**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable
Civil Appeal No. 056 of 2018

In the matter between

**ELIZABETH OWOT** **APPELLANT**

**And**

**ANEK ROSE** **RESPONDENT**

**Heard: 21 August, 2019.**

**Delivered: 26 November, 2019.**

***Land law*** *— Boundary dispute — Establishment of a boundary — Adjoining owners can, through words or action, create a "consentable" (or "consentible") boundary, which is an agreed upon boundary that literally supersedes any other boundary that existed hitherto. -.*

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] The appellant sued the respondent seeking recovery of approximately 6 acres of land situated at Got Ringo village, Pangu Parish, Alero sub-county, in Nwoya District, an order of vacant possession, general damages for trespass to land, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the suit. The appellant's claim was that her late husband Velentino Owot settled on the land in dispute in 1964 while it was vacant unclaimed land. They lived together on the land until the year 1972 when

the deceased secured a job at Awach Mission. He returned to the land in dispute in 1983 and lived there on until the break-out of the Joseph Kony insurgency. He together with the respondents, a neighbour, were displaced into an IDP Camp. They returned each to their respective tracts of land after the insurgency but during the year 2010 the respondent began encroaching on the appellant's husband's land. The dispute was successfully mediated by the Rwot Kweri but the respondent continued with his encroachment. The L.C. Courts up to the L.C.III confirmed the boundaries fixed by the Rwot Kweri. The Chief Magistrate ordered a re-trial hence the suit.

[2] In his written statement of defence, the respondent denied the appellant's claim. She averred that the land she is occupying originally belonged to the late Oyamo, great grandfather of the respondent's late husband, and then Angelo Kiiza grandfather of her husband who when he died it was inherited by the late Jenaro Uma, father of her late husband Ojok Uma who in turn inherited it when his father died. She at all material time lived together with her late husband on that land. It is during the year 1984 Jenaro Uma gave part of the land to the appellant and her husband onto which the respondent has never encroached. The appellant unsuccessfully complained to the Rwort Keri and later in the L.C. Courts against the respondent's husband. She prayed that the suit be dismissed with costs.

The appellant's evidence in the court below:

[3] P.W.1 Acayo Elizabeth testified that the land was given to her late husband in 1964 by Angelo Kiiza who was a cousin to her late husband. The respondent is a neighbour to the East separated by an Ojuta and Oywelo tree. Anek Margarita planted a mango tree to mark the boundary further. The respondent has encroached upon eight acres of her land on which she has built her home, planted pine trees and established gardens. P.W.2 Ojok James, a neighbour, testified that the respondent encroached on eight acres.

The respondent's evidence in the court below:

[4] In her defence, D.W.1 Anek Rose, the respondent testified that she inherited the land form her late husband in 2008. The appellant did not live in the area until the year 2007. Angelo Kiiza gave about half an acre of land to the late husband of the appellant that is to the West of hers. The boundary is a *Kituba* tree and it was shown to her by her brother in law, the late Abara. D.W.2 Obal Ijidio testified that the approximately one acre of land was given to the appellant's husband by Angelo Kiiza and it has a boundary marked by an anthill and *Kituba* tree. The respondent has not crossed that boundary. A tobacco ban used to exist on that part of the land claimed by the appellant. D.W.3 Okot Tina, testified that a *Kituba* tree, an anthill and footpath mark the boundary between the appellant's and the respondent's land.

Proceedings at the *locus in quo*:

[5] The court then visited the *locus in quo* on 21st April, 2018 where the respondent showed the court the *Kituba* tree and the anthill that mark the disputed boundary. Remnants of a building could be seen on the respondent's side of the boundary. While the respondent and D.W.2 stated they were remnants of a collapsed tobacco barn the appellant claimed they are of a house that had been constructed by their caretaker Uma Genaro during the period her late husband was working at Awach Mission. The features mentioned by the appellant including the grave of her step son and mango trees were on her undisputed side of that boundary. A sketch map of the area in dispute and the material physical features thereon shown to court was drawn.

Judgment of the court below:

[6] In his judgment delivered on 13th July, 2018 the trial Magistrate stated that at the *locus in quo* the court found that the mango tree the appellant alleged to mark the boundary between her land and that of the respondent is exactly in the respondent's compound. The bricks that indicated the location of a collapsed building on the respondent's side of the disputed boundary indicated a permanent structure had existed on that part of the land. It could not have been constructed by Uma Genaro, a person who was a mere caretaker. It is more probable that it was a barn as stated by the respondent. The area from which D.W.4 Okot Tina testified was used for making bricks was seen during the visit to the *locus in quo*. The appellant having failed to prove her case to the required standard, it was dismissed with costs 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 thereby arriving at a wrong conclusion, hence occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when he dismissed the suit on grounds that there was a submission on record.

Arguments of Counsel for the appellant:

[8] The appellant did not make any submissions in support of her appeal. In opposing the appeal, counsel for the respondent argued that the trial Magistrate correctly rejected the *Oywello* and *Ojuta* trees as boundary markers and rightly found that the common boundary between the appellant's and the respondent's land was the *Kituba t*ree, an anthill and footpath. There was no evidence of

trespass by the respondent beyond that boundary. The activities of both parties either side of that boundary indicated that they mutually recognised it as the common boundary. All proceedings at the locus in quo were in accordance with the laid down procedure and the evidence so obtained was properly evaluated. The appeal therefore ought to be dismissed.

Duties of a first appellate court:

[9] This being a first appellate court, it has the obligation 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).*

[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. This duty may be discharged with or without the submissions of the parties as the court proceeds to do now.

The first ground of appeal is struck out for being too general:

[11] 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. The second ground of appeal too is too vague to be considered. it too is accordingly struck out.

[12] That should have been the end of this appeal but under its general obligation to re-evaluate the evidence, the court proceeds to determine the propriety of the decision. The dispute between the two parties was over the correct location of a mutual boundary between their adjoining parcels of land. Adjoining owners can, through words or action, create a “consentable” (or “consentible”) boundary, which is an agreed upon boundary that literally supersedes any other boundary that existed hitherto. When adjoining owners of unregistered land treat a line as being the boundary between them, though that line may be different from the boundary described in their deeds, or any other officially recognised boundary that existed hitherto, and when those actions continue uninterrupted for twelve years or more, (whether by a single owner or a succession of owners), the

parties are deemed to have established the line as the boundary, through recognition and acquiescence, regardless of the boundary described in their deeds or any other officially recognised boundary that existed hitherto. The boundary is binding even when it is not reflected in a writing.

[13] 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. 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:

[14] 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 respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant: Mr. Ocorobiya Lloyd.

For the respondent : M/s Odong and Co. Advocates