THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUBENDE SITTING AT KIBOGA

CIVIL APPEAL NO.031 OF 2022

(Arising from Civil Suit No. 0028 of 2019 at Kiboga Magistrates Court)

1.HAJJI NSIMBE MUHAMADI

2.HALIMA NAKAMANYA ==========APPELLANT

VERSUS

1.KAREEM LUYIKWE

2.SULAIMAN SEBAKIJJE

3.KAKUMBA ERIAS

4.AISHA NASSIDE } ==========RESPONDENT

5.BABIRYE MADINA

6.AISHA NANKUMBA

7. MUHAMED KIITA

8.UMARU SSENYONJO

BEFORE HON.JUSTICE KAREMANI JAMSON.K

JUDGMENT

The appellant in this matter filed a suit against the respondents in the Magistrate's court of Kiboga. The same was decided in favour of the respondents who were the plaintiffs in the lower court. The appellant being dissatisfied with the decision of the Principal magistrate grade one His Worship Bbosa Michael appealed to this court.

The appeal is based on the following grounds namely:

1. That the learned trial Principal Magistrate Grade One Magistrate erred in law and fact when he held that the suit property is part of the land the plaintiffs received by way of sketch i.e. PE1 in 2014.

2. That the learned trial Principal Magistrate Grade one erred in law and fact when he failed to evaluate the evidence on the court record and thus reached a wrong decision which occasioned a miscarriage of justice.
3. That the learned Trial Principal Magistrate Grade One erred in law and fact when he failed to apply principles relating to donations/gifts intervivos.
4. That the learned Principal Magistrate Grade One erred in law and fact when he awarded a speculative amount of shs. 4,000,000= in general damages without showing how he came to arrive at that figure.
5. That the learned trial Principal Magistrate Grade One erred in law and fact when he conducted a locus in quo visit in contravention of the principles governing locus visits.

The appellant proposed that the appeal be allowed with costs in this court and below.

Background

The respondents who were the plaintiffs in the lower court filed a suit against the appellants who were the defendants seeking orders that they be found to be trespassers and be evicted. That they be ordered to pay general damages and costs of the suit.

The respondents claimed that they got the land in dispute as a gift inter vivos from their late father one Hajji Abdul Mulindwa.

They contended that the appellants entered the suit land and destroyed their crops and hence the suit,

The first appellant claimed that he is one of the children of late Arimanzane Luyikwe and hence one of the beneficiaries of his estate. That the land in issue was bequeathed to him by the late Hajji Arimanzane Luyikwe his father. That the late Hajji Abdul Mulindwa was the brother of the 1st appellant. The 2nd and 3rd appellants are children of the 1st appellant who are lawfully using his land.

Duty of the first Appellate Court

This court being the first appellate court has the duty to review the evidence of the case and to consider the materials before the lower court. This court has to make up its own mind. See case of **Kifamunte Henry v Uganda SCCA No.1 of 1997**

In the case of **Father Nanesio Begumisa & 3 Ors v Eric Tiberaga SCCA No.170 of 2000 [2004] KALR 236** it was held that:

"This being a first appeal, this court is 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"

Summary of evidence adduced before the lower court:

All the plaintiffs and their witnesses enumerated how the late Hajji Abdul Mulindwa gave them land in dispute. The plaintiffs presented a document Exhibit P.1 prove the allocation of the land to them.

The defendant stated in his evidence that his late father late Hajji Arimanzane Luyikwe distributed land to him and his late brother Late Hajji Abdul Mulindwa.

Consideration of the appeal

In his submissions the learned counsel for the appellants argued all the grounds of the appeal concurrently and the learned counsel for the respondents responded to each ground in the same manner.

I have looked at the grounds of the appeal and I do find that I may not necessary follow order in which they were raised. Some of the grounds may dispose of the whole appeal when considered first.

The fifth ground concerns the conduct of the locus which has to be considered before looking at the evaluation of the evidence and the rest of the grounds.

I will therefore begin with the same ground on the visit of locus in quo.

It is argued by the learned counsel for the appellant that the court record does not clearly state how the locus was conducted.

The learned counsel for the respondents submitted that the learned trial magistrate correctly applied the principles governing the locus visit.

He pointed out that the parties did not at any point intimate that they wanted to call witnesses at the locus.

From the typed record of proceedings, the matter was adjourned on 6th April 2022 for locus to be held on 24th June 2022.

There is a letter on record dated 13th June 2022 informing all parties that there would be visit of locus on 24th June 2022.

Furthermore, on record there is also a list of the people who are said to have been present during the visit of the locus in quo. There is an un clear map on record. The same doesn't have a heading neither does it have anything to explain what it is.

If this is the purported record of the visit of locus I do agree with the learned counsel for the appellant that the locus was not properly conducted. That if it was conducted at all there is no record for the same.

The phrase "Locus in quo" is a legal jargon that means "Place in which" and it is used to refer to the place where something is alleged to have occurred. The visit of locus therefore is a process of authentication that enable court to apply eyes and the brain to see and absorb physical things that the ears heard in the open court.

Visit of locus is provided for under **Order 18 Rule 14 of CPR** where it is provided that the court may at any stage of a suit inspect any property or a thing concerning which any question may arise.

See the case of **Damulira Aloysious vesus Nakijoba Jesephine CA 59 OF 2019 at Masaka High Court Circuit.**

The purpose of visit of locus is to cross check on the evidence given by the witnesses in court and not to fill the gaps in the evidence for them.

See the case of **Fernades v Noroniha [1969] EA 506.**

According to **Practice Direction No.01 of 2007** issued by the Hon. Chief Justice of Uganda then lays down a specific procedure which courts ought to follow upon visit of locus.

In **Deo Matsanga V Uganda 1998 KALR 57** it was held;

"The trial magistrate should record everything that a witness states in locus in quo and recall him to give evidence of what occurred on oath and the opposite party is afforded an opportunity to cross examine him"

The proper procedure therefore is that a record has to be made about the presence of the parties and their counsel if any. Court must ensure all parties are present during the locus visit.

The witnesses earmarked to guide court at the locus must be reminded of the oath they took in court before they do so if they have already taken oath in court. If they haven't they must take oath before testifying at the locus and thereafter guide court.

They guide court in examination in chief. At the end of the testimony the witness should be cross examined. If the witness was being guided by counsel, he/she can then re-examine the witness after cross examination.

All the proceedings at the locus in quo must be recorded and should form part of the court record. The record should clearly show what transpired at the locus. If there is any map drawn it should have a heading explaining what it is about. The map should clearly show the boundaries of the land in dispute and the neighbouring land. It is advisable that campus is drawn to show the directions while at locus.

The parties may not necessarily repeat all that they stated in the court room but must show court what they talked about in their testimonies for court to see and appreciate what was talked about in court room.

All the proceedings should be conducted under the control of the judicial officer visiting the locus because this is part of the court proceedings and locus is part of the court process.

There is a tendency of making a list of none parties that attend the locus like it was in this case. The parties tend to think that the more people one has at the locus the likelihood of being believed which shouldn't be the case.

Whereas this has no effect on the proceedings it also adds no value to the case because they are not witnesses but simply spectators. Many times they tend to want to disrupt proceedings if not managed well. They shouldn't be allowed to influence the proceedings at the locus.

From the record in this matter there is nothing to show what transpired at the locus. The record does not show who testified at the locus.

The nature of dispute in this matter required ascertaining the piece of land that was allegedly inherited by late Hajji Abdul Mulindwa which he later allegedly donated to the respondents and the one inherited by the 1st appellant.

The second duty was to ascertain the land which is in dispute and to show where it is was located.

The learned trial magistrate in his judgment relied on the locus proceedings which are none existent and this informed his decision in the matter. In his judgment he stated that having gone around the land during locus it is not possible that the 1st defendants land goes beyond the fully grown fence. It is not evident in the proceedings that he went around the land.

In the case of **The Registered Trustees of The Archdiocese of Tororo versus Wesonga Reuben Malaba & 5 Ors CA 0096 OF 2009 at Mbale,** this court held that failure to record the proceedings at locus and make them Part of the record so as to guide the appellate court on the lower courts findings on the issue was fatal omission.

I do concur with the learned counsel for the appellants that the locus in quo was not properly conducted and it affected the outcome in this matter substantively.

I am inclined to comment on the duty of an advocate to court which is to help it reach justice. This duty involves guiding court where need be. Both counsel in this matter seem not to have prayed their role well of guiding it during the visit of locus in quo.

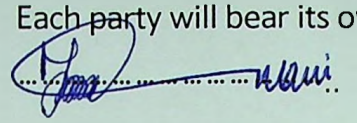
I allow the fifth ground of appeal.

In as far as the rest of the grounds are concerned, it is my finding that any attempt to resolve them may lead to bias because the matter is not finally concluded.

I accordingly allow this appeal and set aside the judgment and the decree of the lower court.

It is my position that for the ends of justice to be served a re-trial should be conducted. I order that a retrial of this matter be conducted before a different magistrate grade one.

Each party will bear its own costs because the fault is by court.



Karemani Jamson.K

AG JUDGE.

11/01/2024