IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 047 of 2017

In the matter between

1. **OTTO FRANCIS**
2. **OYET ALEX**
3. **ONEK SANTO**
4. **ODIDA CHARLES**
5. **TABU ROBERT**
6. **NYERO CASTO**
7. **ORACH CELSIO**
8. **OKELLO DENISH** **APPELLANTS**

And

ORACH SILVANO OWINY **RESPONDENT**

Heard: 9 September, 2019.
Delivered: 26 November, 2019.

Land law**:** *—Locus in quo — at the locus in quo, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court — Evidentiary statements made under examination should be noted in the record to the extent they can be assumed to be of significance in the case. The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a locus in quo..*

Civil Procedure *— Trial de novo — A retrial should not be ordered unless the following conditions are met; (i) that the original trial was null or defective; (ii) that the interests of justice require it; (iii) that the witnesses who had testified are readily available to do so again should a retrial be ordered; and (iv) no injustice will be occasioned to the other party if an order for retrial is made.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for recovery of approximately 500 acres of land located at Lyelokwar village, Pella Parish, Omiya Anyima Sub-county in Kitgum District, a declaration that he is the rightful customary owner of the land in dispute, general and special damages for trespass to land, an order of vacant possession, a permanent injunction and the costs of the suit.

[2] The respondent's claim was that the land in dispute originally belonged to his late father Okech Gabriel. He was born and raised on that land. He inherited the land upon the death of his said late father. During the year 2012, without any claim of right the appellants forcefully entered onto the land where they damaged his tractor that he was using to plough the land. The respondent reported the incident to the police which arrested the appellants but on 15th July, 2012 they escaped from the police. The respondent further reported he matter to the Omiya Anyima Sub-county Land Committee which ordered the appellants off the land and they vacated the land. Once gain during the year 2015 without any claim of right the appellants forcefully entered onto the land whereupon they established gardens. The appellants have since then refused to vacate the land, hence the suit.

[3] In their joint written statement of defence, the appellants denied the respondent's claim. The appellants claimed that the land in dispute originally belonged to their late grandfather Obulu. Upon his death, it was inherited by their late father Nyeko Mario. Both deceased persons were buried on that land. When their father died, they too inherited the land. They were born and raised on that land and now their own children occupy parts of it. They have at all material time been in possession

of the land where they have gardens and use part of it for grazing. It is instead the respondent who has made attempts to forcefully deprive them of the land but he has never been in occupation. They prayed that the suit be dismissed with costs.

The respondent's evidence in the court below:

[4] P.W.1 Ojera Alex Amos testified that he was born and raised on the land in dispute by his father Orach Silvano Owiny, the respondent. His father inherited the land from his grandfather Owiny. When the appellants encroached onto the land during the year 2012, the Land Committee of Omiya Anyima Sub-county ordered them to vacate the land and they complied. They again encroached onto the land in 2015. All the neighbours to the land belong to the Pajong Clan. The appellants have no graves of any of their relatives on the land. The appellants' grandfather Obulu was the traditional Chief of the Akara Clan that originated from Pulwoc Kal in Akara Parish, Mucwini sub-county. His father, the respondent Orach Silvano Owiny, gave a five acre piece of land, East of the land in dispute, to the 1st appellant's paternal uncle Ajibina Lapaya on temporary terms. That part is not in dispute but the appellants have since exceeded the boundary and encroached onto the land now in dispute.

[5] P.W.2 Okeny Jackson, the respondent's paternal uncle and a neighbour to the North of the land, testified that when the appellants encroached onto the land during the year 2012, the Land Committee of Omiya Anyima Sub-county ordered them to vacate the land and they complied. They again encroached onto the land in 2015. The respondent at all material time was in possession of the land in dispute. The appellants' grandfather Obulu was the traditional Chief of the Akara Clan that originated from Pulwoc Kal in Akara Parish, Mucwini sub-county. The appellants have never been in possession. The respondent Orach Silvano Owiny, gave a five acre piece of land, East of the land in dispute, to the 1st appellant's paternal uncle Ajibina Lapaya on temporary terms. There is a grave of

the 1st appellant's late brother on that land. That land was given by Owiny Silvano to the 1st appellant's father but for an un-specified period.

[6] P.W.3 Ojok Quinto, an immediate neighbour to the land in dispute, across Ora Pamin-Molo Stream, testified that when the appellants encroached onto the land during the year 2012, the Land Committee of Omiya Anyima Sub-county ordered them to vacate the land and they complied. They again encroached onto the land in 2015. The respondent at all material time was in possession of the land in dispute. The appellants have never been in possession. They live approximately six kilometres away from the land in dispute. The appellants' grandfather Obulu was the traditional Chief of the Akara Clan that originated from Pulwoc Kal in Akara Parish, Mucwini sub-county. When the Committee visited the land the 1st appellant showed it the grave of his deceased brother but not that of his late father.

[7] P.W.4 Anywar Solomon, another immediate neighbour to the land in dispute, across Lagot Stream and a Hoe Chief (*Rwot Kwero*) in the area, testified that the respondent Orach Silvano Owiny, gave a five acre piece of land, East of the land in dispute, to the 1st appellant's paternal uncle Ajibina Lapaya on temporary terms and that area is not in dispute. When the appellants encroached onto the land during the year 2012, the Land Committee of Omiya Anyima Sub-county ordered them to vacate the land and they complied. They again encroached onto the land in 2015. The respondent at all material time was in possession of the land in dispute. The appellants have never been in possession. The appellants' grandfather Obulu was the traditional Chief of the Akara Clan that originated from Pulwoc Kal in Akara Parish, Mucwini sub-county. When the Committee visited the land the 1st appellant showed it the grave of his deceased brother.

[8] P.W.5 Acaye Raymond, another immediate neighbour to the land in dispute, across Lagot Stream and a former Hoe Chief (*Rwot Kwero*) of the area, testified that when the appellants encroached onto the land during the year 2012, the

Land Committee of Omiya Anyima Sub-county ordered them to vacate the land and they complied. They again encroached onto the land during the year 2015. The respondent at all material time was in possession of the land in dispute. The appellants have never been in possession. They live approximately six kilometres away from the land in dispute. The appellants' grandfather Obulu was the traditional Chief of the Akara Clan that originated from Pulwoc Kal in Akara Parish, Mucwini sub-county. The 1st appellant showed them two graves on the land.

The appellants' evidence in the court below:

[9] The 1st appellant, Otto Francis, testified as D.W.1; and stated that the land originally belonged to his late grandfather Rwot Obulu and on his death it was inherited by his father the late Nyeko Mario. There are only two graves on the land in dispute, that of his grandfather Rwot Obulu who died in 1946 and was buried on that land and not in Mucwini. His father Nyeko who died in 1968 too was buried on that land. He occupies the land together with his sons who are the rest of the appellants. They have homesteads and gardens on the land.

[10] D.W.2. Ocan Severino testified that the land originally belonged to the 1st appellant's late grandfather Rwot Obulu and on his death it was inherited by his father the late Nyeko Mario. Both were buried on that land. The land in dispute is the customary land of the Akara Clan. The 1st appellant occupies the land together with the rest of the appellants who are his sons. They were born and raised on that land. They have homesteads and gardens on the land. The 1st appellant has been using the land in dispute for grazing. Rwot Obulu was buried on the land. The respondent is attempting to forcefully deprive the appellants of their land.

[11] D.W.3 Ezekiel Ongany testified that the land originally belonged to the 1st appellant's late grandfather Rwot Obulu and on his death it was inherited by his

father the late Nyeko Mario. The graves of Rwot Obulu and Nyeko are located on the land in dispute. Two of the 1st appellant's deceased siblings, Ongwech and Arop, too were buried on the land in dispute. The land in dispute was used by the Akara Clan as their grazing land although it is near that of the Pajong Clan. The 1st appellant occupies the land together with the rest of the appellants who are his sons. They were born and raised on that land. The respondent is attempting to forcefully deprive the appellants of their land.

[12] D.W.4. Ogenga John testified that the land originally belonged to the 1st appellant's late grandfather Rwot Obulu and on his death it was inherited by his father the late Nyeko Mario. The graves of Rwot Obulu and Nyeko are located on the land in dispute. The graves of Ongwech and Arop are no longer visible due to passage of time. The land in dispute belongs to the Akara Clan although it is near that of the Pajong Clan. The 1st appellant occupies the land together with the rest of the appellants who are his sons. They were born and raised on that land. The respondent is attempting to forcefully deprive the appellants of their land.

Proceedings at the *locus in quo*:

[13] The court then visited the *locus in quo* on 11th May, 2017 but did not compile a record of what transpired thereat. The trial Magistrate prepared a sketch map showing that D.W.3 Ezekiel Ongany is the immediate neighbour to the West of the land in dispute. D.W.4. Ogenga John is the immediate neighbour to the South of the land in dispute. D.W.2. Ocan Severino is the immediate neighbour to the East of the land in dispute. The land in dispute is to the North of that occupied by the appellants.

Judgment of the court below:

[14] In his judgment delivered on 12th July, 2017, the trial Magistrate found that although the appellants testified that they were born and lived on the land in dispute where their father and grandfather respectively were buried, when the court visited the *locus in quo* it did not find any evidence of homesteads or graves. The land was used exclusively for cultivation of crops. The appellants live approximately six kilometres away from the land in dispute. The appellants' father and grandfather Twon Okun village, Akara Parish, Mucwini sub-county but not on the land in dispute. The land in dispute was formerly used by members of the Loyito Pajong Clan for hunting and performance of their cultural rituals. The appellants' grandfather Obulu was the traditional Chief of the Akara Clan that originated from Pulwoc Kal in Akara Parish, Mucwini sub-county. The appellants do not belong to the Loyito Pajong Clan, which is the respondent's clan but rather to the Akara Clan. The court found that the land in dispute belongs to the Loyito Pajong Clan, the respondent's clan. He occupied the land in dispute for many years and therefore he is its rightful customary owner. He was declared the rightful owner of the land and the appellants as trespassers on that land. A permanent injunction was issued restraining the appellants from further acts of trespass on the land. Judgment was entered in favour of the respondents with costs.

The grounds of appeal:

[15] The appellants were dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at an erroneous decision against the appellants which occasioned a miscarriage of justice.

2. The learned trial Magistrate erred in law and fact when he denied the appellants an opportunity to be heard hence occasioning a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact and demonstrated bias when he ignored an application filed seeking a temporary injunction but instead went ahead to deliver an erroneous judgment against the appellants.
4. The learned trial Magistrate erred in law and fact when at the *locus in quo* he was shown the graves of the appellants' father and grandfather but chose to ignore them thereby arriving at an erroneous decision.
5. The learned trial Magistrate erred in law and fact when at the *locus in quo* he ignored the sisal plantation planted by the first appellant's father that was shown to him and also rejected evidence from other witnesses.
6. The learned trial Magistrate erred in law and fact when at the *locus in quo* he ignored the ruins of the former homestead of the first appellant's father that were shown to him thereby arriving at an erroneous decision.

Arguments of Counsel for the appellants:

[16] In their submissions, counsel for the appellants argued that despite the respondent having failed to lead evidence establishing his root of title to the land in dispute, the decision was delivered in his favour. On the other hand, the appellants adduced evidence of their root of title by inheritance from their late father Obulu and had artefacts on the land indicating their physical possession. All the respondent's witnesses confirmed the appellants' possession of the land. On its own motion, the court decided that cross-examination done by the 1st appellant would suffice and be representative of the rest. As a result, apart from the 1st appellant, the rest of the appellants were denied their right to cross-examine the respondent and his witnesses. Although it visited the *locus in quo* and relied on its observations made thereat, the court did not compile a record of

those proceedings. This occasioned a miscarriage of justice and therefore the appeal should be allowed.

Arguments of Counsel for the respondent:

[17] In response, counsel for the respondent argued that the first ground of appeal is too general and should be struck out. The record of proceedings shows that four of the appellants testified whereupon they closed their case. The 2nd and 8th appellants did not indicate that they intended to testify. They were not prevented by court. There is no evidence of bias on the record. The trial Magistrate conducted proceedings at the *locus in quo* in accordance with the established guidelines and could not permit persons who had not testified in court to give evidence at the locus in quo. The appellants' evidence regarding the presence of graves of their deceased relatives on the land was contradictory and unreliable. At the *locus in quo*, the court established that there were no graves or ruins of former homestead on the land and the appellants live approximately six kilometres away from the land in dispute, at Twon Okun village, Akara Parish, Mucwini sub-county. The court did not find any homestead belonging to the appellants on the land in dispute. He prayed that the appeal be dismissed.

Duties of a first appellate court:

[18] 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*).

[19] 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.

The first ground struck out for being too general.

[20] In agreement with the submissions of counsel for the respondent, I find the first 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.

Grounds two and three

[21] In grounds two and three, the trial Magistrate is faulted for alleged bias and for denying the appellants an opportunity to testify and cross-examine the respondent ns his witnesses. It is important to remember that o*ur judicial system is adversarial.* The court acts as a referee between the two parties where the whole process is a contest between two parties. As reflected in Order 18 of *The Civil Procedure Rules*, each of the parties determines the number of witnesses to call and the nature of the evidence they give. The court simply oversees the process by which evidence is given. The decision to close one's case is left to the party and it may be exercised by a party personally or through counsel. When all evidence has been heard, the trial court declares that the submission of evidence is closed and if the trial does not involve a visit to the *locus in quo*, invites the parties to make their final submissions. In the instant case, the record shows that after the testimony of D.W.4. Ogenga John, the appellants indicated they had closed their case. There is nothing to show that they or any of their intended witnesses were prevented from testifying.

[22] As regards the contention of bias, all litigants are entitled to objective impartiality from the judiciary. It is for that reason that Principle 2.4 of the *Uganda Code of Judicial Conduct, 2003* requires a judicial officer to "refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned." Impartiality can be described as a state of mind in which the judicial officer is disinterested in the outcome and is open to persuasion by the evidence and submissions. A judicial officer is "impartial" when he or she is free of bias or prejudice in favour of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before him or her. The reasonable person expects judicial officers to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them.

[23] Whether a judicial officer is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. The test of judicial bias contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. The reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties the judicial officers swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case. A real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judicial officer in question improperly used his or her perspective in the decision-making process. There has to be a proper and appropriate factual foundation for a reasonable apprehension of bias. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.

[24] In the instant case what is being advanced are mere procedural errors by the trial magistrate. Of themselves they do not show that the trial magistrate failed the test of impartiality. They do not demonstrate that he failed to proceed with an open-minded, dispassionate, careful, and deliberate investigation and consideration of the complicated reality of the case before him but, that instead he relied on stereotypical undue assumptions, generalisations or predeterminations. A reasonable person who is fully informed of and understands all facts and circumstances surrounding this case and seeing the outcome of the case, may not reasonably question the trial magistrate's impartiality in the matter. The two grounds of appeal therefore fail.

[25] In grounds four, five and six of appeal, the trial court is faulted for having ignored material physical items shown to it during the visit to the *locus in quo*. It was the

respondent's case that he gave the 1st appellant only five acres to the East of the land in dispute on temporary basis while the appellants contended that they were born and raised on the land in dispute. As evidence of their long occupancy they claimed to have graves of Rwot Obulu, Nyeko Mario, Ongwech and Arop on the land. It was necessary of the trial court to establish the boundaries of the five acre piece of land acknowledged by the respondents as given to the 1st appellant and form that point determine whether the graves alluded to by the appellants were within or outside the five acres. It had also to determine and illustrate on the sketch map the features shown to it by the witnesses. It cannot be determined from the available record whether this was done or not.

[26] Being a procedure undertaken pursuant to Order 18 rule 14 of *The Civil Procedure Rules,* proceedings at the *locus in quo* are an extension of what transpires in court. They are undertaken for purposes of inspection of a property or thing concerning which a question arises during the trial. For the inspection of immovable property, objects that cannot be brought conveniently to the court, or the scene of a particular occurrence, the court may hold a view at the *locus in quo*. According to section 138 (1) (b) of *The Magistrates Courts Act* and Order 18 rule 5 of *The Civil Procedure Rules*, evidence of a witness in a trial should ordinarily be taken down in the form of a narrative, and this by implication includes proceedings at the *locus in quo*.

[27] Therefore, at the *locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court (see *Karamat v. R [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; [1956] 40 Cr App R 13*). Evidentiary statements made under examination should be noted in the record to the extent they can be assumed to be of significance in the case. The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a *locus in quo*.

[28] The record in the instant case does not disclose if any witnesses were sworn and if any questions were asked by any of the parties at the *locus in quo* concerning what the court ultimately observed. As matters stand, the observations made are hanging, not backed by any identifiable evidence recorded from witnesses. That part of the proceedings, if it was compiled at all, 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.

[29] The law on a missing record of proceedings though 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*).

[30] It is my view that a sketch map drawn at the *locus in quo* is not substantive but only demonstrative evidence. Being only demonstrative evidence, it is neither testimony nor substantive evidence. Nevertheless, it was of critical importance in this case that the features observed by court are attributed to specific witness in accordance with a process that was compliant with Order 18 rule 14 of *The Civil Procedure Rules*. Absence of that part of the record therefore cannot be ignored. In the instant case, that part of the record is missing, reconstruction of the missing part of the record is impossible yet all the available material on record is insufficient to take the proceedings to its logical conclusion.

[31] Where reconstruction of the missing record is impossible and court forms the opinion that all the available material on record is not sufficient to take the proceedings to its logical end, a re-trial would be ordered (see *Mukama William*

v. Uganda, [1968] M.B. 6; Nsimbe Godfrey v. Uganda, C.A. Criminal Appeal No. 361 of 2014 and *East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-200] HCB 331*). This Court cannot proceed on the basis of mere surmises on what the trial court observed at the *locus in quo* and as to how its observations thereat influenced or did not influence its decision.

[32] An order for retrial is an exceptional measure to which resort must necessarily be limited. A trial *de novo* is usually ordered by an appellate court when the original trial fails to make a determination in a manner dictated by law. A retrial should not be ordered unless the following conditions are met; (i) that the original trial was null or defective; (ii) that the interests of justice require it; (iii) that the witnesses who had testified were readily available to do so again should a retrial be ordered; and (iv) no injustice will be occasioned to the other party if an order for retrial is made. These conditions are conjunctive and not disjunctive. The context of each retrial is unique, and its impact can only be addressed by taking into account this individual context. An appellate court may order a new trial if doing so could fix an injustice associated with the first trial. I find in this case that there is need to correct significant errors that occurred during trial and this can only be done by way of a re-trial.

Order :

[33] In the final result, the interests of justice in this case would be best served by a re-trial. For that reason, a retrial is accordingly ordered. Each party is to bear their costs of this appeal.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Makmot Kibwanga Co. Advocates.

For the respondent : M/s Owor-Abuga Co. Advocates.