IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 004 of 2015

In the matter between

OYELLA MARGARET **APPELLANT**

And

KIJUM JOSEPH **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure *— section 70 of The Civil Procedure Act and section 166 of The Evidence Act — 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.*

Land Law*— 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.— 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.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for recovery of land measuring approximately three acres (estimated to be 100 feet by 40 feet) situated at Labolatek village, Dure Parish, Acholibur sub-county, in Pader District, a declaration that the appellant is the rightful owner of the land in dispute, an order of vacant possession, general damages for trespass to land, *mesne* profits, a permanent injunction and the costs of the suit. Her claim was that she was born and raised on that land. She inherited the land in dispute from her father the late Obura Yokana and enjoyed quiet possession thereof until the year 2009 when the respondent, without any claim of right, prevented her employees from constructing a house on the land claiming that it belonged to him, hence the suit.

[2] In his written statement of defence, the respondent refuted the appellant's claim and averred instead that the land in dispute belonged to his father and he was buried thereon upon his death. The respondent inherited it from his late father. It is the respondent's late father who before his death gave a portion of the land to the appellant's father when he was posted to that area to work with the Public Works Department. The respondent has no intention of evicting the appellant from that area which she inherited from her father.

The appellant's evidence in the court below:

[3] P.W.1 Oyella Margaret, the appellant, testified that her father acquired the land when he came to the area to work with the Public Works Department. She was born and raised on that land. When her father died he was buried on that land and she too buried her deceased son on the land. The respondent began trespassing onto the land following the disbanding of the IDP Camps.

[4] P.W.2 Banya James testified that he is a neighbour to the land in dispute with which he shares a common boundary. The appellant's father, Yokana Obura

Ngana, was a herdsman and was in possession of the land in dispute, measuring approximately three acres, from as way back as 1950 and used to graze his cattle thereon until his death in 1976. It is after the disbanding of the IDP camps that the dispute over that land began. There are mango trees and graves of the appellant's deceased relatives on that land. The appellant's father used to graze cattle on part of the land. The appellant resided on that land before she was displaced by the insurgency.

[5] P.W.3 Kitara John testified that he has lived in the neighbourhood of the land in dispute since 1947. The appellant's father Yokana Obura Ngana was allocated the land in dispute by the then local chief, who used to live where the *Yamanos* tree is located. He lived on the land in dispute until his death in 1976, whereupon he was buried on that land. His widow and the appellant remained on the land. It is after the disbanding of the IDP camps that the dispute over that land began. The respondent began claiming the land and sued the appellant before the L.C. Courts. There is an Olam tree, mango trees and graves of the appellant's deceased relatives on that land.

[6] P.W.4 Fabio Oroma testified that the appellant's father Yokana Obura Ngana lived on the land in dispute until his death in 1976, whereupon he was buried on that land. His widow too was buried on that the land when she eventually died. It is after the disbanding of the IDP camps that the dispute over that land began. The respondent began claiming the land and sued the appellant before the L.C. Courts. There are mango trees and graves of the appellant's deceased relatives on that land. He knows that land very well as belonging to the appellant's father since he himself used to graze his cattle on the land.

<u>The respondent's evidence in the court below</u>:

[7] Testifying in his defence as D.W.1 Kijum Joseph, the respondent, stated that the land in dispute originally belonged to his great grandfather Olwoch, it was then

inherited by his grandfather Kijum Delmoi. When he died, it was inherited by the respondent's father and thereafter by the respondent. It is the respondent's late father who before his death gave a portion of the land to the appellant's father when he was posted to that area to work with the Public Works Department. The appellant's late husband too worked with the Public Works Department. He has no claim over the land his late father gave to the appellant's father. It is during the year 2010 that the appellant's nephew attempted to construct a hut on the land in dispute, that the dispute began.

[8] D.W.2 Owiny John Aber testified that the respondent inherited the land in dispute from his late grandmother Ayugi, wife of Kijum Delmoi. It is when the appellant's nephew attempted to construct a hut on the land in dispute, that the dispute began. The dispute is over about two acres. The appellant had left the land when she married and lived in Oryang. D.W.3 Opoka Albino, testified that the appellant had never built a house on the land in dispute. The appellant inherited land from her late father. It is the respondent's father who gave a portion of his land, measuring approximately one acre, to the appellant's father to put up a house. The dispute is over about two acres.

Proceedings at the *locus in quo*:

[9] The court indicated that it would visit the *locus in quo* on 10th September, 2014 but that aspect of the proceedings does not form part of the record of appeal.

Judgment of the court below:

[10] However in his judgment delivered on 20th January, 2015, the trial Magistrate stated that when the court visited the *locus in quo* it found that there was no homestead on the land in dispute. There were no graves as well, possibly they exist on the part that is not in dispute. The area in dispute is approximately two acres, out of the approximately twenty acres of land. It was the testimony of the

respondent that the appellant had never lived on the land in dispute. The respondent gave a history of his origin of title while the appellant was unable to explain how her late father acquired the; land. It is the respondent who testified that the appellant's father was given a portion of the land. The appellant failed to prove her case o the balance of probabilities. The suit was dismissed with costs to the respondent.

The grounds of appeal:

[11] The appellant was dissatisfied with that 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 evidence adduced by the appellant did not prove how her father acquired the land in dispute, thereby coming to the wrong conclusion.
2. The learned trial Magistrate erred in law and when he found that the appellant's father had been given the land in dispute but failed to take into account the period of time he had been in possession of the land, thereby coming to the wrong conclusion.
3. The learned trial Magistrate erred in law and fact when he failed to take into account the fact that the appellant had inherited the land from her father and had for decades lived on the land in dispute, thereby coming to the wrong conclusion.
4. The learned trial Magistrate erred in law and fact when he failed to conduct proceedings at the *locus in quo* properly thereby coming to the wrong conclusion.
5. The learned trial Magistrate erred in law and fact when he failed to take into account that for a long time an injunction prevented any activities on the land and this had an impact on the features seen during the visit to the *locus in quo*.
6. The learned trial Magistrate erred in law and fact when during the visit to the *locus in quo* he failed to inspect the entire land in dispute hence

missing the opportunity to see the graves, the remains of old buildings and evidence of cultivation by the appellant and her family, thereby coming to a wrong conclusion.

7. The learned trial Magistrate erred in law and fact when during the visit to the *locus in quo* he failed to interact with the neighbours and locate the homestead of the appellant and her family, thereby coming to a wrong conclusion.
8. The learned trial Magistrate misdirected himself when he failed to apply the principle of adverse possession and thereby came to a wrong conclusion.
9. The learned trial Magistrate erred in law and fact when he engaged in conjecture, thereby coming to a wrong conclusion.

Arguments of Counsel for the appellant:

[12] In their submissions, counsel for the appellant submitted that the appellant's evidence to the effect that her father had lived on the land, cultivated gardens and grazed his cattle thereon before his death and burial on that very land was corroborated by immediate neighbours to the land. The respondent admitted the appellant's father had lived on the land but was unsure of the date his father purportedly gave that of the appellant, part of the land. The appellant had occupied the land without dispute until the year 2009. By reason the of the long period of user and occupancy, the trial Magistrate ought to have invoked the principle of adverse possession. There is no record of what transpired during the visit to the *locus in quo* yet the trial Magistrate relied on her observations thereat. There is no evidence to show that she inspected the entire land. The trial Magistrate engaged in conjecture when she made findings of fact regarding what did or did not exist on the land. The appeal therefore ought to be allowed.

Arguments of Counsel for the respondents:

[13] In response, counsel for the respondent, submitted that the appellant bore the burden of proving how her father acquired the land in dispute but she did not adduce any evidence in that regard. The visit to the *locus in quo* was properly undertaken on 14th October, 2014 and this is stated in the judgment. There was no homestead, graves or evidence of recent utilisation of the land. The fact that the appellant failed to guide the court to demonstrate to the court the features she had mentioned in her testimony shows that they were either an afterthought or false. The trial Magistrate came to the right conclusion and therefore the appeal ought to be dismissed.

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 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*).

[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 four, five, six seven and nine; errors in conducting the proceedings at the *locus in quo.*

[16] Grounds four, five, six, seven and nine query the trial courts conduct of proceedings at the *locus in quo*. 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*.

[17] 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*. The record in the instant case does not disclose if the 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. This part of the proceedings is missing from the record.

[18] Where reconstruction of the missing 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*).

[19] That aside, visiting the *locus in quo* is intended to enable court check on the evidence given by the witnesses in court, and not to fill gaps in their evidence for them or 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).* Accordingly admission of the evidence of Odong Robert, who had not testified in court, was an error.

[20] However, section 70 of *The Civil Procedure Act*, provides that no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Similarly, 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.

[21] Before this court can set aside the judgment on account of the abovementioned irregularities, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. 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.

[22] I find that considering the nature of the dispute at hand, these irregularities are not fatal since the available material on record is sufficient to take the proceedings to its logical end. According to Order 43 rule 20 of *The Civil Procedure Rules*, where the evidence upon the record is sufficient to enable the High Court to pronounce judgment, the High Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the High Court proceeds.

Grounds one, two, three and eight; courts' findings as to ownership.

[23] In grounds one, two, three and eight, the trial court is faulted for its findings regarding ownership of the land in dispute. The trial court was presented with two versions between which it had to determine the more plausible one. When evaluating the reliability and plausibility of evidence, this may be determined on the basis of the witness's possession of superior knowledge and the degree of disinterestedness in the outcome. By not availing the opportunity of access to some vital information, some sources information lead to inaccurate or incomplete knowledge. Information is factual in nature when it is obtained first hand. Because of personal knowledge or experience of the facts by the witnesses, considered in light of the circumstances, ordinary logic and experience, one version may be found to be more plausible than the other. Testimony is more reliable if it is the product of personal knowledge or experience that is free from error of perception or lapse of memory.

[24] The appellant was 80 years old (hence born in 1933) at the time she testified and stated that she was born and had lived on the land all her life. P.W.2 Banya James was 75 years old (hence born in 1938) at the time he testified and stated

that he had seen the appellant's father utilising the land in dispute as way back as 1956. P.W.3 Kitara John was 84 years old (hence born in 1929) at the time he testified and stated that he had lived in the neighbourhood of the land in dispute since 1947 and had seen the appellant's father utilising the land in dispute until his death in 1976. P.W.4 Fabio Oroma was 85 years old (hence born in 1928) at the time he testified and stated that the appellant's father utilised the land in dispute until his death in 1976. All these witnesses testified from personal knowledge or experience of having seen the appellant's father on the land around 1947 - 1950 while they were in their teens or early twenties respectively. They were immediate neighbours to the land for all that long. Save for the appellant, the rest of them had no obvious interest in the outcome of the litigation. Cross-examination did not discredit them nor reveal that their testimony suffered from the likelihood of error of perception or lapse of memory.

[25] On the other hand, D.W.1 Kijum Joseph, the respondent, was 55 years old (hence born in 1958) at the time he testified and stated that it is his father who gave a portion of the land to the appellant's father when he was posted to that area to work with the Public Works Department. D.W.2 Owiny John Aber was 85 years old (hence born in 1928) at the time he testified but could not tell how much land was given to the appellant's father. D.W.3 Opoka Albino was 62 years old (hence born in 1951) at the time he testified and stated that it is the respondent's father who gave a portion of his land, measuring approximately one acre, to the appellant's father to put up a house. Two of the witnesses were not even born by 1947 - 1950, the period during which the appellant's father settled on the land. Only one, D.W.2 Owiny John Aber, was in his teens at the time but was evasive in his explanation of how much land the appellant's father was utilising.

[26] There are two versions regarding the circumstances in which the appellant's father Yokana Obura Ngana, acquired the land. According to P.W.3 Kitara John, he was allocated the land in dispute by the then local chief, who used to live

where the *Yamanos* tree is located. The respondent on the other hand stated that it is his late father, Kijum Delmoi who gave Yokana Obura Ngana a portion of the land. For similar reasons, the appellant's version is more plausible considering that the respondent's is based on hearsay. He was not born at the time of that transaction. What is not in doubt though is that the appellant's father had lived in that ear since around 1947 - 1950 until his death in 1976. Whereas the respondent claimed the appellant's father had used only one acre the appellant claimed the entire three acres.

[27] Whereas the appellant, P.W.2 Banya James, P.W.3 Kitara John and P.W.4 Fabio Oroma all testified to having seen the late Yokana Obura Ngana utilising the land partly for his homestead and garden and partly as grazing land until his death and thereafter it was inherited by the appellant who continued to utilise it until 2009, the respondent did not offer evidence of his user of the land at any point in time. According to section 110 of *The Evidence Act*, when the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner. The law is that if a person claiming land does not succeed in proving a better 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*). The respondent was unable to prove a netter title and thus the appellant who had always had possession of the land succeeded in proving her claim to it. Had the trial court properly directed itself it would have come to that conclusion.

Order:

[28] In the final result, the appeal succeeds. Accordingly, the judgment of the court below is set aside. Judgment is instead entered for the appellant against the respondent in the following terms;

a) The appellant is declared the rightful owner of the land in dispute under customary tenure.

b) An order of vacant possession.
c) A permanent injunction issues restraining the respondent, his agents and persons claiming under him from undertaking any activities on the land decreed to the appellant.
d) The costs of the suit and of the appeal.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Okello Oryem and Co. Advocates

For the respondent : M/s Legal Aid Project of the Uganda Law Society