



5 Counsel for the Appellants filed a Memorandum of Appeal with the following grounds: \_

- 1). That the learned trial magistrate erred in both law and fact when she failed to Judiciously evaluate the evidence on record thereby coming to an erroneous decision.
- 10 2). That the learned trial magistrate erred in both law and fact when she decided to reopen the case for hearing of witnesses during locus and based part of her decision on it.
- 3). That the learned trial magistrate erred in both law and fact when she dismissed the counter-claim brought by the appellant.
- 15 4). That the learned trial magistrate erred in both law and fact when she injudiciously decreed the suit land to the clan of Atekok and the defendant.
- 5). That the Judgement of the learned trial magistrate is against the evidence on record.
- 6). That the Judgement of the learned trial Magistrate has occasioned a total  
20 miscarriage of justice.

Before addressing the grounds of Appeal, the role of the first Appellate Court has to be addressed since this is a first Appeal from the decision of the Chief Magistrate to the High Court. This role was properly articulated in the case of *Selle and Another vs Associated Motor – Boat Ltd and Others (1968) E.A*  
25 *123 at Page 126* where Justice Clement De Lessing stated the role of the first Appellate court as follows: \_

30 *“An Appeal.....is by way of retrial.....the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect.”*

5 The same principle role was referred to in the case of *Fredrick J.K. Zaabwe vs Orient Bank Ltd & 05 Others, SCCA No. 4 of 2006* by the Supreme Court of Uganda.

In re-evaluating the evidence and subjecting it to a fresh scrutiny, the issues raised at trial and the evidence adduced by both parties in order to resolve the grounds  
10 presented in the memorandum of appeal is considered accordingly.

Resolution of Appeal:

Ground 1 and 3:

*Ground 1: That the learned trial magistrate erred in both law and fact when she failed to judiciously evaluate the evidence on record thereby coming to an  
15 erroneous decision*

*Ground 3: That the learned trial magistrate erred in both law and fact when she dismissed the counter-claim brought by the appellant.*

Grounds 1 and 3 are considered together as they present with similar issues. The perusal of the lower court record in respect of these two grounds show the  
20 following;

PW1 Apacu Karoli testified that he has sued the defendant because he encroached on his land of about half a garden which belonged to his father Obulengo Joseph which now belongs to him for he had inherited it from his father. That he had been utilizing the land since he inherited it. That the defendant had trespassed and  
25 constructed on it. That the plaintiff had inquired from his father who told him that the defendant had come to settle there due to the insurgency and that he was going to be there for a short time and would go back to his place after the situation settled.

That when peace returned after his father's death, he approached the defendant  
30 who claimed to have purchased it from the plaintiff's father.

- 5 In cross examination, PW1 confirmed that Obulengo Joseph is not his biological father but an uncle. He also added that Obulengo had 2 children one died and the other is 18 years old and he is the guardian and that is why he is occupying Obulengo's land. That Obulengo had a right to sell off his land but at least with the knowledge of the family and clan members and neighbours.
- 10 PW2 Esapu Wilbert testified that the land belonged to the plaintiff as he got it from the father Obulengo Joseph. He also confirmed how pw1's testimony on how the defendant got on the land and how he was later claiming to having bought the same and yet there was no clan member who signed the agreement.

On the defense side

- 15 DW1 Eragu Wilbrod testified that the land in dispute is 11 acres which he bought from 3 people. The 1<sup>st</sup> land from Obulengo Joseph who sold him six gardens at 100,00/= and 2 bulls. That it was sold to him in 1999, an agreement was written and was signed by Odongo Vincent, Anoku Micheal, Ajibo Hellen. He does not remember the exact date and the agreement was written by him. He also added
- 20 that he paid in installments and lost the Original agreement during the insurgency. He had photocopied and kept them with Anoku Micheal. He also testified that, he purchased land from Ogulo Emikaya in 200 and the transaction was documented. He also added that he bought another garden from Obito Emikaya in 2002 at 250,000/= and paid it in installments until he cleared.
- 25 He then bought land from Obulengo and Ogulo 1 garden at 170,000/= still in 2001, paid in installments and there are agreements to that effect written by him. He also testified that he bought land from Oreto Vigilio at 200,000/= in 2003 which transaction was documented by him.
- 30 That in 2001, he moved and settled there and in 2006 he received summons from the Atekok clan complaining about all the land. That he told the clan he had bought the land and judgement was entered in his favor.

5 That in 2007, he received a call again and was defeated and they said they would refund his money and animal that he had paid for the clan land.

In cross examination, in respect to DE1, he stated that the document represents his transaction with Obulengo Joseph who thumb printed but the thumb print cannot be seen.

10 That in respect to DE2 the seller thumb printed but the thumb print cannot be seen and there was no witness on the part of the vendor. And the same applied to DE3.

In respect to DE4, he stated that Emikaya Ogulo witnessed the transaction and his witness was Obulengo, Obulengo this time made to write his name as a signature.

15 in respect to DE5, he stated that, he purchased land from Ogulo, Ogulo did not sign the agreement because there was no ink for thumb printing. That he personally did not sign the document yet he is the one who wrote it.

That Ogulo did not sign the agreement in respect of DE6 but the fresh ink appearing on the photocopy had fresh ink which he stated was entered on  
20 8/2/2008 to give balance which was not paid but the vendor did not acknowledge receipt.

In respect to DE7 that there was a transaction between Obulengo Joseph and Mikaya and me it was in respect of one garden, the defendant is the one who wrote the agreements, the vendor did not sign, defense signed, they did not write  
25 their names on the sale agreement.

In respect to DE8 he stated that Oreta did not sign but he brought only witnesses but signed for the second installment. That Oreta did not sign for the last installments but his witnesses Ajiko Hellen and Aelo Janet Signed his neighbours.

Dw2 Anoku Micheal stated that, the defendant told him to go since he was a  
30 builder to take measurements of the land since he had paid. That they went and

5 found Obulengo and other members of the community seated but did not mention the names of the other community members.

He further stated that Obulengo led them where the land was. That the next three gardens from Ogulo Mikaya he was not around during the purchase. That he was given some of the agreements to keep.

10 In cross examination he stated that he has never bought land but has experience. That one cannot inspect nor measure land if you have not fully purchased and paid the amount in full. He further testified that, he never witnessed any documents his work was just to confirm the size of the land.

He also added that it would be a lie if his name appears on any of the agreements.  
15 But later when the document DE3 was showed to him, he stated that his name appears on the document and he signed the document.

In re-examination, he stated that his name appears in the completion document where one bull was paid in senior quarters not Obulengo court and yet the document DE3 shows Obulengo not senior quarters.

20 Dw3 in cross examination stated that on DE2, the parties both did not sign on the agreement.

In resolving this ground, a look at the law in regard to contracts and agreements is necessary. Such a law is The Contracts Ac. It provides for some definitions which are relevant herein.

25 **Section 2 of the Contracts Act** defines what agreement is. It states that;

**“Agreement” means a promise or a set of promises forming the consideration for each other.**

The said **Section 2** also defines a Contract as;

5           **An agreement enforceable by law made with free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound”.**

(See also Section 10 of the said Act.)

In the case of *Greenboat Entertainment Ltd Vs City Council of Kampala H-C-*  
10 *C-S No. 0580 of 2003* court defined a contract as;

*“In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be: capacity to contract; intention to contract; consensus and idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in*  
15 *a given transaction any of them is missing, it could as well be called something other than a contract”.*

Section 101 of the Evidence Act provides that the burden of proof lies with one who alleged and must be proved on the balance of probability.

In this case it is the plaintiff and counterclaimant to prove his case.

20 The history of this case is that the plaintiff sued the defendant for recovery of land which he claims belongs to him as it was donated to him by Obulengo Joseph while the counterclaimant claims that he purchased the same from Obulengo Joseph.

The plaintiff failed to prove the fact that the land belonging to Obulengo Joseph as his but rather informed court that he is a guardian to the surviving child of  
25 Obulengo Joseph.

**Section 1 (k) of the Children Act** defines a guardian as a person having parental responsibility for a child.

**Section 43 h (1) of the Children (Amendment) Act, 2016** provides;

5           **“...all persons appointed as guardians have parental responsibility for the child ...”**

**Section 1(o) of the Children Act, Cap.59** states that;

10           **“Parental responsibility means all rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child.”**

The plaintiff did not prove to court by showing to it any evidence that he was the child’s guardian in order to bring the suit.

15           Given such an anomaly, I would be constrained to agree with the trial magistrate that the plaintiff had no *locus standi* in the first place to bring the suit as a representative of the child.

In respect to the defendant’s counter claim, he stated that he purchased the land from 3 people including Obulengo Joseph.

20           He tendered in court eight (8) documents which were not witnessed by any of the vendor’s family members or clan mates. Indeed, some of the documents were not even signed by the vendor and the buyer with others having thumbprints which could not be seen yet the said documents were stated to be evidence of purchase.

With such anomalies, it is absolutely difficult to confirm actually that the buyer surely purchased the land as claimed in the counterclaim. The counterclaim is thus left supported.

25           Given such scenario, I would agree with the finding of the trial magistrate that the counter claim is tainted with anomalies and as such is cannot be sanctioned by court. This ground of appeal fails.



5 Ground 2:

*That the learned trial magistrate erred in both law and fact when she decided to reopen the case for hearing of witnesses during locus and based part of her decision on it.*

10 Counsel for the appellant stated that the magistrate erred in law when she decided to reopen the case for hearing of witnesses during locus and based part of her decision on it. The trial court visited *locus in quo* at Ogoloi, Arabaka in Arapai Soroti district.

The practice of visiting the *locus in quo* is to check on the evidence by the witnesses and not to fill in gaps in their evidence for them or lest court may run  
15 the risk of turning itself into a witness in the case. See: ***Fernades v Noroniha [1969] EA 506 & Nsibambi v Nany [1980] HCB 81.***

That being said, although it is not mandatory in all cases for court to visit the *locus in quo*, during the hearing of land disputes, the court is required to take keen interest in visiting the *locus in quo* such that whatever transpires at the locus in  
20 quo which is ordinarily conducted after the full trial, is to be recorded as part of the proceedings, with accuracy. See: ***Practice Direction No. 1 of 2007 by the Chief Justice.***

Counsel for the appellant submitted that by declaring of the land to be of the Atekok Ikaalan clan, the trial magistrate, solely relied on the additional evidence  
25 received from the respondent during locus which should not have accorded the weight it deserved.

In the case of ***Turyahikayo James & 2 others v Ruremire Denis [2012] UGHC 157***, it was held that irregularity in receiving evidence at the *locus in quo* does not *per se* render the proceedings a nullity provided that the court can make an  
30 effective, practicable and workable decision that resolves the conflict on the merits of the case.

5 From my perusal of the records of the lower court, I have noted that the trial  
magistrate's decision in accepting additional evidence from the defendant did not  
render the proceedings a nullity as information was important, as the said  
information helped the court to arrive to the final decision in respect to the  
ownership of the suit land and which is one of the purposes of *locus in quo* visit.  
10 I, therefore, find nothing wrong with the trial magistrate receiving additional  
information at the *locus in quo* from the defendant who had in any case testified  
in court and merely added additional information for the clarification of evidence  
already received in court. This ground thus would fail.

Grounds 4,5 and 6:

- 15 *4. That the learned trial magistrate erred in both law and fact when she  
injudiciously decreed the suit land to the clan of Atekok and the defendant.*
- 5. That the Judgement of the learned trial magistrate is against the  
evidence on record.*
- 20 *6. That the Judgement of the learned trial Magistrate has occasioned a  
total miscarriage of justice.*

Having considered the evidence on record presented by both parties and as  
already found, it is clear to me that the plaintiff had no *locus* to bring the suit as  
he failed to prove to court as to under what capacity he had instituted the suit.  
Furthermore, the defendants and the counterclaimant also failed to show court  
25 that he indeed acquired the land by purchase for him to have obtained good title  
in respect of the land.

With these findings, I am in agreement with the learned trail magistrate that the  
suit land to belongs to the clan of Atekok clan as the so-called vendors did  
originate from the said clan.

30 Accordingly, this appeal is found to have no merit. It is thus dismissed.

5 Order:

- This appeal is found to lack merit.
- It is dismissed with costs to the respondent.
- The decision of the lower court *in toto* is upheld.
- Each party to bear own cost in the lower court in any event.

10 I so order.



.....  
Hon. Justice Dr Henry Peter Adonyo

Judge

15

5<sup>th</sup> September, 2022