THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO. 0032 OF 2020

(ARISING FROM THE CHIEF MAGISTRATE'S COURT AT MASINDI CIVIL SUIT NO. 0018 OF 2013)

KYOMUHENDO BOSCO..... APPELLANT

VERSUS

1. ONGEI JULIUS

2. OWONDA ETYEN

3. MAFUTA SIMON ..... RESPONDENTS

BEFORE: HON. JUSTICE ISAH SERUNKUMA

JUDGEMENT

This is an appeal against the decision of Her Worship Elizabeth Akullo Ogwal in Civil Suit No. 0018 of 2013 - Kyomuhendo Bosco v. Ongei Julius, Owonda Etyen & Mafuta Simon. The Appellant/ Plaintiff herein sued the Respondents for trespass and sought reliefs that included a declaration of ownership, damages for loss of property, an eviction order, costs, interest, and permanent injunction to permanently restrain the Defendants from interfering with the suit land.

The Plaintiff / Appellant sued in his capacity as administrator and beneficiary of the estate of the Late Kisembo Edward, the registered proprietor of the suit land comprised in Leasehold Register Volume 2289 Folio 16 Plot 43 at Buruli Block 2 at Kigunia Masindi measuring approximately 80.1 Hectares, who was registered in 1994 vide Instrument number 266244. The Plaintiff alleged that before the title acquisition, his father had acquired the suit land in 1984 from the village Chief, Omukuluwomugongo, whereafter he applied for a lease in 1989. That the 1st Defendant had trespassed onto 2 acres of the suit land in 1996 and a case was reported to the LC II Court, which determined the matter in favour of the Plaintiff's father. In 2013, all the Defendants collectively trespassed on a total of 10 acres and destroyed the suit land by clearing the crops they found thereon and depositing their construction materials.

The Defendants/Respondents filed their defences as follows; The 1st and 2nd Defendant/Respondents submitted that they are the rightful customary owners of the suit land having inherited the same from their late father, Yakobo Nyingi on whose estate they are beneficiaries. Their case was that their father had occupied the land for over 20 years till his death in 1994, having been allocated the same by Giliberi Tofua Omukuluwomugongo. The 2 counterclaimed that the Plaintiff's father had fraudulently gotten registered on the land and the acts of fraud included getting non-neighbours to sign for his forms, crossing out original acreage to include neigbouring land in his application, surveying the land without their notice and waiting for their father to die before forcibly trespassing on their land.

In the 3rd Defendant/ Respondent's defence, he submitted that he inherited the land he occupies from his late father, Ernest Wadri who was allocated the said land in 1970 when he came from Arua by the Omukuluwomugongo Ziriberi. He said that the suit land is the family land on which they even have burial grounds and he was born and lived on the land since his birth in 1973. It was submitted that in 1999 his father became insane, and he took him back to Arua for treatment, leaving his mother in occupancy of the land. That upon his return in 2012 from Arua, he found that the Plaintiff had thrown his mother off the land and was now claiming ownership. Accordingly, the title in his possession was acquired fraudulently.

The trial Magistrate had four issues at the trial regarding the rightful ownership of the suit land: whether the Plaintiff lawfully obtained the certificate of title, whether the Defendants trespassed on the suit land and the remedies available.

The trial magistrate summarized the evidence at trial as follows;

The certificate of title is conclusive proof of ownership of land. The Plaintiff presented 3 witnesses who were all local leaders and had witnessed the land inspection and signed the inspection form in 1984 when the Plaintiff's father applied for a lease. Further, PW2 led evidence that at the time of applying for the lease, the Plaintiff's father was in exclusive possession of the land and that the other people available were Dogo and Yakobo Nyingi. During cross-examination, PW2 submitted that Yakobo Nyingi had settled in the area in 1975 and was a neighbour to the suit land but did not know whether he signed the survey or inspection report.

PW3 led evidence that the 3rd Defendant's father settled in the area in 1987 and was available during inspection but did not raise any objection. PW3 however contradicted PW2 when he said Yakobo Nyingi was not at the inspection. Further, there was no inspection report. PW4 told the court that they never drafted a sketch map of the land they inspected but they generated an attendance list and consent of the neighbours. The said consents were not produced in court.

In their defence, the 1st Defendant submitted that he lived on the suit land since his birth in 1975. DW2 testified that he came to the land in 1978 and worked for the Plaintiff's father and that the 1st Defendant's land is about 15 - 16 acres and for the 3rd Defendant is about 10 - 12 acres. The 3rd Defendant was born in 1973 and remained on the suit land until 1999 when he took his mentally ill father to hospital and upon his return in 2012, he found that his mother had been displaced from the land. He too, had no idea as to how the title was acquired.

Counsel for the Plaintiff submitted that the plaintiff's evidence was consistent and showed how the title was acquired. However, Counsel for the 1st Defendant submitted that the Plaintiff's evidence was riddled with contradictions, that there was sufficient evidence of fraud including stealthily surveying the disputed land, the fact that Yakobo didn't sign the presented inspection report yet he was the immediate neighbour and no evidence of the survey of the land.

The trial magistrate held that the 1st and 2nd Defendants' father was allocated land held in favour of the 1st and 2nd Defendant's claim to the suit land. He held that it was odd that an immediate neighbour, Yakobo Nyingi missed the survey and inspection of the land. The leaders of the village also confirmed that the arrival of the 1st and 3rd Respondents' fathers preceded the Plaintiff's father and therefore as the Defendants' father had acquired the land customarily, processing a title for it in 1984 was fraudulent.

The trial court held that it cannot rely on allegations that a survey was done in the absence of documentation to that effect. Therefore, the issue of trespass was determined in the negative because the Plaintiff's father did not lawfully acquire the land and the suit was dismissed with costs. The 1st Defendant's counterclaim in which he prayed for an eviction order, permanent injunction, and declaration that the land was acquired fraudulently by the Plaintiff's father and that the Plaintiff is a trespasser were granted. The Defendants were declared customary owners, and the title was forwarded to the High Court for

consequential orders for cancellation and rectification of title to exclude the parcels of land found to be for the 1st and 3rd Defendant i.e. 15 acres and 12 acres respectively.

Accordingly, the matter was determined in favour of the Respondents/Defendants and the Appellant/Plaintiff being dissatisfied with the decision of the trial magistrate, filed this appeal in which the following issues were raised;

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 0018 of 2013.
2. The learned trial Magistrate disregarded the Appellant's evidence thereby arriving at a wrong decision in Civil Suit No. 0018 of 2013.
3. The learned trial Magistrate erred in law and fact when she did not follow the procedure during the locus visit occasioning a miscarriage of justice to the Appellant.
4. The learned trial Magistrate erred in law and fact when she held that the Respondents had proved fraud against the appellant's land title and forwarded the title with a consequential order for its cancellation occasioning a miscarriage of justice to the Appellant.
5. The trial Magistrate erred in law and fact when she went ahead to determine the case (portion of land) between the Appellant and Owonda Etyen who had entered a consent judgment by which the suit portion he occupied was decreed to the Appellant.

The Appellant prays for orders that;

1. The Appeal be allowed.
2. The judgment and decree from the Chief Magistrate's Court of Masindi be set aside.
3. The Appellant is the rightful owner of the suit land.
4. Costs of the Appeal and proceedings in the Chief Magistrate's court be awarded to the Appellant.

Representation

The Appellants were represented by **M/s Kasangaki & Co. Advocates** while the 1st Respondent was represented by **M/s Lubega, Babu & Co. Advocates.** The 3rd Respondent did not file submissions while the 2nd Respondent entered a consent judgment and thus should not have been included in the appeal. Both parties filed their submissions.

The duty of the 1st Appellate Court

Section 220(1) of the Magistrate's Courts Act, Section 76 of the Civil Procedure Act and Order 44 rule 1(3) of the Civil Procedure Rules make provision for appeals from the Magistrates' courts to be filed in the High Court. The appeals arising from final orders of the Magistrate's Court such as the ones in the instant case are filed in the High Court and thus, it is the first appellate court in this case.

The 1st appellate court has the duty to re-evaluate the evidence led at the trial court to come up with its conclusion by subjecting the evidence on record to exhaustive scrutiny, re-evaluating it, and coming to its conclusion. This duty was espoused in the case of ***Selle &Anor vs. Associated Motorboats Co. Limited &Ors (1968) E.A 1968,*** where it was held that.

> ***"Briefly put…. this court must reconsider the evidence, evaluate it, and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. This court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. "***

Grounds 1 & 2.

Counsel for the Appellant submitted that the trial magistrate disregarded the Appellant's evidence thus resulting in the erroneous decision. He submitted that the Appellant had 4 witnesses, all of whom presented evidence in support of the ownership of the suit land by the Appellant. PW1 was the Appellant himself and he led evidence to the effect that he is the administrator and beneficiary of the estate of his late father, the Late Kisembo Edward, who is the registered proprietor of the suit land having been registered in 1994. He said that his father had acquired the suit land in 1984 through allocation by the village Chief, Omukuluwomugongo whereafter he applied for the lease in 1989. In 1990, the

elders recommended him for a lease, the land was surveyed in 1994 and he was eventually registered on the title.

PW1 further mentioned the people who were available for the inspection, some of whom were the witnesses herein. He said that he grew up on the suit land where he still is to date. He got to know the 1st Respondent in the 1990s and the 2nd Respondent in 1995. He said that the 2nd Respondent's father came as a tenant and rented land from his late father.

PW2 was Byaruhanga Perez, who led evidence that he was the LC 1 Chairman of the suit land. He stated that the Appellant is a beneficiary and son of the Late Kisembo Edward, who is the registered proprietor of the suit land and he was present during the inspection. He was present during the inspection during which it was established that the suit land was exclusively under the occupation of the Late Edward Kisembo and the boundaries of the land as inspected by PW2 then were Rwakaikara Zephania in the North, PW2 in the East, Tom Wandera in the South and a stream in the West. He also confirmed that the location of the boundary line between Edward Kisembo and Yakobo Nyingi was about 8 meters from the road and there was pine around. He testified that the suit land completely belonged to the late Kisembo Edward and that he signed the lease application forms for the appellant's father.

PW3, Dogo K. Lawrence submitted that he was the sub-county chief (omutongole) of Kihaguzi, Labongo parish which then included the present-day Kihaguzi parish between 1987 and 1994. He testified that he knew the appellant's late father and he was the original owner of the suit land. He stated that he had been a resident of Kihaguzi parish and had seen the Appellant's father occupy the land for a very long time. That in 1990, he was informed of the late Kisembo 's request for a recommendation for an application to lease the land and was instructed by the Parish chief to investigate whether the land was free or not.

PW3 further testified that he consulted with the neighbouring people who informed him that the land belonged to the late Edward Kisembo. On 30th January, the village leader, the neighbours i.e. Perez Byaruhanga, the late Zephania Rwakaikara, John Kiiza, the Parish Chief, and PW3 inspected the land and ascertained the boundaries, whereafter the recommendation was made. The recommendation was signed by the village leader, the parish chief, and sub-county chief. He stated that Yakobo Nyinji was available during the inspection and that he first saw Erinasti Wadri in 1987 and that he was the worker of

Kisembo when the land was inspected and he attended the inspection but didn't object because the land was not his.

PW4 Wanda Fred testified that he was the LC 3 Chairperson of Pakanyi sub-county between 1989 and 1997, where the suit land is. He knew the Appellant as the owner of the suit land. In 1990, the late Kisembo approached him requesting recommendations for the creation of a lease over the suit land. He and other members of the LC inspected and ascertained the boundaries and established that the land had no encumbrances, and this was confirmed by residents and neighbours who attended the inspection. He was thereafter recommended for a lease with the consent of all neighbours. He confirmed that Ongei Julius was a squatter on Kisembo's land. He did not have the attendance list because he was no longer the Chairman. That 38 people attended the inspection and all consented to that the land was the appellant's fathers. The late Kisembo was even buried on the land.

Counsel further analyzed the Defence evidence and reported it as follows.

DW1, Ongei Julius confirmed that they had a land dispute in 2002 over the suit land which was resolved in favour of the Appellant's father by the LC 11 Courts. Further, the 2nd Defendant, Owondo Etyen, who is a brother to the 1st Defendant and had the same story for the root of his ownership as DW1 had entered a consent judgment by which he accepted that the Plaintiff owned the suit land. Counsel submitted that the consent by one brother should negate the claim by the other as they both had the same origin of the claim. Further, both DW1 and DW2 discredited each other's evidence as lies and thus, should both not be considered. Further, the 1st Respondent executed a covenant by which he allowed that he was only a tenant.

DW2, Alex Obitre confirmed that PW2 was a neighbour to the suit land and that he had no proof that he owned the suit land and that he worked on the land. DW2 didn't even know the exact size of the land nor that he gave two acres of land to Kisembo as he alleges. He admitted that he was a casual worker for Kisembo and contradicted DW1 who said he didn't know Perez as a neigbour. His statements were also contradictory as he claimed in one statement that the Appellant's father came in 1983 and another statement in 1984. He also conflicted as he claimed an interest in 38 acres of the suit land.

DW3 Casiano Egapario was not truthful as claimed that Plaintiff's father had grabbed his land and destroyed his crops. During cross-examination, he stated that he had never sued

the Plaintiff's father for the said acts and that the boundary was a river. He had no proof of ownership he claimed and did not know the size of the land, boundaries, or neighbours thereof. He was also an interested party in the dispute thus being biased.

DW4 Mafuta Simon had no proof that the land was vacant and did not report anywhere. He admitted that Perez Byaruhanga was a boss and that the land had clear boundaries but DW1 had grabbed his. He claimed that he had not been on the land between 1999 and 2012 and in 2012 he returned and reoccupied the land. He claimed 25 - 30 acres of the same area being claimed by the 1st Respondent and their evidence was contradictory. Their versions of the acquisition were incoherent and unreliable.

DW5 Jasper Agupio, who was brought during the locus visit did not know the local leaders and did not know where the 2nd Defendant's or Respondent's land started or ended.

Counsel for the 1st Respondent submitted as follows.

The 1st Respondent is the customary owner of the suit land measuring approximately 30 acres situated at Kigunia village having inherited it from his late father, Yakobo Nyingi who in turn acquired it in 1973 by allocation from one Giliberi Tofua Omukuluwomugongo. The 1st Respondent who came with his father took immediate possession of the land and when his father died in 1994, he continued staying and cultivating on the land. The Appellant's father secretly got a title to the land and the 1st Respondent was shocked in 2002 when the Appellant's father claimed that he was on his land including where his house was. The land dispute that ensued was determined by the LC 11 court which did not have jurisdiction in the matter.

The claim to ownership was corroborated by DW2 who is a brother to DW1 and by PW1 who testified that he knows DW1 as a son of the Yakobo Nyingi who was a neighbour to the suit land. DW3 also testified that when he came to the village in 1973, the people he found were Yakobo Nyingi, Venancio Ochora, and Ernest Wadri. This was also corroborated by PW2 who said he found Yakobo in 1975 when he came to the suit land and he was neighbouring the suit land. DW3 testified that when the late Kisembo came in 1982, he first stayed with Perez Byaruhanga whereafter he went to DW2 and requested to be permitted to use a small piece of his land to grow crops. DW3 corroborated DW1's evidence when he said Yakobo Nyingi was his neighbour on the upper side and even

during the locus visit, it was found that Yakobo Nyingi was an immediate neighbour of the suit land.

DW1 told the court that when a dispute arose between him and Kisembo Edward, LC III wrote a letter saying he should continue occupying the land. The Appellant failed to prove his title to the land. PW1 testified that when the land was inspected during the application process, the neighbours, whom he mentioned were available. However, Yakobo Nyingi was not among the neighbours mentioned yet he was a neighbour.

It is clear from P. EX 5 that neither DW1 nor the father signed as neighbours during the survey or inspection. No inspection report was availed to court from 1989 and yet PW2 testified that it took place. PW2 also said he is not sure whether Yakobo signed the application for lease by Kisembo Edward and that even himself, he didn't sign anywhere despite having participated in the inspection. PW4 contradicted his evidence that the land was free of encumbrances when he said that he found DW1 on the land when he went to inspect and that DW1's land is in Kisembo's land and the other part outside and that DW1 had gardens on the said land.PW4 also told the court that the land at inspection was not vacant and this not only corroborates PW4 but also shows he is not a credible witness.

The appellant's witnesses did not produce any documentation for the inspection or survey and thus PW4's evidence that 38 people attended the inspection and consented was mere allegations. PW4 told the court that at inspection, they generated attendance lists and consents for neighbours, but these were not adduced in court.

Resolution of court.

The question to be determined by the honorable court is as to the ownership of the suit property. ***Section 64(1) of the Registration of Titles Act*** provides that a person holding land under the Act holds it in priority over any other interest, except in the case of fraud or in instances where there were pre-existing interests that they have notice of from the Register. However, it has been established through a series of jurisprudence that not all interests in land appear on the register, and that is why it is very pertinent for parties to carry out due diligence. As was held in the case of ***Draza Moses v. Adul Salim & Anor (Civil Suit No. 0016 of 2013) [2016] UGHCDL 65***, whereas the holder of a certificate of title is considered to have legal interest in a piece of land, the law does not undermine unregistered interest and, unregistered interests, often identified as equitable interests,

are now universally regarded as being proprietary in nature and creating estates and interests.

In the landmark case of ***Katarikawe v. Katwiremu (1977) HCB 187,*** the High Court held that ***"Although mere knowledge of unregistered interest cannot be imputed as fraud under the Act, it is my view that where such knowledge is accompanied by a wrongful intention to defeat such existing interest would amount to fraud".*** The court further held that therefore, any registered interest thereafter would be held subject to the pre-existing interests that were disregarded during the acquisition of title by the registered owner.

It is not in contention herein that the Suitland is registered in the Appellant's father's name. However, what is alleged is that at the time of acquiring the leasehold title to the land, the land belonging to the late fathers of the Respondents was deliberately wrongly included in the appellant's title.

The issue as to whether the Respondents had an interest in the property or not before the acquisition of the title is a question of fact. ***Section 102 of the Evidence Act*** places the burden of proof to prove a given case on the person who would fail if no evidence at all were given on either side. Further, ***Section 103 of the Evidence Act*** also provides that the burden of proof as to any fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that proof of a particular fact lies on a particular person. In this case, both parties have presented their evidence which has led to the following findings.

There is a consensus that the 1st Respondent's father's settlement in the neighbourhood where the suit land is located preceded that of the Appellant's father. It is also agreed that both the 1st and 3rd Respondents' fathers were living in the neighbourhood with the suit land in 1994 when the Appellant's father applied for the lease over the suit property. However, there are numerous claims concerning the acquisition of the title in 1994 that have not been duly supported with the necessary evidence and the nature of these transactions has become the major point of the contention that land belonging to the Respondents was erroneously included in the Appellant's father's title. First, the witnesses of either side have testified that Yakobo Nyingi was a neighbour to the suit land, in respect to which a title was acquired. This means that as an immediate neighbour, his engagement and consent to the lease was key before the leasehold title could be created.

PW1, the Appellant himself, testified that when the land was inspected during the application process, the neighbours were available, and he identified the particular neighbours whom he said were available for the inspection. However, Yakobo Nyingi was not among the neighbours mentioned yet the same witness testified that he was a neighbour to the suit land. Further, the prosecution witnesses who claim to have been present during the inspection have all if there was a survey, an inspection, and consents signed by neighbours in support of the application for the lease and that an attendance list was generated during the inspection. However, none of these documents have been produced in court.

Accordingly, it is impossible to establish whether indeed at the time of leasing in 1994, the suit land was part of the approved acres or how the Respondents' fathers responded then. Concerning the 3rd Respondent's father, the Appellants' witnesses testified that he attended the leasing but did not object because he was only a worker on the suit land. This evidence was not corroborated by anything or anyone.

As a result, the court notes that not only is it difficult, with the evidence presented, to establish whether the Respondents' fathers were ever involved in the process that resulted in the leasing of the land but also, it is unclear as to what the demarcation of the Appellant's boundaries were then. The gaps in the evidence of the Appellant have not been sufficiently explained against the evidence of the Respondents and therefore, the burden of proof beyond a standard of probabilities has not been dispensed. I find that the Appellant has failed to prove that the title in his father's name did not include property belonging to other people to guarantee their deliberate exclusion in the title acquisition process and to wrongly include their land in the Appellant's.

Considering the failure to prove their title and the fact that it was established that the Respondents continue to occupy the suit land, it is more likely that the suit land was erroneously included during the acquisition of the title. The Appellant's title should thus be rectified to exclude the parcel of land belonging to the Respondents.

Ground 3.

The Appellant submitted that the findings at locus in quo were not noted. The Appellant was not allowed to show the court the boundary marks that existed even now on the suit land seeing the grown trees surrounding the suit land, graves, and houses occupied by the families of the appellants that still exist on the suit land up to now. It was imperative

to draw a sketch map and indicate the boundaries alleged to exist between the Appellant's family and the Respondents' families if any, cultivations on the suit land and the neighbors testified about in court, as even the Respondents alleged that they have graves too on the suit land. The Respondents' graves were not shown.

The developments by the parties and neighbours, the rock, stream, and acacia trees which Respondent alleged to form their boundary to the suit land should have been recorded to assist with the adjudication of the dispute, but the trial Magistrate closed her eyes to the same which occasioned a miscarriage of justice.

The failure to follow the well-established locus procedure by the trial magistrate vitiated the entire locus proceedings herein to the detriment of the Appellant. Due to the failure to properly carry out the locus in quo, all the above observations went unnoticed and are not on record, which was detrimental to the Respondent.

The 1st Respondent's Counsel submitted that all the requirements in locus in quo were fulfilled. It is clear from the record of proceedings that the parties testified at the locus in quo while still on oath, and the proceedings at the locus in quo were recorded and a sketch map drawn showing what was found on the suit land. Accordingly, the trial magistrate did not fail to conduct the procedure at locus in quo as alleged by the appellant in his submission and therefore, there was no miscarriage of justice.

Resolution

The law relating to the locus in quo was discussed in the case of **Ddamulira** ***Aloysius v. Nakijoba Josephine; Civil Appeal No. 0059 of 2019*** as follows;

> ***"Locus in quo visits are provided for in Order 18 rule 14 of the Civil Procedure Rules which provide that the court may at any stage of a suit inspect any property or thing concerning which any question may arise. Locus in quo proceedings form part of the trial and all rules observed in court are also observed at the locus proceedings."***

In the case of ***Deo Matsanga v. Uganda 1998 KARL 57*** it was also held that,

> ***"The purpose of visiting locus in quo is to cross-check on the evidence adduced during trial. The proceedings at the locus should form part of the court record. The trial Magistrate should record everything that a witness states in locus quo and***

recall him to give evidence of what occurred on oath and the opposite party is allowed to cross-examine him."

Further, it should be noted that once the court visits the locus, evidence at the locus is conducted as part of the trial. There is no adding to or closing gaps at the locus. The evidence only clarifies what has already been testified in court. *(See:* ***The Registered Trustees of the Archdiocese of Tororo v. Wesonga Reuben Malaba & Ors HCT-04-CV-CA-00096 OF 2009).***

It should also be noted as was held in the case of ***David Acar and Ors v. Alfred Acar (1987) HCB 60,*** that most court decisions cited seem to suggest that failure to visit the locus is most likely to fail justice because it is intended that court should move at the scene where the land is to clarify the facts raised in open court. However, it is the peculiar nature of land transactions that visits a necessary part of the trial and proper conduct of it to be exercised by the trial Magistrate /Judge. Where there is failure to do so, is often likely to result in a nullification of the trial depending on the facts of the case.

The issue to be determined now is whether the locus visit that was done by the trial magistrate was properly conducted. The procedure for carrying out locus in quo visits is set out in ***Practice Direction No. 1 of 2007*** and it summarily requires that all parties, their witnesses, and advocates are present, parties and their witnesses are allowed to adduce evidence and be cross-examined, all proceedings are recorded including a sketch map, if necessary.

The Appellant contends that the locus visit was not properly carried out, the findings at locus quo were not noted, the Appellant was not allowed to show the court the boundary marks that existed, a sketch map indicating the boundaries alleged to exist between the Appellant's family and the Respondents' families if any was not drawn and the Respondents' burial grounds alleged to exist were not shown.

It should be noted that visiting the locus is part of the court hearing and the procedure followed during the locus quo is as would be in a courtroom. It can be established from the record of proceedings that the locus visit took place on 18th July 2019. It is also established from the record that the attendance list was generated and the Appellant was present during locus quo. A sketch map was also drafted and is in the record of proceedings. The record of the court hearing was not included in the proceedings. Irrespective of that the recording of the court proceedings as was taken down then by the

clerk during locus quo is on file. From it, we can see that all parties and their Advocates were available.

The locus in quo began with the cross-examination of one of the Defence witnesses who had not been cross-examined earlier in court. Thereafter, the locus proceedings took place too. It is this court's opinion that the role of the court is limited to organizing the locus in quo, ensuring that the concerned parties are available, and listening to their evidence. The parties decide on how to conduct their evidence, and which evidence to present in court or not to.

The Appellant and his lawyer were both present and had an opportunity to present evidence, which they did not. However, even if it were the case that they had not been invited to present such evidence, an objection should have been raised during the continuance of the proceedings. No such objection was raised and this not only shows a lack of diligence. It is incumbent upon parties to act diligently and legal business should be conducted with expedience and efficiency and dilatory conduct will defeat a party's right to be heard. ***(See: Sulaiti Ddungu v. Kateera G. Kaguzibwe; Civil Appeal No. 0044 of 2015)***. It is therefore the court's opinion that the trial Magistrate followed the proper procedure for locus quo.

This issue is determined in negative too.

Grounds 4 & 5.

The parties submitted issues 4 and 5 together, although they were not related. Accordingly, the court's finding in respect to both issues will be separated.

The Appellant's lawyers submitted that the trial Magistrate misdirected herself when she held that the Respondents had proved fraud against the Appellant's land title and even including the portion of the land between the Appellant and Owonda Etyen who had already entered a consent judgment by which the suit he occupied was decreed to the Appellant and forwarded the file to the High Court for a consequential order for cancellation of the Appellant's title. It was submitted that pride must be specifically pleaded and proved however, DW1, DW2, and DW3 did not even prove that the Appellant or his father was fraudulent in acquiring the certificate of title for the suit land. The Appellant's father acquired the land through a transparent process and the office bearer testified on how the land was acquired by the Appellant's father. They were not disproved. Further, on 6th October 2014, the Appellant and 2nd Respondent entered a

consent agreement in respect to his claim. What was left to trial was only the dispute between the 1st and 3rd Respondent. The trial magistrate erred when she adjudicated on a matter that had been settled already.

Regarding ***Ground 4***, Counsel for the 1st Respondent said that there was no inspection report from 1989 and neither did DW1 nor his father, and yet according to the proceedings, he was a neighbour. Yakobo Nyingi did not also endorse the application. PW2 informed the court that the Respondents did not sign the Application and further that in 1984 and 1994, they never drew the sketch map of the suit land being inspected and no attendance was generated. The people who signed the application were not immediate neighbours and this was proved during locus quo. No survey was done.

DW1 testified that PW1's father acquired title to the land when he was there on the land. This was corroborated by PW4 who testified that DW1 was on the land, had gardens on it and other people were occupying it. DW4 further submitted that Kisembo acquired the title without the consent of any of the Respondents. The above circumstances all show that the Respondent was fraudulent in acquiring the land.

Regarding ***Ground 5***, DW1 was never a party to the consent judgment and thus the same cannot be binding on him.

Resolution of court

Ground 4

The determination of this issue follows the findings of grounds 1 and 2. As is already stated therein, the court finds that the Appellant has failed to prove its case on a balance of probabilities as to the ownership of all the land that was included in his father's title. In line with the finding in **Katarikawe v. Katwiremu (supra**), it is our finding that although deliberate steps were not taken by the Appellant's father to commit fraud in 1994, the fact that he intentionally ignored the pre-existing unregistered interests on the land that he was aware of is imputed as fraud. The suit land cannot be said to have been lawfully acquired by the Appellant's father and ought to be excluded from the title. The Respondents should make an application for consequential orders following the findings of the trial court.

Ground 5

It is the court's opinion that this ground is misconceived. A review of the trial magistrate's decision reveals that the decision is limited to the 1st and 3rd Respondents, who were not parties to the consent. Whereas the 2nd and 3rd Respondents had a related claim, each party had an individual cause of action.

In the decision of the case of ***Attorney General and Anor v. James Mark Kamoga; SCCA No. 08 of 2004,*** the Supreme Court held that a consent judgment once signed by the parties, is binding on all the parties who signed it and enforceable by and against the parties to it. It has already been established that the consent entered was only between the Plaintiff/Appellant and 2nd Defendant/2nd Respondent. It did not have anything to do with the 3rd Respondent whose claim continued to exist.

Accordingly, the finding of the court was not in error. The trial magistrate's finding was in respect to the 1st and 3rd Respondents only, whose claims continued to subsist given that they had not been party to the earlier consent.

I find this issue in the negative.

Conclusion.

The Court hereby makes the following orders.

a. The Appeal has failed.
b. Consequential orders are granted directing the Registrar of Titles to rectify the Register by excluding the suit land from the Appellant's leasehold title deed.
c. Costs are awarded to the Respondents.

It is so Ordered.

Dated and Delivered this 29th Day of February 2024.

Isah Serunkuma

JUDGE