IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 017 of 2019

In the matter between

OLANYA BALAAM **APPELLANT**

And

1. AKWERO SIDONIA

2. OLOYA ALFRED **RESPONDENTS**

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

Civil Procedure — *Retrial — Section 80 (1) (e) of The Civil Procedure Act— empowers an appellate court to order a new trial ;Therefore, where reconstruction of the missing record is impossible and court forms the opinion that all the available material on record is not sufficient to take the proceedings to its logical end, a re-trial would be ordered.*

Physical Planning Law *— section 32 of The Physical Planning Act No. 8 of 2010 — Transformation of the non-viable plots was left to a process of self-organisation of the occupants, within the context of the existing and planned urban fabric and street structure, guided by central planning by the municipal authority with wide powers to acquire and redevelop land — Every division of a piece of land into two or more lots, parcels or parts, is a subdivision and each local Physical Planning Committee of a lower local government has power to control or prohibit the consolidation or subdivision of land or existing plots. — Because of the necessity for a legally sufficient plot in connection with any offer to sell or the sale of land in an urban area that involves a sub-division or amalgamation, an offer to sell a portion of a larger tract of land, or the execution of a purchase and sale agreement covering such a tract of land, must be compliant with the planning scheme. The resulting plots cannot be reduced below the minimum sizes and dimensions required by the planning scheme.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally for recovery of land measuring approximately 13 metres by 20 metres situated at Westland "A" Ward, Westland Parish, Central Division, Kitgum Municipal Council, in Kitgum District, a declaration that the appellant is the rightful owner of the land in dispute, general damages for trespass to land, a permanent injunction and the costs of the suit. His claim was that the land in dispute originally belonged to his father Atepo John who purchased it from a one Otto Nelson during the year 1983. The appellant took possession of the land in dispute on 21st March, 2000 as a gift *inter vivos* from his father, Atepo John. The appellant cleared all outstanding Municipal rates due in respect of that land. Without any claim of right nor the consent of the appellant, the respondents subsequently let out the land to divers persons for setting up temporary kiosks, the 2nd respondent claiming that he bought the land from a one Obol Okot George. Several attempts have been made to cause the respondents to vacate the land without success and this has prevented the appellant from developing the land as he had planned.

[2] In their joint written statement of defence, the respondents refuted his claim and averred that in the past, as a consequence of a dispute between the appellant and a one Obol Okot George, the appellant requested the respondents for swapping of plots following the creation of Akwang Road within the area. It was agreed on 15th June, 2018 under that arrangement that the appellant was to occupy the respondent's un-surveyed plot East of the one in dispute, next to the surveyed one of Obol Okot George, while the 2nd respondent was to occupy that of the appellant, West of the one in dispute. Furthermore, the appellant was required to pay compensation and reconstruct some developments belonging to neighbours whose land was affected by the arrangement. Further compensation

was to be computed upon a survey of the plots. The 1st respondent has resided on the land in dispute for over 53 years. They prayed that the suit be dismissed.

The appellant's evidence in the court below:

[3] P.W.1 Nyero David testified that the land in dispute is approximately 20 metres by 10 or 15 metres and was originally occupied by a one John Atebo. It was subsequently occupied by his son Onyango who died later in 1999 followed by his wife Anen in the year 2000. It is then that the appellant, the younger brother of Onyango, took over possession of the land. It is during the year 2004 that the 2nd respondent began to remove the Shea nut trees that marked the boundary and to encroach onto the appellant's land. The appellant sought intervention of the Town Council which stated it would not intervene since the area in dispute was not big enough to constitute a plot under the approved town plan.

[4] P.W.2 Zabina Ladil testified that the 1st respondent is the mother of the 2nd respondent. During the year 1987, she was one of the tenants on the land in dispute which at the time belonged to Onyango. When he died, the land reverted to Atebo who then sold it to the appellant who permitted her to continue occupying it. She was a tenant on that land for 19 years. A rubbish pit and footpath constituted the boundary between that land and the respondents. The respondents have now constructed a kiosk where her house used to be.

[5] P.W.3 Olanya Balaam, the appellant, testified that the land in dispute originally belonged to his stepfather Atepo John who bought it from Otto Nelson. Atepo John left the land to Onyango John and his wife Ventorina. The appellant took over the land from him and cleared all outstanding municipal rates. During the year 2009, the respondents trespassed onto his land by construction of four kiosks and a temporary residential house. He allowed them temporary stay since it was consequent to changes occasioned by urban planning. In the year 2016 when he sought to re-occupy his land the respondents refused to vacate. They

instead proposed that he buys them a plot elsewhere in exchange which he declined to do. He instead bought additional land from other neighbours to constitute a plot under the urban plans and caused its survey during the year 2004, excluding the area occupied by the respondents. The *Shoga* trees that constituted the boundary between his land and that of the respondents were cut down. Now the boundary is a metre from one of the respondents' hut and rubbish dump.

[6] P.W.4 Otto Daniel Nelson testified that in the past he owned the land in dispute. He bought it from John Koko during the year 1979. He sold it to John Atebo during the year 1985. The appellant then bought it from John Atebo. A footpath, a latrine and a *Shoga* tree he planted marked the boundary between that land and that of the respondents. Akwang Rad was created some time after he had sold the land and part of the land was taken off to create the road.

The respondent's evidence in the court below:

[7] In his defence as D.W.1 Sidona Akwero, the 1st respondent, testified that it was in 1974 when her parents occupied the land in dispute with the permission of the Town Council. They constructed five grass-thatched houses on the land. She inherited the land from her parents following their death in 1987. She received demands for payment of ground rent in the year 2017 and she paid. The boundary to the South was marked by a rubbish dump and a footpath. In 2008 the Town Council notified theme of the need to amalgamate plots theta were too small to suit the urban plan. One of the neighbours, Okot George Obol, negotiated with her son, the 2nd respondent to cede part of the land to enable Okot Gorge Obol obtain permission for the development of his plot.

[8] D.W.2 No. 34640 Cpl Oloya Alfred, the 2nd respondent, testified that he was born and raised on the land in dispute. When the Town Council opened Akwang Road, it advised residents with small pieces of land in the area to amalgamate

them to constitute plots consistent with the urban plan. Okot George Obol approached him with a suggestion to swap plots; the respondent to take the latter's plot next the road, which is the plot now in dispute, in exchange for the respondent's off the road. Okot George Obol's plot was wider than that of the respondent and he topped up for the difference by payment of an agreed purchase price. Both plots were then surveyed and the respondent applied for approval of his building plan. The portion obtained by the respondent was separated by a pit latrine from the appellant's land.

[9] D.W.3 Abonga Alfred Alex, testified that during the year 2007 he witnessed an agreement that settled the dispute over that land between the appellant and the respondents. D.W.4. Luwum Daramoi testified that he was the L.C.III Chairman at the material time and mediated a dispute between the parties who owned adjoining plots of land abutting the road. It was suggested to the appellant that he compensates one of his neighbours, Lamel, so that his plot too gains access to the main road. D.W.5 Amoyi Alfred testified that the respondents had occupied the land in dispute at all material time before the appellant began claiming it as his. The 2nd respondent bought an additional plot from Okot George Obol in compliance with the urban plan. The appellant was advised to buy land from Lamel.

[10] D.W.6 Okot George Obol testified that a dispute erupted between him and the appellant during the year 2008 when each of them presented their building plan to the Town Council for approval but could secure approval since his plot was smaller in size than the minimum required under the urban plan. The L.C.III Chairman and the Town Clerk conducted a mediation on 15th June, 2008 as a result of which they swapped plots the appellant taking the respondents on the Eastern side and the respondent taking the appellant's on the Western side. The appellant bought additional plots of land from his neighbours, including D.W.6, which he amalgamated with his existing plot. He had prior to that sold another

part of his land to the respondents on 25th June, 2007. At the time he sold the respondents part of his land, the appellant was not his neighbour.

Proceedings at the *locus in quo*:

[11] The court indicated that it would visit the *locus in quo* on 13th November, 2018 but that part of the proceedings is missing from the record of appeal.

Judgment of the court below:

[12] In his judgment delivered on 26th February, 2019, the trial Magistrate held that he believed the respondent's version showing that they purchased the land in dispute from D.W.6 Okot George Obol. The court wanted D.W.6 Okot George Obol to be joined as a co-defendant but the appellant strongly objected and lodged a complaint over this. The respondents presented a memorandum of understanding showing that the L.C.III Chairman mediated the dispute resulting in that purchase. The land therefore belongs to the respondents and they are not trespassers on that land. The suit was dismissed with no order as to costs.

The grounds of appeal:

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

1. The learned trial Magistrate erred in law and fact when he held that the land in dispute belongs to the respondent who acquired it through purchase and ignored the appellant's evidence that he inherited the suit land and has been in possession ever since.
2. The learned trial Magistrate erred in law and when he dismissed the appellant's suit because the appellant objected to adding a third party.

3. The learned trial Magistrate erred in law and fact when failed and / or mixed up the area in dispute at the *locus in quo* thereby coming up with a wrong conclusion as to which area was in dispute.

Arguments of Counsel for the appellant:

[14] In their submissions, counsel for the appellant submitted that the trial Magistrate ignored evidence that showed the appellant was a neighbour to D.W.6 Okot George Obol. The respondents are neighbours to the South of the appellant's land. The appellant testified that the common boundary between them was a line of *shoga* trees planted by P.W.4 Otto Daniel Nelson, which were cut down to leave a meter wide space behind a hut, a pit latrine and garbage dump. P.W.2 Zabina Ladil as well testified that a rubbish pit and footpath constituted the boundary between that land and the respondents'. This evidence was never challenged in cross-examination. D.W.1 Sidona Akwero, the 1st respondent, too admitted that the boundary to the South was marked by a rubbish dump, a pit latrine and a footpath. D.W.2 No. 34640 Cpl Oloya Alfred, the 2nd respondent, too testified that the portion obtained by the respondent was separated by a pit latrine from the appellant's land. D.W.3 Abonga Alfred Alex, D.W.4. Luwum Daramoi and D.W.5 Amoyi Alfred all testified that the appellant's plot abutted the main road. Being the plaintiff, the appellant could not be forced to join other persons as defendants. The appellant was an un-represented litigant who could not perceive any cause of action against D.W.6 Okot George Obol, hence his objection to joining him to the proceedings as a defendant. D.W.1 Sidona Akwero, the 1st respondent contradicted D.W.2 No. 34640 Cpl Oloya Alfred, the 2nd respondent as to the acquisition of the land.

[15] They submitted further that While the former testified that it was from allocation by the Town Council to her parents, the latter stated that it was by purchase from D.W.6 Okot George Obol. This was a grave contradiction that was unexplained. At the *locus in quo*, the trial magistrate did not focus on the features the parties

had mentioned as forming the common boundary. He erroneously referred to a part of the land as the one in dispute yet it was the un-disputed part occupied by the respondents. Notes taken at the *locus in quo* do not indicate the level of participation of the parties and their witnesses. The trial Magistrate chose to rely on the agreement of purchase rather than the features observed at the *locus in quo*. The court should have found that the common boundary between the parties is marked by the *shoga* trees, a pit latrine and garbage dump.

Arguments of Counsel for the respondents:

[16] Appearing *pro se*, the respondents argued that the appellant did not adduce any evidence of his inheritance of the land in dispute. In the plaint, he claimed to have been given the land by his father Atepo John as a gift *inter vivos* on 21st March, 2000 after he purchased it from a one Otto Nelson in 1983. The 2nd respondent adduced in evidence an agreement by which he purchased the land from D.W.6 Obol Okot George in a transaction of part exchange. He proved that he inherited the other part from his maternal grandmother. The trial court came to the right conclusion when it decided in his favour. The decision was not based on the appellant's objection to the joinder of another party. The trial Magistrate stated that occurrence as a matter of fact not as part of the reasons behind his decision.

Rejoinder:

[17] In rejoinder, counsel for the appellant submitted that the court should find that this was a boundary dispute which boundary the appellant indicated was marked by a latrine, *Shogi* trees and a garbage pit. The mode of acquisition of the land by the appellant from his father Atepo John as a gift *inter vivos* or inheritance is immaterial considering that he has been in possession of the land since the year 2000. Apart from testifying that the parties were neighbours, D.W.6 Obol Okot George did not adduce evidence of sale to the 2nd respondent. The appellant was

never a witness to the transaction, if at all it occurred, yet he is a neighbour. In their memorandums of understanding, they recognised the appellant as owner of the land at the front along the road, on the Northern side. It was an attempt at acquiring land on the Southern part and once it failed the appellant should retain his land to the North. A plaintiff cannot be forced to sue someone else other than the persons he or she has chosen to sue. The appellant had no claim against D.W.6 Obol Okot George and therefore could not be forced to join him as a defendant to the suit.

Duties of a first appellate court:

[18] 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*).

[19] 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, two and three; errors in conducting proceedings at the *locus in quo* and court's findings as to ownership of the suit land.

[20] In grounds one, two and three of appeal, the trial court is criticised for the manner in which it dealt with inconsistencies in the respondent's case, conducted proceedings at the *locus in quo* and the propriety of its findings thereafter. This dispute arose as an off-shoot of a process of regeneration of a disordered neighbourhood with a disaggregated pattern of land subdivision of plots that had to be amalgamated to create viable plots under urban redevelopment. Urban authorities have physical development plans to guide urban development.

[21] According to *The National Physical Planning Standards And Guidelines, 2011* issued by the Ministry of Lands, Housing and Urban Development, the minimum plot widths and lengths for residential development purposes are as follows; low density areas - 25 m x 40 m; medium density areas - 20 m x 30 m; and high density areas - 12 m x 25 m. On the other hand, a standard commercial plot should be 15 m wide and 30 m long and 7.5 m wide and 30 m long as the minimum, to accommodate one minimum standard building of 7.5 m wide (see pages 7 and 11 respectively).

[22] A plot in an urban setting is characterised as a piece of land that; a) has been developed completely by buildings, partially by buildings, or vacant; b) faces a street; and c) has access from the street on a primary edge. To achieve this, the Town Council appears to have opted for a process balancing of master planning by the municipal authority with open structure and small-scale opportunity of gradual investment by individuals. Transformation of the non-viable plots was left to a process of self-organisation of the occupants, within the context of the existing and planned urban fabric and street structure, guided by central planning by the municipal authority with wide powers to acquire and redevelop land under section 32 of *The Physical Planning Act No. 8 of 2010*. The urban physical development plan provided the structural environment establishing the spatial

parameters of future evolutionary change. Transformation was to be brought about piecemeal and spontaneously based on the existing ability of the urban structure to self-regulate and change incrementally, rather than large-scale and comprehensively that would require invoking compulsory purchase powers as a means of land consolidation.

[23] An obvious consequence of the comprehensive transformation of the size and dimensions of the new plots is the fact that many existing boundaries and boundary markers are superseded by new ones. This was an organic development process aimed at fundamentally changing the pattern of land subdivisions across a defined area, removing the majority of historic plot definitions and establishing a completely new and different pattern. Under organic urban development, construction takes place in stages, according to the needs of the private parties. Residents determine the design of their own plots and developments thereon within established limits.

[24] Every division of a piece of land into two or more lots, parcels or parts, is of course, a subdivision. According to section 2 of *The Physical Planning Act No. 8 of 2010* "subdivision" means the dividing of land into two or more parts whether by conveyance, transfer or partition or for the purpose of sale, gift, lease or any other purpose. Under section 32 (b) thereof, each local Physical Planning Committee of a lower local government has power to control or prohibit the consolidation or subdivision of land or existing plots. Section 36 of the Act prohibits the subdivision or consolidation of plots, except with the permission of the local Physical Planning Committee and the sub-division or amalgamation sought is in accordance with the approved local physical development plan relating to that area.

[25] Municipal control of land subdivision and amalgamation is not new. A comprehensive scheme of physical development is requisite to community efficiency and progress. If the steps taken to ensure that growth and

development of urban areas in Uganda is to be realised in a planned and orderly manner, in an urban setting that is subject to an approved urban physical development plan, land subdivision must be decided before ownership. Unregulated land subdivisions frequently cause haphazard development and environmental hazards. In that context, reasonable restrictions on individual property rights are considered a negligible loss compared with the resultant advantages to the community as a whole. In a planned urban setting, any proposed subdivision or amalgamation of plots must conform, as far as practicable, to the approved urban plan. This is to ensure that development can be carried out safely without danger to health, or peril from fire, flood, erosion, excessive noise or other adversity, and to ensure that adequate sites are provided for public uses so that residents of all neighbourhoods should have convenient access to community services and facilities.

[26] Planning restrictions confined to the common need is inherent in the authority to create planned urban centres. The purpose is to preserve through the urban authority a planned and harmonious development of the growth of an urban centre and to prevent individual owners from laying out developments according to their own sweet will without official approval. Because of the necessity for a legally sufficient plot in connection with any offer to sell or the sale of land in an urban area that involves a sub-division or amalgamation, an offer to sell a portion of a larger tract of land, or the execution of a purchase and sale agreement covering such a tract of land, must be compliant with the planning scheme. The resulting plots cannot be reduced below the minimum sizes and dimensions required by the planning scheme.

[27] The agreement of exchange of land by mutual transfers required proof of ownership by the parties to the plot swapping and amalgamation arrangement. It required superimposition of the planned layout over the existing layout for the avoidance of exacerbation of the hitherto unregulated, informal, urban land subdivision practices. It was important for this trial that court, while at the *locus in*

quo, to prepare a detailed sketch map of the land in dispute *vis-a-vis* the land that formed the subject of the agreement of exchange of land by mutual transfers, to enable the court juxtapose this with the planning scheme. The sketch map at the *locus in quo* had to indicate the prominent existing features of the land and its surroundings, the precise location and dimensions of such features as the boundary markers mentioned by the parties and their witnesses.

[28] Where reconstruction of the missing record is impossible and court forms the opinion that all the available material on record is not sufficient to take the proceedings to its logical end, a re-trial would be ordered (see *Mukama William v. Uganda, [1968] M.B. 6; Nsimbe Godfrey v. Uganda, C.A. Criminal Appeal No. 361 of 2014* and *East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-200] HCB 331*). This Court cannot proceed on the basis of mere surmises on what the trial court observed at the *locus in quo* and as to how its observations thereat influenced or did not influence its decision.

[29] Section 80 (1) (e) of *The Civil Procedure Act* empowers an appellate court to order a new trial. An order for retrial is an exceptional measure to which resort must necessarily be limited. A trial *de novo* is usually ordered by an appellate court when the original trial fails to make a determination in a manner dictated by law. A retrial should not be ordered unless the following conditions are met; (i) that the original trial was null or defective; (ii) that the interests of justice require it; (iii) that the witnesses who had testified were readily available to do so again should a retrial be ordered; and (iv) no injustice will be occasioned to the other party if an order for retrial is made. These conditions are conjunctive and not disjunctive. The context of each retrial is unique, and its impact can only be addressed by taking into account this individual context. The discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the parties, the interests of justice, the nature of the dispute, the circumstances of the case in hand and considerations of public interest. These factors (and others) would be determined on a case by case basis.

[30] Whereas section 80 (2) of *The Civil Procedure Act* provides that appellate courts have the same powers and perform as nearly as may be, the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted in them, trial courts have an institutional advantage over appellate courts in the conduct of fact-bound inquiries. Certainly where the appellate court finds an error of law in the trial court's judgement arising from the application of a wrong legal standard, the appellate court will articulate the correct legal standard and review the relevant factual findings of the trial court accordingly.

[31] However, when an appellate court finds that a trial court's decision is based on a misapprehension of the matters of fact in issue, in circumstances where the material on record is insufficient to guide the decision of the appellate court, the decision of the trial court should be vacated or reversed and the case should be remitted back to the trial court to obtain the relevant facts and decide the case according to a proper understanding of those issues of fact. Thus, the appellate court is able to set out the appropriate parameters of a retrial, taking into account the specific context of each case as well as the relevant principles of law.

[32] In the instant case, the conduct of the entire trial and the resultant judgment proceeded without reference to statutory provisions which were of fundamental relevance to the facts underlying the dispute. Such a mistake is *'incuria'* as to vitiate the decision (see *Morelle Ltd v. Wakeling [1955] 2 QB 379* and *Young v. Bristol Aeroplane Company Limited [1994] All ER 293*). Where a statute was not brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the statute, it would be a decision rendered *in per incuriam* (see *Huddersfield Police Authority v. Watson [1947] 2 All ER 193*).

[33] In the final result, the appeal succeeds. Accordingly, the judgment of the court below is set aside. A re-trial of the suit is ordered before another magistrate of

competent jurisdiction. Each party is to bear its costs of the defunct proceedings in the court below and of this appeal.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

For the respondent : ……..