

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT GULU
HCT – 02 – CV – CA – 0044 – 2003
(Arising from Grade I Court Apac Civil Suit No. 047/2002)

ODUR TONNY :::APPELLANT

VERSUS

ODUR GEORGE:::RESPONDNET

BEFORE: HON. JUSTICE REMMY KASULE

JUDGMENT

This appeal arises from the judgment of the Grade 1 Court, Apac District dated 18.12.2003 in original Civil Suit Number 47 of 2007.

The original suit involved a dispute over land situate at Abei village, Atuk parish, Chawente Sub-county, Kwania County, Apac District.

In the original plaint dated 03.09.2002, the suit was as between Odur George (plaintiff) and Odur Tonny (Defendant) and the area of land the subject of the dispute was stated to be three (3) acres only.

In the amended plaint, dated 03.09.2003 the suit is by six (6) plaintiffs, the original plaintiff inclusive, against the same original defendant; and the area of land in dispute is one hundred and sixty (160) acres.

Since the trial of the original suit started on 13.12.2002, it follows that the number of plaintiffs increased from one (1) to six(6) while the trial had already started.

The defendant had filed his written statement of defence to the original plaint on 23.09.2002.

There is no evidence that the defendant, now appellant, was served, let alone afforded an opportunity by court to file and make reply to the claims of the additional five(5) plaintiffs to the original suit.

This was a serious anomaly in the trial of the suit in the court below. The defendant/appellant was condemned for the case of the rest of the added plaintiffs whose case he never prepared for and never filed a reply.

This court has studiously scrutinized both the hand written and typed record of the proceedings of the court below.

Court has observed that through out the trial in the court below only the defendant, now appellant, is recorded as having given his evidence on oath. There is no such recording in respect of all the other witnesses.

This court has recently observed in HCT – 02 – CV – CA – 0015 – 2007 (arising from Apac claim No. 063 of 2004: **ATURI CONSTANTINO & OTIM FRANCO VS ODUR NIKANORI** where witnesses were not sworn, that:-

**“ the learned trial magistrate did not ensure that the trial of the suit complies with the provision of section 137 of the Evidence Act,.....
There is also no indication on the record of proceedings whether the witnesses were sworn or affirmed before testifying”**

This court held the trial of the suit in the above suit a nullity.

Likewise in this appeal, court finds that the trial of the lower court was a nullity for the same reasons.

Counsel for the appellant has invited this court to re-evaluate the evidence on record exhaustively and come to its own conclusions.

Respondents’ counsel, on the other hand, according to the instructions he has from the respondents, the record of the lower court proceedings is incorrect as to who gave evidence. He thus, on that ground, concedes to have a retrial of the case.

This court is unable to accede to the submission of the appellant’s counsel of re-evaluating the evidence, because there is no evidence to re-evaluate, since the record does not show that all the witnesses, except one, took an oath or affirmation before testifying.

As to the respondent’s counsel assertion that the record of proceedings do not tally with the instructions he has as to who gave evidence at trial, this court has to consider the record as

recorded by the trial court, unless court is moved otherwise as to the accuracy of the record, by some legitimate evidence, by way of affidavit or otherwise. There is no such evidence before court.

Given the state of affairs as to how the trial was conducted in the lower court, this court allows this appeal, on the ground that the trial below was nullity. It is ordered that a retrial of the case before a court of competent jurisdiction, other than Herbert Birungi, the trial magistrate Grade 1, takes place.

Since the appeal has succeeded on grounds for which the trial court was in the main, responsible, it is ordered that each party bears the costs of the appeal and those in the court below. If any party has recovered any costs from the other, then those costs are to be refunded to the party that paid them.

.....

Remmy Kasule

Judge

18.08.2008