**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**HOLDEN AT MBALE**

**HCT-04-CV-CA-0062/2014**

**(ARISING FROM PALLISA CIVIL SUIT NO. 66 OF 2013)**

**ISLAMIC UNIVERSITY IN UGANDA…….……..APPELLANT**

**VERSUS**

1. **EFULAIM LUNGHO**
2. **LUNGHO LEKOBOWAMU…….…….RESPONDENTS**

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

**JUDGMENT**

This is an appeal from the decision of the Chief Magistrate's Court of Pallisa presided over by **His Worship Kintu** Imoran Isaac Magistrate Grade I of 15.-4.2-14.

The subject matter of this claim was as follows:

Plaintiffs/Respondents filed civil suit 66 of 2013 in the Chief Magistrate's Court of Pallisa against the Respondents for trespass and sought orders of vacant possession of the land. The plaintiffs averred that they are the legal/customary owners of the suit land situate at Nangeyo village, Naboa Parish, Naboa Sub-county in Budaka District having stayed there since childhood. It was further pleaded that sometime in 2010 the defendant's agents together with security guards invaded the plaintiffs' land and forced the plaintiffs out of their land. The defendants/Appellants on the other hand contended that the land in question is theirs having purchased the same in 1997 and that they are the registered owners of the suit land as they are in possession of a Certificate of Title to the land vide LRV 1429 Folio 23 Block 2 Naboa Road Budaka; which they bought from the original owner **Musa Lubadde**.

At the hearing, plaintiffs, led evidence through five witnesses. Defendants led evidence through 4 witnesses. The learned trial Magistrate having heard the evidence found in favour of plaintiffs, where after defendants being dissatisfied filed this appeal.

The appellants raised 12 grounds of appeal. For purposes of coherence this court will condense these grounds into their like generie and consider them under their generie type as herebelow.

1. Whether the learned trial Magistrate failed to properly evaluate the evidence on record hence reaching a wrong conclusion.
2. Whether the learned trial Magistrate erred in law and fact when he failed to properly conduct a locus visit.
3. Whether the decision of the learned trial Magistrate occasioned a miscarriage of justice.

Both parties filed written submissions in proof/contest of the appeal.

The duty of this honourable court as a first appellate court is to subject the entire evidence on record to a fresh and exhaustive scrutiny, re-evaluate it and come to its own conclusion. This position is as in *Father Nansensio Begumisa and Others v. Eric Tibebaga SCCA 17 of 2002*.

I have carefully considered the lower court record, the submissions and the law and now address the issues raised on appeal as herebelow;

**Issue 1(covering grounds 8,9, and 10).**

Whether the learned trial Magistrate failed to properly evaluate the evidence on record hence reaching a wrong conclusion.

As a first appellate court, in order to answer the above question and in view of all arguments raised by appellants to prove the same and response thereto by Respondents this court makes the following findings. It was the appellant's argument that the land is titled and therefore the title is not impeachable, a finding which the learned trial Magistrate failed to consider.

However respondents' case was that the land in question is customary land. The appellants argued that respondents did not prove that the land rightly falls under the category in law known as customary land.

This court takes cognizance of the fact that according to Section 59 of the RTA, a Certificate of Title is conclusive evidence of ownership of land. This was the position of court in *Kampala Bottlers v. Daminico (U) Ltd SCCA No. 22/1992*; where it was stated that the production of a Certificate of Title in the name of a party is sufficient proof of ownership of land. Similarly in *Patel v. Patel (1992-1993) HCB 137*.

It was the case of appellants therefore that as holders of a Certificate of Title to the disputed land under LRV 1429 Folio 231 Block 2 Yami Naboa Road Budaka District, together with a land sale agreement of February 1997, then they ought to take priority over respondents who have no title. That line of argument however must be weighed against evidence on record which presents a proposition that the land title relates to a different land not the land in dispute. The method of obtaining the title, and the consistency of evidence on record all seem to tell a different story. I will highlight these findings as follows.

According to the evidence on record it was the testimony of DW.1 (**Kigongo Haruna**) that the land in question was bought by the University from a one **Musa Lubadde**. However DW.1 further stated that the certificate of title was initially in the names of **Musa Lubadde** then transferred to **Semagai** then to Islamic University in Uganda. He also averred that by the time he took over management, he did not know where the land passes and he brought a surveyor to open the boundaries to the land. This evidence was mostly hearsay as he depended on what he was told. This is fatal. The evidence of DW.1 is the nexus which was necessary to connect the obtained land title to the method of land acquisition, so as to establish honesty and goodness of title.

DW.2, who was the surveyor to the land said that **Musa Lubadde** informed him that he sold the land to Islamic University in Uganda, around 2004; but that he was not sure (page 22 paragraph 4). This is juxtaposed with DW.1's evidence which had told court that the land was acquired in 1997 (see paragraph 5 on page 26).

DW.2 (**George Kadyama**) in cross-examination stated that he was not a registered surveyor. DW.3 told court that the land was bought in 1997 but that the transfer was made on 03.04.2007.

DW.4 stated that his father bought the land in 1970 and that it was not titled land. During cross-examination he further stated that he could not recall the year when Islamic University in Uganda bought the land as he was studying in Gulu Public School in 1971.

The effect of those pieces of evidence amounts to material contradictions/inconsistencies on the side of defendants/appellants. Such inconsistencies are fatal according to *Alfred Tajor v. Uganda EACA Criminal Appeal No.167/1967* which held that in assessing the evidence of a witness his inconsistency unless satisfactorily explained will usually but not necessarily result in evidence of that witness being rejected. Minor inconsistencies will have the same effect if they point to deliberate falsehood.
On the side of the plaintiffs, they led evidence to show that they had been on the suit land since 1940.

Plaintiffs' evidence shows that (through PW.1) that the land in question has never been that of **Musa Lubadde**, and that no such title has ever been issued over the suit land. DW.1 stated that the university bought **Musa Lubadde**'s land at Namafudu swamp but not the land owned by PW.1. PW.2 said he was born on the suit land and grew up there, has lived there all his lifetime of 84 years. He said he hired out the land to **Musa Lubadde**.

PW.3 stated that in 1992 he hired the land for the cultivation of rice and in 1993 **Musa Lubadde** sued him in Budaka Court for trespass but the case was dismissed for lack of evidence. It was in 2010, that the university agents came and evicted them. PW.4 also was born on the land and confirmed it belonged to plaintiffs.

PW.5 also confirmed that the land belongs to plaintiffs. All these witnesses gave consistent evidence in court.

Furthermore the evidence on record from the defendants, regarding acquisition of their Title is questionable in view of the inconsistencies pointed out above. Appellants denied knowledge of this title. So was it obtained by fraud? In the case of *Fredrick Zabwe v. Orient Bank TD SCCA no.14/2006*, fraud was defined to mean act willfully and with intent to deceive or cheat ordinarily

for purposes of either causing some financial loss to another or bringing about financial gain to oneself.

In *Musisi v. Grindly's Bank Ltd CS NO. 869/1981* Court held that a person registered through fraud is one who becomes registered proprietor through a fraudulent act by him or to which he is a party or with full knowledge of the fraud.
Traces of fraud in evidence on record are traceable through the evidence of DW.1 who said the land sold to the university by **Musa Lubadde** in 1997. DW.2 said the land was sold to the university in 2004. DW.4 said the sale was in 1971 but he was away for studies. These inconsistencies point to fraudulent intent. This court is aware that the issue of fraud was not pleaded and no evidence led on it specifically. However, as an appellate court, this aspects of the evidence are glaring on the record and need to be pointed out, though I will not base my decision on them since they were not pleaded specifically.

Another aspect that the evidence shows is that even if the appellants could be found to have bought the land in good faith, they do not qualify to be taken as "bonafide purchasers." This is because the record and evidence shows that they did not carry out the necessary due diligence to find out whether the land in question really belonged to **Musa Lubadde**.

DW.3 is the only one among all the defendant/appellant's witnesses who tried to show that they tried to carry out a search on the land. However he only pointed out that the search was done at the Land Registry and therefore there was negotiation of the price with the seller. There is nothing to show that they inquired from the neighbours to the suit land whether the land actually belonged to the seller. The position of the law as stated in *Uganda Posts and Telecommunications v. Akim (CA 36/1998)* is that a mere search of the register alone is not enough and thus one ought to go beyond the register while commenting on this subject.

In the case of *Sir John Bagaire v. Arsi CACA No. 7 of 1996* **Okello J-** held that;

> *" land is not vegetables, Properties bought from unknown sellers but are valuable properties, buyers are expected to make investigations not only of the land but also of the sellers before the purchase."*

From the positions discussed above, appellants' failure to conduct due diligence checks on the land excludes them from being bonafide purchasers.

On the other hand as already discussed, evidence from PW.1, PW.2, PW.3 and PW.4 was consistent in showing that the land in question belonged to the plaintiff who cultivated and lived there since childhood.

The evidence from plaintiffs showed that the plaintiffs were adverse possessors of the suit land.

According to *Asher v. Whitelock (1865) QB1*;

> "*Possession of land is the root of title, thus a person who is in possession has a title which is good against the whole world except a person with a better claim*."

According to P*ullock and Wright, an Essay on Possession in the Common Law page 94-95*, it is stated that at common law title is relative. In order to defeat a possessor's title the person challenging it must rely on the superiority of his/her own title and not the weakness of the possessor's title.

In this case appellants have never been in factual possession of the suit land, but have been in "forceful" possession after forcefully ejecting the respondents in 2010 using their armed agents. However the respondents before ejection were in adverse possession since the 1940s. The respondents' evidence therefore was strong in establishing that they were rightly on the land in question as far as the 1940s.

The possession that the plaintiffs/Respondents enjoyed was customary. Appellants argued that no such evidence was provided. The arguments raised by counsel for appellants on this point are not tenable for the following reasons.

The Respondents through PW.1, PW.2, PW.3, PW.4, PW.5 led evidence to prove that they lived on the land as customary owners. It is clear that from the plaint, the respondents' claim is grounded in trespass.

The rules of evidence require that he who alleges a fact has a duty to prove the fact (sections 101 and 102 of Evidence Act). The evidence adduced as reviewed in my view is satisfactory to explain the fact that the plaintiff lived on the land undisturbed under customary tenure which is recognized by the Uganda Constitution of 1995.

I have noted the arguments raised on this question of customary law. I agree that appellant raises the fact that customary tenure is also provided for under Section 1 (1) of the Land Act.

Proof of customary land holding has always been a subject of judicial interpretation because customary holding being based on "non titled" ownership, depends on evidence. The cases reviewed all concerned themselves with evidential value. The facts in this case show that respondents have lived on this land since the 1940's. So what was the tenure system of their holdings?

PW.1, PW.2, PW.3, PW.4, PW.5 testified from pages 14-25 of the typed proceedings to the fact that land belonged to the respondent/plaintiff through inheritance. Grandparents grew on that land, the respondents grew there, and grew thereon seasonal crops like rice. PW.4 as LC.I Chairman confirmed this ownership. The defence through DW.1 said they acquired the land but in 2003 did not knew its boundaries (page 26)! This was inspite of having bought it in 1997.

DW.1 hired a surveyor. DW.2 testified that he conducted a survey. In cross-examination he contradicted his evidence saying he surveyed the land first in 1975, (page 33) and that the land was under public land, and customary land (page 34). His evidence is doubtable as a whole if he ever visited the land in question especially when he said in his evidence in chief at page 32-33 that the survey was conducted partially by a surveyor who took him around the land and on page 33 paragraph 1 that "he had done a great work on the ground…" DW.3 at page 15 said he " did not go to there…." The land had several houses and burial land and bananas. This witness therefore did not know the exact land bought.

DW.4 at page 17 confirmed he resides in Jami village and his land neighbours that of the appellant which is in Jami.

He further confirmed that Islamic University in Uganda bought land from **Musa Lubadde** who also sold to them. The sum total of the evidence of DW.4 is to confirm PW.1's assertion that the land which appellant bought is different from the suit land.

The summation of all evidence above in my view satisfies section 1 (1) (g) that this was customary land in as much as it relates to parcels of land recognized as subdivisions belonging to a person, a family or traditional institution and is owned in perpetuity.

I hold so on the strength of evidence on record. By virtue of that evidence am not persuaded by any of the authorities cited, since all were decided on the strength of lack of evidence in proof of this tenure. In this case that evidence was sufficiently availed and customary ownership by the respondents was proved on the balance of probability.
I therefore uphold the finding of the learned trial Magistrate on this matter.

I am on the rest of the arguments under this issue, in agreement with the authority of *Trevor Price & Another v. Raymond Kesale (1957) EA 752*, where the appellate court can re-evaluate evidence where the trial Judge fails so to do. In this case before me the learned trial Magistrate properly evaluates the evidence and I hold that this issue fails. Hence grounds 6, 7, 8, 9, 10) are accordingly not proved.

**Issue 2: (Grounds 1, 2, 3, 4, and 5) Failure to visit locus.**
The arguments on this point are noted.
The visit to the locus in intended to enable court check on evidence adduced in court. It enables parties to clarify the points of controversy that could have arisen during the trial. Decided cases on this point by this court have restated the position that visit to the locus is not mandatory. This same position was highlighted by **Justice Tuhaise** in *Ziwa Ssalongo & Anor. V. Kafumbe HCCA No. 33 of 2012*; where the Judge pointed out that the visit depends on the circumstances of each case.

The record shows that court visited the locus after giving ample notice to the parties in advance of its intended visit. The failure by counsel for appellants to attend as alleged cannot be blamed on court. A firm of Advocates does not consist of a sole proprietor. If one lawyer could not

attend, another lawyer could have been sent to represent them. In this era of case management if courts are to adjourn cases on account of all types of excuses from counsel, justice will be muddled.

That notwithstanding, the learned trial Magistrate carefully conducted the proceedings at the locus. The appellant was personally present and the court gave the parties the opportunity to explain their evidence. I did not see on record any fresh evidence allowed by the learned trial Magistrate.

I find that the learned trial Magistrate followed the principles laid out in the case of *Ndaamweire George v. Kaana Ephraim HCCA.008/2009* that all proceedings at locus must be recorded, parties must be present, and cross-examination of any witnesses must be allowed.

In view of the evidence on record and proceedings, I find that the learned trial Magistrate properly conducted the locus. This issue is not proved and therefore grounds 1, 2, 3, 4, and 5 are not proved.

**Issue 3: Grounds 6, 7, 11 and 12 Miscarriage of Justice**

A decision is said to have occasioned a miscarriage of justice if there has been misdirection by the trial court on matters of facts and law relating to evidence rendered or where there has been unfairness in the conduct of the trial resulting in an error being made. See: *Matayo Okumu v. Fransiko Amudhe & 2 Others (1979) HCB 229*.

I have already found that in this case there were material inconsistencies in the appellant/defendant's evidence at the trial whereas the evidence by plaintiffs/respondents was very consistent. There was proof that the defendants indeed unlawfully took over the plaintiffs' land and trespassed thereon. It was found as a fact that the land title, held by appellant/defendant relates to a different location of land yet they are illegally occupying plaintiffs' land. It was found for a fact that the title was acquired under questionable circumstances as no due diligence checks were done at time of purchase.

All findings above are contained on evidence as led through PW.1, PW.2, PW.3, PW.4 and PW.5 and DW.1, DW.2, DW.3 and DW.5.

From that evidence therefore am unable to find any evidence of a miscarriage of justice. The finding of the learned trial Magistrate was therefore justified. The issue therefore fails. Grounds 6 and 7, 11 and 12 accordingly are not proved.

The sum total of my findings is that this appeal fails on all grounds raised.
It is accordingly dismissed with costs.

**Henry I. Kawesa**
**JUDGE**
**01.02.2016**