IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 042 of 2017

In the matter between

OKENY ZAK …… APPELLANT

VERSUS

OLANGO JOSEPH …… RESPONDENT

Heard: 4 April, 2019.
Delivered: 9 May, 2019.

Land Law *— creation of a consentable boundary line by "dispute and compromise" —An agreement resulting from a mediation process is enforceable if it is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent on behalf of his late father's estate seeking a declaration that he is the rightful customary owner of land measuring approximately sixty acres at Alimotiko village along Palabek - Atiak Road, Labigirian Parish, Palabek sub-county, Lamwo County in Lamwo District, general damages for trespass to land, an order of vacant possession, *mesne* profits, a permanent injunction, interest on the decretal amount and the costs of the suit. His claim was that his late father Zekeri Otuu Okwile occupied the land in dispute from1958 until his death in 1988. Upon his death, the plaintiff took over administration of the land until 1997 when he was displaced by the L.R.A insurgency. From the year 2007 henceforth upon their return to the land, the

respondent had gradually extended his encroachment onto the land from one garden to approximately ten acres at the time of filing the suit, falsely claiming that the land belonged to his late father, Abita Panypilo. Following a complaint by the appellant to the local leaders, a common boundary was mutually established comprising a series of tress and an anthill. In the year 2011 the respondent exceeded established boundary once again, encroaching on an area measuring approximately two cares, hence the suit.

[2] In his written statement of defence, the respondent averred that the land in dispute measures approximately five and not sixty acres. It belonged to the respondent's late uncle Mzee Oloya Chuze. Out of the five acres, for the sake of peaceful co-existence the respondent surrendered two acres to the appellant, which the appellant now occupies. A common boundary was mutually established comprising a series of tress and an anthill which boundary the respondent has not exceeded. He therefore prayed that the suit be dismissed with costs.

The appellant's evidence;

[3] The appellant Okeny Jack testified as P.W.1and stated that he inherited the approximately sixty acres of land in dispute from his late father Otur Jekeri in 1987. He was granted letters of administration to the estate of his deceased father. The appellant established a kraal, six huts and planted mango trees on the land. The respondent has since 1997 trespassed onto six acres of that land. He also distributed parts of it to divers persons. He cut down natural trees and has planted crops, teak trees and pine trees on the land. The boundary he exceeded is marked by palm trees, an anthill and Olam tree. P.W.2 Odong George Annu testified that the appellant inherited the land in dispute from his late father Otur Jekeri who had settled thereon in 1958. The respondent has since the year 2005 trespassed onto approximately ten acres of that land by planting citrus fruit trees, mangoes, pine trees and rears some livestock. Several attempts to

stop the respondent's activities on the land have been futile. The respondent exceeded the two acres that had been given to him.

[4] P.W.3 Emmanuel Acona testified that the respondent has since the year 2007 trespassed onto the land in dispute by planting trees on approximately four acres out of the approximately sixty acres that belong to the appellant. The land originally belonged to the appellant's father who secured it in 1958. The respondent exceeded the boundary marked by Shea Nut trees, Cwaa trees and other types of trees. P.W.4 Tabisha Atito Olur testified that the respondent exceeded the boundary marked and trespassed onto about six acres of the land in dispute after leaving the IDP Camp. P.W.5 Oiyo Jacob testified that the respondent ahs trespassed onto approximately ten acres of the land in dispute. The appellant inherited the land from his late uncle Otur Jekeri who was not survived by any child. The respondent exceeded the boundary that was established by the elders and planted teak and pine trees. P.W.6 Opira Francis testified that the appellant inherited the land in dispute from his late uncle Otur Jekeri, brother to his late father Ezekiel Oyoo Okwir. The respondent has since the year 2006 trespassed onto approximately ten acres of that land.

The respondent's evidence;

[5] The respondent Olango Joseph testified as D.W.1. and stated that the land in dispute originally belonged to his grandfather Erinya Okumu. It was inherited by his father Pany Pilo Abita. It is during the year 2007 that the appellant began claiming the land as his. The elders established a boundary between the two marked by a fig tree by the roadside and extending up to the Kenya Stream. Both were instructed them not to undertake any activities within two meters of the boundary. The appellant exceeded the boundary by planting trees and grazing his livestock on the respondent's side of the land. The road from Palbek to Atiak serves as the boundary. He occupies the land North of that road and his mother's grave exits on that land. He prayed that the boundary established by the elders

be upheld. D.W.2 Lutara John testified that following a dispute over the land between the two parties, elders were mobilised and resolved it by establishing a boundary. The boundary was demonstrated by the appellant and the respondent acquiesced to it. It stretched from Kenya Stream to Olam tree, palm tree and to the Alwiri anthill near the road. He tendered in evidence minutes of that meeting.

The Court's visit to the *locus in quo* and judgment;

[6] The court then visited the *locus in quo* where the common boundary as established by the local leaders and elders was shown to it. In his judgment, the trial Magistrate held that the boundary dispute between the two parties had been mutually resolved and a common boundary marked. Minutes of those proceedings were tendered in evidence. At the *locus in quo*, the boundary marks were visible. There was no evidence of the respondent's activities beyond the established boundary. The appellant failed to prove his case and it was dismissed with costs to the respondent.

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 trial magistrate erred in law and fact when he held that the appellant had failed to prove his case on a balance of probabilities against the respondent.
2. The learned trial magistrate erred in law and fact when he held there was no proof that the respondent had trespassed beyond the recognised boundary of the appellant's land.
3. The learned trial magistrate erred in law and fact when he held that the boundary of the suit land is from Kenya Stream to the Fig (*Olam*) tree, to the palm (*Tugu*) tree to the Alwiri anthill near the road thus occasioning a miscarriage of justice.

4. The learned trial magistrate erred in law and fact when he held that the respondent had not trespassed onto the appellant's land since he had not gone beyond the boundary thereby occasioning a miscarriage of justice.
5. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence of all the plaintiff's witnesses as a whole thereby arriving at a wrong decision and conclusion.
6. The learned trial magistrate erred in law and fact and was wrong in holding that the respondent / defendant had adduced sufficient evidence to prove his counterclaim.

Submissions of counsel for the appellant;

[8] Submitting on behalf of the appellant, counsel argued with regard to the second ground, that the minutes of the proceedings regarding settlement of the boundary dispute were erroneously received in evidence and relied upon by the trial court. The evidence by all six witnesses in support of the appellant's case was not accorded the weight it deserved since it was cogent and consistent in proof of the appellant's ownership of the land in dispute. The trial court failed to record evidence at the *locus in quo* thereby violating the established procedures for the conduct of such proceedings. The appeal should be allowed and the judgment set aside.

Submissions of counsel for the respondent;

[9] In response, counsel for the respondent argued that the amended memorandum of appeal be disregarded as it was filed without leave. Grounds 1, 5 and 6 ought to be struck out for being too general. At the *locus in quo*, the court established that the respondent had not exceeded the boundary that had hitherto been established mutually between the parties. It is that boundary that the court re-affirmed in its judgment as having been established by the parties mutually upon mediation of the local elders. The trial magistrate properly analysed all the

evidence and came to the right decision. The appeal has no merit and it ought to be dismissed with costs to the respondent.

The duties of this 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] 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.

Inappropriate grounds summarily dismissed;

[12] The appellant did file an amended memorandum of appeal on 23rd May, 2018 without the leave of court nor the consent of the respondent. The grounds outlined in that memorandum and the arguments presented by counsel for the appellant in respect thereof have been disregarded. Ground six is misconceived in so far as the appellant never raised any counterclaim to the suit. Grounds 1 and 5 of appeal are too general that they offend the provisions of Order 43 rules

(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.

[13] 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 two grounds are struck out.

Creation of a consentable boundary line by "dispute and compromise";

[14] The third ground of appeal faults the trial Magistrate for having decided that that the common boundary between the two parties runs from the Kenya Stream to the Fig (*Olam*) tree, to the palm (*Tugu*) tree and to the Alwiri anthill near the road. There are two ways to create a consentable line: by "recognition and acquiescence," and by "dispute and compromise."

[15] The requirements for establishing a boundary by "dispute and compromise" are;- (i) existence of a dispute as to the location of the boundary, (ii) the establishment of a line in compromise, and (iii) consent by both parties to give up their respective claims inconsistent with the compromise. The law encourages the amicable and immediate resolution of bona-fide disputes as to the location of a boundary. Therefore, if a boundary is in dispute but the adjoiners nevertheless

agree to recognise a consentable line, they need not wait twelve years before their agreement becomes effective; it can become effective immediately (see *Niles v. Fall Creek Hunting Club, 376 Pa. Super. 260, 545 A.2d 926 (1988*).

[16] It was the testimony of D.W.2 Lutara John that following a dispute over the land between the two parties, elders were mobilised and resolved it by establishing a boundary. The boundary was demonstrated by the appellant and the respondent acquiesced to it. It stretched from Kenya Stream to Olam tree, palm tree and to the Alwiri anthill near the road. The appellant himself as P.W.1 testified that the boundary exceeded by the respondent is marked by palm trees, an anthill and Olam tree Those minutes were tendered in evidence. This evidence was not weakened by cross-examination and was verified when the court visited the *locus in quo*.

[17] It was argued by counsel for the appellant that the trial court erroneously admitted the record of those proceedings in evidence. When parties agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part, evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement. An agreement resulting from a mediation process is enforceable if it is clear that the parties intended it to be binding and the terms are clear and certain enough so as to be legally enforceable. A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. It is clear that the parties intended the boundary settlement to be binding and from the *locus in quo* its location was clear and certain enough so as to be legally enforceable. The trial court came to the right determination and therefore the third ground of appeal fails.

[18] The second and fourth grounds of appeal fault the trial Magistrate for having found that there was no proof that the respondent had trespassed beyond the

recognised boundary of the appellant's land and hence there was no proof of trespass. Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). The observations at the *locus in quo* by the trial court were more consistent with the respondents' version than he had not exceeded the mutual boundary.

Order :

[19] Therefore the trial court came to the correct conclusion. In the final result, there is no merit to the appeal. It is dismissed and the costs of the appeal and of the court below are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Mr. Oloya Martin.

For the respondent : Mr. Jude Ogik.