IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 054 of 2017

In the matter between

1.	**ANNA ACAYO**	**}**	
2.	**OKONGO MARINO**	**}**	
3.	**ORACA MARCELLO**	**}**	**…… APPELLANTS**
4.	**OKOT DAVID**	**}**	
5.	**KADONGO**	**}**	

VERSUS

LODIK DANIEL WARREN …… RESPONDENT

Heard: 9 May, 2019.
Delivered: 30 May, 2019.

Land Law *—Visits to the locus in quo — Although visiting the locus in quo is desirable, it not mandatory in every case—visiting the locus in quo is at the discretion of the trial court where the court determines that the visit is necessary to enable it understand the evidence better—the visit is meant to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to the land, where such a conflict can be resolved by visualising the object, the res, the material thing, the scene of the incident or the property in issue.*

Civil Procedure *—A fatally defective trial —* w*here in any proceedings the fundamental principles of a fair hearing are breached, such a breach renders the entire proceedings null and void— Ordering a retrial —for as long as there are no special circumstances in the case as would render it oppressive to put the defendant on trial a second time, an appellate court will order a retrial where it is satisfied that there has been such an error in law or an irregularity in procedure of such a nature which renders the trial a nullity.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for a declaration of ownership of land measuring approximately 8 acres, situate at Lela Pakile Ogwang Can village, Ywaya Parish, Padibe West sub-county in Lamwo District. He sought a declaration that he is the rightful owner of the land, an order of vacant possession, a permanent injunction restraining the appellants from further acts of trespass to the land, *mesne profits*, general damages for trespass to land, and the costs of the suit. His claim was that he inherited the land in dispute from his late uncle Angica Owot. Sometime during the year 2006, without any claim of right, the appellants migrated from an IDP Camp at Padibe Trading Centre and settled on the land in dispute. The respondent allowed them temporary stay out of goodwill considering the fragile security situation that prevailed in the area at the time. Following the end of the insurgency, the respondent during the year 2007 asked the appellants to vacate his land but they refused to do so. They instead established gardens, erected kiosks and pit latrines on the land.

[2] In their joint written statement of defence, the appellants contended that the land that was given to the respondent's father by the Church in Lela Myel is different from the one in dispute. The respondent has no rightful claim to the land in dispute. During the insurgency, the first appellant's daughter Apire Pantaleo returned to the land and has occupied it ever since. The rest of the appellants occupy the land by permission of the first appellant.

The respondent's evidence;

[3] Testifying as P.W.1 the respondent Lodik Daniel Warren stated that he acquired eight acres of land from his uncle Angica Owot who in turn acquired it in 1974 as virgin vacant land. He was given the land at a clan meeting but the appellants have unlawfully taken possession of four acres of that land.. He stopped using the land in 2013 by injunction of the L.C.II Court. P.W.2 Rufa Jackson testified

that the respondent stopped using the land in 2013 by injunction. The land belonged to the late Angica Owot. He learnt from his father, who was a neighbour to the land in dispute, that the respondent had inherited it. In 1983, the first appellant was given land adjacent to the one in dispute but in 2003 she encroached onto it by four acres.

[4] P.W.3 Onyango Franco testified that the land in dispute belonged to the late Angica Owot uncle to the respondent and it is him who gave the land to the respondent. The respondent was using the land since 1960s until he was stopped in 2013. It is the first appellant who allowed the rest of the appellants to settle on the land after they came out of the IDP Camp. The first appellant was in 1972 given only one acre adjacent to the land in dispute but she has since 2013 encroached onto it. P.W.4 testified that the land in dispute belongs to the respondent but the appellants constructed houses thereon when they left the IDP Camp. P.W.5 testified that the land in dispute belongs to the respondent by inheritance that occurred in the 1970s. He attended the clan meeting at which authority over the land was granted to the respondent by the clan. He used to grow crops on the land until 2014 when people returned from the IDP Camp an she allowed some of them to construct buildings on the land. The first appellant owns only one acre adjacent to the land in dispute, which she has occupied for over twenty years. She and her clan members slashed the respondent's sorghum that was growing on the land.

The appellants' evidence;

[5] In her defence as D.W.1 the first appellant Anna Acayo testified that the land in dispute belonged to her late father Jakuma Olango. She was born on that land in 1976. D.W.2 testified that Jakuma Olango acquired the land in 1970 and was buried on that land when he died. there are graves of his other relatives. People settled on the land temporarily from 2006 - 2009 during the insurgency. D.W.3 testified that the first appellant's brother. Jakuma Olango died in 1988 and was

buried don the land in dispute measuring one acre whereupon it was given to the first respondent. D.W.4 testified that the first appellant's brother, Jakuma Olango died in 1988 whereupon the land in dispute measuring four acres was given to the first appellant.

The Court's failure to visit the *locus in quo*;

[6] The court thereafter fixed the suit for visiting the *locus in quo* on 6th March, 2017. However, the court thereafter went ahead and delivered its judgment on 6th June, 2017 without undertaking that visit. Consequently, there is no evidence on record relating to the physical existence or otherwise of the features on the land in dispute and circumstances alluded to by the witnesses in their testimony.

Judgment of the court below;

[7] In his judgment, the trial magistrate found that the first appellant did not know how her father acquired the land and how big it was. She failed to furnish court with proof that the land belonged to her father. The respondent had enjoyed a long period of user of the land before the year, 2007 when he allowed the appellants to occupy it during the insurgency. The land belongs to the respondent and the appellants are trespassers thereon. He issued an order of vacant possession, a permanent injunction and awarded costs of the suit to the respondent.

The grounds of appeal;

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

1. The learned trial magistrate misdirected himself on the importance of a visit to the *locus in quo* in the determination of the suit and thereby came to the wrong decision.

2. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence and thereby came to the wrong conclusion that the land belonged to the respondent.
3. The learned trial magistrate erred in law and fact when he misdirected himself on the principle of adverse possession when he failed to apply it and thereby came to the wrong conclusion.
4. The learned trial magistrate erred in law and fact when he engaged in conjecture and outright bias and consequently came to the wrong conclusion on all the issues framed at the trial.
5. The learned trial magistrate erred in law and fact when he misdirected himself on the remedies available to the parties in the circumstances of the case and consequently granted unfair and unjust remedies in favour of the respondent.

Submissions of counsel for the appellants;

[9] In his written submissions, counsel for the appellants argued that failure to visit a *locus in quo* is more likely than not to result in a miscarriage of justice. Whereas the respondent pleaded that the land is located at Lela Pakile Ogwang Can village, his witnesses testified that it is situate at Laguri village. This was a disparity. The appellants' witnesses consistently stated that it is located at Tegot Central village. Some of the features to be found on the land that were mentioned by the witnesses included graves. The extent of the alleged trespass had to be verified by such a visit. The trial magistrate failed to evaluate the evidence properly as a result of which he overlooked contradictions in the respondent's evidence and never addressed the burden of proof born by the respondent. There were discrepancies in the description of the persons neighbouring the land in dispute and its location. The respondent had no *locus standi* to sue on behalf of his other siblings. The appellants have been in possession of the land for such a long period of time that they had acquired title

by adverse possession and prescription. He prayed that the appeal be allowed with costs to the appellants.

Submissions of counsel for the respondent;

[10] In response, counsel for the respondent argued that a visit to the *locus in quo* is not mandatory. It is only done where the court deems it necessary to verify evidence that has been given in court. Tegot Central village was separate and distinct from Laguri village at the time the respondent and his witnesses prepared their witness statements but due to changes by the Local Government, the area was re-named Tegot Central village but is commonly known as Lela Pakile Ogwang Can. The inconsistency in the names of the village at which the land is located therefore is explainable and did not require a visit to the *locus in quo*. The land claimed by the respondent had no graves on it but only kiosks of the appellants. The trial court properly evaluated the evidence before it and came to the right conclusion. The cause of action arose in 2007 when the appellants refused to vacate whereas thy had been occupying it temporarily as a satellite IDP Camp, hence the suit is not time barred. He prayed that the appeal be dismissed with costs to the respondent.

The duties of this court;

[11] 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*). However, I find that the first ground of appeal is dispositive of the entire appeal and deciding the appeal will not necessitate a comprehensive consideration of the rest of the grounds.

Failure to visit the locus in quo was a fatal error on the facts of this case;

[12] The law permits the trial court to carry out an inspection of the *locus in quo*. According to Order 18 rule 14 of *The Civil Procedure Rules*, the court may at any stage of a suit inspect any property or thing concerning which any question may arise. Therefore, where it appears to the court that in the interest of justice, the court should have a view of any place, person or thing connected with the case the court may, where the view relates to a place, either adjourn the court to that place and there continue the proceedings or adjourn the case and proceed to view the place, person, or thing concerned. The purpose of visiting the *locus in quo* is for the court to view the place where issues that led to the case before the court arose, in order to enable it understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. It is also for the proper determination of the case before the court in the interest of justice.

[13] Although visiting the *locus in quo* is desirable, it not mandatory in every case. According to Rule 3 of *Practice Direction No.1 of 2007* (*Practice Direction on the Issue of Orders Relating to Registered Land Which Affect or Impact on the Tenants by Occupancy*), "during the hearing of land disputes the court should take interest in visiting the *locus in quo*...." (emphasis added). The expression used is directory rather than obligatory. Therefore visiting the *locus in quo* is at the discretion of the trial court where the court determines that the visit is necessary to enable it understand the evidence better by harnessing the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony, having regard to the nature of the evidence and of the circumstances of the case before it. It is now well settled that the inspection of a *locus in quo* is strictly not necessary where the area of land in dispute is clear to the court and the parties, since in such a case the trial court must arrive at its judgment not on the impressions from the locus in quo but upon its impressions from the evidence led before the court.

[14] The purpose of a visit to the *locus in quo*, as has been stated repeatedly, is not to recite the evidence already led but to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to the land, and such a conflict can be resolved by visualizing the object, the res, the material thing, the scene of the incident or the property in issue. Where there exists such conflicting evidence as aforesaid, it is expected that the trial Magistrate will apply the court's visual senses in aid of its sense of hearing by visiting the *locus in quo* to resolve the conflict.

[15] That notwithstanding, an appellate court will not interfere with the exercise of discretion of a trial court, even if it might have exercised the discretion differently if the discretion were that of this court, unless it has come to the conclusion that the exercise of such discretion was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice. It has been said before that 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 arise in the evidence or to resolve any conflict in the evidence as to physical facts. In other words, the purpose of an inspection of a *locus in quo* is primarily for the purpose of enabling the court to understand the questions that are being raised at the trial and to follow the evidence and apply such evidence. Notwithstanding the fact the decision to visit a *locus in quo* is essentially discretionary, such a visit will therefore 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.

[16] In the instant case, multiple conflicting pieces of evidence as to the physical facts in issue arose including; the name of the village where the land is located, the size of the land in dispute, the boundaries of the land, the owners of the adjacent pieces of land and the activities undertaken on the land. These are facts which could be easily resolved by viewing through a physical inspection of the land and it is therefore understandable why, after the close of the defence case on 9th

December, 2016 the court adjourned the case to 6th March, 2017 for visiting the *locus in quo*. That visit however never took place and the trial court did not place on record the reasons why it chose not to undertake that exercise. In absence of an explanation on record, the decision by the trial magistrate not to conduct proceedings at the locus in quo therefore was manifestly wrong, arbitrary, reckless, injudicious and contrary to justice, which on the basis of the facts of the case, justifies this court's interference with the trial court's exercise of discretion not to visit the *locus in quo*.

[17] 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. Before this court can set aside the judgment on account of failure of the trial court to visit the *locus in quo*, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. Failure to visit the *locus in quo* will not result in a reversal of the decision of the trial court by an appellate court except where it is demonstrated that the principles of a fair hearing were imperilled by that failure in so fundamental a manner, that the trial was rendered a nullity.

[18] Where, as in the instant case, the claim is for declaration of title to land entailing a pronouncement of the boundary between two areas of land, to treat the suit as if it were a declaration only of title to a parcel of land and consider only evidence that satisfies the requirement of a grant of declaration of title to land, without considering the conflicting evidence relating to its geographical location, its size, its boundaries, the identity of the owners of the adjacent pieces of land and the activities undertaken on the land in dispute, is a fundamental misdirection which affects the decision. The misdirection was clearly occasioned by the trial court's failure to visit the *locus in quo*.

[19] An order for retrial is an exceptional measure to which resort must necessarily be limited. 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 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. None of these bars to a re-trial is evident on the face of the record in the instant case.

[20] For as long as there are no special circumstances in the case as would render it oppressive to put the defendant on trial a second time, an appellate court will order a retrial where it is satisfied that there has been such an error in law or an irregularity in procedure of such a nature which renders the trial a nullity or makes it possible for the appellate court to say that there has been a miscarriage of justice. A fair hearing lies not in the correctness or propriety of the decision but rather in the procedure followed in the trial and determination of the case.

[21] Where in any proceedings the fundamental principles of a fair hearing are breached, such a breach renders the entire proceedings null and void and the appropriate consequential order is one of retrial before another Magistrate. It is clear in the record of proceedings that learned trial Magistrate despite the great effort he made at analysing the evidence laid by the parties before him, missed a crucial procedural step, which on the facts of the case and nature of evidence adduced in court, was required for the proper determination of the issues before him. As a result he concentrated on evidence necessary for a declaration of title, which was not the only issue he was asked to determine, and left undecided the crucial issue of the location and the boundaries of the land in dispute.

[22] This error by failure to visit the *locus in quo* has, on the facts of this case, been demonstrated to have affected the trial court's judgment and the outcome. The only way to correct this error is by way of a retrial.

Order :

[23] Consequently, the appeal succeeds. The judgment of the court below is set aside. A retrial is ordered before a different magistrate with jurisdiction over the matter. Each party is to bear their costs of the appeal and of the court below.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellants : Mr. Okello Oryem.

For the respondent : Mr. Jude Ogik.