IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 078 of 2018

In the matter between

LALWAK ALEX **APPELLANT**

And

OPIO MARK **RESPONDENT**

Heard: 27 February, 2020.
Delivered: 8 June, 2020.

Civil Procedure *— Appeals— Time for lodgement of appeal does not begin to run against the intending appellant until the party who applied for such record within the time allowed for appeal, receives a copy of the proceedings against which he or she intends to appeal.*

Evidence*— Documentary Evidence— section 64 (1) (c) of The Evidence Act— secondary evidence of a document is admissible where the original has been destroyed or lost. The Evidence Act, secondary evidence of a private document is admissible where such is a copy made from the original by mechanical processes which in itself ensures the accuracy of the copy, and a copy compared with such copies.— Documentary evidence must be properly authenticated, and a foundation laid before it can be admitted at trial. The rule of authentication prior to admissibility requires that any item offered as evidence which allegedly has a particular association with an individual, time, or place must be linked with that individual, time, or place either before or at the time of its admission. Until the necessary connection is made, such evidence is simply irrelevant.*

Land Law *—Land sale agreements — The attestation of land transactions takes various forms, from mere issue of a receipt for the money that has changed hands signed by both parties to hand written documents witnessed by friends, neighbours and*

a local grass root leader. — A witness to a document evidencing a transaction of sale / purchase of land must be present when the parties sign the document and see them sign. It is not enough for the parties to tell the witness that the signature is theirs, although a document may also be authenticated by circumstantial evidence that supports its authenticity.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of approximately eight acres of land situated at Dika Ward, Onyona Parish, Ongako sub-county, Omoro county in Gulu District, a declaration that he is the rightful customary owner of the land, general damages for trespass to land, a permanent injunction restraining the appellant's activities on the land and the costs of the suit. His claim was that the land in dispute originally belonged to his late grandfather, Ojok Okojo which in turn inherited it from Daniel Awany during the 1940s. The respondent had quiet enjoyment of the land until the year 2006 when the appellant without any claim of right processed compensation for the land from Government. The appellant's land is to the West of the respondent's land, but do not share a common boundary since in-between them is land that belongs to Ojok Owot.

[2] In his written statement of defence the appellant refuted the respondent's claim and stated that he is the rightful owner of the land in dispute since he purchased the same during the year 1975, from the late Ojok Okojo, the respondent's grandfather. The respondent's paternal uncle, Odong Santo, was one of the witnesses to the transaction. The appellant and his family enjoyed quiet possession of the land henceforth until the year 2006 when upon return from the IDP Camp, the respondent began claiming ownership of the land and constructed a semi-permanent house thereon. He therefore counterclaimed for a declaration that he is the rightful customary owner of the land, general damages

for trespass to land, a permanent injunction restraining the respondent's activities on the land and the costs of the counterclaim.

The appellant's evidence in the court below:

[3] D.W.1 Lalwak Alex, the appellant, testified that on 15th February, 1975 he purchased the land in dispute from Ojok Owot, in order to annex it to that he already had occupied since 1965, in order to gain access to the main Gulu-Pakwach road. He purchased approximately ten acres from Ojok Owot and Labonyinge during the years 1956 and 1959 respectively, constituting the un-disputed area he occupies to the West of the land in dispute. It is the land that was given to his sister Magdalena. His immediate neighbour further West is Acayo Margaret D/o Okello Lubirui where the latter is currently occupying the land. A footpath separated the land he occupied from the one now in dispute. It is adjacent to the land in dispute which measures approximately 8 acres. Following the sale, Ojok Owot remained in occupation of the land with his permission for one more year eventually migrated two kilometres away to a place called Otumpili. One of the witnesses to the agreement, Odong Santonino, was an estranged son of Ojok Owot who lived to the West of the land in dispute until his death in 1987. It is his widow who sold his land to Acayo Margaret. The appellant used the land together with his family until, the year 1986 when they were forced to vacate due to insurgency. It is during the year 1990 that the UPDF established a military detach on his land and that now in dispute. In 1997 he made a claim for compensation by the UPDF. He received shs. 3,000,000/= as compensation for part of the land from UNRA. He has an outstanding claim of shs. 170,000,000/= as compensation due from government as well. The land at one time was occupied by an IDP Camp. It is during January, 2006 that the respondent migrated from Bweyale with his two wives to occupy the land. The respondent has since then permitted multiple other persons to occupy parts of the land.

[4] D.W.2 Olara James, the appellant's brother, testified that he witnessed the agreement of ale between the appellant and Ojok Owot. The appellant brought it to him to sign but he was not present when either party to the agreement signed. He and the appellant's family occupied the land and began cultivating it. During the year 1976 Ojok Owot's two daughters, Dorotia Akelo and Juliana Auma, sought the permission of the witness to remove a pot containing the remains of their deceased siblings born prematurely or with deformities, that had been buried under a tree in Ojok Owot's compound. With the permission of Ojok Okojo, he built three huts on the land in 1980 which he occupied with one of his wives until the breakout of insurgency in 1986. When during the year 1990 the UPDF established an army detach on the land, there was no claimant for compensation save the appellant. It is only during the year 2006 that the respondent began claiming the land as his.

The respondent's evidence in the court below:

[5] P.W.1 Opio Mark, the respondent, testified that he inherited the land in dispute from his late father, Olar Amos Lukwinyo. The land originally belonged to his late grandfather Ojok Okojo. His late mother was buried on that land. It is during the year 1988 that he together with his aunt, P.W.4 Alur Florence, picked his late grandfather Ojok Okojo from the land and took him to her home in order to provide him with better care. He was surprised when during the year 2006 he was summoned on account of the appellant having filed a suit against him, over that land.

[6] P.W.2 Kony William testified that he has lived as an immediate neighbour to the land in dispute since the year 1963 but has never heard of any transaction of sale of that land between the appellant and the late Ojok Okojo. The land was occupied by Ojok Okojo until his death whereupon the respondent inherited it. The appellant first came to the area in 1980 when he lived with his sister Madalena Nyenga, West of the land occupied by the witness. Madalena Nyenga

lived there from 1974 until her death in the year 2016. The respondent has never been in possession of the land in dispute but he saw his sister, Sarah Nako, wife of D.W.2 Olara James, digging on that land in 1989 after Ojok Okojo had been taken away. By the time he left for Lugazi in 1987 Ojok Okojo was still living on the land bur Sarah Nako was not.

[7] P.W.3 Ojok Owot testified that it is his late father Daniel Awany who gave the land in dispute to Ojok Okojo, the respondent's grandfather. Ojok Okojo occupied the land peacefully with his family until the insurgency and his death later. The appellant first came to the area in 1980 when he lived with his sister Madalena Nyenga, on the 28 acres he had given her. It is on that land that the appellant resides to-date. The respondent could not have purchased the land in dispute in 1975 when he first came to the area in 1980. He has never heard of any transaction of sale of that land between the appellant and the late Ojok Okojo, despite being an immediate neighbour. It is Ojok Okojo who permitted Sarah Nako wife of the respondent's brother, D.W.2 Olara James, to grow crops on the land.

[8] P.W.4 Alur Florence testified that she is the daughter of the late Ojok Okojo. She was born on the land in dispute and lived thereon until she married. It is at the height of the insurgency that she picked her late father Ojok Okojo from the land and took her to her home in order to provide him with better care. After his death, the land was inherited by the respondent and following the death of her husband, she too returned home and now lives with the respondent on the land. They enjoyed peaceful possession of the land before and after the insurgency until the year 2006 when the appellant began laying a claim to it on grounds that he purchased it from her late father Ojok Okojo.

Proceedings at the *locus in quo*:

[9] The court then visited the *locus in quo* on 18th November, 2017 but the notes taken by court, if any, are missing from the record of appeal. However, there is available a sketch map drawn during that visit illustrating the fact that the neighbour to the West and South of the land in dispute is P.W.3 Ojok Owot, to the East is Ocen David, to the South separating it from P.W.3 Ojok Owot's land is footpath and to the North is the Gulu-Anaka Road. There is a grave of Ayeng Atto, wife of Ojok Owot, who was buried thereon in 1961, two huts constructed during the year 2006 and gardens, which belong to the respondent.

Judgment of the court below:

[10] In his judgment delivered on 11th October, 2018, the trial Magistrate noted that the court had directed the appellant to produce an original photocopy of his agreement of purchase but what he produced appeared to have been a photocopy made during the 1990s. The other agreement he produced was in his handwriting, was never witnessed by any neighbour, any local authority nor the wife of Ojok Okojo. It is necessary that the neighbours be present to confirm the boundaries and to welcome the new neighbours. This is a practice which has acquired the force of law in Uganda. P.W.2 Kony William, one of the neighbours, denied ever having witnessed the transaction. Although the appellant claimed that he bought the land as it was adjoining the one he inherited, when the court visited the *locus in quo* it found that he is not one of the neighbours thereto. He had no artefacts on the land to indicate that he was ever in possession thereof. P.W.3 Ojok Owot testified that the appellant first settled in the area during the 1980s and therefore he could not have signed an agreement with Ojok Okojo in 1975. Judgment was therefore entered in favour of the respondent. He was declared the lawful owner of the land in dispute, a permanent injunction was issued restraining the appellant from further acts of trespass onto the land, the

respondent was awarded shs.10,000,000/= as general damages, and the costs of the suit.

The grounds of appeal:

[11] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact in failing to evaluate the evidence of the appellant side by side with that of the respondent thereby coming to a wrong conclusion and hence occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact in holding that the appellant failed to prove his customary ownership of the land by lack of use thereof thereby coming to the wrong conclusion and hence occasioning a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact in rejecting the sale agreements of lack of an original, failure to be witnessed by the seller's family members and neighbours to the suit land, thereby coming to a wrong conclusion and hence occasioning a miscarriage of justice.
4. The learned trial Magistrate erred in law and fact in awarding general damages of shs. 10,000,000/= without any basis or proof thereby occasioning a miscarriage of justice.
5. The learned trial Magistrate erred in law and fact in failing to properly conduct proceedings at the locus in quo, and yet he relied on the proceedings thereat thereby coming to a wrong conclusion, hence occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[12] In their submissions, counsel for the appellant argued that having admitted a photocopy of the appellant's purchase agreement in evidence, it erred in

discrediting it as having been made during the 1990s. It is not a legal requirement that neighbours should witness agreements for purchase of customary land. Signatories to the agreement verified its authenticity. P.W.2 Kony William testified that he saw Sarah Nako, the wife of the appellant's brother, Olara James, digging on the land and that Ojok Okojo had by 1989 vacated the land after the sale. Bodies of twins buried by Ojok Okojo's family on the land were as well re-located after the sale. By 1975 there was only one grave on the land, that of Ojok Okojo's wife. Subsequently the appellant had multiple deceased relatives of his buried on the land and the graves were seen during the visit to the *locus in quo*. The appellant occupied the land from 1975 until the breakout of insurgency and thereafter returned in 2006. The respondent has occupied the land since then. The award of general damages therefore was unjustified. At the *locus in quo*, the trial Magistrate only prepared a sketch map of the land in dispute but did not record otherwise kept no record of the proceedings thereat. They prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[13] In response, counsel for the respondent submitted that the appeal is bad in law for having been filed out of time. The judgment of the court below was delivered on 11th October, 2018 yet the appeal was filed on 27th May, 2019. The first ground of appeal is too general and ought to be struck out. None of the neighbours to the land had knowledge of the purported sale of the land by Ojok Okojo to the appellant. None of them had ever seen the appellant in possession of the land. D.W.2 Olara James who claimed to have been a witness to the transaction admitted that he was not present when Ojok Okojo is purported to have signed the agreement, it was only taken to him to witness. The appellant could not explain why one of the copies of the agreement was on ruled paper and the other was not. The trial Court was theretofore justified in its scepticism regarding the authenticity of that agreement. That agreement neither described the size not the dimensions of the land sold. During the visit to the *locus in quo*,

graves of the respondent's relatives were found on the land. Even as the dispute was before court for determination, the appellant continued to receive compensation for the land and this justifies the award of general damages. The appellant's case having been premised of a claimed purchase, the visit to the *locus in quo* was inconsequential to the decision. The appeal should therefore be dismissed.

Duties of a first appellate court:

[14] 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*).

[15] 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.

The preliminary objection.

[16] Regarding the preliminary objection raised by counsel for the respondent, the record indicates that the record of appeal was certified by the trial court on 15th May, 2019. The memorandum of appeal was filed on 27th May, 2019. According to section 79 (1) (a) of *The Civil Procedure Act*, every appeal has to be lodged within 30 days of the date of the decree or order of the court. However according to section 79 (2) thereof, in computing time for the filing of an appeal, the time taken by court in making a copy of the decree or order appealed against or the proceedings upon which it is founded, is excluded.

[17] Although the record of appeal was certified on 15th May, 2019 it is not indicated as to when it was availed to the appellant. The memorandum of appeal though was filed 12 days later, on 27th May, 2019. Time for lodgement of appeal does not begin to run against the intending appellant until the party who applied for such record within the time allowed for appeal, receives a copy of the proceedings against which he or she intends to appeal (see *Godfrey Tuwangye Kazzora v. Georgina Katarikwenda [1992-1993] HCB 145*). In absence of evidence as to the specific date the record was made available to the appellant, I am inclined to give the appellant the benefit of the doubt and find that there is no evidence to show that it was filed out of time. The preliminary objection is accordingly overruled.

Ground one struck out for being too general:

[18] In agreement with counsel for the respondents, I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* 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 frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition (especially when there are no reasonable grounds to think that fish of the relevant type are in the pond) 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*). The ground is accordingly struck out.

Grounds two, three and five; Errors in conducting the proceedings at the *locus in quo.*

[19] In grounds two, three and five of the appeal, the court below is criticised for the manner in which it conducted proceedings during its visit to the *locus in quo*, its findings regarding the validity of agreement presented by the appellant in evidence and evaluation of the evidence of occupancy. The best evidence rule requires that if the contents of a writing are to be proved, the document must be proved by a witness who can attest to the accuracy and integrity of the document. Some documents though are self- authenticated such as ancient documents, recorded deeds and other documents over 30 years old.

[20] By virtue of section 64 (1) (c) of *The Evidence Act*, secondary evidence of a document is admissible where the original has been destroyed or lost. Thus under section 62 (b) of *The Evidence Act*, secondary evidence of a private document is admissible where such is a copy made from the original by mechanical processes which in itself ensures the accuracy of the copy, and a copy compared with such copies. Documentary evidence must be properly authenticated and a foundation laid before it can be admitted at trial. The rule of

authentication prior to admissibility requires that any item offered as evidence which allegedly has a particular association with an individual, time, or place must be linked with that individual, time, or place either before or at the time of its admission. Until the necessary connection is made, such evidence is simply irrelevant.

[21] To authenticate a document, the party seeking to have it admitted must provide evidence sufficient to support a finding that the proffered evidence is what it is claims to be, i.e., a *prima facie* showing. This may be done by a witness with personal knowledge of the circumstances showing that the document is what it claims to be, establishing chain of custody, a person with sufficient familiarity with the handwriting of another person, comparison with a pre-authenticated specimen, handwriting experts, the distinctive characteristics of the document. In the instant case both D.W.1 Lalwak Alex and D.W.2 Olara James testified that they had personal knowledge of the circumstances in which that agreement was made. Once this *prima facie* showing is made, the document may be admitted and the ultimate determination of its authenticity then rests with the court. Consequently, admission of a document in evidence does not automatically guarantee that the court will accept it as genuine. The opposing party may still offer evidence to discredit the proponent's *prima facie* showing.

Admissibility of secondary evidence.

[22] Regarding the admissibility of secondary evidence, section 62 (b) of *The Evidence Act* has two requirements;- first, the copies should be prepared from a mechanical process; and second, the process should be such which in itself ensures accuracy of copy. While every Photostat copy is prepared by mechanical process however, it may or may not be accurate. This is so because a Photostat copy may be the result of manipulation, as it is susceptible to purposeful or accidental alteration or incorrect processing. The potential of fraud exists with all Photostat copies as they can be altered through redacting information performing

a cut and paste job, using a transparency tape lift-off method, electronic editing etc. Not every Photostat copy may be accurate.

[23] While a Photostat copy of a document which is an accurate reflection of original document is admissible as secondary evidence but it had to be shown that the Photostat copy was an authentic and accurate reproduction of the original. Before it is admitted in evidence, a Photostat copy should appear to be above suspicion. It must have been prepared and kept in circumstances and a condition that creates no suspicion about its authenticity. It has to be shown that it was made from the original by a specified person, at particular or specified place and time.

[24] Courts are justifiably cautious when considering the admissibility of, or weight to be attached to such secondary evidence of a document which has been destroyed while in the possession of a person in whose favour it created an enforceable legal right or an obligation. The secondary evidence of such a document may be tampered with or changed and it would be against public policy to take a chance of running the risk of fraud being committed. Where a Photostat copy of a document is produced and there is no proof of its accuracy or of its having been compared with or its being a true reproduction of the original, it cannot be considered as secondary evidence.

[25] In the instant case, there is no material on the record to explain the circumstances under which the Photostat copy was prepared, when, where and who was in possession of the original document at the time Photostat copy was made. The foundation laid by the appellant for leading secondary evidence in the shape of the Photostat copy was therefore inadequate. To compound matters, while annexure "A" to the appellant's witness statement (exhibit D. Ex.1) is written on ruled paper, the capacities of the signatories are not enclosed in brackets, the name of the location and the names of the signatories are written in capital letters, and the date is characterised by strokes in-between figures, the

one tendered in court as exhibit P. Ex.1 is written on plain paper, the capacities of the signatories are enclosed in brackets, the name of the location and the names of the signatories are written Latin character, and the date is characterised by dashes in-between figures. One is clearly not a Photostat of the other yet both are purported to have been made from the same original document. D.W.2 Olara James testified that he signed only one agreement written on ruled paper and that he received a photocopy of the agreement four years after the agreement was signed, yet the photocopy he produced in court is not on ruled paper.

[26] The appellant's ownership claim was questioned by reason of his not having involved the immediate neighbours and local customary leaders, who by practice normally witness such sales. It was contended by the trial Magistrate that agreements of this nature ought to be witnessed by neighbours, friends or relatives who should append their signatures or thumbprints on it. According to *Webster's Dictionary*, to "authenticate" means to "render authentic; to give authority to, by the proof, attestation, or formalities required by law, or sufficient to entitle to credit." A signature is added to a document primarily for purposes of authentication. Although immediate neighbours and local customary leaders often act as witnesses to oral and informal written agreements of sale of customary land and in resolving disputes they could provide crucial evidence in terms of the area and nature of the transaction, that practice has not attained the force of law, neither in custom nor at common law. It was a misdirection, though of no import, on the part of the trial Magistrate to have opined that it is a legal requirement.

[27] Irrespective of the fact that most, though not all, land transactions rooted in custom involve witnesses, particularly from the customary authorities, an agreement of sale of customary land cannot be invalidated on that account alone. The attestation of such transactions takes various forms, from mere issue of a receipt for the money that has changed hands signed by both parties to hand

written documents witnessed by friends, neighbours and a local grass root leader. Some transactions are made verbally by the two parties, sometimes without witnesses. The court though cannot be oblivious to the fact that fraudulent transactions in land tend to occur clandestinely, without family, community, or customary leaders to point out that the seller has no right to the land he or she is offering, existing disputes over the land at the time of sale or its boundaries. It is for that reason that reasonable dealers in such land would be expected to involve family, community, or customary leaders as witnesses.

[28] A witness is required to confirm that the correct party has signed the agreement and no fraud has occurred, such as someone signing the agreement on another person's behalf. A witness to a document evidencing a transaction of sale / purchase of land must be present when the parties sign the document and see them sign. It is not enough for the parties to tell the witness that the signature is theirs. A person witnessing such a transaction should have physically seen the party whose signature they witness, sign the document and been in his or her presence when doing so. It is not acceptable, as D.W.2 Olara James testified to have done, for a party to provide the witness with a document that someone else has already signed and ask the witness to sign it. Although there is no general rule that disqualifies a family member or spouse from witnessing a person's signature on a legal document, as long as they are not a party to the agreement or will benefit from it in some way, however, it is generally best to avoid it as it can raise perceptions of bias and questions about their credibility as a witness in the event that the authenticity of the document is questioned. The trial court was justified in attaching no weight to the agreement.

[29] In the alternative, a document may also be authenticated indirectly by circumstantial evidence that supports its authenticity, for example, through evidence of occurrence, subject matter, and conduct of the parties (see for example *International Brotherhood of Electrical Workers Local 35 v. Commission on Civil Rights, 140 Conn. 537, 547, 102 A.2d 366 (1953*). Circumstances may

suggest that the observed behaviour occurred in response to the document sought to be authenticated. Section 113 of *The Evidence Act* enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of human conduct in relation to the facts of the particular case. For example, pursuant to the "reply letter" doctrine, a letter can be authenticated upon a showing that it was "apparently in reply" to an earlier letter sent to the purported author of the reply letter (see *Sunbelt Health Center v. Galva, 7 So.3d 556*).

[30] That agreement could have been authenticated indirectly by circumstantial evidence found at the *locus in quo*. The decision to visit a *locus in quo* is essentially discretionary, such a visit will be imperative where there are conflicting pieces of evidence as to the physical facts in issue that could be easily resolved by viewing through a physical inspection of the land. In the instant case, no conflicting pieces of evidence as to the physical facts in issue regarding the land arose. The purpose of an inspection of a *locus in quo* is not to substitute the oral testimony in court but rather to clear any ambiguity that may have arisen in the evidence led in court or to resolve any conflict in the evidence as to physical facts existing on the land. In other words, the purpose of an inspection of a *locus in quo* is primarily for enabling the court to understand the questions that are being raised at the trial and to follow the evidence and apply such evidence. It was not imperative, considering the matter in contention in this case, to visit the *locus in quo*, in order to make a determination of how the land has been used since the purported agreement. The only matter of relevance was the current possessory status of the land.

[31] 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*.

[32] 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*). 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 the 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. However, section 70 of *The Civil Procedure Act*, provides 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. When the court visited the *locus in quo*, there is nothing procedurally fundamentally wrong that occurred in the process to justify nullification of the trial. The illustrations of what was observed by court at the *locus in quo,* as reflected on the sketch map, do not authenticate the appellant's agreement, but instead support the findings of the court below. These grounds of appeal accordingly fail.

Ground four; Court’s award of general damages.

[33] The fourth ground of appeal faults the trial court's award of general damages. An appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be

shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd., S.C.C.A. No. 10 of 1993 (unreported)* and *Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises. S.C.C.A No. 16 of 2006*).

[34] When evaluating the potential value of general damages in a case, the court considers the severity and permanency of the damage, loss or injuries. No damage, loss or injury was proved in the instant case. This was more of a suit "to quiet title," also known as a suit "to remove a cloud from the title," rather than a suit for trespass to land. Since the trial court did not advert to this, there was a failure to take into account a material consideration. An error in principle was made when the court awarded damages, yet no acts of trespass had been proved. That part of the decision is erroneous and is set aside.

Order:

[35] In the final result, save for the award of general damages that has been set aside, the judgment of the court below is upheld and the rest of the appeal is dismissed. Half the costs of the appeal are awarded to the respondent.

Delivered electronically this 8th day of June, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Donge and Co. Advocates.

For the respondent : M/s Kunihira and Co. Advocates.