THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0028-2013
(ARISING FROM TORORO CIVIL SUIT NO. 0073/2013)

OKOTH OWOR.....APPELLANT
VERSUS
SUNDAY MUVUWALA.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal against the Judgment and orders of His Worship **Simon Ocen** Magistrate Grade I.

The memorandum of Appeal has 7 grounds of appeal.
Appellant argued grounds (ii) and (iii) together and grounds (i) and (iv) together, arguing ground (v) alone.

Under grounds (ii) and (iii), the appellant complained that in visiting *locus in quo* the trial court made gross errors in that in his judgment the Magistrate referred to evidence of a one neighbour **Ofwono Yowana**, but the record of the trial Court's observations and the statements of evidence of the said **Yowana Ofwono** do not form part of the trial record. Counsel for the appellant pointed out that this omission was fatal. He referred court to the case of ***DAVID ACAR AND 3 OTHERS V. ALFRED ACAR-ALIRO (1982) HCB 60*** and ***YESERI WAIBI V.***

EDISA BYANDALA [1982] HCB 28, and ***NSIBAMBI VS. NANKYA 1980 HCB 81***.

Replying to this allegation the Respondent's counsel referred to the quoted cases especially of ***DAVID ACAR & OTHERS V. ALFRED ACAR-ALIRO (1982) HCB 60***, and argued that it appears that the omission to record the Magistrate's observations at the locus on record was an omission made by the typist, and he referred court to pages 5 paragraph 3 of the judgment, where the Magistrate refers to the fact that,

> "*At the locus in quo I recorded my observations*."

In rejoinder appellant referred court to the case of ***KIBUKA T/A MBALE STAR SERVICE STATION VS. COOPERATIVE BANK LTD [1996] HCB 44***, where **J. Engwau** held that;

> "*It was the duty of trial court to type and certify its record before sending it to the High Court for purpose of appeal and any omission in so doing would not be used against either party to dismiss the appeal*."

He also referred to ***JAMES NSIBAMBI V. LOVINSA NANKYA (1980) HCB 81*** where **J. Odoki** held that a failure to observe the principles governing the recording of the proceedings at the *locus in quo*, and yet relying on such evidence acquired and the observations made at the scene in the judgment is a fatal error which occasioned a miscarriage of justice. He found it a sufficient ground to merit a retrial as there was failure of justice.

This ground if sufficiently disposed off, in my view would answer the rest of the issues and would dispose of this appeal. This is because the judgment of the trial Magistrate in conclusion at page (paper) No.7, last paragraphs reads,

> "*I am therefore fortified in my finding from the record, and my observations at the locus in quo that the suit land belongs to the plaintiff.....*"

The judgment was premised on the observations at the locus, and record, which are in issue under the above grounds. The rest of the grounds cannot stand alone, if grounds 1 and II fail in as far as the proceedings at the locus are concerned.

I have examined the entire lower court record, and considered all arguments and the law as presented by counsel for both appellants and Respondents, in this appeal. I am aware of the duties of a first appellate court as rightly quoted in ***GAPCO UG. LTD VS. AS TRANSPORTS LTD CA 7/2007***, to subject the whole evidence to a fresh exhaustive scrutiny and draw fresh conclusions therefrom; but taking cognisance of the fact that it never had chance to examine the witnesses.

Having done so, I find that in this case the trial Magistrate fell short of the requirement of the law as regards the recording of evidence at the locus. This as has been found by earlier decided cases amounts to varying degrees of injustices depending on the circumstances of each case. Where its gross, courts have nullified the proceedings and ordered retrials. This was the case in the quoted case of ***NSIBAMBI V. LOVINSA NANKYA*** (supra). ***YESERI WAIBI V. EDISA LUSI BYANDALA CA 75/1981***, held that;

> "*the usual practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill gaps for then the trial Magistrate may run the risk of making himself a witness in the case*." Such a situation must be avoided.

The trial Judge/Magistrate should make a note of what takes place at the locus in quo and if a witness points out any place or demonstrates any movement to the court, then this witness should be recalled by the court and give evidence of what occurred. (***Fernandes v. Noronha [1969] E.A. 506***- applied).

The trial Magistrate in this current case failed to take down the said notes and evidence from the witnesses at the locus whom he heavily relied on in his judgment. In the judgment he referred to observations he made regarding the size of the suit land, the fact that it was not cultivated. He refers to details of evidence he noted as the trial Magistrate at locus, but there is nothing on the record to show for it. He refers to evidence led by **Ofwono Yowana** a neighbour, and contradictions thereof, which are not recorded on the lower court record at locus at all. This is important because on paper No.5 paragraph 4 of his judgment, he made conclusions regarding the ownership and boundaries regarding the parties basing on that piece of evidence. He repeats the same in his last paragraph on paper 7 that;

> "*Basing on his findings from the record and observations at locus the suit land belongs to the plaintiff.....*"

There is no such evidence recorded on record at the locus, to aid the appeal court to assess whether his observations were born out of what transpired at locus or his own imaginations. This is fatal. This amounts to a miscarriage of justice.

In the ***James Nsibambi v. Lovinsa Nankya*** case (supra), court further held;

> "*with respect to the learned Chief Magistrate, how can there be no miscarriage of justice when a court acts on vital evidence which is not on record*?"

How could an appellate court review the evidence adduced at the lower court when the evidence is not recorded but merely referred to in the Judgment.

An Appellant court cannot uphold a finding of the lower court unless that finding is supported by evidence on record.

I therefore find that the argument by defence that clerk omitted to type the proceedings unfounded and intended to mislead court. The lower court handwritten record is available and shows the same record as the typed record. No such proceedings were taken down and they do not exist. This ground is therefore proved and succeeds.

Am unable to proceed to determine the other grounds because they are all hinged on this ground and would therefore succeed on account of the court's failure to abide by the legal requirements and guidelines for trial at locus. Moreover failure to visit locus is itself fatal. Therefore no finding on this evidence can stand, if the court misdirected itself on the conduct of the locus. The trial Magistrate's findings were heavily dependent on observations he made at the locus, and as held in ***Kawesa v. Lufuku Civil Appeal No.56/1968*** where in the judgment of the trial court, the Magistrate relied on observations he made at locus but there was no record of any evidence taken at the scene of those observations, the trial was found irregular resulting into a serious failure of justice and the High Court ordered for a retrial of the case. I similarly find that the omissions found so for did result in

serious failure of justice, which have led me to agree with appellant's counsel on all the other grounds of appeal as argued under grounds 1, 4, and 5 which allude to unfairness and procedural irregularity. The Respondent's averments on the issues raised cannot stand because as already pointed out, the trial Magistrate conducted the trial in error, of known legal principles and practices of civil trials. I therefore uphold the issues in all grounds above as proved, and this appeal will accordingly succeed on all grounds for reasons aforesaid above.

The appeal hereby succeeds, the lower court Judgment and orders set aside, and replaced with an order for retrial before another competent Magistrate.
I so order.
Costs to appellants.

Henry I. Kawesa`
JUDGE
27.08.2014