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

Reportable
Civil Appeal No. 004 of 2019

In the matter between

**OKETTA GEORGE** **APPELLANT**

**And**

**1. ACHAYE PHILLIPS**
**2. OJOK ROBINSON**
**3. OKULLU JACKSON**
**4. AKELLO FATUMA** **RESPONDENTS**

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

***Civil Procedure*** *—Appeals — section 80 (2) of The Civil Procedure Act — appellate courts have the same powers and perform as nearly as may be, the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted in them, trial courts have an institutional advantage over appellate courts in the conduct of fact-bound inquiries. — Certainly, where the appellate court finds an error of law in the trial court's judgement arising from the application of a wrong legal standard, the appellate court will articulate the correct legal standard and review the relevant factual findings of the trial court accordingly — However, when an appellate court finds that a trial court's decision is based on a misapprehension of the matters of fact in issue, in circumstances where the material on record is insufficient to guide the decision of the appellate court, the decision of the trial court should be vacated or reversed and the case should be remitted back to the trial court to obtain the relevant facts and decide the case according to a proper understanding of those issues of fact. — Thus the appellate court is able to set out the appropriate parameters of a retrial, taking into account the specific context of each case as well as the relevant principles of law.* — Where the appellate court finds error affecting the determination of only some of

the issues, it may order a retrial solely as to those issues — An appellate court may in its decision and order, direct that the new trial be limited in scope to address only those issues of fact upon which the trial court laboured under a misapprehension, where the issues are not so interwoven that a partial retrial would be unfair to the other party.

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] The appellant sued the respondents jointly and severally for recovery of land measuring approximately 13 acres situated at Lacen-otinga village, Lapanainat West Parish, Koro sub-county Moroto County, in Gulu 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, a permanent injunction and the costs of the suit. His claim was that he is a beneficiary of the estate of the of his late father Oweka Erijali which comprises the land in dispute. The late Oweka Erijali acquired the land in dispute in the year 1983 and his family occupied and had quiet enjoyment of the land, save for the period of insurgency, until the year 2008 when the respondents began trespassing onto the land. The respondents have since then refused to vacate the land hence the suit.

[2] In their joint written statement of defence, the respondents refuted his claim and averred that the land in dispute was acquired by their late grandfather, Ocen Ojama, while it was vacant, unclaimed land. Their father, the late Isaiah Ogwang, was the clan brother of the late Oweka Erijali. He fathered and raised all the respondents on that land. It is Isaiah Ogwang who in the early 1960s on humanitarian grounds permitted the late Oweka Erijali to settle on part of that land. The appellant now seeks to have an extension of the boundary of the land given to his said late grandfather and acquire more of the respondents' land. The land given to the appellant's grandfather is demarcated by a banana plantation. They prayed that the suit be dismissed.

The appellant's evidence in the court below:

[3] The appellant Oketa George testified as P.W.1 and stated that the land in dispute originally belonged to his great grandfather Ocen Ojama, then it passed to his grandfather Chai. It was later inherited by their late father Oweka. There are graves of their deceased relatives on the land. It is after the insurgency that the respondents trespassed onto the land. In 2013 he invited the Area Land Committee to inspect the land in an attempt to obtain a lease over the land. Inspection was undertaken of three and half acres of the land and the document was witnessed by the first respondent. There was a dispute over the rest of the 13 acres and so the Committee did not inspect that part.

[4] P.W.2 Ayat Josephine testified that the land in dispute measures approximately 12 acres. Her father's land, Nicholas Ojwee, is to the North and adjoins that in dispute. The appellant's father, Oweka Erijali with his first wife Akwero Getorina, used to occupy the land in dispute. The wife left the marriage in 1980 and due to insurgency, the land was later left vacant. There are bananas that separate the appellant's land from that of the neighbour Oweka Erijali to the South. *Lucoro* trees later planted later to mark the boundary. Before the insurgency, the appellant had a house and had planted trees on the land in dispute. He restored the house after the insurgency. Originally, a big *Oywello* tree separated the respondents' land from the land in dispute. The tree no longer exists. It is after the insurgency that the respondents occupied part of the appellants' land.

[5] P.W.3 Lanek Janani testified that she is the appellant's paternal untie. The appellant's father, Oweka Erijali with his first wife Akwero Getorina, used to occupy approximately ten acres of land, part of which is now in dispute. A road as established in the year 2000 separates Oweka Erijali's land from that of Isaya Ogwang. When the appellant and his sister returned to occupy the land they found the respondents had encroached onto parts of it and sold off other parts.

The respondents' evidence in the court below:

[6] In his defence as D.W.1, the 1st respondent, Acaye Phillips testified that his grandfather and that of the appellant were brothers. The land in dispute originally belonged to his grandfather Ocen Ojama. It was inherited by his son Orema Gung-Gung, the 1st respondent's grandfather. When the 1st respondent's father Isaya Ogwang died during the year 2001, the 1st respondent inherited the land. It is his father who had initiated the process of acquiring a lease over the land and had planted *Lucoro* trees all along its boundaries. The appellant's father never lived on the land but his mother did. It is the first respondent's father who gave it to the appellant's mother, Akwero Getorina, in 1962. The land given to her is separated from the one in dispute by a *Lucoro* tree. His father attempted to obtain a lease over 200 acres of land, including that which was given to the appellant's mother. The three acres given to the appellant's mother were surveyed. The 1st respondent left out the land occupied by other persons and processed certificate of customary title for only 90 acres, winch exclude the land occupied by the appellant. The boundaries on three sides are marked by bananas planted by the appellant following inspection by the Area Land Committee and one *Oywelo* tree while on the other side is land belonging to the Ayat.

[7] D.W.2 Ojok Robinson, the 2nd respondent, testified that he occupies land measuring approximately 80 meters by 42 meters. It was given to him by his late father Isaya Ogwang during the year 1982 and he has been occupying it since then. It is his late father who gave three acres of the land to the appellant's mother, Akwero Getorina, in the 1960s. The appellant's land is separated from his by a line of banana plants. The 4th respondent Ojok Charles and 5th respondent Akello Fatuma, bought land from the 3rd respondent, Okullu Jackson. That land does not share a common boundary with that of the appellant's mother. The appellant's land is about 100 meters away from the 4th respondent Ojok Charles' land.

[8] D.W.3 Okullu Jackson, the 3rd respondent, testified that he occupies approximately 4 to 5 cares he inherited from his father Joakino Opobo, son of Orema Gung-Gung. He sold part of his late paternal uncle Ongom Sarafino's land, to the 4th respondent Ojok Charles, measuring approximately one acre. He sold another part to the 5th respondent Akello Fatuma, which is about 70 meters from that of the appellant. The 2nd respondent D.W.2 Ojok Robinson's land lies in-between. D.W.5 Ojara Otto Fred is the son of Otto Paolino, hence a grandson of Orema Gung-Gung. It is Isaya Ogwang who gave it to the appellant's mother, Akwero Getorina. Isaya Ogwang and his brothers, planted *Lucoro* trees all around the boundaries of their land. When the appellant invited the Area Land Committee for the inspection of his land, he limited the inspection to the three acres that belonged to his mother Akwero Getorina. It is only during the year 2015 that the appellant began claiming the land occupied by the respondents.

[9] D.W.4. Akello Fatuma, the 5th respondent testified that she purchased the land she occupies from the 3rd respondent D.W.3 Okullu Jackson, during the year 2010. The 4th respondent Ojok Charles is her neighbour to the East. The 2nd respondent D.W.2 Ojok Robinson is her neighbour to the West. The 1st respondent D.W.1 Acaye Phillips, is her neighbour to the South. It was vacant at the time she purchased it. She constructed two huts and a residential house on the land which she occupies. She first saw the appellant five years later during the year 2015 when he initiated court proceedings against her.

[10] D.W.5 Ojara Otto Fred testified that his grandfather and that of the appellant were brothers. It is his late paternal uncle Isaya Ogwang who brought his sister-in-law, the appellant's mother Akwero Getorina, to live on the land. He gave her approximately 2 to 3 acres. The appellant lived with her on that land which they vacated during or around the year 1975. The appellant returned to the land during the year 2008 and planted banana trees to mark the boundary. D.W.5 Ojara Otto Fred sold off part of the land to the 4th respondent Ojok Charles. The entire land occupied by both parties belonged to their common ancestor Ocen

Ojama. The grandfathers of both parties were brothers. When the appellant invited the Area Land Committee for the inspection of his land, he limited the inspection to the three cares that belonged to his mother Akwero Getorina.

Proceedings at the *locus in quo*:

[11] The Court then visited the *locus in quo* on 12th December, 2018 where it observed that the land in dispute measures approximately 10 acres. Together with multiple other persons not parties to the suit, the respondents occupy distinctive areas within the land in dispute. The respondents pointed out the mature *Lucoro* tree demarcating the boundary of their land. The appellant could not point out the exact boundaries of the land he claims. He pointed to hills but this provoked angry reactions from the persons in attendance. The appellant's house is within the area inspected by the Area Land Committee and the bananas planted to demarcate its boundary were visible. A path separates that land from the neighbours. The Court prepared a sketch map of the area in dispute.

Judgment of the court below:

[12] In his judgment delivered on 21st December, 2018, the trial Magistrate found that the appellant is related by blood to the 1st, 2nd and 3rd respondents. The fact that the appellant's father was not buried on the land in dispute but on a separate piece of land distinct from the one in dispute is indicative of the fact that it did not belong to him. When the appellant invited the Area Land Committee to inspect the land, he showed them three and a half acres yet he now claims 13 acres. Although he claimed the land belongs to the estate of his late father, none of his siblings claim any right to it. At the visit to the *locus in quo*, the court observed that the land occupied by the appellant and his sister has clear demarcations marked by *Lucoro* trees that distinguish it from the one in dispute. It lies right in the middle of the land in dispute. There is a clear boundary between the land that belonged to the late Oweka Erijali and that which belonged to the late Isaiah

Ogwang, the latter of whom was buried on the land in dispute. There was evidence of long occupancy by the respondents and other persons not party to the suit, of the land in dispute. By the time of his death, the appellant's father had never challenged the respondents' possession of the land in dispute. The appellant failed to demonstrate the boundary of the land the respondents had trespassed upon. The land claimed by the appellant does not form part of the estate of his late father Oweka Erijali. The appellant has no cause of action and the suit was dismissed with costs.

The grounds of appeal:

[13] 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 land in dispute does not belong to the appellant but is a customary inheritance of the respondents.
2. The learned trial Magistrate erred in law and when he ignored the grave inconsistencies and contradictions in the respondents' evidence thereby arriving at a wrong decision.
3. The learned trial Magistrate erred in law and fact when he held that the 3rd and 4th respondents were bona fide purchasers for value without notice.
4. The learned trial Magistrate erred in law and fact when he conducted proceedings at the *locus in quo* improperly and ignored evidence relating to the boundary between the parties thereby coming to a wrong conclusion.

Arguments of Counsel for the appellant:

[14] In their submissions, counsel for the appellant, submitted that the *Lucoro* trees mentioned by the respondents and stated in the judgment did not in fact exist on

the land at the time the court visited the *locus in quo*. The land in dispute initially belonged to a common ancestor of both parties, Oceng Ojama. When the 1st respondent Acaye Phillips processed a certificate of customary ownership for the 90 acres, it did not indicate any distinctive portions, but rather one block of land. The appellant chose to cause inspection of the three acres free of dispute. The bananas form a common boundary between the appellant's land and that of P.W.2 Ayat Josephine. The appellant and P.W.2 Ayat Josephine each had a dispute with the 1st respondent over different adjoining pieces of land separated by a banana plantation and not a *Lucoro* tree as claimed by the 1st respondent, since it never existed and was never seen during the visit to the *locus in quo*.

[15] They submitted further that when D.W.4. Akello Fatuma, the 5th respondent was purchasing the portion that she now occupies, she never consulted any of the neighbours or the local leaders save the L.C.1. D.W.5 Ojara Otto Fred who sold to the 4th respondent Ojok Charles part of the land that the latter occupies could not specify the size and dimensions of land he sold to him. There was no evidence to show that his father owned the land part of which he sold to the 4th respondent Ojok Charles. The land is not titled hence the concept of bona fide occupancy was inapplicable. The 4th respondent Ojok Charles did not buy in good faith either and chose not to come to court to testify about the transaction. A the *locus in quo*, the mandated procedure was not followed, the banana plantations and *Oywello* tree that the parties showed court were not adverted to in the judgment, yet the court relied on non-existent *Lucoro* trees.

<u>Arguments of Counsel for the respondents</u>:

[16] The respondents did not file submissions in reply.

Duties of a first appellate court:

[17] 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*).

[18] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Grounds one, two and four; inconsistences in respondents' case and errors in conducting the proceedings at the Locus in quo.

[19] In ground 1, 2 and 4, the trial court is faulted for its failure to take into account inconsistencies in the respondents' case, the manner in which it conducted proceedings at the *locus in quo* and findings made in light of its observations there. It is a common ground in this dispute that both parties trace their presence on this land to a common ancestor, Ocen Ojama. While the respondents contend only three acres devolved to the appellant from that common ancestry, the appellant claims it was thirteen acres, ten of which the respondents unlawfully

occupied after the insurgency. From the evidence, the appellant claimed under customary inheritance a right to a thirteen (13) acre part of the land. The respondents too claimed under customary inheritance but contended the appellant's claim was limited to three (3) acres. What was in dispute therefore was not the origin of each party's title but rather the spatial extent of the corresponding inheritance. The question therefore had to be resolved by establishing the true location of the common boundary between land occupied by the disputants.

[20] The appellant's version as stated by P.W.2 Ayat Josephine was that originally, a big *Oywello* tree separated the respondents' land from the land in dispute, but that tree no longer exists. Instead there are bananas that separate the appellant's land from that of the neighbour Oweka Erijali to the South. *Lucoro* trees were planted later to mark the boundary. In contrast, P.W.3 Lanek Janani testified that a road established in the year 2000 separates Oweka Erijali's land from that of Isaya Ogwang.

[21] The respondents' version as stated by D.W.1 Acaye Phillips, the 1st respondent, is that the land given to the appellant's mother, Akwero Getorina, in 1962 is separated from the one in dispute by a *Lucoro* tree. The boundaries on three sides are marked by bananas planted by the appellant following inspection by the Area Land Committee and one *Oywelo* tree while on the other side is land belonging to the Ayat. D.W.2 Ojok Robinson, the 2nd respondent, testified that the appellant's land is separated from his by a line of banana plants. Both D.W.3 Okullu Jackson, the 3rd respondent, and D.W.5 Ojara Otto Fred testified that when the appellant invited the Area Land Committee for the inspection of his land, he limited the inspection to the three acres that belonged to his mother Akwero Getorina.

[22] On the sketch map prepared by the court during the visit to the *Locus in quo*, none of the *Lucoro* trees mentioned by the witnesses are indicated. Only the

location of an old banana plant is shown. The rest of the features mentioned by the parties are not indicated. In the judgment, the trial Magistrate found that "there is a clear boundary between the land that belonged to the late Oweka Erijali and that which belonged to the late Isaiah Ogwang, the latter of whom was buried on the land in dispute." That finding is wholly without support drawn from the record of proceedings of what transpired at the *locus in quo*. It is a theoretically good statement of fact poised, as it were, in the air but not rooted in the factual situation established by the Court. The nature of that boundary was never clarified and neither is it illustrated on the sketch map.

[23] Proof that a trial court entirely misconstrued the nature of the dispute at hand is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to a such degree as to give rise to a right to a new trial or other adequate remedy. The prejudice which must be proved may be manifested where the trial Magistrate failed in some identifiable way, as in the instant case, to assess the evidence properly or expressed an incorrect understanding of the evidence which was given or the submissions which were advanced by the parties.

[24] 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. The discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the parties, the interests of justice, the nature of the dispute, the circumstances of the case in

hand and considerations of public interest. These factors (and others) would be determined on a case by case basis.

[25] Whereas section 80 (2) of *The Civil Procedure Act* provides that appellate courts have the same powers and perform as nearly as may be, the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted in them, trial courts have an institutional advantage over appellate courts in the conduct of fact-bound inquiries. Certainly, where the appellate court finds an error of law in the trial court's judgement arising from the application of a wrong legal standard, the appellate court will articulate the correct legal standard and review the relevant factual findings of the trial court accordingly.

[26] However, when an appellate court finds that a trial court's decision is based on a misapprehension of the matters of fact in issue, in circumstances where the material on record is insufficient to guide the decision of the appellate court, the decision of the trial court should be vacated or reversed and the case should be remitted back to the trial court to obtain the relevant facts and decide the case according to a proper understanding of those issues of fact. Thus the appellate court is able to set out the appropriate parameters of a retrial, taking into account the specific context of each case as well as the relevant principles of law.

[27] Where the appellate court finds error affecting the determination of only some of the issues, it may order a retrial solely as to those issues, saving the parties and the trial court the time, expense and trouble of retrying issues that were properly decided. The most common example is an order limiting the retrial to the issue of damages where the issue of liability was properly decided. Section 80 (1) (e) of *The Civil Procedure Act* empowers an appellate court to order a new trial. It gives appellate courts the broad power to grant partial new trials, on one or all of the issues. An appellate court may in its decision and order, direct that the new trial be limited in scope to address only those issues of fact upon which the trial court

laboured under a misapprehension, where the issues are not so interwoven that a partial retrial would be unfair to the other party.

[28] The judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be made as the result of an appeal cannot affect the determination of the remaining issues of the suit. It is appropriate for a court to grant a partial new trial only when it is plain that the error as to those elements of the decision did not in any way affect the determination of the other issues. Of course in the new trial some evidence from other aspects of the first trial may be admitted if it is related to the issue of the physical location of the common boundary between the two estates; however, it does not open the floodgates to allow in any and every issue from the first trial just because a party might want to present it.

[29] This court finds that the present situation gives rise to appropriate circumstances for a partial retrial. It is clearly apparent that the issues of customary inheritance by each of the parties were so distinct and separate that a trial based solely on establishing the common boundary between the two estates could be had without injustice. Apart from establishing the common boundary, no evidence relating to any other aspect of the first trial is necessary. This is a case in which the issues to be retried are so distinct and separable from others that a trial of them alone may be had without injustice. The interests of justice would not be well served if retrial were not ordered to allow the trial court the opportunity to fully assess the entirety of the relevant evidence and provide a reasoned opinion in light of facts establishing the location of that boundary. That being the case, the remaining ground cannot be considered.

Order:

[30] In the final result, the judgment of the court below is reversed to the extent that it is inconsistent with this opinion, and affirmed in all other respects. A partial re-

trial of the suit is ordered before another magistrate of competent jurisdiction for the determination of the following;

a) What features constitute the common boundary between land that belonged to the appellant's mother the late Akwero Getorina and that of the late Oweka Erijali.
b) Whether the land purchased by the 4th respondent Ojok Charles and the 5th respondent, Akello Fatuma lies within that area that belonged to the late Oweka Erijali or rather in the area that belonged to the appellant's mother, the late Akwero Getorina.
c) If the latter is the case, whether purchase by either or both the 4th respondent Ojok Charles and the 5th respondent, Akello Fatuma was in good faith.
d) Each party is to bear its costs of the defunct proceedings in the court below and of this appeal.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

For the respondents: ……..