IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 077of 2016

In the matter between

1. LANGOYA LIVINGSTONE

2. LOYIRA NICHOLAS **APPELLANTS**

And

1. ANYWAR LAMTON

2. OCAN ANDREW **RESPONDENTS**

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

Civil Procedure *— Order 1 rule 10 (2) of The Civil Procedure Rules — This provision empowers the Court to either strike out the name of any person improperly joined or add the name of any person whether as plaintiff or defendant, who ought to have been joined or whose presence before it may necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. — It is applicable to situations where the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. — The test for the addition of a particular party as plaintiff is whether the presence of such party is necessary or at least proper without whom there can be no effective and final adjudication of all issues involved in the suit with regard to the same subject matter.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The 1st appellant sued the respondents jointly and severally for recovery of approximately 100 acres of land situated at Labworomor Dero Meda village, Lamit Parish, Akwang sub-county, in Kitgum 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. His claim was that he inherited the land in dispute from his father Otto Erinesito. During the years 2008 and 2012 the respondents, without his consent or any claim of right, forcefully entered onto the land, erected thereon grass-thatched houses and began cultivating it. During the year 2013, the appellants reported the intrusion to the clan leaders who ordered the respondents to vacate, to no avail. The respondents instead during the year 2015 wrote a letter to the appellants threatening them with eviction, hence the suit. During the hearing of the suit, the 2nd appellant was joined at the court's own motion after the 1st appellant testified that he acquired the land in dispute from him.

[2] In his written statement of defence, the 1st respondent refuted the appellants' claim and averred instead that the land in dispute is situated at Kileme West village, Pajimo Parish, Akwang sub-county, in Kitgum District belonged to his late father Odoch Sezi who occupied it until his death in the year 2003, whereupon the 1st respondent inherited it. The 1st respondent was born and raised on that land and therefore he is not a trespasser on the land. The 1st appellant has made several attempts to acquire the land forcefully from the 1st respondent without success. The 2nd respondent too refuted the 1st appellant's claim and averred instead that it was during the year 1967 when the 1st respondent gave him the eleven acres of land that he is now occupying. The 1st appellant has made several attempts to acquire the land forcefully from the 2nd respondent without success.

The appellants' evidence in the court below:

[3] P.W.1 Langoya Livingstone, the 1st appellant, testified that it is the 2nd appellant Loyira Nicholas who gave him the land he is occupying. His late father, Otto Nelson, took him to the 2nd appellant in 1967 and that is when he gave him that land. By that time the 2nd appellant father Luwinya was dead. The 1st respondent's father, Sezi Odoch, too gave him another part of the land which he vacated in 1972. He lived on the land un-disturbed until the death of his parents on 20th January, 1993. It is on 2nd December, 2015 that the 1st respondent began demanding that he vacates the land.

[4] P.W.2 Nicholas Loyira, the 2nd appellant testified that he inherited the approximately twenty acres of land in dispute from his late father Luwinya Opio who died in 1959. A road separated that land from land belonging to the 1st respondent. *Chwa* trees had been planted as boundary markers but the 1st respondent cut them down. He later gave the land to the 1st appellant. P.W.3 Owacha William Moi, testified that the 1st appellant was a neighbour to the 1st respondent. The land in dispute belonged to the 1st appellant's father Otto Erinesito who obtained it from his uncle, Nicholas Loyira. Approximately 100 acres of land were given to the 1st appellant's late father in 1967. A feeder road separates the 1st appellant's land from the 1st respondent's land. The 1st appellant's land is in Lamit Parish while that of the 1st respondent's is in Pajimo Parish.

The respondents' evidence in the court below:

[5] Testifying in his defence as D.W.1 Anywar Lamton, the 1st respondent, stated that during the year 1967, the 1st appellant's father settled on his father's land and it is from there that he died. He was given approximately four acres and it is the land now in dispute. In the year 2012 the 1st appellant's left the land and migrated to Pamolo. This was after the 1st respondent's father had paid blood

compensation for a person killed by the 1st appellant. The 1st appellant later returned intending to sell it off but the 1st respondent stopped him, hence the suit. D.W.2 Ocan Andrew, the 2nd respondent, testified that the land in dispute is approximately 80 acres big. It is the father of the 1st respondent, Sezi Odoch, who gave him approximately 12 acres of land in 1967, in the presence of the 1st respondent. He has lived on the land and used it for subsistence food crop growing since then. The 1st appellant came from Pomolo in 1967 after he had killed someone and was given temporary stay on the land in dispute by the 1st respondent's father.

[6] D.W.3 Ocaya Justine, testified that the land in dispute is about 100 acres situated at Panyago village. The 1st appellant settled on the 1st respondent's land in 1967. The 1st respondent inherited the land from his father Sezi Odoch. D.W.4. Obol Emmanuel testified that the 1st respondent is his elder brother. The 1st respondent inherited the approximately 98 acres from his late father Sezi Odoch who died during 1994. The 1st appellant came onto the land in 1967 after he had killed a person at Pamolo. He built a house on the land and had gardens on the land. When he later died, he was buried on that land. The 1st appellant then shifted to Labworomor where he lives to-date. The dispute erupted in the year 2012.

Proceedings at the *locus in quo*:

[7] The court visited the *locus in quo* on 15th October, 2016 where the 1st appellant demonstrated the boundaries of the land and the mango trees he planted thereon. He also indicated the location of the grave of his father in law who died in 1989. No sketch map drawn.

Judgment of the court below:

[8] In his judgment delivered on 29th November, 2016, the trial Magistrate found that the 1st appellant's evidence was full of contradictions. He claimed that he was given the land in dispute by Luwinya yet he was long dead by 1967. He also claimed to have acquired the land from the 2nd appellant yet there is no evidence as to how the latter acquired it. These were major contradictions pointing to deliberate untruthfulness. The 1st respondent's version is that the 1st appellant was given temporary stay on the land in 1967 with a view that he would vacate after blood compensation had been paid for the person he had killed in Pamolo. The 1st appellant later vacated the land in 1972 only to attempt to sell it off in the year 2012. Consequently the 1st respondent was declared owner of the approximately 20 acres in dispute. The suit was dismissed with costs to the respondents.

The grounds of appeal:

[9] The appellants were 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 erroneously added the 2nd appellant as a plaintiff without allowing him time to file his pleadings and this occasioned a miscarriage of justice.
2. The learned trial Magistrate erred in law and when he declared the 20 acres of land as belonging to the 1st respondent yet he had not filed a counterclaim.
3. The learned trial Magistrate erred in law and fact when he relied too heavily on the contradictory evidence of the respondents thereby occasioning a miscarriage of justice.
4. The learned trial Magistrate erred in law and fact when he failed to conduct proceedings at the *locus in quo* properly thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellants:

[10] In their submissions, counsel for the appellants submitted that the 1st respondent admitted that it is his father who gave the land in dispute to the 1st appellant in 1967. His father lived on that land until his death and was buried thereon. It is during the course of the trial that the court on its own motion added the 2nd appellant as a plaintiff but did not allow him time to file his pleadings. The 1st respondent did not file a counterclaim to the suit yet the court declared him owner of the land in dispute. No finding was made as regards the suit by the 2nd appellant. The respondents' evidence was contradictory as regards the size of the land in dispute;- D.W.1 Anywar Lamton, the 1st respondent said it was 4 acres; D.W.2 Ocan Andrew, the 2nd respondent and D.W.3 Ocaya Justine said it was 100 acres; D.W.4. Obol Emmanuel said it was approximately 98 acres, yet the trial Magistrate found it was 20 acres. He did not explain how he came to that determination. He ignored evidence that showed the 1st appellant had lived on that land for over forty years. The record of proceedings at the *locus in quo* is a single line regarding the fact that the 1st appellant demonstrated the boundaries of the land. Evidence of the 1st appellant's household, houses of his relatives and agricultural activities on the land was omitted from the record. This was a complete mistrial.

Arguments of Counsel for the respondents:

[11] In response, counsel for the respondents argued that the respondents' evidence was consistent and supports the findings made by court. To the contrary, the appellants' evidence was full of contradictions and was therefore incredible. Whereas the appellant claimed to have vacate the land in dispute, he at the same time stated that he was being evicted from land given to him by Loyira's. This was denied by P.W.2 Loyira. There was no need to take the measurements of the land in dispute despite the disparity on the estimates of its size. The

witnesses described its boundaries specifically. The burden was on the appellants to prove that the land as described belonged to them, which they failed to do. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[12] 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*).

[13] 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.

Ground one; validity of joinder of the 2nd Appellant to the proceedings.

[13] The first ground of appeal criticises the trial Magistrate for having directed the joinder of the 2nd appellant to the proceedings. Apparently the 2nd appellant was joined as plaintiff under the provisions of Order 1 rule 10 (2) of *The Civil Procedure Rules*, applicable to situations where the name of any person who

ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. This may be done at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just.

[14] This provision empowers the Court to either strike out the name of any person improperly joined or add the name of any person who ought to have been joined or whose presence before it may necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. This power must be exercised in the interest of justice so that all the material questions common to the parties to the suit and to the third parties should be tried once and for all so as to avoid a multiplicity of suits in respect of all the questions relating to the subject matter of the suit.

[15] The test for the addition of a particular party as plaintiff is whether the presence of such party is necessary or at least proper without whom there can be no effective and final adjudication of all issues involved in the suit with regard to the same subject matter (see *Amon v. Raphael Tuck & Sons Ltd. [1956] 1 All E.R. 273* and *Dollfus Mieg et Compagnie S.A. v. Bank of England [1950] 2 All E.R. 611*). What makes a person a necessary party is not merely that he or she has relevant evidence to give on some of the questions involved; that would only make him or her a necessary witness. The court should not exercise its discretion to join as a person who has no claim relating to the subject matter of the suit.

[16] A person who may be joined as a party to the suit should have direct interest in the subject matter of the litigation. The rule contemplates joining as a plaintiff a person whose only object is to prosecute his own cause of action. The litigation should be of a kind that may lead to a result which will affect him or her legally,

i.e. by curtailing his or her legal rights. The only reason which makes it necessary to join a person a party to a suit is that he or she should be bound by the result of the suit and the question to be settled. Therefore, there must be a question in the suit which cannot be effectually and completely settled unless he or she is a party.

[17] In the instant case the 1st appellant's case was that he had received the land he is occupying as a gift *inter vivos* from the 2nd appellant. By that gift the land had vested in the 1st appellant. The 2nd appellant had relevant evidence to give concerning the circumstances in which the gift of land was made. That made him a necessary witness and not a necessary party since the issues to be decided in the litigation would not lead to a result which could affect him legally. He had divested himself of all interest in the land occupied by the 1st appellant. He had no claim relating to the subject matter of the suit and therefore should not have been joined as a party. This ground accordingly succeeds.

<u>Grounds, two, three and four; errors in conducting the proceedings at the *locus in quo* and findings as to ownership.</u>

[18] In ground two, three and four, the trial Magistrate is faulted for not having considered appropriately, contradictions in the respondents' evidence, not having properly conducted proceedings at the *locus in quo* and the finding regarding the 20 acres. The 1st appellant claim was for recovery of approximately 100 acres. His testimony covered two parcels of land; one given to his late father, Otto Nelson, by the 2nd appellant in 1967 and the other by the 1st respondent's father, Sezi Odoch, which he vacated in 1972. It is not clear from the evidence which of the two was the land in dispute. D.W.1 Anywar Lamton, the 1st respondent testified that it was 4 acres; D.W.2 Ocan Andrew, the 2nd respondent and D.W.3 Ocaya Justine said it was 100 acres; D.W.4. Obol Emmanuel said it was approximately 98 acres, yet the trial Magistrate found it was 20 acres. He did not

explain how he came to that determination. This uncertainty ought to have been cleared by the visit to the *locus on quo*.

[19] 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*.

[20] 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.

[21] It was important for this trial that court, while at the *locus in quo*, had to prepare a detailed sketch map of the land in dispute *vis-a-vis* the land which the 1st appellant claimed to have vacated in 1972, to enable the court juxtapose this with the one he claimed was given to him by Loyira. The sketch map at the *locus in*

quo had to indicate the boundaries of both parcels of the land and its surroundings, as mentioned by the parties and their witnesses. 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.

[22] Section 80 (1) (e) of *The Civil Procedure Act* empowers an appellate court to order a new trial. 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.

[22] 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. In the final result, the appeal succeeds.

Order:

[23] In the final result, the judgment of the court below is set aside. A re-trial of the suit is ordered before another magistrate of competent jurisdiction. 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 appellants : M/s Latigo and Co. Advocates

For the respondents: M/s Abore Adonga and Ogen Co. Advocates