IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 072 of 2018

In the matter between

1. KILAMA TONNY

2. ORYEM SIMON

3. APOTO JOSEPHINE ORYANG **APPELLANTS**

And

1. ATIM IRENE OKELLO

2. LAKER JOYCE OKELLO **RESPONDENTS**

Heard: 15 October, 2019.
Delivered: 28 November, 2019.

Evidence *— In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents jointly and severally sued the appellants jointly and severally seeking recovery of approximately 2 acres out of 30.7 acres of land situated at Lajwatek village, Pageya Parish, Koro sub-county, Omoro County in Gulu

District, general damages for trespass to land, mesne profits, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the suit. The respondent's claim was that they inherited the land in dispute as part of the estate of the late Okello John, who in turn acquired it by purchase of one part from a one Omaki Jibidayo and another part on or around 15th July, 1975 from a one Sindare Paulo. As the purchase price of the land and developments thereon, which included 36 cows, 12 goats, food crops, three rolls of barbed wire and houses, the late Okello John paid cash shs. 55,100/= The respondents and the late Okello John lived on the land henceforth until insurgency forced then to relocate to Kampala whereupon they left behind a one Oringa Alex, son of Omaki Jibidayo as caretaker of the land. Upon their return in 2003, Okello John paid off Oringa Alex for his services. He continued to live on the land until his death on 28th August, 2004.

[2] The appellants and other beneficiaries of his estate constructed a five roomed permanent house on the land, a grass-thatched hut, and a poultry house. They occupy the land to-date. To their surprise, the first appellant and other children of the late Okello Tom on or about 19th June, 2009 made an application to Gulu District Land Board seeking a grant of a lease over the land. The land was subsequently surveyed on 12th July, 2012. Without the permission of the respondents, the appellants thereafter during the same year trespassed onto the respondent's land and established gardens thereon, where they planted food crops and trees. The 1st appellant proceeded to establish a grass thatched hut on the land during July, 2013. The respondents caused the arrest and prosecution of the appellants for criminal trespass and malicious damage to property and filed the suit against them.

[3] In their written statement of defence, the appellants denied the respondents' claim. They averred instead that the land in dispute is part of 10 acres that belonged to their father Oryang Kerobino and his wife the 3rd appellant Apoko Josephine Oryang. Oryang Kerobino inherited the land from his late father Odoch

Lagoro who acquired it way back in 1920 as vacant unoccupied and unclaimed land. Without any claim of right and with knowledge that the land belonged to the appellants, the respondents fenced it off and wrongfully applied for a freehold title over the land. The appellants made several futile attempts to stop the respondent's unlawful activities on the land which prompted the respondents to initiate malicious prosecutions against them. The respondents have since erected and occupied buildings on the land. The appellants therefore counterclaimed for general damages for trespass to land, *mesne profits*, a permanent injunction restraining the respondents from further acts of trespass onto the land, and the costs of the suit.

The respondents' evidence in the court below:

[4] P.W.1 Laker Joyce Okello testified that the land trespassed upon forms part of approximately 30.7 acres belonging to the late Okello John which he purchased in 1975. The appellants have trespassed onto approximately two acres of it. The acts of trespass began with the 1st appellant's entry during the year 2012. The other two joined him in the year 2013. They have since then planted trees and constructed a hut, which later collapsed.

[5] P.W.2 Atim Irene, testified that the late Okello John purchased the land in 1975 by way of transactions with two different sellers, Omaki Jibidayo and Sindare Pulo. He fenced it with barbed wire and occupied it with his family. Following the survey of the land in 2012 the appellants damaged part of the fence, uprooted the fencing posts and began encroachment onto the land. The appellant's land is about one kilometre away from the land in dispute and they do not share a common boundary. The 1st appellant had built grass-thatched hut on the land but it collapsed. The appellants have since the year 2012 trespassed onto the land by planting trees and growing seasonal crops.

[6] P.W.3 Oneka Zakeyo, son of Omaki Jibidayo, testified that the respondent's father Okello John bought part of the land in dispute from his father and he was present at the time of the sale. His father sols about six acres to the respondent's father. He personally picked shs. 700/= from Okello John's place of work in Mulago-Kampala as the balance of the purchase price. His father had as well sold another part of the land to a one Sindare Paulo who came from Kenya. When he decided to return to Kenya, he sold the land and all developments he had on the land to the respondent's father. The witness too later sold his land to Caroline Onekalit and relocated. The respondents' land is adjacent to that of Caroline Onekalit while that of the appellants is across Orokwa-ten Stream. The appellants occupied the land in dispute only after the insurgency. P.W.4 Oringa Alex, son of Omaki Jibidayo and also hoe chief of the area for the last 32 years, testified that the respondent's father Okello John bought part of the land in dispute from his father. He bought the other part from Sindare Paul. Both John Okello and his wife Ajulu were not buried on the land. The appellants have encroached on approximately one acre of the respondents' land where they have planted eucalyptus and pine trees and claim the rest of it. The appellants' land is separated from the one in dispute by Ochora Road.

The appellants' evidence in the court below:

[7] The appellant, Kilama Tonny, testified as D.W.1 and stated that the land was acquired by his grandfather in 1920 and it extended across Walter Ochora Road to include the part now in dispute. His home is on the Southern side of Walter Ochora Road. The land in dispute is about 150 metres from his home. Planted pine trees on the land in 2012. Uprooted the respondents' fence and was prosecuted. D.W.2 Olum Michael testified that he has lived in Koch Goma since birth. In 1986 he was displaced and began living on the land in dispute with the permission of his in-law Oryang Kerobino but did not know how he acquired the land. The 2nd respondent later fenced the land, enclosing them in her fence, yet the 1st appellant's father had given them those two acres. There was a dispute

between the appellants and Onekalit Caroline which was decided in her favour but the appellants appealed to the High Court.

[8] D.W.3 Onek John Bosco testified that he was born and lives in Koch Goma but in 1990 during the insurgency he re-located onto the land in dispute, across the road. The land belonged to Oryang Kerobino, but he lived across the road. The 2nd respondent later fenced the land, enclosing them in her fence. They later left the land at the end of the insurgency and handed it back to Oryang Kerobino.

Proceedings at the *locus in quo*:

[9] The court visited the *locus in quo* on 18th August, 2018 where it formed the opinion that the land in dispute is approximately two acres. The 1st and 2nd appellants have mahogany and pine trees growing on the land estimated to be two years old. Pits resulting from the appellants' brick-making activities on the land were visible. The appellants have crop gardens for seasonal crops on the land. The appellants' activities on the land commenced within the last seven years. The respondents have a permanent house and a kraal near the land in dispute. The appellants' homesteads are outside the respondents' fence beyond the home of Caroline Onekalit. The appellants' homes are cross Walter Ochora Road and the land they occupy does not share a common boundary with the land in dispute. A sketch map of the land in dispute was drawn.

Judgment of the court below:

[10] In his judgment delivered on 18th September, 2018 the trial Magistrate found that the respondents have a permanent structure on the land immediately after Walter Ochora Road and that the neighbouring land belongs to Onekalit. Neither John Okello nor his wife were buried on the land in dispute. The respondents are not occupying nor utilising the Northern portion of the land close to Orokwa-ten stream. Their activities are limited to the Southern side where they graze cattle

and grow crops. Whereas the 1st appellant claimed to have begun laying bricks on this land in 1986, that is untrue because he was only six years old at the time. When the court visited the *locus in quo*, there was no evidence of previous brick-making activities at the location he had claimed to have done so. There was no evidence of occupancy by the appellants across Walter Ochora Road. Land between that in possession of the appellants and the one in dispute is occupied by a third party Caroline Onekalit, yet the appellants do not claim the third party to be a trespasser on their land. When in 2008 D.W.2 Olum Michael commenced activities on land across Walter Ochora Road, to lay bricks and grow crops, these activities constituted trespass to the land.

[11] D.W.3 Onek John Bosco only occupied the land during the insurgency as an internally displaced person. He is not a reliable witness regarding its ownership. The 2nd and 3rd appellants did not testify in their defence and that left the evidence against then unchallenged. Kerubino Oryang died in the year 2016 but he never claimed the land from the respondents during his lifetime. The respondents are in possession of part of the land in dispute. The respondents relied on witnesses who had firsthand knowledge of the history of ownership of the land. In the circumstances, the court found that he land in dispute belongs to the estate of the late John Okello. The respondents were declared the rightful owners of the land and the appellants' trespassers thereon. The counterclaim was dismissed, an order of eviction issued, a permanent injunction issued against the appellant's further cays of trespass onto the land and the costs of the suit and the counterclaim were awarded to the respondents.

The grounds of appeal:

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

1. The trial Court erred in law and fact when it failed to properly evaluate the evidence on record thereby arriving at a wrong

conclusion that the respondents are the lawful owners of the land in dispute.

2. The trial Court erred in law and fact by not considering evidence confirmed at the *locus in quo* thereby occasioning a miscarriage of justice.
3. The trial Court deliberately ignored the appellants' evidence thereby denying the appellants justice.

Arguments of Counsel for the appellants:

[13] In his submissions, counsel for the appellants, argued that the respondents claimed that their father bought two parcles of land from two different people which he consolidated into the land now in dispute, but never adduced evidence showing that purchase. While the respondents claimed their father had lived on the land, they also stated that he was buried elsewhere when he died yet the insurgency had ended by that time. The respondents could not tell the size of the land yet they claimed their father had given them the agreement. At the age of 7 years at the time, the 2nd respondent was too young for her father to have shown her the boundaries of the land in the year 1975. P.W.3 Onek Zakeyo who claimed to have witnessed the transaction could not tell what the purchase price was. The court should have found that the respondents and their witnesses were lying. In contrast, the appellants and their witnesses were consistent in their testimony. The court failed to take into account the period the respondents had inexplicably not been in possession of the land in dispute. At the *locus in quo*, the court ignored the *Nsambia* and bamboo trees present on the land that were planted by the appellant's father and grandfather respectively.

Arguments of Counsel for the respondents:

[14] In response, counsel for the respondents, argued that the first ground of appeal is too general and ought to be struck out. The appellant's home is located across

Walter Ochora Road and not on the land in dispute. The respondents adduced evidence of their father's purchase of the land in 1970 and 1975 respectively. Whereas the 1st appellant denied having known Sindani, he acknowledged that it is Sindani who planted the bananas now located on the land. The trfila court rightly found that the respondent's father was in possession of the land until the year 2012 when the appellants' encroachment began. Evidence at the *locus in quo* corroborated the respondents' case. All evidence adduced by the appellants was properly evaluated by the trial court. The court was right to reject the appellants' evidence and to decide in favour of the respondents.

Duties of a first appellate court:

[15] 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*).

[16] 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 first ground of appeal is struck out for being too general:

[17] In agreement with counsel for the respondents, 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.

Proceedings at the *locus in quo*

[18] The second and third grounds of appeal fault the trial Magistrate for the manner in which he evaluated the evidence obtained from the visit to the locus in quo. As a matter of common sense, in a case such as this where the two versions are so diametrically opposed, something in the nature of confirmatory evidence should be found before the court relies upon the evidence of a witness whose testimony occupies a central position in the determination of the truth of either version. In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it.

[19] The appellants' version rested on the theory that the area in dispute formed part of the entire land that lay astride the Walter Ochora Road. They could not account for the presence of Caroline Onekalit in-between and the tract of undisputed land. The respondent's version did. The respondent's case rested on testimony of persons who lived on the land or its neighbourhood as way back as the 1970s while that of the appellants' rested on displaced temporary settlers in the late 1980s and early 1990s. The physical evidence at the locus in quo was supportive of the respondent's rather than the appellant's version. Since the appellant's version rested only on the word of witnesses, it was correctly accorded a lesser weight 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.

Order:

[20] In the final result, In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the trial are to the respondents.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellants : M/s Abore, Adonga, Ogen and Company Advocates.

For the respondents: M/s Latigo and Company Advocates.