



The trial Magistrate found in favour of the Respondent and dismissed the Appellant's claim with costs. The Appellant being dissatisfied with the trial Magistrate's findings lodged the instant appeal whose grounds are;

- 5 1. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on Court record and hence came to an erroneous decision otherwise he would have found in favour of the Appellant which error occasioned a gross miscarriage of justice to the Appellant.
- 10 2. That the learned trial Magistrate erred in law and fact when he failed to have observations at the locus-in-quo on Court record yet he relied on them in his judgment which error occasioned a gross miscarriage of justice to the Appellant.
3. That the learned trial Magistrate erred in law and fact when he irregularly and grossly conducted defective locus-in-quo proceedings which error occasioned a gross miscarriage of justice to the Appellant.

**Representation:**

15 M/s Komunda & Co. Advocates represented the Appellant and M/s Sibendire, Tayebwa & Co. Advocates appeared for the Respondent. By consent both parties filed written submissions.

The Grounds of appeal are discussed separately.

**Resolution of the Grounds:**

20 **Ground 1: That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on Court record and hence came to an erroneous decision otherwise he would have found in favour of the Appellant which error occasioned a gross miscarriage of justice to the Appellant.**

25 Counsel for the Appellant submitted that all the Appellant's witnesses gave evidence that was supported by documentary evidence. That the Appellant told Court that he got the suit land on the 4/5/2010 when he was given an offer in the presence of the LCI Chair person, which he accepted on the 16/4/2010 and also paid Shs. 150,000/=. This evidence was corroborated by PW2 Muheka Emmanuel who added that the Respondent never made any acceptance nor did he pay anything. Thus, the Respondent had his own piece of land since he was not given  
30 any offer.

Further, that the Respondent did not produce any proof of ownership of his land save for DW2 Masereka Kisiyore stating that the land belonged to the Respondent who got it from the Village Chief and he was present. However, no documents were executed and the Respondent did not pay any money because it was family land. That DW2 told lies to Court  
35 when he stated that the Appellant was given another piece of land and not the suit land and yet he stated that he was not present when the Appellant was being given land but was merely told by Yolet Muheka.

Counsel for the Appellant concluded that the trial Magistrate dismissed the Appellant's case without plausible reason as the entire evidence on Court record was all in favour of the Appellant.

5 Counsel for the Respondent on the other hand submitted that it is now settled that this type of ground cannot be handled as a ground of appeal because it is not precise and prayed it be struck out for being argumentative. He cited the case of **Mwaka Benjamin versus Mukirania, Fort Portal High Court Civil Appeal No. 0026 of 2015** where in regard to a similar ground it was held that;

10 *"In my opinion I find this ground to be too broad, inconcise and in contravention with the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules. The Appellant will not take this Court on a fishing expedition. This ground is accordingly struck out."*

15 However, without prejudice Counsel for the Respondent went on to submit that the alleged documentary evidence of the Appellant was manufactured by him and the so called offer did not contain the UGX 150,000/= and nor was there any acknowledgement of the said sum. That it is the usual practice with offers to state conditions and if there is payment of any money then a receipt is issued which is not the case in the instant case.

20 Counsel for the Respondent concluded that an offer was not a prerequisite for one to hold land and the Appellant and his witnesses in an attempt to grab one of the two plots owned by the Respondent concocted the offer to deny him ownership of the same which was also the finding of the trial Magistrate.

Counsel for the Respondent added that it was not disputed that the Respondent had been in possession of the entire 100ftx100ft from 2010 without any complaint and even developed the same. That it was also never disputed that the Appellant wanted to sell one of the plots and when the Respondent objected he was arrested.

25 Counsel for the Appellant in rejoinder submitted that the submissions of Counsel in regard to this ground are not provided for under the law and it is the duty of this Court as a first Appellate Court to re-appraise all the evidence on record to reach its own conclusion bearing in mind that it neither heard or saw the witnesses during the hearing of the case to assess their demeanour as per the case of **Selle versus Associated Motor Boat Ltd [1968] E.A 123**.  
30 Therefore it would be erroneous to deny this Court its cardinal duty to re-evaluate the evidence of the lower Court and the case as cited by Counsel for the Respondent should not be followed.

35 He added that the issue of the receipt was never put to the Appellant in cross examination and the Respondent cannot blame the Appellant for producing an offer and was not cross examined as to whether a receipt was issued upon payment. (See: **Habre International Co. Ltd versus Ibrahim Alarakia Kassim & Others, S.C.C.A No. 4 of 1999**).

Further, that at this stage on appeal Counsel for the Respondent cannot put questions to the Appellant when he had the opportunity to do so during cross-examination. And there was no

proof adduced in Court to show that the Appellant concocted the offer or there was any fraud committed by the Appellant.

This Court has addressed submissions of both sides. The duty of the first Appellate Court was outlined by Hon. Justice A. Karokora (J.S.C as he then was) in the case of **Sanyu Lwanga Musoke versus Sam Galiwanga, SCCA No. 48/1995** where he held that;

*“...it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their veracity...”*

10 In the instant case the Appellant claimed that the Respondent had trespassed on the suit land. In the case of **Justine E.M Lutaaya versus Sterling Civil Engineering Ltd, Civil Appeal No.11 of 2002**, it was stated that;

*“Trespass occurs when a person makes unauthorized entry upon land, and thereby interferes, or pretends to interfere, with another person’s lawful possession of that land.”*

15 The Respondent told Court that he developed the suit land with a house and was using part of it as a compound and he had never been challenged since 2010 until 2014 when he dug a foundation and poured building materials only to be arrested that he had trespassed on the Appellant’s land. The Appellant on the other hand alleged that the trespass on the suit land occurred in 2015.

20 The Appellant also stated that he got the land in 2010 and was granted an offer in 2011 which he accepted and paid UGX 150,000/= whereas the Respondent said he did not pay any money for the land because it was family land.

The Appellant’s witnesses all maintained that no offer was given to the Respondent and so did DW2 who told Court that on the same day as the Respondent he got land because it was  
25 family land that was being divided and no documentation was issued.

DW2 told Court that the Appellant got another piece of land and not the suit land and that those who got documents got them later and not at the time the land was being given out.

The Appellant stated that the suit land had Ruyenje as boundary marks and the Respondent had poured building materials on the land but did not state that the boundary had been  
30 uprooted.

In my view if the parties are neighbours and all of them allege that the suit land has Ruyenje trees as a fence around it, then the Respondent in this case should have uprooted the same for him to be able to access the Appellant’s land as a trespasser which is not the case.

The Trial Magistrate in his judgment and I quote also stated that;

35 ***“The Police did not find any boundaries planted in 2010 uprooted and that is why the Defendant was not charged in Courts of law.”***

From my perusal of the lower Court record, I did not read anywhere the Appellant said that the Respondent uprooted the boundary marks therefore, in my view the Appellant failed to prove his case on a balance of probability. How then was the Respondent able to pour building materials on the Appellant's land if the suit land is fenced and each party claims their land to be fenced. What happened to the boundary or the alleged fence was not explained to the lower Court by the Appellant. On page 4 of the lower Court record, PW1, Uzia Bweya the Plaintiff (now the Appellant) during cross-examination stated:

***“By the time I was offered the land, the Defendant was not present.”***

However, on the same page 4, last paragraph, the same Appellant changed like a chameleon to state;

***“The Defendant was present but did not sign and his wife was not present.”***

This Court cannot trust and believe the Appellant who states one fact and then within the same breath changes. And whereas PW2, Muheka Emmanuel Baluku testified on page 5 of the proceedings that the Defendant's plot (now Respondent) is next to the suit land is 60ft x 100ft and he got it by inheritance, and he still stays there. PW3, Mbambu Johnson on page 6 of the proceedings testified that he did not know whether the Defendant (now Respondent) borders the suit land, and on page 7, PW3 concluded that he did not know where the Defendant stays. PW2 and PW3 in support of the Appellant therefore gave contradictory testimonies and those were grave contradictions which weakened Appellant's case.

The Respondent's case on the other hand was consistent as seen from pages 9 to 12 of the proceedings. The witnesses of the Respondent, DW2, Masereka Kisiyore was categorically that Baghenzi Zimonia acquired the plot in question from Batungi clan and that he did not pay anything because it was family land being divided. Similar testimony was given by DW3, Kiiza Wilson who stated on Page 11 as follows:

***“The land is owned by the Defendant, he acquired the same by sharing among the family. This is the family of Batungi family headed by Muhereka Justus and it was divided in 2010 but I do not remember the months and date...”***

I find the evidence of the Respondent consistent with that of his witnesses as opposed to contradictions noted in Appellant's case. And in the absence of any Ruyenje fence planted for the Appellant which was uprooted, then I cannot fault the trial Magistrate in his findings in favour of Respondent. The trial Magistrate properly evaluated the evidence on record and so Ground 1 of the appeal is hereby rejected.

**Ground 2: That the learned trial Magistrate erred in law and fact when he failed to have observations at the locus-in-quo on Court record yet he relied on them in his judgment which error occasioned a gross miscarriage of justice to the Appellant.**

Counsel for the Appellant submitted that there was only a sketch map on record and names of people who attended locus on the 5/07/2017 but no proceedings of what transpired as is provided for under the law under Practice Direction No. 1/2007 Guideline 3 and the case of

**Yeseri Waibi versus Elisa Lusi Byandala [1982] HCB 28 at 29** where it was held inter alia that;

*“The usual practice of visits to locus-in-quo was to check the evidence given by the witnesses.”*

5 Counsel for the Appellant added that from the record it is evident that the parties were not given an opportunity to present their case as had been relayed in Court nor were they given an opportunity to examine each other or their witnesses. That in the circumstances there is nothing to show that locus was visited save for a sketch map and a list of those that attended but no proceedings whatsoever. Thus, the trial Magistrate should be faulted for relying on  
10 observations at locus which were not part of the record of proceedings as is required by law.

Counsel for the Respondent on the other hand submitted that Counsel for the Appellant was overstretching the law, that it is not a must that examination in Chief or cross examination must happen at locus. That it depends on the circumstances of each case and it is trite law that locus-in-quo is an extension proceedings of Court whose aim is to avail the parties chance to  
15 demonstrate on ground their evidence.

He quoted the case of **Turyahikayo James and 2 Others versus Ruremire Denis, Kabale High Court Civil Appeal No. 83 of 2009**, where it was held that; irregularity in receiving evidence at the locus-in-quo does not per se render the proceedings a nullity provided that the Court can make an effective, practicable and workable decision that resolves the conflict on  
20 the merits of the case.

I have considered the submissions on both sides under Ground 2 of Appeal. In the first instance, it is not mandatory in all land cases for Court to visit locus in quo. Practice Direction No. 1 of 2007 by the Chief Justice is that, during the hearing of the land disputes, the Court should take interest in visiting the locus in quo, and provides for what happens  
25 while there.

Secondly, the locus in quo is to enable parties supplement and/or substantiate on what parties stated in Court, for example by showing graves of their departed ones, by showing unique features on the land which have been given in evidence in Court such as valleys, streams, hills, structures, trees and any boundary marks, e.t.c.

30 Thirdly, if there are any witnesses who did not testify in Court either due to old age, physical inability or being out of the country by the time of hearing in Court, then they can testify at the locus in quo and are subject to cross-examination like other witnesses who testified in Court. The proceedings at the locus in quo are therefore to supplement on what transpired in Court and not to hear the case afresh. There would be no time for that. However, it is  
35 pertinent that whatever transpires at the locus is quo is to be recorded as part of the proceedings in the case.

In the present case, whereas it was necessary to see what was on the ground, failure by the trial Magistrate to record all the proceedings at the locus in quo was not proper. Nevertheless, the case could be resolved upon evaluation of what the witnesses testified in Court which is

what has been considered under Ground 1 of appeal. Since there was other evidence relied on by the trial Magistrate in reaching the decision he did in favour of the Respondent, then I find no miscarriage of justice occasioned to the Appellant.

Ground 3 of the appeal is also about locus in quo which has been covered.

- 5 In conclusion therefore, and in view of what has been outlined, I am unable to fault the trial Magistrate on the conclusions reached. The appeal is accordingly dismissed with costs.

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**WILSON MASALU MUSENE**

10 **JUDGE**

**13/09/2018**