THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL APPEAL No. 0025 OF 2016

(Arising from Adjumani Grade One Magistrate's Court Civil Suit No. 0013 of 2013)

1. ICHA ZACHARY }
2. ERIGA MOSES }
3. DIMA GEORGE } …… APPELLANTS
4. ESTE JOONI }

VERSUS

OJJA DANIEL MOINI …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellants jointly and severally seeking a declaration that he is the rightful owner of land under customary tenure, an order of eviction, an award of general damages for trespass to land and the costs of the suit. The respondent's claim was that the land in dispute measures approximately 90 - 100 acres situated at Amelo village, Pereci Parish, Pakele sub-county in Adjumani District. In 1999, his father, Moini Joseph sued the appellants' father, Dominico Idraku before the L.C.1 Court which decided in favour of Moini Joseph and Dominico Idraku was ordered to vacate the land, which he refused to do. Instead, the appellants continued to occupy the land, grow crops and construct houses on it.

In their defence, the first three appellants denied any liability and contended instead that the proper party should have been the fourth appellant. They refuted the claim that their father had ever been sued before the L.C.1 Court. They instead stated that it is the first three appellants and not the fourth appellant who appeared before the L.C.1 Court where a decision was made in their favour.

At the hearing, the respondent, Ojja Daniel Moini testified as P.W.1 and stated that he had sued all the appellants for encroaching on his land in Amelo village measuring about eight acres. The land originally belonged to his grandfathers Lalia and Lipori and upon their death it was inherited by his father Moini Joseph who was sickly at the time he testified. His father in turn gave the land to him in 2009 and he has been in occupation since then. There are graves of his grandfathers and that of his step mother Andia Kalisto on the land. The dispute erupted when the appellants some time in 2009 began encroaching on the land, in spite of the fact that he did not share any common boundary with them since their land was about three hundred metres from his. They also established a kraal on his land during the year 2012. The dispute was first entertained by the elders who decided in the appellants' favour. Being dissatisfied with the decision, he filed a suit before the magistrate's court.

P.W.2 Amajuru David testified that he lived about eight kilometres away from the disputed land but knew the parties to the dispute since Joseph Moini is his uncle. The witness used to live at Amelo village from 1960 - 1964. It is the respondent's father Joseph Moini who gave the respondent the land in dispute. The respondent had been cultivating it for the previous ten years by growing crops like rice, sweet potatoes and cassava. The witness came to know the first appellant Icha Zachary in 1999 when he settled the land and began grazing cattle thereon. The second appellant Eriga Moses too encroached on the land by tilling it and establishing a homestead. The third appellant Dima George too encroached on about four acres of it by tilling, establishing a homestead and grazing cattle. The third appellant Esete Jooni encroached on the same land by cultivation of crops although he could not estimate how big her garden is. The total acreage occupied by the appellants is about twenty acres. Around July 2013 the elders decided in favour of the appellants and being unhappy with the decision which gave part of the land to an Acholi, the respondent filed a suit.

P.W.3 Faustino Wale Moini, the respondent's brother, testified that the four appellants encroached on the land in dispute in 1999 by growing crops and establishing homesteads on the land. In 2010, their father Joseph Moini having become too sickly, handed over the land to the respondent. There are graves of their deceased relatives situated on this land. Joseph Moini had sued the appellants before the L.C. 1 Court in 1999 which decided in his favour and ordered the

appellants to vacate the land. When they refused to vacate the land he sued them again but the elders and the L.C.s decided to give part of the land to one of the witnesses brought by the appellants, an Acholi, hence the suit.

P.W.4 Isoto Pius testified that the land in dispute is their clan land and there are six graves of their relatives on the land. All the appellants encroached on it in 1999 by growing crops and establishing homesteads. They occupy a total acreage of about twenty eight acres. The respondent Ojja Moini Daniel sued them in 1999 before the L.C.1 Court which decided in his favour and the appellants were ordered to vacate the land within six months but they did not. He sued them again in 2012 before the same court but they still refused to vacate hence the suit before the magistrate's court. P.W.5 Mode Karamela testified that the respondent is her biological son and they had lived peacefully with the appellants until ten years ago when the appellants encroached on their land. Originally the land belonged to a one Koluka. Him and seven other relatives were buried on that land. In 1999 when the appellants encroached on the land, her husband Joseph Moini sued them before the L,C,1 Court which ordered them to vacate the land they did not. Her husband fell sick thereafter and the matter was taken up by her son Ojja Moini Daniel. The appellants had buried two of their own relatives on the land without her permission.

P.W.6 Idragu Setimo testified that there are graves of his deceased uncles on the land in dispute but he was informed that the appellants had encroached on the land hence the dispute. P.W.7 Festo Ida testified that during the 1960s, Joseph Moini gave the first appellant's father Agoge a pice of land which is currently occupied by the first appellant following the death of Agoge. During the 1960s, Joseph Moini gave another piece of land to the second appellant's Aunt Anyosi which she gave to the second appellant's father Idraku during the 1980s and which is currently occupied by the second appellant. Idraku was buried on that land. The third appellant Dima George occupies part of the land that belonged to his late father Idraku. The second and third appellants' Aunt Este Jooni, the fourth appellant, occupies land that was given to her by Joseph Moini. The dispute erupted when the first three appellants extended their farming activities beyond the area given to them by Joseph Moini. the fourth appellant had restricted her activities within the confines of the land that was given to her by the Joseph Moini.

In his defence, the first appellant testified as D.W.1 and stated that the land he cultivates measures approximately two acres and it originally belonged to his late grandfather Aturusi. The appellant inherited the land from his late father Goygoi after his death in the year 2011 who in turn had inherited it from Aturusi. There are several graves of his deceased relatives on the land. The disputed area is land which originally belonged to his late grandfather Aturusi but is communally used for grazing livestock. The second appellant testified as D.W.2 and stated that the land he occupies measures approximately five acres which originally belonged to his late grandfather Ombi, which he now shares with his elder brother, Dima George the third appellant. The respondent's home is about two hundred metres from his. He denied having encroached on any of the respondent's land. The third appellant testified as D.W.3 and stated that he has never encroached on the respondent's land although they share a common boundary marked by Teak trees. He was born on the land he occupies and shares with the second appellant. There are graves of his deceased relatives on the land. The area in dispute constitutes a communal grazing area. The third appellant testified as D.W.9 and stated that their grandfather Ombi had migrated from Surumu to settle on the land now in dispute which was vacant by then. It is her brother Ombi Lessimu who gave her the land that she occupies. Her father Ojja Daniel lived in the neighbourhood and used to graze his livestock on the disputed land. It is after the death of their parents that the dispute erupted. All the appellants refuted the claim that the L,C,1 Court orderd them to vacate the land.

D.W.4 Owole Tom testified that the land in dispute belongs to the Pakwinya Clan who use it communally for grazing their livestock. D.W.5 Tiyajua Tizara, a biological brother to the fourth appellant testified that their late parents Ombi and Laperi were the first to occupy the land in dispute which was by then vacant. There are graves of their deceased relatives located on the land. D.W.6, whose name is not reflected in the trial court's record, testified that the parents of the parties to the suit used to live in harmony and utilise the land peacefully but disputes arose only after their demise. D.W.7 Arijkanjelo Origa testified that the land in dispute measures approximately twenty acres and belongs to the Lowi Pamajoro Clan. He was surprised by the conflicting claims to this land by the parties before court. D.W.8 Okoya Keberu Severino, brother of the late Constatino Idragu, father od the second to the fourth appellants, testified that the land in dispute is vast and used for grazing livestock. There are no settlements or gardens on

that land. It originally belonged to Ombi. That was the close of the appellants' case. The court then visited the *locus in quo* on 20th October 2015.

In his judgment, the learned trial magistrate observed that each of the disputants claimed to have graves of their deceased relatives on the land. When the court visited the *locus in quo,* the respondent was able to point out the graves but the appellants could not. Noting that although P.W.7 gave evidence favourable to the appellants, he was satisfied that the respondent had proved her claim on the balance of probabilities. He entered judgment for the respondent and made an order of vacant possession and costs.

Being dissatisfied with the decision the appellant raised two grounds of appeal, namely;-

1. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence of P.W.7 that corroborated the evidence of the defence witnesses that the defendants are the rightful owners of their respective portions of the suit land.

2. The learned trial magistrate erred in law and fact when he entirely based his judgment on what transpired at the *locus in quo* yet the proceedings at the *locus in quo* were improperly conducted which caused a miscarriage of justice.

In his written submissions, counsel for the appellants, Mr. Paul Manzi argued that the trial magistrate entirely ignored the evidence adduced in court and made his decision based only on what transpired at the *locus in quo*. Had he properly evaluated the evidence of P.W.7, he would have arrived at a different conclusion. The evidence on record does not support the respondent's claim but proves rather that the land in dispute is communal grazing land. There was evidence that each of the portions of land occupied by the appellants was given to their respective fathers by Joseph Moini, the respondent's father. The trial magistrate further erred when he failed to place on record his observations at the *locus in quo,* yet relied on them to make his findings. He prayed that the appeal be allowed with costs to the appellants.

In reply, counsel for the respondent, Mr. Oyet argued in his written submissions that the first three appellants in their written statement of defence disassociated themselves from the respondent's claim and stated it concerned only the fourth appellant. The implication is that the first three appellants did not have a defence to the respondent's claim. Under cross-examination,

the appellants admitted that their respective homesteads were located about 300 metres away from the land in dispute. Whereas each of the appellants in their testimonies claimed their deceased relatives' graves were located on the land in dispute, yet at the locus in quo they did not point out any. He submitted further that where the visit to the *locus in quo* is not of critical importance in the determination of the size of the land in dispute, errors made by court at the *locus in quo* should be inconsequential. Having considered the evidence as a whole, the trial magistrate came to the correct conclusion for which reason the appeal should be dismissed with costs to the respondent.

This being a first appeal, this court is under an 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. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

> It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although 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.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate 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 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.

In order to decide in favour of the respondent, the trial court had to be satisfied that respondent had furnished evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by the appellants, might hold that the more probable conclusion is that for which the respondent contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*). the burden of proof was on the respondent to prove on the balance of probabilities that he had a better claim to the land than the one made by the appellants.

It is convenient to deal with the second ground of appeal first because it is founded on procedural aspect of the trial. It is contended in that ground that the trial magistrate failed to place on record his observations at the *locus in quo*, yet relied on them to make his findings. In response, counsel for the respondent submitted that any procedural error at the locus was inconsequential.

I have re-evaluated the evidence and found significant discrepancies in the description of the total acreage of the land in dispute. In paragraph four of the plaint, the respondent described it as measuring 90 - 100 acres. In his testimony, the respondent Ojja David Moini who testified as P,W,1 described the area of encroachment as being eight acres and that the appellants' grandfather had never grazed his livestock on it. P.W.2 Amajuru David testified that the first appellant had trespassed on about four acres by grazing his livestock and cultivation, the second appellant on about four acres, the third respondent on about four acres as well, and the fourth appellant on an area he was unable to estimate, and all had trespassed by building homesteads and growing crops on it. He estimated the total acreage encroached upon at twenty acres. P.W.3 Faustino Wale Moini estimated the land in dispute at about 100 acres. P.W.4 Isoto Pius estimated that the first appellant had encroached on an area measuring four acres, the second appellant on an area measuring eight acres, the third appellant on an area measuring fifteen acres and the fourth appellant on an area measuring one acre, hence a total of twenty eight acres.

P.W.5 Isoto Pius estimated that the first appellant had encroached on an area measuring ten acres, the second appellant on an area measuring about five to six acres, the third appellant on an area measuring six acres and the fourth appellant on an area measuring about twelve acres, hence

a total of about 100 acres. P.W.7 estimated that the first appellant was occupying an area measuring about ten acres, the second appellant an area measuring about 15 - 20 acres, he never estimated the area occupied by the third appellant and he said the fourth appellant occupies an area measuring about 15 - 20 acres, hence a total of about 100 acres. The appellants had expanded their acreage by encroachments he estimated as follows; the first appellant at six acres, the second appellant at ten acres, and the third appellant by ten acres. Underneath is a graphic representation of the discrepancies;

	1st appellant	2nd appellant	3rd appellant	4th appellant	Total acreage
Plaint	_	_	_	_	100 acres
P.W.1	_	_	_	_	28 acres
P.W.2	4 acres	4 acres	4 acres	_	28 acres
P.W.3	_	_	_	_	100 acres
P.W.4	4 acres	8 acres	15 acres	1 acre	28 acres
P.W.5	10 acres	5-6 acres	6 acres	12 acres	100 acres
P.W.7	10 acres	15-20 acres	_	15-20 acres	100 acres

There are wide discrepancies between respondent's pleadings, testimony and that of his witnesses as regards the estimated area of the land in dispute, which could have been as a result of either over or under-estimation, yet the cause of action was trespass to land.

On his part, the first appellant D.W.1 Icha Zachary described the land in dispute as being occupied by several of his relatives and that there were graves on it of several of his deceased family members. He further described the disputed area as a communal grazing area. He stated that he was occupying only two acres. The second appellant D.W.2 Eriga Moses stated that he was occupying only five acres together with his brother the third appellant D.W.3 Dima George. On his part, the third appellant D.W.3 Dima George confirmed that he jointly occupies land with his brother D.W.2 Eriga Moses but estimated it at five hundred acres most of which is a communal grazing area. D.W.4 Owole Tom estimated the land in dispute to be about 30 - 40 acres used partly for cultivation and as a grazing area. D.W.5 Tiyajua Tizara estimated the land in dispute to be about over 100 acres and that there were graves of their deceased relatives on it.

D.W.7 Arikanjelo Origa estimated the land in dispute to be over 20 acres. D.W.8 Okoya Keberu Severino testified that he could not tell the total acreage of the area in dispute but described it as "vast land used for grazing animals.... theer are no settlements on the suit land and neither does anybody cultivate it because it is just used for grazing cows. The suit land is a public grazing area but it originally belonged to one called Ombi, but nobody has ever constructed any homestead on the land"

In light of the varying description of the land in dispute and its estimated acreage, it was critical, by reason of the nature of the subject matter of the suit, that the court establishes the true size of the area in dispute and the nature of activities being undertaken thereon. It is therefore evident that this would be one of the cardinal reasons that a visit to the *locus in quo* was of crucial importance to the court's decision.

It is not surprising that in his judgment the trial magistrate made the following observation; "that meant that apart from the evidence adduced in court, the whole dispute would be sorted at locus ...." He however misdirected himself at the *locus in quo* as disclosed in his judgment when he made the following comment;

> The court then moved round the entire suit land which is bordered by a swamp to the northern side, Joseph Moini (father to the claimant) on the Eastern part, the homestead of Manya at the edge of South East, to the South are two homesteads, one for Amu Peter Danya. To the West of the suit land is Mzee Anzeliko Madrara. the measurement of the total land coverage of the disputed land is approximately 209 metres to the North, 638 metres to the East, 595.16 metres to the South and 526 meters to the West by use of 100 metre tape measure.....<u>the Court then turned to the defendants to show the graves of their departed loved ones on the suit land but unfortunately none of them did, though defendant No, 3 attempted to take the court outside the disputed area which this court declined since ours to establish those only on the suit land</u>." (emphasis added).

It emerges from that extract that instead of allowing the witnesses to freely lead the court at the *locus in quo* by demonstrating to it the features and the corresponding description of the land as they had testified to in court, the trial magistrate relied only on the demonstration given by the respondent and restricted the appellants from demonstrating to him their version of the disputed area and the corresponding features.

The purpose of and manner in which proceedings at the *locus in quo* should be conducted has been the subject of numerous decisions among which are; *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*. in all of which cases the principle has been restated over and over again that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them. A visit to the *locus in quo* is designed to enable the magistrate understand better the evidence adduced before him or her during the testimony of witnesses in court. It may also be for purposes of enabling the magistrate to make up his or her mind on disputed points raised as to something to be seen there. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* 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. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. For the objective to be achieved, the parties and their witnesses should when demonstrating not be inhibited by court when demonstrating to it features mentioned in their testimony.

The manner in which the trial magistrate went about proceedings at the *locus in quo* was thus skewed in favour of the respondent and denied the appellants a fair opportunity to demonstrate their version of the specific aspects of the case as canvassed during their oral testimony in court. Since parties should be guaranteed a fair trial, an unfair process cannot yield a fair result. In *James Nsibambi v. Lovinsa Nankya [1980] HCB 81*, it was held that a failure to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relying on such evidence acquired and the observations made thereat in the judgment, is a fatal error which occasioned a miscarriage of justice. In that case the error was found to be a sufficient ground to merit a retrial as there was failure of justice (see also *Badiru Kabalega v. Sepiriano Mugangu [1992] 11 KALR 110*). Where the time lag between the time of trial and the date on which the appeal comes up for hearing is short, and there occurred an incurably fundamental defect in the proceedings which affected the outcome of the suit, the proper course would be to direct retrial of the case since in that case witnesses normally would be available and it would not cause undue strain on their memory.

Although when such a glaring procedural defect of a serious nature by the trial court occurs, the High Court is empowered to direct a retrial if it forms the opinion that the defect resulted in a failure of justice, but from the nature of this power, it should be exercised with great care and caution. It should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. It is possible that the witnesses who appeared and testified during the first trial may not be available when the second trial is conducted and the parties may become handicapped in producing them during the second trial. In such situations, the parties would be prejudiced and greatly handicapped in establishing their respective cases such that the trial would be reduced to a mere formality entailing agony and hardship to the parties and waste of time, money, energy and other resources. Viewed in this light, the direction that the retrial should be conducted can be given only if it is justified by the facts and circumstances of the case.

Furthermore, if the appellate court on review of the evidence on record forms the opinion that the case could have been decided without visiting the *locus in quo* such that without reliance on its findings at the *locus in quo*, the trial court would have properly come to the same decisions on a proper evaluation and scrutiny of the evidence which was already available on record, a re-trial will not be directed. The erroneous proceedings at the locus in quo will be disregarded (see *Basaliza v. Mujwisa Chris, H.C. Civil Appeal No. 16 of 2003*).

In the instant case, having considered the evidence as a whole in light of the decision of the trial court, I find that the trial magistrate relied more or less exclusively on evidence gathered at the *locus in quo* in the determination of the suit. This is derived from his comment " that meant that apart from the evidence adduced in court, the whole dispute would be sorted at locus on proof of graves of either party's departed relatives." He did not expressly allude to any other significant features important for his decision found on the land and make findings as regards its approximate size. He did not evaluate the evidence placed before him in court and focused only on the presence of graves on the land. It is doubtful that without reliance on its findings at the *locus in quo*, the trial court would have properly come to the same decision on a proper evaluation and scrutiny of the evidence which was already available on record. In the circumstances, the erroneous proceedings at the *locus in quo* occasioned a miscarriage of justice

and for that reason the judgment of the trial court cannot stand. The second ground of appeal therefore succeeds and in the circumstance I find it unnecessary to consider in any more detail than I have already done, the first ground of appeal dealing with the manner in which the trial magistrate evaluated the evidence. The judgment of the court below is consequently hereby set aside.

Not having found any irregularity in the way the proceedings in court were conducted, save only for the aspect of the visit to the *locus in quo*, the parties would be subjected to unnecessary expense if the court directed a full re-trial. Consequently, it is hereby directed that the original court record should be remitted to the trial court. The trial court should re-visit the *locus in quo* and ensure that this time round the proceedings thereat are conducted in accordance with the guidelines contained in *Practice Direction No. 1 of 2007* and the relevant judicial precedents. The court should thereafter decide the suit based on its observations at the *locus in quo* and the evidence already on record. The costs of this appeal shall abide the results of the re-trial.

Dated at Arua this 27th day of October 2017. ……

Stephen Mubiru
Judge
27th October, 2017