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

HCT – 04 - CV- CA-008-2016
(ARISING FROM BUDAKA CIVIL SUIT NO. 11 OF 2013)

GAWONA MOHAMAD :::::::::::::: APPELLANT

VERSUS

1. **MAWAZI KEMBA**
2. **SABANI HIISA**
3. **AMUZA WERE**
4. **HIISA YAZID :::::::::::::: RESPONDENTS**

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

JUDGMENT

Appellant was dissatisfied with the judgment of the Magistrate Grade I Budaka **Basemera Sarah** dated 27th January 2016 and appealed to this court.

The appellant raised four grounds as below.

1. The learned trial Magistrate did not evaluate the evidence properly or at all.
2. The decision of the learned trial Magistrate is tainted with fundamental misdirection and non directions in law and facts.
3. The decision of the learned trial magistrate is against the weight of evidence.
4. The decision occasioned a miscarriage of justice.

The appellant argued all the grounds together. I will follow the same trend especially since all grounds relate to the assessment and evaluation of evidence by the learned trial magistrate.

The duty of this court as an appellate court of first instance is to re-evaluate the evidence, subjecting it to a fresh scrutiny. The court has to be conscious of the fact that it did not have chance to observe the witnesses, nor listen to them. The law is captured in various cases (see ***Uganda Revenue Authority v. Rwakasaija Azarious & 2 Ors CACA 8/2007***.

I have dully examined the pleadings, the evidence in court, submissions by counsel and judgment of the lower court. I have also studied and internalised the submissions by both counsel for appellant and Respondents on appeal. I now do find the following in resolution of the grounds of appeal raised.

Plaintiff sued the Respondents vide plaint dated 5th September 2013, where in paragraph 3, plaintiff claims against defendants recovery of approximately 50 acres of land located at Kapulukuchu village, Sekulo Parish, Kamonkoli Sub-county, Budaka district and damages accruing from continued trespass, permanent injunction and costs.

Under paragraph 4 of the plaint, the Plaintiff averred that the plaintiff purchased the land on 4.3.1947 from **Wana Tegumila**, for shs. 20 and two goats vide sale agreement annexed as 'A'.

He then allowed 2nd and 3rd Defendants to use part of the suit land temporarily but they later began claiming it as theirs. The 1st and 4th defendants trespassed on the land and erected boundary marks claiming it was bought by their late grandfather **Salim Kyoka**. Plaintiff reported defendants to police but defendants refused to take heed hence this suit.

In their joint written statement of defence the defendants denied the above. In paragraph 6 of the written statement of defence averred that the land is 10 acres, (approximately) and was for their father **Kyoka Salim** (and **Kyoka** is father of Plaintiff and Defendants 1, 2 and 3 and grandfather of 4th defendant). They averred that plaintiff was given his share of the family land by **Kyoka Salim** in 1959 which he occupies todate without any disturbance. They averred that the purported agreement of sale is a forgery.

In his reply to the written statement of defence, plaintiff denied the above allegations clarifying that the defendants 1, 2 and 3 were step brothers with whom he shared a mother. He averred the land was not part of the estate of late **Kyoka**.

In court the plaintiff led evidence of **PW.1 Salya Fazil, PW.2 Gabona Nasur, PW.3 Lugose Salimat** all who testified that the land belongs to plaintiff; by purchase.

In defence, evidence was through **DW.1 Mawazi Kemba**, who said land was for their late father **Salim Kyoka** and he as heir, allocated the said land to his brothers as their share. He averred that the agreement is a forgery. He gave **Hamuza** in 1974.

DW.4 Hiisa Yazid said he owns the land from his late father having been allocated the same by DW.1 the heir in 2013.

DW.3 Were Hamuza also said PW.1 as heir gave him his share of land from their late father's estate in 1974.

DW.4 Hasakya Peter conducted a clan meeting for Bangoma clan upon complaint from plaintiff that defendants were illegally using his land. They as clan decided that the land belonged to **Salim Kyoka** and should be distributed amongst the children of **Kyoka**.

DW.5 Naigono Fatuma said the land used to be for **Salim Kyoka**.

DW.6's evidence is not captured on the record it is written as cross-examination of DW.5.

From that anomaly the record next shows proceedings at locus and again evidence taken from PW.1 named as **Gawona Mohamad, PW.2 Gawona, PW.3 Tashoma Foster, DW.1 Ndeera Abdu, DW.2 Wandera Christopher**.

That was the evidence before court.
The court had to determine three issues agreed on at scheduling, that is:

1. Who is the rightful owner of the suit land?
2. Whether defendants are trespassers.
3. Remedies available.

The learned trial magistrate considered the evidence and found for the defendants; hence the appeal.

The summary of submissions on appeal by both parties raised only one issue which is the question of whether the learned trial magistrate correctly evaluated the evidence, to support her findings on the issues, before court.

In assessing evidence the court has a duty to consider all the evidence as a whole.
The burden of proof is always on he who asserts a fact, though plaintiff has the overall burden to proof the case on a balance of probability. (Sec 101, 102 and 103 of the Evidence Act).

The judgment by the learned trial magistrate in this case is being challenged for failing to give the evidence a proper scrutiny. While arguing the appeal, counsel for the appellant raised the issue of whether the land plaintiff sued for as 50 acres was the same land which the defendants referred to as being 20 acres hence raising the question as to what happened at locus? Counsel shows that 4 witnesses testified at locus whose testimonies are not on record; yet court relied and believed them.

I will begin with an examination of whether the learned trial magistrate based her decision on all evidence before her. This was a land dispute. Parties are bound by their pleadings. In the plaint the plaintiff referred to and described the land. In court parties referred to the land but giving varying descriptions. Plaint refers to 50 acres. The written statement of defence referred to 20 acres. Witnesses were referring to approximations of 10, 20 and 40 acres (see evidence). The evidence also according to the learned trial magistrate's judgment comprised of other evidence of "*the entire village", "the neighbours", "independent witnesses*."
This is on the judgment at page 8 paragraphs 1, 2, 3 and 4 of the learned trial magistrate's judgment.

This means that the learned trial magistrate was swayed greatly by evidence at locus. At page 8 of judgment paragraph 2 he notes, "*It's the duty of court to make note of what transpires at locus and apply such findings when making a decision...*"
Under paragraph 3, (page 8) he noted thus "*<u>The entire village confirmed to</u> court that the suit land belonged to Salim Kyoka....*"

Again under same paragraph he said "*The neighbours further told court that **Salim** used to grow sugar canes and they would go there to eat.....*"

Again the learned trial magistrate noted "*.....Kasubi Mwanamoiza whom the entire village knew as a leper who had no limbs and could not write. This is all evidence which was not discredited or rebutted by the prosecution. All this proved to court the prosecution evidence in its entirety was full of lies.....*"

The conclusions above show that the learned trial magistrate relied heavily on both evidence at locus and in open court. Whereas it is good practice to visit locus, it has to be recalled always that a visit to the locus is done to give the parties a chance to explain the evidence already given in court.

According to Practice Direction No.1 of 2007, a specific procedure is laid out which courts ought to follow upon visiting locus.

I have noted from the record of proceedings starting from page 30 of the typed proceedings and also cross checked the handwritten script, that the court did not follow the land down procedure in conducting locus. The learned trial magistrate did not record all that transpired at locus, when the contents of the judgment at page 8 thereof is considered.

There was fresh evidence taken from three other witnesses who never testified in court which is a violation of the rule of practice under the Practice directive. As rightly cited by counsel for the appellant, this court in ***John Siwa Bonin v. John Arapkissa (HCCS No. 0058) of 2007*** re-echoed the authority of ***De-Souza v. Uganda (1967) EA 78***, where court observed that the purpose of visiting locus in quo is to check on evidence given by the witnesses in court, not to fill in gaps to bolster the party's case. Evidently in this case what the learned trial magistrate called evidence of the "*whole village*", "*Evidence of all neighbours*" etc was never part of evidence before him in open court.

Secondly there is no indication that the parties showed court around the land, as it is not part of his record. It is only referred to in the judgment similarly the question of acreage was not resolved at the locus.

There is all justification to conclude that the learned trial magistrate's conclusions on the evidence were heavily reliant on his findings at locus, yet the evidence at locus was not part of the evidence on record. It was a wrong approach to the evidence as assembled and it violated the rules that govern the conduct of locus.

In ***Justine Okengo v. Natali Abia HCCA No. 34/2004*** (unreported) it was held once the evidence adduced before court necessitates a visit to the locus to ascertain boundaries or the land on which special features are found then court must visit the locus. It was very crucial for court in this case to correctly conduct the locus since all parties were giving varied accounts/descriptions of this land in court. Unfortunately at locus the learned trial magistrate did not resolve this vital evidential gap.

In ***Paineto Omwero v. Saulo S/o Zabuloni HCCS No. 31 of 2010***, it was held that:

> "*Failure to conduct the locus in quo properly renders the evidence to be procured in error. This error violates the trial rendering the decision of the lower court null and void*."

On the above authorities and in view of the gross errors committed by the learned trial magistrate in conducting the locus, yet his judgment greatly depended on evidence procured therefrom, the error vitiated the trial. The rendered resultant decision null and void, as it was based on evidence which was illegally obtained.

The complaints that learned trial magistrate failed to properly assess and evaluate the evidence in court is therefore sustained.
The learned trial magistrate's judgment is not based on evidence as on record.

I do find that the appeal on account of the above reasons succeeds on all grounds. The judgment shall be set aside and a retrial ordered before another competent Chief Magistrate/Grade I. Costs granted to Appellant.

Henry I. Kawesa

JUDGE

21.06.2017