

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

**HCT-04-CV- CA -0076 OF 2012
(Arising from Bubulo land case no. 31 of 2012)**

1. WAMUKOOTA SERAPIO NANDAAH		
2. MUNGARA EDWARD	APPELLANTS
	VERSUS	
1. WAMUTU MARTIN		
2. WOPATA RICHARD	RESPONDENTS

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

JUDGMENT

Appellants being aggrieved by the judgment of his Worship **Omalla Felix** Magistrate Grade I of 4th May 2012 appealed against the same to the High Court alleging in the memorandum of appeal that:

1. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law by not dismissing the plaintiffs' case on the ground of amending the pleadings without the leave of court.
3. The learned trial Magistrate erred in law by not dismissing the plaintiffs' case on ground of lack of geographical jurisdiction.
4. The learned trial magistrate illegally and irregularly conducted the court's visit to the locus in quo.

As a first appellate court, this court is mandated to re-evaluate the evidence and make its own conclusions thereon, taking caution that it never observed the witnesses or heard them.

I have re-evaluated the lower court record. I have also read and internalized the submissions on appeal and below. I now do resolve the grounds of appeal as follows:

Ground 1: Failure to properly evaluate the evidence.

It is the appellants contention that evidence of PW.1, PW.2, and PW.3 was not well evaluated. In their response respondents deny and insist the learned trial Magistrate properly evaluated this

evidence. My own assessment of this evidence by careful scrutiny reveals lots of contradictions in the evidence of location (geographical) and neighbours.

The evidence as given in open court by PW.1, PW.2 and PW.3 is not consistent on the location of land and its neighbours.

PW.1 Wamutu Martin at page 6 of proceedings is recorded as having said in cross examination that he got the land in 1990 from his father **Difasi Mulyanyuma** and neighbours are- **Samwiri**

Khauka - West
- **Masayi Job** - North
- **Edward Mungara** - South
- **Tomboto** - East

He further conceded that **Maumbe** has land on both sides of the road and his land is in Mbale.

PW.2 Wopata, said he acquired the land in 2006 having bought from **Tomboto** and **Masolo**.

The neighbours are - North- **Wandobire**
- South - **Maumbe**
- West - **Wamutu Martin**
- East - **Wopata Richard**

Witness in cross-examination conceded that from contents of agreement exhibited as P.2 x C-D.2 (**Mungara** is not a neighbor.

He also conceded that **Maumbe's** land falls in Mbale District and disputed land is in Manafwa District.

PW.3 Mulyanyuma said he gave the land to Plaintiff No.1 **Wamutu**. He named neighbours as;

West - **Wopata**
East - Plaintiff No.1's land.
North - **Massete** now **Masayi**.
South - **Mungara**.

He said his land borders **Musuli** and **Mayemba** and **Mungara**.

PW.4 Tomboto Patrick sold his land to Plaintiff No.2. The neighbours are:

North - **Maumbe**
East - **Wopata.**

Be confirmed the contents of 14.1.2009 agreement which show:

North - **Wamutu**
Maumbe - East.

PW.5 Michael Musolo sold land to Plaintiff No.2. He said they were neighbours with **Maumbe** for land in Bushiende-Mbale. **Mungara** was a neighbor in the south but he did not know him or his land. He denied that **Mungara** borders **Wopata**, and that they do not neighbor **Wamutu** on the right and left. He confirmed that if anybody said he owns land in East and West he would be wrong.

PW.6 Khaukha Samwiri said he is a neighbor to the disputed land. 2nd Plaintiff bought land from **Tomboto** and he witnessed the sale the land is in Bamulyanyuma Walanga hill. He said **Masette** and **Maumbe** are on the slopes and **Mungara** is not a neighbor said **Wamutu** is in the East.

PW.7 John Watenga said he knew disputed land since 1971. He began using in 1987 having been given by **Wamutu**, **Mungara** claimed it but was taken to LC of Bubulo and it was declared for **Wamutu**.

DW.1 Wamukota Serapiyo bought land in dispute from **Mungara**. Land is in Bushiende-Mbale. He did due diligence from neighbours and LCs and agreement made showing neighbours as;

- Left - **Maumbe**
- Right - **Edward Mungara**
- South - **Agnes Nabala and Mungara**
- North - Border of Manafwa District.

Agreement exhibited as D1A. When he planted pines 2nd Plaintiff (**Wopata**) claimed the land (part of it). He said he had planted pine seedlings which **Wopata** uprooted. He did not know the neighbours on the Manafwa District side.

DW.2 Mungara Edward said he sold land to **D.1 Serapiyo** in 2007. Neighbours are:

- **Clement Maumbe**
- **Maumbe** with Town Council Manafwa road.
- **Agnes Khabala Mulagara Edward.**
- **Mungara.**

In cross-examination he said the land falls in two districts of Manafwa and Mbale, and he did not know those on the side of Manafwa, but **Wamukota's** land falls in Mbale.

DW.3 Mukamba Kitutu testified that as a councilor of Bushiende knew the map of Manafwa and Mbale. The land was in Mbale because Bunabala village, Burukuru Parish, Bushiende is in Mbale District. He tendered the map he was testifying about, admitted as D'B'. He said there were no boundary marks created because of the spilled blood of a dog.

DW.4 John Walera Chairman LC.I Burukuru, Bushiende witnessed the buying of land by D.2. The neighbours were **Clement Maumbe** on two sides, a path, **Agnes Barukuru** and Bushiende.

DW.5 Maumbe Clement gave the neighbours as Basuku and that he neighbours D.2 on both sides.

Having carefully evaluated all the above evidence, and the judgment of the learned trial Magistrate, I find that in answering the issue "who owned the disputed pieces of land?" the learned trial Magistrate did not properly evaluate and assess the evidence before him. This is because in his judgment page 1 and 2 the learned trial Magistrate reproduces the evidence as it is from plaintiff and defence side. He then at page 3 he stated:

"At close of both sides, court visited locus in quo to ascertain what was brought in evidence:-

The Court found out that the land was on a hill called Walanga Hill....."

The learned trial Magistrate then observed that "Both the plaintiff and defendants could not tell court who borders the other at the boundary bordering Mbale and Manafwa....."

He also observes;

“There was no physical mark. Whether natural or artificial at the side boarder instead the entire boarder was cultivated and part of it planted with cassava of close to 4 months. On inquiry by court who owned the said cassava, a person not a party to the suit claimed ownership and said the land was his...”

The learned trial Magistrate then jumped to conclusions as follows:

“This court studied the map and Walanga hill was marked with contours.... I may not inquire the criteria used in mapping but am interested who owns this disputed land....from evidence of both plaintiff and defendants, agreements exhibited and the map, plaintiffs have made out their cases.”

From the judgment it is clear that the learned trial Magistrate based his findings on (i) the map and (ii) evidence at locus. However the evidence of the author of the map (DW.3) **Maumbe** was not put into consideration by the learned trial Magistrate. He does not in his judgment explain how he came to the conclusion that differs from DW.3 the author of the exhibit. It is not shown that DW.3 was invited at the locus to explain his evidence. It is trite law that visits at locus are not aimed at gathering evidence. They are aimed at giving parties a chance to explain the evidence already given in court.

In this case DW.3 should have been invited to explain the map. This was irregular and an error or omission by the learned trial Magistrate.

Secondly the learned trial Magistrate did not at all explain by assessment of evidence why he believed the plaintiffs' evidence and disbelieved the defence. The learned trial Magistrate simply used his impressions at the locus and made conclusions in disregard of the evidence in court. He stated at page 4 *“the court identified some of what were described and seen by court at the locus such as the old pines which are more than 3 years, banana plants. To me I thought the first defendant ought to have asked who planted those trees before purchase. From the entire evidence of both the plaintiff and the defendants agreements exhibited and the map the plaintiffs have made out their cases that the defendants have encroached on their land and thus the*

defendants must go back to their original boundaries which they know but did not want to tell court....”

It is clear that the above conclusions are not borne out of what the evidence on record states. Both plaintiffs in evidence like defendants labored to show their boundaries and name neighbours.

It however transpired that the proceedings at the locus were also not properly conducted as I will demonstrate. I agree with observations pointed out by appellants in their submissions on this failure. I do not agree with explanations in reply by the Respondents. The evidence was not well evaluated. The ground is upheld.

Ground 4:

Appellants complain about failure to properly record the proceedings at the locus.

I have noted that the proceedings at the locus did not form part of the typed proceedings. Respondents asked court to refer to the un-typed record to ascertain (six!). I have perused the lower court and no proceedings at locus were noted down. The learned trial Magistrate only drew a sketch map and made notes which were not part of the record.

In Practice Directive No.1 of 2007, in naming their neighbours the plaintiffs kept on contradicting themselves and naming their neighbours the plaintiffs kept on contradicting themselves and naming their neighbours the plaintiffs kept on contradicting themselves and naming different neighbours. It is on record that defendants successfully showed court that the land in issue was in Mbale and not Manafwa.

Though DW.3 Court was even able to access a map which showed that defendants not plaintiffs knew the boundaries of the land in issue. Actually it baffles my mind for the learned trial Magistrate to find in his opening remarks that “both the plaintiffs and defendants could not tell court who boards the others at the boundary of Mbale and Manafwa....” (page 3 of typed judgment), then conclude at page 5 “How can land owners who regularly use their land fail to know whom they share boundaries with....?”

There was a failure by the learned trial Magistrate to properly evaluate evidence given by defendants and plaintiff in court. He relied heavily on the locus yet the Chief Justice guided courts on how to handle proceedings at locus.

The court must religiously ensure that:

- (i) Parties are in attendance.
- (ii) Their Lawyers are in attendance.
- (iii) Witnesses who testified in court if required to clarify their evidence.
- (iv) All the proceedings at locus are recorded by the learned trial Magistrate and must be included on the court proceedings as a normal court sitting at locus. All clarifications, cross-examinations and other notes made by court must be properly recorded.

Courts have consistently held that failing to follow the above procedure is fatal to the proceedings.

(See cases of *J.W. Onange v. Okallang (1986) HCB 63*; also *David Acar v. Alfred Acar Aliro [1982] HCB 60*, *Roza Muwangala v. Roza Nabuya HCCA 03 of 1957*.

In the case before me the learned trial Magistrate did not record the proceedings at locus. He refers to “a court witness” who was not a party” but no record of who he was, whether he testified on oath, whether he was cross-examined, all is lacking on record. The court made a lengthy reference to observed pines, boundary marks, maize etc all of which are not on record.

The learned trial Magistrate was in error when he failed to correctly handle the proceedings at locus, and yet relied on the conclusions therefrom to decide against the defendants. This omission was fatal, erroneous and goes to the root of the trial. The decision was reached irregularly. Every illegality once brought to the attention of court overrides all other questions.

(See: Makula *International v. Cardinal Wamala Nsubuga [1982] HCB 11*.

I therefore agree with appellants that this failure was an illegality. The ground succeeds.

Grounds 2 and 3

On these grounds, had the learned trial Magistrate given himself time to study the evidence he would have found that evidence of DW.3 among others showed conclusively that the disputed land falls within Mbale District. Geographically, the learned trial Magistrate had no jurisdiction.

Ground 3 is proved.

Regarding the issues of the learned trial Magistrate allowing the matter to proceed following the preliminary objection raised on the status of plaintiffs case for amending without leave, I find that court exercised its discretion not to follow the technicalities of the law. The learned trial Magistrate followed Article 126 of the Constitution. He was aware that plaintiffs were lay people who had come to seek justice. His finding is in my view correct, in view of Article 126 of the Constitution. Ground 2 is not proved.

In the result, I find this appeal succeeds on grounds 1, 3, and 4. Since ground 2 has been covered by the findings of 1, 3 and 4 above this appeal succeeds. The judgment and orders of the learned trial Magistrate are set aside. Judgment is entered for defendants with costs here and below. I so order.

Henry I. Kawesa

JUDGE

7.03.2017

Right of appeal explained.

Henry I. Kawesa

JUDGE

7.03.2017