5 **THE REPUBLIC OF UGANDA**

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO. 0023 OF 2021

MUSASIZI WINSTON::: **APPELLANT**

VERSUS

10 **TWINOMUGISHA DAVID**:: **RESPONDENT**

BEFORE: HON. JUSTICE SAMUEL EMOKOR

JUDGMENT

This Appeal arises from the Judgment delivered by the Magistrate Grade one at

15 Kabale Chief Magistrates Court in Civil Suit No. 0032 of 2018 that resulted in favour of the Respondent.

The brief background to this appeal is that the Respondent sued the Appellant seeking orders of declaration that he is the lawful owner of the suit land, general damages for trespass, a permanent injunction, eviction orders and costs of this

20 suit.

It is the Plaintiff's case that at all material times he has been the owner of the Suitland situate at Katare Cell, Nyarurambi Parish, Rukiga District having inherited it from his father Ndabihagire in 1978 and that the Plaintiff has been in possession and control of the suit land uninterrupted until January 2018 when

25 the defendant trespassed on to the suit land and cultivated and planted therein eucalyptus trees.

The Defendant on the other hand denies the claims of the Plaintiff and avers that he bought the suit land from one J. Kemerwa and that the Plaintiff was a witness

signing the agreement as No. 03 and that the Plaintiff has no cause of action against the defendant.

The trial Magistrate on 30/03/2021 delivered his Judgment in favour of the Plaintiff declaring him the owner of the portion of land where the Defendant has trespassed, awarded him general damages of UgX 500,000/=, an eviction order and costs of the suit.

The Appellant being dissatisfied with the finding appealed to this Court on the following grounds:

a) **That the learned trial Magistrate erred in law and fact when he declared that the Plaintiff/Respondent is the owner of the portion of land where the Defendant/Appellant had trespassed by going beyond the boundary into the Plaintiff's land without clearly stating the extent of the portion of land that the Appellant trespassed on.**
b) **The learned trial Magistrate erred in law and fact when he held that the dispute between the parties is a boundary dispute in total departure from pleadings and the evidence on record hence amounting to a miscarriage of justice.**
c) **The learned trial Magistrate erred in law and fact when he decided that the Defendant/Appellant started claiming the suit land upon the death of Kemerwa in total disregard of the evidence on record.**
d) **That the learned trial Magistrate erred in law and fact when he relied on the weakness of Rwamamanzi Robert DW2's testimony rather than the strength of the Plaintiff's/Respondent's case thus amounting to a miscarriage of justice.**

5 e) **That the learned trial Magistrate erred in law and fact when he ordered that the Appellant pays damages of UgX. 500,000/= in the absence of evidence on record to justify the same hence amounting to a miscarriage of justice.**

At the hearing of this appeal Messrs Beitwenda & Co. Advocates appeared for the
10 Appellant while Messrs Muhangi Justus & Partners Advocates represented the Respondent. Both sides proceeded by way of written submissions.

Duties of a first Appellate Court.

It is the duty of this Court as a first appellate Court to re-hear the case by subjecting the evidence presented to the trial Court to a fresh and exhaustive
15 scrutiny and re-appraisal before coming to its own conclusion bearing in mind the fact that it did not have the opportunity to observe the demeanor of witnesses.

(See father Nanensio Begumisa & 03 others versus Eric Tiberaga SCCA 17 of 2000.)

Grounds 1, 2, 3 and 4.

20 The Appellant's Counsel argued the first four grounds jointly. It is the submission of the Appellant's Counsel that the principles of the law embedded in **Sections 101 -103 of the Evidence Act** which emphasize the burden of proof that lies on a party who wants the Court to declare that he is a winner regarding the claim but that the trial Magistrate made a wrong evaluation of evidence on the record and
25 held in favour of the Respondent Contrary to overwhelming evidence on the record.

5 Counsel for the Appellant submits that PW1 testified that he inherited the suit land from his father in 1978 and that the Plaintiff went beyond his boundary and trespassed on his land. That the Defendant is his neighbour at the top and trespassed on his land in 2008. It is the argument of Counsel that by 2008 the Appellant had not bought any land in the area with the Defendant testifying that 10 he purchased the suit land in 2009. Counsel submits that the Plaintiff /Respondent's claim was misconceived, untenable, baseless and the trial Magistrate ignored a vital point. Counsel further submits that the Plaintiff under cross examination by the Defendant/Appellant said that the boundary is on the left contrary to his evidence in Chief that the Respondent is a neighbor to his land 15 on top and that it was an agreed fact during scheduling that the Defendant/Appellant bought land on top and that all this portrays how creative the Respondent is, Counsel also relies on the contents of the sale agreement regarding the suit land between the Appellant and a one Kemerwa a brother to the Respondent dated 2009 that shows that the latter's land is below the 20 purchased land and that the Respondent's evidence is contrary as regards the exact portion of his land in dispute.

It is the also the contention of Counsel that the Plaintiff's case was riddled with inconsistencies and contradictions with PW2 testifying that on top of the suit land is the road to Ibumba and to the left is grazing land while PW3 testifies that one 25 Rwamunahe owns the land to top of the suit land with the Defendant owning the land to the right-side.

It is therefore Counsel's submission that the Respondent and his 2 witnesses refer to 3 different pieces of land supposed to be the suit land and that their evidence

is not corroborative and hence unreliable but the trial Magistrate ignored all these inconsistencies.

Citing the decision in **Haji Sulaiman Lule versus Zamu Nalumansi Nalongo and another HCCS No. 0558** of **1989** Counsel argues that the Respondent in his capacity as Plaintiff failed to discharge his burden of proving that he is the owner of the Suitland.

Counsel further contends that the Appellant and his only witness gave consistent and reliable evidence that the suit land belongs to the Appellant and that it was an agreed fact that the Appellant bought land on top of the Respondent and that the evidence of the Appellant was not challenged in cross-examination and neither was that of DW2.

Counsel for the Appellant therefore prays that the instant appeal is allowed.

Counsel for the Respondent in his written submissions in reply raised a preliminary objection to the appeal submitting that the Respondent/Plaintiff was never served with the memorandum of Appeal and the record of the proceedings as provided for under the law and that and the same should have been effected within 21 days.

According to the Respondent's Counsel they only obtained copies of the same from the Court a week prior. Counsel therefore prays that the instant appeal is struck out with costs to the Respondent.

To buttress his argument Counsel relied on the decision in **Ndyareeba Francis versus Busingye Juliet HCMA No. 0027** of **2020** in which the Court struck out the memorandum of appeal as it was not served in time.

5 Counsel in addressing grounds 1, 2, 3, and 4 of appeal submits that the Plaintiff/Respondent averred that the Defendant/Appellant trespassed on the Suitland in January 2008 and that this evidence is supported by that of PW2 and PW3. According to the Respondent's Counsel the evidence of ownership and trespass of the Defendant/Respondent is well corroborated and as a result the
10 trial Magistrate held that when he visited locus he established that the nature of the land conflict between the Plaintiff and Defendant relates to a land boundary dispute and that no contrary dispute was brought by the Defendant.

Counsel also contends that the dispute began after the death of Kemerwa as evidenced in the testimony of PW1 and PW2.

15 According to the Respondent's Counsel the cause of action was in trespass and the same was proved by PW1 who testified that there were sisal plants on his land but that the Defendant uprooted them and planted thereon eucalyptus trees. Further that PW1 maintained that the boundary issue was on the left of his land. Counsel also referred to the evidence of PW3 who testified that he was present
20 when the Appellant/Defendant purchased the suit land and that the Appellant uprooted the boundaries and extended into the Plaintiff's land.

Counsel to buttress his case relied on the decision in **E.M.N Lutaaya versus Sterling Civil Engineering Co, SCCA No. 0011 of 2002** where the Court held that trespass is when a person makes an unauthorized entry upon land and
25 thereby interfering with another person's lawful possession of that land.

Counsel for the Respondent also attacks the Respondent/Defendant's case submitting that the Defendant never provided any proof that he ever reported

5 such a case and PW2 instead contradicts the version of PW1 stating that it was a boundary issue while the Plaintiff was saying that the Defendant was encroaching on his land. Counsel contends that it's the Plaintiff who has been complaining to the authorities about the conduct of trespass by the Defendant and that the Defendant's assertion that he has ever reported to the authorities remains 10 unsupported by any independent evidence.

As to whether it is the Plaintiff who uprooted the Defendant's boundary marks Counsel submits that DW1 did not say that he saw the Plaintiff/Respondent uproot the said boundary marks and his only witness informed Court that he was told that the Plaintiff uprooted the said marks and that this evidence is in-15 admissible as hearsay evidence.

Counsel for the Respondent therefore prays that the appeal is dismissed.

Counsel for the Appellant in rejoinder submits that the memorandum of appeal was served on the Respondent on 04/06/2021 and that he acknowledged receipt of the same by writing down his name "Twinomugisha David, a resident of Kitara 20 Cell" It is the contention of Counsel that the memorandum of appeal was lodged in Court on 28/04/2021 and endorsed by the Registrar on the 11/05/2021 and served upon the Respondent on 04/06/2021 which was only two days late.

According to Counsel the late service was as a result of the impact of Covid-19 pandemic and that in the period May – June means of transport had come to a 25 standstill. Counsel also relied on the Chief Justice's circular published in the new Vision of the 8th June 2021 at page 9 wherein the Chief Justice suspended all Court

hearings and appearance for a period of 42 days and scaled down Court operations to 30% physical appearance.

Counsel therefore prays that the preliminary objection is overruled.

Determination:

Point of law

The Respondent in his written submissions raised a point of law regarding the competence of the instant appeal on the basis that the Memorandum of Appeal and the record were never served upon the Respondent within the 21 days stipulated by the law.

The Appellant contends that proper service was effected upon the Respondent albeit 2 days after the expiry of the 21 days and blames this late service upon the Covid pandemic.

I have perused the affidavit on the Court record deponed by one B.G Byamugisha a Court Process Server who avers that on the 04/06/2021 he effected personal service of the Memorandum of Appeal upon the Respondent. I have also seen the Court copy of the said Memorandum of Appeal signed by the Respondent himself stating that he had been served from his home and dated it 04/06/2021. It would therefore appear that Counsel's submission that the Respondent was never served until he obtained a copy of the same from the Court is not true. The issue now remains whether service was effected within the stipulated 21 days period. The Memorandum of Appeal was lodged in the Registry on the 11/05/2021 and as already indicated served upon the Respondent on 04/06/2021. It would appear that service was effected 26 days later and thus 5 days beyond the time line as

5 opposed to the same being only 2 day late as submitted by the Appellant, nevertheless this Court takes Judicial notice of the restrictions that were put in place on movements during the period 2020/2021 owing to the Covid-19 pendemic. The Chief Justice did indeed issue circulars as alluded to by the Appellants' Counsel giving contingency measures to be put in place and to be 10 observed by all staff and litigants. Specific reference is made to that issued on the 21/06/2021 that scaled down Court operations to 10% staff attendance and the same also took cognizance of the fact that there was a ban on public transport.

In the circumstances I find that there was a just cause for late service upon the Respondent of the Memorandum of Appeal and the preliminary objection is here 15 by overruled.

I will now turn to the gist of this Appeal.

The Respondent/Plaintiff's claim before the trial Court was a declaration that the Respondent was the owner of the suit land. The central issue though according to PW2 and PW3 was not the entire suit land but rather a boundary dispute between 20 the parties. The learned trial Magistrate agreed as much stating in his Judgment that:

"*When the Court visited locus it was established that the nature of the land in conflict between the plaintiff and Defendant relates to a land boundary dispute*"

I will return to this issue concerning the locus visit later in this Judgment.

25 I will for now commence with the evidence that was presented before the Court.

5 It is the evidence of the Plaintiff/Respondent PW1 that the Defendant neighbours him at the top of the suit property and that at the time that the Defendant/Appellant purchased his portion from the Respondents' brother one Kemerwa their pieces were separated by a ridge and sisal plants that the Appellant uprooted and trespassed on his land by half an acre. While according 10 to PW2 at the top of the suit land is the road to Ibumba/Kasherere and that the Plaintiff also has land to the left of the suit land.

PW3 testified that at the top of the suit land was one Rwamunahe while the Respondent neighboured the suit property to the left.

The Appellant in his evidence testified to purchasing his portion of land from the 15 Respondent's brother one John Kemerwa and that an agreement to this effect was made to which the Respondent is a signatory and that the Respondent is a neighbor.

The trial Magistrate at the locus drew a sketch map that contains a key clearly showing that the Plaintiff/Respondent boardered the Defendant/Appellant to the 20 left of the Appellants' land and to the bottom of the Appellant's land where the trial Magistrate indicates that there is a ridge separating the two pieces of land at the bottom.

It would appear from the drawing that the boundary line between the Appellant and Respondent is in the form of an "L" with the Respondent boardering on the 25 outside of the "L" while the Appellant owns the land inside the "L". This could explain why the witnesses were challenged when explaining who was at the top of the suit land with all 3 Plaintiffs' witnesses giving different answers save for

5 the Plaintiff who appeared to be more accurate in stating that the Defendant was at the top (above the lower side of the "L") and that they were separated by a ridge.

It is the evidence of the Plaintiff that the boundary dispute is to the left side of the property with an encroachment of up to half an acre.

10 The trial Magistrate in his Judgment makes the following findings:

"I therefore find that the Plaintiffs' evidence corroborated by the Plaintiffs' witnesses who were present at the time of the inspecting the land and eventually sale.

They were present at the locus and ably showed Court the original boundaries and
15 *the extent of intrusion/trespass that had been occasioned by the Defendant who removed the original boundaries and entered into the land of the Plaintiff. The defendant has therefore without any colour of right and without any lawful justification removed the original boundaries and entered into the neighbouring land"*

20 **Practice Direction No.1 of 2007** issued by **Chief Justice Odoki** (as he then was) under **Section 3** provides thus:

"During the hearing of land disputes the Court should take interest in visiting locus inquo and while there:

a) Ensure that all parties, their witnesses and advocates (if any) are present.
25 *b) Allow the parties and their witnesses to adduce evidence at the locus inquo.*
c) Allow cross-examination by either party or his/her Counsel.

5 d) *Record all the proceedings by either party, or his/her Counsel.*

e) *Record any observation, view, opinion or conclusion of the Court, including drawing a sketch plan, if necessary"*

I have perused the certified record of the trial Court. I have also perused the hand written record that is before this court. Save for the sketch map that I have
10 already made reference to there is no other record of the locus proceedings available on the record. There is also no attendance list of the parties, Counsel and other would be witnesses or persons annexed to the record at the locus.

The reference by the trial Magistrate to what the Court was showed at the locus by the Plaintiff and his witnesses is therefore not supported by the record. The
15 record of proceedings on the 17/02/2020 indicates that the defence was closed and the matter fixed for locus with no date allocated for the same.

The sketch map of the locus visit is also undated and unsigned. I have perused the entire file for notices to the parties and the local leadership informing them of the date for the locus visit and there is none on record. The hard cover of the Court
20 file also does not indicate that the date for a locus visit was ever given by the Court. It is imperative to note that the parties in this appeal were self-represented at the lower Court and only engaged the help of Counsel at this appeal.

It is therefore not surprising that none of the parties takes issue with the way in which locus was conducted that is if it ever was conducted.

25 The nature of this case is one in which the decision to be made would heavily hinge on what Court is able to find at the locus.

The respondent claims that the Appellant trespassed on to his land up to half an acre. The trial Magistrate who finds in favour of the Respondent orders for the eviction of the Appellant to the extent of trespass beyond the boundaries. The sketch plan drawn by the trial Magistrate apart from indicating the boundaries between the Respondent/plaintiff and Appellant/Defendant's piece of land does not attempt to indicate the positioning of the original boundaries nor the extent of the intrusion referred to by the Respondent against the Appellant.

In the absence of locus minutes by the trial Magistrate it is impossible for this Court to determine whether the trial Court properly evaluated the evidence on record before coming to its conclusion.

Furthermore the Judgment and orders of the trial Magistrate are difficult to enforce on the basis that the evidence on record is lacking on the extent of the intrusion by the Appellant on the Respondents' piece of land (if any). Any attempts at execution would largely be speculative and therefore with high chances of abuse of Court orders occurring.

It is therefore my finding that the trial Magistrate failed to discharge his duty at locus as required under **Practice Direciton No 1 of 2007** and on this ground alone I would allow the instant appeal.

Before taking leave of this matter I would like to highlight the special role that a trial Magistrate plays in matters where parties are unrepresented by Counsel.

The parties in such matters are ignorant of the rules of procedure used by the Courts and cannot be expected to present their evidence flawlessly as if they are represented by Counsel. It goes therefore without saying that the trial Magistrate

as the arbitrator enforcing the rules of practice cannot be allowed to be oblivious to the challenges of unrepresented litigants and as such should accommodate their shortcomings by explaining the rules of engagements to them in a way that would enable them present their evidence without necessarily descending into the arena him/herself. In the instant matter the Appellant/Defendant attached to his Written Statement of Defence his sale agreement to the piece of land that he purchased from Kemerwa the brother to the Respondent. The sale agreement dated 31/05/2009 makes mention of purchase of 2 pieces of land and was witnessed by the Plaintiff and PW3 who did not deny this when cross-examined by the Respondent.

Strangely this evidence remained only as an annexure to the Written Statement of Defence and was never admitted as part of the Appellant/Defendants' evidence.

The trial Magistrate as a result only makes a cursory remark that the Appellant/Defendant attached to his Written Statement of Defence a sale agreement dated 31/05/2009 and doesn't inquire further into the same. I hold the firm view that the Appellant/Defendant ought to have been given the best possible opportunity to present his defence which the trial Magistrate failed to accord him. I am mindful of the fact that the Civil Procedure Rules, the Magistrates Courts Act and other procedural legislations by Parliament do not provide for separate rules to govern unrepresented litigants and different rules and measures for and unrepresented litigant. Indeed such a move could create uncertainty unpredictability in practice. However this fact notwithstanding **Article 126 (2) (e)** of the **Constitution** of **Uganda** enjoins the Courts to administer substantive justice without undue regard to technicalities. Bearing in mind that each case is

5 unique with its own peculiarities I hold the view that the trial Magistrate ought to have done more in terms of procedure to enable the unrepresented parties in this case to put their case forward most especially in regard to the Appellant/Defendant whose sales agreement was completely disregarded.

As a result it is my finding that the trial before the Magistrate Grade one only 10 resulted into a miscarriage of justice.

I do not find it necessary to consider the 5th ground.

Orders of a retrial.

I am mindful of the fact that a retrial attracts huge costs to the parties since it will entail re-summoning of witnesses some of whom may no longer be alive. Indeed 15 an order for a retrial should be the last resort.

The facts of this case however being that evidence crucial for determination of the case was available on record but never admitted by the Court, the trial Magistrate based his decision on a none existent locus record and the fact that the orders issued by the trial Magistrate are all unenforceable all point to the need 20 for a retrial if the parties are to receive any justice.

In the result, the instant appeal succeeds. The Judgment of the lower Court is set aside.

The trial is to be conducted denovo by another Magistrate of competent jurisdiction and each party is to bear their costs of this appeal.

25 It is so ordered.

Before me,

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SAMUEL EMOKOR
JUDGE.
30 **27/03/2024**