IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 061 of 2018

In the matter between

1. ODWONG JOSEPH AGORO

2. WILLIAM LAGORO **APPELLANTS**

And

1. MORRIS LATIGO

2. IGNATIUS LAKERE LATIGO **RESPONDENTS**

Heard: 27 August, 2019.
Delivered: 12 September, 2019.

Land law *— When the legal description of one parcel of land overlaps with the legal description of an adjoining parcel, the controversy between the parties then is not one of title but rather is strictly a survey issue — An entry made in the register reflecting an overlap of titles, is a mistake and may be rectified, because it should never have been made in the first place — The question of what is a boundary line is a matter of law, but the question of where a boundary line, or a corner, is actually located is a question of fact — Part-parcel adverse possession may effectively transfer ownership of a small portion of an abutting parcel consequent to long term occupation — The general principles that guide the ranking in priority of registered interests in land; the first person to record their deed has senior title regardless of the sequence the conveyances were made or the knowledge a grantee had of an earlier conveyance; the last conveyance made where the grantee did not have notice of an earlier conveyance has senior title; the first person to record their deed who was conveyed the property without notice of an earlier conveyance has senior title.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellants jointly and severally sued the respondent's jointly and severally, for a declaration that they are the rightful owners of land comprised in LRV 2227 Folio 17, Aruu Block 1 in Kitgum, measuring approximately 120 hectares, general damages for trespass to land, *mesne* profits, an order of vacant possession, a permanent injunction and costs.

[2] The 1st appellant's claim was that the land in dispute originally belonged to his late father Obutu Lagoro. Upon his death in 1947, the 1st appellant inherited the land. He occupied it until 1965 when, being a teacher, he was transferred to a school in Puranga. He was thereafter transferred to multiple other schools until his retirement in 1982 when he returned and took possession of the land. During the period of his absence, he had entrusted the land to Jino Okot and Gustafa Agwa as caretakers. On 30th June, 1989 he applied for a lease in respect of the land. The land was duly inspected on 13th September, 1990 and on 26th March, 1992 a lease offer was issued to him. In accordance with an instruction to survey issued on 17th December, 1992, the land was duly surveyed on 3rd September, 1993. On 13th April, 1994 a five year initial term lease agreement was executed between him and the Uganda Land Commission and thereafter a title deed was issued to him on 15th April, 1994.

[3] He continued to occupy the land until the year 2003 when the respondents without any colour of right trespassed onto the land. During the year 2007, the 1st appellant received an offer from Pader District Land Board for extension of the lease to the full term of 49 years. On 15th February, 2008 he accepted the extension, paid the requisite fees, and was issued with a title deed for the full

term. He has since built a permanent house on the land and his activities thereon cover approximately thirty acres.

[4] In their joint written statement of defence, the respondents refuted the appellants' claim and averred that the land they occupy is comprised in LRV 117 Folio 24, Aruu Block 1 in Kitgum, measuring approximately 175.5 hectares, registered to the 2nd respondent. In his counterclaim, the 2nd respondent claimed that he acquired the leasehold title to the land in 1982, valid for 49 years. He permitted his brother, the 1st respondent, to occupy and use part of that land. It is the appellants that may have trespassed onto this land by theirs overlapping over it. They therefore prayed for an order dismissing the appellants' case or in the alternative, one for rectification of the appellants' title, to exclude land comprised in theirs, general damages for trespass to land, the costs of the suit and of the counterclaim.

The respondent's evidence in the court below:

[5] In his defence as D.W.1, the 2nd respondent, Ignatius Lakere Latigo, testified that he has been the lawful owner of the land in dispute since 1982 when he obtained a 49 year lease over the land, comprised in LRV 117, Folio 24 at Kitgum measuring 175.6 hectares. Before issuance of the title, he made the application in 1974, the land was inspected by the East Acholi District Land Board members and a report was made on 4th November, 1974. He received a lease offer on 18th June, 1976. The land was duly surveyed on 30th June, 1980. The title deed for the initial term was issued on 2nd April, 1982 which was later extended to the full term of 49 years. It is during the year 2006 that the 1st appellant began claiming the land as his. The 1st respondent Morris Latigo testified as D.W.2 and stated that he lives on the land in dispute with his brother, the 2nd Respondent by virtue of a certificate of title issued to the latter.

[6] D.W.3 Ongwen George testified that he owns land adjacent to that of the 2nd respondent and was surprised when in 2006 the 1st appellant wrote a letter to him claiming that land as well. The land in dispute belongs to the respondents whom he has seen on that land since childhood. D.W.4 Charles Oyuru Onayi testified that in 1973 he was appointed member of the Kitgum District Land Committee. He was part of the team that inspected land applied for by the 2nd respondent Ignatius Lakere Latigo. There was no complaint raised during that inspection. The respondents closed their case and the court thereafter visited the *locus in quo* on 14th December, 2017 where it established that the 1st appellant had trespassed on the 2nd respondent's land by virtue of a suspected overlap. It prepared a sketch map illustrating the observations made.

The appellant's evidence in the court below:

[7] Testifying as P.W.1, the 1st appellant, Odwong Joseph Lagoro, stated that the 1st respondent is his in-law while the 2nd respondent is his son, and both are his neighbours. The land in dispute originally belonged to his father Oburu Lagoro and on his death the appellant inherited it in 1947. He was born on that land and has lived on it his entire life. The land is used for cultivation and for rearing livestock. On 30th June 1989 he applied to lease the land. The land was inspected on 13th September, 1990 and he received a lease offer on 26th March, 1992. The land was surveyed and a title deed, LRV 2227, Folio 17, plot 3 Aruu Block 1, Kitgum measuring 120 hectares, was issued in the names of the two appellants. The lease was in the year 2007 extended to the full term of 49 years. The 1st appellant has since built a permanent house on the land and utilises about 30 acres of it as farmland.

[8] P.W.2 Martin Anyala testified that he was a member of the Kitgum District Land Board from 1989 to 1992. He was part of the team that inspected the land upon the appellants' application for a lease. No objection was raised by any of the neighbours during that inspection.

Proceedings at the *locus in quo*:

[8] The court then visited the *locus in quo* where it established that the 1st appellant had trespassed onto the 2nd respondent's land.

Judgment of the court below:

[9] In his judgment the trial Magistrate found that when the court visited the *locus in quo*, it established that the 1st appellant had trespassed onto the 2nd respondent's land by overlap. The title deed issued to the 1st appellant also comprised land occupied by D.W.3 Ongwen George and Acholibur health Centre III, yet he had never sued them for trespass. The 1st appellant acquired his title deed in 1994, twelve years after the 2nd respondent had acquired his in 1982 which in 1987 had been extended to its full term of 49 years. Land comprised in LRV 117 Folio 24, Aruu Block 1 in Kitgum, measuring approximately 175.5 hectares belongs to the 2nd respondent and the 1st respondent is a bonafide occupant thereon. In Pader Civil suit No. 006 of 2008, a surveyor wrote a letter dated 19th July, 2010 to the trial Magistrate in respect of the same land and reported that he had established that part of LRV 2227 Folio 17 belonging to the 1st appellant had overlapped over land comprised in LRV 117 Folio 24 belonging to the 2nd respondent, both being on the same side of Lagwenolim and Wangopok Streams.

[10] Both respondents therefore have ever trespassed onto the land. Judgment was therefore entered in favour of the respondents by which the 2nd respondent was declared the rightful owner of Land comprised in LRV 117 Folio 24, Aruu Block 1 in Kitgum, measuring approximately 175.5 hectares while the 1st respondent was declared a bonafide occupant thereon. The court directed that LRV 117 Folio 24 be re-surveyed, controlled and coordinated to the "UTM" standard. For that reason the tile deed for land comprised in LRV 2227 Folio 17 be cancelled or rectified. The respondents were awarded three quarters of the costs of the suit.

The grounds of appeal:

[11] The appellants were dissatisfied with the decision and jointly appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he held that the 1st appellant was not the registered owner of the suit property.
2. The learned trial Magistrate erred in law and fact when he declared the 1st respondent / defendant a bona fide occupant of the suit land.
3. The learned trial Magistrate erred in law and fact when he did not find that the respondents were trespassers on the suit land.

Arguments of Counsel for the appellant:

[12] In his submissions, counsel for the appellants, argued that evidence showed that at the time the 1st appellant made his application, the respondent occupied a different piece of land across the Lanyadhang Stream. That steam formed the natural boundary between his and the respondents' land. The 1st respondent encroached onto the land by construction of a semi-permanent house and establishment of a 30 acres tree plantation. A certificate of title is conclusive evidence of ownership. The trial Magistrate did not make any finding of fraud regarding the process leading to the issuance of that title. The 2nd respondent did not adduce evidence of survey of his land. The 2nd respondent was issued with a title deed for an initial term of five years which he never renewed. It was wrong for the trial Magistrate to have declared the 1st respondent a bona fide occupant of the land yet his occupancy began in 1990. His claimed status as a bona fide occupant was neither pleaded nor argued. By crossing the Lanyadhang Stream, the respondents trespassed onto the 1st appellant's land.

Arguments of Counsel for the respondent:

[13] In response, counsel for the respondents, argued the 1st appellant's lease having been granted on 1st August, 1993 for an initial term of five years, it expired on 2nd August, 1998. On the other hand the 2nd respondent was issued with a title deed on 2nd April, 1982 for an initial term of five years which in 1987 was extended to a full term, twelve years before the title relied upon by the 1st appellant. The 2nd respondents' title being first in time, it should prevail over that of the 1st appellant. The one issued to the 1st appellant was issued in error. When the 1st appellant received a subsequent offer on 15th February, 2008 he failed to comply with its conditions within the time specified. He paid the prescribed fees on 8th September, 2011 more than three years after the offer, yet he was required to do that within 45 days of the offer. The 1st appellant was a tenant at sufferance upon expiry of the title for the initial term. By the time he received the second offer, the 2nd respondent already had running lease over the land and it was thus not available for leasing. Having occupied the land with the consent of the 2nd respondent, the trial Magistrate was correct when he characterised the 1st respondent as a bona fide occupant on the land. He is not a trespasser on the land. Both respondents have been in physical possession of the land to which the 2nd respondent is the registered owner, The trial Court therefore came to the right conclusion when it found that they were not trespassers onto the land.

Duties of a first appellate court:

[14] 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*).

[15] 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.

Grounds one and two

[16] In grounds one and two, the decision of the trial court is impugned for the conclusions drawn regarding the validity of the 2nd respondent's title and bona fide occupancy of that land by the 1st respondent. Owners of titled land are often confronted with situations where deed descriptions for adjoining properties overlap, meaning the legal description of one parcel overlaps with the legal description of an adjoining parcel. This presents a situation in which adjoining owners can each claim title to the same portion of property. The controversy between the parties then is not one of title but rather is strictly a survey issue.

[17] It was the contention of counsel for the appellants that the Lanyadhang Stream formed the natural boundary between his and the respondents' land. The question of what is a boundary line is a matter of law, but the question of where a boundary line, or a corner, is actually located is a question of fact *(see Walleigh v. Emery, 163 A.2d 665, 668 (Pa.Super. 1960)*. In the event that the parties cannot resolve the issue by a boundary line agreement, the owner that has been cultivating or utilising the overlapping portion may assert a claim of adverse

possession to obtain undisputed ownership over the disputed portion under the doctrine of part parcel adverse possession.

Part-parcel adverse possession.

[18] Part-parcel adverse possession involves the inadvertent trespass by one landholder over a portion of land belonging to an adjoining landholder where there is confusion with regard to the correct position of the boundary dividing the two land holdings. The distinction between whole and part-parcel adverse possession is that whole parcel adverse possession is always intentional and not inadvertent while part-parcel adverse possession is usually inadvertent although it sometimes is deliberate adverse occupation of part of another's land holding. The occupational or possessory boundary then prevails over the legal boundary certified in the register and the boundaries would then be shifted by rectification.

[19] Part-parcel adverse possession would effectively transfer ownership of a small portion of an abutting parcel consequent to long term occupation, since that possession may prevail over the strict technical legal boundary. On the other hand, if part-parcel adverse possession is ineffective to transfer ownership of registered land, the technical legal boundary prevails over the occupational or possessory boundary despite the fact that it is not the boundary accepted by the parties involved as governing.

[20] A boundary may be created by the fact of "part parcel adverse possession." The law imposes an obligation to act upon a party who, by the open and notorious acts of the other, has been dispossessed of the area in dispute. The claimant must prove actual, exclusive, visible, notorious, distinct, and hostile possession of the land continuously for more than twelve years (see sections 5 and 11 of *The Limitation Act*). Part parcel adverse possession can accomplish the same thing as a consentable line, effectively subdividing the land.

[21] For a successful part parcel adverse possession claim, there are a number of common law requirements, typically: exclusive, continuous and uninterrupted possession; possession must be adverse to the interests of the legal owner and without permission of the legal owner; open and notorious (using the land in a manner so as to place the legal owner on notice that a trespasser is in possession); and for a period of over twelve years. This requires that the asserting owner proves that he or she had continuous, exclusive, hostile, and open and notorious possession of the overlapping portion under a good faith claim of right for at least twelve (12) years. The respondents did not assert a claim of adverse possession in either their pleadings or their proof.

[22] *The Registration of Titles Act* creates three general principles that guide the ranking in priority of registered interests in land;- (i) race; (ii) notice; and (iii) race-notice. With regard to (i) race; under sections 48 and 54 of *The Registration of Titles Act*, instruments are not effectual until registered and they are entitled to priority according to date of registration. The implication is that the first person to record their deed has senior title regardless of the sequence the conveyances were made or the knowledge a grantee had of an earlier conveyance.

[23] With regard to (ii) notice; under sections 50 and 59 of *The Registration of Titles Act*, a certificate is conclusive evidence of and no notice of any trust whether express, implied or constructive affects the title. The implication is that the last conveyance made where the grantee did not have notice of an earlier conveyance has senior title. Lastly, (iii) race-notice; under section 64 (2) of *The Registration of Titles Act*, land included in any certificate of title is deemed to be subject to rights subsisting under any adverse possession of the land. The implication is that the first person to record their deed who was conveyed the property without notice of an earlier conveyance has senior title. In essence, the registered proprietor’s estate is not paramount where any part of the proprietor's parcel has been adversely occupied.

[24] Counsel for the respondents argued that both "race" and "race-notice" principles should apply in favour of the respondents. To the contrary, of the three priority principles, adverse possession would be the closest to the facts of this case. For adverse possession existing at the time of acquisition of title to override the title, it must be actual i.e. "apparent" or "patent," such that the fact of occupation would put a person inspecting the land on notice that there was some person in occupation (see *Malory Enterprises Ltd v. Cheshire Homes Ltd [2002] Ch. 216* per Arden LJ and *Hodgson v. Marks [1971] Ch 892)*. A person claiming actual occupation may successfully show such occupation, even if it is intermittent, so long as they are able to point to some physical evidence or symbol of their continued residence at the property, as well as evidence of their intention to return to the property.

[25] In the instant case, the trial court found that the overlap between land claimed by the warring parties may have been caused, not by adverse possession, but by two different methods of survey that could have been used, one during the 1980s and the other during the 1990s. The court decided that the more modern UTM method should be used for both parcels of land. The Universal Transverse Mercator (UTM) is a system for assigning coordinates to locations on the surface of the Earth. It is a horizontal position representation, which ignores altitude and treats the earth as a perfect ellipsoid. Under that system, distances measured manually in the field yield ground coordinates whose points are marked by survey mark-stones.

[26] The trial record indicates that the visit to the *locus in quo* did not involve re-opening of boundaries. Instead the court relied on an opinion of a surveyor that was rendered in another suit, Pader Civil suit No. 006 of 2008, where by a letter dated 19th July, 2010 to the trial Magistrate in respect of the same land, the surveyor had reported that he had established that part of LRV 2227 Folio 17 belonging to the 1st appellant had overlapped over land comprised in LRV 117 Folio 24 belonging to the 2nd respondent, both being on the same side of

Lagwenolim and Wangopok Streams. That surveyor was never called as a witness in the court below. This opinion was never subjected to the test of cross-examination for the determination of whether or not it passed the rigid test of accuracy and authenticity as should be determined by precision instruments duly verified by accredited surveyors. Opinions of surveyors based upon erroneous assumptions or that fail to take into account established facts ought to be disregarded. Indeed using that opinion, each party's claim may appear to be as good and self-serving as the other. The court should not have relied on it.

[27] That the dispute is fuelled by what appears to be an overlap is beyond question. Both parties are title holders yet they each claim the other to have trespassed onto their respective parcels of land represented by the two title deeds. Under section 156 of *The Registration of Title Act*, a proprietor of land may apply to have his or her certificate of title amended in any case in which the boundaries, area or position of the land described in it differs from the boundaries, area or position of the land actually and bona fide occupied by him or her and purporting to be so occupied under the title in respect of which the certificate of title was issued, or in any case in which the description in the certificate of title is erroneous or imperfect on the face of it.

[28] By virtue of section 33 of *The Judicature Act*, this court may grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided. Therefore, apart from a proprietor of land seeking rectification of title, this court may make an order for the alteration of the register for the purpose of (a) correcting a mistake, (b) bringing the register up to date, or (c) giving effect to any estate, right or interest excepted from the effect of registration.

[29] In *NRAM Ltd v. Evans, [2017] WLR(D) 491; [2018] 1 WLR 1563*, it was held that there will have been a mistake where the Registrar;- (i) makes an entry in the register that he or she would not have made; (ii) makes an entry in the register that he or she would not have made in the form in which it was made; (iii) fails to make an entry in the register which he or she would otherwise have made; or (iv) deletes an entry which he or she would not have deleted; had he or she known the true state of affairs at the time of the entry or deletion *(see also Norwich and Peterborough Building Society v. Steed, [1993] Ch 116).*

[30] The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration. In the instant case, the Registrar made an entry by which the warring parties became registered proprietors of a portion of the land in each of the two titles that appear to be overlapping. An entry made in the register reflecting an overlap of titles, is a mistake and may be rectified, because it should never have been made in the first place.

[31] However, since this Court in its appellate jurisdiction is not a trier of facts, the veracity and correctness of the alleged overlapping is better left to those scientifically qualified, trained and experienced and whose integrity is beyond question and dispute to make a proper finding. The court though is cognisant of the fact that rectification against a proprietor in possession, who does not consent, will only be ordered if he or she has caused or substantially contributed to the mistake by fraud or lack of proper care, or if it would be otherwise unjust not to make the order. In the instant case it is the latter situation.

Ground three

[32] By the third ground of appeal, the trial Magistrate is faulted for his failure to find that the respondents are trespassers on the appellants' land. It is trite that

trespass is premised the unlawful on crossing onto another's land. It presupposes the existence of a well-established boundary, yet in the instant case the boundary between the two surveyed parcels of land is disputed. This is a litigation or legal controversy spawned by overlapping and encroaching boundaries, each party relying on a certificate of title issued under the Torrens System, which *prima facie* shows their lawful interests or ownership therein. This is a suspected case of a new boundary overlapping an old boundary thereby creating incompatible rights.

[33] Although the respondents' actions are perhaps not sufficient to establish title by adverse possession, they do tend to show their belief that their activities were within the property boundaries created on 30th June, 1980. Those facts show an exercise of ownership over parts of the land beyond the boundary claimed by the appellants to have been Lanyadhang Stream, and, so far, tend to support the respondents' claim of possession of all the land in dispute. In this context, the trial court did not use the expression bona fide occupant as a term of art, but rather to indicate good faith occupancy. The claim for trespass was consequently not proved and the trial court came to the right conclusion in that regard. This ground of appeal fails.

[34] In light of the apparent errors of mis-description in either title deed, reliance on calls of the respective deed plans alone could not be the basis for fixing the disputed boundary lines. The indefeasibility and stability of the Torrens System will be imperilled should the two title deeds continue to exist in their current form, resulting into two holders of certificates of title to areas that overlap each other. In the circumstances of this case it is essential and imperative to preserve the efficacy and integrity of our system of land registration by ordering the re-opening of the boundaries on each of the titles, as the trial court did.

Order :

[35] In the final result, subject to that outcome, the appeal is otherwise dismissed. In view of the higher and greater interest of the public in the sanctity of the Torrens system and in order to administer justice consistent with a just, speedy and inexpensive determination of the respective claims of the parties and their numerous successors-in-interest, and in order to avoid further controversy and litigation, the following orders are made;

a) The trial court is to commission a surveyor to open the boundaries of the two titles in order to establish whether or not there exists an overlap.
b) In the event of any overlap, rectification of the title deed to land comprised in LRV 2227 Folio 17, Aruu Block 1 in Kitgum, measuring approximately 120 hectares, is hereby ordered; to exclude land occupied by the respondents, and comprised in LRV 117 Folio 24, Aruu Block 1 in Kitgum, measuring approximately 175.5 hectares.
c) Each party to bear their own costs of appeal and of the trial.

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Stephen Mubiru
Resident Judge, Gulu

Appearances

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

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