IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 05 of 2015

In the matter between

OMONA DENISH **APPELLANT**

And

AMITO LUDIA **RESPONDENT**

Heard: 12 February 2019

Delivered: 28 February 2019

Summary: dispute over customary ownership of land.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for a declaration that he is the rightful owner of land measuring approximately one acre located at, Kal A2 sub ward, Koch-Goma sub-county, Nwoya District, general damages for trespass to land, an order of vacant possession, a permanent injunction, interest and costs. His case was that he inherited the land from his late father, Ocaya Rufino, following his death in 1987. He lived on the land peacefully until the insurgency when the respondent, who was a neighbour to the South of the land, took refuge on the land. When Knock Secondary School was constructed on the part the respondent used to occupy, she in turn encroached onto the appellant's land The respondent has since then refused to vacate the appellant's land.

[2] In her written statement of defence, the respondent denied the claim in toto. She averred that the land belonged to her late husband Jikiria Bar, who in turn inherited it from his parents, the late Okello Lukamani and Auma Abwar. She has lived on the land since the 1950s when she married her late husband Jikiria Bar. On basis of those facts, she counterclaimed for a declaration that she is the rightful owner of the land, general damages for trespass, interest and costs.

The appellant's evidence in the court below:

[3] The appellant, Omona Denis testified as P.W.1 and stated that the respondent has been his neighbour since 1984. His father's ancestral land is at Obul in Koch-Goma sub-county, Nwoya. The appellant inherited the land from his late father Ocaya Rufino who died in 1997 and was buried at Karuma. His father acquired the land as a gift *inter vivos* from a one Omar upon his migration to Minakulu. The appellant was born on the land in dispute. The respondent has since occupied half of it. A school was in 1992 constructed on the part the respondent used to occupy as a result of which she encroached onto the appellant's land in 1996. There was an IDP camp on the land during the insurgency. The appellant's family vacated the land in 1984 but returned in 2006.

[4] P.W.2 Okello Amos, a neighbour, testified that he grew up and has lived in the area since 1970. The appellant's father Ocaya Abawo used to occupy the land in dispute. The land in dispute is behind his plot. The appellant began living on the land in 1984. During the insurgency the entire area was deserted as people went into the IDP Camp at Onna Dam. The camp covered the appellant's and the witness' land. The respondent occupied a part of what was the appellant's land. The land that belongs to the respondent has been taken over by Koch-Goma Senior Secondary School. In 1984 the respondent lived in the camp but the appellant did not since he had fled to Karuma. The appellant came to the land after the war. The appellant was born on that land.

The respondent's evidence in the court below:

[5] In her defence as D.W.1 the respondent Amito Ludita, testified that she has lived on the land in dispute since his marriage to her late husband Zachariah Obbah. Her husband and several of her children were buried on that land. Koch-Goma Senior Secondary School occupies the neighbouring land which was part of her land that was given to the school by an elder of their family Odur P'Lakor. The appellant came to settle on the land from the IDP Camp. She did not know where he lived before that. The appellant took over a house that had been occupied by a one Avend who returned to his home when the IDP Camp was disbanded. She sued the appellant before Rwot Kweri and the L.C.I -III Courts all of which decided in her favour. The appellant has since refused to vacate the land.

[6] D.W.2 Akello Katalina testified that the respondent is her neighbour and she came to know the appellant only when he came to live in the IDP Camp that was situated on the respondent's land. When the camp was disbanded, the appellant took over some of the houses that had been vacated. The respondent occupied the land from the time she married her late husband Jigiria. Koch-Goma Senior Secondary School occupies land that was formerly occupied by Amito.

[7] D.W.3 Odur Jeffifino testified that the land in dispute and his are separated by a road. He came to know the appellant as a resident of the IDP Camp. The respondent's husband lived on the land before he married her and she came to live on the land when he married her. They lived together thereon until his death. The respondent still lives on the land. The appellant came onto the land during the time people were leaving the IDP Camp to return to their homes. The appellant took over houses that Akello had vacated. Before the camp, no relative of the appellant had ever lived on the land. Koch-Goma Senior Secondary School did not take over any part of the respondent's land.

Proceedings at the *locus in quo*:

[8] The trial court visited the *locus in quo* where it observed a banana plantation belonging to the respondent. An anthill pointed out by the appellant as the boundary established in 1984 between his land and that of the respondent. Took evidence from several people who had not testified in court.

Judgment of the court below:

[9] In his judgment, the trial Magistrate found that none of the neighbours to the land had seen the appellant and his father on the land before establishment of the IDP Camp. The anthill, that was pointed to by the appellant as the boundary had not existed in 1984. The evidence before court is to the effect that the respondent and her late husband had occupied the land before the insurgence. Therefore the land belongs to the respondent. The appellant took advantage of returnees vacating the IDP Camp to occupy part of the respondent's land without her consent. He therefore is a trespasser on the land. The suit was dismissed with costs to the respondent and judgment entered for the respondent against the appellant on the counterclaim declaring the respondent to be the rightful owner of the land in dispute, with an order of vacant possession, a permanent injunction, an ward of shs. 1,000,000/= in general damages and half the taxed costs of the suit since she was represented by the Legal Aid Project of the Uganda Law Society.

The grounds of appeal:

[10] 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 fact in failing to properly evaluate the evidence on record thereby arriving at the wrong conclusion.
2. The trial Magistrate erred in law and fact in failing to consider the evidence at locus to the prejudice of the appellant thereby reaching the wrong decision.

Arguments of Counsel for the appellant:

[11] In their submissions, counsel for the appellant M/s Abore, Adongo and Ogalo Company Advocates argued that the evidence showed that the respondent used to occupy land that is now occupied by Koch-Goma Senior Secondary School. This caused her to encroach onto the appellant's land. Although the respondent admitted having given the school that part of her land, in re-examination she stated that it was an elder of their family Odur P'Lakor who gave the land to the school. Then D.W2 testified that the land taken over by the school was previously owned by a one Yakobo Onyugi. These contradictions were not evaluated by the trial magistrate. The respondent could not tell the size of the land yet the appellant was able to approximate it to one acre. The witnesses called by the respondent denied knowledge of the appellant's father but the appellant acknowledged that she knew him. The family of the appellant and that of the respondent shared a common boundary. The proceedings at the *locus in quo* failed to focus on the existence or otherwise of graves on the land, the boundaries of the land in dispute, identification of the neighbours, and establishing the size of the land in dispute. Apart from P.W.2, all people whose evidence was recorded at the *locus in quo* had not appeared in court to testify, yet the observations made thereat substantially influenced the decision. The decision should therefore be set aside and the appeal be allowed with costs to the appellant.

Arguments of Counsel for the respondent:

[12] In response, counsel for the respondent M/s Kunihira and Company Advocates submitted that the appellant claimed to have inherited the land in 1984 yet that is the same year he said his father acquired it was rightly found to be unbelievable. The contradictions and inconsistencies relating to who gave land to Koch-Goma Senior Secondary School were minor and can be attributed to lapse of memory, especially due to the old age of the respondent. Being unable to testify as to the size of the land should not be adversely construed against the respondent for

she is an illiterate. None of the respondent's witnesses had ever heard of the one Amar that the appellant claimed his father had obtained the land from. Whereas the respondent could name all her neighbours to the disputed land, the appellant could only name the respondent. Evidence obtained at the *locus in quo* did not materially affect the decision of the court, it only confirmed the testimony of the respondent and her witnesses. The trial magistrate properly evaluated all the evidence and came to the correct decision. The appeal should therefore be dismissed with costs to the respondent.

Duties of a first appellate court:

[13] This being a first appeal, it is the duty of this 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*). The appellate 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.

Ground one struck out for being too general:

[14] The first ground of appeal presented in this appeal is too general and 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.

Errors in conducting proceedings at the *locus in quo*:

[15] 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. 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 several people who had not testified in court. This was an error.

[16] 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.

[17] 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 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.

Evaluation of contradictions and inconsistencies in evidence:

[18] Counsel for the appellant argued that the respondent contradicted D.W.2 regarding whether or not it was Odur P'Lakor who gave the land to the school or instead the school took over land previously owned by a one Yakobo Onyugi, yet these contradictions were not evaluated by the trial magistrate. 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.

[19] 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 crime to crime but, generally in a criminal 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 elements 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.

[20] In the instant case, since there is no evidence to show that Odur P'Lakor and Yakobo Onyugi did not belong to the same family of the respondent, I find that this did not materially contradict the respondent's evidence that the land now occupied by Koch-Goma Senior Secondary School formerly belonged to a the family of the respondent. It was a minor contradiction that could be explained by lapse of memory due to passage of time. Since it did not point to deliberate untruthfulness, the trial court was justified in disregarding it.

<u>Oral evidence when corroborated by physical evidence carries more weight</u>:

[21] In his own admission, the appellant stated that the respondent has been his neighbour since 1984. He had no explanation for where the respondent lived or came from before that. This is consistent with the respondent's evidence that the appellant came to settle on the land from the IDP Camp and took over a house that had been occupied by a one Avend who returned to his home when the IDP

Camp was disbanded. D.W.2 Akello Katalina too came to know the appellant only when he came to live in the IDP Camp that was situated on the respondent's land. D.W.3 Odur Jeffifino too testified that he came to know the appellant as a resident of the IDP Camp. The appellant came onto the land during the time people were leaving the IDP Camp to return to their homes. The appellant took over houses that Akello had vacated. Before the camp, no relative of the appellant had ever lived on the land.

[22] The respondent's version that her husband lived on the land before he married her, she came to live on the land when he married her, that both lived together thereon until his death and that she still lives on the land, was verified at the visit to the *locus in quo* by the presence of a banana plantation belonging to the respondent. There was nothing to show that the appellant nor his father Ocaya Rufino or Omar before his alleged migration to Minakulu, ever lived on or undertook any activities on the land. The evidence as a whole shows a significant imbalance that tilts the scale in favour of the respondent and therefore the trial court came to the correct conclusion.

Order :

[23] In the final result, there is no merit in the appeal and it is hereby dismissed. The costs of the appeal and of the trial court are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Mr. Simon Ogen .

For the respondent : Ms. Kunihira Roselyn.