THE REPUPBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Barishaki, & Tuhaise, JJA*]

Civil Appeal No. 117 of 2012

Sukuton Ali.....Appellant

Versus

1. **Augustine Kapkwonyongo**
2. **Musa Chelangat** ..... **Respondents**
3. **Ali Musobo**

[*Appeal arising from the ruling/orders of the High Court before Stephen Musota, J (as he then was) in Civil Suit No. 0060 of 2010 delivered on 7th June 2012*]

Judgment of Percy Night Tuhaise, JA

This is a second appeal from the judgment of His Worship Gimugu K. K, then a grade 1 magistrate, Kapchorwa magistrates' court. The appeal arises from a dispute over ownership of customary land.

Background

The appellant filed a suit in the magistrates' court, Kapchorwa against the respondents, seeking vacant possession of land measuring two acres, permanent injunction, damages for trespass and costs of the suit. The appellant's case is that sometime in April 2007, the 1st and 2nd respondents encroached upon the appellant's land at Kawowo village, Kirwoko Parish, Kaptanya sub-county, Tingey county in Kapchorwa District, and allocated it to the 3rd respondent without his consent. The appellant maintained that his

late father had allocated the land to him in 1981 and he has been in possession of the same.

The respondents denied all the appellant's claims in their written statement of defence (WSD). Their case is that the land claimed by the appellant belongs to the 2nd and 3rd respondents who have been in effective occupation of the suit land.

The learned trial magistrate dismissed the case with costs to the 1st respondent. The appellant appealed against the decision and orders of the learned trial magistrate, to the High Court at Mbale.

The first appellate Judge at the High Court Mbale did not find merit in the appeal. He dismissed it with costs in the High Court and the court below. He upheld the judgment and orders of the lower court.

Aggrieved by the decision of the High Court, the appellant appealed to this Court, on the grounds that:-

1. The learned appellate Judge erred in law when he failed to properly re-evaluate the evidence on record thus reaching on erroneous position.
2. The learned appellate Judge erred in law when he held that the land in dispute belonged to the respondents thus arriving at an erroneous decision.
3. The decision of the learned appellate Judge has occasioned a miscarriage of Justice.

Representation

At the hearing of the appeal Mr. Odokel Opolot represented the appellant while Mr. Chemisto Shuaib represented the respondent.

Objection on Ground 1 and 3

Counsel for the respondent raised an objection on how grounds 1 and 3 and submitted that the said grounds of appeal violate the rules regarding

framing of grounds of appeal as set out under rule 86 of the Judicature (Court of Appeal Rules) S1 No. 13-10 (which will be referred to as "Rules of this Court" in this appeal). He contended that the stated grounds do not challenge the holding and *ratio decidendi*, neither do they specify the points which were wrongly decided. According to Counsel, merely stating that, *"The decision of the learned Judge of High Court has occasioned a miscarriage of justice"* offends rule 86 of the Rules of this Court.

Counsel contended that grounds 1 and 3 of this appeal are therefore untenable, and that failure to comply with the rules renders the two grounds of appeal incompetent and liable to be struck off. He prayed that the same be struck off. He cited **National Insurance Corporation V Pelican Services CACA No. 5 of 2003; Sietco V Noble Bulibers (U) Ltd SCCA No. 31 of 1995; CACA No. 101 of 2013;** and **Arim Felix Clive V Stanbic Bank (U) Ltd** to support his preliminary objection.

In reply, Counsel for the appellant submitted that the respondents are raising the objection to waste court's time which is a total abuse of court process since they deliberately refused, neglected and/or denied to appear for conferencing to agree and/or dispute the said grounds, or to file conferencing notes. Counsel however, without prejudice, submitted that the preliminary objection in relation to ground 1 is misplaced as it is a duty of the first appellate court to review the evidence of the case and to reconsider the materials before the trial Judge, as was held in the case of **Kifamunte Henry V Uganda SCCA No. 10/2007**.

Counsel also submitted that the case of **Arim Felix Clive V Stanbic Bank** was cited by the respondent's counsel out of context as it did not have a ground related to the failure by court to evaluate the evidence as a whole. He contended that it is does not therefore offend rule 86 of the Rules of this Court. He prayed that this Court overrules the preliminary objection as the same had earlier been overruled by the first appellate court.

Resolution of the preliminary objection by Court

Rule 86 of the Rules of this Court provides that:-

> *"A memorandum of appeal shall set forth concisely and under distinct heads, without argument of narrative, the grounds of objection to the decision appealed against,* ***specifying the points which are alleged to have been wrongly decided****, and the nature of the order which it is proposed to ask the court to make."* (emphasis added).

In **National Insurance Corporation V Pelican Services CACA No. 5/2003**, this Court, while interpreting the cited rule 86, relied on the decision of the Supreme Court in **Sietco V Noble Bulibers (U) Ltd SCCA No. 31/1995,** and held that a ground of appeal must challenge a holding, a *ratio decidendi,* and must specify the points which were wrongly decided.

In **Arim Felix Clive V Stanbic Bank (U) Ltd, CACA No. 101/2013**, this Court struck out a ground of appeal which was framed as follows:-

> *"That the learned trial Judge erred in law and fact when he did not properly evaluate the evidence of record and thereby came to a wrong conclusion and occasioned a miscarriage of justice to the Appellant."*

The Court stated that the ground was too general and allows the appellant to go on a fishing expedition to the prejudice of the respondent.

In this appeal, the grounds 1 and 3 of the appeal faulted by the respondent's counsel state as follows:-

> *"1.The learned appellate Judge erred in law when he failed to properly re-evaluate the evidence on record thus reaching an erroneous position.*
>
> *2.....*
>
> *3.The decision of the learned appellate Judge has occasioned a miscarriage of Justice."*

It is clear from the wording of grounds 1 and 3 that both grounds do not specify the points which are alleged to have been wrongly decided, as required under rule 86 of the Rules of this Court. The two grounds, as was

exactly stated in the cases cited above, are too general and allow the appellant to go on a fishing expedition to the prejudice of the respondent.

In that respect, I would agree with the respondent's counsel that grounds 1 and 3 of this appeal do not challenge the holding and *ratio decidendi,* neither do they specify the points which were wrongly decided. This offends rule 86 of the Rules of this Court. The two grounds of appeal are untenable, incompetent, and liable to be struck off.

The respondent's preliminary objection is therefore sustained, and grounds 1 and 3 of this appeal are struck off for offending rule 86 of the Rules of this Court.

This leaves only ground 2 of this appeal to be the only ground of appeal for my consideration.

Ground 2

Submissions for the Appellant

The appellant's counsel argued all the grounds together, according to specific headings.

Counsel submitted that at the first appellate court, the appellant maintained that the suit land is his land having been given to him by his father as *"a gift inter vivos"* in 1981 in the presence of **PW1, PW2,** and **PW3**, under customary tenure; and that this evidence was corroborated by the appellant's wife (**PW2**), and **PW3** the appellant's clan mate. Counsel argued that this is recognized under section 3 of the Land Act Cap 227 which directs that in customary tenure, local customary regulations are applicable to the land management of individual and household ownership.

On the right to a fair hearing, the appellant's counsel submitted that the 1st respondent erroneously allocated the suit land to the 3rd respondent after ignoring the principles of natural justice, in that he proceeded with the clan meeting where the decision to allocate land to the 3rd respondent arose. He argued that this prejudiced the appellant as his side of the story was not

availed. According to Counsel, the 1st respondent's decision was irrational and high handed, and during his testimony, he even boasted of having personally handed over the appellant's land to the 3rd respondent and not the clan. Counsel submitted that the appellant was never given a fair hearing as was held on the case of **Balondemu V LDC, Miscellaneous Cause No. 61 of 2016** which cited with approval the case of **Ridge V Baldwin [1964] AC; and Eng. William Kaya Kizito V Attorney General HCMC No. 38/2006.**

Secondly, the appellant's counsel submitted that the learned first appellate Judge failed to properly re-evaluate the evidence of **PW1, PW2,** and **PW3** both of whom were present during the allocation of the suit land to the appellant; that instead, he overwhelming and wrongly so, based his judgment on hearsay evidence of **DW1, DW4 DW6**, all of whom were not present on the 7th August, 1981 when the land was lawfully allocated to him by his father the late Musika Mwanga.

Counsel contended that the fact of being allocated the suit land by his late father is even well known to the 2nd respondent who was present when the appellant was given the suit land. He submitted that instead, the learned first appellate Judge upheld that there was no single witness from the family, yet the family is big, purportedly implying that the appellant should have manufactured evidence as the respondents did. Counsel cited the principle of evidence that no specific number of witnesses is required to prove a fact. He also maintained that the evidence of **PW2** the appellant's wife, whom the appellant married in 1981 as a condition precedent to being allocated land by then, was sufficient.

The appellant's counsel argued that none of the respondents' witnesses ever mentioned the appellant as having been part of the clan meeting of where the suit land was allocated. He submitted that the allocation if any was illegal and only intended to defeat the interests of the appellant; and that had the learned first appellate Judge properly re-evaluated the

evidence on record, he would not have come to the erroneous conclusion which occasioned a miscarriage of justice to the appellant.

Counsel submitted that the learned first appellate Judge ignored the evidence of **PW3**, and instead, stated that the appellant did not call any credible witness apart from his wife. He referred this Court to the testimony of **PW3** to the effect that that he (**PW3**) is a clan mate of the appellant and the respondents, and that he was present when the appellant's late father gave the appellant the suit land. Counsel argued that the evidence of **PW3** is direct evidence and should not have been ignored by the learned appellate Judge.

Counsel argued further, that the respondents dispute the applicability of the Land Act to the present case, yet the position on customary land has not changed since then, even though the Land Decree of 1975 then applied. He also maintained that the respondents are estopped from questioning the non-documentary evidence since they equally rely on non-documentary evidence to prove the purported land acquisition by the 2nd respondent from the late Musika in the 1950s. According to Counsel, it was irregular for the learned first appellate Judge to look for concrete evidence regarding the size of land, to come to the view that the land did not belong to the appellant.

Counsel also argued that **DW4** and **DW6** contradicted each other when **DW4** stated that the suit land is 7-8, yet **DW2** stated it was only 5 steps, while **DW 6** testified that it was 1-3 acres. According to Counsel, the father of **DW3** who stated that it was 5 steps was not sure of the size of the land he purportedly allocated to his son **DW3**, and therefore could have misallocated the appellant's land to his son. He maintained that **DW4**, the respondents' principal witness, who claimed to have been the one dividing the land amongst the brothers, contradicted the testimony of the 2nd respondent that their father had 4 wives when he testified that their father had 3 wives.

Counsel submitted that the inconsistencies and contradictions in the respondent's case were major and such evidence should have been disregarded as it pointed to deliberate falsehoods. According to Counsel, the learned first appellate Judge erred when he upheld the said evidence, and instead wrongly stated that it was **PW1** who gave contradictory evidence, which occasioned a miscarriage of justice to the appellant. He cited the cases of **Alfred Tajar V Uganda (EACA) No. 167/1967 and Zakaria Onno V Olando Difasi HCT- O4-CV-CA-0025-2013** to support his propositions.

Counsel submitted that minutes taken at the visit to the *locus in quo* are supposed to be part of the record as stated in the cases of **J.W Ononge V Okalang, Kabonge Jane & Another V Ssemanda Paul, Civil Appeal No. 76 of 2014 arising from Civil Suit No. 146 of 2012; Yeseri Waibi V Edisa Lusi Byandala (1982) HCB; David Acar & others V Alfred Acar Aliro (1982) HCH 60**, among others.

According to Counsel, since the notes for the *locus* visit were not on record, the learned trial magistrate acted in speculation and the learned first appellate Judge upheld the speculation without any evidence, yet, court can only act on credible evidence presented to it, rather than assuming or inferring evidence, as was held in **Okale V Republic [1965] EA 555** and **Kanalusasi V Uganda [1998] HCB 10.** Counsel contended that the first appellate Judge's claims that the record of the *locus* visit was not yet typed cannot hold water, because the same was never availed to the appellant for perusal, yet it was requested for.

Counsel further submitted that the purported counter claim by the 3rd respondent which was made without any formal pleadings, but was upheld by the learned first appellate Judge without formally amending pleadings offended Order 7 rule 6 of the Civil Procedure Rules (CPR). According to Counsel, there was a total departure from pleadings by the 3rd respondent. He cited **Uganda Breweries Ltd V Uganda Railways Corporation Civil Suit No. 6/2001** to support his submissions.

Counsel accordingly prayed that the plaintiff be ordered to vacate the appellant's land, since the appellant was deprived of his trees basing on the 3rd respondent's counterclaim and the decision of the clan through their illegal meeting.

Counsel submitted that the statement by the respondents' witnesses that the late Musika Mwanga had nurtured the arrangement of giving each woman her portion of the land to deal with and distribute to her children was not supported by evidence, and besides, no independent expert on Sabiny custom was called by the respondents to testify on the issue of husbands allocating land to their wives, and not sons/daughter as mandated by section 46 of the Evidence Act. He cited the cases of **Marko Matovu & Another (1979)**, **Okethi Okale supra** to support this proposition.

Counsel further argued, without prejudice, that in the event that the appellant was not given the land, he had been in adverse possession of the land from 1981 to 1996, meaning he had been in occupation and utilization of the suit land un-interfered for over 18 years. He submitted that the 3rd defendant (3rd respondent in this appeal) admitted that he did not use part of the disputed portion of land until the plaintiffs planted eucalyptus trees. According to Counsel, this meant that the 3rd defendant was never in possession of the same. Counsel argued that by the coming in force of the 1995 Constitution, and on the authority of **Ayua V Okot & Others HCCA No. 22/2014,** together with section 5 of the Limitation Act, the 3rd respondent is barred from claiming back such land since he sat on his rights.

Counsel maintained that the learned trial magistrate failed in his duty to evaluate evidence, as he did not deal with all material evidence before him, which was that the appellant received his portion of the land from his late father, that the 2nd respondent too was allocated his land on the left as per the evidence of **PW3** who was a neighbor. He argued that the learned trial magistrate's referring to the principle of estoppel and rules relating to donations was not based on evidence.

Counsel prayed that this appeal be allowed with costs at this Court and the courts below; that the judgment and orders/decree of the lower courts be set aside; and for any remedies this Court deems fit.

Submissions for the Respondents

The respondents' counsel, in his submissions, disputed the appellant's claims that he was not accorded a fair hearing during the clan meeting of 14th May 2007. He submitted that the appellant was invited to attend the meeting and present his case in a letter dated 15th May 2007 written by the Clan Chairman (the 1st respondent), but he refused or declined to attend the meetings from which he would have asserted his ownership/rights, then he gave unsatisfactory reasons that he was sick and on bed rest; wrote a letter for postponement of the meeting on the very date of the meeting yet the clan elders had already been summoned. Counsel maintained that the appellant was seen by some clan members at Police CID Office Kapchorwa and at the Human rights Commission Office on the fateful day, as a result of which the clan meeting resolved to proceed, because the appellant's absence was not due to sickness but other sinister issues. Counsel maintained that there was even no documentary proof of the appellant's sickness or treatment.

Counsel further argued that in any case the appellant filed a fresh suit in Kapchorwa magistrates' court which was decided on evidence adduced before the said court.

On the appellant's faulting the learned first appellate judge to re-evaluate the evidence of **PW1, PW2,** and **PW3** who claimed to have been present during the allocation of the said land to the appellant and wrongly basing his judgment on hearsay evidence of the defence witnesses, Counsel submitted that the appellant failed to provide evidence of his use of the disputed land for cultivation, but instead, he confirmed that the 3rd respondent has a banana plantation on the disputed land. According to Counsel, save for the appellant stating that he was using the land up to 1996, there is no such evidence of user by **PW2** or **PW3**, nor was such user proved when the trial

court visited the *locus in quo*. Regarding the evidence by **PW2**, Counsel submitted that although the law allows the wife (**PW2**) to testify for the husband, little weight should be given to her testimony because she is reasonably not expected to divert from her husband's testimony or view.

Counsel maintained that the learned trial magistrate effectively evaluated the evidence before him as a whole and stated the reason why he preferred of the evidence of the defence witnesses to that of the plaintiff's witnesses which had inconsistencies, and at the *locus*, the appellant's witnesses failed to describe how the deceased delineated the land for the appellant.

Counsel submitted that the plaintiff's evidence was full of inconsistencies, regarding when the alleged encroachment on the suit land took place, and the demarcations of the suit land; that even at the *locus*, the learned trial magistrate observed that the plaintiff and his wife (**PW2**) were inconsistent in their identification of the exact spots where they stood with late Musika, or which direction they followed as he showed them the boundaries of the land.

Counsel submitted that the inconsistencies in the appellant's evidence regarding his being allocated the suit land were fundamental and go to the gist of the case that they could not be ignored.

Regarding the minutes of the *locus* visit, Counsel submitted that the said minutes not being typed does not mean that they do not form part of the record, as was correctly observed by the first appellate Judge. He contended that the appellant was just not vigilant to be availed the record.

Counsel also submitted that the issue of the 3rd respondent's counter claim was not a ground of appeal to the first appellate court or this Court, which in effect offends rule 102 (a) of the Court of Appeal Rules, since it prohibits the raising of a new ground or argument on appeal save with leave of the Court. However, without prejudice, he submitted that the alleged counterclaim was just a statement in the 3rd respondent's testimony which the court did not consider while making the orders.

On the appellant's claims to adverse possession of the suit land, Counsel submitted that this argument was not raised at the trial court, neither was it a ground of appeal to the first appellate court or this Court as a second appellate court, which offends rule 102 (a) of the Court of Appeal Rules, as already submitted. Counsel prayed that, since the appellant did not seek leave of this Court to argue the said ground, the appellant's submissions in respect of the same should be disregarded in this appeal.

Counsel submitted without prejudice, however, that the appellant's argument is not tenable since it is disputed that he ever occupied the suit land other than trespassing and claiming the same. He referred this Court to the evidence of **DW4**, who was aged 84 years then, who testified that the suit land was given to the 2nd respondent in the 1950s and in the 1980s, that the 2nd respondent allocated it to the 3rd respondent; and to the evidence of **DW3** that when he was given the land, he constructed grass thatched houses, cultivated maize, and left the other part bushy because grass used for thatching the houses was growing on it.

Appellant's submissions in rejoinder

Counsel submitted that the invitation letter to attend the clan meeting was served on him on the same day the meeting was scheduled to take place, and he consequently wrote a letter requesting for adjournment of the meeting which is on record. He also contended that the appellant was not cross examined about his sickness to substantiate the respondents' claims that he lied about going for medical treatment. He contended further, that the 3rd respondent did not attend the alleged clan meeting yet he was the complainant in the matter as admitted during re-examination, which suggests that his name and signature on the purported attendance list was fraudulently inserted.

On the the respondents' claims that the appellant failed to prove that he was in utilization of the land, the appellant's counsel referred this Court to the evidence on record that the appellant stayed peacefully on the land up to 1996 when the 3rd respondent encroached on his land, and that the 1st

respondent, through his letter containing the purported clan recommendations to the DPC, admits that the appellant grazed, quarried and planted sisal and eucalyptus trees, among others, on the land. According to Counsel, the appellant and his witnesses were not cross examined on the use of the suit land, meaning that their evidence was unchallenged and would have been taken wholly as it was. In the alternative without prejudice, the appellant's counsel maintained that the 2nd respondent did not give any evidence of having been in utilization of the suit land between 1956 and 1985 when he was purportedly allocated the suit land before allegedly giving to his son the 3rd respondent. According to the appellant's Counsel, the 3rd respondent also admitted that he was not in utilization of the disputed portion which he stated he left bushy.

Regarding contradictions and inconsistencies, the appellant's counsel submitted that the nature of trespass by the 3rd respondent was progressive in nature and not a one off, and so, his statements and that of **PW2** cannot be taken to have been contradictory. He argued further, that the respondents' claim that **PW2** contradicted herself when she stated that it was the 2nd defendant who encroached on the land instead of the 3rd defendant, was clearly a typing error. Regarding the respondents' claim that **PW2** contradicted herself when she stated that there were no marks on the land, the appellant's counsel submitted that **PW2** was merely meaning the marks of physical activity, and not boundary marks, which she called open land with nothing.

Counsel submitted further, that the record of proceedings was erroneously prepared without questions for both the cross exam and re-exam where the gist of the respondents (he meant appellant) alleged contradictions arise. He invited this Court to disregard the alleged contradictions as speculative.

Regarding the issue of the notes on the *locus* visit not being on record, Counsel submitted that it is misleading for the respondents to dispute the fact that the appellant had applied for a record of proceedings. He

contended that the failure by court to do its duty should not be visited on the appellant who is an innocent litigant.

Regarding the issue of the counter claim, Counsel submitted that the first appellate court had the duty to review the evidence as a whole including the alleged claim, and that the same should not have been overlooked merely because it was not framed, yet its ingredients were very glaring and formed part of the record. He argued that in the alternative, the learned appellate Judge could have evoked section 98 of the Civil Procedure Act as cited by the respondents. He invited this Court to find that the first appellate court failed in its duty to properly apply the principles highlighted in the already cited case of **Henry Kifamunte**, on where this Court can intervene even though some issues had not been framed in the lower Courts.

On the issue of adverse possession, the appellant's counsel submitted that the appellant proved possession by grazing, planting sisal and eucalyptus trees, which was admitted also by the respondents who are therefore estopped from disputing the same.

Resolution of the appeal by Court

This being a second appeal, matters to be appealed against must be questions of law as stated in sections 72 and 74 of the Civil Procedure Act cap 71. Secondly, this Court is not required to re-evaluate the evidence of the trial court unless the first appellate court failed to do so. Thus, this Court will only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law.

The only ground of appeal this Court will contend with, having struck off grounds 1 and 3 of the appeal for offending rule 86 of the Rules of this Court, is ground 2.

In ground 2, the appellant faulted the learned first appellate Judge for his finding that that the land in dispute belonged to the respondents. The appellant contends that the decision occasioned to him a miscarriage of justice.

The record reveals that the gist of the decision of the learned trial magistrate, which was upheld by the first appellate court, is based on the finding that the appellant failed to prove his case on balance of probabilities.

The appellant's claim was that he was given the suit land as a gift by his late father (Musika Mwanga) in 1981 in the presence of his wife (**PW2**), Musa Chelangat (2nd defendant) and Charles Cherukut (**PW3**). **PW2** and **PW3** also gave evidence to that effect. The appellant also claimed that he was utilizing the land by cultivation and grazing until when the respondents trespassed on it.

The defendants (respondents in this appeal) on the other hand adduced evidence that the suit land was allocated to the 2nd respondent in the 1950s, who eventually gave it to his first born son, the 3rd respondent, in the 1980s. The respondents' evidence also reveals that the suit land, which was above a cliff, had long before the appellant was born, been occupied and used by the 2nd respondent's mother and her children, while the appellant's mother and her children occupied and used the land below the cliff. The land initially customarily belonged to the late Musika Mwanga who divided it among his three wives who included the appellant's mother and the 2nd respondent's mother. The undisputed fact on record is that the appellant and the 2nd respondent are sons to the late Musika Mwanga, born of different mothers.

The decision of the learned trial magistrate, which was upheld by the learned first appellate Judge, was based on the findings that the evidence given by the defendants' (respondents') witnesses was consistent, and was supported by the trial court's findings at the *locus visit*, as opposed to the evidence by the plaintiff's (appellant's) witnesses which was full of contradictions, in addition to not being supported by the trial court's findings at the *locus visit*.

The adduced evidence on record shows, for instance, that the defendants (respondents in this appeal) showed the trial court the cliff which marked the boundaries between the land occupied by the appellant, who occupied

the land below the cliff, and the 3rd respondent, who occupied the land above the cliff. The appellant on the other hand, together with his wife (**PW2**) were inconsistent regarding the markings or spots that separated the two pieces of land, and the years when the 3rd respondent's alleged trespassing took place. For example, the appellant testified as **PW1** that the 3rd respondent encroached on his land in 1996, but in cross examination he said that the 3rd respondent came to the land in 2004.

The learned first appellate Judge correctly stated that the inconsistences were:-

> *"fundamental and go to the gist of the case and could not be ignored. They relate to the main issue of allocation of the suit land to the appellant."*

The entire court record shows that the appellant adduced no concrete evidence, documentary or otherwise to prove his allegations that the suit land was given to him by his late father in 1981, and the alleged give away was not attended by any member of the family, which was a large family, save for the appellant, his wife and **PW3**.

In my considered opinion, after carefully perusing the record of appeal and addressing my mind to the applicable laws and authorities, the learned trial magistrate clearly evaluated all the evidence before him throughout his judgment, and gave reasons why he credited the evidence or one party against the other. The learned first appellate Judge also re-appraised the evidence on record and satisfied himself on the findings of the learned trial magistrate which he upheld.

It is trite law that where factual findings have been made by the trial court and affirmed by the first appellate court, the second appellate court, must be careful not to interfere with those findings unless the court is satisfied that they were devoid of support in evidence on record or that they are so glaringly erroneous that the findings by the trial court were perverse. See

Elizabeth Nalumansi Wamala V Jolly Kasande & 2 Others, SCCA No. 10/2015].

The appellant raised issues that the 3rd respondent made a counter claim without amending his pleadings, and that, without prejudice, he was in adverse possession of the suit land.

The record of appeal shows that the issue of the 3rd appellant's counter claim was not a ground of appeal before the first appellate court or this Court. Similarly, the appellant's claims to adverse possession of the suit land were not raised at the trial court, neither was it a ground of appeal to the first appellate court or this Court as a second appellate court. This offends rule 102 (a) of the Rules of this Court, which prohibits the raising of a new ground or argument on appeal save with leave of the Court.

The appellant did not seek leave of this Court to argue his claims that the 3rd appellant raised a counterclaim, or that he claimed adverse possession on the suit land.

It is now settled law that obtaining leave of court is not merely a procedural matter but an essential step, as was held in the case of **Dr. Sheikh Ahmed Mohammed Kisuule V Greenland Bank (In Liquidation), SCCA No. 11/2010**. For that reason, based on the said authority, I will disregard all submissions on the two issues.

Without prejudice, however I have noted from the record that the statement, which appears at page 33 of the record of appeal, was made by **DW3** as he testified that:-

> *"I pray that the plaintiff be ordered to vacate my land where he has planted his trees and I remain peacefully on my land. That what I can state now."*

This, in my opinion, was just a statement in the 3rd respondent's testimony. The first appellate court, which merely upheld the orders of the lower court, did not base its orders on it.

Secondly, I note, without prejudice, that this Court's addressing of the issue of adverse possession would require it to delve into issues of additional evidence to determine that fact or disprove it. This would not be a mandate of this Court as a second appellate Court dealing with questions of law. This Court could only interfere where the first appellate court failed to re-evaluate the evidence or where there is no evidence to support a finding of fact. I have not found any such situation in this appeal.

The appellant's counsel claimed in his submissions that court failed to make the minutes of the *locus* visit to be part of the record of proceedings. The record of appeal does not contain the notes or minutes of the visit to the *locus in quo,* but both the learned trial Judge and the first appellate Judge alluded to the fact of a *locus* visit having taken place. The record of appeal shows on page 38 that on 21/04/2009 after hearing oral evidence, the trial court adjourned to 7/05/2009 for visiting *locus.* The record shows on page 63 of the record of appeal that the first appellate Judge went on to state in his judgment, that the notes for the visit to the *locus in quo* were on record though not typed. It also appears from the appellant's submissions that he is not disputing that there was a visit to the *locus in quo,* and that he and **PW3** attended it.

That aside however, having perused the evidence on record, it would appear to me that the findings at the *locus* visit, which the appellant does not dispute having taken place, would be merely supplementary to the already credible evidence of the defendant's witnesses regarding the allocation and demarcation of the suit land.

The appellant also raised issues that he was not given a fair hearing at the clan meeting which allocated the suit land to the 3rd respondent. This mater was however pleaded before the trial magistrate. In my opinion, even if it were, for argument's sake, true that the appellant was not given a fair hearing at the clan meeting, it does not negate the fact as borne out by the adduced evidence on record that the appellant did not prove his claims to the suit land to the required standards. This was the principle which both

the trial court and the first appellate court correctly applied to make their respective decisions.

In the result, based on the analysis above and relevant authorities, I find no merit in this appeal and I would dismiss it with costs here and in the courts below.

Dated at Kampala this 20th day of Dec. 2019

Percy Night Tuhaise

Justice of Appeal.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 117 OF 2012

(Coram: Egonda-Ntende, Cheborion Barishaki & Percy Tuhaise, JJA)

SUKUTON ALI::APPELLANT

VERSUS

1. **AUGUSTINE KAPKWONYONGO**
2. **MUSA CHELANGAT**
3. **ALI MUSOBO::RESPONDENT**

(Appeal from the ruling / orders of the High Court of Uganda delivered on 7th June, 2012 in Civil Suit No. 0060 of 2010 by Stephen Musota, J)

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned sister Percy Night Tuhaise, JA and I agree that this appeal should fail for the reasons she has set out therein.

I also agree with the orders made.

Dated at Kampala this ......20th...... day of ......Dec...... 2019

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Barishaki Cheborion and Tuhaise, JJA]

Civil Appeal No.117 of 2012

(Arising from High Court Civil Appeal No 60 of 2010 at Mbale)

BETWEEN

Ali Sukuton==========Appellant

AND

Augustine Kapkwonyongo==========Respondent No.1

Musa Chelengat==========Respondent No. 2

Ali Musobo==========Respondent No.3

(On Appeal from a judgment of the High Court of Uganda (Musota, J.,) delivered on 7th June 2012 at Mbale.)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have read the judgment in draft of my sister, Tuhaise, JA. I agree with it and have nothing useful to add.

[2] As Barishaki Cheborion, JA., agrees this appeal is dismissed with costs here and below.

Dated, signed, and delivered at Kampala this 20th day of Dec 2019

Fredrick Egonda-Ntende

Justice of Appeal