THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0015-2009
(ARISING FROM PALLISA CIVIL SUIT NO. 1/2008)

ODOMEL G. WILLIAM :::::::::::::::::::::::::: APPELLANT
VERSUS
OTIM JOHN :::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The appellant was dissatisfied with the judgment and orders of the learned trial Magistrate in Pallisa CS.1/2008.

He raised four grounds of appeal namely:

1. That the decision of the learned trial Magistrate was against the weight of the evidence.
2. That the learned trial Magistrate did not visit the locus.
3. That the learned trial Magistrate erred in law and fact when he declared that the whole five (5) acres of land belong to the plaintiff.
4. That the decision occasioned substantial miscarriage of justice.

This being a first appellate court, it has a duty to re-evaluate all the evidence and reach its own conclusions, as per the holding in ***Pandya v. R (1957) EA 336***.

I have gone through the evidence on the file. The plaintiff sued for recovery of land, estimated to be 5 acres. Plaintiff called four witnesses whose evidence

basically was that defendant as a caretaker to his father's estate, had grabbed three acres out of 5 acres entrusted to him. He relied on PE.1. an English version of a handover report in which it is shown that defendant handed over land comprising of five gardens to him before the clan.

The defendant on the other hand through six witnesses showed in evidence that he handed over two acres and that was all the plaintiff is entitled to out of his late father's estate (land).
The court did not visit the locus but relaying on evidence in court, found for the plaintiff.

In their submissions the appellant on ground 1 argued that Respondent was given three acres not five as found by the learned trial Magistrate. However Respondent avers in submission that this was not correct since his grandmother died in 1985 after receiving her share. The Respondent insists that appellant was only a caretaker and should not claim what is not his.

On this ground, the learned trial Magistrate in his judgment relied on evidence in court and on EXP.I. I note from evidence that Exp.I was in Ateso and translated. The translated version however shows that the clan was taken around "5 gardens" and agreed that "**Mr. Otim Johnson** can give his uncle **Odomel** a portion at the end of the gardens equivalent to 1 garden as a token for keeping it."
It has therefore to be seen that this evidence which was heavily relied on by the learned trial Magistrate was inconclusive as to the size and directions of the land Does " a garden" translate to "an acre"? Are 5 gardens equivalent to 5 acres? This does not come out from the judgment. It is also not explained from the learned

trial Magistrate's judgment whether it is out of the 5 gardens that the one garden was given and whether these areas are not the ones the parties are contesting. It is therefore my finding that the above evidence needed a lot more scrutiny which the learned trial Magistrate did not do. The findings therefore on it are not conclusive in view of other unexplained probabilities.
Ground 1 succeeds.

On ground 2- which is to the effect that the learned trial Magistrate did not visit the locus thereby occasioning a miscarriage of justice.

The law on visits to the locus has been adequately discussed in a number of decided cases. This court in the case of ***Mukhodha Twaha v. Wendo Christopher High Court (Mbale) CA.142/2012***, held that:

> "*decided cases from Superior courts of record have guided that visiting the locus, in land matters is key to the trial and failure so to do in certain circumstances may render the proceedings a nullity*."

Reference in that case was made to the case of ***James Nsibambi v. Lovinsa Nankya (1980) HCB 81*** where **Hon. J. Odoki** lays down principles which courts must adhere to once a visit to the locus is conducted. It is also trite law that this visit is not a mandatory requirement in all cases, but is a requirement for all deserving cases. These are the cases whereby witnesses give evidence in court describing and referring to certain features like boundaries, graves, mark stones, peculiar neighbourhoods like rivers, streams, mountains, old structures of homesteads etc which court needs to physically see and observe in order to internalize that evidence. This point was emphasized persuasively in ***Safina***

Bakulimya & Anor. V. Yusufu Musa Wamala CA 68/2007 by **Hon. J. Mulyagonja Kakooza** where she observed that:

> "*court moves to the locus only in deserving cases to <u>verify</u> evidence that has been given in court…..*"

In this appeal it has been argued that the learned trial Magistrate omitted this very vital step. It was in my view very necessary for court to visit locus in a case of this nature, where the parties are disputing acreage and were notably all close relatives. The matters which were described in court were more in imagery than mathematics to wit "gardens" instead of acres; "graves"; "land belonging to my "father" "Grandfather", "grandmother," etc. Such evidence and especially the evidence contained in Exp.I needed verification at the locus. The argument by Respondent that locus was not necessary is therefore erroneous. This court therefore finds that by failing to visit the locus the learned trial Magistrate did not reach correct conclusions, and hence his decision occasioned a miscarriage of justice. This ground is therefore proved.

Grounds 3 and 4 will automatically be found proved an account of the findings under ground 1 and ground 2.

I do find that the learned trial Magistrate in the lower court reached a wrong conclusion on the evidence and facts by failing to properly weight the evidence, and also in omitting to visit the locus.

This appeal for reasons stated above succeeds on all grounds as stated.

This is a proper case where a retrial ought to be ordered. I do set aside the judgment and orders of the lower court and order for an immediate retrial of this

case before another competent Magistrate at Pallisa. The peculiar circumstances of this case warrant each party to bear their own costs. I so order.

Henry I. Kawesa

JUDGE

10.11.2016