IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 006 of 2013

In the matter between

OCEN RENALDO **APPELLANT**

And

OKOT JUSTIN ORUNYA **RESPONDENT**

Heard: 22 July 2019
Delivered: 29 August 2019

Land Law**:** *— Adverse possession — However long the occupancy may be, possession of land under a license is not adverse to the interests of the landowner and the possessor thereof cannot an adverse possessor — When a gift of land is made, its boundaries should be ascertained or ascertainable. Court will not perfect it — Under a license, land is occupied but not necessarily possessed — A license allows occupation but does not give the occupier exclusive possession nor legal title — Common boundary — When adjoining owners of unregistered land treat a line as being the boundary between them, and 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, and that boundary is binding even when it is not reflected in a writing.*

Civil Procedure**:** *—Hearing conducted at a locus in quo — When the conditions in which a party's procedural rights may be exercised are replicated at the locus in quo, as opposed to a court room designed to optimise them, insisting on the fact that they should rather have been exercised within a court room, or that the recording of the evidence should have been a distinctive part of the trial process that should have been followed by the visit to the locus in quo rather than the contemporaneous manner would be tantamount to having undue regard to technicalities as opposed to the administration of substantive justice — In our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for the recovery of approximately 400 acres of unregistered land situated at Got Ringo village, Pangu Parish, Alero sub-county in Nwoya District, a declaration that he is the rightful owner of the land in dispute, an order of vacant possession, general damages for trespass to land, a permanent injunction and the costs of the suit.

[2] His claim was that the land in dispute originally belonged to his grandfather Daudi (Orunya). Upon his death in 1962, the land was inherited by his son, Kizza Angello who is the appellant's father. When he too died in 1987, the appellant inherited the land. The appellant was born on that land during the 1940s and has lived there his entire life. Sometime during the occupancy of the late Kizza Angello, he permitted the respondent's grandfather Orunya, to take refuge on the land together with the respondent as a measure of protection of the respondent following the violent death of his father. The respondent's grandfather lived on the land for two years and later vacated leaving the respondent behind. Both parties to this appeal lived in harmony on the land until the year 2006 when upon returning from an IDP Camp, the respondent began restraining from using and attempting to evict the appellant's children and other relatives from the land claiming the whole of it as his own, hence the suit.

[3] The respondent did not file a written statement of defence to the suit. An interlocutory judgment was entered against him and hearing of the appellant's case proceeded *ex parte*. However, when the court visited the *locus in quo*, it allowed the respondent and his witness to testify. In his defence, the respondent stated that when he came to live on the land with his grandfather, the land was vacant. The appellant's father was married to the respondent's aunt Juliana

Akoko and when she died she was buried on that land. Since the restoration of peace, he has had a number of his relatives buried on the land.

The respondent's evidence in the court below:

[4] D.W.1 Bazilo Kony testified that he is a neighbour to the South of the land in dispute where he has lived since 1947. He came to know the respondent when his aunt was married to the appellant's father. The land on which the respondent lives belongs to the appellant. D.W.3 Benadino Olum testified that the respondent came to live on the land in 1939 when the appellant's father married the respondent's aunt. D.W.4 Wilson Oyugi testified that he got to know the respondent in 1942 and he has since then been living on that land.

[5] D.W.5 Aloka Aboyui testified that he too is an immediate neighbour South of the land in dispute. The respondent migrated to the land with his grandfather and aunt, with the consent of the appellant's father. When they all died, they were buried on that land. During the war, both parties vacated the land but returned in 2007.

[6] D.W.6 Onek Venasio testified that he has been L.C.1 chairperson of that area since 1987. During his childhood, he knew that the land belonged to the appellant's father who later married the respondent's aunt, Akoko. The respondent later came and lived in that home. The appellant only began attempts to evict the respondent when he realised the land was getting smaller for a family that is getting ever bigger.

The appellant's evidence in the court below:

[7] The appellant Oceng Kizza Ronald testified as P.W.1 and stated that the land in dispute, measuring approximately 400 acres, originally belonged to his late father Angello Kiiza. The appellant was born and raised on the land. He inherited the land in 1987 upon the death of his father. The respondent's father had never

lived on the land. It is the appellant's step-mother who was the respondent's auntie. Following a fight at the respondent's place of origin, he came and lived with his aunt on the land in dispute in 1952, but later in 1984 left and settled on land across the valley. Due to insurgency, the appellant too vacated the land and settled in Bweyale, from where he returned in 2007 only to find the appellant in occupation of approximately four to five acres of the land in dispute.

[8] P.W.2 Ijedio Obale testified that the appellant inherited the land in dispute from his late father Angello Kiiza. The respondent followed his aunt who was the wife of Angello Kiiza. The respondent later left the land and lived elsewhere. He later returned to occupy the land and when the appellant complained to the L.C officials, the respondent admitted the land does not belong to him. He promised to vacate but has not vacated. He has instead permitted several other persons to occupy the land.

Proceedings at the *locus in quo*:

[9] The court then on 8th December, 2012 visited the *locus in quo* where the respondent sought to be heard and the court granted him and his witnesses audience. Testifying as D.W.2 the respondent, Okot Justine Orunya, stated that it is during the year 1939 that he came with his grandfather Orunya David to occupy the land in dispute which at the time was vacant and unclaimed by anyone. He has never left the land until 1984 due to the insurgency. He has gardens on the land an over ten graves of his deceased relatives who were buried on the land. The appellant's father later married the respondent's aunt in 1949. The two of them migrated to Amuru where he was buried upon his death, but her aunt was buried on the land in dispute upon her death in 1959. The appellant came to live on the land in dispute in 1947. When the insurgency ended, the respondent returned to occupy the land but has since then met a lot of resistance from the appellant and his neighbours, who claim the respondent should not occupy the land because he is not a native of the area.

[10] During that visit, the court observed that each of the parties has his homestead on the land. There were mango trees planted by the appellant's father found near where the respondent's homestead is. The respondent's grandfather was buried on the same land. The graves of Daudi (Orunya) and the respondent's mother existed on the land. The court however did not prepare a sketch map of the area in dispute.

Judgment of the court below:

[11] In his judgment, the trial Magistrate found that the evidence adduced by the appellant in court was inconsistent with the observations made during the visit to the *locus in quo*. It is not true that the entire land is in dispute. The family of the appellant occupies the entire land except the area occupied by the respondent, and his family, which is the only one in dispute. The respondent's claim that the land was vacant when he and his grandfather came to settle on it was rejected. Although the land belongs to the appellant, the respondent is not a trespasser thereon. The respondent came onto the land with his grandfather in 1939 when still a young boy. They occupied part of the land with the consent of the appellant's father, who unfortunately did not specify the boundaries of their holding. The defendant was found not to be a trespasser on the land but rather a bona fide occupant thereof. Judgment was entered in favour of the respondent. He was declared customary owner of the land. The court having deduced that the dispute between the parties was the location of a common boundary between their respective holdings and since none had been specified, it directed that the entire land be divided into two equal parts by the local authorities and that the parties should henceforth live in peace as neighbours. No costs were awarded to the appellant.

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 Magistrate erred in law and fact by giving the respondent audience in the suit at the point of the visit to the locus in quo, yet he had not filed a written statement of defence and had not appeared in court.
2. The learned trial Magistrate erred in law and fact, when he did not evaluate the evidence on record, thus reaching a wrong decision that the respondent was both a bona fide occupant and an adverse possessor and in ordering that the appellant's land be divided in equal shares between the parties.

Arguments of Counsel for the appellant:

[13] In her submissions, counsel for the appellant argued that at the *locus in quo*, the respondent admitted having been aware of the suit, yet he chose not to file a written statement of defence. Order 9 rule 11 (2) of *The Civil Procedure Rules* authorised the court to set the suit down for hearing ex-parte. The suit having proceeded ex-parte, the respondent should not have been granted audience during proceedings at the *locus in quo*. Doing so occasioned a miscarriage of justice. The trial magistrate relied on the testimony of persons who had not testified in court but did so at the *locus in quo*, to decide the suit. It is the weight of that evidence that prompted the order of sub-division of the land. Reference to the respondent as a bona fide or lawful occupant of the land was a misdirection. Those concepts are applicable to registered land only, yet the land in dispute in the suit is under customary tenure. He prayed that the appeal be allowed. The respondent did not file any response.

Duties of a first appellate court:

[14] 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*).

[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.

The first ground

[16] The first part of the first ground of appeal faults the trial Magistrate for having permitted the respondent and his witnesses to testify during the proceedings at the *locus in quo* yet he had not filed a defence and the plaintiff had proceeded ex parte in court. Under Order 9 rule 10 of *The Civil Procedure Rules,* where the suit is not for a liquidated demand, in case a party does not file a defence on or before the day fixed therein, the suit may proceed "as if that party had filed a defence." This phrase means that the court should proceed "as it would if the defendant had filed a written statement of defence." This was not a suit for a liquidated demand yet the interlocutory judgment entered on 19th March, 2012 was under Order 9 rule 6 of *The Civil Procedure Rules*. Instead of fixing the suit for hearing *ex parte*, it was erroneously fixed for formal proof under Order 9 rule 8 of *The Civil Procedure Rules*.

[17] Order 9 rule 11 (2) of *The Civil Procedure Rules* provides that at any time after the time allowed for filing the defences has expired and the defendant has failed to file his or her defence, the plaintiff may set down the suit for hearing *ex parte*. However under Order 9 rule 21 (2) of *The Civil Procedure Rules,* where the court has adjourned the hearing of the suit *ex parte*, and the defendant at or before the hearing appears and assigns good cause for his or her previous nonappearance, he or she may, upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he or she had appeared on the day fixed for his or her appearance. In such a case, the defendant in default is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only that such a defendant cannot claim to be relegated to the position that he or she occupied at the commencement of the trial. Such a defendant might not, without the leave of court, have the earlier proceedings recalled or set the clock back and have the suit heard *de novo* in his or her presence. The trial court therefore did not misdirect itself when it heard the respondent in his defence despite his failure to file a written statement of defence to the suit, considering that it is a dispute over land in which the warring parties are related by marriage.

Recording of the Respondent's evidence at the *locus in quo*

[18] The second part of the first ground of appeal faults the trial Magistrate for having recorded the respondent's evidence at the *locus in quo* rather that in court. It is an established principle that the adjudication and final decision of suits should be made on basis of evidence taken in Court. Visits to a *locus in quo* are essentially for purposes of enabling trial magistrates understand the evidence better. They are 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. That

evidence was recorded at the *locus in quo* in this manner was obviously an irregularity in the trial.

[19] However 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. 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.

[20] It is not in doubt that the court room environment is designed to enhance a public but fair trial for the litigants. It creates a controlled environment whereby the audience is restrained from interrupting the proceedings by denying it the opportunity to comment on what is happening, which may not be easily achieved at a *locus in quo*. The court rooms are designed to minimise distraction, establishing attention towards the bar and bench and thus the case that is being handled, and in that way enable the parties optimum opportunity to present their evidence and arguments.

[21] Whether recording the respondent's evidence instead at the *locus in quo* occasioned any miscarriage of justice, this court takes cognisance of the fact that for a defendant in any suit, the idea of a fair trial involves the unimpeded right to present a defence, entailing;- absence of impediments to the calling of witnesses, access to physical and documentary evidence in custody of the adversary, the

right counsel, the right to compel the attendance and cross-examination of adverse witnesses and production of documents, the right to present their own witnesses, etc. When the conditions in which these rights may be exercised are replicated at the *locus in quo* as opposed to a court room designed to optimise them, insisting on the fact that they should rather have been exercised within a court room, or that the recording of the evidence should have been a distinctive part of the trial process that should have been followed by the visit to the *locus in quo* rather than the contemporaneous manner in which the court dealt with the two phases, on the facts of this case would be tantamount to having undue regard to technicalities as opposed to the administration of substantive justice (see article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*).

[22] Having considered the purpose of recording evidence within a court room environment and the purpose of a *locus in quo* visit, I find that the irregularity in procedure in this case did not in any demonstrable way detract from the solemnity of the proceedings, the neutrality of the trial magistrate, or cause an escalation in the conflict rather than a conversion of a direct struggle between the parties into more or less a dialogue between adversaries that allowed for the resolution of the conflict and dispute between them, or in any way impeded the appellants in exercising their rights as plaintiffs, within the meaning of 28 (1) of *The Constitution of the Republic of Uganda, 1995*. Despite the irregularity, no miscarriage of justice was occasioned.

Second Ground

[23] The first part of the second ground of appeal faults the trial Magistrate for having found that the respondent was both a bona fide occupant of the land and a person entitled to occupancy by reason of adverse possession. Under section 29 (2) (a) and (b) of *The Land Act*, a "bona fide occupant" is a person who before the coming into force of the Constitution, occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for

twelve years or more, or were settled on land by the Government or an agent of the Government, which may include a local authority. The trial court therefore misdirected itself when it applied that concept to the facts of the case, since it was inapplicable.

[24] On the other hand, *Black's Law Dictionary* (2nd Edition) defines adverse possession as claim of ownership of land occupied for more than 12 years unchallenged by the actual owner. Adverse possession thus presupposes occupation of the land without the permission of its owner or other lawful justification. Therefore, however long the occupancy may be, possession of land under a license is not adverse to the interests of the landowner and the possessor thereof cannot be adverse. It was the appellant's case that during the occupancy of his late father Kizza Angello, he permitted the respondent's grandfather Orunya, to take refuge on the land together with the respondent as a measure of protection of the respondent following the violent death of his father. He also stated that it is the appellant's step-mother who was the respondent's auntie. Following a fight at the respondent's place of origin, he came and lived with his aunt on the land in dispute in 1952, but later in 1984 left and settled on land across the valley. The entry onto the land having been with the appellant's father's consent, the question of adverse possession did not arise. The trial court similarly misdirected itself on this account.

<u>On Division of land in equal shares</u>

[25] The second part of the second ground of appeal faults the trial Magistrate for having ordered for a division of the land in equal shares. The trial court in essence was unable to decide the issues submitted to it and came out with a neutral decision. In our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other. The crux of the appellant's action for ejectment action, rested on his ability to identify, by a preponderance of the evidence, the boundaries of his parcel of land to which he

was out of possession but for which he maintains paramount title and the right to immediate exclusive possession. The respondent's case was that he and his grandfather occupied the land as vacant unclaimed land but there was also evidence from the appellant's witness that the appellant and his grandfather were grated rights of possession, more or less in the manner of a gift *inter vivos*, from the appellant's late father.

[26] For perfection of gift *inter vivos*, the donor must have done everything which was necessary to be done in order to transfer the property. Any disposition of property that is too vague to be enforced will be void for uncertainty. A valid gift of land therefore must show certainty of intention, subject matter and objects. "Certainty of intention" means that it must be clear that the donor wished to grant the land as a gift. "Certainty of subject matter" means that it must be clear what land was given as a gift. When a gift of land is made, its boundaries should be ascertained or ascertainable. Land whose boundaries are indeterminable cannot be the subject of a gift since it is practically indistinguishable. "Certainty of objects" means that it must be clear who the beneficiaries, or objects, are. There is therefore no room for evidential uncertainty. Equity will not perfect an imperfect gift (see *Richards v. Delbridge [1874] LR 18 Eq 11*; *Milroy v. Lord [1862] 31 LJ Ch 798* and *Re Fry [1946] Ch 312*). In the instant case, no evidence was adduced as to the boundaries of the land. When the court visited the *locus in quo*, it found that each of the parties had his homestead on the land. There were mango trees planted by the appellant's father found near where the respondent's homestead is. The respondent therefore could not claim the land he occupies as a gift *inter vivos*.

[27] The rights granted to the respondent initially are more in line with a license than an outright gift of land. A bare licence may be created orally, may be express or implied by conduct of the parties or from the circumstances (see *R (on the application of Beresford) v. Sunderland City Council [2004] 1 All ER 160*). It may also arise where the landowner has knowledge of the trespass and gives no

objection to it (see *Canadian Pacific Railway Company v. The King [1931] A.C. 414*). It is by this means that a trespass may shift into a bare licence. A license is an agreement where the landowner gives permission to another party to use the property for a specific, limited purpose. Usually the right is (i) non-exclusive, (ii) for a short term or non-consecutive use, (iii) non-transferrable and (iv) freely revocable. Under a license, land is occupied but not necessarily possessed. A license allows occupation but does not give the occupier exclusive possession nor legal title.

[28] In the instant case, the appellant does not question the initial possession but characterises it as a licensee. However, the respondent's family's subsequent activities on the land are inconsistent with a license. There is an abundance of evidence of exclusive possession. The respondent not only constructed a house on the land but also had multiple graves of his deceased relatives on the land. In the circumstance, the common law doctrine of proprietary estoppel favours' the respondent's claim.

[29] This doctrine has been used to found a claim for a person who is unable to rely on the normal rules concerning the creation or transfer (and sometimes enforcement) of an interest in land. In *Crabb v. Arun District Council [1976] 1 Ch.183,* Lord Denning explained the basis for the claim as follows: “the basis of this proprietary estoppel, as indeed of promissory estoppel, is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law.” It will prevent a person from insisting on his strict legal rights, whether arising under a contract, or on his title deeds, or by statute, when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.

[30] When the legal owner stands by and allows the claimant to, for example, build on his or her land or improve his or her property in the mistaken belief that the claimant had acquired or would acquire rights in respect of that land or property

then an estoppel will operate so as to prevent the legal owner insisting upon his strict legal rights. It applies where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act (see *Willmott v. Barber (1880) 15 Ch D 96; Ramsden v. Dvson (1866) L.R. 1 H.L. 129* and *Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd[1982] QB 133*). That doctrine is founded on acquiescence, which requires proof of passive encouragement (see *The Law of Real Property (8th Edition)* at pages 710 to 711, para 16-001 amd *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850, 884*).

[31] The only question that remains is the boundary that separates his holding from that of the appellant. Sometimes, if a line has been treated as the boundary by owners of adjoining parcels of land for many years, an agreement between them will be inferred by a court that is deciding on the validity of an alleged boundary agreement. Once there is evidence that both adjoining property owners have for period of more than 12 years been going about their business, treating the line as the partition between their properties, then by their conduct they will be deemed to have designated that line as the true boundary between the adjoining parcels of land (see *Plauchak v. Boling, 439 Pa. Superior Ct. 156 (1995*).

[32] There was evidence to the effect that the respondent and his grandfather came onto the land in 1939 while for that of the appellant it was never disclosed when he settled on that land. Where a number of persons settle simultaneously or at short intervals in the same neighbourhood, and their tracts, if extended in certain directions, would overlap each other, the settlers sometimes by agreement determine upon dividing lines, which are called consentible lines. These lines, when fairly agreed upon, have been sanctioned by the courts. 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, and 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, and that boundary is binding even when it is not reflected in a writing.

[33] In the instant case, the appellant did not adduce evidence relating to the boundary of the area occupied exclusively by the respondent's family. The appellant ought to have adduced evidence of this line or the court ought to have established it when it visited the *locus in quo*. This was an omission. This therefore is a matter where a re-trial of that issue only, would be in the best interests of justice.

Order :

[34] In the final result, the appeal succeeds in part. Consequently, the order of the trial court directing a division of the land into equal shares is set side. Instead, it is ordered that;

a) The trial court conducts a re-trial limited only to establishing the “consentable” (or “consentible”) boundary that was established through words or actions of the parties between the period spanning from 1939 until just before the eruption of the dispute.
b) Each party is to bear its own costs of the appeal, of the court below and of the re-trial of the boundary issue.

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Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : Ms. Piloya Rosemary.
For the respondent : Mr. Moses Oyet.