IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 051 of 2016

In the matter between

OCAN AMOS **APPELLANT**

And

OYOO WILSON **RESPONDENT**

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

Civil Procedure *—Appeals — a "provisional Memorandum of appeal" is not a proper document to be considered in computing the time of lodging an appeal —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 —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.*

Evidence — *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 — Adverse inference — where a party fails to call a particular person as a witness whose evidence is material, particularly and uniquely available to that party, where there is no reasonable explanation for the failure to testify*.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant seeking recovery of land measuring approximately 600 acres situated at Bola Ward village, Pajimmo Parish, Akwanga sub-county, in Kitgum District, a declaration that he is the rightful owner of the land in dispute, special and general damages for trespass to land, a permanent injunction restraining the appellant 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 late father, Bartholomew Otim, from whom he inherited it. During the year 1980, the respondent's mother, Salome Aparo, permitted the appellant's father Lukoya Esau, temporary occupancy of part of the land and he duly vacated the same in 1983. During the year 2012, the appellant without any claim of right nor consent of the respondent entered onto the land and began cultivating crops on it. Attempts by the respondent to stop the trespass were unsuccessful, hence the suit.

[2] In his written statement of defence, the appellant refuted the respondent's claim. He averred instead that the land belonged to his father Lukoya Esau who acquired it in 1969. The appellant was born and raised on that land. It is his father who subsequently gave him the approximately 100 acres that he is occupying. The respondent has made multiple unsuccessful malicious attempts to evict him from the land.

The appellant's evidence in the court below:

[3] Testifying in his defence as D.W.1 Ocan Amos, the appellant stated that the land in dispute was originally a hunting ground. He occupies only part of the land but

in 2015 he found that the respondent had exceeded the boundary. His immediate neighbour is Obol Benon, son of Bartholomew Otim and hence the respondent's brother. The appellant has occupied the land since the time of his grandfather in 1957. He had planted mangoes, paw-paw trees and acacia trees. He only vacated the land temporarily during the NRA war. He now lives on the land together with his father.

[4] D.W.2 Esther Obol, wife of the appellant testified that at the time she and her husband occupied the land the respondent was no resident thereon. The respondent acquired the land before the respondent came to live there. Bartholomew Otim never lived on that land. D.W.3 Otto Livingstone testified that the land in dispute belongs to the appellant. It was originally occupied by the appellant's grandfather, the appellant's father Ecawar Kikoya and the appellant's paternal uncle Acellam Oryan in 1957. Following a family dispute, Ecawar Kikoya vacated the land in 1969 and settled elsewhere. D.W.4 Acola Damalie testified that the land belongs to the appellant having acquired it from the respondent's brother Benon Obol, who is also the respondent's neighbour.

The respondent's evidence in the court below:

[5] P.W.1 Oyoo Wilson, the respondent, testified that the land in dispute was vacant and unclaimed when his father, Bartholomew Otim acquired it in 1964. He occupied the land together with his family until his death in the 1980s. The family used the land for mixed farming. There are mango trees and multiple graves of their deceased relatives on the land. During the year 1980, the respondent's mother, Salome Aparo, permitted the appellant's father Lukoya Esau, temporary occupancy of part of the land and he duly vacated the same in 1983. During the year 2012, the appellant without any claim of right nor consent of the appellant entered onto the land and began cultivating crops on it. He constructed two grass-thatched huts on the land.

[6] P.W.2. Lam Sisto, testified that the land in dispute belongs to the respondent. The respondent's father Bartholomew Otim was its first occupant and the respondent inherited it from him. There are mango trees and multiple graves of their deceased relatives on the land. The appellant's father still lives and has not laid claim to the land. The appellant nevertheless entered onto the land, began cultivating crops on it and constructed two grass-thatched huts on it. P.W.3. Liberima Aber Oleber testified that the respondent is her brother in law. The respondent inherited the land in dispute from his father Bartholomew Otim. The respondent's mother, Salome Aparo, permitted the appellant's father Lukoya Esau, temporary occupancy of part of the land and he duly vacated the same in 1983 but now the appellant has returned to the land.

[7] P.W.4. Nyero Alfred testified that the respondent inherited the land in dispute from his father Bartholomew Otim around the year 1964. The appellant's father still lives and has not laid claim to the land. The respondent's mother, Salome Aparo, permitted the appellant's father Lukoya Esau, temporary occupancy of part of the land and he duly vacated the same in 1983. The appellant trespassed onto the land during the year 2012. He is cultivating crops, has planted mango trees and constructed two grass-thatched huts on the land.

Proceedings at the *locus in quo*:

[8] The court indicated that it would visit the *locus in quo* on 13th August, 2016. However, neither the notes taken thereat nor the sketch map of the land in dispute not available on the record

Judgment of the court below:

[9] In his judgment delivered on 17th October, 2016, the trial Magistrate though noted that when the court visited the *locus in quo*, it observed that the land in dispute is vast. The respondent has a lot of developments on the land including buildings,

gardens and livestock. The appellant has no developments on the land. Evidence from independent witnesses, who included Aboda, was tom the effect that the land belongs to the respondent. The respondent who has developments on the land is entitled to the protection of the law. Therefore, judgment was entered in the respondent's favour. He was declared the rightful customary owner of the land in dispute and the appellant a trespasser thereon. A permanent injunction was issued against the appellant restraining him from further acts of trespass to the land and the costs of the suit were awarded to the respondent.

The grounds of appeal:

[10] 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 failed to properly evaluate the evidence before court, relied on hearsay and contradictory evidence presented by the respondent and thereby came to a wrong decision.
2. The trial Magistrate erred in law and fact when he ignored the evidence obtained at the *locus in quo* in making his decision.
3. The learned trial Magistrate erred in law and fact when he erroneously declared the respondent the rightful owner of the suit land.

Arguments of Counsel for the appellant:

[11] Counsel for the appellant did not file submissions in support of the appeal.

Arguments of Counsel for the respondents:

[12] Counsel for the respondents, argued that Obol Benon and the respondent are brothers. They both inherited the land from their father Bartholomew Otim. The appellant's claim that he acquired the land from Obol Benon corroborates the

respondent's case that he owns the land by inheritance from his father. The court was right in its decision for an adverse inference should be drawn from the appellant's failure to call his father as a witness yet he claimed that it is his father who first acquired the land in dispute while it was still a hunting ground.

Duties of a first appellate court:

[13] 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*).

[14] 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.

Lodging an Appeal;

[15] Before addressing the ground of appeal raised, I note that the document purporting to have commenced this appeal is a "Tentative Memorandum of Appeal" dated 24th October, 2016 and filed in this court on the same day. A

tentative memorandum of appeal is not a document capable of commencing a civil appeal since it is "unknown" to the law. In *Mayanja Grace v. Yusufu Luboyera [1977] HCB 133* where the appellant purported to lodge and appeal by filing a "provisional Memorandum of appeal" and later filed the Memorandum of appeal but out of time, the court held that the provisional memorandum of appeal was not a proper document to be considered in computing the time. Similar decisions can be found in *Muhutu George v Mpengere Bulasiyo [1982] HCB 55 and Westmont Land (Asia) BHD v The Attorney General [1998-2000] HCB 46*. For that reason alone, this appeal would have been struck out as incompetent. But for reasons of administering substantive justice without undu regard to technicalities in accordance with article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*), the grounds will be considered.

Ground two; errors in conducting the proceedings at the *locus in quo.*

[16] In the second ground of appeal, the trial court is criticised for ignoring the evidence obtained at the *locus in quo* in making his decision. Unfortunately, that part of the proceedings is missing from the record of appeal. 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*).

[17] As regards the fact that the court recorded evidence from persons who had not testified in court, it is settled law that visiting the *locus in quo* is meant to check on the evidence by the witnesses, and not to fill gaps in their evidence for them, 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 "independent witnesses, who included Aboda" was therefore an error.

[18] In any case, 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 section 70 of *The Civil Procedure Act*, provides that 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. 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. I find that considering the nature of the dispute at hand, these irregularities are not fatal since the issues in controversy were about the root of title and the attendant rights, and not so much about boundaries of the land in dispute. This ground fails.

Grounds one and three; court's finding as to ownership.

[19] In grounds one and three of the appeal, the trial court is faulted for having relied on hearsay and contradictory evidence, thereby erroneously declaring the respondent the rightful owner of the land in dispute. I have perused the record and not found any of the hearsay and contradictory evidence alluded to. One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. It is

the reason why parties are expected to call all witnesses necessary to unfold the narrative of events unless there is a good reason not to do so.

[20] A decision of a party not to call a particular person as a witness whose evidence is material, particularly and uniquely available to that party, where there is no reasonable explanation for the failure to testify, will attract an adverse inference that the witness did not testify because the testimony would have been adverse to the interests of the party who, otherwise, would have been expected to call the witness (see *Talituka Feibe L. v. Abdu Nakendo [1979] HCB 275*; *Pushpa d/o Raojibhai M Patel v. The Fleet Transport Company Ltd [1960] 1 EA 1025; Sirley v. Tanganyika Tegry Plastics Ltd [1968] 1 EA 529; Bukenya and others v Uganda [1972] 1 EA 549; Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634* and *APC Lobo and another v. Saleh Salim Dhiyebi and others [1961] 1 EA 223*).

[21] Whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend upon the particular circumstances of each case. The inference will be justified where; (i) the uncalled witness has knowledge about a material issue; (ii) the witness is available to the non-calling party to testify. The party against whom the inference is sought has the burden of showing that the witness is unavailable to testify; (iii) the witness is under the "control" of the non-calling party, such that the witness would be expected to give testimony favourable to that party. Control refers to the witness's relationship of friendship or loyalty to the party. A party who lists a witness usually expects that witness to testify on its behalf and, thus, the party exercises control over that witness; and (iv) the witness is expected to give noncumulative testimony. The court therefore is required to apply the test of materiality, availability, control and noncumulative nature of the potential testimony.

[22] Although collateral to the issues traversed, evidence of a deliberate action to suppress material evidence is competent as an admission by conduct that the party doing so has, or thinks he has, a weak case and that his evidence is defective or insufficient. The inference follows that the material witness retained in the wings would have testified adversely to the interest of the party suppressing the evidence. Therefore, when a litigant fails, absent explanation satisfactory to the court, to call an available material witness, when under all the surrounding circumstances a reasonable litigant would do so, an unfavourable, but rebuttable, inference may be drawn against the litigant, by virtue of which the evidence he actually offers is construed, or coloured, against him.

[23] In the instant case, the respondent's case was that during the year 1980 his mother, Salome Aparo, permitted the appellant's father Lukoya Esau, temporary occupancy of part of the land and that he thereafter duly vacated the same, together with his wife, in 1983. The materiality of appellant's father Lukoya Esau as a witness is without doubt. His evidence would be material to the issues in the case. He was said to be alive and ordinarily resident with the appellant but no explanation was offered for failure to call him. His evidence would not have been cumulative since testimony may properly be considered cumulative only when it is cumulative of testimony or other evidence favouring the party controlling the uncalled witness. Failure to call this witness was clearly intentional.

[24] When a party fails to call an available witness to testify to matters within his knowledge that would further elucidate facts in dispute, it is only natural to infer that the party fears to call him. The obvious supposition is the witness, if called, would expose facts unfavourable to the party who otherwise would naturally be expected to call him. The appellant's failure to call his father as a witness strengthened the respondent's case. Whereas the respondent presented consistent evidence as to the root of title through inheritance from his father Bartholomew Otim, the appellant presented a contradictory version. He testified that he had occupied the land since the time of his grandfather in 1957, yet in his

written statement of defence he pleaded that it his father Lukoya Esau who acquired it in 1969. To compound it all D.W.4 Acola Damalie testified that the appellant acquired it from the respondent's brother Benon Obol.

[25] Once the respondent adduced evidence of such a quality that a court properly directing itself on the law would say "we think it more probable than not" the burden was discharged (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). The respondent, on the evidence available, proved that the appellant was a trespasser onto the land in dispute. It cannot be said that the court below had erred in any manner in coming to the conclusion that it did. The findings were essentially based on the evidence before it and it could not be said that the interpretation given by the court was quite unwarranted or unjustified.

Order:

[26] In the final result, there is no merit in the appeal and it is accordingly dismissed. The costs of the appeal and of the trial 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 Donge and Co. Advocates.

For the respondent : M/s Otto Harriet and Co. Advocates.