IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 012 of 2017

In the matter between

1. ONGWEN ANTHONY

2. OJWIYA TONNY **APPELLANTS**

And

OCAYA MICHAEL **RESPONDENT**

Heard: 16 September, 2019.
Delivered: 27 November, 2019.

Civil Procedure *— Witness Statements - Order 18 rule 4 of The Civil Procedure Rules requires the evidence of the witnesses to be taken orally in open court — Experience suggests that the best evidence is often obtained by the traditional examination-in-chief, when witnesses are giving their evidence in their own words and give a more genuine version of their recollection — Evidence elicited orally in the courtroom surroundings is often more reliable than that which a witness is prepared to sign up to in a pre-trial written statement. Witness statements frequently stray far beyond any evidence the witness would in fact give if asked proper questions in chief — Parties, especially those that are un-represented, should not automatically be ordered to file and serve witness statements in all trials — Although witness statements have become pervasive, they are undesirable where there are significant factual disputes and credibility issues. This is because witness statements are prone to containing inadmissible content, may not be reflective of the witness' statement of fact but rather eloquent and compelling advocacy of counsel, and thus incapable of withstand test of cross-examination, and so on. There should be consent by all the parties on the adoption of witnesses statements — When witness statements are adopted, advocates should avoid any suggestion of coaching or collusion — The style and flavour of the witness in the recounting of the story should be captured and reflected in the statement — Witnesses should not be allowed by way of*

such statements to give evidence of which they do not have direct knowledge, by reference to documents they have read. Nor would they by way of such statements be permitted to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact.

Evidence *— Witness disqualification — Preclusion may be justified where the witness is found to be incompetent or where their evidence is found to be irrelevant, unnecessarily repetitive — Under the general duty to ensure fairness of a trial, it is evident that judicial officers have the discretion to exclude witnesses but the suggestion that courts have absolute power to preclude the testimony of a surprise witness is extreme and unacceptable.*

Land Law *— Visits to the locus in quo — At the locus in quo, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court — The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a locus in quo — The record of proceedings and evidence of a witnesses during the visit to the locus in quo should ordinarily be taken down in the form of a narrative —Because its purpose is to illustrate testimony, demonstrative evidence gathered at the locus in quo has no evidentiary value independent of the testimony of the witness.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally seeking recovery of approximately 1,500 acres of land situated Tai-Ocot village, Koch Parish, Labongo Amida sub-county in Kitgum District, a declaration that he is the rightful owner of the land in dispute, general damages for trespass to land, a permanent injunction and the costs of the suit. The respondent's claim was that the land originally belonged to his late father Rwot Yosia Ajan. Upon his father's death on 27th February, 1968 he inherited the land and obtained a grant of letters of administration to the estate of the deceased on 17th August, 2015. The respondent had before that enjoyed quite possession of the land until the year

2012 when the appellants without any claim of right and without his consent entered onto the land and began cultivating it. The respondent reported to the matter of the *Ker Kwaro* Acholi who on 11th March, 2013 decided that the boundaries of the land be demarcated but the appellants absconded from the exercise. They have since continued with the trespass hence the suit.

[2] In their joint written statement of defence, appellants refuted the respondent's claim. They averred that the land in dispute originally belonged to their late grandfather, Bangakal who acquired it as customary land around the year 1925. Upon his death, it was inherited by their father Okello Makario who as well was buried on that land when he died. The appellants were born and raised on that land and have not encroached on anyone's land. The respondent has never occupied the land in dispute but has made attempts several times to obtain it forcefully for the appellants who have at all material time occupied it as their homestead, grazing and farmland. They prayed that the suit be dismissed.

The Respondent's evidence in the court below:

[3] Testifying as P.W.1 the respondent, Ocaya Michael, stated that he was approximately six years old when his late father Rwot Yosia Ajan, the then Parish Chief of Koch Parish, acquired the land in dispute in the year 1931. It was by then vacant land. He was the head of seven different clans who used it communally partly as grazing land and partly for cultivation. Most of the clans had by 1960 vacated the land leaving only the Oketta Clan. When he died he was buried on that land. The appellants have their land to the West of the one in dispute. He repeated the averments contained in the plaint. P.W.2 Lam Cyril, testified that both the Palkono and Koch Clans own land within the area. The majority of the clad that occupied the land in the pat no longer live n the area. The respondent's father was the Parish Chief of the area. A number of the respondent's deceased family members, including his father, have been buried on the land in dispute since the year 1938. The land was occupied by Rwot Yosia

Ajan and on his death he was buried thereon. He too repeated the averments contained in the plaint.

[4] P.W.3 Nokrach Christopher, an immediate neighbour, testified that he born and raised on the land in dispute. The land was occupied by Rwot Yosia Ajan and on his death he was buried thereon. The land is predominantly occupied by the Koch and Palkano Clans. The appellant's land is to the West of the one in dispute. They trespassed onto the land in dispute by allocating it to divers people for cultivation. He too repeated the averments contained in the plaint. P.W.4 Okello Alfred Amuna, a former L.C.1 Chairman, testified that the land was occupied by Rwot Yosia Ajan and on his death he was buried thereon. He too repeated the averments contained in the plaint.

The appellant's evidence in the court below:

[5] In defence, D.W.1 Omoya Aditi testified that he was born in 1929 on the land in dispute and raised thereon by his late parents who upon their demise were buried thereon. The land belonged to his late father Omach Bangakal. The respondent's father never owned any land in the area. He repeated the averments contained in the written statement of defence. D.W.2 Olobo Vincent testified that he was born on the land in dispute and raised thereon by his late parents who upon their demise were buried thereon. He too repeated the averments contained in the written statement of defence.

[6] D.W.3 Lakot Emma the first appellant's wife testified that she married the 1st appellant in 1966 and has lived on the land in disputed since 1966 from where she has raised eleven children. Neither the respondent nor his father before him ever occupied or cultivated the land in dispute. She too repeated the averments contained in the written statement of defence. The 1st appellant, Ongwen Anthony, testified as D.W.4 and more or less repeated the averments contained in the written statement of defence. The 2nd respondent Ojwiya Tonny testified as

D.W.5, and he too more or less re-stated the averments contained in the written statement of defence.

Proceedings at the *locus in quo*:

[7] The court then visited the *locus in quo* on 22nd November, 2016 where it did not compile or keep a record of what transpired during that visit, save for three sketchy drawings of maps intended to illustrate its observations. Unfortunately none of the maps bears a key to explain the symbols used in the drawings.

Judgment of the court below:

[8] In his judgment delivered on 14th February, 2017, the trial Magistrate found that the parties share a common boundary, which the *Ker Kwaro* Acholi intended to demarcate. In Acholi tradition, separate portions of land are put to different use; there are separate parts for settlement, for cultivation, for hunting and for grazing. The one in dispute was acquired for cultivation. During the visit to the *locus in quo*, the court found that the area is predominantly occupied by two clans; the respondent's clan, Koch Clan and the appellants' clan, the Palkono Clan. It was evidence to show that the forefathers of the parties to the suit lived together in the past. It was the testimony of P.W.2 Lam Cyril that the respondent's father used to cultivate the land in dispute and upon his death the respondent re-located to an area that is 5 - 6 kms away from the land in dispute. The customary boundary between the respondent's and the appellants' land was a Kwolo tree seen by the court during the visit to the *locus in quo*. The respondent contended that South of that tree was the land his father used to cultivate while North of that tree was the land cultivated by the appellants. On that account judgment was entered in favour of the respondent. The court declared that the land South of the Kworo tree belonged to the respondent and that North of the tree belongs to the appellants. A permanent injunction was issued restraining the appellants from

undertaking any activities on land South of Kworo tree. The costs of the suit were awarded to the respondent.

The grounds of appeal:

[9] The appellants were dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he denied the 2nd appellant the opportunity to cross-examine the respondent and his witnesses but at the same time allowed the respondent and all his witnesses to cross-examine the appellants.
2. The learned trial Magistrate erred in law and fact when he required un-represented litigants to file witness statements, recorded on his instructions and by his staff from the court premises which were commissioned by a Commissioner for oaths in their absence.
3. The learned trial Magistrate erred in law and fact when he failed to admit exhibits presented to him by both parties yet he purported to rely on them in his judgment.
4. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence of ownership of land and the boundaries of the land from both parties when he held that their land was separated by a common boundary marked by a Kworo tree which is in the compound and home of the appellants.
5. The learned trial Magistrate erred in law and fact when he failed to properly conduct proceedings at the *locus in quo*, record his findings at the *locus in quo* and when in his judgment he wrongly relied on facts that had not been established.
6. The learned trial Magistrate erred in law and fact when he acted and conducted the trial in a biased manner to the prejudice of the appellants hence occasioning a miscarriage of justice.

Arguments of Counsel for the appellants:

[10] In their submissions, counsel for the appellants argued that denial by court of the opportunity for the appellants to cross-examine the respondent and his witnesses occasioned a miscarriage of justice. It is a misrepresentation of what transpired in court when the magistrate recorded that the appellants agreed that only one of them was to cross-examine the respondent and his witnesses. It was a violation of their right to a fair hearing. It was further a misdirection when the Magistrate ordered the appellants to file witness statements that were to serve as their examination in chief, yet they were unrepresented at the trial. Witnesses who had been called by the appellants but had not filed witness statements were erroneously rejected by the court and denied an opportunity to testify.

[11] They argued further that all the witness statements were prepared by a clerk to the trial Magistrate under the authority and direction of the trial Magistrate and have identical content. The trial Magistrate rejected exhibits presented by both parties during the trial yet referred to and relied on them in his judgment. The trial Magistrate misconstrued the evidence generally, especially the decision of the *Ker Kwaro*. He alluded to a demarcation by the *Ker Kwaro* which is not reflected in the documents referenced. He decreed the land to the respondent yet one of his findings of fact was that the land was being used by multiple clans. During proceedings at the *locus in quo*, the trial Magistrate did not compile any record, yet in his judgment he relied on observations he made thereat. He only permitted the respondent to demonstrate evidence at the locus in quo at the same time denying the appellants a similar opportunity. All this errors point to bias in favour of the respondent on the part of the trial Magistrate. They prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[12] In response counsel for the respondent submitted that the record shows the appellants indicated to court that it would only be the 1st appellant to cross-examine on their behalf. The 2nd appellant waived his right to cross-examine. The practice of using witness statements in lieu of examination in chief that began in the Commercial Division of the High Court has now permeated all courts at all levels and it has become established practice. It is a process intended to guarantee a speedy trial and therefore it was not wrong for the trial court to have opted for it. The appellants never objected to that mode of trial. This did not occasion a miscarriage of justice. The rest of the procedural and evidential errors highlighted by the appellants did not occasions a miscarriage of justice. The 4th ground of appeal is too general an should be struck out. None of the parties was given an opportunity to adduce evidence during the proceedings at the *locus in quo*. There is no evidence to show that at any stage of the trial the Magistrate offered preferential treatment to the respondent. The appeal should therefore be dismissed.

Duties of a first appellate court:

[13] It is the duty of this court as a first appellate court 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 (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[14] In exercise of its appellate jurisdiction, this 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 follow the trial magistrate's findings of fact if it appears either that he or she 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.

Errors in conducting the proceedings at the *locus in quo*

[15] I have formed the view that two of the grounds of appeal are dispositive of the appeal. The first of those two grounds is the fifth ground of appeal by which the trial Magistrate is faulted for having failed to conduct proceedings at the *locus in quo* in accordance with the stipulated procedure. The record of proceedings reveals that the trial Magistrate did not compile or keep a record of what transpired during that visit, save for three sketchy drawings of maps intended to illustrate his observations. Unfortunately none of the maps bears a key to explain the symbols used in the drawings. It is not indicated as to how the trial Magistrate came to the determination that his illustrations appearing in the drawings were material to the decision, since none of the parties seems to have participated in that exercise.

[16] Being a procedure undertaken pursuant to Order 18 rule 14 of *The Civil Procedure Rules,* proceedings at the *locus in quo* are an extension of what transpires in court. They are undertaken for purposes of inspection of a property or thing concerning which a question arises during the trial. For the inspection of immovable property, objects that cannot be brought conveniently to the court, or the scene of a particular occurrence, the court may hold a view at the *locus in quo*. According to section 138 (1) (b) of *The Magistrates Courts Act* and Order 18 rule 5 of *The Civil Procedure Rules*, evidence of a witness in a trial should

ordinarily be taken down in the form of a narrative, and this by implication includes proceedings at the *locus in quo*.

[17] Therefore at the *locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court (see *Karamat v. R [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; [1956] 40 Cr App R 13*).

[18] Evidentiary statements made under examination should be noted in the record to the extent they can be assumed to be of significance in the case. The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a *locus in quo*. The record in the instant case does not disclose if any witnesses were sworn and if any questions were asked by any of the parties at the *locus in quo* concerning what the court ultimately observed. As matters stand, the illustrations made are hanging, not backed by evidence recorded from witnesses. By coming up with observations and illustrations not generated from witness testimony, the trial Magistrate turned himself a witness in the case.

<u>The use of witness statements in civil trials.</u>

[19] The second of those grounds is the second ground of appeal by which the trial Magistrate is faulted for having required un-represented litigants to file witness statements, recorded on his instructions and by his staff from the court premises which were commissioned by a Commissioner for oaths in their absence. Still according to Order 18 rule 4 of *The Civil Procedure Rules*, "the evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge." This is not only meant to guarantee that evidence is received subject to the rules of evidence meant to ensure that witness testimony is probative, credible, and fairly

and efficiently presented, but it also enables the Judicial officer to evaluate the witness as the evidence unfolds; to assess the extent of the witness' actual recollection and knowledge. Although oral testimony during an examination in chief is time intensive, it therefore has significant adjudicative advantages.

[20] That notwithstanding, witness statements have become pervasive because Court time is increasingly precious, and more efficiency is required. The aims and results of adopting witness statements can be summarised as follows: the fair and expeditious disposal of proceedings and the saving of costs, elimination of surprise, promotion of fair settlements and avoidance of trial, identification of the real issues and elimination of unnecessary issues, encouragement for admissions of fact, reduction in pre-trial applications, shortening of evidence in chief, improvement in cross-examination and concentration of parties on the real issues. When witness statements are used in the place of oral examination in chief, Court time is concentrated on cross-examination rather than examination-in-chief.

[21] Although it is now common practice for witness statements to be exchanged following the scheduling conference, to stand as the witness's evidence-in-chief at trial, at the moment there are no specific guides on what witness statements may contain. Nevertheless it is generally expected that the statement is meant for the witness to give his or her own version of material facts in his or her own words. The style and flavour of the witness in the recounting of the story should be captured and reflected in the statement. The statement must, of course, be truthful. It should state facts within personal knowledge of the witness, and if not specify the source of the information or belief is not within the direct knowledge of the witness. At the very least, the witness must believe it to be true and so state. The statement must be easy to follow. It should set out all the facts upon which the witness relies and is able to speak. The best practice is to lay it out in numbered paragraphs thereby facilitating ease of reference. Inadmissible evidence, e.g. hearsay material, irrelevant or scandalous matter, should be

excluded from the statement. If the statement refers to supporting documents then the latter must be clearly identified, sufficiently spelling out the link between these exhibits and what is pleaded. Comparatively, The U.K *Chancery Division Guide, 2016* provides as follows;

19.1 CPR rule 32.4 describes a witness statement as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally."

19.2 The function of a witness statement is to set out in writing the evidence in chief of the maker of the statement. Accordingly witness statements should, so far as possible, be expressed in the witness's own words. This guideline applies unless the perception or recollection of the witness of the events in question is not in issue.

19.3 A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. It should therefore be confined to facts of which the witness can give evidence. It is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument, expressions of opinion or submissions about the issues, nor to make observations about the evidence of other witnesses. Witness statements should not deal with other matters merely because they may arise in the course of the trial.

19.4 Witness statements should be as concise as the circumstances of the case allow. They should be written in consecutively numbered paragraphs. They should present the evidence in an orderly and readily comprehensible manner. They must be signed by the witness, and contain a statement that he or she believes that the facts stated in his or her witness statement are true. They must indicate which of the statements made are made from the witness's own knowledge and which are made on information and belief, giving the source of the information or basis for the belief.

19.5 Inadmissible material should not be included. Irrelevant material should likewise not be included. Any party on whom a witness statement is served who objects to the relevance or admissibility of material contained in a witness statement should notify the other party of their objection within 28 days after service of the witness statement in question and

the parties concerned should attempt to resolve the matter as soon as possible. If it is not possible to resolve the matter, the party who objects should make an appropriate application, normally at the pre-trial review ("PTR"), if there is one, or otherwise at trial.

19.6 Witness statements must contain the truth, the whole truth and nothing but the truth on the issues covered. Great care must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence. It is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true. In addition, a professional adviser may be under an obligation to check where practicable the truth of facts stated in a witness statement if he or she is put on enquiry as to their truth. If a party discovers that a witness statement which they have served is incorrect they must inform the other parties immediately.

[22] Time and again during cross-examination it has emerged that the true recollection and words of the witness were contaminated by the reconstruction, language and advocacy of the lawyer who prepared the statement. The words of the advocate are too often substituted for the words and recollection of the witness, obscuring the evidence in the process. When preparing witness statements, advocates should avoid any suggestion of coaching or collusion. Court should therefore ensure before relying on such a statement that it contains statements of fact that are relevant (to the disputed issues); that are admissible (should not include statements of opinion and submission); and authentic (expressed in the witness' own words not the advocate's words.

[23] Before a witness statement is adopted in place of an examination in chief, the witness should be given opportunity to;- (a) correct any mistakes in the statement, (b) clarify points made already in the statement and (c) update evidence since the statement was made. It is the duty of opposite counsel at that point to object to inadmissible content in the opposing party's witness statement before it is adopted by court as the examination in chief of a particular witness.

Where the statement has anexures to it, their admissibility as exhibits has to be addressed before the witness statement is adopted in place of an examination in chief. It is not uncommon for much of what the witness has said or written to be missing from the final version of the statement. This does not mean that the witness statement has been be materially changed, but that in the end the witness has not expressed himself as he had wished.

[24] Very often in witness statements, the witness's own language is not used, leading to distorted accounts, commentary on documents attached, argument, submissions and expressions of opinion. Witnesses should not be allowed by way of such statements to give evidence of which they do not have direct knowledge, by reference to documents they have read. Nor would they by way of such statements be permitted to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. Witness statements of that nature are an abuse and run the danger of perverting justice. Such statements should be struck out altogether if they are fundamentally flawed or the abusive parts should be struck out.

[25] Challenges of this nature have been encountered in other jurisdictions. For example in *J.D. Wetherspoon plc v. Harris and others [2013] EWHC 1088 (Ch)*, Sir Terence Etherton, the Chancellor of the High Court, observed that the vast majority of a witness statement served by certain of the defendants contained a recitation of facts based on the documents, commentary on those documents, argument, submissions and expressions of opinion; and that in all those respects the witness statement was an abuse. In *Estera Trust (Jersey) Ltd and another v. Singh and others [2018] EWHC 1715 (Ch)*, Mr Justice Fancourt made some telling observations about the usefulness of witness statements prepared for the case when he commented that “true voices” of the witnesses were “notably lacking from the witness statements.” He stated as follows;

> It is clear to me that they are the products of careful reconstruction of events and states of mind, based on a meticulous examination of all the documents in the case by the large teams of lawyers involved.

> The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements. As was demonstrated repeatedly in cross-examination, the statements mostly present considered argument and assertion in the guise of factual evidence and often with a slant that favours the case of the witness. In many instances, it emerged that this was without any real recollection on the part of the witness of the events or circumstances being described, but with a belief that the witness "would have" done or said something for superficially plausible reasons that are now advanced with the benefit of hindsight..... the process of creating the written statements has infected or distorted the true evidence that the witness was capable of giving. The written statement then, in turn, affects the witness's memory of events when he or she comes to court to give oral evidence, having studied carefully his or her written statement in the days before doing so. It took skilful and painstaking work by counsel to remove the varnish that had been applied and identify what the witness could fairly recall and that of which he or she had no real memory at all.

[26] In *Starbucks (HK) Ltd and Another v. British Sky Broadcasting Group Plc and Others [2015] 1 WLR 2628; [2015] 3 All ER 469*, the Judge lamented; "the statements contained information that, as she readily acknowledged during cross-examination, was not within her own knowledge, but without making this clear or stating the source of the information. This is a breach inevitably causes unnecessary difficulties for the witness when cross-examined.....The fault lies with the solicitors who drafted the witness statements....This slipshod approach to the preparation of witness statements must cease. Similarly in *Duncan Harrop v. Brighton & Sussex University Hospitals NHS Trust [2018] EWHC 1063 (QB)*, the defendant's witness statements were found to have omitted important details. The High Court held that the failure to set out the full story was unreasonable.

[27] Experience suggests that the best evidence is often obtained by the traditional examination-in-chief, when witnesses are giving their evidence in their own words and give a more genuine version of their recollection. Evidence elicited

orally in the courtroom surroundings is often more reliable than that which a witness is prepared to sign up to in a pre-trial written statement. Witness statements frequently stray far beyond any evidence the witness would in fact give if asked proper questions in chief. Moreover, developing statements through numerous drafts, getting the witness to retell the story over and over, is a process which may corrupt memory and render the final product less reliable than the first "unvarnished" recollection.

[28] By reason of limitations such as those noted above, parties, especially those that are un-represented, should not automatically be ordered to file and serve witness statements in all trials. Although witness statements have become pervasive, they are undesirable where there are significant factual disputes and credibility issues. This is because witness statements are prone to containing inadmissible content, may not be reflective of the witness' statement of fact but rather eloquent and compelling advocacy of counsel, and thus incapable of withstand test of cross-examination, and so on. There should be consent by all the parties on the adoption of witnesses statements.

[29] It is beyond question that when a witness statement is properly drafted, it is of no less value to the party relying on it since the witness can fill in the gaps, explain the documents attached and tell the story behind the dispute. Their statements provide the platform for their oral testimony at court and is an important reference point for anyone unaccustomed to, and in all likelihood nervous about, giving live evidence. However, the observation made in *Estera Trust (Jersey) Ltd and another v. Singh and others,* applies to the witness statement in the instant case.

[30] The witness statements were drafted with interminable diffuseness and conspicuous lack of precision. Based on the fact that all their content and style is identical, they were prepared in an obvious "cut-and-paste" mode without an inkling if individuality to them. None of them reflects the true voice of the witnesses, and the extent of their real recollection. When a witness’s recollection

under cross-examination is at odds with the witness statement, this might be evidence showing that the process of creating the witness statements infected or distorted the true evidence that the witness was capable of giving, the result is a miscarriage of justice. Poorly prepared witness statements have the potential of hindering the effectiveness and fairness of the trial. The ones used in this case are entirely worthless witness statements that should never have been relied on at the trial.

[31] Furthermore, Regulation 18 of *The Advocates (Professional Conduct) Regulations*, forbids an advocate from coaching or permitting a person to be coached who is being called by him or her to give evidence in court and from calling a person to give evidence whom he or she knows or has a reasonable suspicion has been coached. This rule not only forbids lawyers from coaching witnesses, but also prohibits anything that strays into an orchestration of the evidence to be given. This means that a witness should be giving their own evidence, in their own words, as opposed to being influenced by what anyone else has said to them. Influencing a witness, when taking a statement from that witness, with regard to the contents of their statement would constitute a breach of Regulation 18 of *The Advocates (Professional Conduct) Regulations*.

[32] In light of that restriction, it is part of the court's duty to ensure, so far as lies within its power, that any witness statements taken and presented before it were taken either by an advocate or, if for some reason that is not practicable, by somebody who can be relied upon to exercise the same standard as should apply if the statements were taken by an advocate, with conspicuous regard to the above principles in mind, conscious of the risk of corrupting memory or coaching the witness through the process. In the instant case, the court clerk assigned by the trial Magistrate to prepare the witness statement was evidently oblivious of those obligations. In find on basis of the two grounds that the trial was so fundamentally flawed that the outcome cannot stand. It is for that reason

that I find consideration of the rest of the grounds, going to the merits of the decision, to be unnecessary and inconsequential.

[33] The *Uganda Code of Judicial Conduct, 2003* requires judicial officers to remain fair and impartial and to maintain the appearance of fairness and impartiality, but provides little direct guidance as to how active or passive a judicial officer should be in handling cases involving unrepresented litigants. Be that as it may, it is not a violation of this principle for a judicial officer to make reasonable accommodations to ensure that unrepresented litigants secure the opportunity to have their matters fairly heard. The trial magistrate appears not to have made such an effort. Instead of making the process less mystifying for self-represented litigants, the trial Magistrate adopted a procedure that may easily be construed as constituting harsh treatment meted out to them. Instead of going out of his way to remove some of the mystery from a system that is supposed to serve its citizens, the trial Magistrate opted to baffle them. By imposing the use of witness statements upon the un-represented parties, the trial Magistrate denied them a reasonable opportunity to have their respective cases fairly presented and heard.

[34] Connected to this is the decision of the trial Magistrate not to record evidence of witnesses who had not filed witnesses statements. The parties to a suit in an adversarial system have the freedom to choose what evidence to present to the court. A decision of court barring a witness called by either party therefore has fair trial implications. The right to a fair trial entails the right to offer the testimony of witnesses, to compel their attendance if necessary, the right to present the party's version of the facts to the court so that it may decide where the truth lies.

[35] To ensure that justice is done, it is imperative to the function of courts that all necessary witnesses be available for the production of evidence needed either by either party. The ends of justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of

the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

[36] Order 5 rule 2, Order 6 rule 2, Order 8 rule 2 (2) and Order 9 rule 2 (a) of *The Civil Procedure Rules* require the filing of a list of witnesses whose presence the parties desire to procure and examine, with or without the assistance of the Court. If the party to a proceeding has listed a witness but does not desire the assistance of the Court for procuring the presence of that witness, obviously the party can produce such witness on the date of hearing and the Court cannot decline to examine the witness unless the Court proposes to act under the section 117 of *The Evidence Act*, which enables the Court to disqualify a person from testifying where it finds that such person is prevented from understanding the questions put to him or her, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

[37] Alternatively, under the rules of evidence, the parties do not have an unfettered right to offer testimony that is irrelevant or incompetent (Part II of *The Evidence Act*), privileged (sections 119 - 128 of *The Evidence Act*), or otherwise inadmissible. The Court therefore may also, for reasons recorded in writing, refuse to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the case or that the party offering such witness(es) is doing so on frivolous grounds or with a view to delay the proceeding. The principle that undergirds the parties' right to present evidence is thus also the source of essential limitations on the right. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony.

[38] Under the general duty to ensure fairness of a trial, it is evident that judicial officers have the discretion to exclude witnesses but the suggestion that courts have absolute power to preclude the testimony of a surprise witness is extreme

and unacceptable. Preclusion may be justified where the witness is found to be incompetent or where their evidence is found to be irrelevant, unnecessarily repetitive beyond that which is required to corroborate other evidence, or likely to compromise the speedy disposal of the case.

[39] In the instant case, the trial court did not disqualify the appellant's witnesses from testifying on grounds of having found that they were prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. The court did not disqualify them from testifying on grounds of having found that their evidence was not material for the decision of the case or that the appellant called them based on frivolous grounds or with a view to delaying the trial. It disqualified them simply because they had not filed witness statements as ordered by court. This was not a lawful justification for their disqualification. Disqualifying witness testimony is a fundamental decision to be made only after careful consideration.

[40] While a trial court is afforded wide latitude to exclude evidence that is of marginal value or repetitive, or which poses a risk of issue confusion, this cannot be done whimsically. The sum total of all these flaws is that this was no trial at all, it was a mistrial.

Orders of re-trial.

[41] The court is mindful of the fact that a re-trial involves the re-calling of witnesses some of whom may have died and others may not be easily traceable. The memory of those witnesses may have faded or lapsed and other may have lost interest in the matter. The exhibits may have been tempered with, lost or misplaced and that re-trials also increase case back log in courts. An order for retrial is an exceptional measure to which resort must necessarily be limited.

[42] A trial *de novo* is usually ordered by an appellate court when the original trial fails to make a determination in a manner dictated by law. A retrial should not be ordered unless the following conditions are met; (i) that the original trial was null or defective; (ii) that the interests of justice require it; (iii) that the witnesses who had testified are readily available to do so again should a retrial be ordered; and (iv) no injustice will be occasioned to the other party if an order for retrial is made. These conditions are conjunctive and not disjunctive. The context of each retrial is unique, and its impact can only be addressed by taking into account this individual context. I find that this is a case where ordering a re-trial is inevitable.

Order:

[43] In the final result, the appeal succeeds. The judgment of the court below is set aside. The trial is to be conducted *de novo* by another Magistrate of competent jurisdiction and each party is to bear their costs of this appeal.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : The Legal Aid Project of the Uganda Law Society.

For the respondent : M/s Conrad Oroya and Co. Advocates.