The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Civil Appeal No. 0059 of 2021

(Arising from Soroti Chief Magistrates Court Civil Suit No. 027 of 2017)

Epoku Charles :: Appellant

Versus

Ekemu Richard :: Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement on appeal

(Appeal from the judgement and orders of the Soroti Chief Magistrates Court at Soroti delivered on the 22nd day of March 2021 by His Worship Watyekere George Wakubona)

1. Background:

The respondent filed Civil Suit No. 027 of 2017 in the Chief Magistrates Court of Soroti at Soroti against the appellant for a declaration that he is rightful owner of land measuring 12 acres comprised at Agama Agule village, Agora parish, Kamuda sub-county, Soroti District, a permanent injunction, vacant possession, general damages and a declaration that the appellant's actions are a constitutional breach of the respondent's right to property and thus illegal.

His claim was that he is the lawful owner of land measuring 12 acres. That he purchased 8 acres on the 3rd November 2007 from Ereu John and another 4 acres from the same seller on the 8th November 2008.

That he immediately took possession of the land and started cultivating the same. That around 2007 while Ereu was away in Kampala, he received information that the appellant had settled on his land which forced the late Ereu to come back to

the village and a meeting was held between the clans of Irarak and Agoria and the appellant agreed to leave the land after harvesting his crops.

However, that at the beginning of 2008 the appellant refused to leave the land claiming his father had stopped him from leaving causing the LCI to call a meeting together with the two clans and the appellant agreed to vacate the land which he peacefully did.

That in a change of events, the appellant wrote to the LC III chairperson of Kamuda sub-county claiming that he had been chased away from his land by Ereu and the LC III chairperson without confirming the allegations wrote a letter to the LCI Agama-Agule giving the appellant permission to go back on the land and resume ownership.

That when Ereu learnt of the action of the LCIII he approached the LCIII with documentary evidence to prove that he was the real owner of the said land and not the appellant, this resulted into a meeting held by the LCIII which ended in the LCIII writing a letter giving back ownership of the land to Ereu John.

That around 2010, the appellant again started encroaching on the respondent's land by building a house and cutting down trees and grass on the land with a view of cultivation, when the respondent's lawyer wrote to him he left the land. In 2012 the appellant came back again together with his family, cut down some trees and started to build and around 2016 the appellant made a complaint at Legal Aid project of the ULS wherein a mediation was held to try and resolve the matter but all in vain.

That the appellant has once again forcefully started building houses on the appellant's land and damaged some crops, he has also forbidden the respondent

and his family from visiting or carrying out any activity on the land and is threatening violence if the respondent does so.

The appellant in his written statement of defence denied the above allegations contending that he inherited 8 acres of land located at Agama-Agule from his late father Edopu Valentino in 1980 and he took possession by way of construction and cultivation undisturbed until 2007 when Ereu John together with some people came and attacked him with his family claiming it was his land.

That upon the destruction of the appellant's home, he reported the matter to police who did not render any assistance to him and he later reported the matter to the LCIII Court who gave him a letter authorizing him to go back on the suit land. That the respondent purchased the suit land in 2008 while very aware that the said land was given back to the appellant as he was shown the LCIII letter and even assured the appellant's family members he was going to recover back his money from the seller the Late Ereu and leave the suit land.

That having been given permission to settle on his land the appellant in 2012 decided to cut down the trees on his land for purpose of building his house was arrested by police on allegations by the respondent that the appellant was a trespasser however the appellant was acquitted.

The trial magistrate having considered the evidence adduced found for the respondent and issued the following orders;

a. Plaintiff is declared to be the rightful owner of the suit land.
b. An order of vacant possession is hereby issued against the defendant. The defendant is given a period of 90 days to vacate the land in dispute. In the event he does not do so by the expiry of the time given then the plaintiff will be at liberty to evict him.

c. A permanent injunction is hereby issued to restrain the defendant and his agents from further occupation and cultivation of the suit land.

d. Plaintiff is awarded general damages of 15,000,000/=.

e. Plaintiff is awarded costs of the suit.

The appellant dissatisfied with the above judgment and orders appealed to this court on the following five (5) grounds;

a. The learned trial magistrate erred in law and fact when he failed to properly evaluate evidence on record of proceedings as a whole in regard to ownership of the suit land when he relied on hearsay evidence and came to a wrong conclusion that the respondent is the rightful owner of the suit land.

b. The trial magistrate erred in law and fact when he failed to find that the respondent's suit was barred by limitation.

c. The trial magistrate erred in law and fact when he failed to conduct proper visit of locus.

d. The trial magistrate erred in law and fact when he awarded excessive damages of 15,000,000 (fifteen million shillings) without any justifiable reason.

e. That the decision of the learned trail magistrate occasioned a miscarriage of justice.

2. <u>Duty of the 1st appellate court:</u>

This court is the first appellate court in respect of the dispute between the parties.

An appellate court is a higher court that reviews the decision of a lower court. It does so by hearing an appeal from a lower court. The primary function of an appellate court is to review and correct errors made by a trial court. In addition, an appellate court may deal with the development and application of law. In carrying out its duty, the appellate court can do any one of the following:

a. Review decisions made by lower trial court;
b. Affirm the decision of the trial court, in which case the verdict at trial stands;
c. Reverse the decision to the trial court, in which case a new trial may be ordered;
d. Modify an order or a decree;
e. Remand the case back to the lower court for further proceedings;
f. Dismiss the case.

This Honourable Court is the first appellate court in respect of the dispute between the parties herein and is obligated to re-hear the case which was before the lower trial court by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and to re-appraise the same before coming to its own conclusion as was held in ***Father Nanensio Begumisa and Three Others v. Eric Tiberaga scca 17 of 2000; [2004] KALR 236.***

As to the duty of a first appellate court, this was well stated by the Supreme Court of Uganda in its groundbreaking decision of ***Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007*** where it held that;

> ***"...the first appellate court has a duty to review the evidence of the case and to reconsider the materials 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"***

Also in rehearing afresh a case which was before a lower trial court, this appellate court is required to take due allowance for the fact that it has neither seen nor heard the witnesses and where it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. See: ***Lovinsa Nakya vs. Nsibambi [1980] HCB 81.***

With the above legal precedents, this instant appeal is considered.

3. Representation:

The appellants were represented by M/s Okanyum, Namusana & Co. Advocates while the respondents were represented by M/s Amodoi Associated Advocates.

This appeal proceeded by way of written submissions which are taken into account in its determination.

4. Determination:

a. Ground 1:

The learned trial magistrate erred in law and fact when he failed to properly evaluate evidence on record of proceedings as a whole in regard to ownership of the suit land when he relied on hearsay evidence and came to a wrong conclusion that the respondent is the rightful owner of the suit land.

Counsel for the appellant submitted that the learned trial magistrate's procedure while evaluating the appellant's evidence was below the standards required by the law when he gave much weight to the purported clan agreement produced by the respondent without cogent corroborated evidence and ignored the appellant's evidence regarding its validity. He further stated that the trial magistrate focused on the hearsay evidence and the purported clan agreement between Irarak clan and Agora clan as well as the letter from the LC.3 which the magistrate considered as the one that rescinded the appellant's exhibit 1 to

justify his finding that the respondent bought the suit land from Ereu John who was the rightful owner of the suit land and not the appellant. That the trial magistrate wrongly put a heavy and burdensome reliance on the uncorroborated documents. He added that it was strange for the trial magistrate to assume that the clan agreement was made in good faith and by the appellant informing court that he was forced to sign the document, court was required to inquire more into the validity of the clan agreement.

Counsel further submitted that the appellant testified that he had an unresolved dispute with Ereu John in respect of the suit land which was confirmed by the testimony of PW3 and he wondered why the trial magistrate overlooked this evidence.

Counsel for the respondent laid out the evidence led by the parties and their witnesses and submitted that was important to note from the onset that the evidence of the plaintiff/respondent was not shaken during cross examination as was in the case of ***Habre International Co. Ltd Vs Ebrahim Alarakia Kassam SCCA No. 4 of 1999*** where Justice Karokora, while citing the case of ***Kabenge v. Uganda U/CA Cr. App. No. 19 of 1997*** stated that;

> ***"... whenever an opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore, an omission or neglect to challenge the evidence in chief on any material or essential point by cross examination would lead to inference that the evidence is accepted subject to it being assailed inherently incredible.***
>
> ***I would infer that the omission by the respondents to seriously challenge the evidence in chief on the material or essential points by cross-examination***

would lead to the inference that the appellants' evidence before the trial judge was accepted".

Counsel further submitted that the appellant failed and had nothing of significance to offer court to guide it in the determination of the matter and never touched anything concerning the purchase of land by the plaintiff from Ereu John.

Further that the trial magistrate at page 5 of the judgment confirmed with the mediation report on record of proceedings that mediation was concluded and the report clearly shows that the land did not belong to the defendant/appellant and was advised to leave or request for some portion to stay.

Counsel for the respondent added that the trial magistrate rightly evaluated the evidence in his judgement to the effect that the defendant did not dispute the fact that the plaintiff indeed purchased the suit land. That the trial magistrate further correctly relied on the sale agreements which the appellant did not object to their being admitted as PEX2 and PEX3.

Counsel additionally submitted that whereas the appellant contended that by the time of purchase of the suit land, there was a dispute between Ereu John and the appellant, the appellant failed to challenge the content in PEX1 which was admitted in Court.

That the trial Magistrate being guided by such admission, correctly highlighted the content at page 5 of the judgment that the defendant ***"accepted to vacate the suit land after the clans of Irarak and Agoria where the clan of the defendant conceded the land in question not to belong in their clan".***

Counsel for the respondent also submitted that the trial Magistrate did not close his judicial eyes on the letter presented and admitted as DEX1 which letter was issued by the Chairman LC3 authorizing the defendant to repossess his land

however, that it was imperative to note that this letter was rescinded by another letter written by the same LC3 chairperson.

Counsel finally submitted that the trial magistrate was alive to the events as they unfolded and correctly evaluated evidence on record of proceedings thereby reaching a correct decision. He prayed that this Honorable Court be pleased to find no merit in this ground of appeal.

b. Evidence on record:

PW1 Richard Ekemu the plaintiff (respondent herein) testified that he bought the 8 gardens in 2007 from Ereu and bought the other 4 gardens in 2008 from Ereu and both transactions were reduced in writing and the respective agreements were admitted in evidence as PEX2 and PEX3.

He stated that before buying the suit land, John Ereu came and asked him to buy the land because he was about to retire as he needed the money to build a house for his second wife. That he went and saw the piece of land with a house in its midst and that all the neighbors were there and upon inquiring he was informed that the house belonged to the appellant who had illegally entered on the land and he was then shown an agreement which the Irarak clan and the Agora clan had made and in that agreement, the Chairman of the Irarak Clan to which the appellant belonged clearly stated that the land did not belong to them and he was given a copy of this agreement dated 22/9/2007.

In that agreement which the appellant signed, the appellant had asked to be given until 29th December, 2007 to leave the land to give him room to him to harvest all his crops which he did not do so claiming that his father had told him not to leave.

The second clan which was involved in the matter was Agoria clan which also had a document dated 22/9/2007 where they were receiving land from the appellant and his entire clan. That having seen these agreements he had no hesitation in buying the land because he grew up in the appellant's grandfather Eseru's home and he knew the land belonged to the Agora clan but particularly to Ereu John.

That when the appellant refused to leave the land, the son of the Ereu John took him to the LC1 Court (LC1 Agule) on 8/02/2008 and at the LC1 Court he said his father refused him to leave and that when he was asked whether his father was present when he signed the agreement. He said no and then asked for two months to leave but was given only one week and indeed on the 16/02/2008 he left the land only to return to it on the 7/04/2008 with a letter from the LC3 addressed to the LC1 not copied to the respondent.

That according to the appellant the letter of the LCIII had returned him on the land and so he started staying there. The respondent was not amused and so he went to the LC2 together with Ereu John and raised a complaint but they were referred to the police. During cross-examination he stated that when he bought the land the appellant never came to him.

PW2 Echweru Alex testified that the respondent bought land from his father and he was present when both transactions happened and even witnessed the agreements. He stated that the land was sold to the respondent without any dispute in the presence of other clan members and he did not see Epoku, the appellant. During cross-examination he stated that the land belongs to his father's clan and he cultivated it except most of the time he was in Kampala.

PW3 Ekuyu William the area LC1 of Agama Village testified that and knows the suit land which according to him belongs to the plaintiff since he bought it from Ereu John who had a dispute with the appellant. He added that before the

respondent bought the suit land, Mr. Ereu had a meeting with Epoku Charles who is the appellant now to resolve issues concerning that land and after the sale which he witnessed, the appellant was given time within which to leave the land since he had accepted that the land was not his and he witnessed the appellant leaving the land as he even authored the agreement between Ereu John and the appellant where the latter accepted to leave the land within one week.

DW1 Epoku Charles (the appellant) testified that he inherited the land from his father Edoku Valentino who died in 2012. That he began using the land in question in 1980, had built and cultivated on the same. That Ereu John came and claimed his land in 2007 and the dispute between them has not been concluded to date though he had filed no case against Ereu John.

He stated that he is aware that the respondent bought land from Ereu John in 2008 but the land had a dispute between him and Ereu and as such it was improper for the late Ereu John to have sold the land and that he had the letter given to him by the LCIII giving him the right to take back his land and the same was admitted as DEX1.

He also informed Court that he was not aware that the LCIII convened another meeting to discuss matters concerning the land in question and even issued another letter to Ereu John.

He added that he went to the respondent's home together with his father and the LC letter after he learnt that he had bought the land and the respondent told them he would not buy the land in question. That he, however, did not take any action against the respondent since his problem was with Ereu John. He confirmed that his father acquired the land by inheritance from one Olila who was his grandfather.

During cross-examination he stated that he did not know the origin of his grandfather Olila or the size of the land he owned and that his father was buried in Awoja where they have land and some of his relatives stay there but thathe also does not know the size of this land. He admitted that his father did not sue Ereu in his lifetime and he had no order stopping Ereu from selling the land.

DW2 Eseru John testified that he was a brother to the defendant and that the land in dispute belongs to the appellant which he was given in 1980 by their father who divided the land among his children when he was staying in Gweri. He informed court that he had heard that the respondent had purchased the land in dispute from Eseru John in 2007 and he went together with their father and Epoku to the LC3 and reported and the LC3 wrote them a letter without summoning the respondent.

That they took this letter to the respondent who told them that since they were claiming the land they should take the letter to Ereu John so that he gives him back his money. That he was not aware that a meeting was convened on the 13/04/2008 about the land in question but only got to learn about the second letter during mediation. He further stated that the appellant was chased from the suit land but returned in either 2014 or 2015 and that is when he built on the land and after being chased from the land he reported the matter to the police. During cross-examination he stated that at the time of the sale of the land by Ereu John, the appellant was not in possession of the same. That he also did not know the size of the appellant's ancestral land in Gweri but that five of the appellant's brothers stay there. Their grandfather was called Eseru who was buried in Agama and was not Olila as stated by the appellant Epoku.

He added that the appellant does not seem to know the size of the land in dispute and the Igoria clan has land on the eastern side of the cattle path and he did not

know the size of the estate of the late Ereu. He admitted that his father did not file any suit against Ereu and neither the appellant file any suit against Ereu or Ekemu.

DW3 Okello Nicholas testified that he is a brother to the defendant and that the land in dispute belongs to the appellant having inherited it from their father Edoku in a year he does not remember and it is Ereu who unlawfully entered the land in 2007. He stated that the matter was brought to the attention of legal Aid who tried to mediate but before they could resolve the dispute, the other party passed on. He further stated that the appellant was evicted from the suit land and it remained in the hands of the Igoria Clan and as a result, the defendant complained to the LC3 and he was given the letter to go back to his land. During cross-examination he stated that most of their ancestors are buried in Aukot which is their origin. He also stated that he knows that the cattle path is between Igoria clan and Irarak clan. When asked for clarification by court he stated that he was not sure if Legal aid completed the mediation but it is true that they visited the land in dispute.

DW4 Emasu Alphonse testified that he was a brother to the appellant and the land belongs to the appellant, he added that he does not know about the dispute in court now. During cross-examination he stated that all his brothers including the appellant were born in Aukot and that is where their father is buried. Their grandfather is buried on the land where Atim stays which is about 800 meters from the suit land. That he is aware the appellant lived in Wila with his family between 2007 and 2014.

DW5 Olobo Silver testified that he does not know the size of the suit land but it belongs to the appellant having belonged to his father. He added that the land was for their grandfather and the appellant's father showed him the land in a

year he does not remember. That after the appellant had a fight with his nephew people from a certain clan came and told them that the land does not belong to them but Ereu, they did not agree but along the way the appellant feared and left the land on his own. During cross-examination he was handed a letter dated 22/09/2007 and he confirmed that it was around that time when they had a meeting and Ereu came with his clan. He further stated that when the clan of Ereu came issues of land were discussed and after the meeting a document was written and in the meeting they agreed to give back Ereu and his clan the land. They signed the document but Epoku's father refused to sign. He added that he believes that if the appellant had requested the respondent for permission to use the land he could not have brought him to court.

At *locus in quo*, counsel for the respondent stated that there were no boundary disputes on the land but that what was needed was the confirmation of the land in dispute. At *locus in quo* court established that the appellant had a homestead of eight huts on the suit land which he constructed in 2015 and he was using part of the land for cultivation. A grave of his son that passed on in 2018 was also seen on the suit land.

In resolving this suit, I note that the fact of the sale between the respondent and the late Ereu John is not in dispute and as such I will not dwell on it.

The main issue is whether the late Ereu John had the right to sell the suit land to the respondent.

The respondent stated that he did inquire into the ownership of the suit land before he purchased it and that he even inquired into the appellant's hut which was on the suit land and he was informed that the appellant had encroached on the land. The matter was then settled between the two clans of Irarak clan and

Igoria clan and it was agreed that the land belonged to Igoria clan to which Ereu John belonged.

The respondent stated he was shown two agreements where both the *Irarak clan* to which the appellant belongs and the *Igoria clan* to which the late Ereu John belonged in which it was agreed that the land was for Ereu John of *Igoria clan* with the appellant and his Irarak clan having no claim in the same. That fact being so, then the land was then handed over to Ereu John and his *Igoria clan*.

These two agreements were admitted as identified documents because the respondent did not possess the originals.

I note upon perusal of the file that DW5 Olobo Silver who was chairman of *Irarak clan* and this fact is indicated in PID1 which indicates that the land was given back to Ereu John of *Igoria clan*.

Indeed, DW5 Olobo Silver his testimony confirmed that it was around the time of 22/09/2007 when they had a meeting with Ereu John and his clan on the issue of suit land which was resolved and a document written giving back the suit land Ereu John and his clan.

The testimony of DW5 corroborates the testimony of the respondent and PW3 that indeed that issue of the Appellant being on the suit land was resolved before the late Ereu John sold the land to the respondent and that the appellant agreed to leave the land then

I should add that it is not understandable as to why the two letters dated 22/09/2007 originating from the above mentioned two clans were not properly exhibited as their originals are on record albeit not translated.

PEX1 was an agreement dated 16.02.2008 wherein the appellant agreed to leave the suit land forever on the basis that it did not belong to him. He signed on this agreement and did not deny doing so.

While counsel for the appellant and the appellant claim he was forced to sign this agreement no evidence in this regard was led. In the law of contract where a party seeks to seeks to rely on duress as a defence so as to vitiate any alluded to consent to an agreement, then proof of the such duress must be adduced.

In the instant case the appellant in his evidence did not bring even single witness who was present during the alleged forced signing of the same to prove that he was forced to sign the agreement to leave the suit land. Given such scenario, the conclusion to be had is that he freely signed the agreement out of his own free will and did accept that the suit land did not belong to him.

It is also imperative to note that neither the appellant nor his father sued the late Ereu John or the respondent over the suit property. The actions of going to the LC3 to complain cannot stand because as testified by the appellant and his witnesses, the respondent and Ereu John were not summoned before the LC3 who wrote DEX1 in which he was unilaterally handing over the land to the appellant.

The fact of the matter was that the LCIII had no appeal or authority to direct whatever he had in DEX3 as firstly he had no appeal before him and neither did he have the legal authority to handle a land matter in its first instance as that authority was the preserve of th lower tiers of the LC structure.

Further it is clear to me that since appellant and his father who passed on 2012 did not prior to the sale of the suit land to the respondent take the late Ereu John to court over the suit land if they were dissatisfied with the clans' decision over

the land, then the conclusion to be had was that they were consciously aware that the suit land did not belong to them.

This fact is further explained by the fact that the appellant himself was not even able to adduce any evidence as to the size of his father's estate or even the suit land which he claimed was eight (8) acres by his WSD yet in court he spoke of 12 with his own witness and a brother, DW2 Eseru John even mentioning the names of a different grandfather and denying the one mentioned by the appellant whom the appellant was using to trace his ownership of the suit land. DW2 further confirmed that the appellant did not know the size of the land in dispute.

I also further note that the mediation which the appellant and his witnesses refer to was concluded as opposed to the appellant's claims otherwise and; as noted by the trial magistrate in his judgement and confirmed from perusal of the file, that mediation which was conducted by Legal Aid which visited the suit land and as confirmed by DW3 filed a report attached to the plaint which correspondingly indicated that the suit land was for the late Ereu John.

Counsel's main issue in relation to this document was that the trial magistrate relied on this uncorroborated document to come to the conclusion that the respondent was the rightful owner of the suit land.

The position of the law is otherwise for Section 60 of the Evidence Act provides that the contents of documents may be proved either by primary or by secondary evidence and section 63 requires that documents must be proved by primary evidence except in the cases hereafter mentioned.

Section 61 further defines primary evidence as the document itself produced for the inspection of the court.

In this instance all documents the trial magistrate relied on were produced in court for inspection and are on the lower court record. The contents of these documents served as proof of their existence and were not hearsay as submitted by counsel for the appellant.

Drawing from the above, it is equable to conclude that since the veracity documents tendered in the lower court as proof of ownership of the suit land by the respondent were unchallenged, then I find that the trial magistrate did not occasion a miscarriage of justice when he found the suit land rightfully belongs to the respondent who bought the same from the late Ereu John who had the right to sell it at the particular time with even the approval of the appellant. Ground 1 accordingly fails.

c. Ground 2:

The trial magistrate erred in law and fact when he failed to find that the respondent's suit was barred by limitation.

The sum of the appellant's submissions is that the appellant claimed to have been in possession of the suit land from 1980 to 2007 which is a period of 26 years. That there was sufficient information in the appellant's WSD to show he was relying on his long stay on the suit land for the declaratory orders he sought from court. He submitted that the trial magistrate ignored the provisions of the law of Limitation Act despite overwhelming evidence.

Counsel for the respondent in reply submitted that the issue of limitation was never raised during the trial and therefore, this in essence should not have been raised as a ground of appeal. He relied on ***Ocaya V. Abwol and another (Civil Appeal NO.76 of 2020).***

Without prejudice to the foregoing, counsel for the respondent submitted that the appellant's trespass started in 2007 and he eventually left and returned on the suit land in the year 2010 and the suit was filed in 2017.

I have perused the pleadings and evidence on record. The respondent's claim to the suit land arose in 2007 when he is said to have first purchased 8 acres of the land. Prior to that time, he had no interest in the suit land. It can therefore be said that his right of action accrued from 2007 when he bought the land and the appellant subsequently refused to leave the same.

The Limitation Act under section 5 provides that no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued, the period from 2007 to 2017 is 10 years and thus not out of the limitation period. This ground is accordingly dismissed.

d. Ground 3:

The trial magistrate erred in law and fact when he failed to conduct proper visit of locus.

Counsel for the appellant submitted that the magistrate did not take the testimony of witnesses at the *locus in quo* and did not make any record of proceedings. That he also disallowed the witnesses from questioning each other.

Counsel for the respondent in reply submitted that it is important to note from the onset that the record of proceedings at page 36 contains proceedings conducted during locus and the main issue for determination as per the record of proceedings was need to confirm whether the visited land was the land in dispute.

Practice Direction No I of 2007, under paragraph 3 provides for *locus in quo* as follows;

During the hearing of land disputes the court should take interest in visiting the locus in quo, and while there:

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.

The gist of the above provision is that proceedings at the *locus in quo* should be as near as possible in form to those recorded by the trial judge during the hearing in court.

In other words, the court extends its physical boundaries to the *locus in quo* so as to continue hearing a case, while viewing for itself what the dispute is about on the ground.

The proceedings are particularly useful for establishing boundaries as well as the existence of the land in dispute. See: ***Settenda v Mwamini Twemanye Sekibala (Civil Appeal No 153 of 2017) 2022 UGCA 76 (18 March 2022)***.

In the instant matter there was no dispute over the boundaries of the land, the main issue was ownership as seen in the evidence and pleadings. This in fact was one such matter that could be resolved without a visit of the *locus in quo*.

This notwithstanding the record as noted by counsel for the respondent indicates that the trial court on the 22.01.2021 visited the *locus in quo* with both parties in attendance and the trial magistrate prepared some proceedings though brief but which showed the features currently on the land.

20

While no sketch map or explicit proceedings such as those taken during hearing were taken I find that given that the substance of the dispute was ownership after purchase it was not necessary for the trial magistrate to overly invest itself in locus proceedings and as such the proceedings on record as they are, did not lead to any miscarriage of justice and the trial magistrate did not err in law in that regard. This ground also fails and is accordingly dismissed.

e. Ground 4 and 5:

The trial magistrate erred in law and fact when he awarded excessive damages of 15,000,000 (fifteen million shillings) without any justifiable reason.

That the decision of the learned trail magistrate occasioned a miscarriage of justice.

Counsel for the appellant submitted that no evidence was led by the respondent to prove damage to his crops by the appellant. He cited various cases which I acknowledge but see no need to reproduce. However, counsel intimated that the essence of those cited cases were that the award of general damages in a claim should not better the position of a party but rather return such party to the position that such a party would have been had that party not suffered the wrong complained of. I agree that is the rationale and substance of the law in regard to the award of general damages

In this case counsel for the appellant faulted the trial magistrate as having grossly erred in awarding the respondent general damages of Ug. shs. 15,000,000 without any evidence of loss by the respondent on record.

On the other hand, Counsel for the respondent in reply submitted that the appellant having lived on the suit land since 2007 to the time of filing the main suit in 2017 which was a period of 10 years during which the Respondent was

greatly inconvenienced by the acts of the Appellant who interfered with his possession and ownership of the suit land, destroyed property and illegally put-up structures. That the award of the UGX 15, 000,000/= as f general damages was justifiable.

Counsel for the respondent relied on ***Kampala District Land Board & George Mitala versus Venansio Babweyana, Civil Appeal No. 2 of 2007*** where it was held that it is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering.

Counsel further stated that the correct statement of the legal principle applicable in the appellate courts of Uganda with regard to damages in civil suits was well stated and articulated by Greer LJ in ***Flint Vs Lovell [1935] 1 KB 354,*** is that;

> ***"...an Appellate Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because it thinks that had it tried the case in the first instance it would have given a greater or lesser sum. In order to justify reversing the trial judge on the question of amount of damages, it will generally be necessary that the appellate court should be convinced that;***
>
> a) ***That the trial judge acted upon some wrong principle of law,***
>
> b) ***That the amount awarded was so extremely high or very small as to make it, in the judgment of the appellate court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

Given that general damages as noted above, are the direct probable consequences of the act complained of, of which such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering; I find that in the instant case the appellant stayed on land that did not belong to

him, cultivated, constructed on and even buried his son on the suit land all while the respondent who lawfully purchased the same tried to get him off the land in vain. He would thus be liable for the suffering and inconvenience the respondent endured in that period.

The fact is that the respondent failed to use the land he long purchased from 2007 up to 2017 when he filed his suit and even during the pendency of this as a result of the actions of the appellant. That fact cannot be ignored.

Accordingly, I would find that the award of Ug. shs. 15,000,000/= by the trial court was reasonable in the circumstances and as such the said amount awarded is not varied as it is confirmed.

With regard to ground 5 counsel for the appellant submitted that the trial magistrate misdirected himself on law and fact when he failed to appreciate the fact that no satisfactory evidence of ownership of the suit land by Ereu John who sold the land to the respondent was given.

That the trial magistrate instead relied heavily on hearsay and the purported clan agreement to come to the conclusion that the respondent owned the land. He further submitted that it is unbelievable that the trial magistrate ignored the criminal judgment in Criminal Case No. 621 of 2012 in which court found the appellant not guilty of criminal trespass and malicious damage in respect of the suit land.

Counsel for the respondent in reply submitted that the evidence of the respondent was on a balance of probability more cogent than that of the appellant and it their considerate opinion that the decision of the lower court in believing the evidence of the respondent was rightly guided by the law and

evidence contained in the record of proceedings which in no has caused any miscarriage of justice.

I have already dealt with this ground while considering ground 1 in which I found that it was correct for the trial magistrate to rely on documentary evidence whose contents were corroborated by the parties and their witnesses in court.

The agreements which were evidentiary documents produced in court did not fall within the meaning of hearsay evidence while confirming the ownership of the land sold by the late Ereu John as this fact was even confirmed by the Appellant's own witness DW5 Olobo with even the two clans involved did agreeing that the suit land belonged to Ereu John of Igoria clan.

Counsel for the appellant furthermore wanted the court to rely on a criminal case judgment as proof that the appellant owned the suit land.

Firstly, the essence of a judgment in criminal trespass is not based on ownership of the suit land and that is why it is not one of the ingredients the prosecution needs to prove.

Secondly in ***Criminal Case No. 621 of 2012 of Uganda vs Epoku Charles,*** the trial magistrate acquitted the appellant because he raised the defence of claim of right under **section 7 of Penal Code** which is an exception to criminal liability in respect of an offence relating to property if the act is done in exercise of honest claim of right.

This means the matter as to ownership of the suit land was not resolved on its merits *per se* leaving the respondent to sought remedy by way of civil suit so that the question of ownership is resolved finally, which it was.

The above findings being so, then I am inclined to conclude that no miscarriage of justice was occasioned to the appellant by the trial magistrate who ignored the

criminal judgment in Criminal Case No. 621 of 2012 as the criminal case in itself did not resolve and was never intended to resolve the issue of ownership of the suit land. This ground thus fails.

5. Conclusion:

In the final result this appeal is found to lack merit and is thus dismissed with costs in this court and in the lower trial court.

The judgment and orders of the lower court are upheld.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

13th February 2024