faulted for having made a decision against the weight of evidence and by his failure to establish the true location of the boundary. In the first place the character of the dispute between the parties was not over the size of the land or its boundaries but rather its ownership. As regards the evaluation of evidence, the weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited. Questions on the weight of evidence are not determined by arbitrary rules, but by common sense, logic and experience. (See *Phipson on Evidence*, 10th Edition, para 2011).

[17] One method for determining truthfulness and reliability of oral testimony is to examine the statement of each witness as regards its internal consistency and external consistency with other available evidence, i.e. inconsistencies between the party's or witness' factual account and the objective evidence. The qualities to look out for relevant in the determination of the reliability of witnesses in the instant case included;- the opportunity the witnesses had to observe the events; whether the testimony of the witnesses was based on hearsay; the ability of the witness to recall events accurately; the relationship of the witnesses to the

parties to the litigation; whether the witness had any interest in the outcome of the litigation; whether part of the testimony of the witnesses was found to be not credible; whether the witnesses appeared to have a bias; the extent to which the testimony of the witnesses was based on opinion and inference; whether the facts which the witness relied on in forming such opinion were established; and any other evidence which supports or contradicts the testimony of the witnesses. 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.

- [18] In the instant case, the trial court had the opportunity to test the credibility of the each of the party's version by way of assessment and determination of how it did or did not fit in with the available physical evidence. The trial court considered the physical evidence and determined how it fit into the overall scenario as presented in the contending versions. The physical evidence at the *locus in quo* fit best with the respondent's than the appellant's version. The trial court therefore came to the correct conclusion. These two grounds of appeal accordingly fail.

Ground three of the appeal.

- [19] In the third ground of appeal, the trial Magistrate is faulted for having awarded the respondent / plaintiff shs. 2,500,000/= as general damages. An appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd.*, S.C.C.A. No. 10 of 1993

(unreported) and Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises. S.C.C.A No. 16 of 2006).

[20] The appellant was found to be a trespasser onto the land. Damages for trespass are inferred from the wrongfulness of the act. I have not found a failure by the trial Magistrate to take into account a material consideration or that he took into account an immaterial consideration or that he made an error in principle in making the award or determining the quantum. I find therefore that there is no basis for interference with the award.

Order :

[21] In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the court below are awarded to the respondent.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : Mr. Paul Ocaya Acellam

For the respondent : M/s Oroma and co. Advocates