THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 0076 2015

BONGOLE GEOFREY & 4 OTHERS::::::::::::::::::::::::::::::APPELLANTS

VERSUS

AGNES NAKIWALA::RESPONDENT

CORAM: HON. MR. JUSTICE GEOFREY KIRYABWIRE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. LADY. JUSTICE HELLEN OBURA, JA

JUDGMENT

This is an appeal arising from the decision of Wilson Masalu Musene, J, delivered on the 19th day of November, 2014 in which he entered judgment in favor of the plaintiff on the following terms:

a) The plaintiff is the lawful registered proprietor of the land in dispute.
b) The counterclaim by the defendants fails and is hereby dismissed.
c) The plaintiff is entitled to vacant possession and a permanent injunction restraining the defendants from committing further acts of trespass.
d) The caveat lodged on the land in dispute by the defendants be vacated.
e) Each party to bear its own costs.

The facts giving rise to this Appeal are as follows;

The Plaintiff (now respondent) sued the defendants (now appellants) for a permanent injunction, vacant possession, general damages, declaration that the plaintiff is the lawful/rightful owner of the suit land, mesne profits, special damages, an order that the caveat lodged on the suit land by the defendants be vacated and costs of the suit. The Appellants denied the allegations and counter claimed that the Respondent fraudulently and without any claim of right registered the land comprised in Kyadondo Block 204 Plots 486 and 488 at Kawempe in her names to the detriment of the Appellants. Judgment was entered in favor of the Respondent and the Appellants were ordered to vacate the caveat lodged on the disputed land and their counter- claim was dismissed. Being dissatisfied with the Court's decision, the Appellants appealed to this Court.

The grounds of appeal as they appear in the Memorandum of Appeal are:

1. *That the learned trial Judge erred in law and in fact when he failed to evaluate all the evidence on record and therefore arrived at a wrong conclusion.*

2. *That the learned trial Judge erred in law and in fact when he failed to take a proper record of the proceedings at the Locus in quo and therefore arrived at the wrong conclusion.*

3. *That the learned trial Judge erred in law and fact when he failed to give the parties an opportunity to cross examine the witnesses at the Locus in quo.*

4. *That the learned trial Judge erred in law and fact when he ignored the evidence contained in the pleadings of Civil Suit No. 1168 of 1998 and therefore found that the appellants had no interest in the suit land.*

5. *That the learned trial Judge erred in law and fact when he failed to evaluate the evidence on record and therefore arrived at a wrong conclusion that the Respondent acquired Title to the suit land without any fraud.*

At the hearing of the Appeal, Mr. Kirumira Adam appeared for the appellants while Mr. Kenneth Kajeke represented the respondent. All parties were present in Court.

On ground 1 of the appeal, counsel for the Appellants invited Court to look at paragraph 9 of the Written Statement of Defense filed by the defendants then who included the respondent herein in Civil Suit No.1168 of 1998. He further submitted that there was a power of attorney issued by the defendants and the same indicated their capacity as beneficiaries of the estate of the late Erick Kimbowa and it was pursuant to those proceedings that the defendants, the respondent herein inclusive got a registrable interest through a consent judgment. Counsel added that in Civil Suit No.1168 of 1998, the respondent was not pleading in her own right but she was pleading as deriving an interest from the estate of the late Erick Kimbowa therefore she did not acquire individual

rights but acquired rights on behalf of all the beneficiaries of the estate of the deceased.

Counsel further submitted that the process of getting to that consent judgment was tainted with fraud as the respondent and her late mother Julian Nagawa misrepresented themselves to Court as the only surviving beneficiaries of the late Erick Kimbowa whereas not. Court further relied on that information and made orders in respect of them alone to the exclusion of the appellants and yet the appellants too were beneficiaries.

On grounds 2 and 3 of the appeal, counsel for the appellant invited Court to look at page 72 of the Record of Appeal where the learned trial Judge stated that "whatever each party showed Court has been noted and details will also be brought out by advocates on either side." He submitted that it is trite law that court has to record the proceedings and what transpired at the locus in quo. Counsel faulted the trial Judge for failing to record what transpired at locus in quo but instead relied on the advocates to bring out what transpired there.

Counsel submitted that the purpose of the locus in quo is to enable witnesses point out what they testified in Court such that the Court can be able to visualize whatever they laid evidence on, and by Court failing to bring this out in its record, the evidence was lost. He further submitted that the trial Judge attempted to turn himself into a witness as all his assertions in the judgment on what transpired at the locus in quo were not based on the record but what he

perceived. He relied on the case of ***William Mukasa v Uganda [1964] EA 698*** to support his submissions.

Counsel argued grounds 4 and 5 concurrently. He invited Court to look at the Power of Attorney where the respondent and her mother clearly purported to be the surviving beneficiaries of the estate of the late Erick Kimbowa whereas not and to counsel, this was a fraudulent intent on their part. He further submitted that when the respondent and her mother represented themselves as the surviving beneficiaries to Court, they were perverting the truth as to the existence of other beneficiaries. Counsel relied on the cases of ***Vivo Energy Uganda Ltd v Lydia Kisitu, Civil Appeal No.193 of 2013, Pyramid Building Society (in liquidation) v Scorpion Hotels Property Ltd (1997) VIC CA*** *and* ***Fredrick Zaabwe v Orient Bank Ltd & 5 Others, SCCA No.4 of 2006*** to support his submission that fraud may take various forms including, pretence and collusion in the conscious misuse of a power or a dishonest course.

Counsel prayed that the appeal be allowed; the judgment and orders of the High Court in Civil Suit No. 163 of 2013 be set aside and the Appellants be declared bona fide occupants of the suit land. He further prayed that the respondent's title be cancelled and the same reverts to the estate of the late Erick Kimbowa and that Court awards the appellants costs of this appeal and in the lower Court.

On the other hand, counsel for the respondent opposed the appeal and supported the decision of the trial Judge.

On ground 1, Counsel submitted that the land in dispute was properly acquired by the respondent and the late Juliana Nagawa pursuant to the Judgment of Court in Civil Suit No.1168 of 1998. He further submitted that the appellants have no Kibanja interest on the property that was purchased by the respondent as their father sold his interest in the Kibanja.

On ground 2 and 3 of the appeal, counsel invited court to look at page 71 of the Record of Appeal on how the locus in quo visit was conducted. He submitted that the conduct of the proceedings at the locus in quo did not violate the set down procedures and therefore no miscarriage of justice was occasioned to the appellants. He prayed that this court upholds the judgment of the lower Court and dismisses the appeal with costs to the respondent.

In rejoinder, counsel for the appellants submitted that the two witnesses who led evidence at the locus in quo were not the same witnesses who had earlier testified in court and thus Court was hearing fresh evidence. He further submitted that if Court had found it prudent to hear this new evidence then the advocates on either side should have been given an opportunity to cross examine these witnesses.

We have studied the record of appeal and the judgment of the lower Court. We have also considered the submissions of both counsel and the authorities that were availed to Court which have been very useful in resolving this matter.

It is trite law that the duty of this Court as a first appellate court is to re-evaluate evidence and come up with its own conclusion as enunciated in Rule 30(1) of the Court of Appeal Rules.

We shall resolve grounds 2 and 3 first because if resolved in the affirmative, they would dispose of the whole Appeal.

The grounds are framed thus;

That the learned trial Judge erred in law and in fact when he failed to take a proper record of the proceedings at the Locus in quo and thereby arrived at the wrong conclusion.

That the learned trial Judge erred in law and fact when he failed to give the parties an opportunity to cross examine the witnesses at the Locus in quo.

Counsel for the appellant faulted the learned trial Judge for failing to conduct a proper hearing at locus in quo. He submitted that the trial Judge visited the locus on the 16th day of September 2014 in the presence of both parties and their Advocates but did not record the proceedings during the visit. He invited Court to look at page 72 of the Record of Appeal where the trial Judge stated that, "whatever each party showed court has been noted. Details will also be brought out by advocates on either side". Counsel added that the trial court went further to allow persons who were not witnesses and had not testified in the trial court to give evidence at the visit in locus. Further that the trial Judge also turned

himself into a witness because all his assertions in the judgment on what transpired at the locus in quo were not based on the record but what he perceived.

On his part, counsel for the respondent argued that the proceedings at the locus in quo were lawfully conducted and no injustice was occasioned to any party.

The manner and purpose of which proceedings at locus in quo should be conducted has been a subject of numerous decisions including; ***De Souza V Uganda (1967) EA 784, Fernandes V Noroniha (1969) EA 506 and Nsibambi V Nankya (1980) HCB 81.***

In ***WILLIAM MUKASA V UGANDA (1964) EA 698 AT 700***, Sir Udo Udoma CJ (as he then was) held as follows:

> *"A view of a locus in quo ought to be, I think, to check on the evidence already given and where necessary and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."*

Visits to the locus are provided for by the ***Practice Direction No.1 of 2007.*** Guideline 3 of the Practice Direction provides as follows on visits to locus in quo:

"During the hearing of land disputes the court should take interest in visiting the locus in quo, and while there:

a) Ensure that all parties, their witnesses, and advocates (if any) are present.

b) Allow the parties and their witnesses to adduce evidence at the locus in quo.

c) Allow cross-examination by either party, or his/her counsel

d) Record all the proceedings at the locus in quo.

e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan if necessary."

The trial Judge stated at page 10 of the Record of Appeal that:

"And when this Honorable Court visited the locus, the parties showed Court the Bibanjas which the said Eric Kimbowa distributed to his children and the said children sold them off. The plaintiff showed Court the shrine which she constructed on the suit land and the structures. None of the defendants showed Court any building put up by the late Fred Bongole the father of the defendants on the suit land."

Upon examination of the Record of Appeal, we find that during the visit to the locus in quo, the trial Judge did not record any of the testimonies he received from the witnesses yet in his finding above, he stated that the parties showed Court the Bibanjas which Erick Kimbowa distributed to his children, he also permitted persons who had not testified in Court such as Fred Kabuuka,

Kabogoza Luwemba and Paul Nsubuga to make statements which he then referred to. This is evident at page 72 of the Record of Appeal. Further, the trial Judge stated that *"Both sides/parties took Court around the disputed land. Whatever each party showed Court has been noted and details will also be brought out by advocates on either side."*

We further note that there is no evidence on record to show that allowance was made for the parties to cross-examine any of the witnesses. In ***David Acar & 3 others v Alfred Acar Aliro (1982) HCB 60,*** Court observed that:-

> *"When the Court deems it necessary to visit the locus-in-quo then both parties, their witnesses must be told to be there. When they are at the locus-in-quo, it is.....not a public meeting where public opinion is sought as it was in this case. It is a Court sitting at the locus-in-quo. In fact the purpose of the locus-in-quo is for the witnesses to clarify what they stated in Court. So when a witness is called to show or clarify what they stated in Court, he /she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings."*

We are of the considered view that the procedure stipulated in the Practice Direction No.1 of 2007 and in the above authorities on visits to locus in quo was not followed by the trial Judge which was an error on his part and this in our view occasioned a miscarriage of justice to the appellants.

We are persuaded by the authority of ***Matayo Okumu v Fransiko Amudhe & 2 others (1979) HCB 229*** where it was held that a decision appears to have caused a miscarriage of justice where there is a prima facie evidence that an error has been made.

In ***Oyua Enoch v Okot William & 9 ORS HCCS No. 0022 OF 2014,*** the trial Judge found that where there is a glaring procedural defect of a serious nature by the trial court, then the Court is empowered to direct a retrial if it is of the opinion that the defect resulted in a failure of justice, but this should be exercised with great care and caution. It should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence.

Having clarified as above, we find that the locus visit was conducted in a highly irregular manner contrary to the principles of law regulating such visits, thus causing a miscarriage of justice which this court cannot overlook.

It was irregular for the trial Court to have allowed persons who were not witnesses and had not testified in Court to give evidence at the locus.

While visit to the locus in quo is not a mandatory requirement, where Court deems it deserving, then it is bound to carry it out properly. The purpose is to find out whether the testimony given in respect of the impugned property is in tandem with what pertains physically on the ground. The visit is not intended and should not be applied to fill gaps in evidence.

In the instant case, the visit to the locus in quo was necessary because in their testimony, the witnesses had referred to certain features of the land including boundaries, graves, a shrine and old structures of homesteads. It was prudent that he made the visit but the trial Judge acted irregularly when he allowed persons who had not testified in Court to give evidence at the locus in quo.

This in our view vitiated the proceedings at the locus in quo and any findings the trial Judge made based upon them.

Therefore grounds 2 and 3 of the Appeal succeed.

Having held that the locus in quo was improperly done, we do not find it necessary to resolve grounds 1, 4 and 5 of the Appeal.

Rule 32(1) of the Rules of this Court empowers the Court to confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders. Failure to observe the principles governing the recording of the proceedings at the locus in quo, and yet relying on such evidence acquired and the observations made thereat in the judgment, was a fatal error which occasioned a miscarriage of justice.

We find that allowing evidence obtained at the visit of locus in quo by persons who were not witnesses in the case would occasion a miscarriage of justice. For that reason we set aside the proceedings.

The appeal succeeds and the file should be sent back to High Court for a retrial. We make no order as to costs.

We so order.

Dated this ....28th....day of ....MAY....2018.

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HON. MR. JUSTICE GEOFREY KIRYABWIRE

JUSTICE OF APPEAL

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HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA

JUSTICE OF APPEAL

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31/5/18

Kirumira Adam for the appellants

2nd, & 5th Appellants are in court

Respondent is in court without counsel

Cc Mellissa Mutsande.

Kirumira Adam for Ruling.

Court: Ruling read out in court to the parties by Esta Nambayo D/R.

31/5/18.