THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 0042 OF 2008

1. **MUKAMA YASONI**
2. **ZOMU PATRICK**
3. **ASONI MUKAMA::APPELLANTS**

VERSUS

SOSI PETER BAMULANGEYO KAISA::::::::::::::::::::::RESPONDENT

[Appeal from the Judgment of Her Worship Nabafu Agnes (GI) in Kamuli Land Tribunal Claim No.0045 of 2006]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arises from the judgment of Agnes Nabafu (GI) on a claim for trespass to land in a suit that had been brought before the Kamuli District Land Tribunal. The trial magistrate found in favour of the respondent (then the plaintiff) and declared that the respondent was the lawful owner of the disputed land. She issued a permanent injunction against the appellants to restrain them from interfering with the suit land and ordered the appellants to pay the costs of the suit.

The facts that are pertinent to the appeal as summarised from the evidence on record are that on 26/02/2002, the respondent bought a piece of land neighbouring that of the 1st appellant from Bishop Cyprian K. Bamwoze. An agreement of sale indicating the

boundaries of the land and the purchase price of shs 1.5m was executed. Bishop Cyprian Bamwoze had purchase the land from one Haji Abdu Kiyaga in 1998 and they had executed a sale agreement in respect of the transaction. After he bought the land, the respondent left it in the care of Moses Lubandi Matege who had before the sale been caretaker of the land for Bishop Cyprian Bamwoze. According to the respondent, there was one temporary shelter on the land when he purchased it from Bishop Bamwoze and it was occupied by one of the appellants. After the purchase, the 2nd and 3rd appellants entered onto the land and started making bricks on it. They also built more huts on it in spite of orders that had been issued to stop them from doing so. Attempts to settle the matter out of court failed so the respondent filed a suit against the appellants in the Kamuli District Land Tribunal.

The case for the appellants was that the 1st appellant acquired the land by purchase in 1951. He claimed to have purchased it from Mugweri Sababi, a kisoko chief at the time. The 1st appellant contended that the respondent had no rights to the land because Kiyaga who sold it to him had lost the land in a suit between him and 16 others in the Grade II Magistrates Court at Mbulamuti. The 1st appellant also claimed that subsequently, Kiyaga appealed against the decision of the Grade II court before the Chief Magistrate at Jinja but he lost the appeal. That subsequently, the land was sold to pay the costs of the appeal so Haji Kiyaga had no land left over to sell to Bishop Bamwoze as claimed by the respondent. The 2nd and 3rd appellants were the son and grandson of the 1st appellant and they claimed to be entitled to use of the 1st appellant's land as such.

At the hearing of the suit the trial magistrate identified 4 issues for determination as follows:

i) Whether the plaintiff had a cause of action;
ii) Whether the defendants had rights to the disputed land;
iii) Who is the owner of the disputed land;
iv) Remedies available to the parties.

The trial magistrate found in favour of the plaintiff/respondent on all four issues and made the orders referred to above. The defendants appealed on two grounds. The 1st was that the trial magistrate erred in law when she failed to properly evaluate the evidence on record to the required standards and thereby arrived at a wrong decision which occasioned a miscarriage of justice. The second ground, which I think was a repetition of part of the first ground, was that the trial magistrate erred in law and fact when she failed to hold that the suit land belonged to the 1st appellant who had held it since 1951. The appellants prayed that their appeal be allowed and the orders of the trial magistrate be set aside with costs in this court and the court below.

The parties and their advocates appeared before me on the 9/04/2009. I ordered that the advocates file written submissions to facilitate the expeditious conclusion of the appeal. M/s Wafula & Co. Advocates filed written submissions in court for the appellants on 28/04/2009. M/s Tuyiringire & Co. Advocates filed submissions on behalf of the respondent on the 1/06/2009. The appellants did not file a rejoinder.

The duty of this court, as the first appellate court, is to rehear the case on appeal by reconsidering all the evidence before the trial court and come up with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. [See **Pandya v. R [1957] EA. 336; Father Narsension Baguma & Others v. Eric Tibekinga, S/C Civil Appeal No. 17 of 2002 (unreported)**].

I have considered the grounds of appeal and come to the conclusion that all that is required in this appeal is to re-evaluate the evidence on record, and considering the arguments raised by counsel for the parties with respect to the grounds of appeal, come to a decision on the pertinent issues for determination. It is my view that the questions that need to be determined in this appeal are as follows:

i) Whether the trial magistrate properly evaluated the evidence before her.
ii) Whether the appellants are the lawful owners of the land in dispute; if not,

iii) Whether the appellants trespassed on the land in dispute.

I will address questions these three questions together because questions 2 and 3 relate to the evaluation of the evidence that was presented by the parties and are quite intertwined. I shall do so while considering the arguments that have been raised by counsel for the parties in respect of each question.

The appellants complained that the trial magistrate did not evaluate the evidence on record properly and thus came to the erroneous finding that the respondent and not the appellants, was the lawful owners of the piece of land in dispute. That as a result, the decision occasioned a miscarriage if justice. In this regard, Mr. Wafula for the appellants argued that the trial magistrate failed to consider the fact that Kiyaga who was Bishop Bamwoze's predecessor in title had litigated over the same piece of land with the 1st appellant. Further that the trial magistrate did not take into consideration that when the respondent purchased the suit land, he did so when the appellants were already in occupation. It was thus contended that the respondent had both actual and constructive notice that there were other persons with interest in the land apart from his predecessor in title.

Mr. Wafula further argued that possession is prima facie evidence of title. That since the appellants were in possession of the suit property before the respondent bought it from Bishop Bamwoze, they had better title to it than the respondent. Further, that the respondent could not bring a suit for trespass against the appellants because he was not in possession of the land. That as a result, the trial magistrate erred both in fact and law when she failed to take this into consideration. Mr. Wafula cited the case of **James Kiyimbye v. Hon. Pual Semogerere & Another, H.C.C.S No. 957 of 1993** in support of his submission.

It was Mr. Wafula's further contention that the trial magistrate failed to take it into account that there were no witnesses from the local authority (LC) when the respondent purchased the land in

dispute from Bishop Bamwoze. He relied on the decision in the case of **John Okalebo v. Eluluma & Another [1978] HCB 200** for the submission that transactions in customary land must be done formally and any transfer of land must be done through local authorities and agreement witnessed by members of the clan to which the vendor belongs.

Mr. Wafula further argued that the trial magistrate did not consider inconsistencies in the evidence adduced by the respondent in court and at the locus in quo. He also complained that the respondent's witnesses who testified in court were not called at the *locus in quo*. That as a result, court did not get the opportunity to clarify from them whether what they stated in court was what obtained on the ground, i.e. at the locus in quo. Counsel for the appellants cited the case of **Badiru Kabalega v. Sepiriano Mugango H.C.C.S. No. 7 of 1987** (unreported) for the submission that witnesses who testify in court are required at the *locus in quo* to clarify what they stated in court and to indicate features or boundary marks, if any, to court.

Mr. Tuyiringire who represented the respondent did not directly address the points raised by counsel for the respondent. However, he argued that the trial magistrate had properly evaluated the evidence on record. After summarising the evidence for the appellants and the respondent, he submitted that the trial magistrate had properly weighed the evidence adduced by both parties and found that the evidence adduced by the respondent was stronger than that adduced by the appellants. This was especially so because the testimony of Kyosi Muzamiru (DW2) was in favour of the respondent's case. That the appellants did not disown him as a hostile witness though court gave them the opportunity to do so. With regard to the appellant's counsel's submission that the appellants were already in occupation of the land when Bishop Bamwoze and the respondent purchased it Mr. Tuyiringire submitted that there was evidence to show that the 1st appellant acknowledged that his son had entered into Bishop Bamwoze's land.

In order to prove that there was a previous suit over the disputed land between Haji Abdu Nuru Kiyaga and he, the 1st appellant produced a copy of a plaint (Exh D1) and a copy of the record of proceedings (Exh D2). The plaint showed that in 1992, Abdu Nuru Kigonya Kiyaga and 9 others sued Yasoni Mukama and 16 other persons in Civil Suit No. 12 of 1982 in the Magistrates Court at Mbulamuti. The suit was for recovery of a piece of land at Nakavule, Buluya in Gombolola Mbulamuti in respect of which Haji Kiyaga and his colleagues claimed to have obtained a lease

from the Uganda Land Commission, but Yasoni Mukama and his colleagues entered onto it thereafter and prevented Kiyaga and others from developing it. In the lower court, the 1st appellant claimed that he and his colleagues had been successful in the suit, meaning that Kiyaga and his colleagues had failed to establish their interest in the land. However, Exh.D2 which was the record of proceedings in Civil Appeal No. 31 of 1986 in the Chief Magistrates Court at Jinja revealed that the suit in Mbulamuti Court was dismissed on a preliminary point of law. The Grade II magistrate who was to hear the matter dismissed it following a preliminary objection that he had no jurisdiction to hear it. On appeal before the Chief Magistrate both counsel to the parties agreed that the matter be remitted to the Grade II court for a retrial. The Chief Magistrate ordered that the file be remitted to that court and that costs for the retrial would be in the cause.

There was no evidence about what happened after the order for a retrial was made. It would therefore appear that the matter was never disposed of on its merits. The record of proceedings shows that the respondent knew about the previous suit. When he was cross-examined by the 1st appellant he testified that after the suit came to a halt, the appellant had his land handed over to him but Kiyaga remained on the portion that he previously occupied. That it was that portion that Kiyaga sold to Bishop Bamwoze, and which the respondent subsequently bought. On the basis of the evidence reviewed above, I find that though the trial magistrate did not consider the previous suit over the disputed land, it was not correct for the 1st appellant to claim that Kiyaga lost all of his land in a previous suit with the 1st appellant because the suit was never conclusively determined. Neither was it correct for the 1st appellant to claim that Kiyaga had no land left and he therefore had no interest to pass on to Bishop Bamwoze.

Regarding the appellants' complaint that the trial magistrate did not take it into consideration the fact that the appellants were in occupation of the suit land when Bishop Bamwoze sold it to the respondent, at page 2 of the judgment the trial magistrate stated thus:

> *"… This is because the railway which the defendant claim (sic) to be his limit crosses vast land (sic) and cannot be taken as a boundary mark and in addition he is proved on a balance of probabilities not to have been in actual possession, if he was why did he or his son decline to witness the purchase of the land by the plaintiff or his predecessor. Even the structures constructed on the land are*

temporal and seem to have been constructed on motive to elect their rights on the suit land which they do not have."

The portion of the judgment above shows that the trial magistrate considered the evidence regarding the appellants' alleged occupation of the land before the respondent. She evaluated the evidence that was adduced by the appellants and weighed it against the evidence adduced by the respondent, as well as what she observed at the locus in quo. After that she preferred the evidence adduced by the respondent to that which had been adduced by the appellants and found in his favour. What then needs to be established is whether the trial magistrate properly found in favour of the respondent. I shall now consider the evidence on record starting with that of Bishop Bamwoze.

Bishop Bamwoze testified as PW3 on 15/11/2007. He stated that he bought the disputed land from Kiyaga and that an agreement had been executed but he did not have it in court when he testified. He undertook to produce it later. It was his testimony the 1st appellant was his neighbour on the disputed land on the western side. According to PW3, after he purchased the land the sole occupant was a lady who kept the land for Kiyaga and she lived in a small grass thatched house on the land. Further that after he bought the land, he asked this caretaker to leave and she did so. Thereafter the house disintegrated leaving nothing on the land. It was also PW3's testimony that after the caretaker left one of the 1st appellant's sons constructed grass thatched huts on the land. When he confronted the 1st appellant about this the 1st appellant responded that there was no problem because he knew that his sons had entered onto the Bishop's land. PW3 thought that the matter would be resolved but he sold the land to the respondent before it was resolved.

When he was cross-examined by the 1st appellant, PW3 told court that he bought the land by an agreement that was executed before members of the Local Council of the area. Further that after he bought the land he went and introduced himself to the 1st appellant. It was his further testimony on cross-examination that after he bought the land, PW3 and the 1st appellant moved around the land many times to clear the boundaries between their two pieces of land and that PW3 had used the land for sometime without any interference by the 1st appellant.

The original agreement of sale that was executed between Kiyaga and PW3 was subsequently produced in court by the respondent, in the absence of PW3 on 6/12/2007 when court visited the locus in quo. The agreement was read to all parties present and the appellants did not object to its admission in evidence. Having seen the original agreement court admitted a Photostat copy thereof in evidence as Exh PII. The testimony of PW3 and the agreement proved without a doubt that Kiyaga owned the suit land and he sold it to PW3 in the presence of the LCs. The appellants did not complain or bring their interest in it, if any, to the attention of Bishop Bamwoze and the LCs. It also proved that the 1st appellant's sons entered onto the land after PW3 bought it and the 1st appellant was aware of this.

The respondent's testimony was that he bought the disputed piece of land from Bishop Bamwoze on 26/02/2002 and they executed an agreement. The sale agreement dated 26/02/06 was admitted in evidence as Exh.P1. Because Exh P.1 which was written in Luganda had been admitted in evidence to prove the plaintiff's case and it was a vital document, in the interests of dispensing substantive justice without undue regard to technicalities, I ordered that it be translated into English to facilitate court's decision. The translated document was admitted as additional evidence under O. 43 rule 22 of the Civil Procedure Rules.

It was the respondent's further testimony that the 1st appellant had land neighbouring the disputed land but there were boundary marks that separated the two pieces of land. The respondent confirmed that when he bought the land there were two grass thatched huts on it but Bishop Bamwoze told him that they belonged to the 1st appellant's sons (the 2nd and 3rd appellants) who had constructed them while Bishop Bamwoze was away. The appellant's sons lived in the houses at the time but before he could evict them, the 1st appellant's sons began to make bricks. That he then filed a suit so that the appellants could be ordered off the land but they continued to construct huts even after they were restrained by the local authorities. The respondent also testified that the appellants did not resist his purchase of the land and they did not give him notice of their interest and in the absence of that, he paid the purchase price. The respondent further testified that he hired out parts of the land the land in dispute without any resistance from the appellants.

While under cross-examination by the 1st appellant the respondent informed court that at the time of purchase, the 1st appellant was summoned to go and witness the sale but he refused to attend. It also appears that the respondent was present when the dispute between the 1st appellant and Kiyaga was settled because during cross-examination he stated that he was one of those present at the 1st appellant's home when different pieces of land were handed over to the 1st appellant and his colleagues. That Kiyaga retained the piece of land he occupied and it is that land that Kiyaga sold to Bishop Bamwoze who later sold it to the respondent. During cross-examination by the 3rd appellant the respondent asserted that the appellants lived on the land in dispute with full knowledge that it belonged to Bamwoze.

Counsel for the appellants complained that the trial magistrate did not consider that there were inconsistencies between the evidence adduced by the respondent in court and at the locus in quo; that while the respondent testified that there were houses on the land when he bought it in 2002, at the locus in quo he turned round and stated that the houses were constructed after he bought the land. At the locus in quo the respondent stated thus:

> *"These houses are in my land (Temporary huts seen).*
> *The defendant and his sons constructed them recently at the beginning of the year after I had sued.*
> *The old one we bought when it was constructed. The defendant's son was staying in therein. They constructed when Bamwoze was away and he tried to chase them but they refused. Most boundary marks were cut by defendant."*

Review of the testimony of the respondent revealed that he stated that there were two huts when he bought the land which the 1st appellant's sons constructed when Bishop Bamwoze was away. That later the 1st appellant's sons made bricks on the land and built more huts. The only contradiction I see here is that while he stated that there were two huts in his testimony in court, at the locus he stated that there was only one hut when he bought. The fact remained that both in court and at the locus in quo the respondent admitted that he bought the land after appellants had built temporary structures on it. I am of the view that that was a minor inconsistency that was correctly ignored by the trial magistrate and it did not occasion any injustice to the appellants.

And as apparent on the face of the record, that inconsistency was cleared by the evidence of PW2 and PW3.

I next considered the contention by counsel for the appellants that the respondent's sale agreement (Exh. PI) was not witnessed by the local authorities and was therefore a doubtful transaction. Exh.PII was written in Luganda and the lower court had admitted it into evidence with no translation into English. Since it was another document that was crucial for the determination of the rights of the parties, I ordered that it be translated into English admitted it as additional evidence under O. 43 rule 22 of the Civil Procedure Rules.

It is true that the LCs did not witness **Exh.PI**. Neither were any of them present when the transaction it evidenced took place. However I reviewed the case of **John Okalebo v. Eluluma & Another [1978] HCB 200** which counsel cited in support of his submission that in order for them to be valid, agreements in respect of customary land have to be witnessed by local authorities and clan members. I found that it could be distinguished from the instant case. In that case, the rights that were being determined related to customary land while the land in dispute here was not customary land. I hold so because the 1st appellant claimed to have acquired it by purchase. Customary tenure is defined in s. 1 (l) of the Land Act to mean a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which are described in section 3 of the Act. According to s.3 Land Act, customary tenure is a form of tenure applicable to a specific area of land and a specific description or class of persons. Subject to section 27 of the Act, it is governed by rules generally accepted as binding and authoritative by the class of persons to which it applies. The rules are applicable to any persons acquiring land in that area in accordance with those rules. And subject to section 27 of the Land Act, customary tenure is characterised by local customary regulation, i.e. applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in land. The rules also may provide for communal ownership and use of land in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution. Such land is owned in perpetuity.

I did not find that any of the descriptions above applied to the land claimed by the respondent or the appellants. Bishop Bamwoze bought from Kiyaga, a *Muganda* who had previously acquired

land in the area. According to Exh.DI, Kiyaga and his colleagues in the suit acquired the land from the Uganda Land Commission and they wanted to process a lease but were frustrated by the actions of encroachers. Kiyaga definitely did not hold the land as a customary tenant. On the other hand the 1st appellant also claimed to have bought from a *kisoko* chief. He did not acquire from his parents or other relatives. He too was not a customary tenant. The rule in **Okalebo v. Eluluma** therefore could not apply to any of the pieces of land in this suit and the trial magistrate was right when she ignored the rule requiring members of the clan or local authorities to participate in the transaction between Bamwoze and the respondent.

Having so reviewed the testimony of the respondent, I came to the conclusion that it was clear and unambiguous. The respondent was not shaken in cross-examination. He established that though he bought the land after the appellant's sons built on it, he had been assured that they were merely trespassers thereon.

Further evidence was from Moses Lubandi Matege (PW2) who testified that he was born in Buluya village and that he knew the residents of Buluya as well as about the land in dispute. He testified that as a *mutaka* (resident of the area for a long time) he knew that the disputed land originally belonged to Haji Kiyaga who had developed it by constructing a kraal and a well on it. PW2 further testified that he used the land after Bishop Bamwoze bought it from Kiyaga because after he bought it, the Bishop entrusted it to PW2 to keep it. It was also PW2's testimony that the land had his garden of potatoes and maize when Bishop Bamwoze bought it. That the 1st appellant's sons only entered onto it in 2006 when he (PW2) was away in Mombasa. That at the time Bishop Bamwoze bought it the land was well demarcated by boundary markers between the 1st appellant's and the respondent's land (i.e. of *birowa* and *lukone* plants) but some of them were cut down, especially where the appellants crossed into the land. According to PW2, the place where the appellants constructed houses, which they did not enter, was the exact place where PW2 had planted his maize.

When he was cross-examined, PW2 clarified that he was in occupation of the disputed land on behalf of Bishop Bamwoze since 1998. That he had been using the land since without any resistance from the appellants. That the appellants previously occupied the piece of land neighbouring the respondent's but they subsequently crossed the boundaries and constructed

houses on the respondent's land. I found PW2's testimony convincing and reliable because he was a *mutaka*. He therefore knew a lot about the land in the areas. In addition, his testimony was not disturbed by cross-examination. It firmly established that Kiyaga had land in the area which he sold to Bamowze who later sold it to the respondent. PW2's testimony also corroborated that of the appellant and PW3; that the 1st appellant's son and grandson entered onto the land after PW3 bought it. It also established that the land was well demarcated when PW3 bought it but the boundaries were disturbed after that.

On the other hand, the evidence for the appellants by the 1st appellant was that he bought the land from one Mugweri Sababi (a *kisoko* chief) in 1951. That in 1952, the said Mugweri's title was challenged by the Seventh Day Adventist Church in court but the church lost the suit to Mugweri and the 1st appellant remained in occupation of the land. Further that in 1982, Haji Abdu Kiyaga & other persons sued the 1st appellant and 16 other people but the Kiyaga lost the suit to 1st appellant and his colleagues. That Kiyaga and others lost the suit even when they appealed in the Chief Magistrates Court at Jinja after which the land was handed over to the 1st appellant and his colleagues. The 1st appellant produced a copy of the plaint in Civil Suit No. 12 of 1982 in Mbulamuti Grade II court in (**Exh.DI**) and a copy of the proceedings in Civil Appeal No. 31 of 1986 in the Chief Magistrates Court at Jinja (**Exh.DII**). It was the 1st appellant case that the respondent was in the wrong when he bought land which Kiyaga had lost in the suit. Also that Haji Kiyaga ran away when he lost the suit which resulted in his loss of all the land on account of costs of the suits. That police had tried to trace Haji Kiyaga to enforce the payment of the costs but in vain. Finally, the 1st appellant asserted that it was Haji Kiyaga who had crossed the boundaries and entered onto a big portion of his land.

When he was cross-examined, the 1st appellant introduced new evidence that he had been cultivating the land and had planted coffee and avocado trees thereon which were destroyed by Kiyaga's animals. That Kiyaga had built a kraal and a borehole on the land so as to grab the land from the 1st appellant. He insisted that the respondent did not buy the land because he (the 1st appellant) did not witness the transaction between him and Bishop Bamwoze.

Perusal of the proceedings in Mbulamuti Court (**Exh.DI**) revealed that the suit between Kiyaga and 9 others (plaintiffs), and the 1st appellant together with 16 other persons (defendants) was

over land at Nakavule, Buluya in Mbulamuti sub-county. The proceedings in the Chief Magistrates Court at Jinja (**Exh.DII**) revealed that the suit was not disposed of on its merits but dismissed because the trial magistrate thought he had no jurisdiction to entertain it. On appeal, the Chief Magistrate ordered a re-trial so that the suit could be determined on its merits. There was no evidence whether there was a re-trial or not so it seems the dispute was never conclusively resolved. But as stated by the respondent it was apparent on the ground that Kiyaga retained the land that he occupied and the 1st appellant also retained what he occupied. The respondent testified that he attended the ceremony where each of the parties were handed their portions of the land by the authorities. In addition, the 1st appellant did not prove that the disputed piece of land was part of that which he purchased from Mugweri in 1951. He produced no agreement of sale nor called witnesses to prove his allegations. I therefore came to the conclusion that by the 1st appellant's own evidence, the contention that Haji Kiyaga lost all his land in a previous suit and had nothing to sell to Bishop Bamwoze was false.

The other witness who testified on behalf of the appellants was Kyosi Muzamiru (DW2). He was the LCI Chairman of Bulwasira Zone. He stated that he witnessed the agreement of sale of the land between Bishop Bamwoze and the respondent. Also that his brother James Isabirye used to keep Kiyaga's land and it was he that escorted the Bishop and the respondent to his home. Further that the 1st appellant had land neighbouring the Bishop's which the Bishop was going to sell. That although DW2 sent for the 1st appellant to witness the transaction the 1st appellant refused or neglected to attend. That when the 1st appellant declined to go and witness the sale one of the 1st appellant's sons was summoned to do so but he too declined. DW2 confirmed that at the time of the sale there were proper boundaries around the land in question. Further that he knew that the respondent had at some time after the sale complained to police that the appellants had trespassed on his land and built houses on it. However, police did not charge the appellants but advised the respondent to sue them. The appellants did not cross-examine this witness and though it was inferred that the witness was hostile the appellants did not think so. They closed their case at that point.

DW2' testimony strongly contradicted that of the 1st appellant. It was more in favour of the respondent than the appellants. It corroborated the testimony of PW3 in material particulars. Though DW2 stated that the boundaries that were present when Bishop Bamwoze bought the

land had not been disturbed and were still present at the time, the testimony of PW2 who was in occupation of the land had already established that only part of the boundary was intact the parts where the incursion occurred having been destroyed. Though I did not have the benefit of seeing DW2 testify, I preferred his testimony to that of the 1st appellant because he was a person in authority in the area and he dared to testify against the party who called him. DW2 most probably told the truth about the dispute before court.

It was submitted for the appellants that because the respondent's witnesses who testified in court (PW2 and PW3) were not called at the *locus in quo* this court should declare the whole proceeding null and void. The mode that proceedings at the locus in quo should take was summarised in Practice Direction No. 1 of 2007. Regulation 3 thereof provides as follows:

> **"Visits to Locus in Quo**
> 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 his/her counsel.
> d) Record all the proceedings at the locus in quo.
> e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary."

The trial magistrate visited the locus in quo on 14/12/2007. Both the 1st appellant and the respondent were present. The appellant showed the boundaries of his land to court and indicated that the appellant's huts both old and new were in his land. The respondent also indicated his boundaries to court. He said his land spread from the railway to the swamp. The trial magistrate drew a sketch map and made some observations. The map showed that there were boundaries of old trees between the disputed land and the 1st appellant's land. However, that boundary was

interrupted at the place where there were two old huts that belonged to the 1st appellant's sons. Further into the disputed land were two new huts that were nearer to the respondent's land. Apart from the 1st appellant and the respondent, three witnesses testified at the locus in quo: Kaluya Gasta, Edisa Kategere and Muyingo Andrew. In particular, Muyingo testified that the houses on the land were built by the 2nd and 3rd appellants 10 and 2 years before. This confirmed to me that the 1st appellant's sons trespassed onto the respondent's land.

I agree with counsel for the appellants that the proper procedure was not followed by the trial magistrate on her visit to the locus in quo. However, I do not agree that for that reason the whole proceeding should be declared null and void for the following reasons. The principle witnesses, i.e. the parties, were both present at the locus in quo. They showed their boundaries to the court which then came to a decision based on their clarifications and other evidence that had been adduced in court. I have not found any decisions in which proceedings were vitiated and held null and void for failure to follow the procedure set down for visits at the locus in quo. Counsel for the appellant did not assist court because he supplied no authority to back his submission. I am therefore of the opinion that for as long as there is no failure of justice, whether or not the proceedings at the locus in quo are carried out to the letter of the law should be treated in the same manner as other failures in procedure. I find that no injustice was caused to any of the parties by the failure to call all witnesses that testified in court at the locus in quo. The proceedings thereat are therefore upheld, for whatever they were worth.

Regarding the contention that one has to be in occupation of land before he/she brings an action in trespass, it has first got to be clearly established whether the respondent was in possession of the land or not. In this regard, PW2 testified that after he bought the land from Bishop Bamwoze, the respondent entrusted it to him. At the time that he testified, PW2 was still in possession of the land as the agent of the respondent. This fact was not challenged by the appellants. I also considered the case of James **Kiyimbye v. Hon. Pual Semgerere & Another (supra)**which Mr. Wafula cited in support of his submission. In that case, the plaintiff was in possession of the suit land through his brother, an agent. When he brought a suit against the defendant for removing murram from his land court found that he could not do so because he was not in physical possession of the land and the suit was dismissed.

However, the Supreme Court rather exhaustively dealt with the parameters of the tort of trespass to land in Uganda in their decision in **Justine Lutaya v. Stirling Civil Engineering C. Ltd. Civil Appeal No. 11 of 2002** (unreported). Mulenga JSC had this to say:

> *"Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land.* ***Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land.*** *At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a landowner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land. During the subsistence of the lease, it is the lessee in possession, who has the capacity to sue in respect of trespass to that land. An exception is that where the trespass results in damage to the reversionary interest, the landowner would have the capacity to sue in respect of that damage. Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land."* **{Emphasis was supplied}**

It appears from the above that the decision in the case of **James Kiyimbye** was overruled by the Supreme Court. As opposed to the common law position, a land owner in Uganda who is in constructive possession of land can bring an action in trespass. The respondent was in constructive possession through PW2 and therefore had the locus to bring the action against trespassers. Though the rule in the case of **James Kiyimbye** was not brought to her attention, I find that even if it had been, the trial magistrate's decision as it stands is still a correct decision and it is hereby upheld.

In conclusion, I find that the trial magistrate properly evaluated the evidence on record and came to the right decision. She properly found that the appellants were not the lawful owners of the suit land and that the 1st appellant's son and grandson, i.e. the 2nd and 3rd appellants, trespassed on the respondent's land. They entered onto the land after Bishop Bamwoze bought it from Kiyaga and made further incursions after the respondent bought it from Bishop Bamwoze. All grounds of the appeal therefore fail.

In the end result this appeal fails and is dismissed with costs to the respondent, both here and in the court below, and the orders entered by the trial court are hereby upheld.

Irene Mulyagonja Kakooza
JUDGE
17/12/2009