IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 107 of 2018

In the matter between

ODOCH GEOFFREY **APPELLANT**

And

1. **ODONG KARAMELA**
2. **ODONG JACKSON**
3. **OKELLO DAVID** **RESPONDENTS**

Heard: 22 July 2019
Delivered: 29 August 2019

Evidence**:** *— Visit to the locus in quo — The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence, if any about physical objects on the land and boundaries — It is the parties or the witnesses who should during the visit to the locus in quo point out such places and things which are material to the case — at the locus in quo, the court should "record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary — Because its purpose is to illustrate testimony, demonstrative evidence gathered at the locus in quo has no evidentiary value independent of the testimony of the witness — court ought to have be sensitive to the probability of finding self serving evidence at the locus in quo — When a party makes a concerted, repeated, and evolving effort to materially or substantially alter evidence that they know is highly relevant to the claims made by the adversary, with efforts to substitute it with self-serving evidence, an adverse inference may be drawn from the fact of spoliation of evidence, because such efforts are wilful with the intention of defeating the adversary's effort to meet their burden of proof — Under well-established evidentiary principles, a litigant's intentional*

suppression of relevant evidence gives rise to an inference that the litigant's case is weak and that the litigant knew his or her case would not prevail if the evidence was presented at trial.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant as administrator of the estate of the late John Acaye, sued the respondents jointly and severally for a declaration that the estate of the deceased is the rightful customary owner of approximately 10 acres of land situated at Adak village, Lukwir Parish, Lalogi sub-county in Gulu District, general damages for trespass to land, an order of vacant possession, a permanent injunction and the costs of the suit.

[2] His claim was that the deceased and his family have owned and lived on the land in dispute since the year 1980. During that year, the land was given as a gift *inter vivos* to the late John Acaye by his father Obina Alphonse. The deceased constructed a house thereon, a pit latrine, planted three teak trees, and established gardens where he grew various crops. The deceased and his family enjoyed quiet possession thereof until his death in the year 2007. He was survived by a widow and four children. They continued to enjoy quiet possession of the land until the year 2014 when the respondents without any claim of right crossed the boundary and occupied approximately six acres of the land. They cut down trees planted by the deceased and established their own pine tree plantation instead. They have since then prevented the family of the deceased from accessing that part of the land and continue to disturb their quiet enjoyment of the rest of the land, hence the suit.

[3] In their joint written statement of defence, the respondents refuted that claim. They instead averred that they have been resident on the land in dispute for more than fifty years. The land originally belonged to his late father in law, Okello Olany before it was inherited by her late husband, Obwoma Galdino. The 1st respondent settled thereon since the early 1950s when she married Obwoma Galdino, the father of the 2nd and 3rd respondents. Upon his demise in the year 2001, the 1st respondent planted pine trees on the land. Neither the appellant nor his father have ever lived on the land in dispute. They therefore prayed that the suit be dismissed with costs.

The respondent's evidence in the court below:

[4] Testifying as P.W.1 the appellant Odoch Geoffrey testified that he is the administrator of the estate of his late father, John Acaye. His late father owns the approximately ten acres in dispute which he inherited from his father, Obina Alphonse. All the respondents are his relatives. They chase him and his siblings off the land in dispute in the year 2014, claiming that he is not the biological son of the deceased. Before his death, the late John Acaye lives on the land in dispute with his family. When he died in 2007, the appellant and his siblings took over possession until they were evicted in the year 2014. The respondents proceeded to plant pine and eucalyptus trees on the land and also constructed houses thereon. They cut down the appellant's teak trees that had existed on the land and attempted to burn the tree stumps. Debris of the appellant's father's former house and remnants of the disused pit latrine still existed on the land. The respondent's land is cross Moroto Road positioned, not directly opposite but rather diagonally, approximately 150 meters away from the land in dispute.

[5] P.W.2 Lukwiya Francis the appellant's paternal uncle and younger brother of the late John Acaye, testified that the land in dispute belonged to the late Acaye John who acquired it in 1980 from their father Obina Alphonse. He cultivated it and planted some pine and teak trees. He had constructed a grass thatched

house on the land but it was destroyed during the insurgency. Galdino Ogwal the late husband of the 1st respondent never claimed the land until his death in 2001. The respondent's land is about 500 meters from the land in dispute, separated by the road to Moroto. The respondents began claiming the land in 2014 when they cut down all the pine trees of the late John Acaye, planted their own pine and eucalyptus trees and constructed a house thereon in August 2016.

[6] P.W.3. Awor Hellen, widow of John Acaye, testified that she last lived on the land at the breakout of insurgency when the family relocated to Gulu Town. John Acaye died in 2007 and was buried at his paternal uncle's home in Adak. The respondents have since taken possession of the land. Had built grass thatched houses on the land. P.W.4 Ogwal David, a neighbour to the land in dispute, testified that it is during the 1980s that the late John Acaye wasa given as a gift *inter vivos* the land in dispute by his father Obwona Galdino, husband of the first respondent. When John Acaye died in 2007 he was buried at his paternal uncle's home which is about one and half miles away from the land in dispute because of the then prevailing insurgency. John Acaye used to live on the land in dispute, had grass thatched houses thereon and had planted teak trees. There are no longer any signs on the land of his homestead which collapsed during the insurgency, and the teak tress he had planted since they were dug up. P.W.5 Okidi Vinansio, another neighbour to the land in dispute, testified that the respondents live across the road. The late John Acaye had planted teak trees and had a pit latrine on the land but all were destroyed by the respondents. They have since planted eucalyptus and pine trees on the land. They also in 2015 constructed two permanent buildings on the land.

The appellant's evidence in the court below:

[7] In her defence, the 1st respondent Adong Karamela testified as D.W.1 and stated that the land in dispute belonged to her husband Galdino Obwoma. He inherited the land from his grandfather the late Olello Olaany before she married him and

used the land for cultivation only. The 2nd respondent cut down some Madalena trees on the disputed land in 2014 and planted pine trees. The 2nd and 3rd respondents planted pine and eucalyptus trees respectively. None of the respondents live on the land.

[8] D.W.2 Odong Jackson testified that he inherited the land in dispute from his late father Galdino Obwoma upon his demise in 2001. He was born and raised on the land. There were three big Madalena trees on the land in dispute which he cut down in the year 2014 and planted pine trees instead. His father Obwoma Galdino did not have a home on the land in dispute during the 1980s. John Acaye never lived on the land and it does not belong to him.

[9] D.W.3 Okello David testified that he inherited the land in dispute from his late father Galdino Obwoma upon his demise in 200. He was born and raised on the land. There were three big Madalena trees on the land in dispute which the 2nd respondent cut down in the year 2014. He planted eucalypts trees on the land in 2014.

[10] D.W.4 Onono Edward testified that Acaye John used to live at Adak Okunge village. The land in dispute did not belong to him. The second and third respondents acquired it by inheritance from their late father Galdino Obwoma. The second and third respondents were born and raised on the land. The land was hitherto predominantly used as farmland only. The late Galdino Obwoma planted three Madalena trees which the 2nd respondent cut down for timber and planted four acres of pine trees instead. The 2nd respondent Wokorach Bosco testified as D.W.5 and stated that he was born and raised on the land in dispute. His father the late Galdino Obwoma had planted three Madalena trees which the 2nd respondent cut down and planted pine trees in their place. That is what sparked off the dispute.

Proceedings at the *locus in quo*:

[11] The court visited the *locus in quo* on 29th October, 2018. The Court observed there were recently planted pine and eucalyptus trees. The appellant was not in possession. There were stumps of pine trees still visible on the land. The respondents have a house and gardens on the land. There were no signs of an old homestead or pit latrine on the land as claimed by the appellant. The Court prepared a sketch map of the area in dispute.

Judgment of the court below:

[12] In his judgment, the trial Magistrate held that had the appellant and the family of the deceased John Acaye been in possession of the land as recently as the year 2014, the court would have found evidence of their activities on the land but there was none found during the visit to the *locus in quo*. None of the relatives of the deceased lived in the neighbourhood. The appellant's evidence had multiple unexplained contradictions.

[13] P.W.2 Lukwiya Francis stated the land in dispute did not form part of Alfonse Obina's estate. The late John Acaye was never buried on the land yet the insurgency had ended. On the other hand, during the visit to the *locus in quo* the respondents were found to be in actual possession of the land. He stated that;

> It's the court's finding that taking the evidence found at locus and the evidence at court in totality and having looked at the contradictions, it's only more probable on a balance of probabilities that the defendants are the customary owners of the suit land because the plaintiff failed to prove that the suit land formed [part] of the estate of the late John Acaye where the plaintiff is an administrator with a beneficial interest. On issue two, having found that this was the customary land of the defendants, the claim of trespass cannot pass because this was not an unauthorised entry onto land.

[14] The trial Magistrate concluded that the appellant had failed to prove ownership of the land and therefore the issue of trespass did not arise since the respondents are in adverse possession. The suit was dismissed with costs to the respondents. A permanent injunction was issued restraining the appellant from interfering with the respondents' quiet enjoyment.

The grounds of appeal:

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

1. The learned trial Magistrate erred in law and fact when he held that the suit land does not form part of the estate of the late John Acaye, thereby causing a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact in holding that the defendants acquired the suit land by way of adverse possession, thereby causing a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact when he failed to properly conduct proceedings at the locus in quo, thereby causing a miscarriage of justice.
4. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby causing a miscarriage of justice.

Arguments of Counsel for the appellant:

[16] In their submissions, counsel for the appellant argued that the trial Magistrate misconstrued the testimony of P.W.2 Lukwiya Francis who stated categorically that the land in dispute belonged to the late John Acaye, and that it was given to him by their late father, Obina Alphonse in 1980. It therefore could not form part of the estate of the late Obina Alphonse. Although the 1st respondent claimed she had been in possession and was utilising the land since her marriage to Obwoma

Galdino, all the respondents' witnesses stated that the respondents began using the land in the year 2014 for which reason the question of adverse possession does not arise.

[17] The findings made by the trial magistrate in his judgment about the status of the land are inconsistent with the observations made and noted in the record of proceedings taken during the visit to the *locus in quo*. In the judgment he mentions the existence of several structures on the land yet in the notes only one is mentioned. In the judgment he stated that considering the activities of the respondents observed on the land they had been in possession for the land for long, but in the same breath he stated the pine and eucalyptus trees had been recently planted by the 2nd and 3rd respondents. The observations made by court are inconsistent with those made by the then counsel for the appellant in her final written submissions to the trial court. He prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[18] In response, counsel for the respondents argued that the appellant's evidence was contradictory and the trial court was correct in not relying on it. Proceedings at the *locus in quo* were conducted properly where the court found that the respondent's home was in the middle of the land in dispute and he had established gardens on the land. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[19] 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*).

[20] 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 fourth ground of appeal is struck out for being too general:

[21] In the first place, the fourth 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 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.

Errors in conducting proceedings at the *locus in quo*.

[22] In ground three, the trial court's decision is assailed on account of the manner in which it evaluated evidence obtained at the *locus in quo* and the weight it attached to the observations made at the *locus in quo*. It is a requirement of the fair and impartial administration of justice that facts be determined only upon evidence properly presented on the record. When during proceedings at the *locus in quo* there is no evidence on record that the parties were given an opportunity to cross-examine, to object to the introduction of the evidence, or to rebut the evidence introduced on record by the adversary, the evidence so obtained is admitted in contravention of the tenets of a fair trial and cannot be used.

[23] Furthermore, in case of an appeal, where the trial Court limits its judgment strictly to the material placed before it by the parties in court, then its judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court. This will not possible where the lower court's judgment is based on personal observations made out of court and off the court record, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court. Because there is no record of the procedural aspects of what transpired during the visit to the *locus in quo*, the litigants may effectively be denied any means of challenge on appeal.

[24] It is now settled law that the purpose of a visit to the *locus in quo* 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. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence, if any about physical objects on the land and boundaries. Where there

exists such conflicting evidence, 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.

[25] According to Rule 5 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*), at the *locus in quo*, the court should "record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary." The implication is that the observations have to be meticulously recorded. The presiding judicial officer needs to adopt a procedure that draws the attention of the parties to the material being placed on record and any observations made. This should be done not only for maintenance of the court's impartiality but also in order to enable the parties test or rebut the accuracy of the court's observations by making appropriate, timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse observation formed against such a party, keep it entirely off the record, only to spring it upon the party for the first time in the judgment.

[26] Procedurally, the Court should be accompanied by the parties and any relevant witnesses to the inspection. It is the parties or the witnesses who should during the visit to the *locus in quo* point out such places and things which are material to the case. Each party may be invited to make appropriate observations such as would aid and assist them in respect of the parties' case as presented in court, within the procedural safeguards of evidence on oath and the opportunity of cross-examination by the adversary. The record of court should reflect the proceedings at the locus in quo including those things or features the parties pointed out as material to their case.

[27] The importance of adherence to this procedure was explained by the Court of Appeals of Tennessee in *Ernest Tarpley, et al. v. Bert M. Hornyak, et al. No. M2002-01466-COA-R3-CV. Decided: March 15, 2004*, thus;-

> A view by the fact finder of places or objects related to a lawsuit does not *per se* destroy the fact finder's impartiality. Where the purpose of a view is to assist the fact finder to better understand evidence properly introduced, and the view itself is not considered as evidence, then the potential for prejudice to a party not present at the view is minimised. In contrast, where the fact finder's observations upon a view are used as evidence to determine the facts, then the procedural safeguards of a trial, including the rules of evidence and the participation of the parties must apply.

[28] When the trial court makes observations at the *locus in quo* without adhering to the tenets of a fair trial and the rules of evidence, it effectively acts like a presiding judicial who makes personal extrajudicial observations, outside of the judicial proceedings, and then bases a decision on those observations. In that case the presiding judicial officer becomes a source of evidence, in effect, a witness. It is established law that when magistrate or judge visits a *locus in quo* and makes notes, the parties should be given chance to agree or deny or contradict the notes on oath, if those notes are to be relied upon in judgment. In *Fernandes v. Noronha [1969] E.A 506* at page 508, Duffus V. P. said:“ ….. in cases where the court finds it expedient to visit a *Locus in quo*, the court should make a note of what took place during the visit in its record and this note should be either agreed to by the advocates or at least read out to them..."

[29] It is when the court has acquainted the parties with the materiality of the observations before placing them on record, and drawing their attention to the tentative opinion formed on basis of the visual observations made by the Court that statements regarding those observations and opinions when eventually reflected in the judgment of the court will be taken to be a correct account of what occurred and therefore final, recorded after intervention of all interested parties at the *locus in quo*. It is undesirable that any observations and / or comments made

by either party or the trial Magistrate during the *locus in quo* visit and which do not form part of the record of proceedings should be used by the trial Magistrate in arriving at his or her final decision.

[30] A trial Magistrate should be careful to avoid placing himself or herself in the position of a witness and arriving at conclusions based upon his or her personal observations of which there is no evidence upon the record. When there is conflicting evidence as to physical facts, the Magistrate can use his or her own observations to resolve the conflict, but it is open to him or her to substitute the result of his own observation for the sworn testimony nor to reach conclusions upon something he or she has observed in the absence of any testimony on oath to the existence of the facts he or she has observed.

[31] Physical items on the land are only demonstrative evidence. They simply demonstrate or illustrate the testimony of a witness. Such evidence will be admissible only when, with accuracy sufficient for the task at hand, it fairly and accurately reflects that testimony and is otherwise unobjectionable. Because its purpose is to illustrate testimony, demonstrative evidence gathered at the *locus in quo* has no evidentiary value independent of the testimony of the witness. It is authenticated by the witness whose testimony is being illustrated. That witness will usually identify salient features of the object and testify that it fairly and accurately reflects what he or she saw or heard on a particular occasion, such as the location of activities, people or things on the land.

[32] The correct purpose of a visit to the *locus in quo* is to aid the court to better understand and weigh the evidence, not to obtain new evidence or to independently determine credibility. The court should consider the sufficiency of the other evidence and the availability of alternatives to visiting the *locus in quo*. The purpose is not to substitute the eye for the ear, but rather to clear any ambiguity that may arise in the evidence or to resolve any conflict in the evidence as to physical facts. Observations of a trial Magistrate at the *locus in quo* are not

evidence unless such evidence has been properly received at the locus or in court through witnesses in situations in which the adverse party is given opportunity to cross-examine the witness.

[33] The record of proceedings at the *locus in quo* does not disclose who identified to the magistrate the key features on the land and their comments with regard thereto; if any of the witnesses were examined on oath; or if questions were asked by the Magistrate concerning what he had observed. The record is constituted only by a list of itemised observations made, a sketch drawing of the land in dispute, and a list of the persons in attendance. The record of proceedings at the *locus in quo* is silent over events that led to those observations. When observations of this nature are made in circumstances where the character of the evidence on which they are based, as well as its probative value, is not shown on the record, an evaluation on appeal of the observations do made is difficult, if not impossible.

[34] A visit to *locus in quo* is not an avenue designed to afford the Court an opportunity to substitute the evidence on record with the impression it got as a result of the visit. Therefore, any consideration of observations made at the *locus in quo*, and their status as evidence, must include consideration of the facts that can be discerned by physical inspection versus those that can only be inferred from the observations. In the instant case, there is nothing on the record to indicate that parties and their witnesses gave evidence during the *locus in quo* visit, neither is anything shown on the record that by the features pointed at by the parties during the inspection visit, it is proper to arrive at the conclusions it did. By drawing the conclusions that it did, the court placed itself in the position of a witness.

[35] The court may take into consideration observations made at the *locus in quo* only for the purpose of determining what testimony on the record is worthy of belief. A court may not formulate an opinion based solely on a personal view of the *locus*

in quo. Similarly, a judgment based on observations made at the *locus in quo* that are contrary to the evidence in the record would be set aside. It is the law that where a trial court bases its judgment on facts acquired from a observations made at the *locus in quo* and overlooks facts proved by evidence introduced at trial, that judgment must be reversed unless there is other evidence on record sufficient to support the judgment. Ground three therefore succeeds.

Grounds one and two

[36] In grounds one and two, the decision of the court below is assailed on account of what are considered to be erroneous findings as to the true ownership of the land, based more or less exclusively on the observations it made at the *locus in quo*. I find merit in the two grounds. Before visiting the *locus in quo*, the court does not seem to have been alive to the pre-condition to such visits. A key pre-condition to a visit to a *locus in quo* is that there is evidence thereat that has remained substantially unchanged since the incident complained of. The proponent of physical evidence to be viewed at the *locus in quo* must not only establish that objects thereat are relevant but also that they have not materially or substantially changed or been altered between the event and the trial. Any material variation or alteration to the geographical or structural nature of the locality would be more likely to confuse than clarify the issues of fact.

[37] It was therefore important when analysing the observations made during the visit to the *locus in quo* for the court to make an assessment of whether there were any material changes to the land that occurred between the time of the incident complained of and the time of the visit. When such changes have occurred, the demonstrative value of evidence obtained at the *locus in quo* becomes greatly diminished. If there is any time from the events in question to the day of trial during which the objects have materially or substantially changed or been altered, just like in the case of an exhibit whose location at any particular time from the events in question to the day of trial cannot be accounted for will result

in the chain being broken, such evidence will be excluded unless another method of authentication can be used, or unless it is admitted to prove the fact of such material or substantial change or alteration, where it is a fact in issue.

[38] P.W.1 Odoch Geoffrey testified that the respondents had cut down the appellant's teak trees that had existed on the land and attempted to burn the tree stumps, but debris of the appellant's father's former house and remnants of the disused pit latrine still existed on the land. On the other hand, the respondents consistently admitted having cut down trees that existed on the land before planting their own. D.W.1 Adong Karamela stated that the 2nd respondent cut down some trees on the disputed land in 2014 and planted pine trees. D.W.2 Odong Jackson testified that there were big trees on the land in dispute which he cut down in the year 2014 and planted pine trees instead and that his father Obwoma Galdino did not have a home on the land in dispute during the 1980s. D.W.3 Okello David testified that he planted eucalypts trees on the land in 2014 while the 2nd respondent Wokorach Bosco who testified as D.W.5 and stated that he cut down some trees that were on the land and planted pine trees. None of the respondents though explained who the owner of the trees they cut down was before they planted their own.

[39] Therefore the trial court ought to have been sensitive to the probability of finding self serving evidence at the *locus in quo*. The expression "self serving evidence" is used generally to describe evidence that appears to have been created or fabricated for the purpose of the hearing, in order to bolster the case of the party proffering the evidence. To determine whether or not the evidence is self serving, the court considers;- the reasons for which the evidence was prepared; the date at which the evidence came into existence; the relationship of the author of that evidence to the party producing the evidence; whether the author of the evidence has any interest in the outcome of the hearing; the nature and content of the evidence; any apparent contrived appearance intended to mislead; whether or not this evidence is corroborated by other reliable evidence; whether the author

of the evidence is available for cross-examination; the credibility of the party producing the evidence; and the consistency of that evidence with other reliable evidence.

Real or demonstrative evidence at the *locus in quo*

[40] Real or demonstrative evidence at the *locus in quo* ordinarily exists by virtue of the activities of the parties and witnesses in the case. For that reason such evidence becomes admissible only upon a showing of the condition of fact upon which its relevancy depends. 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. At a minimum, authenticating demonstrative evidence at the *locus in quo* requires personal knowledge of the witness that points it out to court, regarding the circumstances in which it came into existence in that condition as seen by court. The item should be in a condition that creates no suspicion about its authenticity, for example if it is shown that it is in a place and condition where, if authentic, it would likely be. Any item of evidence may possess distinctive qualities which serve to identify or authenticate it.

[41] By definition, demonstrative evidence is not offered for its truth, but rather is offered to illustrate or clarify substantive proof. Demonstrative evidence is thus intended to be an adjunct to the witness' testimony. Since real or demonstrative evidence at the *locus in quo* has no evidentiary value independent of the testimony of the witness who authenticates it, a trial court ought to caution itself regarding the possibility of evidence at the *locus in quo* having been substantially or materially altered to create self-serving evidence, because real or demonstrative evidence at the *locus in quo* ordinarily exists by virtue of the activities of the parties and witnesses in the case.

[42] For that reason the potential for parties to create self-serving evidence thereat is very high. When dealing with such evidence, a trial court ought to exercise a heightened awareness of the requirements of authentication of such real or demonstrative evidence, lest potentially self-serving evidence that has no weight in law will be given greater evidentiary value over the testimony of credible witnesses who testified on affirmative matters. In the instant case, the court was clearly oblivious to this requirement yet it heavily relied on that evidence in making its decision.

[43] In the evaluation of the appellant's evidence, the trial court made the following findings that;- P.W.2 Lukwiya Francis stated that the land in dispute did not form part of the estate of the late Alphonse Obina; there were no signs of the appellant's possession seen during the *locus in quo* visit; the appellant could not have been occupying the land during the period of insurgency, more especially since the appellant stated the late John Acaye could not be buried on the land in dispute because of the insurgency; the late John Acaye was not buried on the land in dispute but at Adak at his uncle's home, Anania Obote brother of Alphonse Obina, although P.W.2 said it was in accordance with the family decision; P.W.3 Awor Hellen the widow of John Acaye claimed to have lived on the land from 1980 to 2014 yet there were no visible signs of her settlement on the land seen during the visit to the *locus in quo*; P.W.4 Ogwal David testified he had seen the late John Acaye on the land in the 1980s yet there were no visible signs of her settlement on the land seen during the visit to the *locus in quo*; P.W.5 Okidi Vinansio testified that the teak trees on the land were planted by the appellant's grandfather yet the appellant claimed they were planted by the his father; P.W.5 Okidi Vinansio testified that the home of John Acaye was on the land yet there were no visible signs of her settlement on the land seen during the visit to the *locus in quo*; none of John Acaye's blood brothers has any land or homestead bordering the land in dispute.

[44] In its evaluation of the respondents' evidence, the trial court made the following findings that;- P.W.4 Ogwal David testified that Apiyo Martina, a sister to Obwoma Galdino and a sister-in-law and aunt to the respondents respectively, is a neighbour to the south of the land in depute and it could not have been a coincidence. It is more probable that two siblings could be next to each other; the 1st respondent testified that the land originally belonged to Okello Alany, then inherited by her late husband Obwoma Galdino and on his demise, herself in the year 2001; P.W.2 Lukwiya Francis is not a neighbour to the land in dispute which confirms the probability that the appellant has a home elsewhere; it is probable that the land inherited by the appellant is elsewhere and not the one in dispute; the late John Acaye was a brother to Obwoma Galdino but the latter was buried at Tegwana and not on the land in dispute because of the insurgency; at the *locus in quo*, the respondents were found to be in possession and to have been there for a long time; the 2nd respondent testified that the Madalena trees he cut for timber in the year 2014 were planted by his late father Obwoma Galdino; that the late John Acaye and his family had never lived n the land was confirmed by the visit to the *locus in quo*; D.W.4 Onono Edward has lived on that village since birth, was a local leader between 1985 - 1986 and such people are the most informed on land in their localities; the 2nd and 3rd respondents have pine and eucalyptus trees recently planted yet the appellant has nothing on the land.

[45] As an appellate court, this court is mindful of the several instances when it may review findings of fact of the trial court, to wit: (i) when the findings are grounded entirely on speculation, surmises or conjectures; (ii) when the inferences made are manifestly mistaken, absurd or impossible; (iii) when there is grave abuse of discretion; (iv) when the judgment is based on misapprehension of facts; (v) when the findings of fact are conflicting; (vi) when in making its findings the trial court went beyond the issues of the case; (v) when the findings are conclusions without citation of specific evidence on which they are based; (vi) when the findings of fact are premised on the supposed absence of evidence but are

contradicted by the evidence on record; or (vii) when the trial court manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion.

[46] Although this court ought, of course, to give weight to the opinion of the trial court, where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, in exercise of its appellate jurisdiction this court is generally in as good a position to evaluate the evidence as the trial court (see *Benmax v. Austin Motor Company Ltd [1955] 1 All ER 326 at 327*). This court is therefore at liberty to evaluate the inferences drawn from the facts by the trial Magistrate.

[47] Real and demonstrative evidence observed at a *locus in quo* should convey what it is meant to convey. What it conveys must not be altered, distorted, or changed such that the appearance or condition is actually different from what it was before. The real or demonstrative evidence at the *locus in quo* should fairly and accurately depict the underlying oral evidence in terms of scale, dimensions, and contours explained. It must be an exact match to the underlying evidence or the testimony it seeks to illustrate. For that reason, such evidence ought to be preserved in more or less the same state in was in at the time of the dispute. Courts will not tolerate the destruction or concealment of evidence. When a party makes a concerted, repeated, and evolving effort to materially or substantially alter evidence that they know is highly relevant to the claims made by the adversary, with efforts to substitute it with self-serving evidence, an adverse inference may be drawn from the fact of spoliation of evidence, because such efforts are wilful with the intention of defeating the adversary's effort to meet their burden of proof.

[48] The evidence presented to the trial court showed that the respondents gained possession to the land in dispute in 2014. Thereafter they had exclusive possession of the land whereupon the 2nd respondent set out to cut down three

trees which he claims were "Madalena trees" planted by his late father Obwonma Galdino while the appellant claimed they were "teak trees" that had been planted by his late father Acaye John. In the court's view the stumps it saw were of "pine trees." It was also stated at the *locus in quo* that the respondents had covered the disused pit latrine that had hitherto existed on the land as well as destroyed debris of his father's former grass-thatched house by their tree planting activities. Courts have responded to a party's evidence tampering by drawing an adverse inference against the offending party in deciding the merits of the case. In John H. Wigmore, *Evidence in Trials at Common Law § 278, at 133* (James H. Chadbourn ed., rev. ed. 1979), it is stated thus;-

> It has always been understood, the inference, indeed, is one of the simplest in human experience, that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

[49] This is an evidential principle, also known by the Latin maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against the despoiler or wrongdoer). The adverse inference is justified by the fact that a litigant's suppression, alteration, fabrication, or destruction of irreplaceable evidence poses a serious threat to the integrity of a civil trial. When the court finds that a party wilfully suppressed, hid, substantially altered or destroyed evidence in order to prevent its being presented in this trial, the court presumes that the guilty party's destruction of evidence shows that the lost evidence would have been unfavourable to that party and that the act of destruction reveals a guilty conscience or groundlessness of the claim as a whole. Under well-established evidentiary principles, a litigant's intentional suppression of relevant evidence gives rise to an inference that the litigant's case is weak and that the litigant knew

his or her case would not prevail if the evidence was presented at trial (see *St. Louis v. The Queen, [1896] 25 S.C.R. 649 at 652*). The reasonable inference is that the evidence would have proved devastating.

[50] In the instant case, the respondents admitted having obtained possession of the land in 2014 whereupon the 2nd respondent cut down three significant trees they found on the land. The appellant claimed that the three trees cut down by the 2nd respondent, whose stumps the court saw during the visit to the *locus in quo*, had in fact been planted by his late father John Acaye. No wonder the court described the stumps it saw as those of "pine trees," the 2nd respondent described them as "Madalena tree" stumps while the appellant claimed they were "Teak tree" stumps. This set of circumstances created an evidentiary imbalance. Admissible evidence was suspiciously lost or inexplicably destroyed while in the exclusive possession of the respondents.

[51] This was evidence of a deliberate destruction of the trees by the 2nd respondent, rendering the responders accountable for the resultant prevention of their production in evidence at the *locus in quo*. The intentional destruction of evidence, sometimes discussed as a form of obstruction of justice, is usually referred to as spoliation. When spoliation of evidence is established, the court may draw the inference that the evidence destroyed was unfavourable to the party responsible for its spoliation. Evidence manipulation by a party to the suit triggers the "consciousness of a weak case" inference by which the court presumes or infers that the missing evidence reflected unfavourably on the spoliator's interest.

[52] When evidence that would have been admissible at trial has been in existence, in the possession of or under control of the party, and that the party responsible for its destruction did so intentionally, the inference is inescapable (see *Wigmore on Evidence* § 291 (3rd ed. 1940). By cutting down the trees the appellant claimed were planted by his late father and replacing them with theirs, the respondents

engaged in acts of tampering with or destroying irretrievably, potentially significant evidence. That part of the evidence was wilfully and purposefully interfered with in order for the respondents to gain a tactical advantage in the litigation. The respondents then knowingly exploited the absence of the very evidence the appellant sought to rely on, which they had wilfully destroyed. The court therefore ought to have been cautious in its observation that there were no signs of an old homestead or pit latrine on the land considering that it could inferred from the circumstances that the destruction was deliberate.

[53] Given that a visit to the *locus in quo* is not a substitution for evidence, more weight should have been given to the oral evidence adduced in court. The trial court therefore misdirected itself when in light of such tampering it failed to apply the "consciousness of a weak case" inference and instead relied so heavily on evidence that was very suspect. In any event, the court's finding that the stumps were of pine trees was consisted with the testimony of P.W.2 Lukwiya Francis the appellant's paternal uncle and younger brother of the late John Acaye, who testified that their father Obina Alphonse had planted some pine and teak trees on the land.

[54] Furthermore, at the trial the burden of proof lay with the appellant. To decide in favour of the appellant, the court had to be satisfied that he had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the respondents such that the choice between his version and that of the respondents would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondents, might hold that the more probable conclusion was that for which the appellant contended.

[55] Where the *viva voce* evidence of two parties conflicts, the testimony of one may be preferred over that of another, on the basis that the preferred evidence should be given more weight on basis of its relative reliability. For truthfulness and

reliability, a witness's statement ought to be examined as regards its internal consistency and external consistency with other available evidence, i.e. inconsistencies between the party's or witness' factual account and the objective evidence. A statement is more likely to be true if it accords with known facts, available physical evidence, or other evidence from a source independent of the witness.

[56] When evaluating the evidence, the court makes a determination as to which of the versions presented to it is more plausible. It does that by way of an assessment of qualities in the evidence that make the version apparently valid, likely, or acceptable, such as;- the opportunity the witness had to observe the events; whether the testimony of the witness is based on hearsay; the ability of the witness to recall events accurately; the relationship of the witness to the parties to the litigation; whether the witness has any interest in the outcome of the litigation; whether the witness was present during the testimony of any other witness; whether the witness had seen other evidence adduced during the trial prior to testifying; whether the testimony of the witness was elicited through leading questions; whether part of the testimony of the witness has been found to be not credible; the demeanour of the witness; whether the witness appears to have a bias; the extent to which the testimony of the witness is based on opinion and inference; whether the facts which the witness relied on in forming an opinion have been established; and any other evidence which supports or contradicts the testimony of the witness.

[57] The evidence should be examined to determine whether there is material upon which the witness could draw an inference, or whether the statement is based purely on speculation. If the witness is drawing inferences from the evidence, the reliability of the evidence upon which the inference is based must also be considered. The court should not accept speculation or conclusion based on speculation. Since the burden of proof rests on the plaintiff, the question is whether there are sufficient factual allegations to make the plaintiff's version

plausible. It requires court to draw on its judicial experience and common sense (anchors as external benchmark i.e. for apparent reasonableness or truthfulness of the version).

[58] Findings of fact cannot be based on a paucity of evidence that is in effect the sheerest conjecture or the merest speculation. The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction, it may have the validity of legal proof. The attribution of an occurrence to a cause is always a matter of inference. The trial court cannot rely on its own speculation in making its findings. The trial magistrate in the instant case heavily relied on conjecture and surmises, also relied on unauthenticated demonstrative evidence at the *locus in quo*, to discredit the appellant and his witnesses. A decision arrived at on basis of such reasoning cannot stand.

[59] The main issues of fact for determination were;- (i) whether the land formed part of the estate of the late John Acaye; or rather (ii) whether it formed part of the estate of the late Obwoma Galdino. In their pleadings, the respondents contended that they had been in possession of the land for over fifty years. Both the 2nd and 3rd respondents stated in their witness statements that they were born and raised on that land. However in her testimony, the 1st respondent, testified that the land was used exclusively for cultivation. D.W.2 Odong Jackson too testified that his father Obwoma Galdino had never had a home on the land in dispute. D.W.4 Onono Edward while testifying that the second and third respondents were born and raised on the land, he also stated that the land was hitherto used as farmland only. The 2nd respondent under cross-examination admitted that his activities on the land only began in the year 2014. While he admitted that his late father Obwoma Galdino had never had a home on the land in dispute, his mother the 1st respondent claimed to have lived on that land since

her marriage in 1980 until the break out of insurgency. This further contradicted the evidence of D.W.4 Onono Edward who testified that both the 2nd and 3rd appellants were born and raised on that land.

Departure from pleadings.

[60] This inconsistence in the respondents' case and more or less a departure from their pleadings was never addressed by the trial court. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

[61] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. “essential” to the determination of the case. Material aspects of evidence vary from case to case but, generally in a trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case. In this case, these were grave contradictions in so far as proof of ownership heavily rested on the historical user of the land in dispute. The court had to determine who between the parties had been in possession of the land before the insurgency, a matter central to the suit. These grave, unexplained inconsistencies and contradictions should have resulted in that evidence being rejected.

[62] On the other hand, the appellant's case rested on the testimony of two neighbours; P.W.4 Ogwal David and P.W.5 Okidi Vinansio. The former testified that it is during the 1980s that the land in dispute was given to the late John Acaye a gift *inter vivos* by his father Obwona Galdino, husband of the first respondent. John Acaye used to live on the land in dispute, had grass thatched houses thereon and had planted teak trees. There were no longer any signs on the land of his homestead because it collapsed during the insurgency, and the teak tress he had planted had since been dug up. The latter too testified that the late John Acaye had planted teak trees and had a pit latrine on the land but all were destroyed by the respondents. The respondents have since planted eucalyptus and pine trees on the land. They also constructed two permanent buildings on the land during the year 2015.

[63] The two witnesses P.W.4 Ogwal David and P.W.5 Okidi Vinansio being neighbours to the land in dispute, had the opportunity to observe the events they testified about. Their testimony was not based on hearsay. They were able to recall events accurately and are not related to any of the parties to the litigation. They had no interest in the outcome of the litigation. No part of their evidence was discredited by cross-examination or other rebuttal evidence. There was no basis for doubting their credibility. Their testimony corroborated that of P.W.3. Awor Hellen, widow of John Acaye, who testified that she last lived on the land at the breakout of insurgency when the family relocated to Gulu Town. P.W.2 Lukwiya Francis the appellant's paternal uncle and younger brother of the late John Acaye, testified that the land in dispute belonged to the late Acaye John who acquired it in 1980 from their father Obina Alphonse. He cultivated it and planted some pine and teak trees. He had constructed a grass thatched house on the land but it was destroyed during the insurgency. Since the land belonged to John Acaye before his death, it could not have formed part of the estate of the late Obwoma Galdino. Therefore the trial court misdirected itself regarding the import of the testimony of P.W.2 Lukwiya Francis. I have not found any grave

contradictions or inconsistencies in the appellant's evidence adverted to by the trial magistrate in his judgment.

[64] When the two versions are compared, the appellant's is more credible. The land in dispute was occupied by the family of John Acaye until the breakout of the insurgency. Had the trial court properly directed itself it would have found that when the late John Acaye vacated the land as a result of the insurgency, that did not terminate his ownership of the land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before (see *John Busuulwa v. John Kityo and others C.A. Civil Appeal No. 112 of 2003*). The trial court would therefore have come to a different conclusion. For that reason grounds one and two succeed as well. Consequently the judgment of the court below is set aside.

[65] Instead judgment is entered in favour of the appellant. The respondents have been trespassers on the land since their forceful occupancy of the land in dispute during the year 2014. Trespass to land is actionable *per se*. In torts which are actionable *per se*, harm to the plaintiff's rights is presumed. The courts have often recognised that an award of general compensatory damages may serve the purpose or have the effect of vindicating the plaintiff's rights. The appellant is accordingly entitled to have his right of property vindicated by a substantial award of damages. A deliberate trespass is no trifling matter, although in cases of mistake where no perceptible damage is done, only nominal damages are awarded. In the instant case I consider a sum of shs. 5,000,000/= per annum for the period of trespass as both compensatory and vindictive of the appellant's rights, hence shs. 25,000,000/= for the five years' trespass.

Order :

[66] In the final result, the appeal succeeds. The judgment of the court below is set aside. Instead judgment is entered in favour of the appellant in the following terms;

a) A declaration that the land in dispute belongs to the estate of the late Acaye John and hence the appellant as legal representative of the deceased is the owner of the land in dispute.
b) The road to Moroto constitutes the boundary between the respondents' and the appellant's land.
c) An order of vacant possession against the respondents, their agents and persons claiming under them.
d) A permanent injunction restraining the respondents, their servants, agents and persons claiming under them from further acts of trespass on the appellant's land.
e) General damages for trespass to land in the sum of shs. 25,000,000/=
f) Interest thereon at the rate of 8% per annum from the date of judgment until payment in full.
g) The costs of the appeal as well as those of the court below are awarded to the appellant.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

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

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