IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 008 of 2018

In the matter between

ODOCH JENASIO …… APPELLANT

VERSUS

1. OKOT CEASAR }
2. OYOO ALI } …… RESPONDENTS
3. ORINGA GEORGE }
4. ANYWAR SAMUEL }

Heard: 17 April, 2019.
Delivered: 30 May, 2019.

Land Law *—usufructuary Rights— In usufructuary land systems, land rights are inclusive rather than exclusive in character—Exclusive possessory rights under exclusive usufruct in communal land systems do not necessarily translate into exclusive ownership rights under customary tenure.*

Civil procedure *—Unrepresented litigants— the notion of "substantive impartiality" in the handling of unrepresented litigants—Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice — Remedies for defendants— Without a counterclaim, a defendant is not entitled to affirmative remedies*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally for recovery of land measuring approximately 130 hectares, situate at Ariaba "B" Ward, Atoo Parish, Lapul sub-county, in Pader District. He sought a declaration that he is the rightful owner of the land, an order of vacant possession, a permanent injunction

restraining the respondents from further acts of trespass to the land, general damages for trespass to land, and the costs of the suit. His claim was that his late father, Abwola Temsio, occupied only 12 acres out of the approximately 200 acres of land in dispute. The appellant was born on that land and has lived there all his life. During the year 2012, the respondents trespassed on the rest of the land belonging to his deceased uncles in respect of which he sued on behalf of the children of his deceased uncles who are minors.

[2] In their joint written statement of defence, the respondents contended that they own the land in dispute which measures approximately 200 acres and sought a declaration to that effect. They prayed for a dismissal of the suit with costs.

The appellant's evidence;

[3] The appellant Odoch Jenasio testified as P.W.1and stated that he was born on the land in dispute and has lived there ever since. He has no knowledge of how his father acquired the land. His father occupied only 12 acres of it but he is suing on behalf of the children of his uncle for the rest of the land. The respondents trespassed onto the land in the year 2012. P.W.2 Moro Alfred testified that the appellant's late father Temsio Abwola acquired 60 acres of the land in dispute by prescription in 1963. He occupied and utilised it until the insurgency. It is only during the year 2012 that the respondents encroached onto the land. The appellant is utilising only about ten acres of the land.

[4] P.W.3 Nyeko Lamton testified that the land in dispute measures approximately 60 acres. The appellant's late father Temsio Abwola acquired the land in 1963 by inheritance from his father Okii Ijum. It is in the year 2012 that the respondents encroached onto the land. The appellant now occupies only 13 acres of it. P.W.4 Odera Alfred; the appellant's late father Temsio Abwola acquired the land in 1961. The appellant was born on the land and occupied it until the insurgency. The respondents trespassed onto it in 2012. P.W.5 Ogaba Charles testified that

the land in dispute measures approximately 100 acres. The appellant's late father Temsio Abwola acquired the land in 1963 by prescription. The first respondent sued the appellant over the land in 2002 but lost the case. Apart from the 4th respondent, the rest of the respondents have trespassed onto the land.

The respondents' evidence;

[5] In his defence as D.W.1, the first respondent Okot Ceasar testified that his late father Awuni Yulam settled on the land in dispute in 1940 and died in 1987. The appellant's father only came to live with the respondent's father in 1969 and was only given a house to occupy. In 2007, the appellant invited his brothers to return to the land after the insurgency. The appellant now occupies the bigger part of the land and the respondents the rest of it. D.W.2 Oyoo Ali testified that the appellant's late father asked the respondents late father for a piece of land and was granted one. D.W.3 Anywar Samuel testified that the appellant's land is across the stream in another ward. The land in dispute belongs to his late father and they have been wrongly sued.

[6] D.W.4 Oringa George testified that he has not encroached on the land at all and was wrongly sued. The land he occupies is in Ariti-Latwong yet the appellant lives in Ariaba "B" Ward. D.W.5 Olobo Samson testified that the appellant's father came to live on the land in 1969 but was not given any land. D.W.6 Adonga Valentino testified that the first respondents' father was the first settler on the approximately 200 acres of land in 1940. The appellant's mother later came to live with the respondent's father who was her brother. The appellant's father followed later. They cultivated the land together only that the appellant now seeks to claim the entire land as his own. There was no boundary established to separate them.

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

[7] The court then visited the *locus in quo* where it noted the existence of an old homestead near a tree that the respondents had mentioned. The respondents had established homesteads near that tree. It was established and observed that the appellant was indeed a neighbour to the East of the land. In his judgment, the trial Magistrate stated that it was not enough to claim rights of customary ownership simply by stating that one was born on the land in dispute. The appellant did not know how his father acquired the land yet the respondents claimed by inheritance traced back to their grandfather who acquired the land by prescription. The appellant failed to prove ownership of the land to the required standard. The respondents are not trespassers on the land. He declared the respondents the rightful owners of the land, granted an order of eviction and a permanent injunction restraining the appellant from interfering with the respondents' quiet possession and enjoyment of the land, and directed the appellant to meet the costs of the suit.

The grounds of appeal;

[8] 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 failed to properly evaluate the evidence on record thereby arriving at a wrong decision.
2. The learned trial magistrate erred in law and fact when he did not conduct proceedings at the *locus in quo* properly.
3. The learned trial magistrate erred in law and fact when in his evaluation of the evidence failed to recognise that the parties are neighbours.
4. The learned trial magistrate erred in law and fact when he considered the respondents to be beneficiaries of the land.

5. The learned trial magistrate erred in law and fact when he misdirected himself as regards the size of the land.
6. The learned trial magistrate erred in law and fact when he failed to establish authenticity of the boundary between the parties.

Submissions of counsel for the appellant;

[9] In his submissions, counsel for the appellant argued that as regards the issue as to how the land was acquired, P.W.1 testified that he inherited the land from his father. Instead the trial Magistrate stated that P.W.1 was not sure how the father of the appellant acquired the land, yet there was evidence that the father acquired the land in 1963. P.W.2 and P.W.3, P.W.4 and P.W.5 testified that the family of the first respondent came to the land in 1969. The father of the appellant was in possession uninterrupted until the LRA war. When he returned after the war he found the respondent had trespassed onto the land. D.W.6 who was 67 years old testified that the father of the respondent's mother, the grandmother of the appellant, followed the father of P.W.1 after the 1940s. P.W.1testied that he was born there and grew up there and still lives there to-date, and P.W.2 corroborated this.

[10] He submitted further that the respondents originally lived outside the suit land. The respondents had since constructed grass thatched houses on the land. P.W.3 stated that the appellant was living at their old homestead. D.W.1 denied knowledge of the appellant. D.W.2 stated that the appellant's father would cultivate communally with the father of D.W.1. They possessed the land and were settled there. D.W.5 stated the appellant's grandfather was buried on the land in 1966. During the cross-examination of P.W.6 he stated that the appellant's father came to the land in the 1960s. This evidence of acquisition, user and control was never challenged by the respondents.

[11] As regard the boundaries of the land, he argued that P.W.1 testified that the first respondent is their immediate neighbour. According to the sketch map drawn by the court, there were clear demarcations indicating the boundaries of the parties and in the key to the map there is a clear boundary between the first respondent and the appellant. The gardens are indicated. On the South Western side there is a homestead for the appellant and a grazing ground. This shows that the appellant and his father were settled on the land. The magistrate indicated in the judgment that D.W.1 was born on the suit land when there is no such evidence on the record. In the same judgment the Magistrate stated that the appellant's father lived on the land in 1969 and left in the year 2000. This is not supported by any evidence on court record. Para 4 of the plaint indicates that the appellant was in possession of the land measuring approximately 130 acres. The appellant is illiterate. Out of the 130 acres he is occupying 100 acres. The dispute is then over 30 cares. The respondents are occupying the 30 acres. As regards *locus standi*, he did not claim to sue on behalf of other persons. P.W.2 stated that he had brothers or cousins who are below 20 years. He was not suing on their behalf because they are children of his uncle. There was no need for authorisation. He prayed that the court re-evaluates the evidence and decides in favour of the appellant.

Submissions of counsel for the respondents;

[12] In response, Mr. Geoffrey Boris Anyoru counsel for the respondents submitted that ground one should be struck out for offending O. 43 r 1 of *The Civil procedure Rules* since it is general and not specific. The plaint of the appellant does not disclose a cause of action. It should have been struck out under O.7 r. 11 (a) of *The Civil procedure Rules*. It had six paragraphs; 1, 2,and 3 described the parties. Para 4 sought a declaration in respect of land, vacant possession, a permanent injunction. Para 5 stated that the court has jurisdiction. No violation was specified. The magistrate should have struck it out since no violation was pleaded.

[13] In addition, he argued that the actual findings of court are consistent with the evidence and the findings at the *locus in quo*. The trial court came to the correct determination. The appellant in the court below testified he did not know how the land was acquired by his father. That the father acquired 100 acres of land yet in the plaint he claimed 130 acres. The appellant himself conceded that the 4th respondent was not in any way in the suit land. He only sued him because he was a Chief in charge of land (Rwot Kweri). The appellant conceded that the land belonged to his late uncle and that he was suing on their behalf. He had no power of attorney or next friend authority if they were minors. He had no representative order. The lower court was right not to enter judgment in his favour.

[14] Furthermore, he argued, the appellant conceded that they came following the grandfather of the respondent who was the first person to settle in the area. The testimony of D.W.4, D.W.5 and D.W.6 is to the effect that the father of the appellant followed the sister of the first respondent onto the land. Her marriage had failed with the father of the appellant and she returned to her parent's home and the father of the appellant followed her to her home. He then occupied the house that had been given to the wife. He brought the second wife who is the mother of the appellant after the death of the sister.

[15] The respondents' evidence was that the clan advised the appellant to maintain the portion his father had been given and no one was evicting him from there but now he wants to extend the boundary beyond that. That D.W.4 admitted communal cultivation does not entitle the applicant to deprive the entire community of the land. There is no evidence that the entire land belongs to him alone. The map of the *locus in quo* clearly indicates the portion where the home of the appellant is separated by an access road. It indicates the home the first respondent Rev. Caesar Okot, their gardens and home of the other respondents. The boundary was thus clear. In the judgment of the court below, the evidence of the appellant in court was not rhyming with what was found at

locus. There were inconsistencies between the appellant and his witnesses about the size of the land. The alleged areas trespassed upon and the size of encroachment too. He said the 4th respondent was not a trespasser yet his witnesses said so. The 1st respondent was confirmed to be occupying the old homestead of his father. He prayed that the court finds that the court below came to the right decision. He also prayed for the costs of the appeal to be awarded to the respondents.

The duties of this court;

[16] 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*).

[17] 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.

The notion of "substantive impartiality" in the handling of unrepresented litigants;

[18] Both parties were unrepresented at the trial. Self-representation has firm roots in the notion that all persons, no matter their status or wealth, are entitled to air grievances for which they may be entitled to relief. Fairness requires a trial Magistrate to treat self-represented litigants fairly and attempt to accommodate unfamiliarity with the process so as to permit them to present their case, hence the notion of "substantive impartiality." The notion requires that courts depart from "formal impartiality" where identical treatment is not necessarily appropriate or conducive to equality. For purposes of enforcing the right to a fair hearing, it may be necessary for the court to intervene so as to give self-represented litigants additional latitude, assistance and information. This is because to treat people the same without regard to their needs and circumstances can undermine, rather than advance the cause for a fair hearing. In this way, substantive equality may require that parties be treated differently, according to their needs and circumstances.

[19] This notion is explained by the Supreme Court of Canada in *Valentin Pintea v. Dale Johns and Dylan Johns, [2017] 1 SCR 470*, thus;

> [T]aking a substantive approach to impartiality means that not all parties are treated with the same detached passivity, but instead receive the treatment and assistance they need in order to have an opportunity at a fair hearing. In other words, substantive impartiality (like substantive equality) is not necessarily about treating parties the same, but rather about treating them fairly, or in this context, providing self-represented litigants with meaningful legal assistance so they can navigate and function within our legal system.

[20] Access to justice must not be contingent upon retaining counsel, lest the entitlement to a fair trial becomes a mere privilege denied to certain segments of society. Whereas substantive impartiality applies to both procedural and substantive equality for all litigants, nevertheless pleadings are the gateway by which litigants access courts. Consequently, in order to prevent premature dismissal of meritorious cases, pleadings by unrepresented litigants, however

inartfully prepared, are held to "less stringent standards than formal pleadings drafted by lawyers" (see *Erickson v. Pardus, 551 U.S. at 94*; *Estelle v. Gamble, 429 U.S. 97 at 106 (1976)* and *Haines v. Kerner, 404 U.S. 519, 520-21(1972*). In any event, it is the law that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment (see *D.T. Dobie and Company Ltd. v. Muchina and another [1982] KLR 1*).

[21] When dealing with pleadings by unrepresented litigants, the court is concerned with the determination as to whether or not the allegations of fact made in the pleadings, excluding conclusory allegations (assertions for which no supporting specific facts or evidence is offered), permit a plausible inference of wrongdoing on the part of the named defendant. Even an unrepresented litigant should meet the minimum requirements of pleading factual allegations sufficient to suggest that a right was violated, that entitles him or her to redress. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” (see *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009*). A display of the facts leading to every conclusory allegation is essential.

[22] In the instant case, even after subjecting the plaint to the liberal less stringent standard, the appellant's plaint clearly failed to meet the minimum standards required. The basic requirements of a cause of action were not disclosed. There are no basic facts pleaded capable of supporting an inference of wrongdoing on the part of any of the respondents. Paragraphs 1 and 2 of the plaint contain a description of the parties. The operative paragraphs relating to what would be the appellant's statement of claim read as follows;

> 4. Particulars of claim;-
> The (sic) declaration of ownership of the suit land which is situate in Ariaba B Ward, Atoo Parish, Lapul sub-county, Pader District. A permanent injunction and vacant possession of the suit land measuring approximately 130 hectares.

5. The cause of action arose within the jurisdiction of this honourable court.
6. The plaintiff shall pray for;-
   a) Recovery of the suit land.
   b) Vacant possession of the suit land.
   c) General damages.
   d) Cost of the suit.
   e) Any other relief the court deems fit.

[23] The plaint is devoid of even any conclusory statements or recitals of the elements of any cause of action known to the law. Those averments do not meet the minimum requirements of pleading factual allegations sufficient to suggest that any of the appellant's rights was violated in a manner that entitled him to redress. A cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Attorney General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8E.P 116* and *Read v. Brown 22 QBD 31*).

[24] The pleadings must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E.A 514*). Whether or not a plaint discloses a caution of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it (see *Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72*). Order 7 rule 11 (a) of *The Civil Procedure Rules*, requires rejection of a plaint where it does not disclose a cause of action. The trial Magistrate ought to have struck out this plaint for failure to disclose a cause of action.

The general ground of appeal is struck out.

[25] That aside, as rightly argued by counsel for the respondents, the first ground of appeal is too general that it offends 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. 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 struck out.

No error proved in the proceedings conducted at the *locus in quo*;

[26] Grounds 2 and 5 of the appeal fault the trial Magistrate regarding the manner in which he conducted proceedings at the *locus in quo*. The argument is that the proceedings were conducted in so improper a manner that the trial magistrate failed to determine the size of the land in dispute. The purpose of a visit to the *locus in quo* has been the subject of numerous decisions among which are; *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,* in all of which cases the principle has been restated over and over again that 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. Since the adjudication and final

decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* 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.

[27] In his submissions, counsel for the appellant did not advance any specific procedural error that manifested itself during the proceedings conducted at the *locus in quo*. I have re-appraised the proceedings and have not found any. Such a visit is meant to verify, convey and enhance the meaning of the testimony given by the witnesses in court. The record shows that the trial court did exactly that. The court was able to verify the oral testimony of the witnesses and made its observations accordingly. Its findings and the conclusions drawn are supported by the evidence on record. The two grounds of appeal therefore fail on that account.

In usufructuary land systems, land rights are inclusive rather than exclusive in character;

[28] Grounds 3 and 6 of the appeal fault the trial Magistrate for failing to establish authenticity of the boundary between the parties and to recognise that they are neighbours. These two grounds and the argument behind them fail. The appellant sued for recovery of land over 200 acres big yet in his testimony he stated that his father, from whom he claimed to have inherited the land in dispute, occupied only 12 acres of it. He further claimed to have sued on behalf of the children of his uncle with regard to the rest of the land but never disclosed the number, age and other particulars of those children. There was no evidence of trespass on the 12 acres that belonged to his late father. The nature of his claim was therefore for title over the entire approximately 200 acres of land. It was not about boundaries. When the court visited the *locus in quo*, it drew a sketch map that reflects the current holdings of land in possession of the parties on that land. The location of the boundaries was never in dispute and was not one of the issues to be decided. The trial court's findings and the conclusions

drawn are supported by the evidence on record. The two grounds of appeal therefore fail on that account.

[29] Ground 4 of the appeal faults the trial Magistrate for finding that the respondents are beneficiaries to the land. This arises from the trial court's finding that the respondents claim by inheritance traced back to their grandfather who acquired the land by prescription. The trial court was faced with two versions. The appellant's claim was that his father, from whom he inherited and occupied only 12 acres of the entire approximately 200 acres in dispute, the rest of which he claimed on behalf of the children of his late uncle. The respondents' version was that the first respondent's father, the late Awuni Yulam, settled on the land in dispute in 1940 and died in 1987. The appellant's father only came to live with the respondent's father in 1969 and was only given a house to occupy. D.W.6 Adonga Valentino testified that the appellant's mother later came to live with the respondent's father who was her brother. The appellant's father followed later. They cultivated the land together. The evidence by both parties showed they were occupants of distinct parts of the land in dispute by virtue of lineal descent. To take by inheritance is defined as “to take as heir on death of ancestor; to take by descent from ancestor; to take or receive, as right or title, by law from ancestor at his demise” (see *Black’s Law Dictionary, 8th edition,* 2004). The finding is supported by the evidence on record.

[30] D.W.6 Adonga Valentino testified that the appellant and the respondents cultivated the land together only that the appellant now seeks to claim the entire land as his own. This was verified by observations made during the visit to the *locus in quo* where it was established that each of the parties had exclusive possession of a distinct part of the land in what is for all intents and purposes, land used communally. However, exclusive possessory rights under exclusive usufruct in communal land systems do not necessarily translate into exclusive ownership rights under customary tenure. The appellant attempted to assert

exclusive ownership yet the respondents *by* virtue of their common lineal descent, recognise him as having only possessory usufruct rights.

[31] In usufructuary land systems, land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure. Individuals or groups may only acquire the usufruct of the property, not legal title. Each usufructuary is entitled to possess and to use parts of the land along with other usufructuaries, without infringing their rights. The evidence before the trial court proved the land in dispute to be the collective property of the sub-clan or extended family to which both parties belong. The appellant's claim for legal title based on customary inheritance was not supported by the evidence and it was rightly rejected by the trial court.

Without a counterclaim, a defendant is not entitled to affirmative remedies;

[32] Nevertheless, in absence of counterclaim the respondents were not entitled to any affirmative remedies. The declaration that the respondents are the rightful owners of the land and the attendant orders made by the trial court are misconceived. The proper order should have been one striking out the plaint for non-disclosure of a cause of action or one dismissing the suit for failure to prove the appellant's claim.

Order :

[33] For that reason the judgment of the court below is set aside. Instead judgment is entered dismissing the suit. Since the appeal succeeds in part, but not for the reasons advanced by the appellant, the appellant is awarded half the costs of the appeal.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Mr. Owor Abuga Denis.

For the respondents: Mr. Geoffrey Boris Anyoru.