**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable
Civil Appeal No. 060 of 2018

In the matter between

**OUNA ROBIN** **APPELLANT**

**And**

**1. OCAN BENSON OPIRA**

**2. OLWENY PALUKA** **RESPONDENTS**

**Heard: 20 September, 2019.**
**Delivered: 26 November, 2019.**

***Land law*****:** *— 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 — A monument is a point capable of being visibly, physically, and preferably, mathematically ascertained as a boundary marker. A physical object is not a monument for the purpose of locating a boundary unless there is evidence to show that it exists at that location for that purpose — In determining that intent, courts will ordinarily be guided by the visible physical limits of the parcel of land as can be ascertained on the ground by natural boundaries, monumented lines, old occupations, long undisputed abuttals, statements of length, bearing or direction, or similar features as observed by court and verified by credible witnesses — Features that happen to be in the general vicinity of the presumed corner, line or location which exist naturally or for other purposes, must yield to those whose only purpose is to mark a boundary for the latter are more expressive of the intentions of the parties.*

***Evidence*****:** *— Spoliation —Evidence of a lost or disturbed boundary monuments has to be taken into account by the court — Under well-established evidentiary principles, a litigant's intentional suppression of relevant evidence gives rise to an inference that the litigant's case is weak and that the litigant knew his or her case would not prevail if the evidence was presented at trial.*

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] The appellant sued the respondents jointly and severally seeking recovery of a plot of land measuring approximately 143 x 50 metres situated at Laroo village, Agwee Parish, Laroo Division, in Gulu Municipality, Gulu District, a declaration that he is the rightful owner of the land in dispute, general damages for trespass to land, an order of vacant possession, a permanent injunction restraining the respondents from further acts of trespass onto the land, and the costs of the suit. The appellant's claim was that the land in dispute belonged to his late father Ouma Martin and upon his death he inherited it. He and his family enjoyed quiet possession of the land until the year 2006 when the respondents began trespassing on it by cutting down trees, construction of houses and cultivation of crops, hence the suit.

[2] In their joint written statement of defence, the respondents refuted the appellant's claim. They contended instead that they are the indigenous residents of the village and have lived on the land in dispute since their birth. They inherited the land from their respective grandfathers Benjamin Oburu and John Opira respectively. They are therefore not trespassers on the land but in lawful occupation thereof. They prayed that the suit be dismissed.

The appellant's evidence in the court below:

[3] Testifying as P.W.1 Ouna Robin, the appellant, stated that his father had paid ground rent for the land since 1963. Encroachment began in 2006 and was stopped. It recommenced in 2011 during his absence while undertaking studies in South Africa. The 2nd respondent has since constructed a house of the part which he has occupied since the year 2014 while the 1st respondent only grows

crops on the part he occupies. The land in dispute used to be their grazing land. There were acacia and Mivule trees on the land and they would also use it for collection of firewood and cultivation. A footpath used to be the boundary between the respondent's and the appellants land. The survey was done in 2007 but could not include the land now in dispute because of the then existing dispute over it.

[4] P.W.2 Willy Aliker Godin testified that the land in dispute belonged to the late Ouma Martin. They used to graze cattle on the land. The respondents were not among the persons compensated when land was acquired by Gulu University because their land was not close to the University. The respondents used to have yellow acacia trees on their land. P.W.3 Ongom Leo Akuta testified that the land in dispute belonged to the late Ouma Martin. He used to grow cotton, sorghum and other food crops on the land. The boundary used to be a line of trees. The respondents have trespassed onto it and constructed house thereon.

The respondent's evidence in the court below:

[5] In his defence as D.W.1, the 1st respondent, Ocan Benson, testified that the dispute once went to the L.C.II Court which decided in his favour and the trees that formed the boundary were cut and replaced by sisal plants. Has been using the land since 2007 but before that his parents had been using it. During the survey by the appellant, they encroached there meters into his land. D.W.2 Olweny Luke Gaudens, the 2nd respondent, testified that his parents acquired the land from Gulu Town Council and he has lived on it since 1963. There was no dispute over the land until the year 2013. He constructed a house on the land in 2005 and occupied it in 2009. The boundary between his land and that of the appellant's father was marked by Owak trees, Lira and Madalena trees. During the survey by the appellant in 2007, they encroached five meters into his land. There was no dispute over the land at the time of the survey and the appellant had promised to relocate the mark stones.

[6] D.W.3 Odoki Leonard testified that there was a bush on the hill as the boundary between the appellant and the respondents. The appellant has since cleared that bush. The father of the 2nd respondent planted yellow acacia on his land. Sisal was in 2007 planted by the L.C.II Chairman to mark the boundary. The appellant in 2011 cut down all the trees that had been planted to mark the boundary. The appellant must have cut down the sisal plants as well because they do not exist any longer. The footpath on the 1st respondent's land is not the boundary. The 1sst respondent has crops on both sides of the footpath.

[7] D.W.4 Aken Nkomia, an 84 year old neighbour testified that the boundary between the appellant and the respondents used to run from East to West. It was marked by natural trees with beehives but the appellant cut them down when the dispute began. Sisal was planted to replace them. There was also a bush that was being used by the 1st respondent's family who had beehives there. Footpaths in Acholi tradition are not commonly used as boundaries because some footpaths traverse people's homes. Trees and anthills are the more common monuments. A footpath can only be used when it is at the edge of the land. D.W.5 Oru Martin, serving as the L.C.II Chairperson since 2002, testified that he planted sisal plants to resolve the boundary dispute. The boundary runs East to West. At the time they did that, they found the appellant's brother had already planted survey mark-stones and the sisal plants as boundary markers were planted more or less along that line. The 2nd respondent's house was at foundation level. The appellant later uprooted the sisal. He exceeded the boundary and cut down trees and slashed grass on the respondent's side of the land. The matter was reported to the police.

Proceedings at the *locus in quo*:

[8] The court visited the *locus in quo* on 9th February, 2018. A sketch map was drawn showing that the land in dispute lies West of Gulu University. It is separated from that university by a newly constructed road. To the North it is

bordered by the newly constructed "Tegot Lane." The 1st respondent occupies the Western part of it while the 2nd respondent occupies the Western part of it. Their respective occupancies are separated by a line of pine trees running North to South. The appellant's undisputed land is to the south of both those occupancies and its limit is marked by a survey mark-stone and two sisal plants a distance apart but along more or less the same line. The 2nd respondent had a newly constructed house and cassava garden on the part he occupies. There are acacia trees within the are occupied by the 1st respondent.

Judgment of the court below:

[9] In her judgment delivered on 16th August, 2018, the trial Magistrate found that the receipts evincing payment of ground rent produced by the appellant did not specify the boundaries of the land in respect of which the payments were made. They only reflected the size as being four acres. The respondents did not dispute that the appellant owned land in the area but refute his claim that the land in dispute formed part of that in respect of which those payments were made. At the *locus in quo,* it was evident that the land occupied by the appellant was surveyed but the area in dispute lay outside the area that was surveyed. He could not rely on the fact that the land in dispute was close to Gulu University and his father's name was on the list of persons compensated for land acquired for that University whereas the respondents' names were not on the list. The court found the land in dispute had gardens belonging to the respondents and there was no evidence to show that the appellant had ever utilised the land as grazing land. The appellant failed to discharge the burden of proof cast upon him. Consequently, judgment was entered in favour of the respondents. The suit was dismissed with costs and the respondents were declared the rightful owners of the land in dispute.

The grounds of appeal:

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

1. The learned Magistrate erred in law and fact when he held that the appellant had not proved his use and ownership of the suit land.
2. The learned trial Magistrate erred in law and fact when he failed to consider the boundaries between the appellant and the respondents thereby reaching a wrong conclusion.
3. The learned trial Magistrate erred in law and fact when he failed to consider the weight of evidence adduced by the appellant hence arriving at a wrong decision.

Arguments of Counsel for the appellant:

[11] In their submissions, counsel for the appellant argued that the appellant's father was among those compensated when the University acquired land in the neighbourhood. This was because it is the appellant's father whose land shared a mutual boundary with the University and not the respondent's. The respondents had no evidence to show that they too had been compensated by the University. They had no evidence either of having paid ground rent to the Municipal Council. There was a justifiable reason for the appellant to have restricted his survey to the portion of the land that was undisputed. The respondents' activities on the land were clear evidence of their trespass thereon. The footpath the respondents claimed was the boundary had been recently turned into a motorable road. In Acholi custom, footpaths can serve as boundary markers. When D.W.5 Oru Martin plants sisal plants to mark the boundary, he ignored the existing boundary of a footpath. At the *locus in quo*, the trial Magistrate descended into the arena by recording evidence that was important to her, not as demonstrated by the appellant. The appellant was able to show court the footpath that served as the boundary marker. The trial Magistrate instead focused on the survey mark-

stones which the appellant had planted to demarcate only that land over which there was no dispute. They prayed that the appeal be allowed.

Arguments of Counsel for the respondents:

[12] In response, counsel for the respondents submitted that the question that had to be determined is the mutual boundary between the appellant's land uphill, to the North, and the respondent's downhill, to the South. The appellant caused the survey of the land that rightly belongs to him and the trial court came to the right conclusion when it recognised the survey mark-stones as the common boundary. The appellant's description of the land he claimed varied with that of his witnesses. The receipts he produced were for land situated in Pece and not Agwee. There was no evidence to show that the appellant had ever utilised the area in dispute. To the contrary evidence showed that it was utilised by the respondents. The trial court therefore came to the correct conclusion and 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] 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.

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

[15] I find the third ground of appeal to be too general that 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).* The ground is accordingly struck out.

Determination of the boundary in dispute

[16] Grounds one and two of the appeal fault the trial Magistrate for her findings regarding ownership of the land in dispute and the common boundary. Firstly, the dispute between the parties is not about ownership as contended by counsel for the appellant but rather the true location of the mutual boundary between their

adjoining parcels of land. The appellant contends it is the footpath, now turned into a road, while the respondents contend it is the location of the survey mark-stones at the lower end of the appellant's land.

[17] 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).* A monument is a point capable of being visibly, physically, and preferably, mathematically ascertained as a boundary marker. A physical object is not a monument for the purpose of locating a boundary unless there is evidence to show that it exists at that location for that purpose.

[18] In the determination of a land boundary dispute, the intent of the parties is the controlling consideration. In determining that intent, courts will ordinarily be guided by the visible physical limits of the parcel of land as can be ascertained on the ground by natural boundaries (e.g. rivers, valleys, cliffs), monumented lines (boundaries marked defining marks, natural or artificial), old occupations, long undisputed abuttals (e.g. a natural or artificial feature such as a street or road), statements of length, bearing or direction (metres, feet or other measurements in a described direction), or similar features as observed by court and verified by credible witnesses.

[19] For example, under Regulation 21 (1) (n) of *The Land Regulations, S.I. No.100 of 2004,* the Area Land Committee is authorised to accept as evidence on the boundaries of the land the subject of an application;- (i) a statement on the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land matters in the parish or the urban area; (ii) simple or customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects; (iii) human activities on the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land; (iv) maps, plans and diagrams, whether

drawn to scale or not, which show by reference to any of the matters referred to in sub-paragraph (ii) or (iii) the boundaries of the land.

[20] The decisions of courts over many years have established an order of precedence for the various types of calls in a description of the location of a tract of land. This order of importance is expressed as "rules of comparative dignity." These rules are the rules of logic because the courts have carefully weighed the possibility of error in various types of references and have given a value of reliability to each type of reference. The order of importance of references, where there is conflict between them, is given here in order of decreasing importance; (i) lines actually surveyed and marked control over calls for monuments; (ii) reference to a natural monument; (iii) reference to an artificial monument; (iv) reference to an adjoiner; (v) reference to direction; (vi) reference to distance; (vii) reference to area.

[21] The courts found it logical to assume that the most important reference is the one to a natural object because of the permanence of the object. The next most important reference is the one to an artificial object because it can be identified by its description. Courts are aware that errors can be made in determining direction and distance. If a description gives a bearing and distance which should bring the surveyor to a river which is referenced as the boundary, but in fact does not bring the surveyor to the river, it is logical to assume that the reference to direction and distance is incorrect if the intent of the parties was to make the river the boundary. Courts also have found that it is logical to assume that a reference to direction is of higher importance than a reference to distance because of varying competences and measuring equipment for distance.

[22] A reference to an adjoiner is usually given more importance than a reference to direction and distance because where an adjoining line is well established, it can be considered to be a monument. Area is of least importance, but where a reference to area brings other references into harmony, it may be considered of

higher importance. Where no references to monuments exist or where monuments cannot be found, a reference to direction and distance may control. A reference to a monument does not always control if there are two monuments in conflict. The monument which is in harmony with direction, distance, and the references will control.

[23] In the instant case, the appellant testifying as P.W.1 stated that a footpath used to be the boundary between the respondent's and the appellants land and that the survey was done in 2007 but could not include the land now in dispute because of the then existing dispute over it. P.W.3 Ongom Leo Akuta on the other hand stated that the boundary used to be a line of trees. The contradiction was not explained. To the contrary, the testimony of P.W.3 corroborates that of the respondents and their witnesses to the effect that there used to be a line of trees marking the common boundary. D.W.4 Akena Nkomia testified that footpaths in Acholi tradition are not commonly used as boundaries because some footpaths traverse people's homes. Trees and anthills are the more common monuments. A footpath can only be used when it is at the edge of the land. He testified that the common boundary in this case was marked by natural trees with beehives but the appellant cut them down when the dispute began. Sisal was planted to replace them.

[24] D.W.3 Odoki Leonard testified that the footpath on the 1st respondent's land was not the boundary and the 1st respondent had crops on both sides of the footpath. There was a bush on the hill as the boundary between the appellant and the respondents but the appellant had since cleared that bush. The appellant in 2011 cut down all the trees that had been planted to mark the boundary. Sisal was in 2007 planted by the L.C.II Chairman to mark the boundary. The appellant must have cut down the sisal plants as well because they do not exist any longer.

[25] D.W.5 Oru Martin, L.C.II Chairperson since 2002, testified that he planted sisal plants to resolve the boundary dispute. The boundary runs East to West. They

found the appellant's brother had already planted survey mark-stones and the sisal plants were planted more or less along that line. The 2nd respondent's house was at foundation level. The appellant later uprooted the sisal. He exceeded the boundary and cut down trees and slashed grass on the respondent's side of the land. The matter was reported to the police. D.W.1 Ocan Benson testified that when the L.C.II Court which decided in his favour, the trees that formed the boundary were cut and replaced by sisal plants. The survey encroached three meters into his land. D.W.2 Olweny Luke Gaudens testified that the boundary between his land and that of the appellant's father was marked by Owak trees, Lira and Madalena trees. During the survey in 2007, there was a five metre encroachment into his land.

[26] At the *locus in quo*, the court should be shown the actual monuments in their undisturbed positions, which may be identified by their conformity in character to that described during the oral testimony in court. The general presumption applied by most courts assumes that markers are in their original location unless proven otherwise. If the monuments are lost or destroyed, the location in which they existed, if demonstrated by competent evidence, will still control the boundary. In this case, the court found that the appellant's survey line more or less was consistent with the boundary stated by the respondents and their witnesses. Two of the sisal pants were still visible. The trees, the rest of the sisal plants and the path were missing.

[27] Courts have accepted different types of evidence to re-establish the original location of a missing monument. Testimony of witnesses who saw the monument in place near the time it was supposedly set and who can give a reasonably accurate physical description of the monument and its location is often accepted. Improvements built soon after the monument was set and which can be shown to have been located in accordance with the monument can also be determinative. Earlier surveys which note the monument as found and contain a sufficient physical description of the monument and its placement to allow identification

and re-establishment are excellent evidence. The idea is to accumulate as much evidence as possible of as many different types as possible to support the re-established location.

[28] Sometimes the extent of a parcel of land coincides with a feature, natural or artificial, in which case the boundary is the feature. In such cases, there is no need for additional monuments to mark the feature as defining the boundary. The boundary is already defined and marked on the ground. They often are the boundaries of parcels of land. Natural features and abuttal to roads are an excellent example.

[29] Nevertheless, care must always be taken when dealing with such a feature especially when it is of ambulatory character. Where lines are actually established and marked upon the ground by monuments to identify a boundary, the lines so marked must clearly show the intentions of the parties and are presumed paramount to other forms that are conveniently used or adopted as boundary marks but whose existence is related to other purposes, such as footpaths. This is because the primary purpose of the latter is not that they serve as monuments. The mere proximity of a physical feature does not automatically make it a controlling monument. Features that happen to be in the general vicinity of the presumed corner, line or location which exist naturally or for other purposes, must yield to those whose only purpose is to mark a boundary for the latter are more expressive of the intentions of the parties. In the instant case, there was still evidence of two sisal plants supported by oral evidence of the respondents' witnesses.

[30] Furthermore, certainty as to the location of a boundary is better served by monuments remaining undisturbed. If the primary reason for placing physical monuments is to provide long-term evidence of the location of the boundary, then it is critical that they remain in their original locations, even when that location is disputed, since the integrity of a civil trial depends on the preservation of such

evidence. Evidence of a lost or disturbed boundary monuments has to be taken into account by the court. There was evidence adduced of the appellant's persistent destruction of monuments that marked the common boundary.

[31] When the court finds that a party wilfully suppressed, hid, substantially altered or destroyed evidence in order to prevent its being presented in this trial, the court presumes that the guilty party's destruction of evidence shows that the lost evidence would have been unfavourable to that party and that the act of destruction reveals a guilty conscience or groundlessness of the claim as a whole. Under well-established evidentiary principles, a litigant's intentional suppression of relevant evidence gives rise to an inference that the litigant's case is weak and that the litigant knew his or her case would not prevail if the evidence was presented at trial *(see St. Louis v. The Queen, [1896] 25 S.C.R. 649 at 652).* The reasonable inference is that the evidence would have proved devastating.

[32] A party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause *(see John H. Wigmore, Evidence in Trials at Common Law § 278, at 133 (James H. Chadbourn ed., rev. ed. 1979).*

[33] The fact that the appellant had destroyed the original trees that marked the boundary and later most of the sisal plants that were put in place to replace them, was additional corroborative evidence against his case, in favour of the respondents. All in all the trial court came to the correct conclusion.

Order :

[34] 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 respondents.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Kunihira and Co. Advocates

For the respondents: M/s Ladwar, Oneka and Co. Advocates