THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 070 OF 2017
(Arising out of the Chief Magistrates Court of Iganga at Iganga Civil Suit No. 083 of 2011)

1. NGOBI PATRICK
2. KADAMA BATULI.....APPELLANTS

VERSUS

NKUTA WILBERFORCE.....RESPONDENT

JUDGMENT ON APPEAL
BEFORE HON. LADY JUSTICE EVA K. LUSWATA

1] This is an appeal from the decision of His Worship Egessa W. Masaaka Magistrate GDI Iganga, delivered on 8/06/2017.

Background

2] Nkuta Wilberforce was the plaintiff in the lower court in which he sued Ngobi Patrick and Kadama Batuli the appellants for the recovery of a piece of land situate at Buliike Ikumbya in Luuka District (hereinafter referred to as the suit land) that he claimed was wrongfully taken over by them. In his judgment, the Learned Magistrate believed the testimony of Nkuta and his witnesses and declared Ngobi and Kadama as trespassers and ordered

them to vacate the portion they occupied on the suit land. He in addition awarded damages of Shs. 2,000,000 with costs. Ngobi and Kadama being dissatisfied with that decision presented this appeal which is based on six grounds that:-

i) **The learned trial Magistrate erred in law and fact when he totally failed to properly evaluate the evidence as a whole, thereby arriving at a wrong decision that the suit land is located in Bulike-Luuka whereas not.**

ii) **The learned trial Magistrate erred in law and fact when he considered and relied on the evidence of the witnesses of the respondent in isolation of the evidence of the appellants thereby occasioning a miscarriage of justice.**

iii) **The learned trial Magistrate misdirected himself on the law when he held that the appellants were trespassers on the suit land whereas not, thereby arriving at a wrong decision.**

iv) **The learned trial Magistrate erred in law and fact and misdirected himself to the law governing locus in quo when he entertained fresh evidence from witnesses at locus in quo thereby occasioning a miscarriage of justice.**

v) **The learned trial Magistrate erred in law and fact when he admitted in evidence as Exhibit P.1. the sale land agreement at scheduling stage, before hearing commenced.**

Duty of the Court

3] My powers and limits as a first appellate Court are well documented. I must subject the evidence to a fresah and exhaustive scrutiny and then draw my own conclusions. In doing so, I am not bound necessarily to follow the trial Court's findings of fact if it appears that the court clearly failed in some way to take account of particular circumstances and probabilities. I hasten to add that my conclusions may be limited by the fact that I did not see or hear the witnesses and due allowance shall be made in that regard. See for example **Ephraim Ongom & Anor Vrs Francis Benega SCCA No. 10/1987 [1993] Kalr 86 (following R Vrs Pandya (1957) EA 336** and **Selle & Anor Vrs Associated Motor Boat Company Ltd & Anor (1968) EA 123.**

4] Following my order, counsel for the parties filed written submissions. Counsel Naita Julius presented the appeal which was opposed by counsel Tuyiringire Onesmus. Naita submitted omnibus submissions on grounds 1,2,3,

and 5 and lastly ground 4. On the other hand, Tuyiringire chose to submit on each ground separately. Having perused the contents of the memorandum of appeal, I opine that counsel Tuyiringire's approach was more coherent. I choose to adopt it in my judgment, save that the sequence of the grounds as given in the memorandum, will not be followed.

Resolution of the grounds of appeal:-

Ground 1, 2 and 3

5] It is not fully correct as stated by the appellants' counsel that the Magistrate did not evaluate the evidence with respect to the situation of the suit land. As rightly pointed out by counsel Tuyiringire, at page 3 of his judgment the Magistrate stated that:-

"*At the locus which was attended by people from all three villages neighboring the suit land, evidence was led showing how each party related to the suit land and where it was located. The villages neighboring the land in dispute are Kawanga, Buliike-Luuka and BuliikeBulamogi-Kaliro District….whereas the plaintiff told court that his land was separated from that of the 1st defendant by the cattle track, the 1st defendant denied that fact saying that the cattle track was in his land and that he had a boundary with the plaintiff*

and his land was in Buliike Bulamogi, Kaliro not Buliike Luuka". In addition, at page 4 of his judgment, the Learned Magistrate also considered the 1st appellant's evidence that he inherited the suit land from his late father.

6] The trial Magistrate used the above facts to make a decision that the suit land is situate in Buliike Ikumbya, Luuka. I am prepared to state that the evaluation of those facts was short. However, as pointed out by counsel Tuyiringire, Where it is exhibited in the judgment that infact an evaluation took place on a particular point, the Magistrate cannot be faulted for a brief valuation of evidence. See **Ephraim Ongom & Anor Vrs Francis Bageya (1993) IV KALR 86-92**

7] That said, although the quantity or volume of the judgment cannot be faulted on appeal, the quality of the decision *vis a vis* the recorded evidence can be a matter of appeal. Authority supports the fact that the appellate court is not necessarily bound to follow the trial Court's findings of fact especially if it appears that the court clearly failed in some way to take account of particular circumstances and probabilities. In my view, and having carefully perused the record, the Magistrate did not properly record all the evidence and where he did, he did

not exhaustively evaluate the available evidence leading to a miscarriage of justice and a wrong decision that the suit land is located in Bulike Luuka District. My reasons for that conclusion will inevitably address part of ground one as well as the whole of grounds two and three.

8] The contention in ground 2 is that the trial Magistrate considered and relied on evidence of the witnesses of the respondent in isolation of those of the appellants Counsel Naita briefly argued that although the record indicates that the appellant's witnesses testified, that evidence was not evaluated against that of the respondent which is a clear manifestation of bias by the Court.

9] As pointed out by counsel Tuyiringire, in his judgment, the court considered evidence of both sides. He summarized the plaintiff's case and also briefly considered what was advanced in defence. In particular, he was convinced and noted that the respondent owned 35 to 40 acres out of which the 1st appellant had encroached. He believed the plaintiff and his witnesses on the fact that the suit land was in Buliika Luuka and not Buliike Bulamogi Nawaikoke in Kaliro District. I note that the judgment was indeed brief and the trial Magistrate appears to have said much more about the respondent's case than that of the

appellants. Ordinarily there would be no fault in that save that the records shows that both sides adduced quite a large volume of evidence to support the fact of the suit land was either situated in Luuka or Bulike, Budeba, Namasolo, Nawaikoke in Kaliro Districts.

10] The fact that the respondent showed proof of his purchase of the suit land in my view was not a very strong advantage over the 1st appellant because it was not the land but its boundaries that was more in issue. What was not in dispute was the fact that both the 1st appellant and respondent owned land in the vicinity of the locus and that they were immediate neighbors. The point in contention was the feature of the boundary and in which district the suit land was found. Although the judgment indicates that the Magistrate was conscious of those two important matters in dispute, he failed to properly record evidence and to adduce it in manner that should have given a fair and just outcome. The following are my reasons.

11] The respondent and his witnesses admitted that there were no boundary marks separating his and the 1st respondent's land but that a cattle track that had existed for very long, and was still evident on the ground, marked

their boundary. On the other hand, although the 1st respondent admitted the existence of the cattle track, he stated that the boundary was marked by a trench which him and his witnesses claimed was a distance of about 200 meters from the location of the cattle track. The issue of the alleged boundary thus became a crucial fact in dispute, which unfortunately was not very well handled by the Magistrate.

12] The Magistrate made the correct decision to visit the locus. In my view it was very necessary in this case. I note that his decision that the suit land belonged to the respondent and was found in Luuka district was based majorly on evidence picked up from the locus and not what was said in Court. At page 4 of his judgment, the Magistrate relied on the evidence of the LCI and LCII chairpersons of Buliike Bulamogi and Nawaikoke (respectively) and the 1st appellant's unnamed step mother, to conclude that the suit land was not situated in Buliike Bulamogi. None of those persons was a witness in court and as I will show, their evidence being picked up at the locus for the first time, was inadmissible. There was hardly any evaluation of the evidence recorded in court, and surprisingly all the witnesses who testified in court were never called to confirm their testimonies.

13] As I have said, since both parties adduced equally compelling evidence on the situation and boundaries of the suit land, the Magistrate needed but failed to make more critical evaluation of the evidence. This he could have done with assistance from the evidence recorded at the locus, which in my view was never done. Going by the evidence recorded in court, there was no basis for the court to conclude that the plaintiff's version of the facts was more persuasive. The Magistrate gave disproportionate attention to the respondent's case to the prejudice of the respondent and also failed to record vital evidence. As a result, he arrived at a wrong decision.

14] Accordingly, ground one succeeds in part and grounds two and three succeed in full.

Ground 4.

15] The contention under this ground is that the procedure to be followed when visiting the locus was flawed in that the Magistrate entertained fresh evidence from unsworn witnesses which occasioned a miscarriage of justice. Respondent's counsel admitted that new witnesses were called. He relied on precedent to argue that it is proper for court or parties to call additional or even independent

witnesses at the locus in quo. That once such witnesses are allowed to testify, then their evidence can be relied on by the trial court.

16] As stated by appellant's counsel, there is now a wealth of authorities to guide trial courts on how to conduct a locus in quo. That procedure was summed by Justice Karokora (as he then was) in **David Acar & three Ors Vrs Alfred Acar (1982) HCB** as follows:-

"When the court deems it necessary to visit the locus-in-quo then both parties, their witnesses must be told to be there. When they are at the locus-in-quo, it is my view not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo. In fact the purpose of the locus-in-quo is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he/she must do so on oath. The other party must be given an opportunity to cross examine him. The opportunity must be extended to the other party. Any observation by the trial Magistrate must form part of the proceedings."

17] All authorities cited by both counsel appear to strongly support the above procedure. With respect, counsel Tuyiringire misquoted the decision in **De Souza Vrs Uganda (1967) EA 784.** Sir Udo Udoma CJ (as he then was) set the precedent that the purpose of visiting the locus is to check on the evidence given in court but not to fill gaps. He went on to advise that where the court on its

volition invited independent witnesses to Court, they too can be recalled at the locus to testify if necessary. He stressed that the court should always remind the witnesses of the oath (they took in Court) an indication that only witnesses who testified in Court are legitimate witnesses at the locus to avoid the risk of the trial magistrate *"…making himself a witness in the case….."*.Under no circumstances should a court allow fresh evidence at the locus.

18] As pointed out by respondent's counsel, at page four of his judgment, the Magistrate considered evidence given by Baisuka Living the chairperson of Buliika Luuka and Patrick Kivunike the chairperson LCII Nawaikoke. He relied majorly on their evidence to support that of PWI that the suit land was not in Buliike Bulamogi but in Luuka. He also considered the evidence of an undisclosed woman (allegedly the wife of the 1st respondent's father) who testified that their land never stretched to Buliike Luuka and they only cultivated there on authority of the appellant. Nsosi Ngogo the final witness at the locus professed to know nothing about the suit land. Inclusion of that evidence was clearly wrong because neither of those four witnesses was a witness in court. It appears at page four of his judgment (paragraph one) that the judge

even considered evidence of many unnamed witnesses from the three villages bordering the suit land. It was made worse by the fact that none of those witnesses took an oath to testify. Their testimonies were clearly inadmissible evidence and should have never been considered or included in the judgment.

19] Beyond allowing inadmissible evidence, the Magistrate's conduct of the locus proceedings was dismal as very little evidence was actually recorded. Since none of the witnesses who testified in court was called to testify at the locus, their evidence on the boundaries of the suit land was never tested on the ground. The evidence of the respondent and 1st appellant did not include showing the boundaries or neighbors and there was virtually no evidence on the district boundaries to confirm in which district the suit land fell. The Magistrate drew two sketch maps which had little or no evidential value on the facts of the ground. In one map, the cattle track appeared to run not in between but on the eastern side of the land occupied by the 1st appellant and respondent. The second map only showed what appears to have been the land of George Kigenyi, PW2 with no bearing on the suit land.

20] In my view the scanty and inadmissible evidence recorded at the locus could not form the basis of a fair decision especially when the evidence recorded in court was balanced equally and thus required to be supported with evidence on the ground. The Magistrate wasted a good opportunity to test that evidence and without proper evidence from the locus, there was no basis for the Magistrate to have given more weight to the respondent's testimony and that of his witnesses. Certainly, his decision on this point resulted into a serious miscarriage of justice. Also without confirming the boundaries of the suit land at the locus, the plaintiff could not have proved on a balance of probabilities that the appellants had over stepped what was undisputed land of the 1st respondent to trespass into one and a half acres of his portion. The Court would thus have no basis to hold that the 1st appellant were found to be wrongly cultivating the respondent's land, and thus in trespass. Beyond that, there would be no basis to argue that the trial Magistrate's failings were due to bias.

21] Accordingly ground 4 succeeds.

Ground 5

22] Appellants' counsel made no specific submissions on this ground and I do agree with submissions made for the respondent. At the scheduling conference on 22/5/2013, all parties were represented. The agreement of sale dated 10/1/1981 was admitted into evidence as one of the agreed documents and marked Exhibit **P1.** There was no contest from the defendant recorded. After perusing the record of the lower court, I was unable to see that exhibit, it may have been misplaced. However, its absence will not effect my finding on this ground. As pointed out by counsel Tuyingire, one of the purposes of a scheduling conference is to agree on and mark non contested documents as was the case here. In my view this was a frivolous ground and it fails.

23] In summary, this appeal has substantially succeeded. The learned Magistrate's attempts at receiving, recording and evaluating the evidence were grossly flawed and this affected his judgment to the detriment of the appellants. Taking into consideration the law regarding re-trials as enunciated by the Court of Appeal in their judgment of **Vincent Ntambi Vrs Uganda Cr. Appeal No. 78/2012 and Uganda Vrs Kato Kajubi Godfrey in Cr. Appeal No. 39/2010,** there are compelling circumstances that the case should be heard *de-novo*. Accordingly, the judgment

and order of the lower Court are set aside, and instead I order as follows:

a) The suit shall be re-heard afresh before a new Grade One Magistrate.
b) Once evidence is recorded, the trial court shall then pronounce its judgment.
c) The judgment has been set aside because of shortcomings of the trial Magistrate at the *locus in quo*. None of the parties are faulted. I thus grant no costs for this appeal to the appellants and in addition, I set aside the costs awarded to the respondent in the lower Court.

I so order.

Signed

EVA K. LUSWATA
JUDGE
23/1/2020