THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 46 OF 2017

(ARISING FROM MASINDI CHIEF MAGISTRATE'S COURT CIVIL SUIT NO. 06 OF 2016 AT BULIISA)

1. **BITADWA KASIGWA**
2. **SIMON KASIGWA**
3. **TIBAMANYA KASIGWA**
4. **TIBAMWENDA KASIGWA**
5. **TINDYEBWA KASIGWA**
6. **ISINGOMA MALIGA::APPELLANTS**

VERSUS

MWIJAKUBI JULIUS::RESPONDENT

JUDGMENT BY JUSTICE GADENYA PAUL WOLIMBWA

This is an appeal against the judgment and Orders of the Magistrate Grade 1, Her Worship Atim Harriet Okello ESQ in the Chief Magistrate's Court of Masindi.

Background to the appeal

Briefly, it is the respondent's case that he is the lawful owner of the suit land measuring approximately 2 ½ acres situated at Kiyere LC 1 village, Kigwera Sub county in Buliisa district. That he acquired the disputed land by way of first occupation that however the defendants trespassed on to his land when they forcefully planted acacia trees besides several warnings from various authorities. He further stated that he has been denied usage of his land and asked the court to declare him as the lawful owner.

The appellants denied the allegations as claimed by the respondent and stated that the suit land which is located in Kigwere North East village forms part of the defendants' ancestral family land inherited from their grandfather. They further stated that they have been in possession and occupation of the suit land without any interruption from anyone whatsoever until the plaintiff begun claiming the same,

Evidence of the parties at trial.

EVIDENCE OF THE PLAINTIFF

PW1 MWIJAKUBI JULIUS testified that the four defendants are his paternal grandchildren and has sued them for trespassing on his land. He further stated that the matters were earlier on settled by the chairman of his village however the defendants refused to leave the land. That he forwarded the matter to the chairman LCIII and chairman LCI who forwarded him to court. He further stated that he came to Kiyere village in 1982 and occupied the suit land, lived peacefully with the defendant's father until his death. That the land is 2 ½ acres and that the defendants continued to plant trees.

In cross examination, he confirmed that the defendants encroached onto his land which he occupied by first occupation. He stated that the defendants are across the boundary and their father is in Kigwera.

PW2 BAMUTURAKI WILLIAM took oath and testified that the plaintiff and the four defendants are his neighbours. That he is the LCI Chairperson of Kiyere village and that it was in July 2013 when Simon Kasigwa came and planted acacia trees having been seen by Kwemera Christopher. That they talked to him and he was very hostile on them and that he insulted them. He stated that the land is located in the boundary between Kigwera North East and Kiyere. It was further stated in his evidence that the LCIII summoned them as the LCI of Kigwera North East and Kiyera and it was clearly stated that the land in question is in Kiyere village. That they were cautioned not to uproot the acacia trees and in 2016, the plaintiff had gone to put up a structure but he was attacked by the defendants. He further stated that Simon Kasigwa started putting up a structure, and they reported to the police who told him not to continue however it was completed recently and that also Isigoma a son to their sister came and put up a grass thatched house. He told court that it was in 1987 when the plaintiff came on the land and the defendants and family were in Kigwera North East but its only Simon who has shifted to Kiyere village.

In cross examination, it was confirmed that a copy of the resolution was given to the chairman of Kigwera North East. He also confirmed that he has been the LCI since 1992 and have been staying in Kiyere till now. He further confirmed that the defendants have land in Kigwera North East and that their father died and was buried there.

PW3 AYEBALE ROBERT stated under oath that he is the former chairperson of Kigwera Sub County and that in September 2015, he received a complaint from Kwemara Christopher and the plaintiff alleging the defendants had trespassed on the boundary. That he summoned the chairman of Kigwera North East and Kiyere and elders with intention of opening up boundaries. That people who had participated in creation of boundaries the parish chiefs resolved that where the defendants had planted acacia trees

is in Kiyere village and got to learn that the land in question is for Mwijakubi Julius in Kiyere village.

In cross examination, it was confirmed by the witness that he has never given the land to Julius.

EVIDENCE OF THE DEFENCE

DW1 KASIGWA SIMON testified on oath that he is not related to the complainant and that the plaintiff is after grabbing their land. He further stated that their father occupied the suit land by 1st occupation and that they were born there till now. That the land is located in Kigwera North East that however he does not know the size since it is big.

In cross examination, he confirmed that the land is theirs and that the plaintiff just came to Kigwera North East.

DW2 TIBAMANYA KASIGWA stated on oath that the land belongs to them and that it was for their grandfather who occupied it by way of 1st occupation since he was born. That the land is around 4 acres and it's in Kilima North East Kigwera.

In cross examination, he confirmed that the land is in Kigwera North East and does not know how the matters were settled.

DW3 TIBAMWENDA KASIGWA stated in examination in chief that the land belongs to their grandfather Kasigwa Kijangi and that they were born on the suit land. That they were surprised about the plaintiff and further stated that they are residents of Kilima North East Kigwera.

In cross examination, he confirmed that the land is theirs and that they were born on the suit land. He further confirmed that disputes arose after the death of their father.

DW4 TINDYEBWA KASIGWA stated that the land in dispute is theirs having been born there. He told court that it's approximately 4 acres located in Kigwera North East and that they acquired it by way of 1st occupation.

In cross examination, he stated that the land is located in Kigwera North East and that they have trees and shrines and that they cannot allow the plaintiff to use land that is not his.

DW5 BITADWA RWAMUKAGA FRANCIS took oath and told court that the complainant is a neighbour from Kiyere and that he is the LCI chairman of Kigwera North East. He further told court that the plaintiff is the at the border line of Kigwera and Kiyera and that the defendants are on the land of their late father. He added that they were born there and they were left there by their father. He also added that on that land there was a swamp where the father of the defendants used to do his rituals.

In cross examination, he confirmed that he did not agree to the outcome of the meeting dated 7/10/2016.

DW6 MIGUNGU M. JOHN testified before court stating that he was told by the defendants that the plaintiff wants to grab the land for Kasigwa. He told court further that he was a born on that land died there and was buried there. He also stated that the plaintiff does not have half an acre of land in Kigwera North East and that the defendants are on the land of the late father.

In cross examination, he confirmed that he does not know how the plaintiff acquired that land.

Other witnesses

ODONGO MARITO testified that the plaintiff came in 1987 and found the late Kasigwa on disputed land practicing witchcraft.

BITEGEGE SAFAFIN told court that the village was formerly Kilima and that the land belongs to Kasigwa where they have stayed for many years. Further told court that she does not know how the plaintiff came.

Locus Visit

The lower court visited the locus where upon a sketch map was drawn and witnesses were interviewed.

The trial magistrate allowed the plaintiff's claim stating that he is the rightful owner of the suit land and declared the defendants trespassers.

Dissatisfied with the judgment of the lower court, the Appellants lodged this appeal on the following two grounds;

1. The learned trial Magistrate erred in law and in fact when she failed to evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 6 of 2016 that the suit land belongs to the respondent.
2. The Learned trial magistrate erred in law and in fact when she totally disregarded the Appellants' evidence thereby arriving at a wrong decision in Civil Suit 6 of 2016 that the appellants had proved their case on a balance of probability.
3. The learned trial magistrate erred in law and in fact when she failed to address herself as to the correct procedure to be followed at locus in quo thereby occasioning a miscarriage of justice to the appellants.

The appellants prayed for the following orders;

a) That the appeal be allowed
b) A declaration that the disputed land in Civil Suit No. 6 of 2016 belongs to the appellants.

c) An order awarding the costs of this appeal and in the lower court to the appellants.
d) In the alternative but without prejudice to the foregoing, an order of a fresh locus in quo or trial de novo.

Representation

At the hearing of this appeal, the appellants were represented by Mr. Simon Kasangaki of Kasangaki and Co. Advocates. M/s KMA Advocates represented the respondent. Both counsel filed written submissions in support of and against the appeal.

Submissions

Counsel for the appellants decided to argue the first and second grounds of the appeal together.0784745052

Ground one and two

The learned trial Magistrate erred in law and in fact when she failed to evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 6 of 2016 that the suit land belongs to the respondent.

The Learned trial magistrate erred in law and in fact when she totally disregarded the Appellants' evidence thereby arriving at a wrong decision in Civil Suit 6 of 2016 that the appellants had proved their case on a balance of probability.

Counsel for the Appellant, Simon Kasangaki submitted that a fact is said to be proved when the court is satisfied as to its truth. Counsel further submitted that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. That the standard of proof in civil cases is on a balance of probabilities citing the case of **Muller vs Minister of Pensions [1947]2 ALLER 372.**

Counsel submitted that is their considered view that the issue for determination by this honourable court is whether the trial magistrate abdicated her duty to properly evaluate and weigh the evidence on record in arriving at the conclusion she did. That it is their opinion that the trial magistrate failed to properly evaluate the evidence on record and thus arrived at a wrong decision that the suit land belongs to the respondent.

In further evaluation of the evidence, counsel cited DW2, DW3, DW4, DW5 and DW6's evidence who all testified to the ownership of the suit land stating that the suit land belongs to them as it was for their grandfather who occupied it by way of 1st occupation and have grown utilizing the same. That the suit land belonged to the Kasigwa who was a born of that land, died and was buried on it. That it was further confirmed by DW5 that it was the piece of land where the defendant's/appellant's father used to do his rituals.

That DW6 the chairman of Kigwera North East Village testified that the claims by the plaintiff that the defendants built on his land are not true and the plaintiff stays at the border line of Kigwera and Kiyere. That he further stated that the plaintiff does not own even half an acre of land in Kigwera North East and that confirmed that the appellants are on their late father's land. He also relied on the evidence of Odongo Marite which was relied on who confirmed the evidence of all the above witnesses and further added that he became a resident of Kigwera in 1980 and the plaintiff came there in 1987 but that he found the late Kasigwa practicing witchcraft on the disputed land.

In evaluation of the evidence by counsel for the appellant, it was submitted that PW1 testified that the matter is over a boundary dispute which he first referred to the LC chairman then LC11. That he occupied the suit land in Kiyere village in 1982 and settled on the disputed land peacefully till the death of the defendants' father. That he further stated that the defendants encroached into his land having crossed the boundary and confirmed further that he acquired the land when he came by 1st occupation.

Counsel for the appellant also cited the evidence of PW2 submitting that it was his evidence that the plaintiff settled on the suit land in 1987 and the defendants and their families were in Kigwera North East. That even in cross examination he stated that the defendants' land is in Kigwera where their father was even buried.

In analysing the evidence of PW3 a former chairperson of Kigwera Sub County, he stated that he received a complaint from Kwemara Christopher and the Plaintiff alleging that the defendants had trespassed on their boundary. That the suit land belongs to Kasigwa who have stayed there for many years on the disputed land and that he does not know how and why the plaintiff came to start claiming interest in it. Counsel submitted that this corroborates the evidence of the appellants that the suit land belongs to them and not the plaintiff or respondent.

Counsel for the appellants argued that the plaintiff and all his witnesses' evidence, is severally riddled with contradictions, inconsistences and in summary is so discredited to be worthy of credit and/or probative value. That they all cannot state with particularity on how the plaintiff acquired the suit property, the year when the plaintiff acquired and settled on the suit land as he says in 1982 and some of his witness state that he occupied the suit land in 1987. That further to the above, that the witnesses did not know the clear boundaries of the suit land and could not tell how big the appellants trespassed on the respondent's land.

That further contradiction is shown by PW3 who clearly told the truth and contradicted all respondent's evidence that the village where the suit land is located was formerly called Kilima. That further the land in dispute belongs to Kasigwa (a relative of the appellants) who have stayed for many years on the disputed land and that he did not know how and why the plaintiff came to start claiming interest in the suit land.

Counsel further stated that the evidence led by the appellants generally was not rebutted or challenged in cross examination. He implored court to take the appellants' version on the basis of the settled law principle that where a party fails to challenge evidence, that evidence, is accepted as true. He referred court to Justice Karokora, J.S.C, in ***Habre International Co. Ltd vs. Ebrahim Alarakhia Kassim & Others,*** **Civil Appeal No. 4 of 1999 (S.C), (Unreported), at pp. 108-9,**

Counsel for the appellants concluded these two grounds submitting that it is only clear that the suit property is over 4 acres located in Kilima North East of Kigwera belonging to the appellants' grandfather Kasigwa Kajango who acquired it by way of first occupation and to which the appellants were born and raised. That it is thus the appellants' prayer that this honourable court finds that the learned trial magistrate erred in law and in fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 6 of 2016 that the suit land belongs to the respondent.

Prayed that grounds 1 and 2 of appeal succeed.

GROUND 3

The learned trial magistrate erred in law and in fact when she failed to address herself as to the correct procedure to be followed at locus in quo thereby occasioning a miscarriage of justice to the appellants.

Counsel for the appellants submitted that it is their strongest opinion that the trial magistrate failed to address herself as to the correct procedure to be followed at Locus in quo thereby occasioning a miscarriage of justice to the appellants.

Citing the case of **Crane Insurance Co. Ltd vs Shelter (U) LTD CACA No. 14 of 1998,** it was held that a "miscarriage of justice "is where there has been a misdirection by the trial court on matters of fact relating to the evidence given or where there has been unfairness in the conduct of a trial. That it is a settled position in the case of **Yeseri Waibi vs Edisa Lusi Byandala (1982) HCB 28** where it was held that the practice of visiting locus in quo is to check on evidence given by witnesses and not to fill gaps therefore the trial magistrate may run the risk of making himself a witness in the case.

That further the law regarding a view of the locus in quo was correctly stated by **Sir Udo Udoma CJ (as he then was) in Mukasa vs Uganda [1964] E.A 698 at 700** that;

"A view of a locus in quo ought to be, I think to check on the evidence already given and where necessary, and possible, to have such evidence jocularly demonstrated in the way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or a magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."

He also cited **Practice Direction No. 1 of 2007** that lays out what the court should take into interest when carrying out the locus in quo.

Counsel for the appellant relying on the above, stated that it was evident that there was no proper locus visit conducted by the trial magistrate since it was devoid of merit and in breach of the well laid down procedure of conducting locus visit. That fore instance many witnesses including Mariko, Wandera Kilama, Babyesiza Allan, Musinguzi David, Kamanyire Naboth, Kamanyire Steven, Watum Bigire, Byegarazo Zidooro and fifty others that were simply interviewed in the gathering where the trial magistrate found them, many of whom are not residents where the disputed land is situate as many stay in Kitooke a village far from where the land is located.

Counsel further stated that there was no sketch map drawn, that the trial magistrate stood in one position asked questions to a crowd she found turning the whole exercise into a public meeting, wrote answers and went away all which falls short of the recognised locus visit procedures.

Counsel submitted that the developments by the appellants and neighbours to the suit land should have been recorded to assist with the adjudication of the dispute. He stated that the locus visit herein occasioned a miscarriage of justice to the appellant and this was emphasized in the case of **David Acar vs Alfred Acar Aliro (1982) HCB 60.**

Counsel submitted that it is their submission that failure by the trial magistrate to conduct locus as per the statutory prescribed procedure like not drawing a sketch map, not visiting the suit land, allowing people not witnesses give evidence even those who stay villages away from the suit land was an error. That this error vitiated trial rendering the decision made null and void thus occasioning a miscarriage of justice to the appellants. He relied on the case of **Badiru Kabalega vs Sepiriano Mugangu HCCS No. 7 of 1987** where **Ongom AJ** as he then was provided the procedure to be followed at locus and further stated that;

"…. if the trial court fails to follow the accepted procedure at locus and bases largely on the trial at the locus in quo, that omission is fatal to the whole trial."

Counsel invited this court to find and hold that the trial court failed to conduct the locus in quo according to the prescribed principles and wrongly evaluated the evidence at the locus in quo thereby leading to a miscarriage of justice to the appellants. That had she conducted the locus in quo properly she should have reached a proper finding that the suit land belongs to the appellants. That since this matter that would be decided on the available evidence on record even without considering the evidence collected at the locus in quo, prayed that court enters judgment for the appellants.

Prayed that;

a) the appeal be allowed

b) A declaration that the disputed land Civil Suit No. 6 of 2016 belongs to the appellants.
c) An order awarding the costs of the appeal and in the lower court to the appellants.
d) In the alternative but without prejudice to the foregoing, an order of fresh locus in quo or trial de novo.

Respondent's submissions

Counsel for the respondent cited and relied on **Section 101 of the Evidence Act** on the issue of burden of proof and standard of proof required in civil cases. He submitted that the evidence of all the plaintiff's witnesses PW1, PW2 and PW3 was coherent, corroborative and credible.

Counsel submitted that the plaintiff occupied the suit land neighbouring that of the appellants' father until he died. That when the appellant's father died all hell broke loose and the appellants started to claim the respondent's portion of land. That it is their submission that the planting of acacia trees by the 2nd appellant in 2013 on the respondent's portion of land was meant to cement their fraudulent and illicit act of taking over the respondent's land.

Counsel further submitted that it was testified by PW2 that 2nd appellant was seen by Christopher Kwemera planting trees on the suit land (portion of the respondent). That the evidence of planting of acacia trees by the defendants is corroborated by PW3 and when confronted by the Local Council One Chairman together with Kwemara and the respondent, the 2nd appellant did not claim and or demonstrate his claim of ownership over the suit land but instead insulted the respondent. He further stated that when the issue was received to the Local Council 3 Chairperson PW3, he also entertained and resolved the issue finding that the suit land belonged to the respondent, Mwijakubi Julius.

Counsel further submitted that it was not true that the trial magistrate did not evaluate all the evidence and or did so selectively. Counsel relied on page 2 of the trial magistrate's judgment where she noted that;

".....therefore, considering evidence of the plaintiff and the defendants and considering evidence on locus as well...."

That from the above, it is succinctly clear that the Learned Trial Magistrate was alive and aware of her duty as the trial court to consider all pieces of evidence as were led by the parties while arriving at her conclusions and judgment.

Counsel further quoted from the judgment where the trial magistrate stated that;

".... that while the plaintiff was able to indicate how he acquired the suit land by way of first occupation. The defendant's evidence was marred with

contradictions and inconsistences, one version was that the suit land belongs to the late grandfather Kasigwa Kajungi while another version was that the suit land belonged to their late father. The 3rd version was that they were born and found themselves on the suit land."

Counsel argued that the above demonstrates a robust analysis and consideration of evidence by the Learned Trial Magistrate. Counsel added that the Trial Magistrate analysed the evidence knitting together the pieces of evidence of the appellants and arriving at three versions which to her and to him as counsel rightly so even in his opinion were heavily contradictory. That it is trite that contradictions may point towards falsehoods and added that is one of these cases where contradictions point towards deliberate falsehoods meant at concealing the truth. He cited the case of **Constantino Okwel Alias Magendo versus Uganda, SCCA No. 12 of 1990** where the Supreme Court laid down the law as to contradictions and inconsistences. That court stated that;

"In assessing the evidence of a witness his consistency or inconsistency, unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected, minor inconsistences will not usually have the same effect, unless the trial judge thinks they point to deliberate untruthfulness.

Counsel argued further that the Trial Magistrate had the opportunity to observe the demeanour of the witnesses and the parties during the hearing of the suit and that this is the part of the trial that the judicial officers always keep at the back of their minds when deciding cases.

He concluded stating that Learned Trial Magistrate was alive to her duty and properly evaluated the evidence on record and prayed that court so finds.

ON THE SECOND ISSUE

Counsel submitted that the trial magistrate properly and exhaustively evaluated the evidence on record and arrived at the right conclusions both in law and fact. That she did not disregard the appellants' evidence but took regard of it, evaluated and found the same contradictory and not credible.

He added submitting that no explanation was offered by the appellants for the grave contradictions and further noted that PW3 testified that the suit land belonged to the respondent and not Kasigwa as purportedly stated by the appellants.

ON THE THIRD ISSUE

Counsel submitted that the ground is redundant, academic and further stated that the appellants themselves on page 11 of their submissions admit that this was a matter that would have been decided without a locus visit. He further stated that the absence of

evidence that the magistrate strongly relied on the findings at the locus visit or based her judgment on the locus visit, it would be unfair to reverse the decision of the court on grounds of the said locus visit.

Counsel relied on the case of **Oyua Enoch vs. Okot William & 9 others civil Appeal NO. 022 of 2014** where it was noted that;

"nevertheless where, by the nature of the dispute to be adjudicated, ***the appellant courts finds that the visit to the locus in quo was a useless exercise and that the case could have been decided without visiting the locus in quo*** *such that without reliance on its findings at the locus, the trial court would have properly come to the same decisions on a proper evaluation and scrutiny of the evidence which was already available on record,* ***a retrial will not be directed. The erroneous proceedings at the locus in quo will be disregarded.***

He prayed that if there were any erroneous findings and or improper procedures, that in light of the above decision and the fact that the trial magistrate did not heavily rely on the locus to enter judgment, he prayed that the said issue of improper be disregarded.

Counsel argued that there is no evidence that the learned trial magistrate relied on the findings from the locus in quo. He further stated that a sketch map was drawn as seen in the judgment where she noted that;

"locus in quo was conducted a map of disputed land was drawn witnesses were interviewed as well."

Counsel further submitted that the Learned Trial Magistrate visited the land and that the evidence given by the people was not relied upon to arrive at the judgment and conclusions. He cited the case of **James Nsibambi vs Lovinsa Nankya [1980] HCB 81** where the court held that what is fatal is failure to observe the procedures for locus and later heavily relying on the evidence from the trial at locus in quo.

In further submission, he stated that the appellants are just giving lame excuses that the locus in quo was not conducted properly just to cover up for the bad evidence and weak case that they have. Counsel further stated that these bold allegations must be substantiated by evidence considering that they have not even highlighted from the record the conduct and or part of the proceedings or judgment complained of. That there is no evidence whatsoever that the learned trial magistrate interviewed the listed persons and more than 50 others.

That this ground should fail.

In rejoinder counsel denied the allegations that their evidence had three versions with contradictions that however what is true from the record of proceedings is that the suit property measures approximately 4 acres located in Kilima East of Kigwera that belonged

to the appellants' grandfather the late Kasigwa Kajango having acquired the same by way of first occupation. That upon his demise the appellants' father took over, produced and raised the appellants on it and all this was confirmed by DW3 who confirmed that the village where the suit land was, was formerly called Kilima. That he also stated that suit land belongs to the appellants herein and that he can't tell how and why the respondent herein started claiming interest in the same.

Counsel added further that there is no way this case could have been decided without proper, clear and well conducted locus in quo as it entirely revolves around trespass to land and boundary marks. That the failure by the trial magistrate to properly conduct the same vitiated the entire process to the detriment of the appellants. That despite the errors, the trial magistrate strongly relied on the proceedings on locus in quo as seen in the judgment that "***observations at Locus Quo indicated some act of trespass by the defendants way of constructing structures and planting acacia trees"***

He concluded stating that in the premises he reiterates their submissions that the trial magistrate failed to follow the prescribed principles and wrongly evaluated the evidence at the locus in quo thereby leading to a miscarriage of justice to the appellants necessitating an order of fresh locus in quo or trial de novo.

Duty of the first appellate court

The duty of this court as the first appellant court is to rehear the case on appeal by reconsidering all the evidence before the trial court and coming up with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. **[Pandya v R [1957] EA, 336; Father Narsension Begumisa & others v. Eric Tibekinga, SC Civil Appeal No. 17 of 2002 (unreported).** It is therefore incumbent on this court to re-evaluate the whole of the evidence adduced and come up with its own decision.

Determination

THE LAW

Section 101(1) of the Evidence Act places the onus to prove their interest in the suit land on the Appellants. This burden must be discharged on a balance of probabilities.

From the evidence on record and the submissions presented, the appellants in their submissions state that the suit property measures approximately 4 acres located in Kilima East of Kigwera that belonged to the appellants' grandfather the late Kasigwa Kajango having acquired the same by way of first occupation. That upon his demise the appellants' father took over, produced and raised the appellants on it and that all this was confirmed by DW3.

For the respondent, it is his case that he came to Kiyere village in 1982 occupied the suit land by way of first occupation and that he was neighbouring the appellants' father and they lived peacefully. That upon the demise of the appellants' father, all hell broke out in regards to the suit land.

In determination of a land boundary dispute, the court will normally be guided by the visible physical limits of the parcel of land as can be ascertained on the ground by natural boundaries e.g. rivers valleys or by monumental lines (boundaries marked by defining marks, natural or artificial, old occupations, long undisputed abuttals (e.g. a natural or artificial feature such as a street or road), statements of length, bearing or direction (metres), feet or other measurements in a described direction) or similar features as observed by court and verified by credible witnesses. For example, under Regulation 21 (1) of The Land Regulations, 2004 (which were in force at the time the boundary dispute first erupted), in ascertaining boundaries, Area Land Committees were authorised to;

(n) accept as evidence on the boundaries of the land the subject of the application-

(i) a statement on the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land matters in the parish or the urban areas;

(ii) simple or customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects;

(iii) human activities on the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land;

(iv) maps, plans and diagrams, whether drawn to scale or not, which show by paragraph (ii) or (iii) the boundaries of the land.

It is evident that in this specific case, both parties did not adduce evidence as to any identifying mark or rely on anything to show the true boundaries of the disputed land. The trial magistrate was left with the option of considering the oral testimony of the witnesses in regards to who had credible evidence not marred with contradictions and inconsistencies.

The trial magistrate in her judgment stated that;

"During scheduling all the defendants stated that they didn't know the boundaries of the suit land but while during hearing they estimated the suit land to be approximately 4 (four) acres.

Evidence was led by the respondent showing that the local authorities convened a meeting intended to resolve the boundary dispute however all was in vain. In the plaint, the respondent states that he occupied the disputed suit land by way of first occupation some years ago and since that time nobody has ever claimed the suit land in dispute.

That the appellants forcefully planted in the disputed land acacia trees besides various warnings from various authorities.

That the matter was resolved by the sub county of Kigwera for mediation in his favour upon which they left the suit land for one year but later came back. He attached the sketch map.

In the written statement of defence, the appellants stated that the plaintiff shifted to Kiyere village in 1990s and found them on the suit land.

The appellants submitted that the witnesses DW2, DW3, DW4, DW5 and DW6's evidence was clear as they all testified to the ownership of the suit land as belonging to the appellants. That the suit land belonged to the late Kasigwa who was a born of that land, died and was buried on it and further stated that DW5 corroborated the evidence that the defendants'/appellants' father used to do his rituals on the suit land.

Upon analysing the evidence presented by DW1, he states that their father occupied the suit land by 1st occupation and that they were born there till now. DW2 and DW3 stated in their evidence that it was for their grandfather who occupied it by way of 1st occupation since he was born. Whereas DW4 in his evidence in chief, told court that land in dispute is theirs having been born there. DW4 gives no explanation to the court on how they acquired the land whereas DW1 in contradiction to DW2 and DW3 states that their grandfather acquired it by way of first occupation.

This clearly demonstrates that there were contradictions and inconsistencies in the appellants' evidence that may point towards falsehoods as to the ownership of the suit land.

However, the respondent's case was that he also acquired it by way of first occupation when he came to Kiyere village in 1982. But it should be noted that though all the respondent's witnesses testified that the suit land was located in Kiyere village and that it belonged to the respondent, PW2 specifically told court that it was 1987 when the plaintiff came on the land. This too contradicts the evidence of the respondent who stated that he occupied the suit land in 1982 by way of first occupation.

As already pointed out in the submissions, the trial magistrate in regards to the contradictions and inconsistencies stated in her judgment that;

"....that while the plaintiff was able to indicate how he acquired the suit land by way of first occupation. The defendant's evidence was marred with contradictions and inconsistences, one version was that the suit land belongs to the late grandfather Kasigwa Kajungi while another version was that the suit land belonged to their late father. The 3rd version was that they were born and found themselves on the suit land."

The trial magistrate did not analyse the evidence of the respondent in regards to the contradictions and inconsistencies as to when the respondent occupied the suit land. That notwithstanding, I find the contradictions in the respondent's evidence minor.

The law relating to contradictions and inconsistencies is well settled that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If, however, they are minor and capable of innocent explanation, they will normally not have that effect. See ***Makau Nairuba Mabel vs Crane Bank Ltd, HCCS No. 380 of 2009 per Obura J.; Okecho Alfred vs Uganda, S.C Crim. Appeal No. 24 of 2001; Alfred Tarjar vs Uganda Crim. Appeal No. 167 of 1969 (EACA)***

I find that the appellants' contradiction on how they acquired the suit land is a major contradiction intended to mislead this court. If surely, they acquired the suit land through their late grandfather as submitted by the counsel, why then would they give different versions of their ownership to the suit land.

Evidence was given by the respondent that he lived peacefully on the suit land while the defendants' father was alive and that disputes arose after his death. This was confirmed by DW3 that indeed disputes arose after the death of their father. Why would the appellants wait for the death of their father and that is when they plant acacia trees on the disputed land? I find that this was a deliberate move by the appellants to utilize the suit land well knowing that it was for the respondent.

It was confirmed by DW6 the chairman of Kigwera North East Village that the plaintiff stays at the border line of Kigwera and Kiyere. Whereas it is submitted by the appellants that the suit land is located in Kigwera North East village and the respondent states that it is found Kiyere village, it was stated by PW2 that it was resolved by the LCI of Kigwera North East and Kiyera that the land in question is in Kiyere village and that it belonged respondent. It should also be noted that PW3 confirms the above evidence and stated further that he summoned the chairman of Kigwera North East and Kiyere and elders with intention of opening up boundaries of the disputed land. He further stated that the people who had participated in creation of boundaries the parish chiefs resolved that where the defendants had planted acacia trees is in Kiyere village and they resolved that the land in question is for Mwijakubi Julius, the respondent herein.

It has been submitted by the appellants' counsel that PW3 told this honourable court the truth contradicting the respondent's evidence. That he stated that the village where the suit land is located was formerly called Kilima and that the land in dispute belongs to Kasigwa (a relative of the appellants) who have stayed there for many years.

However, it has been observed upon analysing the evidence of PW3 on record that the submissions made by the appellants' counsel are deliberate lies intended to mislead this court.

It is not disputed that the suit land is on the boundaries of Kigwera North East Village and Kiyere and looking at the sketch map as drawn by the trial magistrate, the area trespassed on was clearly indicated.

As already pointed out, the appellants bear the burden to prove that the trial magistrate failed to evaluate the evidence on record and that she disregarded the appellant's evidence thereby arriving at a wrong decision.

Accordingly, this court finds that the trial magistrate evaluated the evidence as whole when she stated in her judgment that;

"Therefore, considering evidence of the plaintiff and the defendants and considering evidence on locus as well."

In my view, all the evidence was evaluated by the trial magistrate and accordingly the appellants have failed to discharge their burden. Drawing from the above, this court rejects grounds 1 and 2.

Ground 3

The learned trial magistrate erred in law and in fact when she failed to address herself as to the correct procedure to be followed at locus in quo thereby occasioning a miscarriage of justice to the appellants.

Counsel for the Appellant complained that the manner in which the locus visit was conducted was improper as it was devoid of merit and in breach of the well laid down procedure of conducting locus visit. It was his submission that no sketch map was drawn, that the trial magistrate stood in one position asked questions to a crowd she found turning the whole exercise into a public meeting, wrote answers and went away all which falls short of the recognised locus visit procedures.

Being a procedure undertaken pursuant to Order 18 rule 14 of *The Civil Procedure Rules*, proceedings at the *locus in quo* are an extension of what transpires in court. They are undertaken for purposes of inspection of a property or thing concerning which a question arises during the trial. For the inspection of immovable property, objects that cannot be brought conveniently to the court, or the scene of a particular occurrence, the court may hold a view at the *locus in quo*. According to section 138 (1) (b) of *The Magistrates Courts Act* and Order 18 rule 5 of *The Civil Procedure Rules*, evidence of a witness in a trial should ordinarily be taken down in the form of a narrative, and this by implication includes proceedings at the *locus in quo*.

The purpose of and manner in which proceedings at the *locus in quo* should be conducted has been the subject of numerous decisions among which are; *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81,* in all of which cases the principle has

been restated over and over again that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only.

Considering that the visit is essentially for purposes of enabling trial magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony.

In the instant case, the record of appeal, reveals that the locus was carried out, a sketch map was drawn showing the observations made during the visit and that there was an attendance list of those who attended. However, it should be noted that there is no record as to what transpired at the locus in regards to what was asked and who testified. This is contrary to what the counsel for the appellant is telling this honourable court since he states that there was no sketch map drawn and that the whole exercise turned into a public meeting as many people were interviewed in regards to the suit land.

As per the record, no evidence has been found that many people were interviewed. Where a trial court fails to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relies on such evidence acquired and the observations made there at in the judgment, it has in some situations been found to be a fatal error which occasioned a miscarriage of justice and a sufficient ground to merit a retrial, if the case would have been decided differently had the court observed all the principles guiding conducting of locus in qou. (see for example ***Badiru Kabalega v. Sepiriano Mugangu [1992] 11 KALR 110*** **and** ***James Nsibambi v. Lovinsa Nankya [1980] HCB 81***).

However, section 166 of *The Evidence Act*, states that the improper admission or rejection of evidence is not to be ground of itself for a new trial. An appellate court will set aside a judgment of the court below, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial.

Accordingly, in the instant case, this honourable court finds that no miscarriage of justice was occasioned to the appellant in the way the locus in quo was conducted

notwithstanding that some procedures were not followed. The evidence of the Respondent (plaintiff) and his witnesses in the court was cogent and believable as I observed in the consideration of grounds I and II of the appeal and is sufficient to show that he is the owner of the suit land.

For the reasons above, the appeal is hereby dismissed with costs of appeal the Respondent.

Gadenya Paul Wolimbwa
JUDGE
27th July 2021

I direct the Registrar of the court to email this judgment to the parties on 29th July 2021.

Gadenya Paul Wolimbwa
JUDGE
27th July 2021