THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0031-2010

(Arising from Busia Civil Suit No. 104 of 2007)

PAINETO OMWERO…..……..……..APPELLANT

VERSUS

SAULO S/O ZEBULONI……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

The appellant Paineto Omwero represented by M/s Nagemi & Co. Advocates filed this appeal against the judgment and decree of the Magistrate Grade I Busia dated 28th January 2010 in Civil Suit 104/2007 wherein the learned trial Magistrate dismissed a land claim by the appellant with costs. The respondent Saulo S/o Zabuloni appears in person.

According to the record, the facts constituting the cause of action are that the appellant claims ownership of the suit land which he stays he inherited from his fore parents i.e. his grandfather Odumbo and his father Oluya. That sometime in 2006, the respondent encroached on the plaintiff's land and started cultivating and erecting grass thatched houses on it.

The appellant alleges that he tried to stop the respondent in vain hence the suit in the lower court.

The respondent denied the claim by the appellant and to the contrary contended that he acquired the suit land from his uncle the late Zekeri Hasakya who had bought the land from the appellant. He denies ever erecting any house or cultivating on the appellant's land.

In the memorandum of appeal, the appellant complained that:-

1. The learned Magistrate erred in law by entertaining public opinion as evidence at the *locus-in-quo* thus occasioning a miscarriage of justice.
2. The learned Magistrate erred in law and fact in disregarding the totality of the evidence of the appellant in relation to exhibit P.1D1 and came to a wrong conclusion that the appellant did not prove his claim to the land in dispute to the required standard.
3. The learned Magistrate did not properly evaluate the evidence, oral and pleaded on record, and thereby came to a wrong conclusion that the respondent is the rightful owner of the land in dispute, a decision which occasioned a miscarriage of justice.

The appellant proposed that court orders *inter alia* that:-

(i) This appeal be allowed.

(ii) This court reverses and sets aside the judgment and decree of the trial court, and

(iii) This court awards costs for this appeal and the court below.

I allowed the parties to this appeal to file written submissions to support their respective cases. This was done and submissions were filed on record. I will not reproduce the said submissions but suffice to mention that I have studied the said submissions and related the same to the lower court's record.

As rightly submitted by Mr. Nagemi learned counsel for the appellant, this court being a first appellate court has a duty to re-evaluate the evidence adduced in the lower court and reach its own conclusion bearing in mind that it had no opportunity to see the different witnesses testify. This court has to consider the lower court's record as a whole including the annextures, the evidence on both sides and satisfy itself if the lower court's decision can stand.

I will now go ahead and consider the grounds of appeal as argued.

Ground 1:

In his submission, the respondent argued that with or without the public opinion evidence, the appellant had the duty to prove his claim on a balance of probabilities but failed to do so. That the weakness of the respondent's evidence could not bolster the appellant's case. That the trial court followed the procedure at the *locus-in-quo* and applied the law properly.

The appellant argued to the contrary.

When I perused the record I found that the following witnesses testified for the appellant, to wit:

- PW.1 Paineto Omwero (appellant)
- PW.2 Desiderio Oguttu
- PW.3 Muswime Barasa

The following witnesses testified for the respondent to wit:

- DW.1 Saulo S/o Zabuloni (respondent).
- DW.2 John Omachali.
- DW.3 David Agong.

However, when court visited the *locus-in-quo* none of the above witnesses testified. The record indicates that other witnesses including Wabwire Jonathan, The LC.I Chairman (not named), Oguttu Jackson and Lawrence Okumu gave evidence which was evidently relied upon by the trial magistrate although they had not been summoned as witnesses of the respondent during the trial. This was despite a protest by learned counsel for the appellant in his submissions warning the learned trial Magistrate of the dangers of entertaining such evidence. The procedure adopted by the learned trial Magistrate is strange and not allowed in civil trial procedure. I wish to emphasize what this court has decided over again regarding conduct of proceedings at the *locus-in-quo* which was rightly put in the case of ***DAVID ACAR & 3 ORS V. ALFRED ACAR ALIRO [1982] HCB 60***, Karokora Ag. J (as he was) observed *inter alia* and I agree that:-

> *"……..I wish to comment about the manner in which the trial was conducted at the locus-in-quo….. When the court deems it necessary to visit the locus-in-quo then both*

parties, their witnesses must be told to be there. When they are at the locus-in-quo, it is ……..not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo. In fact the purpose of the locus-in-quo is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he/she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings."

See also: ***FERNANDES V. NORONIHA [1969] EA 506***

De SOUZA V. UGANDA [1967] EA 784

This standard procedure must be adhered to when a trial court decides to visit the *locus-in-quo* during a trial.

I am in agreement with Mr. Nagemi that the learned trial magistrate did not adhere to this procedure. The record of proceedings does not bear the evidence or steps taken at the *locus-in-quo*. Secondly it is not shown whether parties were given the opportunity to cross-examine either witnesses. Thirdly the four witnesses indicated as having given evidence at the *locus-in-quo* had not attended the earlier trial in court and had not been summoned as witnesses for either side. They were not witnesses called upon to testify what they had stated in court before.

Such evidence was procured by the learned trial Magistrate in error yet the trial magistrate relied on it to reach his conclusions. This error vitiated the trial

rendering the decision of the lower court null and void. By relying on that evidence, the learned trial magistrate's decision occasioned a miscarriage of justice to the appellant. Ground 1 of the memorandum of appeal therefore succeeds.

Having allowed ground one of the appeal I find it unnecessary and a waste of court's time to delve into deciding upon the remaining two grounds of appeal since ground 1 disposes of this appeal.

Consequently I will allow this appeal and set aside the judgment and decree of the lower court. A retrial will be ordered.

The appellant shall get the costs of this appeal only.

Musota Stephen

JUDGE

2.6.2011

2.6.2011

Counsel P. Nagemi for the appellant.

Fatuma as Clerk.

Nagemi: I am ready to receive the judgment.

Court: Judgment delivered in open court.

Gladys Nakibuule Kisekka

DEPUTY REGISTRAR

02.6.2011