THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NUMBER 0073 OF 2014

ARISING FROM CIVIL SUIT NUMBER 18 OF 2004

KAKURU WILLIAM **APPELLANT**

VERSUS

KAGORO JOHN **RESPONDENT**

JUDGMENT BY JUSTICE GADENYA PAUL WOLIMBWA

This appeal arises from the decision of the Chief magistrate of Masindi dated 23rd September 2014 in which he gave judgment in favour of Kagoro John (the Respondent) against Kakuru William (the Appellant) with orders that the respondent is the rightful owner of the suit land, that the appellant be evicted from the land ; that a permanent injunctions issues against the appellant and his agents from interfering with the Respondents quite enjoyment of the suit land ; that the appellant pays general damages of four million shillings and costs of the suit.

The Appellant being aggrieved with the decision of the Chief magistrate filed this appeal. The grounds of Appeal are:

1. The Chief Magistrate erred in law and in fact when he held that the appellant was a trespasser;
2. The Chief Magistrate erred in law and in fact when he failed to follow proper locus in qou procedures; and
3. The Chief Magistrate erred in law and in fact when he failed to properly evaluate evidence on record and came to a wrong conclusion.

The Appellant was represented by Mr. Kafuuzi Kwemara while the Respondent was represented by Mr. Paul Baingana. The parties filed written submissions and I set the judgment on notice.
The facts giving rise to this appeal as can be gathered from the record of appeal are as follows.

In 1995, the Respondent bought a Kibanja from Malyamu Mukafaku, a widow to the late Ayoub for two hundred thousand shillings. The Kibanja, is located at Kijujujbwe trading center in Masindi. Prior to the sale of the Kibanja, the late Ayoub and his wife, were forced to abandon the Kibanja because of the liberation war. They sought refuge, where unfortunately, Ayoub passed on. About 1986, the Respondent, Bemanya and …., entered upon this Kibanja and started using it as they had nowhere to go due to the effects of the war. The trio continued to stay on the Kibanja until 1994, when Malyamu Mukafaku, the widow to the late Ayoub returned to claim possession of the land. With the help of the Local authorities, Malyamu Mukafaku, managed to get the Respondent and the other encroachers off the land. She then left the Kibanja in charge of a one Twaha. In 1995, Malyamu Mukafaka, sold the Kibanja to the Respondent for two hundred thousand shillings. An agreement to witness the sale was made before M/s Isingoma and Company Advocates. The Respondent then took possession of the Kibanja, although it's not clear whether he took over the entire Kibanja, as Bemanya, was claiming the lower part of the Kibanja. It appears that the Respondent did not attempt to remove Bemanya from a portion of the Kibanja that he was claiming. In 2003, the Respondent learnt that Bemanya was planning to sell the portion of the Kibanja, which he claimed to the appellant. The respondent put announcements on radio warning the public not to buy the Kibanja, but the appellant, never heeded the warning. He bought the Kibanja from the Bemanya. Following, the sale of the Kibanja to the appellant, the respondent sued the appellant in the Chief Magistrates Courts. The Chief Magistrates Court found in favour of the Respondent. As note above the Appellant being aggrieved by the decision of the Chief Magistrate filed the present appeal.

Although the appellant filed three grounds of appeal, the grounds can be reduced in just two, namely;

1. The Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and came to a wrong conclusion; and
2. The Chief Magistrate erred in law and fact when he failed to follow proper locus in qou procedures.

In dealing with the appeal, I will start with ground number two: The Chief Magistrate erred in law and fact when he failed to follow proper locus in qou procedures.

The appellant submitted that the learned Chief magistrate did not follow the established procedure for conducting a locus in qou as laid down in Practice Direction 1 of 2007 and several decided cases including **Safina Bakulima and Another vs. Yusuf Musa Wamala COA 68 of 2007**.
He submitted that whereas all the parties were present at the locus in qou, the court did not invite the appellant and respondent to testify at the locus in qou. He also criticized the learned Chief magistrate for not taking the evidence of Malyamu, who sold the respondent land at the locus in qou. Counsel submitted that it was very important for the Appellant and the Respondent to testify at the locus in qou to show court the land what each of them had bought and was claiming to be his. He submitted that failure to call these two essential witnesses caused a miscarriage of justice. Lastly, he blamed the learned Chief Magistrate for not recording his observations and conclusions at the locus in qou.

The Respondent's counsel made the following response.
He submitted that the parties moved around the locus in quo to establish whether the appellant was occupying the land the Respondent bought from Malyamu. He said that Petero Katabazi, who was a relevant witness led the court around the Kibanja.

He submitted that all the parties were present at the locus in qou with their counsel and that the proceedings at the locus in qou were conducted in an orderly manner.

Counsel, also submitted that the locus in qou in accordance with the guidelines for conducting locus in qou and specifically guideline number 3, which the appellant referred to. He also relied the cases of **David Acar and 3 others vs. Alfred Acar Aliro (1982) HCB 60 and Mukasa vs. Uganda 1964 EA 698**, which have given guidance on how the court should conduct a locus in qou. In the case of Mukasa (supra) Sir Udo Udoma CJ, as he then was said:
A view of a locus in qou ought to be, I think to check on the evidence already given and where necessary, and possible to have such evidence clearly demonstrated in the same way a court examines a play or may or some fixed object already exhibited or spoken of in the proceedings.

Lastly, counsel submitted that no miscarriage of justice had been caused by the Chief Magistrate in conducting the locus in qou.

Traditionally, courts have found it necessary to visit the locus in qou in land matters for two major reasons. Firstly, to ascertain issues relating to boundaries and features on the land if they are in issue and to secondly to confirm and verify the evidence of the witnesses on the ground. Thirdly a visit at the locus in qou gives the court the opportunity to hear the case where the dispute arose and for the public to have an appreciation of the justice machinery, and where possible to participate in the administration of justice. In some cases, most of the cases have been resolved at the locus in qou with parties making peace in front of the community.

The procedure to follow at the locus in qou was laid down in Practice Direction No. 1 of 2007. The Court has to observe the following standard operating procedures at a locus in qou:

1. Ensure that parties and their witnesses and advocates are present;
2. Allow the parties and their witnesses to adduce evidence at the locus in qou;
3. Allow cross examination by either party, or his or her counsel;
4. Record all proceedings at the locus in qou;
5. Record any observations, view, opinion or conclusions of the court including drawing a sketch plan, if necessary.

In **Safina Bakulima and Another vs. Yusuf Musa Wamala CA 68 of 2007**, the Court held that the court moves to the locus in qou in deserving cases where it needs to verify the evidence that has been given in court on the ground. It is my view that such visits are necessary to enable the court to determine boundaries of the; and in dispute or the special features thereon, especially where this cannot be reasonably achieved by the testimonies of the witnesses in court.

In this case, the court visited the locus in qou on 20th December 2012, the parties, their counsel were present. The plaintiff's counsel asked the court to have Petero Katabazi, I believe as a witness. Katabazi was reminded that he was under oath. He gave very brief evidence. The next person who was called was Bemanya. He also gave evidence under oath and was cross examined.

The Chief Magistrate, did not make any observations what he saw at the locus in qou. The Chief Magistrate never drew the sketch map of the locus in qou.

The Chief Magistrate, did not take evidence from the other witnesses who had testified at the trial most especially, Malyamu, who was sold the land to the Respondent, the respondent, the area Local council officials and indeed the neighbors, some of whom testified at the trial like Twaha. Why was it important for these witnesses to testify at the trial? It was important for the witnesses to testify because the parties were at variance as to whether the land in dispute was one piece of land or two; boundaries needed to be clarified about what each of the parties allegedly owned on the ground. Malyamu, for example needed to show the court, the exact land which she sold the Respondent since the sales agreement was silent about the boundaries of the land which she had sold to the Respondent. Equally, the Chief Magistrate should have drawn a sketch plan of the land in dispute, noted the special features and made observations regarding the land in dispute.

An evaluation of the procedure and proceedings undertaken by the Chief Magistrate at the locus in qou clearly point fell short of the guidelines for visiting the Locus in qou in Practice Direction 1 of 2007 and a plethora of decided cases on the matter. It is therefore surprising that not much can be read in the visit to the locus in qou to assist the court to effectively determine this case.

Are the errors of the Chief Magistrate fatal to the case? this question must be answered from the perspective of whether the failure of the Chief Magistrate to conduct the locus in qou caused a miscarriage of justice? In my view the failure by the Chief Magistrate to observe the guidelines for conducting the locus in qou robbed the court of the opportunity to conclusively determine the dispute between the parties and as such caused a miscarriage of justice.

Given that the errors of the Chief Magistrate at the locus in qou caused a miscarriage of justice, it will not be necessary to consider the other ground of appeal as it will be an exercise in futility. I accordingly set aside the decision of the Chief Magistrate and direct that the file be remitted to the Chief Magistrate, Masindi, to carry out a proper locus in qou and decide the case on the basis of the evidence already on the record, unless if of course, the court considers it necessary to rehear some witnesses or summon new witnesses.

costs in the lower court

With regard to costs, each party will meet the costs of appeal as the error was made by the Court.

It is so ordered.

Gadenya Paul Wolimbwa

JUDGE

28/6/2022

All the parties are absent

Mr Robert Olingo - Court Clerk

Judgment read in open court.

28/6/2022