IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 071 of 2018

In the matter between

ATIM BETTY **APPELLANT**

And

ONEN FELIX RUGUS **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure *— Parties — A suit filed in the name of a sole plaintiff who is deceased at the time it was filed is a nullity —section 70 of The Civil Procedure Act — Before court can set aside the judgment, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. 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. — Limitation— Section 5 of The Limitation Act — No action may be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her.*

Evidence Law—*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*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant, a deceased person, through the holder of letters of administration to his estate, Layoo Ronnie, sued the respondent seeking recovery of land measuring approximately 55 acres situated at Dika village, Onyona Parish, Ongako sub-county, in Gulu District, a declaration that he is the rightful owner of the land in dispute, an eviction order, general damages for trespass to land, a permanent injunction restraining the respondent from further acts of trespass onto the land, and the costs of the suit.

[2] The appellant's claim was that his deceased grandfather, Nekemiya Okello, acquired the land as vacant unclaimed forest land within the Temanjo Clan area. He married two wives; Karen Anek and Gertrude with whom he settled on the land and established a family. He lived there until his death during the year 2010. Before his death, he had asked the respondent around the year 1943 to vacate the approximately a quarter of an acre of the land in dispute, he had allowed the respondent's grandmother to occupy temporarily. As the respondent procrastinated about vacating the land, the Uganda National Roads Authority acquired that part of the land compulsorily and the respondent fraudulently claimed compensation as if he were the owner of the land, hence the suit.

[3] In his written statement of defence, the respondent refuted the appellant's claim. He averred instead that the land belonged to his late father Okelo Yafesi having been given approximately 15 - 45 acres of then forested land by the late Opiyo Angelo. The respondent's father cleared the forest and lived thereon from 1965 until his death in 1982. The respondent was born and raised on that land and when his said father eventually died he was buried thereon. The family of the deceased have been in occupation of the land for that long save for the period of the insurgency. There are gardens, a banana plantation and multiple graves of their deceased relatives on the land. Several attempts at mediation of the dispute have all yielded results in the respondent's favour. The appellant has

nevertheless continued to harass the respondent and cause his malicious arrest. The suit is maliciously filed intended only to prevent the respondent access to compensation that he is entitled to.

The appellant's evidence in the court below:

[4] P.W.1 Layoo Ronnie, the appellant, testified that the land in dispute is the family land of Nekemiya Okello occupied by over 70 family members who have dwellings and gardens over approximately 60 acres. They have occupied the land since the 1930s. It is during the year 2014 that the respondent trespassed onto approximately 35 - 50 acres of the northern part of that land where he has cleared part of the forest and established a homestead with more than five huts. By the time he was born, the respondent was residing on part of the land in dispute, which, he was told, they are permitted to occupy in 1965. The respondent's father Yafesi was buried next to the respondent's home. Between the appellant's land and that now in dispute is a banana plantation established around 2002 - 2005 but he did not know who planted it. It is during the year 2018 that the respondent began activities on the land in dispute. It is during the year 2016 that he heard about compensation that was to be made by the Uganda National Roads Authority to people who owned land within that area.

[5] P.W.2 Owiny Christopher, testified that by the time he was born in 1973, the respondent was already in occupation of the land in dispute. It his grandfather the late Nekomiya Okello was born on the land in dispute. He gave part of the land by the roadside to the respondent's father, for ease of his then school going children, who included the respondent. It was of recent during the year 2014 that the respondent began cutting down trees on that land belonging to the appellant. The common boundary between the respondent's and the appellant's land is marked by mango trees. The banana plantation planted by the respondent in 2007 is not the boundary. The appellant occupies 55 acres of the land.

[6] P.W.3 Kinyera John Bosco, testified that it is the late Nekomiya Okello who during 1965 gave about 100 acres of the land in dispute to the respondent's father Yafesi Okello to enable his school going children have easy access to school. The boundary between the respondent's land and that of the appellant is marked by mango trees. The respondent exceed that boundary and occupied over 20 acres of the appellant's land where he established a banana plantation over ten years ago. None of the appellant's relatives has any activity beyond the banana plantation. Yafesi Okello planted two or three mangoes trees on the land. The dispute over the land began in the year 2014.

[7] P.W.4 Joseph Owinji alias Amal, testified that the land in dispute belonged to their late grandfather Nekomiya Okello. The respondent has lived on the land since the 1960s and has established gardens, planted pine trees and built grass-thatched houses on the land. He is also cutting down trees in the forested part of the land. The respondent has stopped the descendants of the late Nekomiya Okello from undertaking any activity on the land in dispute. The respondent established a banana plantation to mark the boundaries yet he does not know the history of its acquisition. The respondent does not belong to the Temajo Clan, he is of the Jokumu Clan. In 2012 the Temajo Clan asked him to leave the land.

[8] P.W.5 Lanek Celestino, testified that he is the Clan head. It is during the year 1966 the respondent's father Yafesi Okello requested for a small piece of land from Angelo Opio to put up a house to enable his children go to school. He was given less than an acre. The respondent has since then expanded the area of his occupancy to about 40 acres. The respondent cuts down the trees that used to mark the boundary between his and the appellant's land. The appellant is to the South while the road is to the East of the land in dispute. The appellant planted bananas along the boundary during the time of insurgency. P.W.6 Rose Ojok, testified that the respondent's father was given a small portion of land of about two acres but the respondent has since then exceeded the boundary. The

boundary was marked by mango trees. The appellant later during the year 2002 established a banana plantation along the boundary.

The respondent's evidence in the court below:

[9] Testifying in his defence as D.W.1 Onen Felix, the respondent, stated that he has lived on the land in dispute since his birth in 1959. It is approximately 45 acres and he inherited the land from his late father Okello Yafesi who inherited it in turn from his own father Okech Onyii. The appellant is a neighbour to that land and the common boundary between them is a banana plantation stretching from the roadside to the stream. The appellant has never used the land in dispute. It is only during the year 2015 that the dispute erupted between him and the appellant over the land following an announcement by the Uganda National Roads Authority that it was to compensate people who owned land within that area for expansion of the Gulu - Alwiyo Road. During the verification exercise, the local authorities confirmed the respondent's ownership of the land in dispute. It is Angelo Opio who in 1965 showed his father the boundaries of the land. He planted the banana plantation at the boundary in 1977 and it exists to-date.

[10] D.W.2 Omona John testified that the land belonged to the respondents' grandfather Onen Felix, it was inherited by Yafesi Okello, the respondent's father before the respondent eventually inherited it. He was given about 45 acres and it is Angelo Opio who in 1965 showed the respondent's father the boundaries of the land. The boundary between the respondent's and the appellant's land is a footpath from then road to the stream and a a banana plantation that has existed on the land since 1965.

Proceedings at the *locus in quo*:

[11] The court visited the *locus in quo* on 11th July, 2018 where it observed that the land in dispute measures approximately 40 acres and the respondent is in

occupation. The graves of the respondent's parents are visible on the land. The respondent has a homestead with mature trees on the land. The boundary is marked by a line of banana trees and the respondent's activities have not exceeded that boundary. Beyond that boundary are huts belonging to a one Richard who has as well opened up a new garden for cultivation. The appellant had nothing to show indicating his current or Nekomiya Okello's possession in the past, of the land in dispute. A sketch map of the land in dispute was prepared illustrating those observations.

Judgment of the court below:

[12] In his judgement, delivered on 14th September, 2018, the trila Magistrate found that the appellant's testimony regarding the donation of land by his grandfather Nekomiya Okello to the respondent's father is hearsay. The appellant though conceded that the respondent has been on the land since the year 1965 and established a banana plantation thereon around the year 2002. The respondent therefore qualifies as a bonafide occupant of the land. Neither the appellant nor any of his witnesses have any activities on the land or live in its neighbourhood. At the *locus in quo*, the court observed the location of the banana plantation along the boundary. The appellant conceded that the respondent's father was given a portion of land by the roadside. At the *locus in quo*, the long period of the respondent's possession was evinced by the existence of an old homestead and mature trees. There was no evidence of his having exceeded the boundaries. The appellant had nothing to show indicating his current or Nekomiya Okello's possession in the past.

[13] The court did not find any mango trees on the land demarcating the boundary as claimed by the appellants' witnesses. A suit file in 2014 was time barred considering the respondent's long period of occupation. Nekomiya Okello never challenged the respondent's occupation nor activities on the land. He never challenged the monumentation of the boundary by way of banana plants. The

appellant's evidence was contradictory regarding the size of land given to the respondent's father. The alleged presence of graves of their deceased relatives on the land was proved to be untrue during the visit to the *locus in quo*. The appellant, a grandson, whose knowledge of the background is suspect, has no basis for challenging the respondent's occupation. The appellant failed to prove that the land in dispute forms part of the estate of the late Nekomiya Okello. Even if it did, his claim is time barred. The respondent is a bona fide occupant of the land having inherited it from his father. The appellant failed to prove that the respondent had exceeded the boundaries. The respondent is the lawful owner of the land; hence the suit was dismissed with costs.

The grounds of appeal:

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

1. The learned trial Magistrate failed to evaluate the evidence on record thereby reaching a wrong decision.
2. The learned trial Magistrate erred in law and fact when he ignored the evidence of P.W.1 and held the respondent to be a bona fide occupant, thereby reaching a wrong conclusion.
3. The learned trial Magistrate erred in law when he dismissed the suit for being time barred.
4. The learned trial Magistrate erred in law and fact when he failed to conduct proceedings at the *locus in quo* properly thereby reaching a wrong decision.

Arguments of Counsel for the appellant:

[15] Counsel for the appellant, did not file any submissions

Arguments of Counsel for the respondent:

[16] The respondent appeared *pro se* and argued that all the evidence before court was to the effect that the respondent had been in occupation of the land in dispute since 1965. There was no evidence of trespass adduced. In his testimony, the appellant claimed that over 70 people live on the land but he was unable to demonstrate this during the visit to the *locus in quo*. He admitted that at the time he was born he found the respondent resident on the land yet his grandfather, who was still living then, did not question his occupancy. He further admitted the existence of a banana plantation between his land and that of the respondent. The court was right when it found the appellant to be a bona fide occupant of the land since he had lived there for more than twelve years before 1995. The court came to the right conclusion when it found the suit was time barred since the respondent has been in continuous possession of the land from 1965. The visit to the *locus in quo* was intended to clarify the oral testimony of the witnesses given in court and that purpose was achieved. The proceedings were properly conducted and therefore the appeal should be dismissed.

Duties of a first appellate court:

[17] 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*).

[18] In exercise of its appellate jurisdiction, 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.

[19] In the first place, the suit was filed in the name of a person who was deceased at the time it was filed. It was therefore a nullity (see Babubhai Dhanji Pathak v. Zainab Mrekwe [1964] E.A.24). A dead person cannot institute a suit. A suit filed in the name of a sole plaintiff who has died before the institution of the suit is a complete nullity. This reason alone would have disposed of this appeal. But for completeness of the decision, the rest of the aspects of the appeal will be considered.

Ground one struck out for being too general.

[20] I find the first ground 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). The ground is accordingly struck out.

Ground four; errors in conducting the proceedings at the *locus in quo.*

[21] In the fourth ground of appeal, the trial court is criticised for having conducted proceedings at the *locus in quo* in an irregular manner. Being a procedure undertaken pursuant to Order 18 rule 14 of *The Civil Procedure Rules*, proceedings at the locus in quo are an extension of what transpires in court. They are undertaken for purposes of inspection of a property or thing concerning which a question arises during the trial. For the inspection of immovable property, objects that cannot be brought conveniently to the court, or the scene of a particular occurrence, the court may hold a view at the locus in quo. According to section 138 (1) (b) of *The Magistrates Courts Act* and Order 18 rule 5 of *The Civil Procedure Rules,* evidence of a witness in a trial should ordinarily be taken down in the form of a narrative, and this by implication includes proceedings at the locus in quo.

[22] Therefore, at the *locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court *(see Karamat v. R [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; [1956] 40 Cr App R 13).* Evidentiary statements made under examination should be noted in the record to the extent they can be assumed to be of significance in the case. The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a locus in quo. The record in the instant case does not disclose if the witnesses were sworn and if any questions were asked by any of the parties at the locus in quo concerning what the court

ultimately observed. As matters stand, the observations made are hanging, not backed by evidence recorded from witnesses.

[23] However, section 70 of *The Civil Procedure Act*, provides that 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. 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.

[24] I find that considering the nature of the dispute at hand, these irregularities are not fatal since the available material on record is sufficient to take the proceedings to its logical end. According to Order 43 rule 20 of The Civil Procedure Rules, where the evidence upon the record is sufficient to enable the High Court to pronounce judgment, the High Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the High Court proceeds. The oral testimony clearly explained the common boundary marking the extent of the land claimed by each of the parties, physically defined by some natural features, and these were identifiable on the ground. This ground accordingly fails.

Ground three; dismissal of suit for being time barred.

[25] By the third ground of appeal, the trial court is faulted for having dismissed of the suit for being time barred. P.W.1 Layoo Ronnie testified that it is during the year 2014 that the respondent trespassed onto approximately 35 -50 acres. P.W.2 Owiny Christopher testified that it was of recent during the year 2014 that the

respondent began cutting down trees on that land belonging to the appellant. Section 5 of The Limitation Act, provides that no action may be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her. The activities complained of were alleged to have begun in the year 2014. According to section 16 of The Limitation Act, time begins to run from the date of the adverse possession. Limitation begins to run from the date of the cause of action to the date of filing the suit (See *Miramago F. X. S. v. Attorney General [1979] HCB 24*). Since it was alleged that the adverse possession began in 2014, a suit filed in the year 2015 would clearly be time barred. The trial court therefore misdirected itself on this finding. This ground of appeal succeeds.

Ground two; disregard for the testimony of the appellant.

[26] By the second ground of appeal, the trial court is faulted for having disregarded the testimony of the appellant. 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.

[27] The dispute was essentially over the size of land that the respondent was entitled to on account of the size of land that was given to his grandfather. Discrepancies or contradictions in this regard were material and could not be ignored. In the plaint it was claimed that the respondent's grandfather was given approximately a quarter of an acre. P.W.3 Kinyera John Bosco testified that it was about 100

acres. According to P.W.5 Lanek Celestino the respondent's father was given less than an acre. Then P.W.6 Rose Ojok testified that the respondent's father was given a small portion of land of about two acres. The disparity in acreage is too wide and unexplained. The court was justified in rejecting this evidence.

[28] Furthermore, the appellant failed to prove the alleged trespass. All the appellants' witnesses and himself acknowledged the fact that the respondent's father had been given land in that location. P.W.1 Layoo Ronnie claimed the respondent had exceeded the boundaries of the land given to him and occupied an extra approximately 35 -50 acres. P.W.2 Owiny Christopher testified that the respondent was cutting down trees on that land belonging to the appellant, while P.W.3 Kinyera John Bosco testified that the respondent had exceed that boundary and occupied over 20 acres of the appellant's land. Not only were the witnesses inconsistent as to the extent of the trespass but when the court visited the locus in quo it found that the boundary was marked by a line of banana trees and the respondent's activities had not exceeded that boundary. In light of the fundamental flaw in the suit and failure to prove the alleged trespass, this ground of appeal fails.

[29] Despite the error in finding the suit to have been time bared, it cannot be said that the court below had erred in any manner in coming to the conclusion that it did. The findings were essentially based on the evidence before it and it could not be said that the interpretation given by the court was quite unwarranted or unjustified.

Order:

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

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Donge and Co. Advocates.

For the respondent :