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

Reportable
Civil Appeal No. 002 of 2015

In the matter between

**ODERA BEN** **APPELLANT**

**And**

**HELLEN LAKER OBONI** **RESPONDENT**

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

***Land Law —*** *Locus in quo* ***—*** *proceedings at the locus in quo are an extension of what transpires in court, the parties and their witnesses are required to freely lead the court by demonstrating to it the features and the corresponding description of the land as they had testified to in court. Both parties may point out material features and observations to the court which they wish to be placed on record.* ***—*** *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 and 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* ***—*** *Boundaries 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—Monuments are something tangible that the lay persons can see and understand. While anyone can comprehend and visualise that they own land at the top of the hill or to up to a stream, the size of an acre or hectare may vary in lay persons' estimations*

***Civil Procedure —*** *Judicial Bias* ***—*** *A real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judicial officer in question improperly used his or her perspective in the decision-making process. There has to be a proper and appropriate factual foundation for a reasonable apprehension of bias.*

## JUDGMENT

**STEPHEN MUBIRU, J.**

Introduction:

[1] The respondent sued the appellant seeking recovery of land under customary tenure measuring approximately 32 meters by 22 metres, situated at Ayul "B" Ward, Pager Parish, Kitgum Town Council in Kitgum District, general damages for trespass to land, *mesne profits*, a permanent injunction restraining him from further acts of trespass onto that land, interest and the costs of the suit. The respondents' case was that on 5th January, 1995 she purchased the land in dispute from a one Opira Alfred. She enjoyed quiet possession of that land until 18th December, 2012 when the respondent without her consent nor a claim of right, entered onto the land, cleared part of it and began laying bricks.

[2] In his written statement of defence, the appellant denied the appellant's claim. He contended that the respondent had sued a wrong party. The land in dispute measuring approximately 32 meters by 40 metres belongs to his uncle who bought it from a one Opiyo Peter. During the year 2011 a boundary dispute erupted between the respondent and the family of the appellant's uncle. It was resolved by the *Ker Kwaro* in favour of the appellant's family. He prayed that the suit be dismissed.

The appellant's evidence in the court below:

[3] D.W.2 Mark Opio testified that he sold the land in dispute to D.W.1 Olwocch Sikondo. The appellant is a caretaker on behalf of his uncle. It measures approximately 32 feet by 40 feet and the boundary was marked by a metallic bar on one side and a *Kituba tree* on the other. The measurements of both the

appellant's and the respondent's plots were taken by Ocaya Alex. The appellant is to the East while the respondent is to the West of that boundary marker.

The respondent's evidence in the court below:

[4] In his defence, P.W.1 Hellen Laker Oboni, the respondent, testified that she purchased the land in dispute from a one Opira Walter s/o Ocen during the year 1994 and paid the purchase price of shs. 170,000/= in instalments until the final payment that was made during the year 1995. One of the instalments was received by Opira while the other was received by Opiyo Mark. She constructed three grass thatched house on the land one of which was occupied by her parent. It is during the year 2011 that the appellant began to encroach on that land by undertaking cultivation on a strip of land measuring 3 meters by 22 metres. The appellant uprooted the flowers planted vegetables and sweet potatoes up to her toilet, spoiling one of the doors to her toilet in that process.

[5] P.W.2 Ibrahim Okula testified that he was the Chairperson of Ayul "B" Ward at the material time. The appellant trespassed onto a strip of land measuring approximately five meters in width, on the Eastern side of respondent's land, after she had purchased the land from a one Ocaya Alex. The common boundary on the Eastern side is marked by a palm (*Tugu*) tree on one side and a *Kituba tree* on the other.

[6] P.W.3 Loum Dramoi testified that during his tenure as Chairperson of Ayul "B" Ward, the respondent sued the appellant's father. She alleged that the appellant's father had trespassed onto her land. Measurements were taken of the corresponding parcels of land. The respondent's plot measured 32 meters by 22 metres. The Committee then planted flowers to mark the common boundary between the two adjoining parcels of land. P.W.4 Komakech Samuel testified that the dispute between the parties concerns the corresponding size of their respective plots of land. Measurements of the plot that belongs to the respondent

were taken and it measures approximately 32 meters from the road by 22 metres along the road.

Judgment of the court below:

[7] In his judgement, judgment delivered on 20th January, 2015, the trial Magistrate made reference to a visit having been made to the *locus in quo*, but that part of the proceedings is missing from the record of appeal. Nevertheless he found that the parties share a common boundary. When the court visited the *locus in quo*, the court found the palm (*Tugu*) tree and the *Kituba tree* that mark the common boundary. The appellant purchased after the respondent had purchased her plot yet he never consulted her about the location of the boundary as a diligent buyer would be expected to do. It is curious that even after he became aware that the boundary markers had been destroyed, the appellant's uncle, D.W.1 Olwocch Sikondo, never took any steps to have it replaced. The court found when it visited the *locus in quo* that a trench had been dug extending from the line marked by the palm (*Tugu*) tree and the *Kituba tree* up to the respondent's toilet and this constituted an act of trespass. Judgment was therefore entered in favour of the respondent. She was granted vacant possession of the strip of land in dispute, a permanent injunction was issued against the appellant and he was condemned in cots of the suit.

The grounds of appeal:

[8] 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 failed to properly evaluate the evidence before him thereby arriving at an erroneous decision against the appellant thus occasioning a miscarriage of justice.

2. The learned trial Magistrate erred in law and fact when he refused to take the measurements of the disputed land at the *locus in quo* in order to determine the actual boundary since the respondent's land measures 32 meters by 22 metres as is reflected in the sale agreement, hence occasioning a miscarriage of justice.
3. The learned trial Magistrate demonstrated bias in arriving at his judgment and in effect denied the appellant justice.
4. The learned trial Magistrate erred in law and fact when at the time of conducting proceedings at the *locus in quo* saw an earlier boundary demarcation dug by the Area L.C.1 and the Rwot Kweri separating the appellant's plot from that of the respondent but ignored the same and as such arrived at an erroneous decision.

Arguments of Counsel for the appellant:

[9] In their submissions, counsel for the appellant, submitted that there were contradictions in the respondent's evidence regarding the size of the land she bought. Whereas he testified that it measured 32 meters by 22 metres and the area in dispute was about 3 meters wide by 32 meters, P.W.2 Ibrahim Okula testified that it measured 20 meters by 20 metres and that the area in dispute is 5 meters wide. This was not a minor contradiction yet the trial Magistrate did not consider it at all. D.W.2 Mark Opio, being the person that sold land to both parties should have been considered by the court as the most important witness. The agreement relied upon by the respondent was written in Luo yet the trial Magistrate was not provided with a translation as required by law. The trial Magistrate therefore failed to evaluate the evidence properly. The respondent's claim was in respect of land measuring 32 meters by 22 metres while that of the appellant's uncle measured 32 feet by 40 feet. It was necessary at the *locus in quo* for the measurements of both plots to be taken. The implication of that failure is that the proceedings at the *locus in quo* were not undertaken properly, ultimately leading to a wrong decision. Whereas the appellant's evidence was

consistent, that of the respondent was not and the court ought to have decided in the appellant's favour.

Arguments of Counsel for the respondent:

[10] In response, counsel for the respondent, argued that the appeal was filed out of time. The judgment was delivered on 20th January, 2015 yet the memorandum of appeal was filed three months later on 17th April, 2015. This was outside the thirty days' time allowed by law for filing appeals. The appellant never sought leave of court for filing the appeal out of time. The appellant waived his right to testify during the trial, he was not prevented by court. During his purchase of the neighbouring plot, the appellant's uncle never involved the neighbours contrary to the expected practice. Since both parties described what the common boundary was, it was unnecessary for the court to undertake measurements of the two plots during proceedings at the *locus in quo*. The appeal therefore has no merit and ought to be dismissed.

Duties of a first appellate court:

[11] 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*).

[12] 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 struck out for being too general

[13] I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

Grounds two and four; errors in conducting the proceedings at the locus *in quo*.

[14] By the second a fourth grounds of appeal, the trial court is faulted for having conducted proceedings at the *locus in quo* in an irregular manner which ultimately affected the outcome of the case. The purpose of visiting the *locus in*

*quo* is to check on the evidence by the witnesses (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)*. Therefore proceedings at the *locus in quo* require the parties and their witnesses to freely lead the court by demonstrating to it the features and the corresponding description of the land as they had testified to in court. Both parties may point out material features and observations to the court which they wish to be placed on record.

[15] 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*.

[16] 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. As matters stand, the observations made are hanging, not backed by evidence recorded from witnesses.

[17] 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. Monuments are something tangible that the lay persons can see and understand. While anyone can comprehend and visualise that they own land at the top of the hill or to up to a stream, the size of an acre or hectare may vary in lay persons' estimations. Because of these issues and the fact that no person will measure the same thing exactly the same way, monuments must govern over bearings, acreage and distances. No matter how “accurate” a measurement is, it has a lower value than a natural or artificial monument. Any natural object, and the more prominent and permanent the object, the more controlling as locator, when distinctly called for and satisfactorily proved, becomes a landmark is not to be rejected because the certainty which it affords, excludes the probability of mistake (see the Supreme Court of Georgia case of *Margaret Riley v. Lewis L. Griffin and others, (1854) 16 Ga. 141*). The question of dimensions is mere matter of description, if the physical boundaries are ascertained.

[18] In the instant case it was the testimony of P.W.2 Ibrahim Okula that the common boundary between the parties is marked by a palm (*Tugu*) tree on one side and a *Kituba tree* on the other. According to D.W.2 Mark Opio, the common boundary was marked by a metallic bar on one side and a *Kituba tree* on the other. When the court visited the *locus in quo*, it saw both the palm (*Tugu*) tree and a *Kituba tree*, but not the metallic bar. Its observations were consistent with the respondent's version rather than the appellant's. When determining the true position of a disputed boundary, the courts have always been aided by: (i) permanence; (ii) visibility; and (iii) accuracy of the monument. Of the two boundary lines described by the parties, it is the respondent's that met the three qualities of permanence, visibility and accuracy. Preference had to be towards that boundary which best fit the majority of the available evidence.

[19] The only procedural error is that these observations were not documented by way of a record of proceedings taken during the visit to the *locus in quo*. Where reconstruction of the missing part of the 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*).

[20] Moreover, 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 the merits 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. I do not find such miscarriage manifested in these proceedings. The plain meaning of trespass as per *Halsbury's Laws of England Vol. 38 page 734* is: - "(a) is a wrongful act (b), done in disturbance of the possession of property of another ….. against his will." A claim in trespass to land is a claim made in spatial terms, with rights asserted by reference to a boundary across or beyond which outsiders may not move without permission.

[21] P.W.3 Loum Dramoi testified that during an earlier dispute over the same boundary, his Committee had planted flowers to mark the common boundary between the two adjoining parcels of land. This was corroborated by D.W.1 Olwocch Sikondo, the appellant's uncle who testified that during that earlier depute over the same boundary, the L.C.II executive had planted flowers to mark the common boundary which flowers existed for a long time but were later destroyed by unknown people who planted a garden of sweet potatoes. P.W.1 Hellen Laker Oboni, the respondent, testified that it is the appellant who during the year 2011 began to encroach on that land by undertaking cultivation on a

strip of land measuring 3 meters by 22 metres. When the court visited the *locus in quo* it observed that a trench had been dug extending from the line marked by the palm (*Tugu*) tree and the *Kituba tree* up to the respondent's toilet and correctly concluded that this constituted an act of trespass by the appellant.

Ground three; Bias

[22] By the third ground of appeal, the trial Magistrate is criticised for having laboured under a bias that affected the outcome of the case. It is trite that all litigants are entitled to objective impartiality from the judiciary. It is for that reason that Principle 2.4 of the *Uganda Code of Judicial Conduct, 2003* requires a judicial officer to "refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned." Impartiality can be described as a state of mind in which the judicial officer is disinterested in the outcome and is open to persuasion by the evidence and submissions. A judicial officer is "impartial" when he or she is free of bias or prejudice in favour of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before him or her. The reasonable person expects judicial officers to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them.

[23] Whether a judicial officer is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. The test of judicial bias contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. The reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties the judicial officers swear to uphold. The reasonable person should also be taken to be aware of the social reality that

forms the background to a particular case. A real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judicial officer in question improperly used his or her perspective in the decision-making process. There has to be a proper and appropriate factual foundation for a reasonable apprehension of bias. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.

[24] In the instant case, there is nothing to show that the trial magistrate failed the test of impartiality. Nothing demonstrates that he failed to proceed with an open-minded, dispassionate, careful, and deliberate investigation and consideration of the complicated reality of the case before him but, that instead he relied on stereotypical undue assumptions, generalisations or predeterminations. This ground accordingly fails. Finally, although judgment was delivered on 20th January, 2015 the memorandum of appeal was filed three months later on 17th April, 2015. This was outside the thirty days' time allowed by section 79 of *The Civil Procedure Act* which provides that an appeal to the High Court shall lie within 30 days from the date of the delivery of the judgment. The appellant never sought leave of court for filing the appeal out of time.

[25] An appeal filed out of time without the leave of court is incompetent and will be struck out as incompetent (see *Maria Onyango Ochola and others v. J. Hannington Wasswa [1996] HCB 43; Loi Kageni Kiryapawo v. Gole Nicholas Davis, S. C. Miscellaneous Civil Application No.15 of 2007* and *Hajj Mohammed Nyanzi v. Ali Sseggane [1992 – 1993] HCB 218*).

Order:

[26] In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the suit and of the appeal are awarded to the respondent.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

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