

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0012 OF 2015**

**(Arising from Yumbe Grade One Magistrate’s Court Civil No. 0016 of 2014)**

5

**BRAN DEHYA** ..... **APPELLANT**

**VERSUS**

10

**KHEMISA KARALA** ..... **RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

15

In the court below, the respondent sued the appellant for recovery of land measuring approximately two acres situated at African Quarter Vilage, Lukutua Parish, Yumbe Town Council in Yumbe District, a declaration that she is the rightful owner of the land, an order of eviction, a permanent injunction, an award of general damages, and costs. The respondent’s case was that before he left for Sudan during 1987, she entrusted the said land to a one Juma Dehya as caretaker who in turn entrusted its stewardship to a one Alahai Dehya. During the year 2004, the respondent returned from Sudan and sold part of it to a one Aga Siraji. When during the year 2014 the respondent attempted to take back possession of what remained of her land, she found that the appellant had together with several other people encroached on it and constructed grass-thatched houses thereon and were growing crops on it as well. She was denied access to the land hence the suit for its recovery.

25

30

In his written statement of defence, the appellant contended that he owns the land in dispute, having inherited it in 1979 following the death of his father in exile. I the same breath, he at the scheduling conference stated that he acquired the land from his father as a gift *inter vivos*. The respondent sold her one acre to a one Agha and does not own any part of the land anymore. It was an agreed fact at the scheduling conference though that the respondent acquired a share of her father’s land.

In her testimony, the respondent stated that she acquired the land in dispute from her late father before they went together into exile in Sudan in 1979. He entrusted the land to a one Juma Dehya as caretaker. On her return from exile, she sold part of it, less than an acre, to a one Siraj Agha. Later the appellant was among the people who occupied her land without her consent. The  
5 appellant acquired the land forcefully. P.W.2. Ali Dehya, a biological brother of the appellant, testified that the land in dispute belongs to the respondent. Following the death of the respondent's father, Juma Dehya took over stewardship of the land. Juma Dehya later handed over stewardship to Alahai Dehya with a caution that he should secure his own land. Instead Juma Dehya permitted two of his sons to occupy it and when the respondent returned to reclaim  
10 it, the appellant threatened to shoot her dead. P.W.3. Juma Dehya, a biological brother of the appellant, testified that the land in dispute belongs to the respondent. In the past it belonged to the respondent's father and that is where the respondent was born. The respondent's father left the land to her as he fled into exile where he died. The land measured about 15 acres at the time and the deceased entrusted it to him before his death. Upon their return from exile, he allowed  
15 his brother Alahai Dehya to look after the land temporarily. When the respondent returned from exile, she sold part of the land. The appellant with the two sons of Alahai Dehya later settled on the land and stubbornly refused to leave despite the decision of the elders requiring them to vacate and let the respondent occupy her land.

20 P.W.4. Asiku Swadik Aditan, the L.C. 1 Chairman of the village at the time, testified that in 2004 the respondent had lodged a complaint with him and upon visiting the land together with his other committee members, they directed the appellant together with the other trespassers to vacate the land. The appellant defied the directive. The issue was referred to the L.C.II and subsequently the L.C.III. The respondent inherited the land from her late father and sold part of it  
25 to a one Siraj Agha and the appellant was one of the witnesses to the sale agreement. P.W.5. Aluma Siraj alias Agha, testified that he bought part of the land in dispute from the respondent on 20<sup>th</sup> June 2004 and the appellant was one of the witnesses to the sale. That was the close of the respondent's case.

30 In his defence, the appellant who testified as D.W.2 stated that the respondent is his cousin. The land in dispute belonged to his late father Dehya Baba who gave it to him as a gift *inter vivos*.

His father and that of the respondents were brothers. The respondent's father left her only one acre and the respondent lived most of her life in Kampala. In contrast, the appellant had lived on the land for about 62 years. He has a homestead and planted a forest of mango trees on the land. In 2004, the respondent had sold off her land to Agha Siraji and he witnessed the sale agreement.

5 D.W.1 Alahai Dehya testified that the appellant is his elder brother. He acquired the land in dispute from their late father Dehya Baba and had lived on it for 55 years. He planted mango trees, teak trees and eucalyptus trees and also buried five of his dead children of his on the land. At one time the respondent asked him for land which he gave her and the respondent sold it off. He denied the claim that it is the respondent's father who entrusted the land to him as a  
10 caretaker. D.W.3 Alias Izaruku testified that he is the owner of the land in dispute, which he inherited from his father who was a brother to the respondent's father. The respondent lived in Kampala. D.W.4 Adinani Gelinga Asubala Khemis testified that the land in dispute belongs to D.W.3 Alias Izaruku. The court found that the two witnesses had committed perjury and committed them to custody. D.W.5 Ratibu Bran testified that he was told by his father that the  
15 appellant acquired the land in dispute from his father.

The Court then visited the *locus in quo* on 17<sup>th</sup> August 2015. The court found that there was a clear boundary between the land claimed by the respondent and that which belonged to the appellant's father. There was a grave of the respondent's step mother on the land. There were  
20 also recent graves of the appellant's children. The suit had initially been filed against two defendants, the first one being D.W.1. Alahai Dehya but in the course of the trial, after the court's visit to the *locus in quo*, the respondent and the first defendant entered into a consent judgment. Trial continued only against the appellant and judgment was eventually entered against him.

25 In his judgment trial magistrate found that the respondent had proved on a balance of probabilities that the land in dispute belonged to her. He found that the appellant had taken advantage of being a caretaker of the land to grab it from the respondent. She was being victimised because of her gender yet her father had given her the land. The court declared that the land occupied by the appellant and the two sons of Alahai Dehya belongs to the respondent  
30 and ordered the appellant to hand over vacant possession of the land to the respondent. It issued an eviction order for that purpose and awarded the respondent the costs of the suit.

Being dissatisfied with the decision the appellant challenges it on the following grounds, namely;-

1. The learned trial magistrate erred in law and fact by ignoring the fact that the respondent's suit was time barred.
2. The learned trial magistrate erred in law and fact by deciding in favour of the respondent based on his observation at *locus in quo* which were never disclosed on the record of proceedings.
3. The learned trial magistrate erred in law and fact in concluding that the suit land was entrusted to the defendants by P.W.3 Juma Dehya on evidence which was never adduced in court.
4. The learned trial magistrate erred in law and fact by deciding for the respondent in view of the glaring contradictions in the evidence of the respondent and the witnesses.
5. The learned trial magistrate erred in law and fact by being harsh and biased against the appellant and his witnesses in favour of the respondent.
6. The learned trial magistrate erred in law and fact in concluding that the land where the appellant settled his two sons belongs to the respondent.

In his written submissions, counsel for the appellant Mr. Komakech Dennis Atiine argued that the appellant's evidence was unchallenged that he had lived on the disputed land for the last 62 years, established a homestead on it and planted a forest of mango trees. This evidence was not considered by the trial magistrate and had he done so he would have decided that the suit was time barred. The trial court as well erred in relying on observations it made at the *locus in quo* which were not placed on the record of proceedings. There were inconsistencies in the testimony of P.W.3 Juma Dehya regarding how the appellant came to occupy the land, as well as the size of the land in dispute, which the trial court never took into account. The court as well treated the appellant's witnesses harshly and prevented them from testifying freely and manifested bias against the appellant. The court further erred in failing to find that the respondent had sold off the land her father gave her and what she claimed truly belongs to the appellant. He prayed that the appeal be allowed with costs to the appellant.

In his written submissions, counsel for the respondent Mr. Bundu Richard argued that the period of limitation begins to run from the time the owner of land becomes aware of the presence of a trespasser on the land. The evidence reveals that she only became aware of the appellant's presence on the land upon her return from exile. The initial entry of the appellant on the land was with the consent of the respondent. The appellant became violent when the respondent attempted to reclaim the land and that is when adverse possession began. She immediately reported to the L.C.1 which intervened. The period of limitation had not elapsed when the respondent eventually filed the suit during the year 2014. As regards proceedings at the *locus in quo*, he argued that the original trial record contains the relevant record which was inexplicably omitted from the typed version. There was evidence on record that the land was entrusted to the appellant as caretaker and instead he sold off two plots from it without authorisation. The contradictions mentioned by counsel for the appellant were minor and the trial court was right to ignore them. The record of proceedings does not manifest any bias on the part of the trial magistrate. The trial court therefore came to the correct decision and the appeal should be dismissed with costs

15

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

20

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

25

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to

30

follow the trial magistrate’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

5

The first ground of appeal assails the decision of the court below on account of limitation. The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims (see *Dhanesvar V. Mehta v. Manilal M Shah* [1965] EA 321; *Rawal v. Rawal* [1990] KLR 275, and *Iga v. Makerere University* [1972] EA 65). Section 5 of *The Limitation Act*, which provides for limitation of actions for the recovery of land, states as follows;

10

15

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.

This limitation is applicable to all suits for possession of land based on title or ownership i.e., proprietary title as distinct from possessory rights. Furthermore, Section 11 (1) of the same Act provides that;

20

25

No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as “adverse possession”), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue until adverse possession is taken of the land. (Emphasis added).

These provisions have been applied in cases such as *Semusambwa James v. Mulira Rebecca* [1992-93] HCB 177 and *Kintu Nambalu v. Efulaimu Kamira* [1975] HCB 222, where it was held that a suit for a claim of right to land cannot be instituted after the expiration of twelve years from the date the right of action accrued.

30

According to section 6 of the same Act, “the right of action shall be deemed to have accrued on the date of the dispossession.” A cause of action therefore accrues when the act of adverse possession occurs. In *F. X Miramago v. Attorney General* [1979] HCB 24, it was held that the

period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff. If by reason of disability, fraud or mistake the operative facts were not discovered immediately, then section 21 (1) (c) of *The*  
5 *Limitation Act* confers an extension of six years from the date the facts are discovered. An owner of land is deemed to be in possession of the land so long as there is no unauthorised intrusion. Non-use of the land by the owner, even for a long time, will not affect his or her ownership. But the position will be altered when another person takes possession of the land and asserts rights over it and the original owner omits or neglects to take legal action against such person for years.

10

In the instant case, there are two versions as to how the appellant entered into possession of the land in dispute. According to the appellant at page 12 of the record of appeal, he acquired the land from his late father Dehya Baba who gave it to him as a gift *inter vivos* and had lived on the land for about 62 years. If this version is believed, then the issue of limitation would not arise at  
15 all as the appellant's occupation would not constitute adverse possession. The respondent's version at page 4 of the record of appeal is that she entrusted the land to Juma Dehya as caretaker but later the appellant forcefully entered onto the land on an unspecified date. None of the parties indicated when this adverse possession began. The burden was on the appellant, being the one relying on limitation, to plead or adduce facts as to when the adverse possession began. The only  
20 evidence available on record is that the respondent found the appellant in possession of the land on her return from Sudan and the appellant initially resisted her sale of part of the land until she eventually managed to sell part of it off to P.W.5 Aluma Siraj. The agreement of sale was tendered in evidence as an exhibit and it is dated 20<sup>th</sup> June 2004. On basis of this evidence, the appellant's adverse possession began sometime in the year 2004 and the suit having been filed in  
25 2014, the twelve year limitation period had not elapsed. This ground of appeal therefore fails.

The second ground of appeal faults the trial magistrate for his failure to record proceedings at the *locus in quo* and yet he went ahead to rely on the observations he made thereat in making his decision. Counsel for the respondent contended in his submissions that the proceedings at the  
30 *locus in quo* were contained in the original trial record. I have perused the entire original trial

record and ascertained that the trial magistrate indeed did not record proceedings at the *locus in quo* and the typed record is an accurate reflection of the original trial record.

Several decisions such as *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980] HCB 81, have clarified that the practice of visiting the *locus in quo* is to check on the evidence given in court by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. Considering that the visit is essentially for purposes of enabling trial magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony.

Upon such a visit a court is susceptible to perceiving something inconsistent with what the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party. The court therefore needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record. This should be done not only for maintenance of its impartiality but also in order to enable the parties test or rebut the accuracy of its observations by making appropriate and timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse opinion formed against such a party, keep the adverse opinion entirely off the record, only to spring it upon the party for the first time in its judgment. Furthermore, in case of an appeal, where the trial court limits its judgment strictly to the material placed before it by the parties, then its judgment can be tested by the appellate court by reference to the same materials which are also before the trial court. This will not possible where the court's judgment is based on personal observations made off the record of proceedings, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.



In the instant case, whereas the trial court did not record any of its observations made at the *locus in quo*, it relied on the observations as is evident in paragraph 2 at page 3 of the judgment where it stated as follows;

5 This court visited the *locus in quo* and the findings was (sic) that; there was a clear boundary between the land formerly owned by Dehya (father of the defendants) and Karala (father of the plaintiff). It was a well known and clear demarcation right from the main Yumbe-Moyo road up to the valley. Somewhere towards the valley were sisal plants that were planted to show a clear boundary. This court saw very old mango trees which Juma Dehya told court was (sic) planted by Karala (father to P.W.1). Although the defendants tried to insist that the mango trees were planted by Izaruku, Juma Dehya disputed them. This court also found that there was a grave of the step-mother of the plaintiff some 50 metres from the mango trees. The defendants agreed with this fact. The graves showed by the first defendant were recent graves of his deceased children. This court also found the second defendant had settled his sons on the suit land. The biggest part of the plots near Yumbe-Moyo road had already been sold by the defendants.

Where a trial court fails to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relies on such evidence acquired and the observations made thereat in the judgment, it has in some situations been found to be a fatal error which occasioned a miscarriage of justice and a sufficient ground to merit a retrial (see for example *Badiru Kabalega v. Sepiriano Mugangu* [1992] 11 KALR 110 and *James Nsibambi v. Lovinsa Nankya* [1980] HCB 81). In cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order of a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. It is possible that the witnesses who appeared and testified during the first trial may not be available when the second trial is conducted and the parties may become handicapped in producing them during the second trial. In such situations, the parties would be prejudiced and greatly handicapped in establishing their respective cases such that the trial would be reduced to a mere formality entailing agony and hardship to the parties and waste of time, money, energy and other resources. Viewed in this light, the direction that the retrial should be conducted can be given only if it is justified by the facts and circumstances of the case. However, where the time lag

between the date of the incident and the date on which the appeal comes up for hearing is short, and there occurred an incurably fundamental defect in the proceedings which affected the outcome of the suit, the proper course would be to direct retrial of the case since in that case witnesses normally would be available and it would not cause undue strain on their memory.

5

However, if despite the defect in procedure the dispute to be adjudicated is of a nature where the appellate court finds that the visit to the *locus in quo* was a useless exercise and that the case could have been decided without visiting the *locus in quo* such that without reliance on its findings at the *locus in quo*, the trial court would have properly come to the same decision on a proper evaluation and scrutiny of the evidence which was already available on record, a retrial will not be directed. The erroneous proceedings at the *locus in quo* will be disregarded. For example in the case of *Basaliza v. Mujwisa Chris, H.C. Civil Appeal No. 16 of 2003*, the court observed;

15 There was no dispute over boundaries. The visit to the locus was in the circumstances a useless exercise. This case could have been decided without visiting the locus. Without basing himself on his findings at the locus, the learned Chief Magistrate would have properly come to the same decisions on a proper evaluation and security of the evidence which was already available to him on record.

20 In that case, a retrial was not ordered. In the instant case, the dispute between the parties was over ownership of land which the respondent claimed the appellant had wrongfully occupied together with the two sons of Alahai Dehya without her consent, and the fact that she was subsequently prevented from repossessing it. The appellant claimed ownership of the land by gift *inter vivos* from his late father Dehya Baba obtained at an unspecified date and conversely the respondent claimed the same land by gift *inter vivos* from her late father Karala Baba obtained sometime during 1979 when she fled with her father to exile in Sudan. The issue for determination could be decided by relying on oral testimony of witnesses who knew the history of ownership of the land. Since the dispute did not involve establishment of the nature of developments on the land or the boundaries of the land, its determination did not necessitate a visit to the *locus in quo* and in my view the visit was superfluous. The court could have made its decision without recourse to evidence from the *locus in quo*. Reliance on that evidence therefore should not be fatal since it did not occasion a miscarriage of justice.

In addition, I have considered the age of the parties as revealed on the court record; the respondent was 80 years old while the appellant was 76 years old in March and June 2015 respectively when they testified. P.W.2 was 62 years old, P.W.3 was 59 years old, P.W.4 was 52 years old, P.W.5 was 37 years old, D.W.1 was 76 years old, D.W.1 was 75 years old, D.W.3 was  
5 67 years old and D.W.4 was 46 years old. The majority of the key witnesses, including the parties themselves, are persons of considerable advanced age who if a re-trial is ordered will be required to recall events that occurred way back in the late seventies, and perhaps before, with a degree of accuracy that is helpful to court. The possibility of conducting a fair trial when the memory of the key witnesses may have waned due to advanced age and passage of time is  
10 doubtful. Their capacity to endure the rigours of a trial at their age may as well have diminished by reason of age. I had the opportunity to observe the two litigants in court when the appeal was first called for hearing and they could barely sit up by the end of the day's proceedings, and they obviously had a limited attention span. It is clear that both will be severely handicapped if they are to be subjected to a re-trial, which will most certainly cause undue strain on their memory.  
15 For all those reasons the second ground of appeal fails.

Grounds three, four and six will be considered concurrently. They essentially criticise the trial court in the manner it went about evaluation of the evidence before it. It is contended by counsel for the applicant that the court overlooked material inconsistencies in the respondent's case and  
20 that its finding that the land in dispute was entrusted to the appellant by P.W.3 Juma Dehya, is not supported by the evidence on record and that it therefore came to an erroneous conclusion that the land occupied by the appellant and the two sons of Alahai Dehya, belongs to the respondent.

25 Regarding inconsistencies in the respondent's case, it is trite law that grave contradictions unless satisfactorily explained may, but will not necessarily result in the evidence being rejected and minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually be ignored (see *Alfred Tajar v. Uganda*, EACA Cr. Appeal No.167 of 1969, *Uganda v. F. Ssembatya and another* [1974] HCB 278, *Sarapio Tinkamalirwe v. Uganda*, S.C. Criminal  
30 Appeal No. 27 of 1989, *Twinomugisha Alex and two others v. Uganda*, S. C. Criminal Appeal No. 35 of 2002 and *Uganda v. Abdallah Nassur* [1982] HCB). The gravity of the contradiction

will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

5 The inconsistencies and contradictions that were highlighted in the submissions of counsel for the appellant relate to; the size of the land that was given to the respondent by her late father, whether it is the appellant occupying the land or the two sons of Alahai Dehya, and whether it is P.W.3 who permitted the appellant to temporarily stay on the land or rather the respondent. The latter one is compounded by the appellant's claim at page 12 of the record of appeal where he said; "The plaintiff left the land to me." I have considered the range and character of the  
10 inconsistencies and contradictions so highlighted. I have not found them to be grave in so far as they relate to matters which are peripheral to the central issues in the case. I have also not been able to find any evidence to suggest that they were the result of deliberate untruthfulness on the part of any of the witnesses to whom they are attributed. I therefore have not found any error occasioned by the trial court's disregard of these matters.

15

Regarding ownership of the land in dispute, it was an agreed fact at the scheduling conference as reflected at page 3 of the record of appeal, that the "plaintiff (now the respondent) got a share of land from her late father." The only question then that had to be decided by court was what  
20 happened to that land thereafter and whether it was the land then occupied by the appellant and the two sons of Alahai Dehya. According to the appellant at page 12 of the record of appeal, the respondent's father left her one acre which in the year 2004 she sold to Agha Siraj. The problem with the appellant's version is that although he acknowledges that the respondent's father left her land, he claims that it is him who later gave it to her when he said, "I gave her what belongs to her in 2004.....She sold the whole chunk of land to Agha. Nothing remained." This statement  
25 tends to confirm the testimony of P.W.3 at page 6 that "D2 (the appellant) settled on that land with my permission." Otherwise there is no other way that the appellant could have claimed a say in the respondent's sale of land which the appellant knew her father had given her unconditionally. Secondly, although the appellant claimed that the respondent sold the entire one acre to Agha Siraj, the agreement adduced in evidence by P.W.5 Agha Siraj indicates that the  
30 land he purchased from the respondent measured only 75 by 26 by 28. Although the agreement is silent as to whether these were measurements in feet or metres, they certainly were not in

kilometres and whichever of the other two measures is taken (P.W.5 at page 10 of the record of appeal said they were metres), the area of land sold would be far less than an acre. So the question remained, what happened to the rest of the respondent's land?

5 According to the respondent in her testimony at page 4 of the record of appeal, she did not know how the appellant came onto her land. She handed over the land to P.W.3. Juma Dehya as caretaker, only to return later and find that the appellant and the two sons of Alahai Dehya, were occupying it. It took some effort for her to overcome the appellant's resistance to her sale of the part she eventually sold to P.W.5 Agha Siraj. On his part P.W.3 Juma Dehya, to whom the land  
10 was entrusted, testified at pages 6-7 of the record of appeal that after the land was entrusted to him he later permitted Alahai Dehya and the appellant to occupy it temporarily. Alahai Dehya then in turn permitted his two sons to settle on the land as well. They all have stubbornly refused to leave since then. It is the respondent who authorised the appellant to put up buildings on the land (which the respondent refutes). This is corroborated by the appellant in his testimony at  
15 page 12 of the record of appeal where he stated that the "plaintiff left the land to me" and that "I gave her what belongs to her in 2004."

It would appear from the evidence taken as a whole that the respondent probably at one point ratified her agent, Juma Dehya's decision to permit the appellant to occupy her land. She  
20 however later withdrew this permission and from that point forward the appellant became a trespasser on her land. Unfortunately for her, the appellant had begun to assert the status of owner of the land, hence his belief that the respondent had "left the land" to him and that he had the capacity to "give her" only that part which he thought belonged to her. The little regard he had for the respondent henceforth is further manifested by his answers in cross-examination  
25 when he said; "you were left in my hands. The dowry paid for you were handed over to me." The learned trial magistrate was able to see through this entire facade and in his judgment he stated;

When Juma Dehya entrusted the defendants with the suit land they used this opportunity to grab it simply because the plaintiff was still in her marriage elsewhere. This can be understandable because most customs tend to lock out girl  
30 children out of their fathers' property on ground that they will be catered for by their husbands. The Constitution of Uganda now recognises the rights of women and unless this court enforces such rights, they will not benefit from the new

constitutional order. The plaintiff was given land by her late father and therefore she needed to realise her share.

I cannot agree more. Article 21 (1) and (2) of *The Constitution of the Republic of Uganda, 1995*  
5 provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and are to enjoy equal protection of the law. For that reason, no person can be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. The conduct of the appellant towards the respondent in this case is a patent attempt to deprive the  
10 respondent of her property on account of her sex as manifested by his demeaning attitude towards her while under cross-examination.

There is no evidence to show that when the appellant and the two sons of Alahai Dehya were permitted to occupy the respondent's land, they thereby acquired any interest in the land. In  
15 *Radaich v. Smith (1959) 101 CLR 209*, it was held that an interest in land, as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes, can be ascertained by seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives whereby the right of exclusive possession is secured by the right to maintain ejection and, and after his or her entry, trespass;  
20 though a licensee in actual possession, could maintain an action for trespass against intruders relying on the fact of possession and not on title. Without title, the appellant had no basis for maintaining an action for ejection. There is no proof that the appellant acquired a proprietary legal or equitable interest in the disputed land that is enforceable *in rem*. To the contrary, the appellant acknowledged, by conduct, that the land belongs to the respondent and that title to it  
25 vests in her rather than him when on 20<sup>th</sup> June 2004, he signed as a witness to the agreement by which the respondent sold a portion of the land in dispute to P.W.5 Agha Siraj.

Trespass is unjustified entry onto land in another's possession, i.e. entering onto the land without permission, or refusing to leave when permission has been withdrawn (see *Davis v. Lisle [1936]*  
30 *2 KB 434, [1936] 2 All ER 213*). When pleaded as part of an action for recovery of land, it is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership rather than possession. When the appellant and the two sons of Alahai Dehya were

permitted to temporarily occupy the respondent's land, they became licensees thereon. In 2004 when their possession as licensees was revoked, their occupancy was terminated. They were supposed to vacate the land peacefully. Having adamantly refused to vacate, the suit was filed by the respondent as a licensor, seeking recovery of possession from them as licensees. Having re-  
5 evaluated the evidence, I am unable to fault the trial magistrate in the terms suggested by the counsel for the appellant. The three grounds of appeal; three, four and six, therefore fail.

The last ground of appeal imputes bias on the part of the trial magistrate on account of the manner in which he handled the testimony of the appellant at page 12 of the record of appeal  
10 when during the examination in chief he answered "the plaintiff is my follower.... I am not making her to suffer" and the way he dealt with both D.W. 3 Alias Izaruku and D.W.4 Adinani Gelinga Asubala Khemis when at page 13 – 14 of the record of appeal he remanded the two of them after observing that "the witness(es) has taken oath to tell court lies. [They] will be detained until [they] can tell the truth." He found that both had perjured themselves.

15

There are many different factual settings which could place the impartiality of a trial court in question; among such contexts are situations where the trial magistrate has personal knowledge of the disputed facts concerning the proceedings before him or her, or where the trial magistrate has or is perceived to have a pecuniary interest, either direct or indirect, in the outcome of the  
20 case before him or her. Another such context is where the relationship of the trial magistrate to one of the parties or counsel is sufficiently close to give rise to a reasonable apprehension of bias (see Principles 2.4, 2.4.1 and 2.4.2 of *The Uganda Code of Judicial Conduct, 2003*) or any other occurrence or state of affairs by reason of which the impartiality of the trial magistrate might reasonably be questioned. There need not be proof of actual bias. The test is whether a  
25 reasonably well-informed person, considering the state of affairs giving rise to the apprehension of bias, might consider that it might have an influence on the exercise of the court's public duty (see *Ex parte Barusley and District Licensed Valuers Association (1960) 2 Q B D 169*; *Obiga Mario Kania v Electoral Commission and another, C. A. Election Petition Appeal No. 4 of 2011*; *G.M. Combined (U) Ltd v. A.K. Detergent Ltd and four Others, S. C. Civil Appeal No. 7 of 1998*  
30 and *Shell (U) Ltd and Nine others v. Muwema and Mugerwa Advocates and Solicitors and*

another, S. C. Civil Appeal No. 02 of 2013). In *Professor Isaac Newton Ojok v. Uganda*, S. C. Criminal Appeal No. 33 of 1991, it was decided that;

5 The court does not look at ..... the mind of ..... whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was as impartial as could be, nevertheless if fair minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias.  
10 Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice ... would or did favour one side unfairly at the expense of the other.

Before finding a reasonable apprehension of bias, the reasonable person would require some  
15 clear evidence that the trial magistrate in question had improperly used his or her personal perspective in the decision-making process. There must be circumstances from which a reasonable person would think it likely or probable that the court in fact favoured one side unfairly or that it did not approach the case with an open mind. A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real or apprehended. The  
20 reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualised understanding of the issues in the case. The impugned aspects of the trial should be construed in light of the whole of the trial proceedings.

I have considered the impugned comments and I am satisfied that they were based entirely on the  
25 case before the trial magistrate and not on anything extraneous, were made after a consideration of the conflicting testimony and were entirely supported by the evidence. They reflected an appropriate recognition of the facts in evidence and of the context within which those witnesses were testifying. However, in remanding the two witnesses, the trial magistrate exceeded his authority since under section 102 of *The Magistrates Courts Act*, such a power is exercisable  
30 only in respect of refractory witnesses. Neither D.W. 3 nor D.W.4 was a refractory witness. The trial magistrate was high handed in the way he dealt with a perceived instance of perjury where instead such observation ought to have gone to veracity of the two witnesses during his evaluation of the evidence, but this was not a manifestation of bias.



D.W.3 claimed to be owner of the land in dispute in his own right and was supported or corroborated in this by D.W.4. I do not see how the testimony of either witness would have helped the appellant in supporting his claim that the land in dispute was given to him by his late father Dehya Baba. The testimony of the two witnesses entirely contradicted his. The manner in which the court treated the two witnesses may have been high handed but it did not affect the fairness of the trial or the outcome. This ground of appeal too fails.

In the final result, I find the appeal has no merit and it is accordingly dismissed with costs to the respondent; costs of both the appeal and of the court below.

10

Dated at Arua this 15<sup>th</sup> day of June 2017.

.....

Stephen Mubiru  
Judge  
15<sup>th</sup> June 2017

15