IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 021 of 2017

In the matter between

KILAMA TONNY **APPELLANT**

And

1. **LAKER CAROLINE ONEKALIT**
2. **ANGWECH JOSEPHINE ONEKALIT**
3. **AKUMU CATHERINE ONEKALIT** **RESPONDENTS**
4. **ONONO GERSON ONEKALIT**
5. **OGWAL ISRAEL OBURA ONEKALIT**
6. **OKELLO CHRISTOPHER MUREFU**

Heard: 15 October, 2019.
Delivered: 27 February, 2020.

Civil Procedure *— Substantive justice — by virtue of article 126 (2) (e) of The Constitution of the Republic of Uganda, 1995) which enjoins courts to administer substantive justice without undue regard to technicalities, it is not desirable to place undue emphasis on form rather than the substance of the pleadings —Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds — Pleading fraud — According to Order 6 rule 3 of The Civil Procedure Rules, where a party relies on fraud as part of the cause of action, the particulars of that fraud with dates should be stated in the pleadings.*

Land law *— The Torrens System — Save for fraud and illegality, the Torrens registry "mirror" and "curtain" principles hide significant aspects of the land's local history from registry users, allowing owners and courts to drop the land's history from their sphere of direct concern —That which the certificate of title describes is not that which the registered proprietor formerly had, or which but for registration would have had. The title it certifies*

is not historical or derivative. It is the title which registration itself has vested in the proprietor — Boundary by acquiescence — In order to establish a boundary line by recognition and acquiescence, there must be a well-defined line which is in some fashion physically designated upon the ground — An express agreement between the parties or their predecessors is not essential. It is sufficient if the parties, for the requisite period of time, have demonstrated by their possessory actions with regard to their properties and the asserted division line a mutual recognition and acquiescence in the given line as a boundary between their adjoining interests.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant, jointly with his father Oryang Kerobino, sued the respondents jointly and severally seeking a declaration of ownership of land under customary tenure measuring approximately ten (10) acres situated at Baromal Lajwatek village, Pageya Parish, Koro sub-county, in Gulu District, recovery of that land, general damages for trespass to land, a permanent injunction restraining them from further acts of trespass onto that land, interest and the costs of the suit.

[2] The appellant's case was that the land in dispute originally belonged to his grandfather Odoch Laguto who acquired it in 1920 while it was vacant, unclaimed land. Upon his death it was inherited by the appellant's father, Olobo Musa from whom the appellant inherited it around 1968. Before his death, the appellant's co-plaintiff and one of his other brothers, the late Ojok Yovani, had applied for a lease over that land. They were granted a lease offer in 1976. Before that, the 1st respondent's father, the late Dr. Onekalit, had in 1973 requested the two offerees to give him part of the land for his block making project. He was given approximately two cares of the land. The land was occupied by the appellant's mother in law and her family until the insurgency, at the end of which it was handed back to the appellant during the year 2007, with all the developments thereon. Without any claim of right, the respondents had in 1998 applied for a lease over

the land and caused its survey while its occupants were still living in an IDP Camp. During the year 2012 the 1st respondent together with a group of youths entered onto the land and destroyed all the developments thereon. It is only during the year 2013 that the appellant discovered the respondent's fraudulent acquisition of title over the land. The 1st respondent has since then taken possession of the land which he uses for growing of crops. His father Oryang Kerobino died before testifying in court and the appellant continued with the suit as a sole plaintiff.

[3] By their joint written statement of defence, the respondents denied the appellant's claim. They denied the claim that their late father acquired any land from the appellant or his father in 1973. They averred instead that in 1976, a one late Mzee Omaki sold four acres of his land to the respondent's late father Dr. Onekalit. Later, Mzee Omaki gave as a gift *inter vivos*, the residue of the land to Dr. Onekalit, following another transaction of sale to Mzee Okello John. He bought another part from a one Jibidayo Omaki, through his brother Tom Opira. Upon the death of Dr. Onekalit during the year 1989 and his wife Mrs. Betty Onekalit in the year 2005, the respondents continued to occupy the land left by their deceased parents. Before the respondents took possession of the land, a village meeting was convened in the year 2007 by which its boundaries were settled by elders knowledgeable regarding the location of its boundaries, and it was fenced off. The appellant's land was located North of Col. Walter Ochora Road. It is the respondents' mother who during the period of insurgency gave the appellant's mother-in-law and daughter temporary refuge on the land. Upon her death, her surviving son Olanya Kasimiro vacated the land during or around November, 2008 by amicable settlement of a suit. The respondents too possession of that part of the land in 2009 after Olanya Kasimiro had been compensated for his developments on the land and vacated it. It is during that year that the respondents began the processes of acquisition of a freehold over the land. The land was duly inspected by the Area Land Committee, surveyed, mark stones planted and on 8th September, 2011 a freehold title was issued for land comprised in FRV 1018 Folio 19 Block 2 Plot 86 being 6.271 hectares at Lajwatek village.

The appellant's evidence in the court below;

[4] P.W.1 Kilama Tony testified that the land in dispute measures approximately ten acres. He presented for identification, an application form for rural land dated 21st September, 1976 but stated that his father did not receive a lease offer. The respondents' land is to the West of the land in dispute and they have never lived on the land in dispute. It is during the year 2005 that the respondents began encroachment on the land by eviction of his uncle Olanya Kasimiro who had been occupying that part since 1990 and fenced off that part of the land. The respondents now occupy the ten acres. The land was temporarily occupied by Olanya Kasimiro. The dispute between Olanya Kasimiro and the respondents was resolved by mediation on 22nd December, 2007 at the end of which it was decided that the land belonged to the appellant's father Kerobino Oryang. His home is separated from the land in dispute by a road.

[5] P.W.2 Okello Santo Mukomoi testified that between 1967 and the time of his death in 2016, the land in dispute was occupied by the appellant's father Kerobino Oryang who inherited it from his late father Odoch Lagutu who settled in the area in 1920. Before his death, Kerobino Oryang had in 1976 began the process of obtaining a lease title over the land. The land stretched up to Okwateng Stream. Onekalit shared a common boundary with the land in dispute. Olanya Kasimiro settled on the land during the insurgency with the permission of Kerobino Oryang but was evicted from the land in 2007. Kerobino Oryang had in 1973 given only two acres of the land to Dr. Onekalit for his brick making project.

[6] P.W.3 Onek John Bosco testified that he is the son of Olanya Kasimiro. Before his death, he had occupied part of the land in dispute that had been given to him by Kerobino Oryang in 1990 during the insurgency. The land lay across the road to Koro Laianat Tetugu. Dr. Onekalit was a neighbour to the West of that land. The dispute began in 2015 when the 1st respondent caused the land to be fenced. A mediation agreement between his father and Caroline Onekalit required his father

to vacate the land. In 2007 the respondents began demolishing Olanya Kasimiro's hits on the land and uprooting the trees he and Kerobino Oryang had planted on the land. After the insurgency in 2008, he and his father Olanya Kasimiro returned to their home in Koch Goma.

[7] P.W.4 Olum Michael testified that he lived on the land in dispute temporarily with his father Olanya Kasimiro during the insurgency. It is the 1st respondent who during 2008 directed the houses they had on the land to be demolished. He is aware of the mediation that took place between Olanya Kasimiro and Caroline Onekalit but it was inconclusive.

The respondents' evidence in the court below;

[8] D.W.1 Laker Caroline testified that her father bought some of the land and the rest was given to him as a gift *inter vivos*. He purchased approximately 4 hectares and was given approximately 2 hectares. They had lived on the land undisturbed for 35 years by the time they applied for and acquired a title deed to the land. The appellant's home is approximately 200 meters away, across the road. D.W.2 Jakayo Onek testified that it is Jibidayo Okello who gave approximately 4 acres of land to Dr. Onekalit during the 1970s and the boundary was shown to him but no boundary marks were planted. It is him who in turn showed the 1st respondent the location of that boundary. D.W.3 Ajulina Acayo was deferred and eventually never testified.

[9] D.W.4 Opira Tom testified that he is an immediate neighbour to the West of the land in dispute. During 1976 Onekalit showed him the boundary of the approximately four acres of land that was given to him by Jibidayo Okello. Upon his death, the land was occupied by his children. D.W.5 Alex Oringa testified that it is his late father Jibidayo Omaki who gave the land in dispute to Dr. Onekalit during the 1970s. It is during the year 2014 that the appellant began planting eucalyptus, pine and teak trees on the land before he was stopped. When a dispute

erupted in 2007 between Onekalit and Oryang Kerobino, it was on 22nd December 2017 resolved at a mediation that the land belonged to Onekalit since it had been given to him by Jibidayo Okello. The common boundary between the appellant and the respondent's land is Co. Walter Ochora Road. D.W.6 Ocitti Andrew was disqualified.

The court's visit to the *locus in quo*;

[10] The court then visited the *locus in quo* on 21st February, 2017 where it recorded additional evidence from; (i) Josephine Oryang; (ii) Ajilia Achayo; (iii) Sarafina; (iv) Ochora Alfred Okello; (v) Kinyera Simon Peter and (vi) Ocitti Andrew. The court never prepared a sketch map for the land in dispute.

Judgment of the court below;

[11] In his judgment delivered on 11th April, 2017 the trial Magistrate held that during the visit to the *locus in quo*, the court observed that the land in dispute is less than ten acres. The appellant did not plead particulars of fraud. During his testimony, the appellant introduced evidence of trespass committed as way back as 1998, which too was not pleaded. The appellant having failed to plead and prove fraud as against the respondents, the respondents are declared the lawful owners of the land. The appellant did not prove his case to the required standard and it was accordingly dismissed with costs to the respondents.

The ground of appeal;

[12] The appellant was dissatisfied with the said decision and appealed to this court on the following ground, namely;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion.

The appellant's submissions;

[13] Counsel for the appellant submitted that although the respondents in their pleadings and evidence stated that the late Dr. Onekalit acquired only four acres, the title deed reflects 6.272 hectares, which is far bigger than the land they could account for. The discrepancy in size of the land claimed by the respondents was a major contradiction. The respondents did not present to court any agreement of sale between their late father and Jibidayo Omaki. Had the court properly evaluated the evidence, it would have found that he alleged purchase was never proved.

The respondents' submissions;

[14] In response, counsel for the respondents argued that although the respondents pleaded that they are registered owners of the land in dispute and attached a copy of the title deed, the appellant never pleaded any grounds to justify the impeachment of that title. The sole ground of appeal is too general and should be struck out. They prayed that the appeal be dismissed with costs of the respondent.

The ground of appeal is truck out;

[15] In agreement with counsel for the respondents, I find the only 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.

The obligation not to have undue regard to technicalities;

[16] That on its own would have been dispositive of the appeal. However, the law of pleadings has been undergoing changes in a bid to do substantial justice rather than uphold mere technicalities. Hence when an issue of claim or defence, though not pleaded, is established by the evidence on record, which has not been objected to, the court would uphold the same. In the same vein it is said that the court would give effect to the legal consequences following from the pleaded facts and not be held back by the formulation of the pleadings (see *In re Vandervell's Trust (No.2) [1974] 3 WLR 256* and *Belmont Finance Corporation Ltd v. Williams Furniture Ltd [1979] 1All ER 118*). By virtue of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*) which enjoins courts to administer substantive justice without undue regard to technicalities, it is not desirable to place undue emphasis on form rather than the substance of the pleadings. Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. Courts have always been liberal and generous in interpreting pleadings.

[17] Under the general duty of the first appellate court I have subjected the entire record to fresh scrutiny. The three fundamental principles which underlie the title registration system and generally accepted are: the mirror principle (that the register reflects accurately and completely all of the current facts material to the title); the curtain principle (that the register is the sole source of information necessary for a purchaser. The register contains all the information about the title,

a historical search behind the register to verify that the title is good is unnecessary); and the insurance principle (that anyone who suffers a loss should be compensated. Compensation is for loss of rights if there are errors made by the Registrar of Titles about the validity or accuracy of a title). The general rule consequently is that an owner of a titled land duly registered takes the property free from minor interests that have not been duly registered even if he or she knows of the existence of such interests.

[18] Although under section 64 (2) of *The Registration of Title Act* a certificate of title is subject to any rights subsisting under any adverse possession of the land (otherwise characterised as an "overriding interest"), this is subject to the condition, that the claimant of adverse possession is actually occupying the land. Even in such cases, by virtue of the mirror principle if any claimed interest of an actual occupant is not evident upon ocular inspection reasonably made, that actual occupant's interest is not protected. Similarly, if during the process of acquisition of title, the actual occupant failed to confirm his or her interest on the property he or she actually occupies when asked about it and the disposition subsequently took place, the interest of that actual occupant does not become overriding and is not protected.

[19] The mirror principle otherwise means that if something is not on the register, then persons dealing with that land and courts are entitled to ignore it. Once land is brought under the operation of *The Registration of Titles Act*, the divergent local histories of the land and those who live and have historically lived on it become irrelevant as the overarching, standardised order of the registry takes over. Save for fraud and illegality, the Torrens registry "mirror" and "curtain" principles hide significant aspects of the land's local history from registry users, allowing owners and courts to drop the land's history from their sphere of direct concern. Fraud entails personal dishonesty or a moral turpitude on the part of the registered owner. Mere knowledge that a prior interest existed is insufficient to constitute fraud.

[20] The Torrens system produces indefeasible titles behind its distinctive "curtain" and "mirror" principles. Each parcel of land is identified by reference to a numbered deposited plan. Each plot of land is the subject of a separate folio in the register. The folio records the dimensions of the land and its boundaries, the names of the registered proprietors, and any legal interests that affect title to the land. Person who obtain title through the registry become indefeasible; their title is new, perfect, oriented toward the future and insured against the past. The Torrens system of registered title is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not that which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor (see *Breskvar v. Wall [1971] 126 CLR 376 at 385*).

[21] It follows that by virtue of section 59 and 176 of *The Registration of Titles Act*, a certificate of title is conclusive proof of ownership (see *Kampala Bottlers v. Damanico (U) Ltd, S. C. Civil Appeal No. 22 of 1992* and *H. R. Patel v. B.K. Patel [1992 - 1993] HCB 137)*. It can only be impeached on grounds of illegality or fraud, attributable to the transferee (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others, S.C. Civil Appeal No. 4 of 2006 and Kampala Bottlers Ltd v Damanico (U) Ltd., S.C. Civil Appeal No. 22of 1992)*. Registered proprietors are given indefeasible title that can only be disputed under those specified circumstances. Upon registration, a registered holder immediately acquires protection of registration, subject to statutory fraud which they themselves may have committed (see *Frazer v. Walker [1967] 1 AC 569; [1967] 1 All ER 649*). The title of a registered proprietor is not impeached unless he or she somehow engaged in fraud leading to the acquisition of the title. The appellant had the onus of proving fraud against the respondents. From the evidence on record he did not.

[22] According to Order 6 rule 3 of *The Civil Procedure Rules*, where a party relies on fraud as part of the cause of action, the particulars of that fraud with dates should be stated in the pleadings. Consequently where impeachment of title is sought by

reason of fraud perpetrated in the course of its acquisition, the particulars of fraud must be specified in the pleadings and the allegation of fraud must relate to the way in which the proprietor gained registration (see *Lubega v. Barclays Bank [1990-1994] EA 294;* B.E.A. *Timber Co. v. Inder Singh Gill [1959] E.A. 465 at 469*; *Okello v. Uganda National Examinations Board [1986-89] EA 436; [1993] II KALR 133 at 135* and *Kampala Bottlers v. Damanico (U) Ltd, S. C. Civil Appeal No. 22 of 1992*). The acts alleged to be fraudulent must be set out and then it should be stated that these acts were done fraudulently.

[23] On the other hand, a plaintiff may assert and fully develop more than one legal theory to support a single claim. For that reason, once an issue concerns the actual facts giving rise to the claim, and it was in fact actually litigated and was necessary to a final judgment on the merits, the court is entitled to make a finding on it whether or not the parties raised it as one of the issues for the court's determination. A judgment may be pronounced not only as to all matters that were in fact formally put in issue by the parties, but also on those matters that were offered and received to sustain or defeat the claim, where it is necessary to the court's judgment, in order to ensure the reliability, conclusiveness, completeness and fairness of a judgment. It is for that reason that fraud, though not explicitly pleaded, it may be inferred from the facts alleged in pleadings (see *Nalwoga Teddy Nalongo Ssewamala v. Josephine Nansukusa and others H.C. C.A. No. 17 of 2011*). Although an issue may not have been pleaded, where both parties had a full and fair opportunity to litigate the issue, after full contest in which both parties had a fair opportunity to prove their respective case, it can actually be determined and necessarily decided by the court.

[24] In the instant case, the manner in which the background to the competing claims was introduced in evidence did not give the respondents a full and fair opportunity to litigate the issue of fraud. Not only did the appellant fail to plead particulars of fraud but also did not articulate any particular set of omissions or acts that were committed fraudulently by any of the respondents. As a result, the trial court was

unable to decide the issue of fraud on the merits due to that procedural defect. Consequently, fraud was not one of the matters that were actually litigated.

[25] That aside, D. Ex. 5 is a set of documents comprising a topographical map, a location map and a site plan indicating that the respondents' land is separated from the appellant's land by Walter Ochora Road. By a process of acquiescence, that road appears to form the boundary between the two parcels of land. Boundary by acquiescence entails four elements, all of which must be shown to establish ownership of a disputed parcel: (1) occupation up to a visible, certain, well defined line, and in some fashion physically designated upon the ground, e.g., by monuments, roads, fence lines, or buildings, (2) the adjoining landowners, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of or mutual acquiescence in the designated boundary line as the true boundary line, (3) that mutual recognition of the boundary line continued for the period of time necessary to establish adverse possession (12 years).

[26] In order to establish a boundary line by recognition and acquiescence, there must be a well-defined line which is in some fashion physically designated upon the ground and, in the absence of an express agreement between the adjoining owners or their predecessors in interest establishing the designated line as a boundary, they must have in good faith manifested by their acts, occupancy, and improvements with respect to their respective properties a mutual recognition and acceptance of the designated line as the true boundary line, which recognition and acceptance must endure for that period of time required to secure property by adverse possession. In all cases, it is necessary that acquiescence must consist in recognition of the abuttal as a boundary line, and not mere acquiescence in its existence as a barrier.

[27] An express agreement between the parties or their predecessors is not essential. It is sufficient if the parties, for the requisite period of time, have demonstrated by their possessory actions with regard to their properties and the asserted division

line a mutual recognition and acquiescence in the given line as a boundary between their adjoining interests. When adjoining property owners occupy their respective holdings to a certain line for a long period of time, they are precluded from claiming that the line is not the true one. This approach is founded upon the truism that actions are often, if not always, stronger talismans of intentions and beliefs than words. The time required to elapse before a line is established, is the time necessary to secure property by adverse possession. The appellant's land is distinctive and does not include that of the respondents. The trial court therefore came to the correct conclusion.

Order:

[28] In the final result, the appeal fails. It is accordingly dismissed with the costs of the suit and of the appeal to the respondents.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

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

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