IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 069 of 2017

In the matter between

OCHWA OLANYA CHARLES ..... APPELLANT

VERSUS

1. OCHAYA SANTO }
2. ACAYO LUDINA } ..... RESPONDENTS

Heard: 10 May, 2019.
Delivered: 30 May, 2019.

Family law *— Mental Incompetency— Presumption of soundness of mind — evidence required to establish incompetency— Only a person appointed by court as manager of an estate of a person of unsound mind may claim land on his or her own behalf.*

Civil procedure *— 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 a declaration of ownership of land measuring approximately 200 acres, situate at Gwendiya village, Pageya Parish, Awach sub-county in Gulu District. She sought a declaration that she is the rightful owner of the land, 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 the land originally belonged to his late grandfather upon whose death it was inherited by his father Odong Serafino and when his father died the appellant inherited the

land. He was born on this land in 1965 and lived on it until he was displaced into and IDP Camp during 1996. Before his death, the appellant's father had become of unsound mind prompting the appellant's uncle Raymond Okello to administer his estate. The appellant's uncle applied for a lease over the land. Consequently it was inspected in 1983 and its boundaries were demarcated by mark stones. Upon return to the land from the IDP Camp, the appellant found the respondents had trespassed onto the land.

[2] In their joint written statement of defence, the respondents averred that the land they occupy measures approximately 900 x 400 meters and is situated at Lacir village, Boo Coro sub-ward, Awach sub-county, Gulu District. They inherited it from their late grandfather Lacuch Ambrose who died in 1978. Okello Raymond caused survey of his land and there was no problem but in 1985 he attempted to extend the boundaries of the land and this is where the conflict began. They contended that the appellant has no claim over that land and the suit should therefore be dismissed with costs.

The appellant's evidence;

[3] Testifying as P.W.1 the appellant Ochwa Olanya Charles stated that the land was inspected during 1985 upon application of his uncle Raymond Okello and was estimated to be 200 acres. Insurgency interrupted the process of acquisition of a title over the land. Raymond Okello had his own land measuring approximately 80 acres and it is distinct from the one in dispute. The respondents began by trespassing onto 30 acres of the land and then proceeded to claim the entire 200 acres. He is now using only about five acres of the land. P.W.2 Okello Victor testified that the land in dispute was owned by Odong and Raymond.

[4] P.W.3 Okello Raymond testified that upon his application on behalf of his brother who had a mental problem, the land was inspected on 29th April, 1985. Four of the neighbours objected to the inspection out of jealousy. The process of

obtaining a lease offer was interrupted by the insurgency. Had began renewing the process in 2009 and had received a lease offer when the dispute erupted. The defendants were neighbours to the North East of the land before they began to encroach on the land in 2009. The respondents live in different village and their land is separated from the one in dispute by a footpath. P.W.4 Otto Samuel testified that the land belongs to the appellant and the boundary to the East of the land was a fig tree and a road. The dispute only began in 2009 when people returned from the camps.

The respondents' evidence;

[5] The first respondent Ocaya Santo testified as D.W.1and stated that the area in dispute is approximately 30 acres which he inherited from his late father Lacuru Ambrose. Some of his deceased relatives were buried on this land. The boundary between his land and that of the appellant were mark stones planted in 1983, three Lakoro Dong trees and an anthill. He was not one of the four people who objected to the inspection initiated by Raymond Okello. Later Raymond Okello caused a survey of the land. D.W.2 Oryang Michael testified that before the insurgency, it was the respondents' father using the land in dispute. The boundary between the appellant's and the respondents' land is marked by mark stones planted in 1983, Lakoro Dong trees and an anthill.

[6] D.W.3 Okwera Morris testified that the boundary between the appellant's and the respondents' land is marked by mark stones planted in 1983, Lakoro Dong trees and an anthill. before the insurgency, it was the respondents' father using the land in dispute and the land was nicknamed airfield. D.W.4 Aciro Lucy Anywar testified that before the insurgency, it was the respondents' father using the land in dispute and the land was nicknamed airfield. There are graves of their deceased relatives on the land. The boundary between the appellant's and the respondents' land is marked by a big Lacuku trees, a school and later mark

stones planted in 1983, The respondents have since constructed one house on the land.

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

[7] The trial court then visited the *locus in quo* where the parties demonstrated the area in dispute. The court observed that about 150 acres had been surveyed as land belonging to the estate of the late Odong Sarafino and saw the mark stones. The court noted further that the respondents have their two houses within the land in dispute. The trial Magistrate proceeded to draw a sketch map that illustrates the key observations made during that visit.

The judgment of the Court below;

[8] In his judgment, the trial Magistrate found that when Raymond Okello caused the survey of the 150 acres, it covered the whole of the estate of the late Odong Sarafino. His attempt to acquire an additional 200 acres under the guise of obtaining it on behalf of his mentally incapacitated brother was opposed by the neighbours. Before the insurgency, it is the respondents who used to cultivate the land and had nicknamed it Bar dege. This was confirmed when the court visited the land since the terrain fit the description. He entered judgment in favour of the respondents. He declared the respondents owners of the land in dispute. He issued an eviction order and permanent injunction against the appellant. He awarded the respondents general damages of shs. 5,000,000/= and the costs of the suit.

The grounds of appeal;

[9] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The trial magistrate erred in law and in fact when he failed to properly evaluate evidence that the appellant applied for the suit land, it was inspected and found to be free and was approved and hence he came to the wrong conclusion.
2. The trial magistrate erred in law and fact when he failed to describe and to demarcate the 30 acres claimed by the respondents from the 200 acres, hence he came to the wrong conclusion.
3. The learned trial magistrate erred in law and in fact when he failed to properly conduct locus by recording evidence from the advocate of the respondents hence occasioning a miscarriage of justice to the appellant.
4. The trial magistrate erred in law and in fact when he awarded general damages of shs. 5,000,000/= to the respondent who did not plead a counterclaim hence occasioning a miscarriage of justice to the appellant.

Submissions of counsel for the appellant;

[10] In his submissions counsel for the appellant, argued that the appellant and his witnesses adduced evidence to the effect that the appellant's uncle Raymond Okello applied for the suit land on behalf of his then mentally ill brother Odong Sarafino, it was inspected on 29th April 1985 and found to be free and was approved for leasing. The process was interrupted by insurgency, before which the appellant had already established a farm and house on the land. The respondents began encroachment on the land in 2007 but before that had no interest in and had never been in possession of the land. Whereas the respondents in their written statement of defence claimed to own approximately nine acres, the court found that the land in dispute was approximately thirty acres, a complete departure from their pleadings. At the *locus in quo*, the trial Magistrate failed to delineate the boundaries of the 900 x 400 meters of land they claimed, as well as the 30 acres the court found belonged to them. At the *locus in quo*, the court recorded evidence from the respondents' counsel contrary to procedure, to support the finding that it is the appellant who had recently settled

on the land in dispute. The respondents did not present a counterclaim and the trial court therefore erroneously awarded them general damages. He prayed that the appeal bellowed.

Submissions of counsel for the respondents;

[11] In response, counsel for the respondents submitted that this was a boundary dispute between the parties. The appellant pleaded in paragraph 4 (b) of the plaint that by the time of the insurgency, the land he had applied for had been inspected and mark stones planted. When the court visited the *locus in quo*, it was able to see the mark stones and to establish that the respondents' activities were outside the land so delineated. Attempts by the appellant to claim land beyond the mark stones was a departure from his pleadings and an afterthought. It is that attempt that the neighbours opposed. The appellant did not produce in evidence any documentary evidence to show that the land beyond the mark stones was ever applied for and inspected. He produced documents where a one Raymond Okello was named as the applicant for land.

[12] He argued further that it is claimed that the respondent's father was a person of unsound mind but no credible evidence to that effect was adduced. Even assuming that he was of unsound mind, the appellant's uncle had no legal authority to apply o his behalf, as he had never been appointed as administrator of his estate. The claim that the land was 200 acres was based on mere estimates and so was the court's estimate of 30 acres since the land is un-surveyed. Delineation of the land was unnecessary since the appellant's claim was based on the fact that his land had been inspected and mark stones planted. The area he claimed and which was then in dispute was clearly indicated on the map prepared by court at the *locus in quo*. The respondents' counsel only commented on observations made during that process but did not give evidence. It was in the shape of an airfield. The award of general damages was justified. He prayed that the appeal be dismissed.

The duties of this 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] 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.

Only a person appointed by court as manager of an estate of a person of unsound mind may claim land on his or her own behalf;

[15] Grounds 1, 2 and 3 of appeal faults the trial Magistrate regarding the manner in which the court conducted proceedings at the *locus in quo*, evaluated the evidence and the conclusions it made. When the trial court has reached a conclusion on the primary facts, the appellate court when re-evaluating the evidence may come to a different conclusion where; - (i) there was no evidence to support the finding, (ii) the finding was based on a misunderstanding of the evidence, (iii) it is shown that the Magistrate was clearly wrong and reached a conclusion which on the evidence he or she was not entitled to reach, (iv) the

findings of credibility are perverse, or (v) it is a finding which no reasonable court could have reached, based on the evidence on record. Though it ought, of course, to give weight to the opinion of the trial court, where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge (see *Benmax v. Austin Motor Company Ltd [1955] 1 All ER 326 at 327*). This court is therefore at liberty to evaluate the inferences drawn from the facts by the trial Magistrate.

[16] The appellant pleaded that before his death, his father had become of unsound mind prompting the appellant's uncle Raymond Okello to administer his estate. The appellant neither adduced evidence of the claimed unsoundness of mind nor an appointment of his uncle as the legal representative of his father. The capacity to enter into legal transactions and to litigate independently is very closely related to a person's mental condition. Therefore any transaction or claim in respect of property of a person of unsound mind may only be made by a person appointed by court as manager of his or her estate (see sections 2 and 4 of *The Administration of Estates of Persons of Unsound Mind Act*). For a legal transaction to be valid the law requires that the parties be able to understand the nature, purpose and consequences of their actions. In the instant case, P.W.3 Okello Raymond claimed to have made an application on behalf of his brother who had a mental problem, who therefore had no ability to understand the nature, purpose and consequences of that action. He also made the application in his own name and not that of his brother Odong Serafino, under whom the appellant claimed.

[17] Before the trial court, the appellant did not adduce evidence to illustrate on what basis his father Odong Serafino, was considered to be a person of unsound mind. Mental incapacity is primarily the result of either mental illness (which includes acquired organic brain syndromes such as dementia of which the most

common form is Alzheimer's disease) or intellectual disability. Mental incapacity may also be related to the process of ageing in general. Mental illness covers both neurosis (a functional derangement due to disorders of the nervous system, e.g. depression and obsessive behaviour), and psychosis (a severe mental derangement involving the whole personality e.g. schizophrenia and bipolar disorder (also known as manic depression). Making a finding as to the mental capacity of someone therefore is not a simple matter and should not be taken lightly. Brenda M. Hoggett in her book, *Mental Health Law (*4th edn, (1996*)* Sweet & Maxwell, London), makes the following statement:

> Defining mental disorder is not a simple matter, either for doctors or for lawyers. With a physical disease or disability, the doctor can presuppose a state of perfect or "normal" bodily health (however unusual that may be) and point to the ways in which the patient's condition falls short of that.....even if it is clear that the patient's capacities are below that supposed average, the problem still arises of how far below is sufficiently abnormal, among the vast range of possible variations, to be labelled a disorder.

[18] A lay person cannot arrogate to himself or herself the authority to determine another person to be of unsound mind. The general rule is that adults are presumed mentally and legally competent to manage their own affairs until the contrary is proved. As the appointment of a manager of the estate of a person incapable of managing his or her affairs due to a mental illness or deficiency involves a serious curtailment of a person's rights and freedoms, even the courts will not lightly make such an appointment. However, where the court has declared a person to be of unsound mind, and incapable of managing his or her own affairs, such certification creates a rebuttable presumption of incapacity, shifting the burden of proof to the party who wants to hold the certified person bound by a transaction.

[19] When a person becomes incapable of managing his or her own affairs due to mental infirmity, especially the administration of his or her estate, it is imperative that someone be legally appointed to assist the person who has become

incapable. In terms of our current legal system no person may manage the affairs of another person without the required authority to do so. Until certified by court to have been a person of unsound mind, the law presumed Odong Serafino to be mentally and legally competent to manage their own affairs. There was no legal basis for P.W.3 Okello Raymond's assumption of the role of taking decisions on his behalf. Appointing oneself as an administrator to the affairs of another person is an infringement of that person's fundamental right to manage his or her own affairs independently and a court cannot give approval to such conduct.

[20] It is worse in this case that even when he purported to act in the name of Odong Serafino, P.W.3 Okello Raymond processed all documents in his name, yet he attributes them to his brother. According to section 91 of *The Evidence Act*, when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. P.W.3 sought by oral evidence, to have documents issued him his name attributed instead to his late brother, Odong Serafino. Therefore the entire premise upon which the appellant founded his claim was fundamentally flawed and could not give rise to a lawful claim.

[21] That aside, it was the appellant's case that when his uncle applied for a lease over the land in dispute, it was inspected in 1983 and its boundaries were demarcated by mark stones but the process could not be concluded by reason of the insurgency. At the *locus in quo* the limits of that land were seen by the existence of mark stones, yet the appellant sought to claim land beyond the marked boundary. I have perused the record of proceedings at the *locus in quo* and not found any evidence taken from counsel for the respondents. I have only found comments recorded in the manner of observations made by court and

counsel, in reaction to objects found on the land. The court is entitled to record observations made by the parties and their counsel during that process. The court having found that the land alleged to have been applied for P.W.3 Okello Raymond was clearly demarcated and the respondents had not trespassed onto it, delineating the one now in dispute became unnecessary and its actual size ceased to be of any relevance. The burden was on the appellant to prove his claim, which burden the appellant clearly failed to discharge. Since the decision of the court below is supported by the evidence available on record, for all the foregoing reasons I find that the three grounds of appeal lack merit and they accordingly fail

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

[22] The last ground of appeal faults the trial magistrate for awarding general damages to the respondents. An appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd., S.C.C.A. No. 10 of 1993 (unreported)* and *Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises. S.C.C.A No. 16 of 2006*).

[23] I find that 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 dismissing the suit for failure to prove the appellant's claim, with an award of costs.

Order :

[24] For that reason the judgment of the court below is set aside. Instead judgment is entered dismissing the suit and awarding the costs of the suit to the respondents. 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. Patrick Abore and Mr. Okello Dennis Wacha.

For the respondents: Mr. Watmon Brian.