

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

**HCT-04-CV- CA- 173 OF 2015
(ARISING FROM LAND SUIT NO. 162/2012)**

**1. EDWARD OWOR
2. AWOR BUDESTA ::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

**1. OCHWO MELLO
2. OKELLO BOLE ::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

In this appeal, the appellant was dissatisfied with the judgment of the Chief Magistrate Tororo under (suit LD 162 of 2012 dated 19th November 2015, on 7 grounds of appeal.

However grounds 3, 5 and 7 were abandoned by appellant’s counsel, who chose to argue grounds 1 and 4 together, and grounds 2 and 6 separately.

I will follow the same order of resolution of the grounds of appeal.

As a first appellate court, I have the duty to reappraise the evidence and arrive at my own conclusions, following the principles that I have/ did not have chance to observe the witnesses as advised in *Banco Espanal V Bank of Uganda SCA 8/1998* (unreported).

Grounds 1 & 4 (irregularity).

Under ground 1, it was complained that the learned trial Magistrate erred when she failed to take cognizance of the procedural irregularity of the respondent’s

suit and under ground 4- the complaint is that the learned trial Magistrate erred when she found that the plaint disclosed a cause of action against appellants/defendants.

The appellants' argument was that the irregularity was in respect to the failure to conduct the locus and or to record the proceedings at locus. Respondents stated that no procedural irregularity occurred in conducting the locus visit.

I have examined the record of proceedings and all being said the record speaks for itself.

As pointed out by appellants' counsel, the provisions of Practice Direction No.1 of 2007, it is emphasized that proceedings at the locus must be recorded. It provides that court should record any observations view, opinion or conclusions of the court including drawing a sketch plan if necessary.

This is in line with the case of ***David Acar V Alfred Acar Aliro (1982) HCB 60*** which held *inter alia* that:

“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 stated in court he or 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.”

I noted from the proceedings that court conducted a hearing of their case at the locus. The proceedings of the main trial in open court and that at locus are mixed up. I did not see on record any indication that the court observed, moved around, was shown the land etc. All that is on record is just a recording of evidence as it

normally is in open court (see page 12 of typed proceeding to page 15). It is shown at page 12 that: “Both counsel and parties have agreed to hearing the case further at locus with this 4 witnesses.

1. Yokoyasi Opoyo
2. Filista Akello
3. Ofumbi Hazana
4. Onyango Yombo

The above procedure was flawed. The usual practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill in gaps as per ***Waibi v Byandala (1982) HCB 28.***

Clearly in this case court just shifted the hearing at locus for no clarifications. New evidence was given at locus by new witnesses. At situation akin in ***Paineto Omwero V Saulo s/o Zebuloni HCCS 31/ 2010*** (unreported) where court found that:

“the standard procedure must be adhered to when the court decides to visit the locus in quo, the record of proceedings does not bear the evidence of steps taken at the locus in quo. Also 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 to state 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 decision above is on all fours with the present case. The four witnesses who testified at the locus had not testified in open court before, neither had summons

been issued to them earlier on as witnesses for either party. Their evidence at locus was therefore in error, and it vitiated the trial. I do not see even the record of what transpired after their testimony at locus. No record, or sketch plan etc is on record. For the above observations, I find that the conduct of the locus was done irregularly and the entire proceedings thereat were a nullity.

This ground succeeds, and on it alone the matter having involved a claim for land between the parties, there is no way the findings of court can stand if locus was not proper. The pleadings by the defendants clearly denied the fact that the land plaintiff sued for was part of the Estate of late **Simon Osinde**.

Accordingly locus would have enabled the learned trial Magistrate to go around the land and see the land the parties claimed. The failure was fatal and was a gross misdirection.

The question of cause of action was not argued by appellants though they simply allude to the fact that it must be specifically pleaded not inferred.

They argued that particulars of trespass should have been clearly set out.

In reply respondents' counsel argued that the respondents properly brought the suit and relied on **Steven Semakula V Samuel Serungogi C/S 187/ 2012** for their argument that the plaint discloses a cause of action against 1st & 2nd appellants.

The law on cause of action is provided for under O 7 r 11(a) of the Civil Procedure Rules that:

“a plaint may be rejected if it discloses no cause of action. The law is further that in determining whether a plaint discloses a cause of action the court must look only at the plaint and its annexures if any and nowhere else.”

(See: *Kapeka Coffee Works Ltd Vs NPART CACA N03/ 2000*).

I have looked at the plaint in this matter. Under paragraph 4 it states that:

“the plaintiff brings this suit jointly as administrators ... against defendants jointly and severally for declarations, a permanent injunction and other reliefs set out here in

e) On diverse days the 1st defendant unlawfully and without any right whatsoever entered upon the suit land and trespassed upon the said land and has continued to do so to date and has

i) Occupied the homestead of the late Osinde Simon....”

According to *Uganda Aluminium Ltd V Restuta Twinomugisha CACA NO 22/ 2000*. A cause of action means every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied the plaintiff must prove in order to obtain Judgment.

The plaint specifically mentions 1st defendant.

I am satisfied that the facts pleaded by plaintiffs in paragraph 4 of the plaint disclose a cause of action only as against 1st Defendant. Not the 2nd Defendant.

This ground succeeds only in part.

Ground 2 & 3: (Limitation Period)

Counsel for appellant argues that the suit was brought as a suit for recovery of land and hence was subject to the law of limitation.

The respondent objected to the above on grounds that respondent held letters of Administration to enable institute a suit against the appellants who had trespassed on the estate.

I have to point out that the plaint under paragraph 4 does not specify that the cause of action is in trespass. It only specifies that the suit is for declarations, permanent injunction and other reliefs.”

It only mentions trespass as an effect under paragraph 4 (e)..

The time against the plaintiff therefore is traced from the date of the occurrence of the mischief which brought him to court, which according to paragraph 4(c) began in 1964 as against 1st defendant/appellant.

The whole episode cannot be traced from date of the letters of Administration. The statement under paragraph 4(e) “on diverse days 1st defendant unlawfully entered” does not specify the time. The only time mentioned is in 1964. Therefore the law of limitation which governs time frames for litigation would come into play here. As argued rightly by appellant’s counsel Section 5 of the Limitation Act would come into play. I do not agree that section 180 of the Succession Act would give coverage to the respondents. This suit was clearly time barred and ought to have been rejected by the learned trial Magistrate.

This is on the strength of the law of Limitations under sect 5 of the Limitation Act which provides that no action shall be brought by any person to recover any years from the date on which the cause of action arose. Further on the case law authority of ***Departed Asian Property Custodian Board V DR J. M. Musambis (CACA No. 04/ 2004*** which noted

“this court and the Supreme Court have held in many cases that enforcement of provision of a statute is Mandatory.”

This ground for reasons above succeeds.

Ground Three:

Having found that the visit to the locus was not done properly it falls that it was not possible to correctly determine who owned the disputed land.

This ground therefore succeeds.

All in law for reasons above this appeal succeeds on grounds above.

The lower court Judgment is set aside, and replaced with a finding for the appellants. Costs to appellants here and below.

I so order.

Henry I. Kawesa

JUDGE

03.04.2017