THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 004 OF 2020

(ARISING FROM CIVIL SUIT NO. 42 OF 2013, GULU CHIEF MAGISTRATES COURT)

OLUM PETER.....APPELLANT

VERSUS

MODIKAYO OBINA.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

This is an appeal from the Judgment and Decree of the then Magistrate Grade One of Gulu Chief Magistrates Court, His Worship Kintu Isaac Imoran, delivered on 20th December, 2019, in Civil Suit No. 42 of 2013 in a land matter. The Appellant was the defendant in the trial Court. He was sued over a piece of land situate at Opidi Lwala village, Lwala Sub-ward, Onyona Parish, Ongako Sub-County, Gulu District. The cause of action was in trespass and declaration of ownership. Whereas the suit land was described as measuring approximately 300 acres, it turned out that the dispute was narrowed to the boundary that separates the two parties. The area in issue was therefore averred by the Respondent (plaintiff then) to be approximately

three (3) acres. Each side alleged that the other trespassed on the three acres. The trial court received evidence and is said to have visited the area in dispute (*locus in quo*) although there is no such record. In his Judgment, the Learned trial Magistrate made a finding that the disputed land is about 300 acres (not the three), and stated that since each party claims and occupies and cultivates almost half thereof, each party therefore failed to show and demarcate the actual land boundary separating the two disputants. Court held that each party is the rightful owner of half of the land. Court therefore decreed that the approximate of 150 acres of the land belong to the Respondent (Plaintiff) and the other being approximately 150 acres is owned by the Appellant (Defendant). Court issued a permanent injunction restraining the Appellant (Defendant) from trespassing or laying claim to the Respondent's 150 acres. Court declined to issue eviction Order, and each party was to bear its own costs of the suit.

Against the above decision and orders, both parties are aggrieved and dissatisfied. The Defendant appealed first, and the Plaintiff cross appealed.

Grounds of Appeal

The Appellant is shown to have crafted and lodged his grounds of appeal without the assistance of counsel. The grounds are repetitive and gravitate around the manner in which the trial court evaluated the evidence on record, and the conduct of the

proceedings at the *locus in quo*. For the record, I will reproduce the grounds;

1. The Learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record in regard to the testimonies of witnesses of the Respondent and thus came to a wrong decision.

2. The Learned trial Magistrate erred in law and fact when he disregarded the evidence contained in the court proceedings thus came to a wrong decision.

3. The Learned trial Magistrate erred in law and fact when he took evidence at locus but failed to physically identify the features claimed by the parties thus came to a wrong decision.

4. The Learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence adduced by the Appellant at the locus.

5. The Learned trial Magistrate erred in law and fact when he only considered evidence adduced by the Respondent's witness disregarding the evidence adduced by the Appellant's witnesses thus came to a wrong decision.

The Appellant prayed that the Judgment and decision of the trial court be set aside/quashed and appropriate orders be made declaring the subject matter of the dispute as the Appellant's property. The Appellant also prayed for costs of the Appeal.

In its Memorandum of Cross Appeal, which I shall comment on later, the Plaintiff in the lower Court, formulated three grounds, namely;

1. Had the Learned trial Magistrate evaluated the evidence on record he would have found the cross appellant had clearly established the boundary of the suit land as a road from Alero- Paminyai to Goma.

2. The Learned trial Magistrate erred in law and fact when he did not award the cross appellant the costs of the suit.

3. Had the Learned trial Magistrate properly instructed the parties at the locus, the Court could have established the boundary.

The Cross Appellant (Plaintiff) prayed that the Cross Appellant is declared the owner of the entire suit land, with costs.

Representation

At the appeal hearing, the Appellant represented himself while Learned Counsel Mr. Ocorobiya Lloyd represented the Respondent/ Cross Appellant. The parties filed written submission and were granted leave to supplement orally. Mr. Ocorobiya did, while the Appellant did not, opting to adopt his written submission.

Arguments

I must confess some difficulty in deciphering the gist of the Appellant's submission. Upon perusing it, before the scheduled hearing, I advised the Appellant to appear by counsel, given the complex nature of the appeal. The Appellant intimated that he would consider the guidance but when he subsequently appeared, he had made up his mind to proceed *pro se*. Given the nature of the Appellant's uncoordinated arguments, I decided to summarize the key aspects of what I think his submission encompasses.

The Appellant gave the background facts, as per the parties' pleadings in the trial court. I however note that some factual assertions in the statement of brief facts are not borne out of the Appellant's Written Statement of Defense. I have therefore ignored such.

In his submission, the Appellant faults the trial Court for alleged improper conduct of proceedings at the *locus in quo*. The

Appellant claims that the court turned the *locus in quo* court session into a village meeting. The Appellant also asserted that no land was seen or inspected by the trial Court. He argued that the Court failed to verify the truth on the ground.

The Appellant referred to the impugned Judgment, where the trial Court noted that Court had visited the *locus in quo* and established as a fact that *"the Plaintiff does not stay on the suit land."* The Appellant then claimed that the trial Court went ahead to make conclusion thus, *"so the remainder that court finds is that, there is nothing (that) would cause dispute between the two parties as far as land is concerned, but ignorance, greediness and ill motives."* With respect, the above quoted parts are nowhere in the Judgment of the trial Court. I must observe that it is improper for a litigant to impute a finding on a trial court when the same is not backed by the Judgment/ Ruling and the court record.

The Appellant also argued that the Respondent (Plaintiff) had trespassed on the suit land and that the trial Court should have held so, having visited the locus and noted that the Respondent was not staying on the suit land. This submission, with respect, appear contradictory.

The Appellant also argued that the trial Court merely assumed that the disputed land claimed by the Respondent measures 300 acres. The Appellant contended that the trial Court

does not stay on the suit land, and later held that, the Respondent and family members occupy part of the suit land, estimated in half (150 acres).

The Appellant faulted the trial Court for ordering that the land is shared in equal proportion (half). The Appellant submitted that such order would create more land dispute during the sharing of locked land surrounding homestead of one of the parties.

The Appellant also argued that the Learned trial Magistrate ought to have taken seriously the evidence of Respondent, that the Respondent's lease application for the suit land did not succeed, following the complaint by the Appellant and his brothers, way back in 1976, opposing the lease application by the Respondent in regard to the suit land.

The Appellant prayed that the Appellate Court determines what forms the boundary of the land of the two disputants. The Appellant submitted on what he believes marks his land boundary from the Respondent's. I wish to observe that the submission in that respect, is untenable as the Appellant purports to adduce fresh evidence on appeal and in submission. What he seeks to introduce and therefore canvasses in written arguments, is not borne out of the evidence on record. Moreover, the Appellant did not seek leave to adduce additional

evidence on appeal under Order 43 rule 22 of the Civil Procedure Rules. I therefore reject that bit of the submission.

The Appellant asked this Court to come to its own conclusions based on the available evidence. He prayed that Court holds that the Respondent is a fraudulent land grabber, and that the suit land does not belong to the Respondent (Cross Appellant). The Appellant also prayed for a declaration that the Appellant owns the suit land, and that the Respondent is a trespasser. He also sought for a permanent injunction against the Respondent, mesne profit, general damages, interest, and costs of the Appeal as well as costs of the trial court, against the Respondent.

In his written arguments, Learned Counsel for the Respondent gave brief history of the case. He stated that, in his plaint, the Respondent (Plaintiff) had averred that the Appellant had trespassed on about three (03) acres of land, by way of cultivation and construction of a hut and pit latrine. Learned Counsel also asserted that his client had averred that although the Appellant is a neighbor (in the east), the road from Alero-Paminyai to Koc-Goma acted as a boundary (of the suit land).

Learned Counsel then proceeded to mix up his arguments, without specifying whether they relate to the appellant's grounds of appeal or the Respondent's Cross- Appeal. It is only when Learned Counsel was submitting on the third ground of the Appeal that he was clear that he was arguing the Appeal.

However, the preceding arguments appear general and jumbled up. It seems to me Learned Counsel did that way, to address both the grounds of Appeal, and his client's cross appeal, given the similarity in the grounds. With respect however, Learned Counsel should could have done better.

Learned counsel also referred to the impugned holdings of the trial court, where Court declared that the parties should own the land equally (150 acres each). Counsel argued that the dispute is a boundary one. Counsel wondered why the trial court still found that the parties had failed to clearly demarcate their boundary, yet the parties had in their pleadings and evidence, averred and shown that the dispute was a boundary dispute. Counsel then opined that what this Appellate Court has to determine is what formed the boundary of the parties. Counsel asserted that the Respondent stated that the boundary is Alero-Paminyai to Koc- Goma Road. Counsel submitted that this Court had before decided in the case of **Professor Henry Kerali Vs. Fatuma Bona and 2 Others, C.S No 09 of 2011**, that, marked trees could be used as boundary marks, or other natural features. Counsel prayed that the Respondent's evidence that the Alero-Paminyai- Goma Road is the boundary of the suit land (separating the two parties' land) be held to be uncontroverted. He thus prayed that this Court should hold that, that is the boundary that should separate the two.

Learned Counsel criticized the trial court for going to the suit land but failing to verify the truth. He argued, that constituted a serious error. Counsel asked that this Court comes to its own conclusion, based on the available evidence. Learned Counsel concluded that basing on the available evidence, the Appellant exceeded the boundary and trespassed on the Respondent's land by constructing a pit latrine and a hut on it.

Learned Counsel closed his submission by faulting the trial Court for irregularly conducting the locus. Counsel however disclaimed that, the irregularity notwithstanding, the Appellate Judge can still make judgment even if locus proceedings was not well conducted. Counsel also criticized the trial court for not asking the parties to show what each knew to be their boundaries. Counsel prayed for costs in this Court and the trial court.

Resolution of the Appeal

Before I resolve the Appeal, I remind myself of the duty of this Court, sitting as a first appellate court from the decision of the Magistrate Grade One, and sometimes a Chief Magistrate, where the Chief Magistrate sits as a trial Court. As a first appellate court, the parties are entitled to obtain from this court, the court's own decision on issues of fact and issues of law. However, in the case of conflicting evidence, I have to make due allowance for the fact that I have neither seen nor heard the

witnesses testify, and make an allowance in that regard. I must however weigh conflicting evidence and draw my own inference and conclusions. See: **Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002, (per Mulenga, JSC)**. See also **Coghlan Vs. Cumberland (1898)1 Ch. 704**, wherein the Court of Appeal of England put the matter succinctly as follows;

"Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the Judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the full conclusion that the Judgment is wrong...when the question arises which witness is to be believed rather than another and that question turns on the manner and demeanour, the court of appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from the manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witness whom the court has not seen." See: **Pandya Vs. R [1957] EA 336.** In Pandya, the above passage was cited with

approval. Court held that the principles declared above are basic and applicable to all first appeals.

In **Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10 of 1997**, the Supreme Court held that, it was the duty of the first appellate court to rehear the case on appeal, by reconsidering all the materials which were before the trial court, and make up its own mind. The Court held, failure by a first appellate court to evaluate the material as a whole constitutes an error of law.

In this Appeal, I will resolve the Appeal under three broad grounds because of their overlapping nature, without reproducing them. I however note that the grounds of the Cross Appeal, although poorly framed in a very argumentative manner, resonate to the Appellant's grounds of Appeal. The only exception in the Cross Appeal is that the Cross Appellant also faults the trial Court for not awarding costs. The rest of the grounds therefore relate to the alleged improper evaluation of evidence and the conduct of the *locus in quo* proceedings.

Conduct of *locus in quo* Proceedings

Locus in quo is a Latin word meaning the scene of the event. It is a place where anything is alleged to have been done. In regard to land, the term is used to refer to the area of the dispute. The Civil Procedure Rules, S.1 71-1 appear to recognize the need for a Court to visit *locus in quo.* Thus Order 18 rule 14 CPR

provides, ***"The Court may at any stage of a suit inspect any property or thing concerning which question may arise."***

In **Alimarina Okot & 4 Others Vs. Lamoo Hellen, High Court Civil Appeal No. 026 of 2018, Stephen Mubiru, J.** citing O.18 rule 14 CPR, was of the view that locus in quo proceedings are taken pursuant to the quoted rules, and therefore the locus in quo proceedings are an extension of what transpires in Court. I agree.

Given the whole context and the purpose of the CPR, my view is that *locus* visit is not mandatory. The Court exercises discretion in deciding whether or not to visit *locus*. However, where it has decided to conduct locus visit, Court must comply with the law regulating *locus in quo* proceedings.

The Practice Direction No. 1 of 2007, Guideline number 3 provides for the *locus in quo*. It provides for how the *locus in quo* proceedings should be conducted where court decides to visit the *locus*. It states,

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

a) Ensure that all parties, their witnesses, and advocates (if any) are present.

b) Allow the parties and their witnesses to adduce evidence at the *locus in quo*.

c) Allow cross-examination by either party, or his/her counsel.

d) Record all the proceedings at the *locus in quo.*

e) Record any observation, view, opinion or conclusion of the court, including a sketch plan if necessary."

My view is that the Practice Direction was largely informed by the case law on the subject. Thus in **David Acar & 3 others Vs. Alfred Acar Aliro (1982) HCB 60**, Court stated,

"When the Court deems it necessary to visit the locus in quo, then both parties, their witnesses must be told to be there. When they are at locus in quo, it is not a public meeting where public opinion is sought as it was in this case. It is a Court sitting at the locus in quo. In fact, the purpose of the locus in quo is for the witnesses to clarify what they stated in Court. So when a witness is called to show or clarify what they stated in Court, he/she must do so on oath. The other party must be given opportunity to cross examine him. The opportunity must be extended to the other party. Any observation by the trial Magistrate must form part of the proceedings."

See also: Bongole Geoffrey & 4 Others Vs. Agnes Nakiwala, Civil Appeal No. 0076 of 2015 (Court of Appeal) where the Practice Direction and the principles enumerated in the case law were cited with approval.

In the present case, I have combed through the record of the trial Court and the entire case file and found nothing to suggest that the trial Court recorded anything at the *locus in quo*. Both parties here stated that, the visit did happen. However, as to when that was so, the record does not indicate. I have noted that during the proceedings of 26th March, 2019, the then counsel for the Defendant (present Appellant) closed the Defense and prayed for *locus* date. The trial Court noted that the *locus* would be conducted on 17th April, 2019 at 2:00pm. That was the last record about the intended *locus* visit. The fact that the *locus* was visited, next featured in the impugned Judgment, at page 5. The Judgment does not state when the *locus* visit took place. There is no sketch map either. On the case file is a Notice of the intended *Locus* visitation issued by the trial Court, dated 9th April, 2019, addressed to the OC Police, Ongako Police Post. Therein, it was stated that the *locus* visit would happen in the area on 31st May, 2019 at 2:00pm, so the Police was requested to avail security to Court at the *locus in quo*. The letter also, by a copy thereof, requested the Local authorities of the area (Opidi Lwala village, Onyona Parish, Ongako sub county, Omoro District, and the parties, to be present.

As it is abundantly clear, the trial Court did not indicate on record whether the *locus* visit did take place on 31st May, 2019, and if so, what transpired. I agree with both parties to this appeal, that the proceedings at the *locus in quo* flouted the rules

regarding the conduct of such proceedings. I need not repeat a litany of complaints raised in this appeal. Suffice is to state that the irregular proceedings deprived the parties of the opportunity to clarify the area in dispute, that is, the boundary each claims to be the boundary of the suit land. It has also deprived this appellate Court of the benefit of such findings, if at all.

The omission by the trial Court to conduct a proper *locus in quo* proceedings, resulted in the erroneous findings that the disputed area was 300 acres, instead about three acres which both parties had canvassed in Court. It also resulted in the trial Court making the erroneous orders. The Order that each party would take the half of the land (150 acres), a sort of a draw, was unsupported, and erroneous in law.

In the circumstances, I find that, the evidence on record was not properly evaluated at all. Without going into specifics, given the fact that both parties agree, I hold that the conclusions of the trial Court, where the parties drew, like in a world of soccer, is confirmatory of improper evaluation of evidence on record. Accordingly, the complaints raised by the parties to the appeal are valid. I do not however find the complaint in the cross appeal, that the trial Court erred in ordering that each party bears their own costs, valid. The complaint was not pressed in this appeal. I deem that it was abandoned. I will not therefore address it.

Given the above findings, and looking at the circumstances of the whole case, I am of the view that a fair trial was vitiated. A miscarriage of justice was therefore occasioned to both parties.

A decision is said to have occasioned a miscarriage of justice where there is *prima facie* evidence that an error has been made. See: **Matayo Okumu Vs. Fransiko Amudhe & 2 Others (1979) HCB 229**; **Bongole Geoffrey & 4 Others Vs. Agnes Nakiwala, Civil Appeal No. 0076 of 2015 (Court of Appeal).**

Where there is a glaring procedural defect of a serious nature by the trial court, then an appellate Court may order for new trial, if Court is of the opinion that the defect resulted in a miscarriage of justice. However an Order of retrial should be exercised with great care and caution. It should not be made, for example, where due to lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. See: **Oyua Enock Vs. Okot William & 9 Others, HCCS No. 022 of 2014.** In **Alimarina Okot & 4 Others Vs. Lamoo Hellen, High Court Civil Appeal No. 026 of 2018 (Mubiru, J**., *supra*),

In the Alimarina case (s*upra*), Court was of the view that a retrial is an exceptional measure to which resort must necessarily be limited. Court observed that a trial de novo is usually ordered by an appellate Court when the original trial fails to make a

went on to set down the conditions that must be satisfied before an order of a retrial can be made. They are; that the original trial was null or defective; that the interests of justice require it; that the witnesses who had testified were readily available to do so again should a retrial be ordered; and that no injustice will be occasioned to the other party if an order of retrial is made. The Learned Judge opined that the above conditions are conjunctive, meaning they must all be satisfied.

In my respectful view, circumstances may arise where an Appellate Court can only do justice by ordering a new trial, even where one or more of the above conditions have not been met. For example, it may transpire that some of the witnesses who testified have long deceased, and yet the justice of the matter requires that a de novo trial is ordered and held. With the greatest respect, I also do not think that because of its nature, a Judge sitting on an appeal would be expected to inquire whether or not the witnesses who testified in the defective trial, are still alive, before the Judge can Order for a retrial. Moreover, the provision of Order 43 rule 21 of the CPR seems to me, to give the High Court discretion in the matter, although as noted in **Bongole Geoffrey & 4 Others Vs. Agnes Nakiwala, Civil Appeal No. 0076 of 2015 (*supra*),** an order of retrial should be issued with great caution. That in my view, is not to take away the discretion of the High Court in the matter, in deserving cases, where not all the conditions precedent listed in the persuasive decision of my Learned brother in the **Alimarina**

case, are satisfied. For completeness, **O. 43 rule 21 CPR** which support my slightly different view on the matter provides,

"if upon the hearing of an appeal it shall appear to the High Court that a new trial ought to be had, the High Court may, if it shall think fit, order that the Judgment and decree shall be set aside, and that a new trial shall be had." (Underlining is for emphasis.)

The provision of O.43 rule 21 CPR, in my view, guides the Application of section 80 (1) (e) of the of the Civil Procedure Act Cap 71, which provides,

"Subject to such conditions and limitations as may be prescribed, an appellate court shall have power to order a new trial."

I must add that, I am not aware of a statute or regulations that have prescribed conditions and limitations for Court exercise of power to order a new trial. Rather, the conditions and limitations that courts have developed over time, hence case law, apply. In my respectful view, the conditions and limitation developed by Courts, if held to be conjunctive, would defeat the purpose for and application of section 80 (1) (e) of the CPA, as amplified by O.43 rule 21 of the CPR. It is for the above reasons that this Court refrains from adopting a very strict constructionist approach, with regard to the held *sine qua non*

to an order of retrial. In my view, whereas the conditions laid down by Courts offer good guide, they are not conjunctive but disjunctive.

In the present matter, the request by the parties that this Court should finally resolve the matter, with respect, is appreciated, but not sustainable, because Court lacks sufficient material and evidence to resolve the boundary question. A *locus* visit and the testimony of witnesses, who must first testify in Court about the land boundary, in my view, would be the only panacea to this land boundary conundrum. I therefore do not accede to the invitation, although if sufficient material existed, I would have accepted and exercised such power under section 80 (2) of the Civil Procedure Act, to perform the duties of the trial Court, as bolstered by O.43 rules 20 and 27 of the CPR.

In the circumstances, the Appeal succeeds, and so is the Cross Appeal, save for the ground of the Cross Appeal regarding the non-award of costs of the trial Court, which is deemed abandoned. I would, therefore, exercising my powers under Order 43 rule 21 of the CPR, set aside the whole Judgment and Decree issued by the Learned Magistrate Grade 1. Instead I order that Civil Suit No. 42 of 2013 is retried by the Chief Magistrate of Gulu Chief Magistrates Court, expeditiously. In my view, it does not matter whether some of the witnesses who testified in the first trial are alive or not, as without a retrial, the old recurring land dispute will just be swept under the carpet.

However, without prejudice to the retrial which is hereby ordered, the parties are hereby strongly encouraged to attempt to resolve the long boundary dispute amicably, by choosing a court accredited mediator, and if possible, joined by a Traditional Chief, all acceptable to the parties, and report to the Chief Magistrate of this Court, as the Learned Chief Magistrate shall guide.

Given the circumstances of the matter, each party shall bear its own costs of this Appeal and costs of the first trial. I so order.

Before I take leave of this matter, I noted that the Respondent lodged what he termed 'Memorandum of Cross Appeal', which I deemed to be a Notice of Cross Appeal. Having perused the Civil Procedure Rules (CPR), I found no express provision allowing a party who wishes the High Court to vary or reverse the decision of the Magistrate Court, in any event or on the Appeal being wholly allowed or in part, to file a 'Memorandum of Cross Appeal' or 'Notice of Cross Appeal' in the High Court. However, I note that the Rules governing appeals to the Court of Appeal and the Supreme Court expressly provide for Cross Appeals. I would therefore have struck out the present Cross Appeal but did not for the simple reason that the Cross-Appellant raises grounds common to those raised by Appellant. I therefore approached the matter liberally, but more from an Appeal angle, and not a Cross appeal *per se*. The Rules Committee appointed by the Hon. the Chief Justice of the Republic of Uganda may

wish to consider revisiting the Civil Procedure Rules and cure this apparent lacuna in the Rules of Practice in the High Court. There could of course be good reasons for the Rules' omission, which this Court is oblivious of.

Delivered, dated and signed in Court this 27th day of February, 2023

27/2/2023

George Okello

JUDGE HIGH COURT

Judgment read in open court in the presence of;

10:53am

27th February, 2023

Attendance

Ms. Grace Avola, Court Clerk.

The Appellant is absent.

The Respondent in Court.

Mr. Ocorobiya is absent. (Counsel for the Respondent).

Respondent: I am ready to receive the Judgment of Court.

Court. The Judgment of Court is delivered in open Court.

27/2/2023

George Okello

JUDGE HIGH COURT

Later at 11:05: The Appellant appears as court was reading its Judgment.

27/2/2023

George Okello

JUDGE HIGH COURT