THE REPUBLIC OF UGANDA

IN THE HICH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA – 0039 OF 2017

KAKYO ROSE :: APPELLANT

VERSUS

1. **RWAKIJUMA GEORGE**
2. **MUGISA CLOVIS**
3. **KABAGAMBE ZAVERIO**
4. **AHEBWA CHRISTOPHER**
5. **ISINGOMA LAWRENCE :::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

This is an appeal against the decision of His Worship Kwizera Vian, Magistrate Grade One at Fort Portal dated 30/6/2017 in which he made judgment in favour of the Respondents/plaintiffs. The appellant seeks orders of Court to allow the appeal and set aside the decision of the trial Court with costs.

Background:

The Respondents/plaintiffs filed Civil Suit No. 14 of 2016 against the appellant/defendant contesting her actions to close an access road which they claimed had been in existence for over 50 years. The respondents/plaintiffs sought

a declaration that the suit land measuring 12ft wide formed part of the access road on which they enjoyed a right to use, a permanent injunction stopping the appellant/defendant from further blocking the access road and replacing the boundaries, general damages and costs of the suit.

The appellant/defendant denied the allegations by the respondents/ plaintiffs and contended that the respondents/plaintiffs had no access on the suit land given to them by Byaruhanga and that her land did not border with the same. That the 1st respondent/plaintiff asked her for a temporary road to use to ferry building materials to his site which she accepted; that thereafter the plaintiffs claimed that they had an access road on the suit land whereas not. She asked court to dismiss the suit with costs.

The trial Magistrate after trial entered judgment in favour of the respondents/plaintiffs confirming that they had an access road on the suit land, a permanent injunction restraining the appellant from blocking the same, general damages of shs 500,000/= and costs of the suit. The appellant/defendant being aggrieved lodged this appeal against the decision of the trial court and framed four grounds as follows:

1. **That the learned Trial Magistrate erred in law when he tried a matter which had been adjourned for mediation at locus instead of mediating it.**
2. **That the learned Trial Magistrate erred in law and fact when he visited locus prior to hearing the case contrary to the well laid down principles governing locus.**

3. **The learned Trial Magistrate erred in law and fact when he entirely based his judgment on what transpired at locus in quo yet the proceedings at locus were improperly conducted which occasioned a miscarriage of justice.**
4. **That the learned Trial Magistrate erred in law and fact when he denied the appellant/appellant/defendant an opportunity to being heard and bringing witnesses contrary to the rules of fair hearing and natural justice.**

Representation and Hearing:

Learned Counsel Julian Nyaketcho appeared for the appellant/defendant and Mr. Muhumuza Samuel for the respondents/plaintiffs. The parties filed written submissions which I have considered.

Submissions for the appellant:

It was contended that the matter had been adjourned for mediation to be conducted at locus but the trial magistrate proceeded to hear it, contrary to Rule 4 of the Judicature (Court Mediation) Rules 2013 which stresses the fact that every civil matter must first be mediated and it is after mediation has failed that court can hear the same. It was submitted that under the said rule, mediation was mandatory and the failure to adhere to the same caused a miscarriage of justice to the appellant.

Learned counsel also challenged the manner in which the locus proceedings were conducted. It was pointed out that the purpose of a locus visit is to ascertain the evidence that the parties have adduced in court. It was contended that the trial magistrate had not heard any evidence in court and thus had nothing to confirm with what was on the ground. That all the evidence was gathered at locus, contrary to established principles of conducting a locus visit thus rendering it irregular.

It was further contended by the appellant that the trial magistrate only allowed one of the plaintiffs to testify upon a prayer by counsel for the plaintiffs which was contrary to Order 1 rule 8 (12) of the Civil Procedure Rules; that this was irregular and occasioned a miscarriage of justice to the appellant. Learned counsel for the appellant further argued that the trial magistrate erred in law and fact when he admitted the evidence of PW2. That his evidence contained what transpired at locus and thus was irregular.

Counsel also submitted that the appellant was not accorded a right to a fair hearing. It was asserted that the appellant was not given an opportunity to present her witnesses. That the appellant had indicated in her written statement of defense that she intended to present three witnesses, her-self inclusive. That she did no present her witnesses as she was not guided by the trial magistrate. That since the appellant was unrepresented, it was the duty of the trial magistrate to advise the appellant about the same. That since such guidance was not given this occasioned a miscarriage of justice to the appellant. The court was asked to allow the appeal and set aside the decision of the trial court.

Submissions for the respondents:

In response Mr. Muhumuza commenced his submissions by raising a point of law. He contended that the appellant raised new grounds in her submissions which were not indicated in her memorandum of appeal filed in court. That learned counsel for appellant challenged the manner in which the trial court allowed only the plaintiff to testify which to him was a new aspect not covered under the grounds framed by the appellant for determination by this court. He thus invited court to ignore all the submissions in that regard.

On the merits of the appeal, learned counsel submitted that Section 7 of the Magistrate's Court Act allows court to sit at any place within the local limits of its jurisdiction. That Section 7 (2) validates proceedings of a Magistrate's Court conducted at any place or building. He thus asserted that the trial magistrate had the discretion and legal capacity to hear the case while at locus. Learned counsel cited the case of **Onek Manacy & Anor Vs. Omona Micheal, Civil Appeal No. 36 of 2010** where the trial court heard the evidence at locus and proceeded to conduct the locus in quo on the same day and the proceedings were found to be valid on appeal. He thus submitted that there was nothing irregular with the manner in which the trial court conducted the proceedings in this case.

He contended further, that the record is silent as to whether there was a settlement; that since there was none the trial court had the powers to go ahead and hear the case at locus and determine the same on merits. It was pointed out that the trial was not objected to by the appellant/respondent. Learned counsel also contended that the trial court properly relied on the evidence of PW2. That per the record, PW2

gave evidence and was cross examined and as such the trial magistrate rightly relied on such evidence.

Learned counsel also submitted that the evidence was well recorded by court having given the appellant the opportunity to cross examine the witnesses of the appellant/respondent and as such no injustice was occasioned to the appellant. He argued further that the appellant testified and thereafter informed Court that she closes her case. That the appellant was given an opportunity to present her evidence and witnesses but she chose to close her case. Therefore, no injustice was occasioned to her. Learned counsel asked court to find no merit in all the grounds of appeal and thus consequently strike put the appeal with costs to the Respondents.

Duty of first appellate Court:

This being a first appeal, my duty is to subject the evidence at trial to a fresh and exhaustive scrutiny and a reappraisal of all the evidence on record before reaching my own decision. I will make due regard to the fact that I did not see the witnesses testify to observe their demeanor. I will weigh the evidence and the contradictions therein to draw my own inference. **(See Fr.NanensioBegumisa& 3 others Vs. Eric Tiberuga, SCCA No. 17 of 2014 [2004] KALR 236).**

CONSIDERATION OF THE APPEAL BY COURT:

Ground 1: That the learned Trial Magistrate erred in law when he tried a matter which had been adjourned for mediation at locus instead of mediating it.

It was contended for the appellant that the trial magistrate erred in law and fact when he proceeded to hear the case without subjecting it to mandatory mediation as required under Rule 4 of the Judicature (Mediation) Rules 2013.

Section 4 (1) of the Judicature (Mediation) Rules, 2013 states as follows: ***The court shall refer every civil action for mediation before proceeding for trial***. In my view, this Section 4 (1) should be read together with Order 12 of the Civil Procedure Rules.

Order 12 of the Civil Procedure Rules provides for scheduling conference and alternative dispute resolution and statutes as follows:

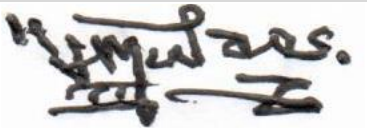
> **1. Scheduling conference.**
>
> ***(1) The court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement —***
>
> ***(a) ……..***
>
> ***(b) ……..***
>
> ***(2) Where the parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of Order XV of these Rules.***
>
> **2. Alternative dispute resolution.**

(1) Where the parties do not reach an agreement under rule 1(2) of this Order, the court may, if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench, named by the court.

In this case, on the 12th of June 2017, when the case came up for mention, counsel for the plaintiff informed court thus: ***"Parties wish that we visit locus in quo because they may settle the matter there".*** By this request, it is my understanding that the parties were in efforts to explore any other form of settlement. I find that the court thereby granted the opportunity to explore any other form of settlement and adjourned the case to 14th June 2017 for locus visit where the matter could be concluded as requested. In effect, the court allowed for mediation and any other form of settlement as envisaged under Section 4 (1) of the Judicature (Mediation) Rules and Order 12 (1) (1) of the Civil Procedure Rules.

At the proceedings of 14/6/2017, in my view, the trial magistrate complied with the requirements of Order 12 (1) (1) of the Civil Procedure Rules which provided another opportunity to the parties to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement. The holding of the scheduling conference and the subsequent hearing were prompted by counsel for the plaintiff who informed court that ***"Matter for scheduling and hearing".*** This was the same counsel that had applied to court for a locus visit on the grounds that the parties could settle the matter there.

The proceedings of 14/6/2017 are silent as to whether there was any such settlement at locus as had been alluded to by counsel for the plaintiff in court on



12/6/2017. Had there been such settlement, then the court would have proceeded under Order 12 (1) (2) of the Civil Procedure Rules to make relevant orders. What is on record is that on 14th of June 2017, when the case came up at locus, counsel for the plaintiff informed court thus: ***"Matter for scheduling and hearing".*** The court thus went ahead with scheduling and recorded the evidence at locus. None of the parties informed court as to whether any form of settlement had taken place.

Under Order 12 (2) (1) of the Civil Procedure Rules, where the parties do not reach an agreement under rule 1 (2), the court may, if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench, named by the court.

In my analysis, while at locus, by seeking scheduling and hearing by counsel for the plaintiff without objection from the appellant/defendant, as opposed to settlement as had earlier been reported in court on 12/6/2017, it was understood that the parties had not reached any settlement and therefore where the parties had failed to agree, the trial magistrate was at liberty to proceed with the hearing. By proceeding with the matter as requested by counsel for the plaintiff with no objection from the appellant/defendant, it implied that the case lacked good potential for settlement and as such, there was no need to bring Order 12 (2) (1) of the Civil Procedure Rules into play.

I therefore find no error committed by the trial magistrate as complained. **Ground 1** therefore fails**.**

Ground 2: That the learned Trial Magistrate erred in law and fact when he visited locus prior to hearing the case contrary to the well laid down principles governing locus.

It was contended for the appellant that the learned trial magistrate erred in law when he relied on the evidence of PW1 who was not sworn. I have perused the record and noted that in the typed proceedings, it was omitted to record that PW1 was sown, but the hand written proceedings do show that the trial magistrate recorded that PW1 was sworn. The argument that PW1 was not sworn therefore lacks merit.

Another contention was that it was erroneous for the trial magistrate to allow only one of the plaintiffs to testify on behalf of the rest contrary to Order 1 rule 8 (12) (2) of the Civil Procedure Rules. On the other hand counsel for the respondents asserted that the appellant did not raise a ground of appeal as regards the propriety of the evidence of PW1 given on behalf of the rest and that this constituted arguing a new ground on appeal. I will consider the issue on its merits as it is accommodated by the complaint in Ground 3 to the effect that the proceedings at locus were improperly conducted which occasioned a miscarriage of justice.

On the 14th June 2017 when the case came up for hearing, learned counsel for the respondents intimated to court that since all the plaintiffs/respondents claimed a right of way, one of them would testify to represent the rest. The appellant/defendant was asked whether she had an objection and she stated that she had no objection. Court made an order that the 1st plaintiff represents the rest of the

plaintiffs. In my view, nothing bars a witness from giving evidence that is within his or her knowledge that accommodates and could resolve a matter on behalf of him-self or her-self as well as the other plaintiffs. It is my view that where the evidence of witnesses is similar and adducing the same would make it repetitive, a party can decide to drop some witnesses and rely on the evidence of a few witnesses or even one witness to prove their case. I am therefore unable to fault the order by the trial magistrate allowing only the 1st plaintiff to testify in proof of the claim of the plaintiffs.

The appellant also challenged the manner in which locus proceedings were conducted on the basis that court had to hear the case in court first before proceedings for locus. All the authorities cited to me are about the importance and purpose of visiting locus and the manner of conducting locus proceedings but do not help me in determining whether it is irregular to conduct all the proceedings at locus without first conducting proceedings in the court house. The resolution of **Ground 3** will accommodate this complaint.

Ground 3: The learned Trial Magistrate erred in law and fact when he entirely based his judgment on what transpired at locus in quo yet the proceedings at locus were improperly conducted which occasioned a miscarriage of justice.

Section 7 of the Magistrate's Court Act provides for place of sitting of court and states as follows:

Place of sitting

(1)A magistrate's court—

(a) may be held at any place within the local limits of its jurisdiction; or

(b)if it appears to the Chief Justice that the interests of justice so require, may be held, with the written authorisation of the Chief Justice, at a place outside the local limits of its jurisdiction designated in the authorisation, and shall be held in such building as the Chief Justice may, from time to time, assign as the courthouse.

(2)Notwithstanding subsection (1), if a magistrate's court sits in any building or place within the local limits of its jurisdiction for the transaction of legal business, the proceedings shall be as valid in every respect as if they had been held in a courthouse assigned for that purpose.

Therefore a magistrate's court can be held at any place within the geographical limits of court and such proceedings will be deemed to have been held in a courthouse. There was therefore no error in holding the proceedings at locus.

I will now deal with the regularity of the locus proceedings. In **Deo Matsanga Vs. Uganda 1998 KALR 57,** it was observed thus: **"*The purpose of visiting the locus in quo is to cross check on the evidence adduced during the trial. The proceedings at the locus should form part of the court record. The trial Magistrate should record everything that a witness states in the locus in quo and recall him to give evidence of what occurred on oath and opposite party is afforded an opportunity to cross examine him*"**

In this case, in the proceedings of the trial court, the trial magistrate recorded the evidence of the witnesses and they pointed out the marks on the suit land. PW1

stated that he was the one who sold the land to the appellant. He stated that the avocados were not the boundary marks. That the road existed and it was the one that the appellant blocked. The trial magistrate also drew a sketch map of the access road which is part of the record and recorded his own observations. I find that the trial magistrate properly conducted locus in quo and there was no irregularity in the proceedings. I therefore find that the proceedings were regular and there was no illegality therein. **Grounds 2 and 3** of the appeal therefore fail.

Ground 4: That the learned Trial Magistrate erred in law and fact when he denied the appellant/defendant an opportunity of being heard and bringing witnesses contrary to the rules of fair hearing and natural justice.

The appellant contended that she was denied a right to fair trial since she was not given an opportunity to lead evidence from her witnesses listed in the summary of evidence.

Article 28 of the 1995 Constitution emphasizes that every person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. The broad contours of the right entails giving each party a right to be heard and to present his or her evidence in a claim by or against him or her before a decision is taken by court. In the persuasive dicta by Mubiru J in **Onek Manacy& Anor Vs. OmanaMiccheal, (Civil Appeal No. 032 of 2016) [2018] UGHCCD 47 (4 October 2018*),*** he observed inter-alia that:

"The judicial system in Uganda uses the adversary system of trial when resolving disputes. It is a system based on the notion of two adversaries battling in an arena before an impartial third part, with the emphasis on winning. Under the guidance of court, which ensures that rules of evidence and procedure are followed, the two adversaries have full control of their respective cases. This means that they are responsible for pre-trial procedures, and preparation and presentation of their respective cases during trial. It is their duty to gather evidence, to organize and present witnesses. The role of the judicial officer is to decide the evidence is admissible, and what evidence is inadmissible and therefore to be excluded from the trial."

It therefore follows that the duty to gather and present evidence is on the parties. It is not the duty of court to advise parties on which evidence should be adduced and that which should not be adduced. In this case, the appellant's counsel contended that the appellant/defendant was denied a right to a fair hearing on account that court did not advise her to lead the evidence of the other witnesses listed in her summary of evidence. The appellant gave her evidence and she stated that she bought the suit land from PW2 and there was no such access road. She was cross examined and she closed her case by herself. She never indicated to the trial magistrate that she had other witnesses to present.

I have observed that the plaintiffs were represented by counsel while the appellant/defendant was self-represented. The locus visit was based on the application of counsel for the plaintiffs who informed court that the matter could be settled there and the appellant/defendant had no objection. While at locus,

counsel for the plaintiffs informed court that the matter was for scheduling and hearing. I am not sure if in these circumstances the appellant/defendant understood that all the proceedings were to be held and concluded at locus since the usual practice was to hold proceedings in the courthouse and then also at the locus visit. The appellant/defendant in her written statement of defence had listed 3 witnesses including her-self. I am not sure that the appellant/defendant had taken her witnesses with her to the locus; or whether she had prepared on the basis that all the proceedings would be held and concluded at locus or hoped to adduce the evidence of her listed witnesses back in the courthouse; and whether in closing her defence case, she was only closing the locus visit part of her case, or her entire defence case.

I believe that in adopting the procedure to conduct the entire trial at locus though regular, the trial magistrate had a duty to guide the unrepresented appellant/defendant in order to satisfy him-self in ensuring that the rules of evidence and procedure were properly followed to ensure a fair hearing. In my view, the appellant should have been notified that all the proceedings were to be concluded at locus and she should have been asked whether she was ready to proceed on that basis and if she had thus brought all her witnesses.

I therefore find that the procedure adopted by the trial magistrate of holding the entire trial at locus without satisfying himself that the appellant/defendant had fully understood the procedure that was being applied, may have inadvertently denied the appellant/defendant an opportunity of being heard and bringing her witnesses contrary to the rules of fair hearing and natural justice which resulted in a

miscarriage of justice suffered by the appellant. **Ground 4** succeeds and on this basis, this appeal succeeds with the following orders:

1. **The judgment of His Worship Kwizera Vian, Magistrate Grade One (Fort Portal) dated 30/6/2017 is hereby set aside.**
2. **The case is referred back to the trial court to conduct a re-trial.**
3. **Each party shall bear their costs of this appeal and in the court below.**

I so order.

Vincent Wagona

High Court Judge

FORT-PORTAL

DATE: 31/8/23