

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0021 OF 2016

(Arising from Kitgum Grade One Magistrates Court Civil Suit No. 14 of 2014)

- 5 1. **OGWANG DONASIANO** }
2. **OKWERA MARTINE (AMUKU)** }
3. **OCAN MARCILIANO** }
4. **OJERA ALEX** }
5. **TABO BOSCO** } **APPELLANTS**
10 6. **KILAMA JOHN** }
7. **OYET MICHAEL (OPIO)** }
8. **APIO NARASISA** }
9. **FAFIYANO ANYING (LUNOO)** }
15 10. **OLANYA RAY (OTWALA)** }

VERSUS

REGINA OKOT **RESPONDENT**

20 **Before: Hon Justice Stephen Mubiru.**

JUDGMENT

The respondent sued the appellants jointly and severally for a declaration that she is the owner of
25 56 hectares of land under customary tenure, situated at Koroch village, Atut Parish, Wol sub-
county in Agago District. She sought orders of eviction, a permanent injunction and an award of
general and special damages for trespass to land. Her claim was that she inherited the land in
dispute from her late husband, Okot Elizeo in 1991 who in turn had acquired it as a gift *inter*
vivos from his late paternal uncle, Sirayo Okwang who opened it as virgin land. Having married
30 her late husband during 1968, they moved and settled onto the land in dispute in 1970 and
utilised it peacefully until the year 2007 when the first eight appellants began their encroachment
onto the land by undertaking cultivation on a massive scale. The last two appellants followed suit
during the year 2013, proceeding further to construct a hut thereon. She sued the first appellant
before the L.C.II Court which decided in her favour in 2009 and the first appellant's appeal to the
35 L.C.III Court was dismissed but he refused to vacate the land.

In their joint written statement of defence, the first eight appellants contended that they have lived on the land in dispute since 1956 and never left it save for the duration of the period of insecurity. The last two appellants contended they have lived on the land in dispute since 1965 and the tenth appellant was born on that land. They therefore refuted the respondent's claim that they were trespassers on her land, since she occupies her and they occupy theirs.

The appellants having not turned up in court on the day the suit was fixed for hearing and the court being satisfied that they were duly served but had not furnished any explanation for their absence, allowed the respondent to proceed ex-parte against them.

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In her testimony as P.W.1, the respondent stated that the appellants are her in-laws. She settled on the land in dispute when she married her late husband in 1968 and utilised it together with him until his death in 1991 when she took over control and possession of the land. In 2007, the first appellant left the I.D.P Camp and encroached on the land. He was followed shortly after by the seven other appellants and finally the last two during the year 2013. they undertook cultivation on the land on a massive scale, cut down trees for charcoal and the last appellant has since constructed and occupied three grass thatched huts. P.W.2, Odoch Michael, the respondent's brother in law, testified that the appellant inherited the land in dispute from her deceased husband, Okot Elijao. During the year 2007, the appellants encroached on the land and began cultivating it. The L.C.II decided against them but they refused to vacate the land.

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The court then inspected the *locus in quo* and recorded evidence from a one Oyamo David who testified that the land in dispute belongs to the respondent. Another witness, Obonyo Jimmy testified to the same effect. Another witness Milton Banya too testified that the land in dispute belongs to the second respondent. The last witness, Marasisa Akidi testified that the land in dispute belongs to the first appellant. The court then drew a sketch map of the key features observed on the land in dispute and its neighbourhood.

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In her judgment, the trial magistrate found that on basis of the evidence before him, the respondent was the rightful owner of the land in dispute under customary tenure. The appellants are trespassers on the land having undertaken activities thereon unlawfully without the consent

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of the respondent following the disbanding of the I.D.P Cap. She therefore declared the respondent the rightful owners of the land in dispute, issued a permanent injunction against the appellants, awarded the respondent damages for trespass to land with each of the appellants directed to pay her the sum of shs. 800,000/= and the costs of the suit.

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Being dissatisfied with the decision, the appellants appealed to this court on the following grounds;

1. The learned trial Magistrate erred in law and fact when she failed to afford the appellants an opportunity to file a defence.
- 10 2. The learned trial Magistrate erred in law and fact when she ignored the presence of the appellants in court and proceeded ex parte.
3. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence and thus reached a wrong conclusion
4. The learned trial Magistrate erred in law and fact when she did not accord the appellants
15 due facilities to present their case and thus reached a biased judgement.
5. The learned trial magistrate erred in law and fact when she passed judgment basing on the inconsistent testimonies of the respondent's witnesses.

When the appeal came for hearing on 5th September, 2018 the respondent and her counsel was in
20 court. Only the third and ten appellants were in court, but their counsel was not. They stated that their counsel was on the way to court but was running late. The court directed that counsel for the appellants should file and serve his written submissions by 14th September, 2018 and counsel for the respondent was to file his in reply by 18th September, 2018, and the judgment was fixed for delivery on 20th September, 2018. Counsel for the respondent complied with the directions
25 but that for the appellants filed his submissions a few minutes before delivery of this judgment.

In their written submissions, counsel for the appellants M/s Makmot-Kibwanga and Company Advocates argued that the trial court denied the appellants an opportunity to prosecute their defence. The trial magistrate filed the requirement of mandatory mediation following the filing
30 of the written statement of defence and instead proceeded to hear the suit on 12th February, 2015 the day to which the suit had been adjourned on 4th January, 2015 in the presence of the 3rd and

10th appellants following its decision to extended the time within which the appellants were granted leave to file a defence to the suit. The trial magistrate did not issue any hearing notices for that and subsequent dates, never refereed the suit to mediation and did not conduct a scheduling conference. The trial court erroneously proceeded ex-parte against the appellants
5 when they had filed a defence to the suit. This violated the right of the appellants to be heard. The magistrate further failed to undertake a proper evaluation of the respondent's evidence.

In his written submissions, Counsel for the respondent Mr. Okot Edward David argued that the appeal was filed out of time and is therefore incompetent. The judgment of the court below was
10 delivered on 17th May, 2016 yet the memorandum of appeal was filed nearly two months later on 7th July, 2016. The appeal was filed 51 days after the judgment yet the law required that it should be filed within 30 days. Although the appellant were served with summons to file a defence, they did not file any within the stipulated time. On 4th January, 2015 the day the suit was fixed for hearing, only the 3rd and 10th appellants turned up in court and the court on its own motion
15 extended time within which they were directed to file their defence, by 26th February, 2015. Indeed they filed it on 10th February, 2015. The suit was fixed for hearing on 8th September, 2015 but none of the appellants was in court on that day. The court then allowed the respondent to proceed ex-parte against them. The evidence both in court and at the *locus in quo* supports the findings and orders made by court and therefore the appeal should be dismissed with costs.

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This being a first appeal, this court is under an obligation 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 in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court
25 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.

It is necessary to begin with the third ground of appeal presented in this appeal. I find that it is too general and offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules*
30 which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and

under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts
5 frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621; Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). I
10 accordingly strike out the third ground of appeal presented in this appeal.

As regards the second and fourth grounds of appeal, I have perused the record and found that Although the appellants were served with summons to file a defence, they did not file any within the stipulated time. On 4th January, 2015 the day the suit was fixed for hearing, only the 3rd and
15 10th appellants turned up in court and the court on its own motion extended time within which they were directed to file their defence, by 26th February, 2015 and indeed they filed it on 10th February, 2015. They never turned up in court again despite service of hearing notices on them, prompting the trial court, and rightly so, to grant the respondent leave to proceed *ex parte*.

20 On the other hand, according to Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the summons or notice of hearing was duly served, it may proceed *ex parte*. In the instant case the court record indicates that the third and tenth respondents were in court on On 4th January, 2015 when the matter was adjourned to 10th February, 2015. There was no
25 explanation for their absence on that day. Accordingly leave was rightly granted to counsel for the respondent to proceed *ex-parte*. These two grounds of appeal are not supported by the court record and they too fail.

As regards the fifth and last ground of appeal, I note some irregularities in the way the trial court
30 went about its conduct of proceedings at the *locus in quo*. The purpose of and manner in which proceedings at the *locus in quo* should be conducted has been the subject of numerous decisions

among which are; *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980] HCB 81, in all of which cases the principle has been restated over and over again that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only.

10 Considering that the visit is essentially for purposes of enabling trial magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. In the instant case, the record of appeal, reveals that during the visit to the *locus in quo*, the trial magistrate failed to observe these principles when it received evidence from three persons who had not testified in court. Where a trial court fails to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relies on such evidence acquired and the observations made thereat in the judgment, it has in some situations been found to be a fatal error which occasioned a miscarriage of justice and a sufficient ground to merit a retrial (see for example *Badiru Kabalega v. Sepiriano Mugangu* [1992] 11 KALR 110 and *James Nsibambi v. Lovinsa Nankya* [1980] HCB 81).

25 However, if despite the defect in procedure the dispute to be adjudicated is of a nature where the appellate court finds that the visit to the *locus in quo* was a useless exercise and that the case could have been decided without visiting the *locus in quo* such that without reliance on its findings at the *locus in quo*, the trial court would have properly come to the same decision on a proper evaluation and scrutiny of the evidence which was already available on record, a retrial will not be directed. The erroneous proceedings at the *locus in quo* will be disregarded (see for example the case of *Basaliza v. Mujwisa Chris, H.C. Civil Appeal No. 16 of 2003*).

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According to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. I find that if evidence of the four witnesses; Oyamo David, Obonyo Jimmy, Milton Banya, and Marasisa Akidi is disregarded, the rest of the evidence is capable of supporting findings of fact on basis of which a decision can be properly reached. Consequently, that procedural error will be disregarded as inconsequential in the instant appeal and the evidence of the four persons is excluded from the re-evaluation. I find that what is left of the evidence, that of the respondent and P.W.2, Odoch Michael, is devoid of the contradictions alluded to in the ground of appeal and is capable of supporting the findings and orders of the court below.

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According to section 56 (1) (j) of *The Evidence Act*, a court may take judicial notice of the commencement, continuance and termination of hostilities between the Government and any other State or body of persons. In such cases, the court may resort for its aid to appropriate books or documents of reference. By virtue of that provision, this court takes judicial notice of the fact that from the middle of the year 2004 onwards, rebel activity dropped markedly in the entire Northern Region of Uganda, and in mid-September, 2005, a band of the active remnants of Lord's Resistance Army fighters, led by Vincent Otti, crossed into the Democratic Republic of Congo. Thereafter, a series of meetings were held in Juba starting in July, 2006 between the government of Uganda and the LRA (see Wikipedia, "*Lord's Resistance Army insurgency*" at https://en.wikipedia.org/wiki/Lord%27s_Resistance_Armey_insurgency, visited 18th September, 2018). The implication is that in 2006, northern Uganda was nearing the end of the brutal Lord's Resistance Army insurgency (see IRIN, "*How the LRA still haunts northern Uganda*," at <http://www.irinnews.org/analysis/2016/02/17/how-lra-still-haunts-northern-uganda>, visited 18th September, 2018). I find this to be consistent with the respondent's version that the appellants unlawfully occupied her land during the year 2007, after the disbanding of the I.D.P Camps at the end of the Lord's Resistance Army insurgency.

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Furthermore, taking into account section 70 of *The Civil Procedure Act*, to the effect that no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court, I have not found any miscarriage of justice that was occasioned in this case by the trial court's failure to refer the suit to mediation and to

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conduct a scheduling conference. This is because the appellants had excluded themselves from the trial when they failed to turn up in court on 10th February, 2015 without explanation for their absence prompting the court to grant the respondent leave to proceed ex-parte.

5 I any event, the appellants filed the appeal out of time without having sought an extension of time. Section 79 of *The Civil Procedure Act* provides that an appeal to the High Court shall lie within 30 days from the date of the delivery of the judgment. The judgment was delivered on 17th May, 2016. There is no evidence that the appellants sought leave to appeal out of time or for extension / enlargement of time within which to appeal. The memorandum of appeal was filed on
10 7th July, 2016, a total of 51 days after the judgment. An appeal filed out of time without the leave of court is incompetent and will be struck out as incompetent (see *Maria Onyango Ochola and others v. J. Hannington Wasswa* [1996] HCB 43; *Loi Kageni Kiryapawo v. Gole Nicholas Davis, S. C. Miscellaneous Civil Application No.15 of 2007* and *Hajj Mohammed Nyanzi v. Ali Ssegane* [1992 – 1993] HCB 218). This appeal not only lacks merit but it is also incompetent
15 and it is consequently dismissed with costs to the respondent.

Dated at Gulu this 20th day of September, 2018

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Stephen Mubiru
Judge,
20th September, 2018.

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