IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 004 of 2018

In the matter between

OKELLO SISTO DENISH **APPELLANT**

And

PADER SUB-COUNTY LOCAL GOVERNMENT **RESPONDENT**

Heard: 13 September, 2019.
Delivered: 26 November, 2019.

Land law *— Locus in quo — a sketch map drawn at the locus in quo is not substantive but only demonstrative evidence. 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.*

Civil Procedure *— Res judicata — res judicata is a defence rather that a basis for proving a claim.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for recovery of approximately two square kilometres of land located at Kilak Central, Ora Luka and Obotajali Wards, Kilak Parish, Pader Sub-county in Pader District, a declaration that he is the rightful customary owner of the land in dispute, general damages for trespass to land, an order of vacant possession, a permanent injunction and the costs of the suit. The appellant's claim was that the land in dispute originally belonged to his late father Okech Gabriel. He inherited the land upon the death of his said late father in

1995. He enjoyed quiet possession of the land, established gardens and reared livestock thereon until the year 2013 when the respondent began trespassing on it by construction of a cattle dip without his consent. The respondent thereafter began construction of an educational institution on the land against the appellant's protestations. The respondent has since refused to vacate the land claiming that it has a title to the land, hence the suit.

[2] In its written statement of defence the respondent denied the appellant's claim. The respondent claimed to be the lawful owner of the land in dispute. The respondent contended the appellant's suit was bad in law and the plaint did not disclose a cause of action. The respondent prayed that the suit be dismissed with costs.

The appellant's evidence in the court below:

[3] In his testimony as P.W.1 Okello Sisto Denish, the appellant, stated that the land originally belonged to his grandfather who acquired in during the 1930s. His family has occupied the land since then. They planted mango trees, Shea nut trees and have graves of their deceased relatives on the land. In 1999 he leased part of the land to Kitgum Veterinary office for a period of two years only. In the year 2000, another request was made to use the land and they allowed them to use the land temporarily. During the insurgency, sub-county authorities established an Internally displaced People's Camp on the land and by the year 2006 had gone ahead to construct the sub-country headquarters, a health centre, cattle dip and a technical institute on the land. The respondent has been involved in litigation with the appellant and his brother Langoya Christopher. In both suits the decision was against the respondent.

The respondent's evidence in the court below:

[4] In their defence, the respondents presented D.W.1 Okello Joseph the Chairman L.C.1 of Ogwil West village and cousin of the appellant, who testified that the appellant comes from Ogwil West in Pader and that is where his family's customary land is located. His father was buried there. The appellant has lived on that village since 1968. All their siblings live on that village. The land in dispute is property of the Government. The witness, the appellant and the rest of the family lived in an IDP Camp at Kilak Corner from 1997 to 2006. D.W.2 Okech John Langoya, the Chairman L.C.II of Kilak Parish, testified that the appellant's family's customary land is located at Ogwil West in Pader, five kilometres away from the land in dispute. The appellant has never owned the land in dispute. His father died in 1974 and was buried at Ogwil West. In 1967 a ranch was established on the land by the then Ministry of Agriculture, Animal Husbandry and Fisheries. The Ministry established thereon cattle dip in 1970, a bore hole in 1971and fenced the land off. During the year 2000 Government began restocking the farm. The respondent constructed thereon Health Centre III in 2004, and a Technical Institute in 2015.

[5] D.W.3 Ogwa Charles testified that it is the former Ministry of Agriculture, Animal Husbandry and Fisheries that constructed a cattle dip, staff houses, a bore hole and pit latrines on the land in dispute. He worked as a casual labourer on that ranch in 1970. There were no families living on the land at the time the ranch was established. The appellant's father Okech Gabriel died in 1974 and was buried at Ogwil West. He never lived nor occupied the land at all during his lifetime. the land belongs to the Government.

Proceedings at the *locus in quo*:

[6] The trial court vested *the locus in quo* on 8th December, 2017. It observed that the appellant failed to attend the proceedings without offering any explanation.

The court found ruins of a cattle dip, staff houses, a bore hole and pit latrines that were constructed thereon in 1967. A new Technical Institute (Kilak Corner), a new cattle dip and a new health Centre constructed by the respondent were visible on the land. The court did not prepare a sketch map but received in evidence multiple photographs taken of these features found on the land.

Judgment of the court below:

[7] In his judgment delivered on 21st December, 2017 the trial Magistrate found that although the appellant claimed to have leased the land to the Ministry of Agriculture for two years only, he did not produce any documentary proof. The three witnesses who testified on behalf of the respondent were believable and credible. Their evidence was not discredited by cross-examination. The appellant therefore is not the rightful owner of the land and has no cause of action against the respondent. The former Ministry of Agriculture, Animal Husbandry and Fisheries had in 1967 established a cattle dip, staff houses, a bore hole and pit latrines, ruins of which were seen by court during its visit to the *locus in quo*. It is the former Ministry of Agriculture, Animal Husbandry and Fisheries that allowed the respondent to take possession of and manage the land. It is on that account that the respondent had gone ahead to construct a new Technical Institute (Kilak Corner), a new cattle dip and a new health Centre. The respondent therefore is not a trespasser on the land. Instead it is the appellant who is a trespasser on the land. The appellant has no cause of action, there is no merit in his claim. The respondent was declared rightful owner of the land. The suit was dismissed with costs to the respondent and an order made for eviction of the appellant from the land after thirty days from the date of judgment.

The grounds of appeal:

[8] The appellant was dissatisfied with the decision and appealed to this court on the following grounds that have been paraphrased, namely;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision.
2. The learned trial Magistrate erred in law and fact when he failed to find that the suit was *res judicata* having been tried before by the High Court at Gulu in an earlier suit filed in the year 2006 in which the three respondent's witnesses were sued for wrongful sale of parts of the land in dispute.
3. The learned trial Magistrate erred in law and fact when he failed to draw a sketch map and compile a list of persons in attendance during the court's visit to the *locus in quo*.
4. The learned trial Magistrate erred in law and fact when he failed to find that the veterinary doctors who occupied the land in the past did so temporarily and had no claim over or interest in the land.

Arguments of Counsel for the appellant:

[9] Counsel for the appellant did not present any submissions in support of the appeal. In their submissions, counsel for the respondents argued that the first ground of appeal is too general and ought to be struck out. They prayed that the appeal be dismissed with costs of the respondent.

Duties of a first appellate court:

[10] 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*).

[11] 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 of appeal is struck out for being too general:

[12] 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.

Errors in conducting the proceedings at the *locus in quo*

[13] In the third ground of appeal, the trial Magistrate is faulted for his failure to prepare a sketch map and to compile a list of the persons present during the court's visit to the *locus in quo*. It is trite 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. 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. In the instant case the oral evidence and the photographs presented as exhibits are very clear. The omission was therefore not fatal. Similarly, compilation of a list of the persons in attendance, although desirable, is not mandatory. The omission to compile such a list does not vitiate the proceedings. This ground accordingly fails.

Grounds two and four

[14] In grounds two and four of appeal, the trial Magistrate is faulted for his failure to find that the suit was *res judicata* and was in error when he found that the land does not belong to the appellant. It is a settled principle of the law that once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in another suit afresh *(see In the Matter of Mwariki Farmers Company Limited v. Companies Act Section 339 and others [2007] 2 EA 185).* For *res judicata* to apply, it must be shown that the earlier decision was by a court of competent jurisdiction, the decision must be shown to have been final on the merits in that suit, the decision in the former suit must also be shown to have concerned a matter that is directly and substantially in issue in the subsequent suit and the earlier decision should have been between the same parties, their successors in interest or their privies *(see Saleh Bin Kombo Bin*

Faki v. Administrator-General, Zanzibar [1957] EA 191). In the instant case, none of these requirements were proved by the appellant. The documents he produced were not judgments but photocopies of letters that were only identified and not admitted in evidence as exhibits. In any event, *res judicata* is a defence rather that a basis for proving a claim.

[15] As regards the finding delivered in favour of the respondent, it is settled law that "possession is good against all the world except the person who can show a good title" *(see Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5).* Possession may thus only be terminated by a person with better title to the land. To be entitled to evict the plaintiffs from the land, the defendants must prove a better title to the land. If someone is in possession and is sued for recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them *(see Ocean Estates Ltd v. Pinder [1969] 2 AC 19).* Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. The plaintiff must succeed by the strength of his or her own title and not by the weakness of the defendant's. He did not prove to be the holder of a better title. His claim that family has occupied the land since the 1930s was not proved.

[16] To the contrary, the evidence showed that the respondent, and its predecessor in title, the Ministry of Agriculture, Animal Husbandry and Fisheries, has been in possession of the land since 1967. The appellant claimed that the respondent's predecessors in title were mere licensees. Proof of the license is lacking. Evidence of permanent structures dating back to the 1970s is inconsistent with temporary occupation under a license. They support a finding of exclusive possession by the respondent. The trial Magistrate therefore came to the correct conclusion.

Order:

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

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Appeared *pro se*.

For the respondent : Ms. Twesigomwe Doris, State Attorney.