



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 016 of 2018

In the matter between

LANEK KENNETH **APPELLANT**

VERSUS

AKENA FRED **RESPONDENT**

Heard: 9 May, 2019.

Delivered: 30 May, 2019.

Land Law —Grants of land — the activities undertaken on the land in dispute as indicators of the intentions of the parties.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for a declaration of ownership of land measuring approximately half an acre (17ft x 32ft x 18ft x 30ft), situate at Aboo Kal Ward, Kal Parish, Atanga 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 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 the land in dispute was given to him by his nephew, the late Atidi Oola on 1st January, 1993. It is after the death of his nephew in 1995 that the dispute with appellant began.

- [2] In his written statement of defence, the appellant contended that in 1993, he was approached by the respondent's nephew Atidi Oola and mother who requested him to allow the respondent temporary occupation of a small portion of his land. The dispute began in 1995 when he sought recovery of the land.

The respondent's evidence;

- [3] Testifying as P.W.1 the respondent Akena Fred stated that his nephew gave him the land in dispute on 1st April, 1993 to enable him live nearby as he nursed him. Upon his nephew's death later in 1995, the appellant began claiming the land as his. The appellant forcefully evicted him from the land in March 2014, hence the suit. There are graves of his father and children on the land. P.W.2 Nkinori Otto Amia testified that it is Augustine Okoya who gave the land in dispute to the respondent in 1993. It was arranged that way so that the respondent could nurse Augustine Okoya. P.W.3 Alunya Jackson testified that he was given the land in dispute by Oola Atidi in 1993 who died later in 1996. The appellant then began harassing the respondent over that land.

The appellant's evidence;

- [4] On his part, testifying as D.W.1, the appellant Lanek Kenneth testified that in 1993, he inherited the land in dispute from his father Opiya Alphonse. He was approached by the respondent's nephew Atidi Oola and mother who requested him to allow the respondent temporary occupation of a small portion of his land. The respondent had just retired from the army. D.W.2 Abalo Janet testified that when the respondent retired from the army, he was given a portion of land that belonged to the appellant's mother. Atidi's land was across the stream. D.W.3 Lawoko Coleen testified that the land belongs to the appellant. When the respondent left the army in 1992, he went to live with his uncle Atidi. He later left and settled at his original place. D.W.4 Odonga Dokmoi testified that the land belongs to the appellant. The respondent sought refuge on the land in 1993 as a

deserter from the army. He later left and settled at his original place. The appellant's mother had given Atidi land on temporary terms. Atidi gave the land to the respondent.

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

[5] When the trial magistrate visited the locus in quo, he observed graves on the land. A number of old homesteads including that of the mother of Atidi. The magistrate confirmed that Atidi too was buried on the land in dispute. He drew a sketch map illustrating the features observed on the land including the location of graves, an old homestead, mango trees and the owners of the neighbouring plots adjacent to the one in dispute.

Judgment of the court below:

[6] In his judgment, the trial Magistrate found that the gift of land to the respondent was perfected when he took possession. The land belongs to the respondent and the appellants are trespassers thereon. Although the respondent took possession in 1993, it was not until 2006 that the appellant began claiming the land. The respondent was declared owner of the land in dispute and the appellant a trespasser thereon. The respondent was awarded shs. 3,000,000/= as general damages. An order of vacant possession issued, a permanent injunction and costs of the suit awarded 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 failed to properly evaluate the evidence on record regarding ownership of the disputed land thereby arriving at a wrong conclusion.

2. The learned trial magistrate erred in law and fact when he did not consider the fact that the land in question was given to the respondent by the appellant and his father due to insurgency and that it was recoverable by the appellant at the end of the war.
3. At the *locus in quo*, two independent witnesses confirmed to the court that the land in dispute belonged to the appellant's father and that the appellant had been using it unchallenged until the appellant asked the respondent to vacate the land in 2006, but the respondent did not.
4. Oola Atidi from whom the respondent claimed title, occupied the land in dispute temporarily with the consent of the appellant and his mother during the period of insurgency.
5. The trial magistrate failed to evaluate the evidence by both parties comprehensively and came to the wrong conclusion regarding the circumstances in which the land in dispute was given to the respondent.

Submissions of the respondent;

[8] None of the parties was represented by counsel on appeal. The appellant did not present any submissions. In his written submissions, the respondent argued that the land in dispute was given to him by his nephew, a one Atiri Oola in 1993. He was constrained to file the suit when his possession of the land and safety was threatened by the appellant. He was forced off the land by the appellant yet earlier disputes with the appellant's mother over the land had been decided in the respondent's favour by the clan and local leaders. He prayed that the appeal be dismissed.

The duties of this court;

[9] 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 17 of 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).

- [10] 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 grounds are struck out;

- [11] The first and fifth grounds of appeal presented in this appeal are too general and 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. 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 accordingly struck out.

Terms of a grant of land may be inferred from the conduct of the parties;

- [12] Grounds two, three and four all advance the argument that the respondent only acquired temporary rights of user of the land in dispute from the family of the appellant, limited to the duration of the insurgency. That the respondent was supposed to vacate the land immediately thereafter, which he refused to do. The trial court is thus faulted for having found to the contrary. Whereas the appellant contends the respondent was only meant to have temporary use of the land, the respondent argues that he acquired the land as a gift *inter vivos*, without any temporal restrictions. The real question then in controversy is whether the evidence before the trial court established that respondent had only temporary user rights over the land in dispute or rather permanent ownership rights.
- [13] A court faced with this kind of dilemma will focus on the activities undertaken on the land in dispute as indicators of the intentions of the parties. While some activities are more appropriate to and associated with temporary use, others will be more appropriately associated with permanent use. Temporary use will be associated with activities and material placed on the land that might be easily removed and relocated, while permanent use will be associated with activities and material placed on the land that might be deliberately designed to require great difficulty in removing after installation. In addition, activities associated with temporary use are more likely to be of the type that require more frequent inspection or adjustment in comparison to those associated with permanent use.
- [14] When the trial court visited the *locus in quo*, it established that the respondent had graves of his relatives on the land. The court also found old homesteads on the land including that of the mother of Atidi. The magistrate confirmed that Atidi too was buried on the land in dispute. The physical evidence was examined and

compared with the witnesses' testimony. The court looked at the physical evidence determined how it fit into the overall scenario as presented in the contending versions, on basis of which it determined the reliability of the respective accounts of the parties. It found that the physical evidence was supportive of the respondent's rather than the appellant's version. Since the appellant's version rested only on the word of witnesses, the trial court rightly accorded a lesser weight to that version in the face of the respondent's version which could be independently and objectively verified by the physical evidence found at the *locus in quo*. The physical evidence found on the land revealed activities that are more appropriately associated with permanent use than temporary use.

Order:

[15] I therefore find no merit in the appeal. It is accordingly dismissed with costs of the appeal and of the court below to the respondent.

Stephen Mubiru
Resident Judge, Gulu

Appearances:

For the appellants : Unrepresented.

For the respondent : Unrepresented.