

The Republic of Uganda
In the High Court of Uganda at Soroti
Civil Appeal No. 0041 of 2019

10

Versus

15

Judgement on Appeal

20

The respondent filed CS 031/2013 for recovery of his 10 gardens situated at Onyurutu village Ominya Parish, Toroma sub county, Katakwi District, permanent injunction, eviction order, general damages and costs of the suit.

The appellant in his written statement of defence denied the respondent's claim over the land contending that he is the rightful owner of the land which is 3 acres and not 10 as alleged. That the respondent was wrongfully claiming eight acres of land next to the suit land which he had earlier

5 bought from Odeke s/o Adusa on 1/12/1995. He further stated that the land in dispute is lawfully his having bought the same from Opio s/o Okuta on 31/12/1995 and he has been using the land for agricultural purposes since 1995.

The trial Magistrate entered judgement in favour of the plaintiff, now
10 respondent, thus;

- a) A declaration that the suit land belongs to the plaintiff.
- b) The defendant, his sons and grandchildren are given six months from the date of this judgement to vacate the suit land otherwise an eviction order will be made against them.
- 15 c) A permanent injunction issues against the defendant, his children and grandchildren from interfering with the ownership of the suit land.
- d) The defendant shall pay the plaintiff general damages of shs. 4,000,000/=.
- e) The plaintiff is entitled to costs of the suit.

20 The defendant being dissatisfied with the above judgement appealed on the following grounds;

- a) The decision of the learned trial Magistrate was not supported by the evidence on record.
- b) The learned trial Magistrate failed to properly evaluate the evidence on
25 record thereby reaching an erroneous decision.
- c) The learned trial Magistrate erred in law and fact to hold that the suit land, consisting of 10 acres belonged to the respondent.
- d) The locus in quo, was perfunctorily conducted.
- e) The decision of the learned trial Magistrate has caused a total
30 miscarriage of justice to the Appellant.

5 2. Duty of the 1st appellate court:

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
10 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 one of the following:

This Honourable Court is the first appellate court in respect of the dispute
15 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*
20 *236.*

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

25 *"...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"*

In rehearing afresh, a case which was before a lower trial court, this
30 appellate court is required to make due allowance for the fact that it has neither seen nor heard the witnesses and where it finds conflicting

5 evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. See: ***Lovinsa Nakya vs. Nsibambi [1980] HCB 81.***

In considering this appeal, the above legal provisions are taken into account.

10 3. Representation:

The appellant was represented by Okanyum, Namusana & Co. Advocates while the respondents were represented by Legal Aid Project of the Uganda Law Society.

This matter proceeded by way of written submissions. These are
15 considered together with the lower court record in the determination of this appeal.

4. Determination:

a. Grounds 1,2 and 3:

- *The decision of the learned trial Magistrate was not supported by the*
20 *evidence on record.*
- *The learned trial Magistrate failed to properly evaluate the evidence on record thereby reaching an erroneous decision.*
- *The learned trial Magistrate erred in law and fact to hold that the*
suit land, consisting of 10 acres belonged to the respondent.

25 Grounds 1,2 and 3 are considered together. In arguing this appeal counsel for the appellant submitted that while it is trite law that in the evaluation of evidence when delivering a judgement, a judicial officer must look at the whole evidence on record, the trial court gave much weight to only the plaintiff's evidence without giving cogent reasons why he chose to believe
30 do so as opposed to those of the defendant. That this was because the

5 the trial court in its analysis and evaluation of the evidence solely focused on the authenticity of a sale agreement which it stated was likely forged document as none of the witnesses whose names appear on it signed on it and that even the majority of the witnesses were from the purchaser's (Defendant/ Appellant).

10 Yet according to counsel, there is no law that requires any specific number of witnesses to a sale agreement and that neither is there a legal requirement for any number of witnesses to be from either party to make such a document genuine.

Counsel for the appellant submitted that when a witness confirms in court
15 that he was present during the execution of an agreement then the requirement of signature becomes irrelevant as was the case here where two of the witnesses testified in court confirming that they witnessed the sale of the suit land.

Counsel thus faulted the trial magistrate for making no consideration on
20 the testimony those witnesses.

Additionally, counsel submitted that the trial magistrate should have also considered the fact that the claim on the suit land was time barred given that the uncontroverted fact that the defendant had been in occupation and use of the suit land since 1995 which was over 12 years before the suit
25 for reclaiming the suit land was made.

That had the trial magistrate addressed his mind to the import of the law of limitation for recovery of land, together with the general evidence regarding the appellant's long stay on the land, he would have surely come to a different conclusion in his judgement than he reached.

30 Counsel for the respondent in reply, submitted that the trial magistrate properly evaluated the evidence on record thereby reaching a just decision

5 where the respondent was declared a rightful owner of the suit land. Throughout the entire case the testimony of the respondent's witnesses is that he inherited the suit land from his father, Anderea Oukoi who died in 1983.

The following is the summary of recorded oral evidence. **Okiror John Robert**
10 **(PW1)** who is the respondent herein testified that he got to know the appellant in 2013 as he had sent his son Ocipo Dominic to put a home in the disputed land and that when he asked Ocipo Dominic why he was constructing a home on the suit land Ocipo Dominic told him that it was his father Akileng Musa who is the appellant who had sent him there to do
15 so on the basis that he had already bought the land.

Okiror John Robert (PW1) told court that on hearing this assertion he reported the matter to the LC1 and the area land committee who both summoned Akileng Musa who upon appearing before those authorities told them that he had bought the suit land from one from one Odeke s/o
20 Adusa at the price of 6 goats and 48,000/= in 1995.

Okiror John Robert (PW1) contended that the suit land, measuring 10 gardens, originally belonged to his late father Anderia Oukoi and on it were three graves of Aguti Tereza, his aunt, Ounyi, his grandfather and Kiyai Josephine, his younger sister.

25 He denied knowledge of how Odeke sold the land to Akileng Musa.

Omer Girado, PW2 testified that Akileng Musa was from Kapujan and that the land in issue concerned where Odeke s/o Adusa resided with the aunt of Okiror John Robert (PW1), the respondent as husband and wife.

That when the respondent's aunt died, Odeke s/o Adusa was chased away
30 the land which remained vacant. That at that Okiror John Robert got a job in the army and was away while Alusi Okiror used the suit land.

5 That when Okiror John Robert returned from the army he wanted to reclaim their land but he found that Akileng Musa had constructed thereon. **Osinga Edward PW3**, testified that the land originally belonged to Anderea Oukoi. That Odeke s/o Adusa once stayed with a woman called Tereza Aguti on the suit land as her concubine and that even Adusa, the father of
10 Odeke had also stayed on the land but he did not know him well. He denied any knowledge of Aguti ever inherited land from her father like her brother Oukoi.

Akileng Musa, the appellant testifying as **DW1** stated that he acquired the suit land through purchase from one Odeke s/o Adusa at 28,000/= and 6
15 goats and an agreement dated 31/12/1995 was entered.

That the agreement was witnessed by Okiror Filbert, Otai John and Imalingat Lodoviko (LC1 Chairman) on his side and Amuto Matilda the respondent's mother, Imalingat Lodoviko and Okiror s/o Kwapi on the part of the seller. That after he bought the land he settled his son called Amodoi
20 Mark on the suit land in 1996 but that he unfortunately he passed on in 2007 and was buried on the suit land together with his two children who also died and at the time of burying the children Okiror John Robert was present.

That after the death of Amodoi his widow eloped with another man leaving
25 the suit land and the clan resolved that one Ocipo care-take the land on behalf of the children of Amodoi Mark.

That Amodoi's son is now grown up and settled on the suit land. He confirmed that the LC1 was present during the sale of the land and he signed the agreement but did not stamp and that it was Odeke himself who
30 brought people who endorsed the agreement. He insisted that Odeke had got the land from Anderea Oukoi as he was staying with his sister.

5 He told court that Odeke was not buried on the suit land but that Odeke's wife was and that when Odeke fell sick he requested to be taken back to his place of origin and he ordered that the land he was in be sold to meet his burial expenses and it was done with the Chairman LC1 and his committee was present during the sale.

10 **Okiror Filbert DW2** testified that he came to know of Akileng Musa, the appellant on the day of the sale of the land as he witnessed the transaction and signed on the side of the buyer with the seller of the land as Odeke s/o Adusa whom he known Odeke for long as his grandfather. He insisted that Odeke was the owner of the suit land because when he married a woman
15 from Akarau, the woman's relatives gave him that piece of land to settle on and that since they did not have children when Odeke became old he decided to sell the portion given to him and returned to his original clan to stay with his brothers.

During cross-examination Okiror Filbert DW2 highlighted that Odeke
20 married Aguti Teresa though he was originally from Gorja Village, Orimai Parish Kapujan sub-county and the suit land is in Akurua village in Toroma Sub-county. That many people were present during the transaction but not all of them signed but some of the in-laws endorsed.

Otai John DW3 testified that the appellant is his biological brother who
25 bought 8 acres in 1995 and he was present during the transaction with the purchase price being 28,000/= and 6 goats. He confirmed that his names being on the agreement and agreed he did not sign and that nobody was bothered with the non-signing.

The above constituted the evidence received by the trial court which then
30 visited locus with the parties and their witnesses reiterating their testimony given in court.

5 The witnesses especially the respondent and his witnesses identified the grave of Aguti Teresa and the mango trees near which she stayed with Odeke s/o Adusa.

Akileng Musa's son's home was seen on the suit land. The grave of Oyi was also seen as well as an old live fence (Eligoi) showing a homestead of Oyi.

10 Akileng Musa, the appellant showed graves of Amodoi Marko, Adengo Grace and Okiror Richard.

Both parties herein are all laying claim to the suit land. The appellant's claim is that he bought the land while the respondent claims to have inherited it from his grandfather Anderea Oukoi which testimony is
15 supported by the testimonies of PW2 and PW3.

The respondent's evidence further is reinforced by the graves of Aguti- his aunt, Oyi- his paternal uncle as well as his old homestead which were seen at locus.

The appellant on the other hand claimed to have acquired the land from
20 Odeke s/o Adusa and he exhibits an agreement DEX1 dated 1/12/1995 which indicates that Odeke s/o Adusa sold to him the said piece of land consisting of about 8 acres in size to him at UGX 28,000/= (Twenty-Eight Thousand Shillings Only) and 6 goats.

That the said agreement was exhibited in court as DEX1 and it has (6) six
25 names of witnesses with the LC1 of the area, one Onyurutu Lodofiko Imalingat, appearing as a witness for both sides. The witnesses did not sign the agreement which also does not bear any LC1 stamp.

The appellant brought to court two (2) of the alleged the witnesses to the agreement and these were **Filbert Okiror DW2** - witness for the seller and
30 **Otai-DW3** witness for the appellant.

5 Akileng Musa, the appellant and some of his witnesses disputes that the land was sold and insists that this was evidenced by the non-signing of the so called land sale agreement which even was not endorsed with an LC1 stamp.

During locus proceedings the appellant claimed that it was not necessary
10 for neighbours to sign. The authenticity of the document is questioned though by the appellant who insists that it has no verifiable signatures and an official stamp from the LC1 of the area.

This notwithstanding, even if this court were to take it that the agreement was authentic and accepts that the appellant bought land from Odeke s/o
15 Adua, there is no proof that Odeke had authority to sell the land.

It is agreed that Odeke concubined with Aguti Tereza, the aunt to the plaintiff and sister to Anderea Oukoi, however, there is no proof that Odeke was given the suit land by Aguti's father or that Aguti inherited the suit land separate from her brother which then Odeke could be said to
20 have inherited upon her death.

What is factually true is that it is only Aguti who is buried on the suit land and Odeke who got ill was taken back by his clansmen to a place called Gorja where he had come from. That is where he died and was buried.

Also during locus visit, the old homestead and grave of Oyi, who was the
25 paternal uncle of the respondent, were seen on the suit land with the appellant admitting that Odeke, while selling him the land did not show him the old homestead of Oyi.

One wonders that this homestead which was prominently seen during locus visit would have escaped the sight of the appellant.

30 In this matter I am dealing with two sets of claims. A sale and an inheritance.

5 The sale has an unsigned agreement. In law there are various consequences of unsigned sale agreements. Firstly, unsigned agreement is, prima facie not legally binding with parties not be able to enforce the terms and conditions stated in it.

Secondly, an unsigned contract or agreement may lack clarity and precision
10 in terms of obligations, duties, and responsibilities of both parties. This may lead to a misunderstanding or disagreement between the parties.

Thirdly, in the absence of a signed agreement, one party may misrepresent the parties' intent, obligations, or duties in the contract. This may lead to the other party being misled and unprotected.

15 Fourthly, an unsigned agreement may not account for unforeseen situations that may arise during the performance of the contract. This may lead to conflicts and disputes between parties.

And lastly, without a signed agreement, there is no legal record of the terms and conditions agreed between the parties. This may lead to
20 confusion, misunderstandings, and loss of evidence in case of a legal dispute or litigation.

Thus ordinarily it is advisable that agreements are signed to avoid the risks and dangers associated with unsigned contracts.

On the other hand, where a party who did not sign a contract appears in
25 court to justify what is in the unsigned contract, the contract may still be enforceable if the party's words and conduct demonstrate their assent to the agreement.

Signatures are not required for a written contract to be binding on the parties.

30 However, whether a valid contract exists is a threshold question of law for the trial court for to prove the existence of a contract, the party seeking

5 enforcement must prove offer, acceptance, consideration and sufficient specification of the essential terms.

If the other party expresses concern or where a fundamental part of the deal has not been addressed, the court is unlikely to enforce such a contract.

10 In other words, if the party's words and conduct demonstrate their assent to the agreement, the contract may still be enforceable even if they did not sign it.

In this case, it is agreed by both sides that indeed the document tendered in court as evidence of sale of the suit land is not signed and neither is it
15 stamped by the witnessing authority which is the LC 1 of the area, though two witnesses of the sale confirmed that they witnessed the sale.

However, what is intriguing is the fact that during the locus in quo visit, a prominent feature which is the old homestead of Oyi, who was the paternal uncle of the respondent which years later on was still seen on the
20 suit land was never mentioned or seen by the alleged buyer of the suit land. The appellant admitted that he did not see that homestead too and even questioned its presence on the suit land. He blames Odeke for not showing it to him.

In my considered opinion, the presence of the old homestead of Oyi, who
25 was the paternal uncle of the respondent, would indicate that the tendered agreement which was not even signed by any of the party is a document which cannot be relied upon for it was incumbent upon the alleged buyer of the suit land to do due diligence to ensure not only that is the land in question having no encumbrances but to ensure that the one
30 who is selling, that Odeke s/o Adusa had the right to sell land.

5 Counsel for the appellant raised the issue of limitation in his submissions, stating that the same was ignored by the trial magistrate yet the appellant had pleaded occupation of the land since 1995.

I note that this issue was not raised in the lower court, though this court being an appellate court has the discretion and may consider such new
10 issues when raised on appeal.

However, a party relying on new raised issues must have raised the same at the trial with such not considered for this court's discretion to be exercised as there must be sufficient material, which upon evaluation, this court can determine whether if the matter had been raised at the trial, the
15 lower trial court would have had sufficient so as to determine the same.

In this instance the respondent brought the suit for recovery of the suit land which he said he inherited in 1986 and under paragraph 4(ii) he stated that in December 2012 the defendant started using/claiming the land in issue.

20 The appellant on the other hand in his written statement of defence merely stated that he bought the land in 1995 and that he has since been using it for agricultural purposes.

The witnesses' testimonies as seen above focused more on the ownership of the suit land and not the period of possession or how the land was used
25 or even as to when the respondent noticed the appellant on the suit land. This being the case I find that the evidence on record is not sufficient to determine the issue of longevity of one on the suit land. That being the case, I would not exercise the discretion of this court and consider the same at this level.

30 The above being so, I would conclude that all the three grounds are not sufficiently proved and are thus dismissed.

5 b. Ground 4:

The locus in quo was perfunctorily conducted.

Counsel for the appellant submitted that the trial magistrate did not conduct the proceedings in regards to *locus in quo* as required by law as he did not take the testimony of the witnesses and make a full record of
10 proceedings.

In response, Counsel for the respondent submitted that the submissions of counsel for the appellant were misguided and it seems he did not peruse the record of proceedings appropriately as the trial court confirmed from the parties the neighbours to the land, observed features and confirmed
15 where the suit land was.

Locus in quo visit by a court, while not being a must for the court to do so, is guided by **Practice Direction No I of 2007** whose paragraph 3 provides as follows;

During the hearing of land disputes the court should take interest in visiting
20 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.
- 25 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 guidelines is that proceedings at the locus in quo
30 should be as near as possible in form to those recorded by the trial judge during the hearing in court.

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

These proceedings are particularly useful for establishing boundaries in disputes. See: ***Sitenda v Mwamini Twemanye Sekibala (Civil Appeal No 153 of 2017) 2022 UGCA 76 (18 March 2022).***

10 In the instant case the trial magistrate visited locus in quo on the 21/5/2019 and seen from the handwritten record of proceedings both parties were present and gave their testimonies on how they got the land, they showed the features on the land including the graves, old homesteads
15 and trees. All the witnesses who previously testified in court except for DW2 were present to clarify their testimonies which they had given in court.

The trial magistrate also drew a sketch map of the disputed land indicating some of the features on the land as well as who were its neighbours.

20 Taking all these elaborate steps mentioned above into account, I would find no fault the locus in quo visit process at all and would conclude that it was conducted in accordance with the guidelines as all the essential steps were followed. Accordingly, I do find that the locus in quo proceedings in this matter was properly conducted. This ground fails.

25 c. Ground 5.

The decision of the learned trial Magistrate has caused a total miscarriage of justice to the Appellant.

No submissions were made on this ground by counsel for the appellant and so I will take it that was abandoned.

5 5. Conclusion:

This appeal having failed on all grounds is found to have no merit and is accordingly dismissed.

6. Orders:

- This appeal is dismissed.
- 10 - The judgement and orders of the lower court are accordingly upheld
- The Appellant to pay the costs of this appeal and in the lower trial court.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

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18th January 2024