

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0039 OF 2014**  
**(Appeal from the judgment and decree of Nebbi Chief Magistrates Court in**  
**Civil Suit No. 009 of 2010)**

**OPIO SIMON ONGIERA ..... APPELLANT**

**VERSUS**

**ONYAI FURASIKA ..... RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

This is an appeal from the decision of a Session Chief Magistrate of Nebbi, in Civil Suit No. 09 of 2010 given on 25<sup>th</sup> August 2014, by which judgment was entered in favour of the Respondent (plaintiff in the court below) against the appellant (defendant in the court below) declaring the respondent as the rightful owner of the land in dispute, grant of an order of a permanent injunction and costs.

In the court below, the respondent by a plaint dated 3<sup>rd</sup> March 2010 sued the appellant for trespass to land situate at Kiyaya West Village (Alwi Maramba village in his testimony), Boro Parish, Panyimur Sub-county in Nebbi District seeking a declaration that he was the rightful customary owner of the land. The respondent's case was that the land in dispute originally belonged to his grandfather from whom his father, Marcelino Ouchi, inherited it upon whose death in 1997 (1999 in the conferencing summary and 1994 in his testimony) the respondent in turn inherited it. The appellant, who owns an adjacent piece of land, trespassed on part of the land, mortgaged and hired out parts of it to diverse persons and all efforts to cause him to vacate the land were in vain.

In his defence dated 15<sup>th</sup> March 2010, the appellant denied the respondent's claim and contended instead that in the year 1938, customary ownership of the land in dispute had been transferred to

the family of Omvor after it had been abandoned by the respondent's grandfather, Odhil. The appellant claimed to have inherited it from his father, Opio Federico upon his death in 1972.

During the hearing, the respondent testified that the land belonged to his grandfather Odhil who when he died it was first inherited by one of his sons, Ringtho Juma and after his death, Marcelino Ouchi, the respondent's father inherited it. The respondent inherited it in 1994 upon the death of his father. During his lifetime, Ringtho Juma had permitted the appellant's grandfather Ovor, but that Ovor had surrendered it back to Ringtho Juma before his death. The appellant had trespassed onto the land in 2003. P.W.2, the respondent's neighbor for the last six years, testified that his grandfather and father had narrated to him the history of the land in dispute to the effect that it originally belonged to Odhil then inherited by Ringtho Juma, and later the respondent upon the death of his father in 1999. An earlier dispute between the appellant and Ringtho Juma had been resolved out of court and the appellant had vacated the land only to repossess it after one month. P.W.3, another neighbor of the respondent since 1986 testified to similar effect. P.W.4, who had known the respondent since childhood testified to similar effect about the history of ownership in favour of the respondent.

In his testimony, the appellant stated that he inherited the land from his late father at the age of 15 and had since then been cultivating the land, growing thereon a variety of seasonal crops. D.W.2, the L.C.I chairman of the area had for 28 years known the disputed land as belonging to the appellant. D.W.3 the appellant's clans-mate testified that he had seen the appellant utilize the disputed land for the previous 17 years. D.W.4 testified that the appellant had inherited the land from his late father, Federico in 1987.

When the court visited the locus in quo, it found that the appellant had no dwelling on the disputed land. The court received evidence from various witnesses who had not testified in court, in support of the respondent's case.

In his judgment, the trial magistrate found that there was "overwhelming evidence" in favour of the respondent. He found a number of contradictions in the appellant's case regarding the period of time for which he had cultivated the land, the approximate acreage of the disputed land, and

on that account found in favour of the respondent thereby declaring her the rightful owner of the land, issuing a permanent injunction against the appellant and awarding her the costs of the suit.

Being dissatisfied with that decision, the appellants appealed on the following grounds, namely; -

1. The learned trial magistrate erred both in law and fact when he failed to properly evaluate the evidence on the court record and thus wrongly entered judgment in favour of the respondent.
2. The learned trial magistrate erred both in law and fact when he failed to properly conduct proceedings at the locus in quo as required by law and failed to determine the boundaries of the suit land.

At the hearing of the appeal, the appellants were represented by Mr. Sammuel Ondoma while the respondent was represented by Mr. Paul Manzi. In arguing the appeal, both counsel addressed grounds one and two together and grounds three separately. The appellant seeks orders setting aside the judgment and orders of the court below, a declaration that the appellant opens and maintains the suit land which is a public road as it is of public importance and an award of costs, both of the appeal and of the trial. The respondent opposes the appeal.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the court below to a fresh scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others vs Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

In his submissions in support of the appeal, Mr. Paul Manzi counsel for the appellant argued that before the trial court, the respondent had not proved the custom by which he inherited the land and that even if he had inherited any land from his deceased father, it was not the land in dispute since the appellant's evidence was to the effect that it belonged to the respondent's father. The

respondent had used the land for over 17 years and this evidence was not considered by the trial magistrate. With regard to the second ground, he submitted that the trial magistrate did not properly conduct the proceedings at the locus yet he relied on the adduced in that irregular manner to decide in favour of the respondent. The trial magistrate had relied on public opinion of persons who were neither parties nor witnesses in the suit to decide the suit and this occasioned a miscarriage of justice. Citing

In response, Mr. Madira Jimmy counsel for the respondent opposed the appeal and argued that the trial magistrate properly evaluated the evidence and came to the right conclusion. The respondent's claim was based on inheritance of the land and his three witnesses had corroborated his testimony. In his submission, since the suit was not about boundary disputes, the visit to the locus in quo was unnecessary and any errors committed in the way it was conducted did not affect the outcome of the suit. The error he committed in listening to people who had not testified in court did not influence his decision.

For practical reasons, it is necessary to deal with the second ground first since it has the potential of disposing of this appeal considering that it is premised on the validity of the trial. 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. This was more particularly explained in *David Acar and three others v Alfred Acar Aliro* [1982] HCB 60, where it was observed that:-

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 the *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 had 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.

The procedures to be followed upon the trial court's visit to a *locus in quo* have further been outlined in *Practice Direction No. 1 of 2007*, para 3, as follows; -

- a. Ensure that all the parties, their witnesses, and advocates (if any) are present.
- b. Allow the parties and their witnesses to adduce evidence at the locus in quo.
- c. Allow cross-examination by either party, or his/her counsel.
- d. Record all the proceedings at the locus in quo.
- e. Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

One important object of these guidelines is the avoidance of conduct which might engender suspicion and distrust of the court but instead to promote a feeling of confidence in the administration of justice. In civil trials, according to Order 18 r 5 of *The Civil Procedure Rules*, evidence of witnesses is to be taken orally in open court in the presence of and under the personal direction and superintendence of the judicial officer. By that provision, it is contemplated that the adjudication shall be made on evidence taken in Court, and on such evidence alone should a decision rest. However under Order 18 rule 14, the court has power at any stage of a suit to inspect any property or thing concerning which any question may arise. Although this provision is invoked mainly for purposes of receiving immovable items as exhibits, this power includes inspection of the *locus in quo*. The determination of whether or not a court should inspect the locus in quo is an exercise of discretion of the magistrate which depends on the circumstances of each case. That decision essentially rests on the need for enabling the magistrate to understand better the evidence adduced before him or her during the testimony of witnesses in court. It may also be for purposes of enabling the magistrate to make up his or her mind on disputed points raised as to something to be seen there. It is a visit that ought to be made with a clear focus on what it is that the magistrate intends to see or the parties and their witnesses intend to show the magistrate, which evidence is to be tested at the inspection and what the issues are which he or she would decide by that inspection, so as to avoid the likelihood of turning the exercise into a fishing expedition for evidence. It would advance the cause of clarity and transparency if these objectives are clearly set out by the court on the record of the trial, before undertaking the visit.

Since the adjudication and final decision of the suit should be made on basis of evidence taken in Court, the visit 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 the magistrate 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. Considering the propensity of the magistrate upon such a visit perceiving something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party, the magistrate needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record. This should be done not only for maintenance of the court's impartiality but also in order to enable the parties test or rebut the accuracy of the court's observations by making appropriate, timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse opinion formed against such a party, keep it entirely off the record, only to spring it upon the party for the first time in his judgment. Furthermore, in case of an appeal, where the trial Court limits its judgment strictly to the material placed before it by the parties in court, then its judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court. This will not possible where the lower court's judgment is based on personal observations made out of court and off the court record, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.

In the instant case, before visiting the *locus in quo*, the court had received evidence from the following; P.W.1 Onyai Furasika, P.W.2 Ongom Santo, P.W.3 Wifred Upenytho, and and P.W.4 Anyoli Martin in respect of the respondent's case. It had also received the oral testimony of D.W.1 Opiyo Simon, D.W.2 Oyulu Wilbesto, D.W.3 Genaro Oluge and D.W.4 Odubugiu Geoffrey in respect of the appellant's case. The record of appeal does not contain the record of proceedings of court sitting at the *locus in quo*. The original trial record was not submitted to this court and in absence of any explanation as to its whereabouts, reconstruction of this part of the record could not be made, as none of the parties had any document relating to it. The only evidence of what transpired at the *locus in quo* is to be found in comments of the trial magistrate at page five of his judgment where he stated as follows;

During the inspection of the suit land on 11/06/2014 the plaintiff told the gathering that the defendant trespassed on the suit land in 2004. Except (sic) from the defendant (DW1) only, Orwotho Geoffrey, Samuel Oyikunginga, Tekakwo Brian, Jalbonyo Michael, Valeriano Bengy, Okecha Odongo, Santo Ongom (PW2), Owachgiu Richard and Okethwengu Urunge supported the statement of the plaintiff as the rightful owner of the disputed land. Okecha Odongo told the gathering that he was born at Marama Lower village where the suit land is situated. That Omvor, the defendant's grandfather and Odhil (the plaintiff's grandfather) had their own land and they never disputed (sic) on the suit land belonged to the plaintiff. Valeriano Bengy told the gathering that the defendant (DW1) had quarrels with his brother on another land but later started to claim the suit land from the plaintiff.....the defendant and his witnesses were contradictory and inconsistent with their statements / evidence which the court cannot rely on. The plaintiff and her witnesses were consistent on how the plaintiff acquired the suit land.

The trial magistrate does not seem to have appreciated the fact that the proceedings at the *locus in quo* were proceedings of court and therefore not proceedings of a "gathering." This misconception largely accounts for the series of misdirections that bedeviled his conduct thereat. He admitted and recorded evidence of six persons who had not testified in court, including; Samuel Oyikunginga, Tekakwo Brian, Jalbonyo Michael, Okethwengu Urunge, Okecha Odongo and Valeriano Bengy, the latter two of whose statements he reproduced as part of his judgment. There is no indication that any of the witnesses at the *locus in quo* were subjected to an oath or reminded of the one they had taken in court.

There is no indication that allowance was made for the parties to cross-examine any of the witnesses that gave adverse evidence during those proceedings yet they were entitled to have nothing stated against them in the judgment which was not stated on oath in their presence and which they had opportunity of testing by cross-examination and of rebutting. The Magistrate did not place on record his observations at the *locus in quo*, but expressed them for the first time in his judgment when he found that the defendant and his witnesses were contradictory and inconsistent in their evidence in comparison to the plaintiff and her witnesses who were consistent on how the plaintiff acquired the suit land. He imported in his judgment matters of inference and opinion, without distinguishing whether or not they had been coloured by his observations at the *locus in quo*. In the circumstances, considering that he deemed it important to

reproduce the statements of two people, Okecha Odongo and Valeriano Bengy, who were not witnesses in the case, the conclusion that their statements influenced his decision is inevitable.

In *James Nsibambi v Lovinsa Nankya [1980] HCB 81*, it was held that a failure to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relying on such evidence acquired and the observations made thereat in the judgment, is a fatal error which occasioned a miscarriage of justice. In that case the error was found to be a sufficient ground to merit a retrial as there was failure of justice.

When there is a glaring procedural defect of a serious nature which resulted in a failure of justice by the trial court, the High Court is empowered to direct a retrial, but from the nature of this power, it should be exercised with great care and caution. It should not be made where for example due to the 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. It is possible that the witnesses who appeared and testified during the first trial may not be available when the second trial is conducted and the parties may become handicapped in producing them during the second trial. In such situations, the parties would be prejudiced and greatly handicapped in establishing their respective cases such that the trial would be reduced to a mere formality entailing agony and hardship to the parties and waste of time, money, energy and other resources. Viewed in this light, the direction that the retrial should be conducted can be given only if it is justified by the facts and circumstances of the case.

However, where the time lag between the date of the incident and the date on which the appeal comes up for hearing is short, and there occurred an incurably fundamental defect in the proceedings which affected the outcome of the suit, the proper course would be to direct retrial of the case since in that case witnesses normally would be available and it would not cause undue strain on their memory. In the instant case, although six years have elapsed since the incidents forming the subject matter of the dispute occurred, there is nothing on the facts of this case to suggest that a retrial would not be just and fair.



Where the decision on appeal turns on a finding that a mistrial occurred in the court below, grounds of appeal requiring consideration of the merits of the case, pale in relevance and become moot. Delving in the merits of a ground of appeal which deals with the evidence adduced during the impugned trial, after ordering a retrial, may amount to loading the dice against one of the parties at the retrial. A mistrial occurred with the incurably fundamental defect in the conduct of proceedings at the *locus in quo*, which is not a mere irregularity, and it affected the outcome of the suit. Having found that the manner in which the trial was conducted was fundamentally defective, I will not consider the other ground of appeal which addresses the quality and evaluation of evidence adduced during the defective trial.

In the final result, the appeal is allowed. The judgment, decree and orders of the court below are set aside. The costs of the appeal will abide the results of the retrial since none of the parties is responsible for the mistrial.

Dated at Arua this 3<sup>rd</sup> day of November 2016.

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Stephen Mubiru  
Judge