THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA -009- OF 2015
(ARISING FROM PALLISA CIVIL SUIT NO. 01 OF 2014)

ONGOM STEPHEN:::::::::::::::::::::::::::: APPELLANT

VERSUS

1. **OTODO CLEMENT**
2. **OSAURO JOHN :::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE HENRY. I. KAWESA

JUDGMENT

The appellant appeals the decision of the Grade I of Pallisa of the 19th January 2015 under Civil Suit No. 01 of 2014.

He raised 6 grounds of appeal.

The duty of this court as a first appellate court was stated in ***Begumisa V. Tibebaga SCCA 17/ 2002*** and includes the duty to reevaluate the evidence, make its own conclusions and findings. The court must caution itself that it neither had the opportunity to see or hear the witnesses.

The facts of this case as presented in the pleadings briefly were as here below:

The plaintiff / appellant sued the defendants/ respondents vide plaint dated 6th January 2014 for land situated in Kamuge Olinga measuring 3 acres. In paragraph 5, he states that in 1994 his late father **Ongom John** divided land among all his children and the plaintiff began using this land, then later gave it to the defendant to caretake for him.

In 2000, D1 encroached thereon and when plaintiff demanded it from him in 2012 he declined to give him vacant possession.

He therefore sued him in court for vacant possession , permanent injunction and damages.

By written statement of defence dated 24 of January 2013, both defendants denied the suit.

The evidence in court was as follows:

PW1 Ongom Stephen who said he inherited the land from his father **John Ongom** in 1994 land3 acres at Kamuge Olinga Pallisa . **D1 Otodo Clement** was a caretaker and has refused to vacate. He relied on a copy of Will annexed "A" and exhibited as PE1 and clan minutes annex 'B' and exhibited as PE2.

PW2- Apoloto Mary said the land was for her late husband **John Ongom** acquired through inheritance from **Osauro**. She cultivated from 1968 to 2011 when defendant encroached and hired it to D2 who also hired to **Okiria**. She informed PW1 who went to the clan. The clan solved the matter but defendants refused to vacate.

PW3- Adupa Joseph said the land is for **Ongom Stephen** (PW1). He got it on 12.11.1994. The witness wasn't present but knew of this fact as a County Chief of Ikorom Ikanoko clan to which the parties belong. When **Ongom** died, on 24.11. 94, he attended the burial together with defendants. A will was read out where all lands were mentioned and the suit land was given to the plaintiff.

PW4- Adakuni Cosma said land is for **John Ongom** and he inherited it through a Will. He was the one who wrote the Will on 12.11.94.
He identified PEX1 as the said Will.

PW5 said that he knows the suit land, he had ever assisted in a previous land dispute at family level and the land is for plaintiff who inherited from his late father **John Ongom** in 1994. He grew up seeing plaintiff's mother using land and hence confirmed plaintiff retained it through his father's will. The will is genuine.

In defence Court heard evidence of **DW.I Otodo Clement** who said the land is his by inheritance from his father in 1945 land is at Kasana village about 3 acres and land is customary.

DW.2 Osauro John, said land is for his grandfather **Osauro** owned jointly with **Akite**.

DW.3 Okurut Andrew said land is for first defendant; who got it from his father **Auchati** and it is about 6 acres.

DW.4 Okoi James said the land is for D.1 it is about 7 acres at Odukano village and is customary land.
DW.5 Galyete Gorret; said the land is for D.1 who got it from his father **Ewudote**.

Court visited locus, made observations and then made judgment in favour of the defendants/respondents.
With that evidence, and bearing in mind the grounds of appeal and submissions by counsel, I now resolve the appeal as herebelow:

Ground 1: Misdirections and Non-directions and failing to evaluate evidence
The main complaint is that the learned trial Magistrate ignored evidence by the plaintiff. The appellant alleges that plaintiff led evidence of PW1, PW2, PW4, PW5, PEX1 and PEX2 to prove that he inherited the land from his late father. However learned trial Magistrate did not consider this evidence but only relied on defence case. The alleged contradictions in view of appellant's counsel were minor and ought to have been ignored.

In Response Respondent's counsel argues that the plaintiff failed to prove the case on balance of probabilities.
Counsel Kyabakaya argued that the learned trial Magistrate failed to properly assess the plaintiff's evidence which **Counsel Wamimbi** opposed.

I have gone through the evidence. The burden of proof in civil matters is heavy on the plaintiff to prove his allegations on the balance of probabilities.
(Section 101,102,103 Evidence Act)

In Court plaintiff relied on PW1, PW2, PW3, PW4, PW5, PE1 and PE2. Defence relied on DW1, DW2, DW3, DW4, and DW5. The court however visited locus, and in its Judgment relied heavily on the findings by court at locus.

The learned trial Magistrate at pages 5-6- Court noted findings at locus greatly influenced its decision. At page 5 the learned trial Magistrate noted:

> "*At the close of the defence court conducted locus where it established that …. in view of the <u>above facts and testimonies</u>, I shall analyze and resolve the issues as follows…*"

The above shows that court in reaching its conclusions made reference to other *"facts and testimonies"* at locus which were not part of the evidence in open court. It was as a result of those findings at locus that the learned trial Magistrate at page 6 of his Judgment concludes;

> "*Whereas plaintiff tendered a will and clan minutes, those 2 documents were note denied by defendant but rather <u>were reflecting to other properties and not the suit land</u> (sic!), but even if the will was talking of land in that village, would it have been the suit land?"*
>
> *Possibly <u>no because</u> the first defendant has been staying on the suit land for more than 50 years therefore it is unlikely that the plaintiff was referring to the suit land…*"

That discourse shows that the learned trial Magistrate did not believe the fact that the will is referring to the suit land, he did not however refer to any other evidence which was to the contrary opinion save his findings at locus. It is therefore crucial to examine if this conclusion is tenable in view of the appellant's allegations in the grounds of this appeal.

The law that governs Courts as they hear land matters has been articulated in numerous cases. However in cases of this nature where court finds it necessary to visit locus in order to ascertain conflicts related to boundaries, descriptions of locations, neighbors etc, then court must strictly follow the provisions of ***Practice Directive 1/2007*** under Rule 3 thereof the Directive provides that while at locus in quo court should;

a) Ensure that all the parties, their witnesses and Advocates if any are present.

b) Allow the parties and their witnesses adduce evidence at the locus in quo.
c) Allow cross-examination by either party or his counsel.
d) Record all proceedings at locus in quo.
e) Record any observations, view opinions or conclusions of the court including a drawing a sketch plan if necessary.

This procedure has been further articulated by courts in a number of decided cases. For example: In ***David Acar V Alfred Aliro (1982) HCB 60*** said;

> "*the purpose of the visit is for the witnesses to clarify what they stated in court, they do so on oath, they must be allowed to be cross-examined… the observation by the learned trial Magistrate must form part of the proceedings…*"

In ***Paineto Omwero V Saulo Zebuloni HCCS No. 3 of 2010*** (unreported)the court held that the four witnesses indicated as having given evidence at the locus in quo had not attended the earlier trial court and had not been summoned as witnesses for either side and were not called to testify on what they had stated in court before such evidence was procured in error. This error vitiated the trial rendering the decision of the lower court null and void.

The above statement of the law emphasizes that the purpose of visiting locus in quo is to check on the evidence given by the witnesses and not to fill gaps for them at the trial, lest the Magistrate becomes a witness in the case.

In this case the findings at the locus, though listed by the learned trial Magistrate, did not satisfy the strict requirements of the law. The learned trial Magistrate heard fresh evidence , did not put the witnesses on oath, did not properly record the proceedings, and findings. See page 16 and 17 of typed proceedings.

He only goes into recording by reported speech what he notes thus:

> "*Locus*
> *LC.I (Omoki Gabriel)*

I welcome the visitors

Sketch

Ongom: the crops are for Odida S/o Otodo…."

All these people were not sworn.

The conclusions by the learned trial Magistrate therefore based on evidence at locus was evidence irregularly obtained in violation of the rules of natural justice. The conclusion that PE.1, was a reference to a different land is not borne out by any evidence on record. Whereas both plaintiff and defendant, their witnesses kept on referring to names that appear different both of the villages and neighbours where the suit land is located, the learned trial Magistrate made conclusions not based on evidence in open court.

That being the position then, the entire judgment was heavily reliant on conclusions at locus, which proceedings were irregularly conducted.

In a case like this, where a visit to locus could have enabled the parties to clarify on the evidence in court, then the entire trial could not have been held to be justly concluded when court failed to properly conduct this visit.

I will highlight one crucial point which the visit of locus court have resolved had it been done properly and it could have solved this case. The contents of PE.1 were translated in English. A perusal of the English version (PEX.1) on the un-typed record at page (5) under paragraph 3 it reads;

"*from my home starting from graves up to the road will belong to my son Ongom, including the three gardens that his mother had been cultivating in <u>Kamugu Olinga</u> belong to Ongom Stephen and his brother Joseph…..*"

Now if the will is specific in the above paragraph, the court should have asked plaintiff to show where the home where the alleged <u>graves</u>, <u>road,</u> three gardens of the late are, since this was the crux of the dispute.

This content in the will contradicts the learned trial Magistrate's finding that the will was referring to other properties not the suit land. If so did defendants say so or prove so?

In my view going by this finding alone, I do agree with appellant that the learned trial Magistrate failed to properly evaluate the evidence both in court and at locus, hence reaching a wrong conclusion. I do find that ground 1 is proved.

This finding since it even leads to a conclusion that the locus was wrongly conducted answers the rest of the grounds in the affirmative as proved. There was miscarriage of justice, as the learned trial Magistrate failed to conduct locus properly and to consider the evidence properly. The Appeal succeeds on all grounds. The fact that the learned trial Magistrate heavily relied on findings at the locus, this court finds that the findings were in error and the illegalities at the locus totally violated the trial. The process was null and void.

The findings and judgment of the lower court are accordingly set aside. In the interest of justice this court orders a retrial to be conducted, and particularly the trial court should examine the will and visit locus properly to ascertain the proper lands, locations and neighbourhoods of the land in dispute among other issues raised herein. The trial be before another competent Magistrate Grade /Chief Magistrate at Pallisa.
Costs of appeal allowed to appellant.
I so order.

Henry I. Kawesa
JUDGE
07.07.2017