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

HCT-04-CV- CA -0051 OF 2015
(ARISING FROM MBALE CHIEF MAGISTRATE'S CIVIL SUIT No. 84 OF 2010)

1. **BILLAH NABUSAYI**
2. **MUTONYI KHAUKHA MARGRET:::::::::::::::::: APPELLANTS**

VERSUS

BETTY GRABBER KHAUKHA :::::::::::::::::::::: RESPONDENT

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

JUDGMENT

This is an appeal from the decision of Her Worship **Agwero Catherine** Grade I Magistrate delivered on 30th April 2015.

The Appellant raised five grounds of appeal and prayed that the decision of the Magistrate Grade I be quashed with costs to the appellants.

The brief facts were that the first plaintiff (1st Appellant) Billah Nabusayi bought a plot from 2nd Plaintiff (2nd Appellant) **Khaukha Margret** in 2004. The 2nd Plaintiff and the defendant (respondent) **Betty Grabber Khauka** are sisters, and defendant who lived in Switzerland used to send money to 2nd plaintiff (2nd Appellant) to purchase for her land in Busiu Township.

Defendant, upon learning of the sale transaction between 1st Appellant and 2nd Appellant took away the plot from 1st Plaintiff. In a bid to compensate the 1st Plaintiff for the loss, the 2nd Plaintiff gave plot 20D to her, but again the Respondent took away the said plot as well. The Plaintiffs then filed the suit against the defendant claiming for vacant possession permanent injunction, damages and costs of the suit.

This is a first appellate court, with the duty of re-evaluating the evidence so as to make its own conclusions, aware that it never observed or saw the witnesses.

In this appeal the appellant argued grounds 1 and 2, together, 2 and 3, together and ground 5 alone.

I will then follow the same order and will determine the grounds as herebelow.

Ground 1 and 4 (failure to evaluate the evidence)
Appellant claimed that he brought 7 witnesses to court who testified that plot 20 D Busiu Township belonged to the plaintiff 1 (1st Appellant) having duly purchased it from 2nd Plaintiff (2nd Respondent).
He particularly referred to the evidence of **PW.6 Bulob Deus** and **PW.8, Opio Henry** whose evidence and documentary exhibits showed that plot 20 D was allocated to 2nd Appellant, and plot 15-19 Block D Busiu Township allocated to Respondent. He also alluded to evidence showing that the lease offers which were given to both 2nd appellant and Respondent show that Respondent only acquired plots from 15-19 Bloc D and not Plot 20D.

He also complained of the learned trial Magistrate's reliance on DW.1's evidence regarding "Block E". No evidence was before court to prove that the rectified title was done by a designated land registrar.

He complained that the learned trial Magistrate's evaluation regarding Exh.P.II and Exh.P.III, was erroneous and she was wrong to attribute "forgery" in the transaction which fact was never proved in court.

In reply counsel for the Respondent while referring to the law under Section 61 of the RTA, maintained that title is conclusive proof of ownership. He however made reference to the apparent error on the title and argued that it was explained both by Annex 'C' and the visit to locus.

Interestingly though, Respondent counsel shifted arguments and conceded that the locus in quo was not conducted properly and stated that had it been done correctly then the issue would have

been settled in favour of the Respondent. He prayed that the court should find that a major irregularity occurred and hence should allow a retrial so that locus can be done.

I have done through the evidence on record. I agree with the concerns raised by both parties regarding the assessment of the evidence by the learned trial Magistrate. The case before court ought to have been helped in resolution if the locus in quo was done properly.

As pointed out by counsel for the Respondent the procedure laid down by the CJ under Practice Directive 1 of 2007, provides that during the hearing of land disputes the court should take interest in visiting the locus in quo and while there.

(a) Ensure that all the parties, their witnesses and advocates (if any) are present.
(b) Allow the parties and their witnesses to adduce evidence at the locus in quo.
(c) Allow cross-examination by either party or her counsel.
(d) Record all the proceedings at the locus in quo.
(e) Record any observations, view, opinion or conclusion of the court including drawing a sketch plan if necessary.

The record at page 43 (typed) shows only a report that court visited locus. The visit itself is not recorded as part of the record of proceedings of court. The court in ***David Acar v. Aliro (1987) HCB 6***, held that:

> "*Locus is a court sitting at the locus in quo…. Witnesses must be on oath, any observations by the trial Magistrate must form part of the proceedings*."

In the case under consideration, the above was not done. The conduct was hence irregular. This made the purpose of the visit unattainable in that the parties did not adequately explain at locus the actual boundaries and positions regarding the alleged Block 20D and Block E. This was fatal. This was the position in ***Justine Okengo v. Natali Abia HCCA No. 34, Desouza v. Uganda (1967) EA 78*** and ***Bonin v. John Arap Kissa HCS. 058/2007*** the gist is that by failing to visit the locus in qou, the trial court failed to have actual physical evidence as to the boundaries of the land in the dispute and to test the accuracy of the evidence adduced in court by

the various witnesses with what was actually obtaining on the ground. This was a miscarriage of justice as the court deprived itself of evidence that would help it reach a right decision.

In the case before me a similar result obtains in that in failing to conduct the locus proceedings properly court failed to correctly evaluate the evidence before it. The effect is that the appellant is justified in the assertion that the learned trial Magistrate did not properly evaluate the evidence. The Respondent is also right that the failure to properly handle the locus proceedings deprived the learned trial Magistrate the opportunity to conclusively determine the controversy surrounding Block 20D and "Block E". I sustain these grounds of appeal as proved on all arguments above.

Grounds 2 and 3:

These grounds have been conceded by the Respondents; only arguing that the documents were on record but not properly produced on record as exhibits by counsel who represented the respondent at the trial.

That be as it may, it is counsel for appellant's contention that the learned trial Magistrate was wrong to refer to documents not properly adduced in court by the party who wanted to rely on them. The case of ***Twine Amos v. Tamusuza James CR. 11/2009***, as quoted is good authority for the appellant's arguments which are hereby sustained. It is also true as held by court in ***Mbogo v. Shah (1967) EA 116***, that mistakes of counsel should not be visited on the litigants.

Is this conduct, excusable where counsel fails to properly lead evidence and formerly place annexed documents before court as exhibits?

I would think that it all depends on the circumstances before court. In some deserving cases, court may be swayed to refer to the pleadings where such documents form part of the annextures in case they are not controverted by the opposite party.

On record there are a set of documents received on record as IDE.I to IDE.III. I also noted that the written statement of defence (amended) has references to Annex 'A', "copy of the proceedings of the clan, Anex 'B' "copy of surrender," and annex 'C' withdraw Notice of CS. 101/2004.

All that scenario fits in well with counsel for the Respondent's arguments that had the lawyer properly guided the trial all the above documents would have been put properly before court. This was not done, and if court relied on any of the documents not properly tendered before it. It would be a procedural irregularity. I do uphold the two grounds of appeal as proved.

Ground 5:
Basing on the findings under grounds 1, 2, 3 and 4 above ground 5 automatically succeeds.
This is because without ascertaining who owned the land it is impossible to ascertain who was in trespass.

Respondent did not argue this ground; but prayed for a retrial under grounds 1, 2, 3 and 4 above.
Appellant re-evaluated the evidence and proposed that court should find Respondents in trespass.
I however find that the evidence as it is necessitates a retrial so that this and other questions are reconsidered before another trial Judicial Officer. There are serious matters raised in the course of the trial which the learned trial Magistrate did not resolve in her judgment. The question of who actually owns Block 20D, how did BLOCK E, come up? Was it an error? Who altered the certificate and was it legally altered? There is need to revisit the locus in order to have conclusive answers to many of the unresolved questions above.

For reasons stated above I allow this appeal.

It succeeds on the grounds as stated herein. It is ordered that the judgment and orders of the learned trial Magistrate be set aside, and be hereby replaced with an order for a retrial before another competent Judicial Officer with jurisdiction to hear the matter. Costs allowed to the appellants. I so order.

Henry I. Kawesa
JUDGE
17.3.2017