The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Appeal No. 50 of 2022

(Arising from the Chief Magistrate's Court of Soroti at Soroti Land Claim No. 089 of 2012)

1. Abiro Paulina
2. Iilu Grace ::: Appellants

Versus

Eweru Joseph *(Administrator for the estate of the Late Audo Mary Eweru)* ::::::::::::::::: Respondent

(Appeal from the Judgement and Orders of the Magistrate Grade 1's Court vide Civil Suit No. 089 of 2012 of the Chief Magistrate's Court of Soroti at Soroti delivered by His Worship Pirimba Emmanuel on 09th September 2022)

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

1. Background:

The plaintiffs' (now appellants') sued the defendant (now respondent) vide Land Claim No. 089 of 2012 for; recovery of customary land measuring approximately five gardens located in Arute village, Abeko parish, Ogolai sub-county, Amuria district, a permanent injunction, vacant possession and costs of the suit. That at all material times, the appellants are the sole owners of the suit land for about twenty-five years, having inherited it from their late husband, Eliu Lawrence, who passed away on 12/12/1994 and was buried on the suit land.

On the other hand, the respondent denied the appellants' claim and contended that she is the owner of the suit land by virtue of having inherited it from her late husband, Eweru William and that she had at all material times been in possession of the same jointly with her husband since 1973. Upon the death of Eweru William in 1990, the respondent continued to enjoy quiet possession of the suit land until 15th January 2012, when one Ejimu John, with the appellants, made attempts to interfere with that quiet possession and her ownership by attempting to erect a structure on the suit land without any right which prompted her to approach the authorities eventually procuring the arrest and preference of criminal charges against the appellants vide Criminal Case No. SOR-15CR-CO-70/2012. That in delivering its judgement, the trial magistrate in the said case made pronouncements on ownership to the effect that the suit land belongs to the respondent.

The issues that the trial court resolved were;

a) Who is the rightful owner of the suit land?
b) Whether the plaintiffs are trespassers on the suit land?
c) What remedies are available to the parties?

In its judgement delivered on 9th September 2022, the trial court found in favour of the respondent with the following declarations and orders;

a) A declaration that the suit land belongs to the defendant
b) a declaration is that the plaintiffs are trespassers on the suit land without the consent or authorisation of the defendant
c) Costs of the suit are awarded to the defendant.

Being dissatisfied with the decision which was entered in favour of the defendant/respondent, the plaintiffs/appellants appealed to this court.

2. Grounds of Appeal:

According to the memorandum of appeal, the appellant raised three grounds of appeal as follows;

a) That the learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record hence arriving at the wrong decision.
b) That the trial magistrate perfunctorily conducted the visit to the locus in quo hence arriving at a wrong decision.
c) That the decision of the trial magistrate has occasioned a miscarriage of justice upon the appellants.

The appellant proposed the following orders;

a) That this appeal is allowed.
b) That the Judgement and Orders of the Grade 1 Magistrate Court be set aside.
c) Costs be awarded to the appellant and in the court below.

3. Duty of the first appellate court:

This is the first appeal from the decision of the learned magistrate, and therefore, the duty of the first appellate court is to scrutinise and re-evaluate all the evidence on record in order to arrive at a fair and just decision.

This duty was well laid down in the case of ***Kifamunte Henry vs Uganda SCCA No. 10 of 1997***, where it was pointed out that;

> ***"The first appellate court has a duty to review the evidence of the case and to reconsider the material before the trial judge. The appellate court must then make up its own mind, not***

disregarding the judgment appealed from but carefully weighing and considering it."

Where there is conflicting evidence, then the appellate court has the duty to make allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions as was pointed out in ***Lovinsa Nankya vs Nsibambi [1980] HCB 81***

Furthermore, in the case ***Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236,*** the obligation of a first appellate court was pointed out as being;

"...under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion."

4. Power of the Appellate Court:

Section 80 of the Civil Procedure Act, Cap 71, grants the High Court appellate powers to determine a case to its finality.

The above legal positions in regard to the duty, legal obligation and the power of the first appellate court are considered while resolving this appeal.

5. Representation:

In this appeal, the appellants are represented by M/s Obore & Co. Advocates, while the respondent was represented by M/s Legal Aid Project of the Uganda Law Society.

Counsel representing the parties argued this appeal by way of written submissions. The submissions and the whole record of the lower court,

including pleadings, proceedings, judgement, and orders, are considered while resolving this appeal.

6. Determination:

Both Counsel chose to argue the grounds in their order, and I shall resolve them as such.

a. Ground One:

That the learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record hence arriving at the wrong decision.

Counsel for the appellants avers that in the appellants' witness statements, they averred that the respondent's mother -Audo Mary, from whom he holds Letters of Administration, never lived on the suit-land and that her land was adjacent to the suit-land and upon the death of her husband around 1986, she migrated to Agwara village, Abia parish, Kuju sub-county, Amuria district where she lived until she passed on around 2021. Counsel contends that it was around 2012 that she started laying claims to the suit-land, causing the arrest and conviction of the appellants in Amuria Court, compelling them to file this suit in the lower Court.

Counsel asserted that on **Page 25 of the proceedings,** the then defendant, Audo Mary, conceded to the fact that she resides in Agora village, Abia parish, Kuju sub-county, Amuria district, different from the suit-land, which is located in Arute village, Abeko parish, Ogolai sub-county, Amuria district.

Counsel for the appellants contends that the respondent's (DW1's) testimony on **Page 26 of the proceedings,** that she filed the case in Amuria when the plaintiffs/appellants came onto her land and started construction, yet she was

in occupation before 2012, counsel submits that it does not make sense at all in his view because if the respondent's mother were in occupation of the suit-land before 2012 when she caused the arrest and conviction of the appellants, there would have been no reason for her to have migrated to Agora when the appellants allegedly trespassed on the suit-land by way of cultivation.

That she would have been the one to file this Civil Suit No. 89 of 2012 against the appellants if she was aggrieved by their occupation of the suit land. Counsel adds that interestingly DW1 evaded telling the trial Court when she left the suit-land but her own witnesses from the proceedings confirm that she never occupied the suit-land as she alleges.

To support the assertion, counsel for the appellants submits that on **page 29 of the proceedings** during the cross-examination of **DW2 (Ayuro Mary),** who married in the same family as the respondent's mother **(Audo Mary), DW2** averred that the plaintiffs are cultivating on the land, they have used the land for many years, they also cultivated the land during insurgency and that Audo (DW1) does not live in the area.

Counsel for the appellants further averred that on p**age 13 of the proceedings, PW2, Iilu Grace** averred that Ayuro (DW2) is supposed to be on the other side with Audo, and Audo has her place where she is supposed to be but has abandoned it and come to our side and that the testimony of the respondent's own witness (DW2 Ayuro Mary) during cross-examination on **Page 29 of the proceedings** confirms the foregoing, that DW2 testified that her sons are staying in the old homestead where the husband of the defendant and his son were buried. Counsel for the appellants argues that the respondent's father and brother would not have been buried in the land where DW2's (Ayuro's) sons live if they did not own that particular piece of land. To counsel, it is not

a coincidence that both the respondent's late father and brother were buried in the same land and that the existence of the old homestead occupied by DW2's (Ayuro's sons) gives credence to the 2nd Appellant's testimony that the respondent's father occupied that piece of land in his lifetime and that his late mother (Audo) without any justification abandoned her rightful share of land to lay claims to the suit-land which she had never ever utilised at all in her lifetime.

Counsel for the appellants contends that on **page 30 of the proceedings, DW2 (Ayuro)** confirmed that the appellants have occupied the suit land for a very long period of time.

Counsel for the appellants submits that on page 8 of the judgement that whereas the trial magistrate held that the evidence on record showed that the plaintiffs are in possession of the land, he held that "having found in issue one that the land belongs to the defendant, the plaintiffs/appellants were held as trespassers". Counsel for the appellants argued that if at the respondent's mother was in occupation of the suit-land way before the appellants were married as the trial Magistrate alleged, then the appellants would never have occupied the suit-land at all. Counsel argued that in regard to the holding of the Trial Magistrate, that piece of evidence was misleading as he appeared to be giving evidence from the bench as the same was never canvassed during the court proceedings.

Counsel for the appellants argued that DW2 also, in her testimony, averred that even during the insurgency, the appellants were utilising the suit-land and that her cross-examination provided very insightful evidence to which counsel wonders why the trial Magistrate disregarded her testimony.

On the other hand, and in regard to the first ground under determination, Counsel for the respondent contends that the suit land is customary land which, by virtue of Section 1(1) of the Land Act Cap 227, is defined as a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons. To that end, counsel argues that proof of ownership of customary land is based on evidence because it is based on non-titled ownership. Counsel cites the case of ***Marko Matovu and 2 others vs Mohammed Sseviiri and 2 others CA No. 7 of 1978,*** where he contends that it was held that customary land can be acquired through inheritance. Counsel avers that for one to claim inheritance of property from the deceased person, the same must have belonged to the deceased during his lifetime.

Counsel for the respondent avers that the testimonies of the appellants and their witnesses agree with that of the respondent's mother, Audo, who establishes that the respondent's mother used to utilise the suit land and was actually married to the same village. Her husband's occupation of the land and history of possession of the suit land could be traced from the late Eweru, Atidi and Eweru Isaac.

Counsel contends that this fact was not disputed and challenged by any of the appellants, their witnesses, or any evidence adduced to the contrary.

Counsel for the respondent avers that the fact that the respondent's mother sold part of the suit land without any objection from the appellants or any other person as to the ownership of the land gives the court a lot of confidence to adjudge the instant appeal with costs to the appellants since no one can sale what does not belong to him/her of which the appellants have no claim whatsoever and neither objected as the rightful owners.

Counsel for the respondent contends that the respondent's case remains strong and consistent when the appellants and their witnesses throughout their evidence, apart from denying particular facts that Audo's husband was not related to any of them, none gave any satisfying evidence on how their husband got the land in dispute and in fact, all of them were not around when the respondent's mother acquired and utilised the suit land but rather all the evidence of the appellants was from the bar a mere fact that all of them and their witnesses agreed and admitted the fact that they were all just told and it is not what they know. The respondent's counsel contends that appellants failed to challenge the admitted minutes in annexures "B, C and D, to which in ***Uganda vs James Sabuni 1981 HCB 1,*** it was held that ***"an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue."***

The respondent's counsel asserts that the appellants have failed to satisfy the court that the suit land belongs to them and how they acquired the same.

Analysis:

It is evident that counsel for the appellants based his submission for the ground under determination largely on scrutinising the evidence of DW4 during cross-examination to fault the trial magistrate's evaluation of the evidence on record.

In light of the above, it is imperative that I remind myself of Section 102 of the Evidence Act, Cap 6, which imposes the burden of proof on the plaintiff/appellant, who would fail if no evidence at all were given on either side and Section 101 of the Evidence Act which provides that whoever desires

the court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and further that the burden of proof lies on the person who is bound to prove the existence of any fact.

Furthermore, in reference to the case of Miller vs Minister of Pension [1947] 2 ALLER, the proof is on a balance of probabilities. The proof of the existence of such facts must carry a reasonable degree of probability but not as high as required in criminal cases.

Also, I refer to Section 133 of the Evidence Act, which provides that no particular number of witnesses shall, in any case, be required for the proof of any fact.

Upon perusal of the record of the proceeding, the portions of DW2's testimony during cross-examination that were spotlighted by counsel for the appellant were at variance with DW2's testimony in chief in some respects and also slightly inconsistent with DW1's averments of occupation of the suit land and her late husband's ownership thereof. But during re-examination on page 30 of the record of proceedings, DW2 clarified, and the court takes note that the plaintiffs/appellants had been on the land for about four years when the criminal case was reported in Amuria and that they took possession of the land after the insurgency. That the defendant/respondent has ever come back to the land and constructed a house and that she also planted cassava but was chased away by the appellants/plaintiffs. That there is a road which separates DW2's land from that of the plaintiffs/appellants and that the respondent does not claim the land which belongs to the appellants.

Also, counsel for the appellants scrutinised DW1's testimony during cross-examination, as already alluded to above, but upon further perusal of the record, it is my assertion that I do not find the argument that because the defendant, during cross-examination on page 25, stated that she was not staying on the suit land, it is sufficient to aver that the appellants are the owners because she DW1 at page 26 testified that she left the suit land because she was being threatened and because the appellants had settled on her land.

The Supreme Court laid down the law as to contradictions and inconsistencies in the case of ***Constantino Okwel Alias Magendo vs Uganda, SCCA No. 12 of 1990,*** where the court stated that;

> ***"In assessing the evidence of a witness, his consistency or inconsistency, unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected; minor inconsistencies will not usually have the same effect unless the trial judge thinks they point to deliberate untruthfulness. Moreover, it is open to a trial judge to find out that a witness has been substantially truthful even though he lied in some particular respect."***

Arising from the above, it is my finding that the inconsistencies pointed out by counsel for the appellants in DW2 and DW1's evidence during cross-examination were not only clarified during re-examination but were minor and thus do not supportive of the appellants' case in way as even the perusal of the record and the judgement show that the appellants and their witnesses were so inconsistent in their testimonies, leaving so many gaps and questions.

It should be pointed out at this stage that main issue before the courts relates as to who is indeed the rightful owner of the suit land.

According to the testimony of the appellants, they aver that they inherited five gardens from their late husband, Eliu Lawrence, who had been given the land by his late father Acabi Casmiri and that the land is located in Arute village, Abeko parish, Ogolai sub-county, Amuria district.

The appellants testified that they were not there when Acabi gave Eweru land and that the exchange of gifts occurred when they were not yet married to the late Elilu with PW1 stating that whatever she was telling court being what she heard from her grandfather.

On the other hand, PW2 testified that the suit land borders the centre she does not know and when it was established while PW4 stated that their late father, Acabi Casmiri, wrote a will giving Elilu Lawrence a share of his land, where the plaintiffs stay.

PW5 testified during cross-examination that when Casmiri Acabi gave land to Eweru he was not present because he was still young.

DW1 testified that she inherited the land from her late husband, Eweru William, who had also inherited it from his father, the late Atidi Honorat who was killed in 1990.

She testified that she got married to her husband in 1973 and found him living on part of the suit land and cultivating the remaining land and continued utilising the same till 1990 when Eweru William was killed.

That the plaintiffs were neighbours ever since she got married Eliu Lawrence, now deceased, in the 1980s up to 2012 when they started encroaching on the suit land forcing DW1 to stop utilising the same.

DW1 stated that the suit land is surrounded by a swamp, Abiro and the plaintiffs, Alumo Theresa and Abeko Centre. That she continued living on the suit land until 2003, when she temporarily left the land due to the Kony insurgency to Soroti and that when the situation stabilised, she could make routine visits to her home and also cultivate the suit land.

That in 2006 she was called to attend a meeting for the purposes of establishing Abeko Trading Centre since her father-in-law is one of those that gave the trading centre land.

During cross-examination, she stated that she did not leave the suit land after the death of her husband in 1990.

DW2 corroborated the testimony of DW1 and testified that the plaintiffs own a different piece of land but the plaintiffs shifted their homes from that land and went to build on the suit land yet the plaintiffs' husband had never lived on the suit land.

DW3 corroborated the evidence of DW1 and DW2 but added that the plaintiffs entered the suit land in 2012 and cultivated cassava. He also testified during cross-examination that the plaintiffs burnt down the home of DW1 and her husband.

DW2 Ayuro Mary, in her testimony, corroborated the neighbours of the suit land and also testified that it was in 2012 when the plaintiffs started encroaching on the defendant's land by altering boundaries and that they also

burnt the defendant's houses and forcefully started cultivating the defendant's land.

During re-examination, DW2 testified that the plaintiffs came to occupy the suit land after the insurgency and that when the defendant returned she used the land as she built on it a house and cultivated cassava but was chased away by the plaintiffs.

DW2 confirmed that there is a road that separates the suit land.

From the above summary of the testimonies, it can be deduced that the appellants arrived on the land way after the respondent had been earlier bought onto the land by her husband.

The respondent know consistency in testimony as well as very well knowing the neighbours of the suit land with her position clearly supported by her witnesses with no challenge to the ownership of the suit land as being that of her grandfather-in-law.

On the other hand, the ownership of the suit land by the appellants' husband was disputed with the plaintiffs' testimony of how their husband owned the land being based on hearsay for they told court that they were told but do not bring anybody to support their assertion.

Therefore, after carefully considering the evidence which was adduced before the trial magistrate, it is acceptable to note that the judgement of the learned trial Magistrate was based on proper and sufficient scrutiny of the evidence adduced by both parties before him and invariably, it is my finding that, since the respondents' witnesses were consistent in their testimonies regarding ownership of the suit land as they brought out the fact that it belonged to the

respondent through inheritance from her late husband Eweru William and that at all material times since 1973, she has been in possession except during the period of the Kony insurgency which is a notorious fact.

That fact makes the testimony more believable for the respondent clearly posits that upon the death of her husband, Eweru William, in 1990, the respondent continued to enjoy quiet possession of the suit land until 15th January 2012 when one Ejimu John, with the appellants, made attempts to interfere with her quiet possession and ownership of the same by attempting to erect a structure on the suit land.

The evidence before the trial court was to the effect that the respondent had control and possession of the land in dispute prior to 2012 when the plaintiffs/appellants forced her off the suit land.

In view of the above, I find that the respondent is undeniably the owner of the suit land, her having proved her ownership of the same, unlike the appellants who, on a balance of probabilities, failed to prove their ownership. Therefore, ground one fails.

b. Ground Two:

That the trial magistrate perfunctorily conducted the visit to the locus in quo hence arriving at a wrong decision

Counsel for the appellants avers that on page 7 of the Judgment, where the trial magistrate makes mention of a locus visit, the trial Magistrate also alleged that after the locus visit, the plaintiffs did not file written submissions which, in Counsel's view, is a total big lie.

To this, counsel for the appellant contends that they filed their written submissions on the 13th July 2022, of which a copy is annexed to the submissions on appeal, marked as "A". Counsel contends that the submissions in Civil Suit No. 89 of 2012 were served upon counsel for the respondent on the 13th July 2022 and they received the same and affixed their stamp confirming receipt as such for the trial Magistrate to allege that the plaintiffs did not file their written submission, in his view, disadvantaged because the trial Magistrate wrote the judgement before the submissions.

Counsel for the appellant cited the case of ***Ongom Stephen vs Otodo Clement and Anor Civil Appeal No. 009/2015,*** in which the case of **David Acar vs Alfred Aliro [1982] HCB 60** was cited for the holding that, ***" The purpose of a locus visit is for the witnesses to clarify what they stated in Court, they do so on oath, they must be allowed to be cross-examined.....the observation by the Learned Trial Magistrate must form part of the proceedings....."***

In Counsel for the appellants' view, the trial Magistrate unimaginatively held as follows on **Page 7 of his Judgment; "I have taken into consideration the evidence of both the documents and observation at the Locus and also submission of Counsel for the defendant in arriving at this decision.**

Counsel believed that the magistrate's observation fell short of what transpired at Locus and that the evidence of witnesses of either side, the features at the locus, and his own observations at the locus are not documented to form part of the proceedings.

Counsel for the appellants contends that they would have been interested in knowing from his locus findings if they had formed part of the certified proceedings, what features actually persuaded him at the locus to believe that

the defendant and her husband were in occupation of the suit-land long before the appellants were married on the same and secondly, how the appellants took advantage of the insurgency to deprive the respondent's mother of the suit-land and take possession of the same.

The respondent's counsel contends that the learned trial magistrate considered the evidence of both the parties while analysing the evidence at locus and testimonies in court, thus coming to a fair conclusion that the suit land belongs to the respondent.

Counsel for the respondent contends that the practice of visiting locus in quo is to check on the evidence of the witnesses and not to fill in the gaps in their evidence for them or lest the court may run a risk of turning itself into a witness in the case. Counsel asserts that though not mandatory, the court is required by Practice Direction No. 1 of 2007 to take a keen interest in visiting locus in quo, and whatever transpires thereat is recorded to be part of the proceedings, which counsel contends, that that visit confirmed the testimony of the respondent and her witnesses that the appellants are not the owners of the suit land and that the land claimed for by the appellants is different land.

It is trite that conducting a locus in quo is not mandatory but it is at the discretion of the trial Magistrate.

In ***Opio vs Onyai (Civil Appeal No. 39 of 2014 [2016] UGHCLD 35,*** Mubiru, J observed the following on locus in quo:

> ***" The purpose of and manner in which proceedings at the locus in quo should be conducted has been the subject of numerous decisions, among which are; Fernandes v Noroniha [1969] EA 506,***

De Souza v Uganda [1967] EA 784, Yeseri Waibi v Edisa Byandala [1982] HCB 28 and Nsibambi v Nankya [1980] HCB 81, in all of which cases the principle has been restated over and over again that the practice of visiting the locus in quo is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case.

This was more particularly explained in *David Acar and Three Others v Alfred Acar Aliro [1982] HCB 60, where it was observed that:-*

> *" 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 the 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."*

The procedures to be followed upon the trial court's visit to a *locus in quo* have further been outlined in **Practice Direction No. 1 of 2007,** para 3, as follows; -

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/her 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.

One important object of these guidelines is the avoidance of conduct which might engender suspicion and distrust of the court but instead promote a feeling of confidence in the administration of justice.

The determination of whether or not a court should inspect the locus in quo is an exercise of discretion of the magistrate, which depends on the circumstances of each case. That decision essentially rests on enabling the magistrate to better understand the evidence adduced before him or her during the testimony of witnesses in court. It may also enable the magistrate to make up his or her mind on disputed points raised as to something to be seen there. It is a visit that ought to be made with a clear focus on what it is that the magistrate intends to see or the parties and their witnesses intend to show the magistrate, which evidence is to be tested at the inspection and what the issues are which he or she would decide by that inspection, so as to avoid the likelihood of turning the exercise into a fishing expedition for evidence. It would advance the cause of clarity and transparency if these

objectives are clearly set out by the court on the record of the trial before undertaking the visit.

Since the adjudication and final decision of the suit should be made on the basis of evidence taken in Court, the visit to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to test the evidence on those points only. Considering that the visit is essentially for the purpose of enabling the magistrate to understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court.

The visit to the *locus in quo* is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. Considering the propensity of the magistrate upon such a visit to perceive something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party, the magistrate needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record.

This should be done not only to maintain the court's impartiality but also to enable the parties to test or rebut the accuracy of the court's observations by making appropriate, timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse opinion formed against such a party, keep it entirely off the record, only to spring it upon the party for the first time in his judgment. Furthermore, in case of an appeal, where the trial Court limits its judgment strictly to the material placed before it by the parties in court, then its

judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court.

This will not be possible where the lower court's judgment is based on personal observations made out of court and off the court record, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.

According to the record of proceedings, before visiting the locus in quo on 24th June 2022, the court had received evidence from PW1, Abiro Paulina, PW2 Illu Grace, PW3 Ejimu John, PW4 Oumo John, PW5 Egwangu Simon, PW6 Elunyu Faustino and DW1 Audo Mary Eweru, DW2, Epenyu Gusberito, DW3 Apou Vincent, and DW4 Ayuro Mary.

The lower court file also contains the record of proceedings of the court sitting at the locus in quo. The trial Magistrate on Page 7 of his Judgement, also made observations from his locus in quo and records the same as follows:

> **"When the court visited, both parties and their respective lawyers went for locus. The plaintiffs showed the defendant's land as a swamp, and actually, the swamp was about 200kilometeres away from the suit land. It was also established that the plaintiffs are the ones utilising the suit land by cultivation and settlement. The defendant also showed what he believes to be the boundaries and the neighbours to the suit land that the plaintiffs are in possession of. The court took note of the features and boundaries if the land in dispute."**

In addition, the lower court files contain a sketch plan of the disputed land.

In ***James Nsibambi v Lovinsa Nankya [1980] HCB 81,*** it was held that a failure to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relying on such evidence acquired and the observations made thereat in the judgment, is a fatal error which occasioned a miscarriage of justice. In that case, the error was found to be a sufficient ground to merit a retrial as there was failure of justice.

In my view, it is trite that while locus in quo visit is discretionary but when conducted it is carried out it should not be for filling gaps in the evidence of either party but it should be anchored to the oral testimonies of the parties already received in court and is meant to guide the trial magistrate to better understand the evidence adduced before him during the testimony of the witnesses in the court and also for him to make up his mind on the disputed points raised which in this instant matter the trial magistrate did.

The counsel for the appellant averred that the locus in quo was not conducted in the way which he believes were in harmony with the law but the perusal of the lower court record show that the trial magistrate's conducted the same in the way required and even the appellants were granted the chance to interview witnesses and even show the trial magistrate the disputed land. That to me, show that the Locus in Quo Practice Guidelines, *Practice Direction No. 1 of 2007,* requirements were met.

Accordingly, I find that the appellants have failed to prove this ground and it fails.

c. Ground Three:

That the decision of the trial magistrate has occasioned a miscarriage of justice upon the appellants.

Counsel for the appellants contends that the decision of the trial magistrate has occasioned a miscarriage of justice upon the appellants.

Counsel for the respondent argued that from grounds one and two, the trial magistrate properly subjected the evidence on the record to sufficient scrutiny and that there was no miscarriage of justice occasioned on the appellants. In support of the foregoing, counsel for the respondent cited the case of ***Onek Manacy and Anor vs Omona Michael Civil Appeal No. 32 of 2016,*** where the court stated that; miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error and that the court must examine the entire record, including the evidence before setting aside the judgement or directing a new trial.

Since grounds 1 and 2 have failed, I am constrained to believe that the trial magistrate's decision did occasion a miscarriage of justice. This ground also fails.

7. Conclusion:

Under Sec.27 of the Civil Procedure Act, costs follow the event. Thus, in the case of ***Primchand Raichand Ltd & Another vs Quarry Services of East Africa & 6 Others [1972], EA 162*** it was held by court that ***"a successful litigant ought to be fairly reimbursed for costs he had incurred ...."***

This instant appeal is not meritorious and is thus hereby dismissed with costs to the respondent in this court and below.

8. Final Orders:

- This appeal has no merit and it is dismissed.
- The judgment and orders of the lower trial magistrate vide Civil Suit No. 89 of 2012 of the Chief Magistrate's Court of Soroti at Soroti, delivered on 9th September 2022, are hereby upheld.
- The costs in this court and in the lower trial court are awarded to the respondent.

I do so order.

.....

Hon. Justice Dr Henry Peter Adonyo

Judge

23/08/2023