IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0102 of 2018

In the matter between

1. KEKERIA LAYET

2. CANRACH CATHERINE **APPELLANT**

And

ABWOCH ERUKULANO **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Civil Procedure *— Order 25 rule 1 (2) of The Civil Procedure Rules — The plaintiff may with the leave of court, withdraw or discontinue a suit, and the court may, before or at, or after hearing upon such terms as to costs, and as to any other suit, and otherwise as may be just, order the action to be discontinued.*

Land law*— Communal land rights — section 22 (1) of The Land Act — Recognises the fact that a community may convert part of or all of its land into fully private properties for their own purposes and benefit, rather than usufructs, in accordance with community sustained norms.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellants are the administrators of the estate of the late Marako Oyet. They jointly sued the respondents for recovery of approximately 10 acres of land

situated at Kamama Central village, Moroto Parish, Palabek Gem sub-county in Lamwo District, a declaration that the property belongs to the estate of the late Marako Oyet, general damages for trespass to land, *mesne* profits, an order of eviction, permanent injunction, interest and costs. Their claim was that at all material time the late Marako Oyet owned 50 acres of land. Sometime in the year 1988, during the period of insurgency, a camp for the internally displaced was established on that land. At the end of insurgency in the year 2008, the IDP Camp was disbanded and the occupants directed to return to their respective homes. The respondent has unlawfully refused to vacate ten or so acres of the land, to-date.

[2] In his written statement of defence, the respondent contended that the land in dispute forms part of the Lamudi Communal land and originally belonged to his late grandfather the late Lufuko Tom. Upon his death it was inherited by the respondent's father the late Lacito Atulu Onyach. It is from him that the respondent inherited it in turn and he has lived thereon for the last 70 years. The appellants are not members of the Lamudi Clan. It is the appellants who entered onto the land during the year 1996 during the insurgency and were accommodated by the respondents and his clan members. The appellants have since the end of the insurgency refused to vacate the land and now occupy approximately ten acres of the land. The respondent therefore counterclaimed for a declaration that the land belongs him, special and general damages for trespass to land, an order of eviction, permanent injunction, interest and costs.

The appellant's evidence in the court below:

[3] P.W.1 Canrach Catherine testified that her father, the late Marako Oyet, owned 50 acres, of which ten are now in dispute. Marako Oyet inherited the land from his father Enayo Okun, who in turn inherited it from his own father Olal Acoro. The land in dispute abuts on Panguc Swamp to the North, on Kitgum-Palabek Kal main road to the South, on Lacaa Swamp to the East and on that of Acoro Mary to the West. The respondent occupied that land around 1997 – 1998 when

he came to the area. He was given refuge by a one Atulu Lacito. At the time the land was occupied by Block 11 of the IDP Camp. He came from Block 7. When the insurgency ended, the respondent refused to vacate the land. There are graves of their deceased relatives on the land. There are four big mango trees, a *kworo* tree, a small banana plantation, three shallow wells and three boreholes labelled IDP Camp, on the land.

[4] P.W.2 Okongo Richard testified that the land in dispute abuts on Panguc Swamp to the North, on Kitgum-Palabek Kal main road to the South, on Lacaa Swamp to the East and on that of Acoro Mary to the West. There are three boreholes labelled IDP Camp and three shallow wells on that land. It was during the year 1997 that he took refuge in Bock 7 of an IDP Camp at Palabek Gem. Block 7 was located on land that belonged to Atulu Lacito. It is the respondent who in 1997 gave him the land where he built his house. It was during the insurgency, at the time when the land was still an IDP Camp. After the insurgency he returned home. The respondent inherited land from a one Atulu Lacito. It is the witness who, on instructions of the then Resident District Commissioner, approached the appellants and requested them to permit the establishment of Block 11 on their land. The respondent was a home guard with his home near the barracks but due to constant attacks of the barracks by the rebels, he re-located to Block 11 with his wife, Paska. From the year 2008 – 2014, people left the IDP Camps to return to their previous homes. The respondent refused to vacate the appellants' land.

[5] P.W.3 Odong Alex testified that it was during the year 1997 that he settled in an IDP Camp which was located on the land in dispute. Land that belonged to the late Marako Oyet was occupied by Block 11. He was appointed the block leader. The respondent's father was known as Atulu Lacito. When the IDP Camp was established, Bock 7 was located on Atulu Lacito's land which was on a different side of the road and did not share a common boundary with the land in dispute. The respondent moved from Bock 7 which was near the military barracks, to the

land in dispute in 1999 during the existence of the IDP Camp. He constructed two huts thereon I which he lived with his family but continued to fetch his food from Block 7. When the camp was disbanded during the year 2006, the respondent remained on the land.

The respondent's evidence in the court below:

[6] D.W.1 Erukana Obwoch testified that he was told by his late father Lacito Atulu Onyach that his grandfather Lujoko Tom used to own a big chunk of land covering parts of Kamama Central village and both sides of the current Kitgum-Atiak main road. He inherited land north and south of the main road from his late father. He has occupied that land all his life. When the IDP Camp was disbanded, the appellants refused to vacate. The appellants used to reside about three miles away from the land in dispute and only migrated onto it during the year 1996 at the time of the insurgency. The land in dispute used to be the respondent's grazing land. It was never part of the IDP Camp. The appellants never owned land in that area. Marako Oyet was buried elsewhere, about three miles away, not on the land in dispute.

[7] D.W.2 Lacan David testified that the respondent, together with seven other people used to graze their livestock on the land in dispute, communally. When the cattle were rustled, they converted the land into farmland. In the year 2001 following re-stocking, they returned to grazing on the land. There was an IDP Camp in the area. The appellants lived in the area during the existence of the IDP Camp. Marako Oyet was buried elsewhere, not on the land in dispute.

[8] D.W.3 Ocan Willy testified that the land in dispute used to be grazing land with no human habitation. There was subsequently established an IDP Camp in the area. It is the respondent who began cultivating the land following theft of the cattle by Karimojong cattle rustlers. He still occupies the land. D.W.4 Ochola Mark Kerosine testified that there was an IDP Camp in the area. The L.C.II never

handled any case concerning the land in dispute. What he learnt was that the land used to be communal grazing land utilised by Manyo Kitara, Oceng Titus and several other persons.

Proceedings at the *locus in quo*:

[9] The trial court then visited the *locus in quo* on 5th June, 2018 where it observed that the land in dispute measures approximately thirty acres. The appellants occupy approximately ten acres of it while the respondent occupies approximately twenty acres. Boreholes were visible near where the relatives of the appellants live. However, there is no sketch map on the record illustrating the features seen during the visit.

Judgment of the court below:

[10] In his judgment delivered on 5th December, 2018 the trial Magistrate found that there was no evidence led to show that during his lifetime, the late Marako Oyet ever cultivated the land in dispute. Evidence showed that the late Marako Oyet was buried at his home far away from the land in dispute. There was no evidence to show that he ever farmed the land in dispute. It was not pleaded, as the appellants later claimed in their testimony, that he was born on the land in dispute. Evidence showed that the respondent was by 1986 resident on the village and he did not settle thereon in the 1990s as claimed by the appellants. There were material contradictions between the testimony of P.W.2 Okongo Richard and that of P.W.3 Odong Alex regarding from whom the request for establishment of an IDP Camp was made and handling of the dispute by the L.C.II Court. On the other hand, the respondent produced consistent and credible evidence. Most of the land in dispute was grazing land for a long time. It is only after cattle rustlers had stolen the cattle that it was converted into farmland. The respondent therefore is the customary owner of the land. The respondent cannot be a trespasser on his own land. The respondent was declared the rightful owner

of the land. The appellants were restricted to the ten or so acres they occupy since there existed a distinctive boundary on the land. A permanent injunction was issued restraining the appellants from interfering with the respondent's possession and enjoyment of the land. The suit was dismissed with costs.

The grounds of appeal:

[11] 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 in fact when he failed to properly evaluate the evidence on record regarding ownership of the suit land thereby arriving at a wrong conclusion.
2. The learned trial Magistrate erred in law and in fact when he did not consider the fact that the land in question is customary land.
3. The learned trial Magistrate erred in law and in fact when he declared the respondent the customary owner of the suit land despite the fact that the respondent abandoned his counterclaim.
4. The learned trial Magistrate was biased in his judgment against the appellant.
5. The learned trial Magistrate erred in law and in fact when he failed to dismiss the respondent's counterclaim with costs.

Duties of a first appellate court.

[12] The appellants though did not file submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did the respondents file submissions. That notwithstanding, 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. All Grounds will be considered concurrently.

[14] A counterclaim is in the nature of a cross-suit, in essence a suit by the defendant. Under Order 25 rule 1 (2) of *The Civil Procedure Rules*, the plaintiff may with the leave of court, withdraw or discontinue a suit, and the court may, before or at, or after hearing upon such terms as to costs, and as to any other suit, and otherwise as may be just, order the action to be discontinued. Considering the timing of the abandonment of the counterclaim so late in the proceedings, and the fact that it should not have been raised in the first place, the trial court misdirected itself when it failed to dismiss the counterclaim with costs.

[15] Both P.W.1 Canrach Catherine and P.W.2 Okongo Richard described the land in dispute as abutting on Panguc Swamp to the North, on Kitgum-Palabek Kal main road to the South, on Lacaa Swamp to the East and on that of Acoro Mary to the West. Although in their estimates both the land measured approximately 50 acres, when the court visited the *locus in quo* if formed the opinion that it measures approximately thirty acres in all. The appellant occupy approximately ten acres of it while the respondent occupies approximately twenty acres. It is an

established rule that where land is described by its admeasurements, and at the same time by known and visible monuments, the latter prevail. The question of quantity is mere matter of description, if the boundaries are ascertained (see *Howe v. Bass, 2 Mass. 380 (1807).* Being un-surveyed land, mistakes in acreage are more probable and more frequent, than in marked trees, valleys, rivers or other natural objects capable of being clearly designated and accurately described. The trial court therefore came to the right conclusion when it found the inconsistence to be minor.

[16] Having established the bounds of the land in dispute, the court then had to determine the rival claims to its ownership. Both parties claimed ownership by customary inheritance. The appellants supported theirs by additional evidence of a grant of letters of administration. While the appellants contended that they inherited the land from late Marako Oyet who owned it under customary tenure before his demise, the respondent claimed it formed part of land handed down by inheritance, from his late grandfather Lujoko Tom, through his late father Lacito Atulu Onyach and eventually to him. While the appellants did not adduce evidence as to the type of user at the time, the respondent's version was that it served as communal grazing land. Although each of the parties contended it is the other who came to the land during the insurgency, the common factor is that at the breakout of insurgency, an IDP Camp was established in the area. The camp was divided into multiple blocks and the land in dispute happened to host Bock 11. The key to resolving the dispute therefore lay in the determination of possession of the land at the time of insurgency.

[17] D.W.1 Erukana Obwoch under cross-examination testified that the land in dispute used to be his grazing land. It was never part of the IDP Camp. On his part, D.W.3 Ocan Willy testified that the land in dispute used to be grazing land with no human habitation, while D.W.2 Lacan David testified that the respondent, together with seven other people used to graze their livestock on the land in dispute, communally. However, when P.W.2 Okongo Richard and P.W.3 Odong

Alex testified that for establishment of the IDP Camp on the land permission was sought from the family of Marako Oyet, they were never cross-examined on this. The respondent only introduced the version of communal grazing in his defence yet it is it is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue (see *Habre International Co. Ltd v. Kasam and others [1999] 1 EA 115; Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008;* R *v Hart (1932) 23 Cr App R 202* and *James Sawoabiri and another v. Uganda, S.C. Criminal Appeal No. 5 of 1990*). The trial court therefore ought to have found that it was the family of Marako Oyet that was in possession of the land at the time of establishment of the IDP Camp, and indeed when the court visited the *locus in quo* it found them on the land, lending credence to their claim of customary ownership thereof.

[18] Secondly, both P.W.2 Okongo Richard and P.W.3 Odong Alex explained how and the circumstances in which the respondent re-located from Block 7 of the IDP Camp that was located on hid father Atulu Lacito's land, which was on a different side of the road and did not share a common boundary with the land in dispute. The respondent during the year 1999 moved from Bock 7, which was near the military barracks, to the land in dispute that used to host Bock 11, in order to avoid repeated attacks by rebels that were being made on the military barracks at the time. The trial Court misconstrued evidence of this re-location as testimony regarding the respondent's first migration to the area. Had the trial court considered this evidence in its proper perspective, it would have found that this relocation did not confer any interest in the land now in dispute. He was a mere licensee on the land, which permission was revoked at the end of the insurgency. Once a license is revoked, the licensee becomes a trespasser if he remains on the land after a reasonable time in which to leave has elapsed (see *Hillen v. ICI (Alkali) Ltd [1936] AC 65; Robson v. Hallett [1967] 2 QB 939; and*

Minister of Health v. Bellotti [1944] KB 298). The trial court misdirected itself when it did not find the respondent to be a trespasser on the appellants' land.

[19] The respondent's justification for continued possession of the land against the will of the appellants appears to be based on a misguided notion that at one time in history, all this land belonged to his late grandfather Lujoko Tom. However evidence revealed that over the years, under circumstances not canvassed in evidence, most of this land had been taken over by divers occupants, and this partly explains the respondent's decision to abandon his counterclaim during the visit to the *locus in quo*, as it affected multiple persons in possession of land in the neighbourhood, against whom he could not successfully assert this "historical title." By his actions, the respondent sought to reclaim land from the appellants, which he believed to have historically belonged to his grandfather, based on a vague claim of previous participation of his father in its communal use.

[20] Communal and private tenure are both forms of holding exclusive rights to land. Against the appellants' claim of exclusive private ownership and use, the respondent sought to assert a claim based on communal use. He presented his claim as that directed at securing communal pasturelands in which he has a usufructuary stake. Whereas D.W.2 Lacan David testified that during the year 2001 following re-stocking, the land reverted to communal grazing, when the court visited the *locus in quo* it found evidence to the contrary. The respondent had ploughed most of the land and the court did not advert to having found any livestock on the land. This is inconsistent with the communal purpose and user advanced by the respondent as justification for his claim.

[21] Although section 22 (1) of *The Land Act* recognises the fact that a community may convert part of or all of its land into fully private properties for their own purposes and benefit, rather than usufructs, in accordance with community sustained norms ("customary law"), no evidence was adduced to show that this part of the land was ever allocated by the rest of the communal users to the

respondent as a member of the group of community members in whom title thereto vests, for his exclusive use and occupation for any specified period, or at all. It is evident that his reliance on that concept is a disguise or smokescreen for his intended exclusive private ownership and use of the land. The appellants clearly proved a better claim to the land than his and the court ought to have decided in their favour.

[22] The respondent has been in unlawful possession and user of the appellants' land since the year 2008 when the IDP Camp was disbanded. Allowing one year as reasonable time for him to have vacated the land thereafter, the appellants are entitled to both general damages for trespass to land, and *mesne* profits, reckonable from the year 2009 to-date, a period of eleven years. The respondent's actions having been wilful and callous, the appellants are awarded shs. 10,000,000/= as general damages for trespass to land. The respondent has been utilising approximately twenty acres of the appellants' land for farming. I consider a sum of shs. 200,000/= per annum, per acre, as adequate *mesne* profits for that unlawful use, hence shs. 4,000,000/= per annum, or shs. 44,000,000/= in total. The amounts awarded as general damages and *mesne* profits are to carry interest at the rate of 8% per annum from the date of judgment until payment in full.

Order:

[23] In the final result, the appeal is allowed. The judgment of the court below is set aside and it its place the counterclaim is dismissed, and judgment is entered in favour of the appellants against the respondent with orders that;

a) A declaration is hereby made that the land abutting on Panguc Swamp to the North, Kitgum-Palabek Kal main road to the South, Lacaa Swamp to the East and Acoro Mary to the West is comprised in the estate of the late Marako Oyet.

b) The respondent is declared a trespasser on the land so described. An order of vacant possession accordingly issues in respect of that land in favour of the appellants.
c) A permanent injunction against the respondent, his agents, employees or persons claiming under him, restraining him from interference with the appellants' quiet possession and enjoyment of the land.
d) Shs. 10,000,000/= as general damages for trespass to land.
e) Shs. 44,000,000/= as *mesne* profits.
f) The sums on (d) and (e) above are to carry inters at the rate of 8% per annum from the date of judgment until payment in full.
g) The respondent meets the appellants' costs of the suit, the counterclaim and the appeal.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellants :

For the respondent :