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

HCT-04-CV-CA- 0057 OF 2013
(ARISING FROM PALLISA CIVIL SUIT NO. 013/2010)

1. **WAIKUBI ASUMAN MUZALE**
2. **NAKASONKO NUSULA :::::::::::::::::::: APPELLANTS**

VERSUS

KIGAYE SAMSON :::::::::::::::::::: RESPONDENT

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

JUDGMENT

The Appellants were dissatisfied with the Judgment of **Her Worship Atingu Stella** Magistrate Grade I at Pallisa Court dated 9th May 2013, on 6 grounds.

The appellant argued grounds 1, 3, 4, 5 and 6 together and two separately.
The Respondent followed the same formant in reply.

As a first appellate court, I have a duty to reappraise the evidence and make fresh conclusions thereon bearing in mind the fact that I did not have chance to examine, listen to and watch the witnesses. (See ***Pandya v. R (1957) EA 336***).

I have examined the lower court record, and do hold as follows.
The Plaintiff in the lower court filed suit 13/2010 against the defendants/Respondents seeking recovery of land situate at Nangeye village, Budaka District approximately 2 acres.

According to paragraph 3 of the plaint the suit against defendants is for recovery of a piece of land measuring 2 acres situated at Nansenye; the plaintiffs having inherited the land from their late father-**Nduga Ali** who died on 24th March 2009. In their written statement of defence the defendant averred in paragraph 6 that the land is his as the owner of the suit land having purchased it from **Nduga Ali** and **Debule Iddi**.

The plaintiff led evidence of **PW.1 Asuman Waikubi Muzale** that the land was left to them by their late father **Ali Nduga** in 2009. The land is 20 acres and defendant grabbed two acres thereof. He said he had never heard that late **Nduga** sold the said land to the defendant.

PW.2 Nakasonko Nusura said the land belonged to her late father **Nduga Ali** who died on 24.08.2009 and defendant was a neighbor to the suit land. Defendant had encroached on 2 acres of the 20 acres left by the late Ndugwa.

PW.3 Mwasiti Naikesa, said the land belonged to her and her children the plaintiffs. It was for her late husband **Ali Nduga** who also acquired from his father **Rajab Mugwa**. She claimed she was not aware of the sale of the land to the defendant.

PW.4 Salama Nawawi said defendant is a mere land grabber.

DW.1 Sam Kigaye said he purchased the land from late **Ali Nduga** first in 2007 and second portion in 2008 and third was sold to him by **Nduga**'s grandson **Dewule** in 2008. He handed in the sale agreements for identification as IDI, ID.2 and ID.3.
DW.3 Bruhan Waikubi confirmed the sale and was a witness to the sale.

DW.3 Lugwere Ndugwa, said the defendant bought the land from **Ali Nduga** while he was still alive, and he was present.

He signed on the sale agreement as a witness.

DW.4 Nadome George knew that the defendant bought land from 2nd Plaintiff. he was present at the sale and witnessed the agreement.

The appellant claims that the learned trial Magistrate did not assess the evidence properly. The learned trial magistrate in her judgment, after analyzing the evidence found that the defendant proved on the balance of probabilities that he bought the suit land from the late **Ali Nduga**.

The law is that he who alleges a fact has the burden to prove it; as per section 101,102 and 103 of the Evidence Act. The plaintiffs from evidence above did not lead any evidence to show that the two acres occupied by defendant was part of the late **Nduga**'s 20 acres as alleged. However the defendant led both oral and documentary evidence to prove that he bought the land in question. I do agree with respondent's counsel that the learned trial Magistrate correctly evaluated the evidence and reached the right conclusion on the evidence.

These grounds accordingly fail.

Ground 2: Locus:

The learned trial Magistrate did not visit locus and gave reasons as to why.

The visit to the locus is a requirement as per Practice Direction 1 of 2007 by the Chief Justice to Courts. This direction is to the effect that during the hearing of land disputes the court should take interest in visiting the locus in quo.

What is the purpose for visiting locus?

In the case of ***David Acar v. Alfred Acar Aliro [1982] HCB 60***, it was held that when a court deems it necessary to visit the locus then the correct procedure has to be followed. The purpose of visiting the locus in quo is to check on the evidence given by the witnesses and not to fill gaps for them at the trial (see ***Waibi v. Byandala [1982] HCB 28***.

The locus is visited only in deserving cases. This is a case where after hearing the evidence, court wants the witnesses to clarify their evidence regarding peculiar issues like boundaries, special marks on land, graves, rivers etc.

This is to help court clear, whatever remained unclear during their testimonies in court.

Given the above, it is true that the learned trial Magistrate did not visit locus which should have been done given the nature of this case being land. However it was not fatal since the evidence in open court was sufficient to explain the issues before court. I do agree with the submissions of respondent's counsel that given the circumstances of this case the case of ***Registered Trustees of Archdiocese of Tororo v. Wesonga Reuben Maleka & 5 Others Civil Appeal 96 of 2009*** is distinguishable.

Am therefore satisfied that the failure to visit the locus was not very fatal in the circumstances. I therefore find that this ground is not proved.

All in all, all the grounds have failed. The appeal is not proved.

It is dismissed with costs to Respondents.

Henry I. Kawesa

JUDGE

12.4.2017