

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

**HCT-04-CV- CA- 005-2015  
(ARISING FROM TORORO CIVIL SUIT NO. 76 OF 2012)  
(FORMERLY BUTALEJA CIVIL SUIT NO. 43/2009,)**

<b>ALICE MUGALA</b>	:.....:	<b>APPELLANT</b>
<b>VERSUS</b>		
<b>KESENKE JACOB MAISO</b>	:.....:	<b>RESPONDENT</b>

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

**JUDGMENT**

The appellant was dissatisfied with the Judgment of **His Worship Kubusheshe Francis** Chief Magistrate Tororo of 22<sup>nd</sup> December 2014.

Appellant raised 4 grounds of appeal namely:

1. That the learned trial Magistrate erred in law and fact when he failed to evaluate the evidence properly or at all.
2. The learned trial chief Magistrate erred in law and fact when he conducted the proceedings at locus in quo perfunctorily.
3. The decision complained against has occasioned a substantial miscarriage of justice.

The duty of a first appellate court is to re-evaluate the evidence and make its own conclusions while reminding itself that it did not have opportunity to listen to the witnesses. (*Uganda Revenue Authority V Rwakasaya Azarious & 2 Ors CACA 8/ 2007* (Unreported))

I have duly evaluated the evidence on record. I will address the grounds of appeal in the order they were presented.

This is so because the appellant did not file submissions, though given a schedule. Respondents filed theirs and appellants rejoined.

Given the above, this court now finds as follows:

### **Ground 1: Failure to evaluate evidence**

I have examined the evidence before court, the pleadings as filed and the Judgment and findings of the learned trial Magistrate. I do find as follows.

#### **Evidence:**

The plaintiff led evidence through PW1, PW2, PW3 and PW4. This was alongside exhibits A, B, C, D, E, F and G. The case for the plaintiff basically was that PW1 Alice Mugala acquired the suit land from her father **David Nsereke** vide the written document naming her heir dated 18/ 12/ 95. She did not have problems on the land till defendant encroached on the land. She sued the defendant and won him vide court Judgment EXP “D”.

She argued the land she had won over is one and the same, and there is no other land as alleged by defendants. She stated that defendant had built a house thereon and cultivated on it. She called **PW2 Kinga Siraje** who testified that the land belongs to the plaintiff, who had won over the same land in Tororo court. He confirmed that defendant encroached on the land.

**PW3 Lyadda John**, said defendant began using the land in 2009 plaintiff complained to the LC against defendant, she won. **Daudi Nkero**- father of plaintiff upon his death. He was present when during the burial and last funeral

rites the will was read out and plaintiff announced heir. He was part of the LC1 Committee which on orders of Grade 1 Court handed over land to the plaintiff. They handed over the land and planted boundary marks.

The neighbors –East **Ebuneri Kasubi**, West – **Besweri Watala**, North-Namatala River , South –**Wilson Rwoda & Visa Moses** (brother of plaintiff). Plaintiff used the land till 2009 when defendant forcefully constructed there a house. He received a complaint, went to the scene to check and found it true. He also confirmed the Trial Magistrate visited the locus and confirmed the suit land.

**DW1- Jacob Kasenke Maiso** testified that he inherited the land from his grandfather **Asanasio Kadyali**, that land was passed on to his father who also passed it to him. He said that the land was his and he had constructed a house thereon.

He said the neighbors are North – **Nalubale** , East **Abuneri Kasubi** and South **Wilson Pado**, West **Besweri Watala**. He called **DW2- Abuneri Kasubi** who claimed the land he litigated with plaintiff is different. He claimed the land in dispute is near where he cultivates. He however kept shifting the positions saying he had ever litigated on it with plaintiff, at same time denying (page 18 of proceedings).

In cross-examination he said that Tororo court did not announce plaintiff the winner (page 18 of proceedings)

**DW3 Yunusu Wamoyo** said the land was for **Asanasio Kadyali**.

He knew this land is now in dispute. He confirmed plaintiff ever litigated with her brother **Ikumba** and **Kasubi** over land adjacent to suit land and won.

**DW4 Mwereri Fred**, stated as that the plaintiff had a dispute in court over land with **Kasubi**, the land was handed over to plaintiff but is different from the current suit land.

**DW5- Josipater Keera** said defendant inherited the land from **Asanasio Kyadyali**. He named neighbors to the land as East – **Pooda Kasubi**, West **Besweri Bataala**, and North Namatala River. In cross-examination he said he did not know the land earlier on litigated upon.

Court visited locus and at locus heard evidence afresh from all witnesses in absence of their lawyers. At end of the trial court pronounced Judgment in favour of the defendant.

From the above evidence on record, it is clear that as per the evidential burden contained in Section 101, 102,103 of the Evidence Act the burden is upon he who asserts a fact to prove it. Therefore, the plaintiff had the burden to prove that that the defendant trespassed and encroached on her land in terms as contained in paragraph 4(a)- (g) of her plaint. The standard of proof is on a balance of probabilities.

On the other hand the defendant had the evidential burden to prove as per his written statement of defence under paragraph 4, that he is lawful owner of that land, and as per paragraph 7 that the suit land was different from the land referred to by the plaintiff, and as per paragraph 8 of the written statement of defence, that the suit land has never been subject of civil litigation.

Going by the evidence in court and the findings of the learned trial Magistrate, the following matters are notable:

1. The plaintiff led ample evidence to propose that the land she sued defendant for was the same land she had litigated over in Tororo with her brother. She led evidence through PW1, PW2, PW3, PW4, Exhibits 'A', 'B', 'C', 'D', 'E', 'G' and 'H'. In my view, this evidence satisfied the requirement of the evidential burden as in Sections 101, 102 and 103 of the Evidence Act.

However since defendant sought to prove the contrary as pleaded by him by his written statement of defence, then he should have specifically led evidence to show that the lands were different. However, I do find that the evidence of DW1, DW2, DW3 and DW4 was not conclusive on this matter. Apart from testifying so, I found the defence evidence contradictory. For example while giving evidence, the witnesses kept on changing the names of the neighbors to the land.

This was specially evidence in the testimony of **D2 Abuneri Kasubi** who is brother of plaintiff and had been litigating with plaintiff in the earlier case. He first told court he was not sure if the land is the same, then said it is, then again in re-examination said it is not. He was not a reliable witness. This is further demonstrated when it transpires from the evidence on record that DW2 having participated in CS 0024/2002, now comes to court as a witness for the defendant, who had also been sued earlier on by the plaintiff for criminal trespass!!

Such evidence cannot be cogent and must be taken with caution. This is against the background of documentary evidence from plaintiff including the Judgment of court in CS 0024/2002- Exhibit P"D": Hand over letter to LCS- Exhibit "F" Attendance list Exhibit "G" and other documents alluded to by plaintiff. These

include the will Exhibit D 'H' and letters of Administration Exhibit '1'. The sum total of all that evidence is that it was heavy unless controverted by:

- i) Evidence from defence that the land is indeed different.
- ii) Defendants to prove that the land is his.
- iii) The court's visit at locus to check all the above information.

From all the available evidence I agree with counsel for appellant that the learned trial Magistrate did not bother to assess the evidence using above legal tests regarding the evidence. In his Judgment he went on a legal frolic of discussing the plaint (pleadings) in isolation of evidence adduced by the plaintiff. In the process he attempted to overrule the Judgment of the Magistrate Grade 1, a jurisdiction he did not possess! (See page 5 & 6 of Judgment).

The arguments upon which the learned trial Magistrate based to make his conclusions were neither arguments before him nor evidence, he merely went academic. In my assessment of the evidence I do not agree with the findings of the learned trial Magistrate. The evidence led by the plaintiff was good evidence and she discharged her burden of proof. She based her case on the earlier litigation in Tororo. She produced the Judgment.

She insisted the land is one and the same. She produced evidence of PW2, PW3 and PW4 who participated in the handing over of this land.

They all showed that defendant only came on the land in 2009.

PW3, told court as a member of the local council that he was present when plaintiff was declared the heir.

The question which arises is that if plaintiff won the case in court, (Tororo) and she had been handed over the land, then why could she bother still to sue defendant?

It was the evidence of D2 that plaintiff did not win the case and that he is the owner of the land and still utilizes it! DW2 had no copy of the said Judgment.

Defendant and his witnesses were not clear on which land it was. This is clear from DW2 and all the other witnesses like DW4 who stated on page 24 “ *I recall I was present when Chairperson **LC1 Kanti** handed over the land to the plaintiff in the case between plaintiff and **Kasubi** .. the land is not the same as the suit land in this case, the suit land shares a common boundary – the two pieces are different ..*”

And **DW5, Josipater Keera** who stated in cross-examination at locus ( page 35) “ *I do not know the attendance for handing over the land to you, may be you just put me there... I have never put my thumb print on that document even if the computer was to say so, I would assume you put it there while I was sleeping ...*” ( page 35).

On the other hand it comes out clearly from the plaintiff that the suit land is hers. This is contained in PW2’s evidence ( page 5) as a witness to the handover ceremony of land to plaintiff, and **PW3 Lyadda John Male** (Pages 9-13), who he was the chairman LC1 and conducted the handover of the land to plaintiff following a court order , and in presence of the whole village , where after boundary marks were erected- an attendance list was drawn and he signed on it, and it is the same land where the defendant had constructed the house. The sum total of this evidence is that defendant and his witnesses told court deliberate

lies in order to try and grab the land of the plaintiff. The evidence on record bears this out. I therefore do believe the plaintiff and her witnesses, as they were credible.

I disbelieve the defendant and his witnesses. The learned trial Magistrate did not address his mind to the evidence on record and instead dwelt on other trivialities. As rightly argued by appellant's counsel the learned trial Magistrate failed to properly evaluate the evidence. Ground 1 therefore succeeds and is proved.

### **Ground 2: Conduct of locus**

I have looked at the record of proceedings and noted that though court visited the locus, the learned trial Magistrate did not conduct the locus correctly.

According to Practice Direction N0.1 of 2007, it is stated and required under Rule 3 therefore that during the visit to the locus court should:-

- a) Ensure all parties and their witnesses and Advocates (if any) are present.
- b) Parties and their witnesses adduce evidence at the locus in quo.
- c) Allow cross-examination.
- d) Record all proceedings at the locus.
- e) Record any observations, views, opinion, or conclusions of the court including drawing a sketch plan if necessary.

The aim of the visit is to check the evidence given in court and not to fill the gaps for them as per *Waibi V Byandala HCB 28 at 29*.

In the case before me it was necessary for the plaintiff and defendant each to take court around the land which each claimed was the suit land and to see the land

which defendant claimed was the subject of the Tororo case since he alleged that it shared boundaries.

The record of the locus proceedings however shows that court merely listened to evidence and did not go around the land.

There is no record of observations made by the learned trial Magistrate. There is no sketch map showing the location of the alleged lands.

All the above were very crucial for a case which wholly depended on the findings at locus, as per the learned trial Magistrate's findings contained at page 4 last 4 paragraphs of his Judgment .

The learned trial Magistrate referred to observations made at locus which are not found anywhere on record.

This is fatal. The courts have held consistently that once a court decides to visit locus then the right procedure ought to be followed, and any observation by the trial Magistrate must form part of the proceedings.

See cases of *Marieta Dyer Akile V. Mawadri George HCCA No. 2008* (unreported) and *Paineto Omwero V Saulo S/o Zebuloni HCCS NO. 31 of 2010* (unreported) .

Such failure if proved has the capacity to vitiate the trial rendering the decision of the learned trial Magistrate null and void.

As argued by counsel for the appellant , the procedure adopted by the learned trial Magistrate at locus did not follow the right steps contained in Practice Direction 1/2007.

I do agree that the failures pointed out were fatal and did amount to procedural irregularities, since the learned trial Magistrate based on observations and views he made at locus which are not part of the proceedings. His findings there on are a nullity and cannot be relied on to support the findings he did. This ground therefore succeeds.

**Ground3: Miscarriage of Justice:**

Having found ground 1 and 2 proved, it follows that the learned trial Magistrate made errors which amount to a miscarriage of justice.

As per *Hadondi Daniel Vs. Yolamu Ego( CACA No.67/2008)* the miscarriage of justice is said to have been occasioned where there has been a misdirection on matters of fact or law and the decision cannot be supported having regard to the evidence on record as a whole

I do find that on the basis of the evidence on record as a whole the learned trial Magistrate's decision cannot stand. The ground is proved.

All in all this appeal is proved and succeeds on all grounds. The appeal is allowed. The decision and orders of the learned Magistrate are hereby set aside and a finding entered for the plaintiff/ appellant with costs here and in the court below. I so order.

**Henry I. Kawesa**

**JUDGE**

**19.05. 2017**