

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0032 OF 2014
(Arising from Adjumani Grade One Magistrates Court Civil Suit No. 0013 of 2011)

ALULE RICHARD **APPELLANT**

VERSUS

AGWE DOMNIC **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the appellant sued the respondent for recovery of land held under customary tenure at Ubungo village, Lowa Parish, Ciforo sub-county measuring approximately 80 acres, seeking a declaration that he is the rightful owner thereof, general damages for trespass to land, a permanent injunction, interest and costs. The appellant's case was that sometime in the 1950s the appellant's grandfather Ariloko, gave part of his land to a friend of his bay the name Ochege and another part to the respondent's father Paulino Mbgulu. In 1966, Paulino Mbgulu left the land and migrated to Esia-Dembele where the respondent was born. Around 1986-87 or thereabout, Paulino Mbgulu and the respondent returned from Esia-Dembele to reclaim the land. By that time Ariloko had died and the land had been inherited by the appellant's father Mikalino Tiondi who in turn had died and the land had passed on to the appellant under inheritance. He was by then holder of letters of administration to the estate of his late father, Mikalino Tiondi.

In his written statement of defence, the respondent denied the appellant's claim and instead contended that he is the rightful customary owner of the disputed land having inherited it from his father. He averred that he was born and grew up on the land in dispute. His parents and deceased siblings are buried on the same land. The land has never belonged to the appellant's forefathers and therefore he could not have inherited it. The land in dispute is not part of the estate of the late Mikalino Tiondi. He prayed that the suit be dismissed with costs.

In his testimony, the appellant stated that he acquired the land through inheritance from his late father, Mikalino Tiondi in 1993. There are many graves of his relative son the land including that of his grandfather Ariloko and his nephew Dratema. In the 1950s the appellant's grandfather Ariloko, gave part of his land to the respondent's father Paulino Mbgulu, who when he died in 1997 was buried on the same land. In 1966, Paulino Mbgulu During the year 2011, the respondent had encroached onto that land in an area measuring approximately one acre, hence the suit. P.W.2 Cerelino Amadile testified that the appellant's grandfather, Ariloko settled onto that land in 1939. In the 1950s Ariloko, gave approximately twenty acres of this land to the respondent's father Paulino Mbgulu. The respondent had no claim to the land because the land was not given to him but to his father. P.W.3 Abdula Ibrahim, a son of the late Ochea, testified that the land in dispute belonged to the late Ariloko. The late Ochea had given part of the land he obtained from Ariloko to Paulino Mbugulu, the respondent's father. Due to the 1979 insurgency, Paulino Mbgulu migrated to Demgbele and this witness to Sudan. Later in 1986 when this witness returned from exile, he found Paulino Mbgulu had returned to the land together with the respondent. The appellant closed his case.

In his defence, the respondent testified that he has known the appellant since 1992 when they went to the same primary school. He was born on the disputed land and grew up on it. He inherited the land in dispute from the late Paulino Mbgulu following his death in 1999. Before that, Paulino Mbgulu had acquired the land from two brothers, Chula and Iza during the 1930s. The family had since then lived on that land and cultivated it. His grandfather, Chicela Lagoni, mother Rosa Viya, step mothers Veronica Abiyo and Amula are all buried on that land. At no time did the land belong to the appellant's grandfather. D.W.2 Justino Amuza, son of Chula, testified that before his death, Ariloko never lived on Ubungo village but was instead a resident of Kabaoli village in Okangali Parish, Ciforo sub-county. The land in dispute originally belonged to Chula. During the 1930s, Paulino Mbgulu requested for and was given land by Chula, where he lived and which he tended with his family until his death in the 1990s. He and his wife were buried on that land. D.W.3 Adravu Fred testified that the land in dispute belongs to the Majope Clan and was in the past occupied by the late Paulino Mbgulu who acquired it from Chula in the 1930s. The respondent inherited the land from his late father. D.W.4 Ajju Ben testified that from his childhood in 1954, he saw the land in dispute was occupied by the late Paulino Mbgulu and

when he died in the 1990s he was buried on the same land. He had acquired the land from the late Chula during the 1930s. When Ariloko died he was buried at Kabaoli village in Okangali Parish, Ciforo sub-county and at no time did he occupy or carry out any activity on the land in dispute. The appellant as well lives as his neighbour in Kabaoli village in Okangali Parish, Ciforo sub-county. The appellant hails from Agoro Clan in Kabaoli yet the land he now claims belongs to the Majope Clan in Ubungo. The respondent closed his case. The court then visited the *locus in quo* on 20th May 2014 where it found that the land in dispute was located in Ubungo village, Lowa Parish, Ciforo sub-county Adjumani District and noted its boundaries.

In his judgment, the learned trial magistrate found that on basis of the observations made during the court's *locus in quo* visit, the respondent's family had been in possession of the disputed land for a very long time. Paulino Mbgulu acquired proprietary interest in the same land by long usage and possession irrespective of whether it was given to him by anyone or not. The appellant and his family members could not thereafter claim it when they lost ownership / possession in the 1930s. He found the appellant's evidence had failed to prove his claim on the balance of probabilities. He therefore dismissed it with costs and issued a permanent injunction against the appellant from interfering with the respondent's use of the land.

Being dissatisfied with the decision the appellant appeals on the following grounds, namely;

1. The trial magistrate erred in law and fact when the court failed to judiciously / properly evaluate the evidence on record thereby arriving at a wrong conclusion.
2. The trial magistrate erred in law and fact when he relied on the unsworn evidence of people who had gathered to attend the locus hearing.
3. The trial magistrate erred in law and fact when he held that the respondent acquired the suit land by usage and possession.

When the appeal was called for hearing, the appellant was not in court despite the return of service filed in court by which the court was satisfied that the service on the appellant had been effective. Rather than dismiss the appeal for want of prosecution under Order 43 r 14 (1) of *The Civil Procedure Rules*, this being a dispute over land which should rather be decided on merits than on technicalities, the court invoked the provisions of rule 20 of that order and its inherent

jurisdiction on grounds that the evidence upon the record was sufficient to enable the Court to pronounce judgment and at the same time was also cognisant of its duty as a first appellate court to subject the entire evidence to an exhaustive scrutiny, which duty may be exercised with or without the submissions of the parties or their counsel. The court therefore received the submissions of counsel for the respondent only.

In his submissions, counsel for the respondent Mr. Samuel Ondoma argued that the trial court arrived at the correct decision since the appellant failed to prove that he was the customary owner of the land in dispute. On the other hand, the respondent adduced cogent evidence

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 and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga*, SCCA 17 of 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.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

I find it convenient to deal first with the second ground of appeal which faults the trial magistrate for failing to comply with the procedural requirements of a hearing at the *locus in quo*. Order 18 rule 14 of *The Civil Procedure Rules* empowers courts, 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, it includes inspection of the *locus in quo*. 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 isnot 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.

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. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits 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 trial magistrates 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.

Upon examination of the record of appeal, it is evident that during the visit to the *locus in quo*, the trial magistrate prepared a sketch map which indicates the features the court found on the land. These included an excavated patch of marrum, teak trees, a fig tree, a palm tree, burned and un-burned bricks belonging to the respondent. He also recorded some features on the adjacent pieces of land including names of the owners of the neighbouring parcels of land, the location of banana plantations, their houses, a small road and significant trees. He also recorded the names of persons in attendance whose total was thirty eight, inclusive of the parties and their witnesses. He did not record anything else. Then in his judgment at page 13 paragraph one of the record of appeal he commented thus; “On the opposite side of the road is land utilized by one called Onoma Phillip whose land stretches from the Eastern Part of the suit land to the Southern end of the same suit land. On Court’s inquiry who this Onoma Phillip was, Court was informed by the gathering that he was a brother to the defendant, Agwe Domnic.” This is the only evidence of reliance on the unsworn evidence of people who had gathered to attend the locus hearing.

It is trite law that the practice of visiting the *locus in quo* is intended to check on the evidence given by witnesses and not to fill gaps by calling upon persons who never testified in court to participate in the proceedings (see *James Nsibambi v. Nankya* [1980] HCB 81). 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 normally a fatal error if it occasions a miscarriage of justice (see *James Nsibambi v. Lovinsa Nankya* [1980] HCB 81). It may in some cases be a sufficient ground to merit a retrial once there is failure of justice

(see also *Badiru Kabalega v. Sepiriano Mugangu* [1992] 11 KALR 110). However, where, by the nature of the dispute to be adjudicated, the appellate court finds that the visit to the *locus in quo* was a useless exercise and that the case could have been decided without visiting the *locus in quo* such that without reliance on its findings at the locus, the trial court would have properly come to the same decision on a proper evaluation and scrutiny of the evidence which was already available on record, a re-trial will not be directed. The erroneous proceedings at the locus in quo will be disregarded. For example in the case, *Basaliza v. Mujwisa Chris*, H.C. Civil Appeal No. 16 of 2003, the court observed;

There was no dispute over boundaries. The visit to the locus was in the circumstances a useless exercise. This case could have been decided without visiting the locus. Without basing himself on his findings at the locus, the learned Chief Magistrate would have properly come to the same decisions on a proper evaluation and security of the evidence which was already available to him on record.

In *Basaliza v. Mujwisa Chris*, a re-trial was not ordered despite the defective proceedings at the *locus in quo*. In the instant case, I am of the view that the defect has not occasioned a miscarriage of justice since it related only to the attempt by court to establish the identity of one of the neighbours to the disputed land. It did not in any way demonstrably influence the decision of court. The case can still be decided on basis of the available evidence without having to rely on that observation by the trial court made as a result of the impugned aspect of the visit to the *locus in quo*. Ground two of the appeal therefore fails.

Grounds 1 and 3 of the appeal assail the trial court's evaluation of the evidence as having led it to wrongly find that the land belongs to government and not either party. Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed (See *Peters v Sunday Post Ltd* [1958] E.A. 429).

At the trial, the burden of proof lay with the appellant. To decide in favour of the appellant, the court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the respondent such that the choice between his version and that of the appellant would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondent, might hold that the more probable conclusion was that for which the appellant contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

Comparing the two versions, I find that although the appellant attributed the historical ownership of the land in dispute to his grandfather Ariloko and through inheritance he himself subsequently acquired upon the death of his father Mikalino Tiondi in 1993 and while the respondent on his part ascribed the historical ownership of the land to a one Chula and through inheritance from his father Paulino Mbgulu, the appellant and his two witnesses P. W.2 Cerelino Amadile and P.W.3 Abdula Ibrahim all acknowledge that the respondent's father Paulino Mbgulu began living on the disputed land in the 1950s. Although in the plaint the appellant had averred that at a point in time Paulino Mbgulu migrated to another place and later returned to occupy the land, I do not read into this temporary absence any intention of abandonment of his interest in the land. The effect is that there is nothing on the record to show that his proprietary rights in the land were terminated at any one time. Then it was up to the appellant to explain how he became customary owner of land which he acknowledges at one time belonged to the respondent's father.

The burden of proof in the court below lay on the appellant, he being the plaintiff. He had to prove acquisition of the land in dispute as a customary owner on the balance of probabilities. Customary tenure is recognized by Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and s. 2 of the *Land Act*, Cap 227 as one of the four tenure systems of Uganda. It is defined by s. 1 (l) together with s. 3 of the *Land Act* as system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which include; (a) applicable to a specific area of land and a specific description or class of persons; (b) governed by rules generally accepted as binding and authoritative by the class of persons to which it applies; (c) applicable to any persons acquiring land in that area in accordance with those rules; (d) characterised by local customary regulation; (e) applying local

customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land; (f) providing for communal ownership and use of land; (g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and (h) which is owned in perpetuity.

Customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules. Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply. Review of judicial practice in this area presents three modes of proof of customary ownership.

In the first category, are customary rules that over the years, in the legislative history of land legislation in Uganda, have attained documentation by way of codification. These include persons holding under the *Ankole Landlord and Tenant Law of 1937*, the *Toro Landlord and Tenant Law of 1937* or Bibanja holdings by virtue of the *Busuulu and Envujjo Law 1928* the latter of which under s. 8 (1) provided that except a wife or a child of the holder of a kibanja, or a person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof, no person had the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner. Under s. 29 (1) (a) of the *Land Act*, such former customary tenants on land now have the status of lawful tenants. In such cases, there is no need to prove the nature and scope of the applicable customary rules and their binding and authoritative character

but rather the production of evidence to show that the specific land in question is one to which such rules apply and that the acquisition was in accordance with those rules, for example by production of Busuulu Tickets, as was done in *John Busuulwa v. John Kityo and others C.A. Civil Appeal No. 112 of 2003*, and in *Kiwalabye v. Kifamba H.C. Civil Suit No. 458 of 2012*. For such interests, production of an agreement purporting to sell and transfer a Kibanja holding is not sufficient proof of acquisition of a lawful holding. There is an additional need to prove consent of the mailo owner, e.g. introduction to the registered owner and payment of a “Kanzu” (see *Muluta Joseph v. Katama Sylvano S.C. Civil Appeal No. 11 of 1999*).

In the second category, are instances where because of the more or less homogeneous nature of the community in a specific area, the customary practices regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of the specific parcel of land in that area have attained notoriety that court would be justified in taking judicial notice of such practices under section 56 (3) of the *Evidence Act*. In such situations, a court would take judicial notice as a fact, the existence of such practices which are not subject to reasonable dispute because they are generally known within the trial court’s territorial jurisdiction. Such judicial notice has been taken in matters of distribution of land as part of an estate of a deceased person such as in the case of *Geoffrey Mugambi and two others v David K. M’mugambi and three others, C.A. No. 153 of 1989 (K)* (unreported), where the parties did not adduce evidence to prove the relevant Meru customary law of land distribution. But the Court of Appeal of Kenya held that as the custom was not only notorious but was also documented, the trial Judge was perfectly entitled to take judicial notice of it and it was not therefore necessary to call evidence to prove it. The Court held thus;

“Inheritance under Meru law is patrilineal. The pattern of inheritance is based on the equal distribution of a man’s property among his sons, subject to the proviso that the eldest son generally gets a slightly larger share. In a polygamous household, the distribution of land is by reference to the house of each wife equally, irrespective of the number of sons in the house.” This is the Meru customary law which the Judge applied in an attempt to distribute the deceased’s land among his sons. There was no evidence to suggest either that the deceased had divided his land among the houses of his wives or among his sons. The respondents’ claim was made in their capacity as the sons of the deceased and not on the basis of membership of the various houses of the deceased’s wives. There is no doubt that the Judge understood the custom and

applied it correctly in this case. The respondents had shown that no provision had been made for them by the deceased. This ground of appeal therefore must fail.

In the last category, are cases where the customary rules are neither notorious nor documented. In such cases, the customary law must be established for the Court's guidance by the party intending to rely on it. As a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of persons who would be likely to know of its existence, if it existed, or by way of expert opinion adduced by the parties since under s. 46 of the *Evidence Act*, which permits the court to receive such evidence when the court has to form an opinion as to the existence of any general custom or right, such opinions as to the existence of that custom or right, are relevant. In *Ernest Kinyanjui Kimani v Muira Gikanga* [1965] EA 735 at 789, the court stated:

As a matter of necessity, the customary law must be accurately and definitely established. ...The onus to do so is on the party who puts forward the customary law. ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.

In the instant case, the customary law under which the appellant acquired the land is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the appellant to adduce evidence of the customary law. It was not enough for him to claim to have inherited the land. He had the onus of adducing evidence of the customary procedures, practices and rules by virtue of which he is recognised as such. Having failed to do so, the trial magistrate was justified in his finding that the appellant had failed to prove his case.

The question which was before the trial court was whether the appellant adduced before it evidence which showed a greater probability capable of satisfying a reasonable man that the land in dispute belonged to him. The trial court came to the conclusion that he had failed to discharge that burden. Having subjected the evidence to a fresh and exhaustive scrutiny, I have come to a similar conclusion and consequently, grounds 1 and 3 of the appeal fail.

In the final result, I find no merit in the appeal and it is accordingly dismissed with costs to the respondent of both the appeal and the trial.

Dated at Arua this 23rd day of February 2017.

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Stephen Mubiru
Judge