THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

Civil Appeal No. 65 of 2012

(Arising from High Court Civil Appeal No. 74 of 2010 on appeal from FPT-21-CV-CS-030/ 2004 at Kyenjojo)

BETWEEN

Kutambaki Augustine==========Appellant

AND

Byaruhanga Paul========== Respondent

(On appeal from the Judgment of the High Court (Chibita, J.) delivered on the 25th August 2009 at Fort Portal)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] This is a second appeal from the decision of the High Court of Uganda at Fort Portal. The appellant was the defendant in the original suit in the magistrates' court at Kyenjojo. The respondent was the plaintiff. The respondent had filed this action against his uncle the defendant in trespass. He contended that the defendant had taken over his land, approximately 5 acres which he had inherited from his late father, who passed away in 1978. The appellant on the other hand contended that he had bought the suit land jointly with his brother, the father of the respondent. And that they had divided it up. It was the respondent now who was laying claim to his portion of the land.

[2] In the court of first instance judgment was delivered in favour of the appellant. The respondent appealed to the High Court. The High Court reversed the judgment of the magistrates' court and decreed the land to the respondent. The appellant died and is now represented by his legal representative James Agaba.

[3] The appellant appealed against that decision to this court setting forth 5 grounds of appeal which I set out below.

> '(1) The learned judge erred in law and fact when he failed to properly re-evaluate the evidence on record of the lower court leading to an erroneous decision.
>
> (2) The learned judge of the High Court in his re-evaluation of the evidence of the Lower Court as to the difference between a "road" and a "path" and the contents and intent of the late Alifunis Nsisi as contained in his will dated 4th April 1978.
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> (3) The learned judge of the High Court erred in law when he disregarded the findings of the Lower Court when at the scene in quo while he had neither personally visited nor seen or appreciated the demeanour of the witness.
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> (4) the Learned Judge of the High Court made an erroneous decision when he reversed the decision of the High Court on no legal basis.
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> (5) The Learned Judge of the High Court erred in law when he failed to refer the matter back to the Lower Court for hearing de novo since the evidence at the *locus in quo* did not form part of the record of proceedings.'

[4] The respondent opposes the appeal and supports the judgment of the High Court on appeal.

Submissions of Counsel

[5] The appellant is represented by Mr Richard Rwabogo. The respondent is represented by Mr James Ahabwe. Both counsel filed written submissions.

[6] The appellant abandoned grounds 1 to 4 and remained with only ground 5 as the sole ground of appeal in this matter. It was contended for the appellant that the learned trial judge made an error of law in failing to order a re-trial once it was established on appeal that the trial court had relied on evidence obtained during the visit to the *locus in quo* while no note was available of such evidence in the record of proceedings of the trial court.

[7] It was submitted for the appellant that the learned trial judge noted that the lower court had relied heavily on the proceedings at the *locus in quo* when such proceedings were actually not captured on the record of proceedings. The failure of the trial magistrate to capture the entire record of proceedings at the *locus in quo* and failure to draw a sketch plan meant that the learned trial judge on appeal could not arrive at a correct decision occasioning a miscarriage of justice. Reference was made to Yowasi Kabiguruka v Samuel Byarufu, [2010 UGCA 7; Yeseri Waibi v Edisa Lusi Byandala [1982] HCB 28 and Mukasa v Uganda [1964] E A 698 in support of the case for the appellant.

[8] It was submitted for the respondent that the sole ground of appeal is not tenable and the order for a re-trial is not called for. There is sufficient evidence on record for both parties that enabled the learned judge on appeal to arrive at the decision he did. It is conceded that the trial magistrate made a mistake in failing to draw a sketch map of the suit land and failing to record his observation at the *locus in quo* for which he was faulted by the learned trial judge. However, the learned judge on appeal did not base his decision on the proceedings at the *locus in quo*. The learned trial judge on appeal relied on other evidence on record to come to the conclusion he came to that the land rightfully belonged to the respondent.

[9] It was further submitted for the respondent that in the instant case there are no compelling circumstances for ordering a re-trial in light of the fact the appellant is dead and his legal representative was not a witness during the trial and the other witnesses are of advanced age. They are either too old or dead. It is argued that a re-trial would cause injustice. Reference was made to Vicent Ntambi v Uganda Court of Appeal Criminal Appeal No. 78 of 2012 (unreported) in support of this submission.

[10] Lastly it was argued for the respondents that the learned trial judge was not under a duty to award a remedy that had not been prayed for by either party. The appellant had not sought in the court below for an order for a retrial as he had not filed a cross appeal. The respondent prayed that this appeal be dismissed with costs.

Analysis

[11] This is a second appeal. What is permitted to be appealed against are questions of law pursuant to sections 74 and 72 of the Civil Procedure Act. I am satisfied that the sole ground of appeal involves a question of law. Secondly on second

appeals this court is not required to re-evaluate the evidence of the trial court unless the first appellate court failed to do so.

[12] I will start by re stating the relevant facts to the above appeal. The learned trial magistrate who heard and determined this case at first instance visited the *locus in quo*. He heard the testimony of one witness, PW8 (really PW6), which he recorded. He did not produce a sketch plan of the land in dispute or the disputed boundary. He did not record any observations of what he saw at the *locus in quo* or whether he heard any other person including previous witnesses that had testified. In his judgment he stated in part,

> 'Hence court having visited the locus in *quo* and seen the land in dispute and the will having mentioned not to cross the road and paths and not Mpunda as denied by PW2 and counsel for the plaintiff yet court was able to identify a path that is between the plaintiff and the disputed land and also as shown by DW6. It is clear that the road or paths talked about in the will could not have been the one to Mpunda but that separating the plaintiff and the disputed land since even Agaba's house son to the defendant and various plantations like avocadoes claimed to have been planted by the defendant all fall in the disputed land and not the land of the plaintiff. And with the same I will find the plaintiff to have failed to prove that the land in dispute belongs to him.'

[13] The first appellate court, quite rightly in my view, criticised the learned trial magistrate for taking into account observations and evidence adduced at the *locus in quo* which is not available on the record of the trial. The learned appellate judge stated,

> 'It was conceded by both Counsel that the locus was visited and that the trial magistrate relied heavily on the proceedings at the locus in his judgment. Indeed the last witness testified from the locus. The Trial Magistrate should have indeed taken greater care in capturing the record at the locus and following the procedure.'

[14] The learned appellate judge then evaluated the evidence on record and concluded that the learned trial magistrate had made several errors that led him to reach the wrong conclusion. Firstly, that the defence witnesses the trial magistrate believed were not credible given that they denied a crucial bit of the evidence that related to the sale of the disputed land by the appellant to Bamanya which the appellant was pressurised to abandon by the clan. The appellant refunded the purchase price to the buyer. The inference the judge drew from

this was that those defence witnesses were not telling the truth as the appellant could only be forced by the clan to cancel the sale if the land did not belong to him. Secondly that the trial magistrate introduced a path without evidentiary basis as the boundary between the appellant and the defendant yet the will had talked of a road and the witnesses had identified the road as the road to Mpunda which separated the land of the appellant and the disputed land.

[15] The learned appellate judge allowed all the grounds of appeal and concluded that the land belonged to the respondent.

[16] The learned appellate judge is faulted for deciding the case on basis of re-evaluating the evidence on record which was incomplete as it did not have part of the proceedings at the *locus in quo*. It is contended that he should have ordered a retrial. For the respondent it is contended that a re-trial was neither prayed for by the respondent nor the appellant in the first appellate court. The learned judge should therefore not be faulted for not ordering a re-trial.

[17] Neither party in the court below prayed for a re-trial on account of the trial magistrate having failed to conduct the *locus in quo* in accordance with the accepted procedure. The appellant (respondent in the High Court) supported the decision of the court of first instance. The respondent (appellant in the High Court) prayed for setting aside the judgment of the trial court and substituting it with a declaration that the disputed land belonged to the respondent on the evidence on record. The appellant is therefore raising this prayer of a re-trial for the first time on a second appeal.

[18] The procedure trial courts are to follow on conducting proceedings at *locus in quo*, as provided for in case law, (See J.W. Ononge v Okallang [1986] HCB 63 & Badiru Kabalega v Sepiriano Mugangu, (High Court Civil Appeal No. 7 of 1987), [1992] KALR 110), has now been codified in Practice Direction No.1 of 2007 and is as follows:

> **'3. Visit to the Locus in Quo**
> During the hearing of land disputes the court should take interest in visiting the locus in *quo* and while there,
>
> (a) Ensure that all the parties, their witnesses and advocates (if any) are present.
>
> (b) Allow the parties and their witnesses to adduce evidence at the locus in *quo*.

(c) Allow cross examination by either party or his or counsel.

(d) Record all the proceedings at the locus in *quo*.

(e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.'

[19] Discussing the purpose of a visit to the *locus in quo*, Ongom, Ag. J., (as he then was), in Badiru Kabelega v Sepiriano Mugangu (supra), stated,

' ... it is well established that the purpose of visiting the locus in *quo* is for each party to indicate what he is claiming. Each party must testify on oath and be cross examined by the opposite party. Similarly, witnesses who have already testified in court are required at the locus in *quo* to clarify what they were stating in court to indicate features or boundary marks , if any, to the court. Any observation made or noted by the trial magistrate at the locus in *quo* must be noted and recorded and must form part of the record. Unless it is requested or intimated in advance, the court should not allow fresh witnesses to be called at the locus in *quo*. If the trial court fails to follow this accepted procedure at the locus in *quo* and bases his judgment largely on the trial at the locus in *quo*, that omission is fatal to the whole trial.'

[20] Where the trial court relies in its judgment, significantly or largely on proceedings at the *locus in quo* which has not been conducted following the above procedure, or where no record of it is properly made or available that would vitiate the proceedings leading to a re-trial according to most High Court decisions that I have read. See J.W. Ononge v Okallang [1986] HCB 63 & Badiru Kabalega v Sepiriano Mugangu, (High Court Civil Appeal No. 7 of 1987), [1992] KALR 110).

[21] I do think that this formulation is somewhat too wide. The more precise formulation should be, in my view, that where the trial court relies in its judgment, significantly or largely on the proceedings at the *locus in quo*, which have not been conducted in the accordance with the procedure set out above, would be fatal to the judgment and not necessarily to the whole trial. The result of this finding may often be to order a re-trial if the trial in the court below is not salvageable. The appellate court should be able to determine whether on the evidence on record it is possible to arrive at a decision that would conclude the case without causing a miscarriage of justice. Where it so finds it may determine the case after a re-evaluation of the evidence and the law. If, however, this is not possible, the appellate court would then have to order a re-trial.

[22] Re-trials should generally be ordered only where it is in the interests of justice to do so, or, put differently, where a miscarriage of justice would occur, if no re-trial is ordered. Courts should as much as possible help to bring cases to an end rather than prolong litigation where it is possible to do so. If, on a review of the evidence on record, it is possible to fairly determine a matter it would be in the interests of justice to do so and bring to an end such litigation. This would avoid the pitfalls caused by delay in concluding litigation, which include possible death of parties, unavailability of witnesses, deterioration of memories of some witnesses and the escalating costs associated with prolonged litigation.

[23] In Yowasi Kabiguruka v Samuel Byarufu (supra) this court affirmed a decision of the High Court on appeal that ordered a re-trial in a matter where the trial court had not visited the *locus in quo*. The Court of Appeal held that failure to visit the *locus in quo* was not an illegality. However, a re-trial was ordered where the interests of justice required the court to visit the *locus in quo* in order to be in a position to adjudicate the dispute between the parties.

[24] In the instant case the learned judge on appeal noted that the learned trial magistrate had not followed the accepted procedure for visiting a *locus in quo*. However, he did not order a re-trial. Neither party had prayed for a re-trial. The learned judge on appeal re-evaluated the evidence on record for each side and arrived at a conclusion that the land in question belonged to the respondent. Did the approach of the learned judge on appeal occasion a miscarriage of justice?

[25] I think not in the circumstances of this case. The appellant in his written statement of defence had stated,

> 'I and my brother shared out this land and demarcated it in the traditional way. We then built our houses and each one of us started to work from his part of this land. Unfortunately, a few years later, my brother ALIFUNSI NSISI died. His land remained under the ownership of his wife and children. Later after the death of their father, these children were taken by their mother to her home side where they stayed for years. Myself I remained here making sure that their part of the land was not tampered with while I was working from my part of the land. I did not go beyond the boundaries which are even clearly indicated in the will of their father (by brother ALIFUNSI NSIISI).'

[26] The will of the late Alifunsi Nsiisi was tendered in evidence and it stated in part,

> 'Therefore Augustine should not cross the road from down to go up to disturb my children. He is bordering Kyamanywa and down there is a Gasiya tree, bordering with Ndora.'

[27] Augustine is the Appellant. The question therefore is what was the road the appellant was not supposed to cross? PW2 stated that it was the road to Mpunda. While denying this the appellant admitted in cross examination to have encroached on the plaintiff's land in 1990. He also admitted that he had sold the disputed land which he had claimed was his land but complaints were raised and he had to refund the money to the buyer on the intervention of his clan members. This was in direct contradiction to his own witnesses that had claimed that he had not sold land to Bamanya or been forced to refund the money by the clan. This largely discredited DW2, DW5 and DW8 (who ought to be DW6) since they denied knowledge of any sale of the disputed land.

[28] DW3 testified that the appellant had in 1990 encroached on the plaintiff's land. And that the appellant had wanted to sell the land to Bamanya. Much as he maintained that the land in dispute belonged to the appellant this was really inconsistent with the evidence that the appellant was compelled by the clan to rescind the sale of the land to Bamanya because the disputed land did not belong to him. The disputed land belonged to the respondent.

[29] The testimony of PW3 largely corroborated the testimony of PW2. PW3 was a neighbour to the disputed land; brother to the appellant and uncle to the respondent. This testimony was not discredited on cross examination. He firmly stated that the disputed land belonged to the respondent and its boundaries had been stated in Alifunsi Nsiisi's will. He gave the background to why the PW2 and her children left their home to go to their maternal uncle for some time. He detailed the attempts of the appellant to take over the disputed land, including the aborted sale to Bamanya.

[30] The learned judge on appeal determined, on the evidence, that the boundary between the appellant and the respondent was the road to Mpunda. The appellant in his written statement of defence had stated the boundaries of the land belonging to the plaintiff were set out in his father's will. The will had stated that the appellant should not cross the road. On the evidence of PW2 this road mentioned in the will was the road to Mpunda. The appellant's land therefore stopped on the road to Mpunda.

[31] The appellant abandoned all grounds of appeal that had related to the learned judge on appeal's evaluation of the evidence. I take it that the appellant does not contest the factual findings made by the learned judge on appeal or that the learned judge made an error in law in re-evaluating the evidence on record other than what is contained in the only ground of appeal argued before us. The appellant's only complaint is that the learned judge did not order a re-trial in light of his finding that the proceedings at the *locus in quo* did not follow the accepted procedure for conducting visits to the *locus in quo*. The learned judge on appeal vacated the judgment of the trial court on both this account as well as on account of the fact that the learned magistrate had wrongly accepted the appellant's version of the case which had been seriously discredited and was not worthy of belief.

[32] Of course, this may have been the ideal case for a visit to the *locus in quo*. Unfortunately, the proceedings of the visit to the *locus in quo* were not fully recorded by the trial court. However, it is possible on a review of the evidence available on record that was properly received to determine ownership of the disputed land. I am satisfied that the learned judge on appeal reached the correct conclusion that the disputed land belonged to the respondent, without relying on the visit to the *locus in quo*. And no miscarriage of justice was thereby occasioned. I would decline to order a re-trial.

Decision

[33] I would dismiss this appeal with costs here and below. As Barishaki Cheborion and Tuhaise, JJA, agree this appeal is dismissed with costs.

Signed, dated and delivered at Kampala this 25th day of Sept 2019

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 65 OF 2012

KUTAMBAKI AUGUSTINE::APPELLANT

VERSUS

BYARUHANGA PAUL:::RESPONDENT

(An appeal from the decision of the High Court of Uganda at Fort Portal delivered on 25th August, 2009 in Civil Appeal No. 74 of 2010 by Chibita, J)

CORAM: HON. MR. JUSTICE FREDRICK EGONDA - NTENDE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my brother Fredrick Egonda – Ntende, JA and I agree that the learned appellate Judge reached the correct conclusion that the disputed land belonged to the respondent.

This appeal is therefore dismissed with costs.

Signed, dated and delivered at Kampala this 25th day of Sept 2019

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL FOR UGANDA AT KAMPALA

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

Civil Appeal No. 65 of 2012

(Arising from High Court Civil Appeal No. 74 of 2010 on appeal from FPT-21-CV-CS-030/2004 at Kyenjojo)

Kutambaki Augustine..... Appellant

Versus

Byaruhanga Paul..... Respondent

(On appeal from the Judgment of the High Court (Chibita, J.) delivered on the 25th August 2009 at Fort Portal)

Judgment of Hon. Lady Justice Percy Night Tuhaise, JA

I have had the benefit of reading in draft the Judgment of my brother Hon. Mr. Justice Fredrick Egonda-Ntende, JA.

I agree with his analysis, reasoning, and conclusion that this application has no merit and should be dismissed with costs here and in the court below.

Dated at **Kampala** this 25th day of Sept 2019.

Percy Night Tuhaise

Justice of Appeal.