THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

HCT – 02 – CV – CA – 0036 – 2007

HCT – 02 – CV – CIVIL APPEAL NO. 0014/20006

(Arising from Apac Civil Suit No. 0016/2002)

1. OJAKA YEKO)

2. ODUR JOE)

3. EBONG PHILIPS):::::::::::::::::::::::APPELLANTS

VERSUS

ONONO PHILIPS ::::::::::::::::::::::::::::::::RESPONDENT

BEFORE HON. JUSTICE REMMY K. KASULE

JUDGMENT

This judgment is in a civil appeal against the judgment and Decree of the Magistrate Grade I, Apac, given on 05.07.2006.

The trial in the court below involved a dispute as to who of the appellants and respondent, owned a piece of land situate at Adagani village, Atongtidi Parish, Chawante Sub-county, Apac District. The respondent contended that he was the rightful owner having been in occupation of the land since 1959. The appellants on the other hand, maintained that they were customary owners of the land, having inherited the same from their forefathers.

The appellants are paternal relatives of the respondent. The father of the appellants was a brother of the respondent.

The trial court, after receiving evidence from the parties and their respective witnesses decided the case in favour of the respondent against the appellants. Dissatisfied with the judgment, the appellants appealed to this court on five (5) grounds of appeal, namely:-

1. The decision of the learned trial magistrate is not supported by evidence on record.

2. The learned trial magistrate failed to properly appraise and evaluate the evidence on record and thereby came to a wrong decision.
3. The learned trial magistrate erred in law and fact in failing to visit the locus in quo to ascertain on the ground the actual suit land.
4. The decision of the learned trial magistrate has occasioned a total miscarriage of justice to the appellants.
5. There are fundamental errors patent on the face of the record.

The appellants prayed this court to allow the appeal by setting aside the decision of the lower court, and for judgment to be entered for the appellants with costs.

The respondent opposes the appeal and prays this court not to disturb the judgment and orders made by the lower trial court.

In the appeal, learned Counsel R.I.S. Oyoit represented the appellants while learned counsel Twontoo Obaa represented the respondent. Both respective counsel filed written submissions.

Grounds 1 and 2 were considered together.

For the appellants, it is submitted that the judgment of the trial magistrate was very short, superficial and vague and did not consider in depth the evidence adduced before him as a whole and thereby hurriedly believed the respondent's case. This led the trial magistrate to reach wrong conclusions in the case.

On the other hand, it is submitted for the respondent, that a judgment need not be in many pages or long to be proper. The trial magistrate properly directed his mind on the facts and the law on all the available evidence in reaching his conclusion. There is therefore, according to the respondent, no merit in grounds 1 and 2 of the appeal.

A scrutiny has been made by both counsel of the evidence of the parties and their respective witnesses adduced at trial. Court has also studied the record of proceedings as relates to this evidence.

The court record of proceedings shows that except for the second appellant, Odur Joe, who testified on oath on 03.05.2005, the rest of the parties and their respective witnesses did not give their evidence on oath. All that the court record shows is that, each one of them, proceeded to testify, soon after particulars of their names and residences had been taken.

The failure to ensure that evidence is given on oath and for the court record to clearly so state in respect of all parties and their witnesses, except for the second appellant,

makes the trial in the lower court a nullity as the evidence so adduced is deprived of any validity and value as proper evidence.

Grounds 1 and 2 of the appeal therefore succeed in sense that there was no valid evidence before the trial court for that court to evaluate so as to be able to reach the conclusions it reached.

Ground 3 faults the trial court for failing to visit the locus in quo.

There is merit in this ground. The dispute concerning the suit land is whether or not the disputants have gone over the borders of their respective portions of land and trespassed onto that of their opponent(s). on page 11 of the typed proceedings, the court proceedings of 15.04.2004 show that in a **Civil Appeal No. 7 of 1995; Philip Onono vs Emmanuel Okello,** on 30.04. 97**,** the learned chief Magistrate, Godfrey Namundi, who entertained that appeal ordered the trial court Grade II at Aduku, in conjunction with the local leaders to demarcate the proper boundaries of the appellant's land not in dispute.

It was thus incumbent upon the trial court to ascertain, first, whether the suit land in **Civil Appeal No. 7 of 1995,** was the same suit land in the suit before him, and if so, whether the borders demarcated by court in conjunction with the local leaders, as showing the appellant's land had been violated or not, and if violated, whether it was the appellants who had done the violation. All this could have been best done by the trial court visiting the locus in quo and ascertaining the boundaries of the suit land, the subject of the dispute. That way the trial court would have been in a position to decide, who of the appellants and respondent, was committing trespass, on the other's land. This court therefore holds that failure by the trial court to visit locus in quo was an error that resulted in a miscarriage of justice. Ground number 3 of the appeal succeeds.

As to grounds 4 and 5 of the appeal, this court has already pointed out instances of miscarriage of justice and fundamental errors committed by the trial court, making the trial a nullity. Albeit all of them, are not necessarily the instances raised by the appellant's counsel. Grounds 4 and 5 therefore also succeed.

In the result this appeal succeeds. For the reasons given, this court sets aside the judgment and orders of the trial Grade I Court, Apac delivered on 08.092006. It is ordered that a retrial of the suit de-novo by a court of competent jurisdiction be held.

For this purpose, the court file of the case is to be remitted to the Chief Magistrate's Court, Lira, to take the necessary steps for a retrial of the suit by a court of competent jurisdiction.

As to costs, errors that have led to the retrial of the case, are those of the trial court. It is therefore ordered that each party is to bear its own costs of this appeal and those of the court below of the proceedings giving rise to this appeal.

The appellants and respondent are hereby ordered to maintain the status quo on the suit land as it is now, until such a time as the re-trial of the suit shall commence; when this particular order to maintain the status quo shall lapse, and it will be up to the court retrying the case, on its own, or on being moved by any of the parties, to make appropriate interim orders, as that court shall deem fit, as regards the suit land.

.....

Remmy K. Kasule

Judge

31st October, 2008