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

HCT-04-CV- CA- 31 OF 2016
(ARISING FROM LAND SUIT NO. 57/2012 FORMERLY CIVIL SUIT NO. 48 OF 2002 ARISING FROM HCCS No. 68/1999)

DIXON EJAKAIT EKOJOT ISARA :::::::::::::::: APPELLANT

VERSUS

DAVID OKIRU :::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant sued the Respondent in the lower court for trespass on his customary piece of land situated at Lwanjusi village approximately 8 acres. It was alleged in the plaint that on or about 14th June 1999 the 1st Defendant with full knowledge and connivance of the 2nd defendant forcefully entered the plaintiff's customary piece of land situated at Lwanjusi village and did remain in forceful and wrongful occupation thereof.

The land was lawfully returned to the plaintiff on 13th June 1990 by one **Yonasani Emetono** the late father to the 1st defendant and husband of the 2nd defendant.

Respondent /defendant denied the appellant's claim and stated that the suit land belongs to him by inheritance from late **Yonasani Emetono** his father.

At the end of hearing the learned trial Magistrate found for the Respondent. Appellant was dissatisfied hence this appeal. Three grounds were raised;

1. That the learned trial Magistrate erred in law and fact when he grossly failed to properly evaluate the evidence on court record hence reaching an erroneous decision.
2. That the learned trial Magistrate erred in law and fact when he erroneously ignored to visit the locus in quo.

3. That the decision occasioned a miscarriage of justice.

The duty of a first appellate court is to re-evaluate all the evidence, give it a fresh scrutiny and make its own conclusions thereon, bearing in mind the fact that it never listened to the witnesses.

This position has been observed and restated in many cases. For emphasis it was such held in ***Bonco Arabe Esponol V Bank of Uganda SCCA 8/ 1998***.

I will therefore determine the appeal with the above principle in mind and I will follow the order of arguments of the appellant's counsel.

Ground 2: Failure to Visit Locus

The court did not visit locus. A look at the proceedings of the lower court shows that after hearing all evidence, court adjourned the matter for visiting locus on 16.08.2010 at 11:00am. This was after counsel Dagira for defence closed the defence and prayed that "*since this is a land matter we seek a date for visiting locus*"

The record shows that on 16th. 08. 2010 no visit was done due to absence of learned trial Magistrate; it was adjourned for visiting locus on 31.08. 2010, however no visit was done on that date as "court was not ready." The matter was adjourned to 01. 10. 2010, and on that date the trial Magistrate was indisposed. It was adjourned to 02/ 12/ 2010 for mention and case forwarded to Chief Magistrate for directions. The next record is for 10. 03. 2011, then 26.02. 2013 for visiting locus. On 26/02/2013 defendant was absent and counsel Dagira prayed for another date for visiting locus, and it was rescheduled to 13/ 03/ 2013 both defendant and his counsel were absent , but plaintiff was present . Court in its wisdom declined to adjourn the matter any further and opted to write Judgment. Judgment was hence fixed for 28/03/ 2013.

From the proceedings it is clear that parties wanted court to visit the locus, (application by defendant's counsel), but the visit wasn't done for reasons as stated on record.

Was this failure fatal as to occasion a miscarriage of justice?

Appellant proposes so, and relied on the case of ***Bwire John Guloba V Wanyama Manasi & Oweri Joel HC-04-CA-092-2008***, where Hon **Justice Musota** persuasively at page 6 of his Judgment observed that the purpose of a visit at the locus is to allow witnesses to clarify what they gave in evidence.

Appellant claims that the witnesses were denied the opportunity to clarify their evidence which made the learned trial Magistrate to reach an erroneous decision.

Respondent on the other hand was of the view that this failure was not fatal. He referred to the case of ***Yeseri Waibi V Elisa Lusi Byandala 1982 HCB 28 page 29*** for the persuasive holding that the practice of visits to locus in quo was to check on the evidence given by the witnesses which was not necessary in this case since the witnesses seemed to be knowing the land and their evidence was conclusive and needed no crosschecking at the locus.

I wish to begin by pointing out that it is now settled law that visits to the locus are done in any deserving cases. Deserving cases are the ones where while giving evidence in court the witnesses allude to special features, boundaries, figures, cultural sites, land marks, neighbors, markstones, buildings or old sites, graveyards or grave- all whose descriptive nature, requires a court to visit the site. This could be to ascertain, clarify, confirm or seek explanations.

It is however never intended that the visit, is used to fill up gaps in evidence for either party. This was the essence of the practice Direction No. 1 of 2007 where Practice Guideline 3 provides that during the hearing of land disputes, the court should take interest in visiting locus in quo, and lays down what should happen when it does so. Each case is therefore assessed by the learned trial Magistrate to determine from evidence adduced in court if a visit is necessary. In my view however though not mandatory a visit to locus is necessary in most land disputes.

This was the gist of the holding in ***Safina Bakulimya& Another V Yusuf Musa Wamala Civil Appeal No. 68 of 2007.***

Various persuasive decision from the High Court have followed a similar pattern of reasoning pointing at the necessity to visit locus. These includes ***Mukodha Twaha V Wendo Christopher High Court Civil Appeal 0142- 2012***, where this court found that failing to visit the locus in a deserving case is fatal and renders such a trial a nullity.

Is this case one such deserving case? From the pleadings, I think it is for the following reasons.

First, it is counsel for the defendants who upon close of defence, moved court that "this being a land matter, court should visit locus". Court judiciously weighed the prayer conceded that it was a deserving case and hence fixed the matter for visiting of locus. The import from that is that the learned trial Magistrate and counsel had already made up their mind that before Judgment, court needed to go on the ground so as to have the witnesses clarify their evidence. It was therefore premature to base on this evidence to conclusively determine the case, before the scheduled visit.

Secondly I have observed from the pleadings that the evidence from both plaintiff and defendant is at variance in a number of crucial areas which would have necessitated a visit to locus to get clarifications.

For example while describing the land in dispute; the plaintiff **Ekojot** (PW1) at page 4 of the pleadings names the neighbors to the land in dispute as follows

"Neighbors by East **Butulumayo Okadapu**, West myself, North **Osuna** (alive) South **Omukuru Akisoferi Omaset**…"

PW2 **Akisoferi Omaset** said neighbours are **Dinasio Ekakor** on East. On the South side – **Akisoferi Omaset** , North- **Remigius Mute**, North East is a river and **Oketch** on far side of the River .

On the other hand DW1 **Okiru David** named the neighbors, east – **Batulumayo Kadapawo** and **Asirasi** and now **Etyang** and **Okudapau**

West- **Ekojot**, North- a swamp, South- a road from **Lwanjusi** dispensary.

DW2- **Yokolam Okitela** named the neighbors to the disputed land as;

East- **Asirasi**, West- **Isara** (Plaintiff),North – Swamp , South- road.

From the descriptions of this land, and the evidence as on record there is a great likelyhood in my mind that these parties were referring to different lands, on which each one of them laid particular interests and claim. It was clear from evidence that the land involves both clan

inheritance rights, and claims based on gifts and assignment of rights. There was a great need to visit the locus and have these witnesses show court exactly what land each one of them and their witnesses referred as land inherited, land given, land entrusted etc.

I am therefore of the opinion that the failure to visit locus in this case led the trial Magistrate to wrong conclusions on the evidence.

The failure was in error of fact and law. It tainted the Judgment with irregularity, and caused a miscarriage of justice. I agree that with the standard in ***Matayo Okumu Vs. Fransisko Amudhe & Others (1979) HCB 229,*** in mind this is one such case where the decision appealed against caused a miscarriage of justice as *prima facie* an error was made by not visiting the locus.

This ground succeeds. On the strength of this ground alone, the other grounds also succeeds as it disposes off the entire appeal.

I therefore for reasons above find that the appeal succeeds.

The lower court Judgment is set aside. The Judgment and Orders below are replaced with an Order for retrial before another competent Chief Magistrate. Costs to the appellant here and below. I so order.

Henry I. Kawesa

JUDGE

14.02.2017