IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 047 of 2015

In the matter between

OKECH JOHN DAVID **APPELLANT**

And

OJOK ROBIN **RESPONDENT**

Heard: 27 September, 2019.
Delivered: 26 November, 2019.

Land law *— Locus in quo — Visiting the locus in quo is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them.*

Civil Procedure *— Burden of proof — in our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other. If a judicial officer finds it more likely than not that something did take place, then it is treated as having taken place. If he or she finds it more likely than not that it did not take place, then it is treated as not having taken place. A judicial officer is not allowed to sit on the fence. He or she has to find for one side or the other.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant jointly and severally with a one Ojok Celestino seeking recovery of land measuring approximately 500 acres situated at Odet village, Koch Li Parish, Koch sub-county, in Nwoya District, a declaration that he is the rightful owner of the land in dispute, general damages for trespass

to land, an order of vacant possession, a permanent injunction restraining the respondents from further acts of trespass onto the land, and the costs of the suit. The respondent's claim was that the land in dispute originally belonged to his grandfather Okello Koko Lachan. Upon his death it was inherited by the respondent's father Alwedo Emmanuel. The appellant had never lived on the land before. It is after the insurgency that he occupied part of it and claimed that the entire land was his having bought it from Ojok Celestino. In their written statement of defence, the appellant and his co-defendant refuted the respondent's claim. He prayed that the suit be dismissed.

The respondent's evidence in the court below:

[2] The respondent, P.W.1 Ojok Robin David, testified that the land in dispute, measuring approximately 500 acres, originally belonged to his grandfather Okello Koko Lachan. On his death, the respondent's father Alwedo Emmanuel inherited the land. The respondent's mother still occupies the land even after the death of her husband in the year 2009. The respondent has acacia trees, a kraal and mango trees on the land. The respondent only came to know the appellant only after the insurgency, when he settled in the neighbourhood. The appellant began claiming the respondent's land as his and stopped him from using it, until the L.Cs intervened on the respondent's behalf. By then the appellant had built three grass thatched houses on the respondent's land and cut down his trees. The appellant purported to have purchased the land from Ojok Celestino and has since then occupied about 250 acres of the land.

[3] P.W.2 Acan Maria the respondent's mother testified that she lived on the land in dispute with her late husband Alwedo Emmanuel until insurgency forced them to migrate to Karuma. The respondent was born and lived on that land until insurgency forced him to flee to Karuma. Upon their return to the land, Ojok Celestino stopped them from using their land and later purported to sell it to the appellant. P.W.3 Uma Agulu Odet testified that he was a neighbour to the land

and he had never seen the appellant on the land before. Alwedo Emmanuel was his neighbour for a long time. The respondent was born and raised on that land. After the appellant purported to have purchased the land, the appellant went to him inquiring about the ownership of that land and he advised him to claim a refund of his money as the land did not belong to Ojok Celestino but to Alwedo Emmanuel. Before he purported to have bought the land, the appellant had resided at the home of Ojok Celestino. P.W.4 Cecilia Achan testified that she has for a long time been an immediate neighbour to the land. It was occupied by the late Alwedo Emmanuel and his family until recently when she saw the appellant for the first time in the area, only after the insurgency. The appellant has planted trees on the respondent's land.

The appellant's evidence in the court below:

[4] In his defence, the appellant D.W.1 Okech John Davis testified that he obtained the land in dispute from a one Ochieng Joseph in 1973 and not by purchase from Ojok Celestino. It is insurgency that forced him off the land but he returned during the year 2007 after the insurgency. D.W.2 Ojok Celestino testified that it is his late father Ochieng Joseph who gave him part of the land and gave the other part to the appellant. D.W.3 Madalena Achan testified is the late Ochieng Joseph who gave her the part of the land she occupies. Her husband had given land to the respondent's father but later evicted him while the respondent was still a child. D.W.4 Vicentina Abwola testified that the land belongs to the appellant. The respondent came to the land only after the insurgency. The respondent's father had lived on the land temporarily courtesy of the late Ochieng Joseph but he was later evicted.

Proceedings at the *locus in quo*:

[5] The court then visited the *locus in quo* on 12th April, 2014 where it recorded evidence from; (i) Opiru Charles; (ii) Napthali Kibwota; (iii) Odongkara Michael;

(iv) Opwonya David; (v) Ocaya Laponye; (vi) Otto Luka; (vii) Adwong Simayo; and (viii) Obwona Akuku. Although the record does not feature a sketch map, there are notes showing that the court observed that there was a former homestead of the respondent's elder brother Opira on the land. The Magistrate was shown a boundary marked by acacia trees from Otit Stream to another stream. There was a kraal up to an anthill. A medicinal tree "*Labuka*" for the treatment of cows. The court was also shown a former homestead of the appellant. An a acacia tree, a mango tree and a grave of the appellant's late aunt. The respondent also showed court where he used to tether his goats. The location of the house where the goat keeper used to reside.

Judgment of the court below:

[6] In his judgment delivered on 23rd October, 2015, the trial Magistrate observed that evidence at the *locus in quo* showed that the parties lived side by side on the land. Each of the parties was attempting to acquire the land to the exclusion of the other. The court adopted a middle position and found that the land belongs to both the appellant and the respondent. None of the parties is a trespasser on the land. The land should be divided into two equal parts between the appellant and the respondent. Each party is to bear their own costs.

The grounds of appeal:

[7] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned Magistrate erred in law and fact when he declared both parties as lawful owners of the suit land.
2. The learned trial Magistrate erred in law and fact when he held that the suit land should be divided equally between the parties and that there was a "draw" in the case.

3. The learned trial Magistrate erred in law and fact when he did not dismiss the respondent's case against the appellant after finding that there was no transaction of sale between the appellant and Ojok Celestino.
4. The learned trial Magistrate erred in law and fact when he failed to conduct proceedings at the *locus in quo* in accordance with the law and allowed witnesses to testify when they had not testified in court.

Arguments of Counsel for the appellant:

[8] In his submissions, counsel for the appellant argued that by the trial Magistrate's failure to find in favour of the respondent, the implication was that the respondent had failed to prove his case. The trial Magistrate then ought to have dismissed the suit. Ordering that the land be divided and shared between the parties was erroneous, as the land could not belong to both parties. There was no evidence to prove joint ownership and that was not the respondent's case as filed in court. The respondent based his claim on a transaction of purchase from his co-defendant Ojok Celestino yet he failed to prove it. The respondent's father had only been hosted at the home of Ojok Celestino and only returned after the insurgency to claim the land as his. During the proceedings at the locus in quo, the trial Magistrate should not have recorded evidence from persons who had not been called as witnesses in court.

Arguments of Counsel for the respondent:

[9] In reply, counsel for the respondent submitted that the evidence led by the respondent established that he is the rightful owner of the land in dispute and the court was therefore wrong to have ordered a sub-division of the land.

Duties of a first appellate court:

[10] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (*see Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236)*. In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see Lovinsa Nankya v. Nsibambi [1980] HCB 81).

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

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

[12] By the fourth ground of appeal, it is contended that the trial Magistrate erred in law and fact when he failed to conduct proceedings at the *locus in quo* in accordance with the law and allowed witnesses to testify when they had not testified in court. Visiting the *locus in quo* is to check on the evidence by the witnesses, 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).* Admission of the evidence of;

(i) Opiru Charles; (ii) Napthali Kibwota; (iii) Odongkara Michael; (iv) Opwonya David; (v) Ocaya Laponye; (vi) Otto Luka; (vii) Adwong Simayo; (viii) Obwona Akuku was an error.

[13] That notwithstanding, according to 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. Furthermore, according to section 70 of *The Civil Procedure Act*, 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. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

[14] 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. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the eight additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those eight witnesses.

Decision to sub-divide the land

[15] In grounds one, two and three of appeal, the trial Magistrate's decision ordering a sub-division of the land instead of dismissing the suit is questioned. It is trite that in our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other. If a judicial officer finds it more likely than not that something did take place, then it is treated as having taken place. If he or she finds it more likely than not that it did not take place, then it is treated as not having taken place. A judicial officer is not allowed to sit on the fence. He or she has to find for one side or the other. Generally speaking, in most cases a judicial officer is able to make up his or her mind where the truth lies without expressly needing to rely upon the burden of proof. However, in the occasional difficult case, sometimes the burden of proof will come to his or her rescue. "If the evidence is such that the tribunal can say" we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" *(see Miller v. Minister of Pensions [1947] 2 All ER 372).* When left in doubt, the party with the burden of showing that something took place will not have satisfied the court that it did.

[16] Evidence adduced by the respondent and his witnesses showed that he was born and lived on that land until insurgency forced him to flee to Karuma. D.W.2 Ojok Celestino testified that it is his late father Ochieng Joseph who gave him part of the land and gave the other part to the appellant. The respondent therefore was not a trespasser on the land. When the respondent vacated the land as a result of the insurgency, that did not terminate his ownership of the land. Involuntary abandonment of a holding does not terminate one’s interest therein, where such interest existed before (*see John Busuulwa v. John Kityo and others C.A. Civil Appeal No. 112 of 2003).* The temporary abandonment of the land by the respondent in the instant case not having been voluntary, his rights as owner were revived when he re-asserted them after the insurgency.

Order :

[17] In the final result, the appeal is allowed and judgment of the court below is set aside. Instead, and because the respondent proved his case against the appellant, judgment is entered in his favour. The costs of the appeal are as well awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : M/s Komakech-Kilama and Co. Advocates

For the respondent : M/s Latigo and Co. Advocates