

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**CIVIL APPEAL NO. 18 OF 2012**

*Arising Out Of Civil Suit No. 32 of 2008 at Chief Magistrate’s Court of Makindye*

**BARBRA NAMBI LUFF.....APPELLANT**

**VERSUS**

**RAYMOND LWANGA.....RESPONDENT**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**JUDGEMENT**

This was an appeal from the judgment and decree of Her Worship Ajio Hellen Magistrate Grade 1 Makindye dated 9<sup>th</sup> December 2012.

The background to the appeal is that the appellant, who was plaintiff in the lower court, filed civil suit no. 32 of 2008 against the defendant/respondent seeking a permanent injunction and general damages for trespass in respect of land comprised in LRV 2163 Folio 41 plot 2344 at Busabala Makindye. The plaintiff/appellant was the registered proprietor of the said land having purchased it from a Dr. George William Samula who was holding a 49 year lease on the land. The defendant/respondent denied being a trespasser and pleaded that he is a lawful occupant on the land as a customary tenant, having inherited such occupancy from his late father George William Musoke who had a kibanja on the land which he developed with houses and crops. He contended that the plaintiff had no right to evict him as the plaintiff’s right was subject to the already existing rights of the defendant. The trial Magistrate found for the defendant/respondent and dismissed the plaintiff/appellant’s suit with costs in that the plaintiff had not proved his case against the defendant on a balance of probabilities.

The appellant, being dissatisfied with the judgment, appealed against it on the following grounds:-

1. *The learned trial Magistrate erred in law and fact in finding that the appellant was not vigilant enough to have inspected the land when she was a neighbor to the land.*
2. *The learned trial Magistrate erred in law and fact in finding that Dr. Samula's failure to show the sale agreement between himself and the respondent's father affected the appellant's rights to the land.*
3. *The learned trial Magistrate erred in law and fact in holding that neither Musoke nor Nakate had sold the land to Dr. Samula on which the respondent had constructed houses.*
4. *The learned trial Magistrate erred in law and fact in finding that PW2 Dr. Samula, failed to prove that he acquired lawful interest from Musoke despite possessing the certificate of title.*
5. *The learned trial Magistrate erred in law and fact in holding that the respondent was a lawful occupant on the appellant's land.*
6. *The learned trial Magistrate erred in law and fact when she found that there was no evidence to show that the respondent's father had been compensated.*
7. *The learned trial Magistrate erred in law and fact when she held that the respondent was not a trespasser on the suit land.*
8. *The learned trial Magistrate erred in law and fact by failing to properly evaluate the evidence on civil suit no. 32 of 2008 and thereby reached a wrong conclusion.*

The appellant prayed this court to allow the appeal, to set aside the trial Magistrate's decision and substitute it with an order reinstating civil suit no. 32 of 2008, or an order that the suit be heard on its merits. He also prayed for costs in this court and in the court below.

At the hearing of the appeal, this court gave time schedules within which Counsel filed written submissions.

I will first address the submissions of Counsel for the respondent that grounds 1, 2, 3, 4 and 6 of the contravene the provisions of Order 46 rule 1(2) of the Civil Procedure Rules (CPR) before I delve into the merits of this application. It was Counsel's argument that the said grounds are argumentative and narrative and he invited this court to strike them out. The appellant's Counsel

opposed this and submitted that the said grounds are neither argumentative nor narrative. He contended that the said grounds of appeal are just particular on the points of law and fact in issue in this appeal which the trial Magistrate relied on to pass her judgment. He cited **Sulaiman V Maganda [1989] 1 KALR 138** to support his position.

In **Sietco Noble Builders (U) Ltd Civil Appeal No. 31 of 1995** it was stated by the Supreme Court that a ground of appeal must challenge a holding, a ratio decidendi, and must specify points which were wrongly decided. Failure to comply with the rule renders the ground of appeal incompetent and liable to be struck off. In **Sulaiman V Maganda** cited above it was held that the appellant has a duty to particularize the points of law and fact that are in issue on appeal, in the memorandum of appeal.

In the instant situation I find that each of the grounds mentioned, namely, 1, 2, 3, 4 and 6, which are reproduced above, did challenge the holding, the ratio decidendi, and concisely and specifically pointed out the points of law allegedly wrongly decided by the trial Magistrate. I therefore find no merit in the points of law raised by the respondent's Counsel. I decline to strike out the grounds of appeal in question.

**Ground 1: The learned trial Magistrate erred in law and fact in finding that the appellant was not vigilant enough to have inspected the land when she was a neighbor to the land.**

Learned Counsel for the appellant submitted that due diligence was done by the appellant before she bought the land in that she inspected the boundaries and there were no houses within. He cited **Uganda Posts and Telecommunications V Lutaaya Civil Appeal No. 36 of 1995** to support his position. He also referred to where PW1 testified that Dr. Samula had a land title and the land was registered at the time of purchase. Counsel maintained that the appellant was aware she was purchasing registered land and was not under duty to inquire how the seller acquired title since all circumstances clearly showed that the seller was the rightful owner of the suit land. He submitted that PW2 corroborated the evidence of vacant occupation on page 10 of the record of proceedings. He submitted that the trial Magistrate relied on the hearsay evidence of DW1 when she concluded that the appellant was not taken around the suit land or vigilant enough to have inspected when she was a neighbor. He contended that in fact the appellant was taken around the boundaries of the suit land as per the evidence on page 7 paragraph 7 of the record of

proceedings, in addition to being a neighbor and knowing the suit land well. He also contended that the seller had a title to the land who guaranteed good title and/or a refund of the purchase price with interest in case of default.

The respondent's Counsel submitted that the trial Magistrate was right to hold that the appellant was not vigilant enough to have inspected the suit land before buying the same from Dr. Samula. He stated that the adduced evidence reveals the appellant as having stated that being a neighbor she was aware of the land she was buying and it was not necessary to be taken around the whole land. He argued that if the appellant had been vigilant she ought to have been in the position to establish that the land is encumbered, because the respondent's house which the appellant claimed to be at a distance is actually on the suit land. He also referred to where PW3 stated that he found a house on the land before he sold same to Nambi (appellant), that Nambi did not object to carry out an investigation, that he sold the land well aware there was somebody, and that Nambi said she could settle it. He submitted that this implied that by the time PW3 sold the land there was indeed a house occupied by some people. He contended that this contradicts the appellant's statements that she inspected the boundaries of the land, that there were no houses on the land, and that it was not occupied.

It was also submitted for the respondent that the appellant fell short of fulfilling the extent of inquiries she ought to have carried out as required in the cited case of **Uganda Posts and Telecommunications V Lutaaya**. He submitted that the appellant's statement that she was a neighbor was disputed by the witnesses who testified at the *locus* that their first time to see the appellant was when she started claiming ownership of the land. He referred to the testimony of DW2 the Local Council Chairman of the area that the first time to see the appellant was in 2007 when she reported to him matters concerning the suit land. He referred to the appellant's allegation that she is a neighbor as a fabrication. He submitted that if the appellant had carried out thorough inquiries before buying the suit land she would have been in position to know that the respondent had an interest in the same, and that her buying the same without making such inquiries raises an irresistible presumption that she had intentions of defeating the respondent's interest in the suit land. He cited **Omar Salim Mukasa V Haji Muhamad Ojara [2006] HCB 114** to support his submissions.

In **Uganda Posts and Telecommunications V Lutaaya Civil Appeal No. 36 of 1995**, Karokora JSC held that a mere search of a register is not enough. One ought to inquire beyond the register provided one is aware that another person had another interest in the land.

In her judgment, page 2 paragraphs 3 and 5, the trial Magistrate stated as follows:-

*“Still in cross examination, the plaintiff told court she was not taken around when she was purchasing land by Dr. Samula. She added it was not necessary to be taken around as she was aware of the land she was buying. She further said she did not need to visit the plot as she was a neighbor to the land she bought...Still in cross examination plaintiff told court at the time of purchasing the land there were no occupants on the land.”*

The trial Magistrate then, in paragraph 1 of page 8 concluded in part, as follows:-

*“First and foremost, the plaintiff was not vigilant enough to have gone to inspect the land she was purchasing to establish whether or not there was occupation on the land. She told court it was not necessary because she knew the land as she was a neighbor to the land (sic) in my view it was wrong for the plaintiff to make such assumption in this age and error (sic) where land matters have become so sensitive. She ought to have ascertained whether or not there were other interests on the land before purchasing it.”*

The record of proceedings, on the last paragraph of page 7 however indicate the appellant as testifying in cross examination as follows:-

*“...I do not have the sales agreement when Dr. Samula bought the land. He had a title. I did not ask him the agreement. I bought 2 hectares. I inspected the boundaries of the land. There were no houses within. When I bought that land the defendant’s house was a distance not on my land. I was not taken around the whole land by Dr. Samula. It was not necessary. By the time I bought the land I was aware of the land I was buying. I did not need to visit the plot. I am a neighbor to that land I bought...”*

I find nothing in the plaintiff/appellant’s testimony in cross examination to suggest that she never inspected the suit land when she bought it. On the contrary she was specific that she inspected the boundaries of the land and there were no houses within. She however testified that she was not taken around the whole land. This does not necessarily mean that she never inspected the

land. It is her evidence that she inspected it, only that she did not cover the whole land. She explained that it was not necessary to do so since she was a neighbor to the land. This evidence was corroborated by PW2 the caretaker of the suit land who in cross examination testified that he started caretaking the land in 2003 and by that time there were no developments on the land.

In view of the adduced evidence on record, and the legal authorities on the issue, it is my opinion that the learned trial Magistrate erred in law and fact when she concluded that the plaintiff was not vigilant enough to have gone to inspect the land she was purchasing to establish whether or not there was occupation on the land.

I therefore allow ground number 1 of this appeal.

**Ground 2: The learned trial Magistrate erred in law and fact in finding that Dr. Samula's failure to show the sale agreement between himself and the respondent's father affected the appellant's rights to the land.**

**Ground 3: The learned trial Magistrate erred in law and fact in holding that neither Musoke nor Nakate had sold the land to Dr. Samula on which the respondent had constructed houses.**

**Ground 4: The learned trial Magistrate erred in law and fact in finding that PW2 Dr. Samula, failed to prove that he acquired lawful interest from Musoke despite possessing the certificate of title.**

**Ground 7: The learned trial Magistrate erred in law and fact when she held that the respondent was not a trespasser on the suit land.**

Counsel for the appellant submitted that the failure to show a sale agreement did not in itself vitiate the sale and cannot have negatively affected the rights of the appellant buyer. He argued that a contract can be oral, written or implied from the conduct of parties under section 10 of the Contracts Act. He referred to page 14 of the record of proceedings where PW3 testified that he bought the land from George William Musoke and Nakate but he lost the agreement, and that the evidence of loss was not contradicted on cross examination. He faulted the trial Magistrate's holding that PW3's failure to produce a witness to the sale transaction, or his statements to court about the LC1 being present when he also said he was only with musoke as a contradiction. He

submitted that the Magistrate omitted to take into account the evidence of PW3 that the LC1 Chairman was present, and that of Naziwa Paulina at the *locus* that PW3 bought the land from Musoke.

It was also submitted for the appellant that the trial Magistrate erred in holding that PW3 contradicted himself in as far as the area he bought from Musoke was concerned because there was a fence between Nakate and Musoke's land, and wrongly concluded that neither Musoke nor Nakate sold land to PW3. Counsel for the appellant contended that the Magistrate ignored the evidence that Musoke had a big piece of land which was surveyed without objection, before Musoke passed away in 1995 and there were no encumbrances or occupants on the land. He submitted that possession of a certificate of title was conclusive evidence of title unless fraud is pleaded. He concluded that when Musoke sold the land to Dr. Samula PW3, Musoke's kibanja interest and that of his successors in title extinguished, and that therefore the Magistrate erred in law and fact in holding that the respondent was a lawful occupant.

It was submitted for the respondent that the burden was on the appellant to prove that Musoke had sold part of his kibanja to Dr. Samula under sections 101, 102, 103, and 104 of the Evidence Act. Counsel for the respondent argued that Musoke's relatives, area chief or the residents were not present when the sale allegedly took place, and that as a highly educated man, PW3 ought to have known the value of written agreements especially in land matters. He argued that PW3 did not bother to get a copy of the agreement from the LC of the area whom he was referring to in his testimony. He argued that there was no way the trial Magistrate could have relied on the evidence of PW3 which was full of contradictions. He reasoned that Dr. Samula had to prove that before acquiring the title deed he settled the interests of the respondent's father as a tenant on the suit land for it still subsisted even though the appellant had acquired a title deed in respect of the land. He also submitted that the trial Magistrate did not err in finding that neither Musoke nor Nakate had sold the suit land to Dr. Samula, arguing that this would have conflicted with the appellant's pleadings that Dr. Samula bought the land from the respondent's father. He contended that the appellant is precluded from departing from her pleadings under order 6 rule 7 of the CPR. He also submitted that the appellant's title is subject to the interests of the respondent as a customary tenant who derives interest from his father.

The trial Magistrate's findings on page 8 of her judgment are that Dr. Samula failed to produce evidence to show that Musoke actually sold him his interest in the land. She reasoned that Dr. Samula failed to produce the agreement of sale which is so crucial in contractual relationship especially on things to do with land, and that he also failed to produce a witness to the transaction. She concluded that neither Musoke nor Nakate sold to Dr. Samula

The appellant pleaded in paragraph 4 of the plaint that she was the registered proprietor of the suit land having purchased the same from Dr. Samula who in turn purchased it from the defendant's father. Dr. Samula testified as PW3 that he bought land (kibanja) from two people Musoke and Nakate, that he got a title to it when Musoke was still alive, after the land had been surveyed. This evidence is corroborated by exhibit **P1** the certificate of title which shows the first registered proprietor of the suit land to be Dr. George William Ssamula who got registered on 25/08/1993 while the appellant got registered on the land 21/12/2007. In cross examination Dr. Samula testified that he lost the sale agreement but that the LCs have a copy.

Section 59 of the Registration of Titles Act (RTA) states that a certificate of title is conclusive evidence of title and it cannot be impeached except for fraud. In my opinion, the trial Magistrate erred in law when she ignored exhibit **P1** and instead based her decision on the fact that Dr. Samula who sold to the appellant had failed to produce the sale agreement between him and Mr. Musoke. In this case no fraud had been pleaded by the defendant as to prompt court to inquire and deliberate on the transactions behind exhibit **P1** which the trial Magistrate never referred to at all yet it had been admitted in evidence and was not contested by the respondent. I find no merit in the submissions of learned Counsel for the respondent that the burden was on the appellant to prove that Musoke had sold part of his kibanja to Dr. Samula, or that as a highly educated man, Dr. Samula PW3 ought to have known the value of written agreements especially in land matters, or that PW3 should have bothered to get a copy of the agreement from the LC of the area, or that the appellant had a duty of proving that the respondent's father was compensated in respect of his interest to the suit land, or that the appellant did not adduce any such evidence. The appellant did produce a certificate of title exhibit **P1** to prove her interest in the land and it was not challenged for fraud. That should have settled the matter.

It is my finding that the learned trial Magistrate erred in law and fact in finding that Dr. Samula's failure to show the sale agreement between himself and the respondent's father affected the



appellant's rights to the land. I allow grounds 2, 3, 4 and 7 of this appeal which were argued together.

**Ground 5: The learned trial Magistrate erred in law and fact in holding that the respondent was a lawful occupant on the appellant's land.**

The trial Magistrate stated in paragraph 2 page 9 of her judgment that that it was proved that the defendant's father had settled on the land for many years even before Dr. Samula and the plaintiff came into the picture. She concluded that that makes the defendant's interest fall within the description of section 29(1)(c) of the Land Act.

A lawful tenant under Section 29(1)(c) of the Land Act is a person who has occupied land as a customary tenant but whose tenancy was not disclosed or compensated by the registered owner at the time of acquiring the leasehold certificate of title.

Counsel for the appellant submitted that the kibanja interest of the defendant's father extinguished upon the sale of the kibanja to the defendant. He submitted that the evidence shows that when the appellant bought the land there was no one on the land, but that the trial Magistrate did not consider it. He argued that the respondent in the given circumstances cannot be a lawful occupant of the suit land under section 29(1)(c) of the Land Act. The respondent's Counsel however submitted that there was evidence to show that the respondent's father was the one in occupation of the suit land before the appellant and PW3 became the registered proprietors of the same. He argued that the late Musoke falls within the definition of a lawful tenant and that the said interest passed on to the respondent who holds letters of administration to the estate of the late Musoke.

There is evidence on record corroborating the evidence of PW3 Dr. Samula that he bought some land from Musoke. At the *locus*, Naziwa Paulina told court that PW3 had bought land from Musoke. The adduced evidence further reveals that the eventual leasing of the suit land to Dr Samula after he purchased the kibanja was preceded by survey and demarcation of the land when Musoke was still alive. The fact that the land was eventually registered in the names of Dr. Samula would infer that Musoke did not raise any objections or claim interest in the same, or if he did it was settled. There is also adduced evidence like in the testimony of PW1, PW2 and PW3 that the land was not encumbered. PW1 testified in cross examination that the land had no

occupants at the time she bought it and there were no buildings on the plot. This was corroborated by PW2 the caretaker who testified that by the time he was caretaking there were no developments on the land but that structures were constructed in 2008. PW3 also stated that he did not put developments on the land. This evidence was hardly considered by the trial Magistrate in making her decisions.

I have already made a finding that Dr. Samula's certificate of title which he transferred to the appellant is conclusive evidence of ownership except where it is impeached for fraud. There is no evidence in this case that the said title was impeached for fraud. I would in that respect agree with Counsel for the appellant that when Musoke sold his kibanja to Dr. Samula his interest in the same ceased. It follows that even the administrators of his estate and or successors in title could hold no claims on the same land. Thus section 64(2) of the RTA cited by Counsel for the respondent which would make the appellant's title subject to the defendant's claims is not applicable in this case where evidence is clear that there are no such subsisting claims. What is evident from the evidence adduced is that the respondent's father sold his interest to Dr. Samula who in turn sold to the appellant. The defendant/respondent remains a neighbor on the land who however wants to encroach on what his father sold as revealed by the evidence on record. This goes against the trial Magistrate's conclusion that the plaintiff/appellant's ownership is subject to the defendant/respondent's interest.

It is my finding that it was erroneous in law and in fact for the trial Magistrate to hold that the respondent was a customary tenant or lawful occupant on land which his father had long sold. Ground number 5 of the appeal is allowed.

**Ground 6: The learned trial Magistrate erred in law and fact when she found that there was no evidence to show that the respondent's father had been compensated.**

The trial Magistrate stated in paragraph 3 of page 9 of her judgment that there is no evidence that the plaintiff compensated the defendant on that land or that PW3 had acquired Musoke's interest on the land. She accordingly found that the plaintiff had not proved her case on a balance of probabilities.

The appellant's Counsel submitted that clear direct oral evidence of PW3 that he bought the land was ignored by the Magistrate. He argued that there was no evidence on record to support the

trial Magistrate's conclusions. He submitted that since the respondent's father had sold the land, the issue of compensation could not arise. The respondent's Counsel on the other hand argued that the appellant had a duty of proving that the respondent's father was compensated in respect of his interest to the suit land and the appellant did not adduce any such evidence. He contended that the mere testimony of PW3 that he paid the respondent's father four million shillings was not enough and he should have gone further to prove such payment. He argued that since PW3 failed to prove that he settled the interests of the respondent's father, his title which he transferred to the appellant was subject to the subsisting interests.

There is evidence of PW3 that he bought the suit land from two people Musoke and Nakate. PW3 testified that he paid four million shillings to Musoke but he lost the sale agreement. There is also evidence that he was eventually registered as the leaseholder of the land and passed on the interest to the appellant. At the time he was registered Musoke did not raise any objections. In my opinion, the issue of compensation could not arise in this case where there was purchase of land and the purchaser eventually registered the land in his names without objection from the seller. I therefore find that the trial Magistrate erred in law and fact when she found that there was no evidence to show that the respondent's father had been compensated. I allow ground 6 of the appeal.

**Ground 8: The learned trial Magistrate erred in law and fact by failing to properly evaluate the evidence on civil suit no. 32 of 2008 and thereby reached a wrong conclusion.**

Counsel for the appellant submitted that the loss of the sale agreement by PW3 could not vitiate the sale. He also submitted that there were no major contradictions in the evidence of PW3 as to lead the trial Magistrate to doubt his evidence. He contended that minor contradictions and inconsistencies which do not go to the root of the case can be explained by forgetfulness due to lapse of time. He also submitted that the trial Magistrate erred when she entertained the evidence of Naziwa Paulina and Fred Sengendo when the said witnesses had not given evidence in court. He submitted that the purpose of a *locus in quo* visit is to enable witnesses who testified in court to clarify on the evidence they adduced in court. He cited **Yeseri Waibi V Edisa Lusi Byandala [1982] HCB 28** and **David Achar & 3 Others V Alfred Achar Aliro [1982] HCB 60** to support his position. Counsel for the respondent however submitted that the trial Magistrate took the evidence of Sengendo and Naziwa under section 100 of the Magistrate's Court's Act (MCA),

that both Counsel were given an opportunity to cross examine them, and that the appellant's Counsel was present and did not object to it. He submitted that the trial Magistrate took note of the evidence adduced in court and compared it with that adduced at the *locus in quo*, that she properly evaluated it, and that she found contradictions in the plaintiff/appellant's case which she could not rely on, and that she consequently ruled in the defendant/respondent's favour.

The trial Magistrate on page 9 of her judgment, stated as follows:-

*"...It is in my view proved that the defendant's father had settled on this land for many years even before Dr. Samula came into the picture and definitely before the plaintiff even came into the picture. This being the case it makes the defendant (sic) interest fall within the description of section 29(1)(c) of the Land Act.*

*Moreover there is no evidence that the plaintiff has compensated the defendant on that land neither was evidence adduced to prove that PW3 had acquired Musoke's interest on the land. That being the case therefore I find that the plaintiff has not proved her case on a balance of probabilities as required by law and that being the case therefore the plaintiff (sic) interest on the land by virtue of article 237(3) of the constitution, section 29(1)(c) and section 64(2) of the Registration of Titles Act.*

*The discussion also disposes of issue 2 whether the defendant was a trespasser on the plaintiff's land because you cannot be a trespasser on your own property."*

It is evident from this court's analysis of the evidence on record, which does not have to be repeated, that the trial Magistrate relied on the failure by PW3 to produce the sale agreement between himself and Musoke in court to judge in favour of the defendant/respondent. She was oblivious of exhibit **P1** the certificate of title which was conclusive proof of the ownership of the suit land, and which clearly corroborated the evidence of PW1, PW2 and PW3 as to the sale, ownership, vacant possession, and lack of encumbrance on the suit land. She delved into evidence concerning transactions on the land before registration that would only have been relevant if fraud had been pleaded by the defendant. Even then she ignored the evidence by PW3 that he bought the land from Musoke but he lost the agreement.

It is also clear from the pleadings and the adduced evidence on record that the plaintiff was alleging encroachment (trespass) on her part of the land by the defendant who however was maintaining he was properly on the land. There is undisputed evidence on record by the appellant's witnesses that the defendant cut the plaintiff's fence in 2007 and constructed structures in 2008. This evidence was not addressed by the trial Magistrate at all, yet it was vital in determining the issue of who had trespassed on whose land. Trespass is a derogation of the rights of a person entitled to possession of immovable property. In order to maintain an action in trespass the person may either be in actual possession or merely have a right to possession at the time of trespass. All this was not considered by the trial Judge.

The trial Magistrate's reliance on the evidence of witnesses at the *locus in quo* who had not given evidence in court was challenged by the appellant's Counsel. He argued that the purpose of a visit to the *locus in quo* is to enable witnesses who testified in court to clarify on the evidence they adduced in court. This was opposed by the respondent's Counsel who however submitted that the trial Magistrate took the evidence of Sengendo and Naziwa under section 100 of the MCA, that both Counsel were given an opportunity to cross examine them, and that the appellant's Counsel was present and did not object to it.

In **Yeseri Waibi V Edisa Lusi Byandala** cited above, court held that the practice of visiting the *locus in quo* is to check on the evidence given by witnesses and not to fill the gap for them or court may run the risk of making himself a witness in the case. Although there is no express provision mandating the trial court to visit the *locus in quo*, it is now a rule of practice that where an issue of encroachment arises in the course of court proceedings, the trial court may not properly determine the issue in chambers without visiting the *locus in quo* to establish the extent of encroachment and conduct and record the testimony of some witnesses if any at the *locus*.

In this case the trial Magistrate invited other witnesses namely Naziwa Paulina and Fred Sengendo who had not testified at the trial to give evidence. Section 100 of the MCA empowers a magistrate to summon or call any person as a witness or to recall and re examine any person at any stage of any trial or other proceeding but the prosecution and defence side must be availed an opportunity to cross examine such witness.

The record indicates that the said witnesses were numbered as the plaintiff's witnesses, that is, Naziwa Paulina as PW2 and Fred Sengendo as PW3. However they were cross examined by both Counsel after their sworn testimonies at the *locus*. In my opinion, the trial Magistrate was in order to call the two witnesses under section 100 of the MCA, only that she recorded them as the plaintiff's witnesses instead of recording them as court witnesses. However since both witnesses were cross examined by each Counsel, this did not prejudice the plaintiff's or the defendant's case. In any case, the appellant's Counsel did not object to the calling of the witnesses and he participated in their cross examination. On this point therefore, I would not agree with the appellant that the trial Magistrate erred when she called other witnesses during the visit to the *locus in quo* since she has powers to do so at any stage of the proceedings and a *locus in quo* visit is one such stage of court proceedings.

All in all however, I agree that the learned trial Magistrate erred in law and fact by failing to properly evaluate the evidence on civil suit no. 32 of 2008 and thereby reached a wrong conclusion. For the foregoing reasons, I allow ground 8 of this appeal in part.

In the final result this appeal is allowed. The judgment and orders of the lower court are set aside. The appellant is the registered proprietor and lawful owner of the land. The respondent is a trespasser on the appellant/plaintiff's land and should leave the said land with immediate effect. The appellant/plaintiff is awarded costs of the appeal here and in the court below.

**Dated at Kampala this 6<sup>th</sup> day of December 2012.**

**Percy Night Tuhaise**

**JUDGE.**