IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 002 of 2016

In the matter between

1.	**OJARA SAMUEL**	**}**	
2.	**OKWERA JACKSON**	**}**	
3.	**OJARA ALFRED**	**}**	**…… APPELLANTS**
4.	**OWINY NELSON**	**}**	
5.	**KOMAKECH JAMES**	**}**	
6.	**LAOYO JALON**	**}**	
7.	**OKELLO PETER**	**}**	

VERSUS

BWOMI SEZI …… RESPONDENT

Heard: 17 April, 2019.
Delivered: 16 May, 2019.

Land Law *— where land is described by its admeasurements, and at the same time by known and visible monuments, the latter prevail.*

Evidence *— Contradictions — the distinction between minor and major contradictions is one of materiality —materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be proved — Burden of proof — Whereas the burden of establishing the case (the legal burden) rests throughout the trial on the party who asserts, the burden of introducing evidence (the evidential burden) constantly shifts as evidence is introduced by one side or the other— once one party leads sufficient evidence capable of showing a prima facie case of the existence of the facts in issue, the evidential burden shifted onto the adversary.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for a declaration of ownership of land measuring approximately 20 hectares, situate at Abuturu village, Gem Parish, Lalogi sub-county, Omoro County in Gulu District. He sought a declaration that he is the rightful owner of the land, a permanent injunction restraining the appellants from further acts of trespass to the land, general damages for trespass to land, and the costs of the suit. His claim was that he settled on the land in dispute sometime in the 1970s as the first settler thereon while in was vacant land. He lived in quiet enjoyment of the land until his possession was disrupted by the LRA war which forced him into an IDP Camp. On his return to the land in the year 2008, he found the appellants had occupied most of it and thus deprived him of its use. They have since desecrated many of his dead relatives' graves located on the land and placed him under constant threat of eviction, hence the suit following an order of re-trial.

[2] In their joint written statement of defence, the appellants averred that have lived on the land for more than 30 years. Their grandfather, the late Koyo Mario acquired the land around the year 1933. Before him it belonged to their great grandfather Yaconi Otto. It is in the year 1984 that the respondent came to live with his nephew, Koyo Mario on that land whereupon his was given three gardens but has since laid claim to the entire land on basis of a forged will. The dispute was in February 2010 the subject of arbitration by the Rwot of Puranga resulting in an agreement to divide the land between the warring parties, which agreement the respondent later reneged on despite having executed it. They prayed that the suit be dismissed.

The respondent's evidence;

[3] The respondent Bwomi Sezi testified as P.W.1 and stated that the appellants are his neighbours to the South. During 1976 he migrated to the home of a one

Nekonori Otto who showed him vacant unclaimed land in the neighbourhood, measuring approximately 80 acres, which he took over and occupied. He established his home and gardens on that land. His occupancy was interrupted by the insurgency but on his return from the IDP Camp he found the appellants had encroached onto his land. The boundaries are marked by Lamina Onyang Stream, Conge Stream, and Abuturu Road. P.W.2 Edisa Akello Atoo testified that she is the widow of Nekonori Otto. In 1970 the respondent approached her late husband requesting him for land on which to establish his home. There was no one living across Lamina Stream at the time and that is the land he was given. The respondent established his home and gardens on the then vacant land. The appellants have since crossed the Abuturu road that forms the boundary between their land and that of the respondent and encroached onto his land.

[4] P.W.3 Ociti Akam testified that the respondent acquired the land in dispute from Nekonori Otto in 1976. The boundary between the respondent and the appellants is a road leading to Abuturu. The appellants have trespassed onto his land and established gardens on it. Before putting up a structure on that land, the respondent initially loved at the home of Nekonori Otto. Some of the respondent's deceased relatives, including his mother, were burned on that land. The appellant's land is about a mile from the one in dispute. P.W.4. Olima Richard testified that the appellant's are the respondent's neighbours to the South of his land. The land in dispute belongs to the respondent and he has occupied it since 1976 since his father Nekonori Otto gave it to the respondent. It is during the insurgency that the appellants crossed over a pat that constituted the common boundary, into the respondent's land and established gardens thereon. The respondent then closed his case.

<u>The appellants' evidence</u>;

[5] The 5th appellant Komakech James testified as D.W.1 and stated that the land in dispute measures approximately twenty acres and none of the appellants had

trespassed onto that land. It is his father Olwoch Ponsiano who in 1984 gave the respondent three gardens in the neighbourhood of that land, but he was never given the land in dispute. The respondent has since expanded his claim to the twenty acres, claiming more than the thee gardens he was given. The respondent still occupies the land given to him by Olwoch Ponsiano. There is a road in between the 5th appellant's home and that of the respondent. The 6th appellant Laloyo Jalon Kingston testified as D.W.2 and stated that the land in dispute, measuring approximately 20 acres, belonged to their late great grandfather Yasoni Otto. The sons of Yasoni Otto, Mario Koyo and Obwoch Ponsiano, in 1984 permitted the respondent to occupy three acres in the neighbourhood of that land. The respondent should be restricted to the three acres he was given. There is a road separating the home of the respondent from those of the appellants but it is not meant to be the boundary.

[6] D.W.3 Koyo Mario testified that in 1984 he was approached by the respondent who requested him for land for cultivation. He gave the respondent three acres of land. The respondent has since then laid claim to more that the land he gave him, hence the dispute over the twenty acres. The boundary now is a road from Ninjai to Loyoajonga. The appellants then closed their case.

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

[7] The court thereafter visited the locus in quo where it recorded evidence from (i) Okidi Bowen, (ii) Lapil Lamson Lebanon Benard, (iii) Adjumani Michael, (iv) Okello Michael and (v) Koyo Jackson Labeja. The court observed what remains of the respondents' deceased relatives graves on the land. He also had a banana plantation on the land. The court prepared a sketch map indicating that the land occupied by the respondent and that which is now in dispute is separated from that occupied by the appellants by a road that branches off from Abuturu Road, leading to Come Stream

The judgment of the court below;

[8] In his judgment, the trial Magistrate found that the appellants acknowledge that the respondent was given some land on the area in dispute. It is the time of the grant and the size of the land that is in dispute. The evidence showed that the appellants used to reside south of the land in dispute separated by Abuturu road. What remains of the respondent's deceased relatives' graves on the land was visible when the court visited the *locus in quo*. The appellants' evidence was contradictory regarding the process of measuring the land given to the respondent and the individual who gave it to him. The respondent had a banana plantation on the land yet the appellants had only recently constructed houses on the land, despite their claim that they and their forefathers had lived on the bland. The respondent was declared rightful owner of the land and a permanent injunction was issued restraining the appellants from interfering with is quiet enjoyment of the land. The respondent was awarded general damages of shs. 4,000,000/= for trespass to land. He was awarded the costs of the suit.

The grounds of appeal;

[9] The appellants were 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 ignored gross inconsistencies on the size of land claimed by the respondent thereby arriving at the wrong conclusion.
2. The learned trial magistrate erred in law and fact when he misdirected himself on the appellant's customary ownership and possession of the land in dispute thereby occasioning a miscarriage of justice.
3. The learned trial magistrate erred in law and fact when he ignored the deliberate falsehood in the testimonies of the respondent's witnesses thereby arriving at the wrong conclusion.

4. The learned trial magistrate erred in law and fact when he held that the respondent had possession of the land in dispute thereby arriving at a wrong conclusion.
5. The learned trial magistrate erred in law and fact when he shifted the burden of proving the respondent's case onto the appellants thereby arriving at a wrong conclusion.
6. The learned trial magistrate erred in law and fact when he held that the respondent acquired interest in vacant land in the 1970s thereby occasioning a miscarriage of justice.
7. The learned trial magistrate erred in law and fact when he failed to properly evaluate the entire evidence on record thereby arriving at a wrong conclusion.

Submissions of counsel for the appellant;

[10] In her written submissions, counsel for the appellants argued that the respondent claimed to have acquired the land in dispute during 1976 as vacant land. The appellants' version was that they owned the land and gave him only three cares from which he now lays claim to the approximately twenty cares in dispute. The appellants had a superior title since they claimed customary ownership by inheritance from time immemorial. The respondent's witnesses were inconsistent as to the size of the land. The sizes they mentioned ranged from 20 acres to 600 acres. They also contradicted themselves as to whether he acquired the land as vacant land or whether it was given to him by Nekonori Otto or D.W.3 Koyo Mario. The court relied on the mediation report to question the appellants' motive in accepting to have the land shared if they did not acknowledge the respondent's claim to it and this shifted the burden of proof to the appellants rather than the respondent. the appeal should therefore be allowed.

Submissions of counsel for the respondent;

[11] In response, counsel for the respondent argued that the respondent's evidence established that he had been in occupation of the land in dispute since 1976. At the *locus in quo*, the court observed the road the formed the common boundary between the appellants' and the respondent's land. The boundary was respected by both parties and the dispute arose only after the insurgency. Estimates of the size of the land were mere approximations and disparities therein should be found to have been inconsequential. The respondent discharged his evidential burden and the respondent's failed to disprove his case. Although the appellants acknowledged the respondent's occupancy of three acres, none of them gave a description of the recognised common boundary with their land. The respondent proved his case on the balance of probabilities as to the location of that common boundary. The trial court therefore came to the correct conclusion and the appeal should be dismissed.

The duties of this court;

[12] 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*).

[13] 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.

General ground of appeal struck out;

[14] The court finds ground 7 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*). That ground is struck out.

Visible monuments prevail over admeasurements of land;

[15] In grounds 1, 3 and 5, the trial Magistrate is faulted for having ignored falsehoods and inconsistencies in the respondent's case, as well as having misdirected himself on the burden of proof. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr.*

Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

[16] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from case to case but, generally in a trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

[17] The contradictions and inconsistencies cited by counsel for the appellants relate to the size of the land in dispute, where the respondent resided before construction of a house on the land in dispute, and whether the land was vacant or given to him by Nekonori Otto. The question for this court then is whether disregard of the disparities in the approximated measurements of the various witnesses in favour of the monument-based measurements of the court, constituted a material irregularity in the proceedings. 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.

[18] The question of quantity is mere matter of description, if the boundaries are ascertained. The rule is bottomed on the soundest reason. There may be mistakes in measuring land, but there can be none in monuments. When a witness estimates the size of land, he or she naturally estimates its quantity by the features which enclose it, or by other fixed monuments which mark its

boundaries. He or she may be mistaken as to the size but not the monuments. The witnesses gave a description of the boundaries of the land, which were verified during the visit to the *locus in quo*. Therefore, disparities in the approximated description of the size of the land became immaterial once the court was able to verify the boundaries during the *locus in quo* visit.

[19] Questions regarding where the respondent resided before construction of a house on the land in dispute, and whether the land was vacant or given to him by Nekonori Otto, were not central to the determination of the matter in dispute which more or less zeroed down to establishment of the common boundary between the appellants' and the respondent's land. Since that part of the evidence related to collateral matters that had no impact on the outcome of the case, nay inconsistencies and contradictions therein were minor, yet they did not point to deliberate untruthfulness. The trial court therefore was justified when it disregarded them.

[20] Although the respondent bore the persuasive burden of ultimately proving his case against the appellants on the balance of probabilities, once he led sufficient evidence capable of showing a *prima facie* case of the existence of the facts in issue, the evidential burden shifted onto the appellants to disprove those facts. The respondent and his witnesses established a *prima facie* case of the following primary facts that;- he acquired the land from a one a one Nekonori Otto in 1976; the land was vacant at the time he acquired it; he occupied it peacefully until the insurgency; the road to Abuturu formed the common boundary between his land and that of the appellants; the appellants crossed that boundary into his land after the end of the insurgency.

[21] Whereas the burden of establishing the case (the legal burden) rests throughout the trial on the party who asserts it (see section 101 and 102 of *The Evidence Act; Pickup v. Thames Insurance Co., (1878) 3 QBD 594* and *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14), the burden of introducing

evidence (the evidential burden) constantly shifts as evidence is introduced by one side or the other (see section 103 of *The Evidence Act* and *Halsbury's Laws of England*, 4th Edition, Volume 17, para 15). The evidential burden shifts or alternates from one party to the next in the progress of a trial according to the nature and strength of the evidence offered in support or in opposition of the main facts to be established. The evidential burden is satisfied merely by adducing evidence sufficient to refute or discredit the *prima facie* case established by the other party. After considering the matters before it, the court may either believe the fact to exist or its non-existence, i.e. as proved or disproved. The trial court will therefore, have to evaluate the entire evidence after the defendant has not offered any evidence to determine whether the case has been proved to the standard before entering such judgment on the evidence. Failure to discharge the evidential burden carries the risk, but not the certainty, of failure in the whole or some part of the litigation. Success in discharging the obligation shifts the evidential burden on to the opposing party.

[22] In response to the respondent's *prima facie* case the appellants adduced evidence of the following primary facts;- he acquired only three acres from D.W.3 Koyo Mario and his brother in 1984 and not from Nekonori Otto in 1976; there was no response to "the land was vacant at the time he acquired it"; that he occupied it peacefully until the insurgency was not disputes; there was no response to "the road to Abuturu formed the common boundary between his land and that of the appellants"; the appellants were non- responsive to the fact that they "crossed that boundary into his land after the end of the insurgency" but simply claimed that the entire land belonged to their forefathers from time immemorial.

[23] According to that scale of evidence, outlined above, the appellants failed in their duty to adduce evidence rebutting or discrediting the respondent's *prima facie* case regarding two of the key determinations and did not contest the other. The evidence adduced by the appellants categorically refuted only the time,

manner of acquisition and the size of the land, all of which were secondary to the location of the common boundary between theirs and his land. The trial court did not shift the persuasive burden onto the appellants but in its evaluation of the evidence, was practically commenting on the appellants' failure to discharge the evidential burden. A party upon whom the evidential burden shifts but who nevertheless fails to adduce any evidence when the burden has so shifted to him or her, fails. His statements did not amount to shifting of the legal burden. They were made within the context of the entire judgment, and when they are so read, they are perfectly consistent with the law. The three grounds of appeal therefore fail.

[24] In grounds 2, 4 and 6, the trial Magistrate is faulted for having failed to find that the appellants had a better claim to the land in light of their root of title, and therefore he misdirected himself when he held that the respondent was in possession of the land in dispute. Although not raised as a ground, the court notes further that at the *locus in quo* evidence was taken from five persons who had not testified in court. Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better*. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only.

[25] The practice of 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)*. I have perused the record and have found that the trial magistrate recorded evidence from five people who had not testified in court. This was an error.

[26] 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.

[27] 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 two 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 witnesses.

[28] In their defence, the appellants acknowledged that the respondent was given some land within or around the area in dispute (they were not specific). Although the time of the grant and the size of the land that was in dispute, the evidence showed that the appellants used to reside south of the land in dispute separated by Abuturu road. When the court visited the *locus in quo*, it observed what remained of the respondent's deceased relatives graves on the land. He also had

a banana plantation on the land. In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it.

[29] The material fact in doubt was the extent of the land owned by the respondent. The appellants did not adduce any evidence regarding the location of the boundary. The testimony of the respondent and his witnesses regarding the location of the common boundary. This evidence was corroborated to a greater or lesser extent by the other statements or circumstances with which it fit (see *DPP v. Kilbourne [1973] 1 ALL ER 440; [1973] AC 720*). Secondly, the corroborating evidence was also credible and independent. It was not a mere repetition of the evidence on record. The observations at the *locus in quo* by the trial court were more consistent with the respondents' version than the appellant's claim.

Order :

[30] 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 appellants : Ms. Shamim Amoro.

For the respondent : Mr. Doii Patrick.