THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

CIVIL SUIT NO. 16 OF 2012

HON. HENRY ORYEM OKELLO

(Suing as the surviving administrator of

the estate of the late Gen. Tito Okello Lutwa) ==========PLAINTIFF

-VERSUS-

1. ONEN ALLAN (Administrator of the estate of the late Mzee Tito Olworo)

2. AKENA SAMUEL (Legal representative of the late Josca Aboda)

3. OCHAN GEORGE BERNARD==========DEFENDANTS

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI

JUDGMENT

Introduction:

[1] The Plaintiff, Hon. Henry Oryem Okello, is the surviving administrator of the estate of the late Gen. Tito Okello Lutwa. He instituted this suit against the Defendants (Mzee Tito Olworo, Josca Aboda and Ochan George Bernard) seeking, a declaration that land comprised in LRV 1841 Folio 6 Block 3 Plot 3 land at Lamit Kapim South, Kitgum District, hereinafter referred to as 'the suit land', belongs to the estate of the late Gen. Tito Okello Lutwa; an order evicting the Defendants from the suit land; a permanent injunction to restrain the Defendants and their agents from further interfering and claiming the suit land; general damages for trespass, interest; costs of the suit; and any other reliefs that the court deems fit.

Plaintiffs' case:

[2] The Plaintiff's case is that on the 8th May 1990, Tito Okello Lutwa was registered as the proprietor of the suit land after a normal process of application, inspection, survey and lease offer. The Plaintiff and the beneficiaries of the estate have been in occupation and use of the suit land. In around 2003, the 3rd Defendant (Ochan George Bernard) started claiming ownership of the suit land but later abandoned the claim. In February 2012, the Plaintiff contracted Jolanam Survey Services to reopen the boundaries of the suit land. The surveyors were threatened by the Defendants through the Chairperson Local Council I of the area not to carry out the boundary reopening. The threat notwithstanding, the boundary reopening was conducted, all the corner beacons were found missing on the ground, but they were replaced with iron bars. Thereafter, the Defendants illegally removed the iron bars and embarked on

cultivating the suit land. The Plaintiff contended that the Defendants interfered with his right to own and use of the suit land.

Defendants' case:

[3] The Defendants denied the Plaintiff's claim. They contended that the suit land was a subject of litigation between them and Tito Okello Lutwa. The matter was decided in their (Defendants') favor, and as such, this suit is res judicata. The Defendants filed a counter - claim against the Plaintiff in which they pleaded that at all material times they were the customary owners of the suit land. The 2nd Defendant (Josca Aboda) gave Tito Okello Lutwa a piece of land with clear boundaries. In the 1960s, Tito Okello Lutwa used police and the army to grab the land of the Defendants and chased them away. The Defendants regained possession of their customary land as soon as they got the opportunity to do so. Defendants contended that they were prevented from using the suit land, thereby denying them livelihood. They further contended that the soldiers and the police inflicted physical injury on them and caused them psychological torture. In addition, the Defendants contended that Tito Okello Lutwa obtained the certificate of title for the suit land by fraud. They prayed that, the certificate of title be canceled; they be given an order of quite possession of the suit land against the Plaintiff; an order for mesne profit accruing since 1995; general damages, interest and costs of the suit.

Issues:

[4] On the 21st November 2014 the parties filed a joint scheduling memorandum in which they agreed that the issues for the determination of the court should be:

1. Whether the Plaintiff is the rightful owner of the suit land. if so,
2. Whether or not the Plaintiff acquired the suit land fraudulently.
3. Whether or not the Defendants have trespassed on the suit land.
4. What remedies are available to the parties.

[5] I have reviewed the above issues as against the parties' pleaded case. In my view, the issues agreed upon by the parties do not properly reflect the material proposition of law or facts affirmed by one party and denied by the other party. First, the Defendants, in their Written Statement of Defense, alleged that the Plaintiff's suit is res judicata, which allegation was denied by the Plaintiff in the Reply to the Counter – claim. Secondly, the Defendants alleged in the counterclaim that they are customary owners of the suit land, which allegation was

denied by the Plaintiff in the reply to the counterclaim. The parties did not frame any issues as to whether the Plaintiff's suit is res judicata and whether the Defendants are the customary owners of the suit land.

[6] Under Order 15 Rule 5 of the ***Civil Procedure Rules, S.I. 71 – 1***, this court has the power, at any time before passing a decree, to amend or strike out any issues that appear to it to be wrongly framed or introduced and to frame additional issues, on such terms as it thinks fit, as may be necessary for determining the matters in controversy between the parties.

[7] In my view, therefore, the proper issues for the determination of the court are:

1. Whether the Plaintiff's suit is res judicata.
2. Whether the Defendants are the customary owners of the suit land.
3. Whether Tito Okello Lutwa was registered as the proprietor of the suit land through fraud.
4. Whether the Defendants trespassed on the suit land.
5. What remedies are available to the parties.

Legal representation:

[8] The Plaintiff was represented by Mr. Luis Odongo of M/s Odongo & Co. Advocates. The 1st and 2nd Defendants were represented by Mr. Moses Tugume of Samuel Kakande of M/s Tugume Byensi & Co. Advocates. The 3rd Respondent was represented by Mr. Donge Opar of M/S Donge & Co. Advocates.

Case procedural history:

[9] The Plaintiff filed the plaint on the 1st of April, 2012. On the 25th of April, 2012 the Defendants filed their Written Statement of Defense and Counter - claim. On the 27th of April, 2012 the Plaintiff filed his Reply to the counter – claim. On the 29th October 2013, counsel for the Defendants applied for leave to file an amended Written Statement of Defense. The Court granted the Defendants leave but gave a directive that the amended Written Statement of Defense should be filed within two weeks from the date of the order. The Defendants did not file the amended Written Statement of Defense as directed by the court. I have seen on the court record an amended Written Statement of Defense and counter – claim which was signed by counsel for the Defendants on the 22nd of April 2014. There is no evidence on the court record that it was duly filed or that the requisite fees were paid or that it was served onto the

opposite party. It is very clear to me that this document was smuggled onto the court file. The same is accordingly expunged from the court record.

[10] On the 6th of March 2018 counsel for the 3rd Defendant informed the Court that the Plaintiff and the 3rd Defendant had settled their dispute out of court. Counsel for the Plaintiff sought the leave of the Court to withdraw the suit against the 3rd Defendant, which leave was granted. Although the counterclaim by the 3rd Defendant was not formally withdrawn, given that counsel for the 3rd Defendant had informed the court that the 3rd Defendant had settled his dispute with the Plaintiff, it was taken that the counterclaim of the 3rd Defendant had been concluded by consent of the parties. The suit thereafter only proceeded between the Plaintiff and the 1st and 2nd Defendants.

[11] On the 10th July 2017 counsel for the 1st and 2nd Defendants informed the court that the 1st Defendant (Mzee Tito Olworo) died on the 18th of March 2016. On the 6th of September 2018, Onen Allan appeared in court as the administrator of the estate of the late Mzee Tito Olworo. Although no application was made, in compliance with Order 24 rule 4(1) of the ***Civil Procedure Rules, SI 71 – 1***, to cause Onen Allan to be made a party to this suit, the suit proceeded against him as a legal representative of the 1st Defendant.

[12] Furthermore, on the 27th June 2022, counsel for the 1st and 2nd Defendants informed the court that the 2nd Defendant (Josca Aboda) had also died. This Court granted Letters of administration to Akena Samuel, limited for the purpose of representing 1st Defendant in this suit, in accordance with Section 222 of the ***Succession Act, Cap 162***.

Evidence presented:

[13] The Plaintiff called 2 witnesses. Henry Obina testified as P.W.1 and Charles Oyuru Onayi, testified as P.W.2. In addition, the Plaintiff adduced 5 documents, that is, a power of attorney of the Plaintiff, application for rural land, inspection report, lease offer, and a certificate of title. The 2nd Defendant testified as D.W.1; Molly Anyango testified as D.W.2; Abur Peter Oryem testified as D.W.3; John Abwona testified as D.W.4; Martin Luther Opira testified as D.W.5; and Bob William Labeja testified as D.W.6.

[14] P.W.1 (Joseph Obina) testified that Tito Okello Lutwa is his paternal uncle. He (P.W.1) knew the suit land because he grew up on it. According to him, the neighbors of the suit land are, Kitgum – palabek road on the Northern side; Ochan George Bernard on the southern side (although during cross - examination he stated that he was on the western side); Kitgum Church of Uganda diocese headquarters on the eastern side; and Tito Olworo and Joska Aboda on the west side. He denied that Tito Okello Lutwa was given the suit land by Joska Aboda. He testified that on the 4th May 1982 Tito Okello Lutwa applied for the suit land measuring approximately 30 acres. The suit land was inspected by the Land Committee in the presence of the local authorities and neighbors. Muzee Tito Olworo signed as number 2. A lease offer was issued to Tito Okello Lutwa and on the 8th May 1990 he was issued with a leasehold certificate of title for a period of 49 years effective from the 1st November 1989. After the death of Tito Okello Lutwa, the Plaintiff was granted letters of administration to administer his estate. The Plaintiff and other beneficiaries of the estate enjoyed quite possession and use of the suit land until 2003 when the 3rd Defendant (Ochan George Bernard) instituted a suit against the Plaintiff in the Chief Magistrates Court of Gulu, claiming part of the suit land. The case was dismissed for want of prosecution. In 2012 Joska Aboda and Muzee Tito Olworo started cultivating beyond the boundary of the suit land. He testified that he did not know how Tito Okello Lutwa acquired the suit land before he applied to be registered on it. When the court visited the locus, he pointed to the court the part of the suit land which he said was trespassed on by the Defendants.

[15] P.W.2 (Charles Oyuru Onayi) testified that he lives near the suit land, although he does not share a common boundary with it. Church of Uganda separates him from the suit land. He narrated that in 1982 he was appointed as a member of Kitgum Land Board. The chairperson of the Board was Tom Owot. The other members of the Board were Casto Obong, Arac Acen, Ikeda, Charles and the secretary of the Board was Obol. The Land Board carried out the inspection of the suit land on the 1st of August 1982. The brother of Tito Okello Lutwa called Bartholomay Odong is the one who showed the committee the suit land. The subcounty chief, Labeja and the parish Chief, Acamo Apwoyo, who showed the committee the neighbors of the suit land. The committee walked around the suit land in the presence of very many people including the subcounty chief and also Muzee Tito Olworo Muzee, who said he was representing the church. They were made to sign as those who attended the inspection. The next day, on the 2nd of August 1982, the committee signed the application form. In cross-examination he testified that the inspection report was signed 2 weeks after the inspection of

the suit land because they had to wait to see if there were any complaints. According to him, during the inspection, no complaint was raised; there was no force used against anybody since there was no policeman or military. According to him, there is a church separating Muzee Tito Olworo and Josca Aboda and the suit land.

[16] D.W.1 (Joska Aboda) testified that her father in law, Lazaro Lagala, owned land under customary tenure in Lamit village in Kitgum District, measuring 32 acres where he had his home with 10 huts. He planted on the land trees and crops. In addition, he was using the land for grazing cattle and goats. In 1965, together with her husband, Aboda John, they settled on the land of her father in law where her husband had established a permanent home on approximately 20 acres. She found when the 1st Defendant (Mzee Tito Olworo) had already settled on his land neighboring the land of Lazaro Lagala. She described the neighbors of the land of Lazaro Lagala in 1965 to be, Kitgum All Saints Church of Uganda, the late Rev. Onen, Rev. Zabuloni Isoke Secondary School and the late Anna on the East; the 3rd Defendant (Ocan George Bernard) who is the son of Lutoo on the west; Tito Okello Lutwa of the North and Pachoto Nasanaire on the south.

[17] D.W.1 further testified that in 1968, her father in law died. Thereafter, her husband, Aboda John, took over the entire land of his father in law under the Acholi custom. In the same year (1968), Tito Okello Lutwa, through his brother Toolit Stanley, requested for a small plot of land to build an urban home where his children would access social amenities in town such as schools and hospitals. In a meeting which was attended by Toolit Stanley, Tito Okello Lutwa, Aboda John, the 1st Defendant (Mzee Tito Olworo) and herself, together with her husband they gave Tito Okello Lutwa a small plot of land measuring 50 meters x 50 meters thereby becoming their immediate neighbor on the northern side of their land. Tito Okello Lutwa fenced off the plot with eucalyptus trees on the eastern side and on the southern side using barbed wires. He built on the plot a semi-permanent house and he brought his wife and children to stay on it. Following the overthrow of President Idi Amin, Tito Okello Lutwa and his family went into exile but she remained on their land with her family.

[18] D.W.1 further testified that it was in 1979 when Tito Okello Lutwa returned from exile that he put a military detach outside the plot which was given to him. The Military detach was on her land. She narrated that one time, Bartolomay Odongo, a clan brother of Tito Okello Lutwa, together with Tabu Arim, son of the brother of Tito Okello Lutwa, forcefully fenced

approximately 40 acres of land belonging to the Defendants. The 1st Defendant (Mzee Tito Olworo) was arrested by soldiers, taken to the home of Tito Okello Lutwa, tortured and Bartolomay Odong told him that if he did not want to leave his land for Tito Okello Lutwa, he would be killed. While Mzee Tito Olworo was being tortured, his land was forcefully fenced off and annexed to the plot which she had given Tito Okello Lutwa. A grader was used to remove the barbed wire fence separating the land of Mzee Tito Olworo and that of Lutoo Erinayo. Upon his release, Mzee Tito Olworo was forced to take refuge in Micwini and only returned to his land in 1986 after the overthrow of President Tito Okello Lutwa. Tabu Orim who remained taking care of the home of Tito Okello Lutwa continued to conflict with Mzee Tito Olworo over his land.

[19] D.W.1 futher testified that in 2001, the Plaintiff took over the house of Tito Okello Lutwa which was built on the plot measuring 50 meters x 50 meters. He called a meeting of all residents of the village of Lamit and declared that he is the owner of land measuring about 30 acres. He ordered the Defendants to vacate the suit land. According to her, the Plaintiff forcefully grabbed her land which is approximately 10 acres and fenced it off. Together with the Mzee Tito Olworo they protested the acts of the Plaintiff. They were arrested, taken to police and subsequently charged with the offence of threatening violence. The case was later dismissed. The Plaintiff then sent Labeja Bob Willam (D.W.6) to negotiate with them so that he could pay them Ugx 5,000,000/= for the land, but they refused. In 2003, her husband, Aboda John, died. She took over the land. She has been owning it as a customary owner and occupying it as a widow of Aboda John.

[20] According to D.W.1, the certificate of title for the suit land was secured by fraud because, Tito Okello Lutwa never owned in Lapim village land of more than 50 meters x 50 meters; the neighbors, who are customary owners of the suit land, were never involved in the inspection and survey process; Tito Okello Lutwa used violence, intimidation, torture between the years 1982 and 1985 to avail himself the suit land without the consent of the Defendants or first compensating them; and whenever Tito Okello Lutwa would bring people from Lands Office, he would deploy soldiers who would first beat the Defendants and arrest them before the land officers would continue with their work.

[21] D.W.2 (Anyango Molly) testified that her father, Mzee Tito Olworo, owns land under customary tenure in Lapem Kapim South cell in Kitgum Municipality and in Barjere Village

in Lamit parish in Kitgum District. He got the land in 1967 as a gift inter vivos under the custom of Acholi community from a friend/ maternal uncle to his mother, the late Ezekia Amone. She stated that her father used to show her and the rest of her siblings the boundaries of his land. She described the boundaries of her father's land as, Pachoto Nasanaire on the east; Erinayo Lutoo on the West; Aboda John and Tito Okello Lutwa on the north; and Opige Emmanuel on the South. The land of Tito Okello Lutwa which is north of their land is about 6 acres. She stated that her father planted several trees and crops on the land. He also built 7 huts and many family members have been buried on the land. She testified that the family of Tito Okello Lutwa forcefully grabbed 16 acres which is part of her father's land, fenced it and planted pine trees on 6 acres. She narrated that when she was in Primary 4, her father was arrested by soldiers and taken to the police. While he was in police custody, soldiers fenced off part of his land. In 1989 Tabu Orim, a cousin brother of the Plaintiff brought workers and destroyed their gardens near Bwongo ladyel steam. Tabu Orim then sued her father before the Magistrate II Court of Kitgum but judgement was given in favor of her father. Tito Okello Lutwa's family was ordered to leave her father's customary land. However, Tabu Orim extended the boundaries of Tito Okello Lutwa's land into her father's land by planting concrete pillars on her father's land. Her father reported the matter to the local chief (Rwot Kweri) of the area who decided the matter in favor of her father. When Tabu Orim died, the Plaintiff continued with the conflict using Obina (P.W.1). Obina sent Etandikwa who ploughed all the millet of her father. When her father stopped him, the following day Obina sent 2 policemen who arrested her father. According to D.W.2, the certificate of title for the suit land was secured by fraud. Her reasons were similar to those given by P.W.1.

[22] D.W.3 (Abur Perezi Oryen) testified that she was married in Lamit Kapim village in 1967. She got to know Josca Aboda and her husband, John Aboda, as village mates. In 1978, Josca Aboda showed her the boundary of her land when she was collecting firewood from it. She described the neighbors of the land of Joska Aboda as, Kitgum All Saints Church of Uganda, the late Rev. Onen, Rev. Zabuloni Isoke Secondary School, the late Anna Adira and her brother the late Erinayo Oryema on the East; the 3rd Defendant (Ocan George Bernard) son of Lutoo Erinayo on the west; Tito Okello Lutwa of the North, Pachoto Nasanaire on the south and Mzee Tito Olworo to the south west. She also described the neighbors of Tito Okello Lutwa to be, Kitgum – Palabek road on the north; Josca Aboda on the south; and Rev. Zabuloni Isoke, Anna Adira, Kitgum All Saints Church of Uganda and the 3rd Defendant (Ocan George Bernard) on the east. She stated that the Plaintiff sent constructors on the land of Josca to put a wall fence.

The constructors went beyond the boundaries of the Plaintiff. She stopped the constructors and showed the proper boundaries of Josca Aboda. According to her the boundary between the land of the Plaintiff and that of Josca Aboda is Tugu tree and mango trees.

[23] D.W.4 (Abwola John) testified that he is the rwot kweri (village chief) of Pajere village where the land of Mzee Tito Olworo falls. He described the neighbors of Mzee Tito Olworo as being, Pachoto Nasanari and Aboda Joska on the East, Opige Immanuel on the West, Lutoo Erinayo, father of Ochan George Bernard in the South and Tito Okello Lutwa in the North. As for the land of Josca Aboda, he described her neighbors to be, Kitgum All Saints Church of Uganda, the late Rev. Onen, Rev. Zabuloni Isoke Secondary School and the late Anna on the East; Ocan George Bernard son of Lutoo (3rd Defendant) on the west; Y.Y Okot Memorial College on the North, Pachoto Nasanaire on the south and Mzee Tito Olworo on the south west. According to him, Tito Okello Lutwa's land stops at Bunga Ladiel steam, but he extended his land by crossing the stream and encroached onto the land of Mzee Tito Olworo. He narrated that between 1983 – 1984 Tito Okello Lutwa used soldiers to arrest and beat Mzee Tito Olworo and he was later taken to prison. Tito Okello Lutwa fenced the land for which he had imprisoned Mzee Tito Olworo. The Plaintiff wanted to extend the boundary further beyond the boundary of his father's land by forcefully fencing the land of Mzee Tito Olworo and that of Josca Aboda. He testified that court had already declared Joska Aboda and Mzee Tito Olworo as the customary owners of their land. He further testified that Charles Oyur Onai (P.W.2) did not invite the families of Daniel David Labwon, Rev. Onen Kerironi, Perezi Oryem, Emmanuel Opige, Aboda John, Josephine Toolit and Paito Nasanairi during the inspection of the suit land in 1982 and yet they were families neighboring the suit land.

[24] D.W.5 (Opira Martin Luther) testified that he is the Chairperson Local Council 1 of Lamit Kapim village where the suit land is situated and he grew up near the suit land. Therefore, he knows the land of Joska Aboda and that of Muzee Tito Olworo very well. His description of the neighbors of Mzee Tito Olworo and that of Josca Aboda was the same with D.W.4. According to him, between the land Joska Aboda and Tito Okello Lutwa there was a barbed wire fence and eucalyptus trees. Near the barbed wire fence, Joska Aboda had planted Mango trees – atina type and there is also a tall palm tree (tugu) at the boundary. According to him the suit land belongs to Joska Aboda and that of Muzee Tito Olworo. He testified that it is the Plaintiff who is trying to fence land more than what his father owned. He further testified that

court had already declared Joska Aboda and Mzee Tito Olworo as the customary owners of their land.

[25] D.W.6 (Labeja Bob William) testified that he grew up in Lamit village near the suit land. Therefore, he knows the land of Joska Aboda and that of Muzee Tito Olworo very well. His description of the neighbors of Mzee Tito Olworo and that of Josca Aboda was the same with D.W.4. According to him, the land which was given to Tito Okello Lutwa by Aboda Josca and her husband was fenced by Tito Okello Lutwa using eucalyptus trees and barbed wire fence. He testified that the problem started in 1988 – 1990 when Orim Tabu abandoned the original boundaries and extended the boundaries on the southern part. In the process he encroached on the land of Josca Aboda and Muzee Tito Olworo. He stated that the Plaintiff fenced the suit land using burnt bricks on the north, east and west. The southern side was left open leaving features showing the boundary mark such as Nsambya tree and palm (Tugu) tree. He also testified that court had already declared Joska Aboda and Mzee Tito Olworo as the customary owners of their land. He further testified that Charles Oyur Onai (P.W.2) did not invite the families of Daniel David Labwon, Rev. Onen Kerironi, Perezi Oryem, Emmanuel Opige, Aboda John, Josephine Toolit and Paito Nasanairi during the inspection of the suit land in 1982 and yet they were families neighboring the suit land.

Legal submissions:

[26] The court gave counsel directives to file written submissions, which directives were duly complied with. I have given the submissions of counsel the requisite consideration while determining each issue before the court.

Burden and standard of proof:

[27] The burden of proof in civil matters lies upon the person who asserts or alleges. Any person who, wishes the court to believe the existence of any particular fact or desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist. (***See section 101, 102 and 103 of the Evidence Act Cap 6 of the laws of Uganda***). The opposite part can only be called to dispute or rebut what has been proved by the other party (***See Sebuliba versus Co-operative Bank (1982) HCB 129).*** The standard of proof required is on the balance of probabilities. In ***Miller versus Minister of Pensions (1947)2 ALL ER 372*** Lord Denning stated;

"That the degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it is more probable than not,' the burden of proof is discharged, if the probabilities are equal, it is not."

Analysis and determination of the court:

[28] Before I proceed to determine the issues in this matter, I note that counsel for the 1st and 2nd Defendant, in his written submissions, raised a point of law that this suit is incompetent since it was filed in 2012 by P.W.1 (Joseph Obina) without a power of attorney of the Plaintiff. According to counsel, P.W.1 was given the power of attorney in 2013 and yet he filed the suit in 2012. In support of his argument, counsel relied on the case of ***Nanziri Yayeri (Suing through her lawful Attorneys Semyano Peter, Semyano David & Harriet Kalemeera) versus Namirembe Kagimu and 7 others High Court Civil Suit No. 313 of 2014.*** Counsel for the Plaintiff on the other hand submitted that the suit was filed in 2012 by the Plaintiff as the surviving administrator of the estate of the late Tito Okello Lutwa. The Plaintiff gave P.W.1 (Joseph Obina) a power of attorney in 2013 to act on his behalf. Counsel submitted that the case of ***Nanziri Yayeri*** which was cited by counsel for the Defendant, the facts are distinguishable from those in this case. Counsel for the Plaintiff invited the court to overrule the objection.

[29] I have carefully considered the submissions of both counsel on the matter. With all due respect to counsel for the 1st and 2nd Defendant, the point of law raised is clearly misleading. First, the plaint is very clear that the Plaintiff filed this suit as the surviving administrator of the estate of the late Tito Okello Lutwa. At the time of filing the suit P.W.1 (Joseph Obina) was not in the picture. Nowhere was he mentioned as having been the one who filed the suit. Secondly, P.W.1 (Joseph Obina) did not testify that he is the one who filed this suit. He testified that he was given the power of attorney in 2013 but the suit was filed in 2012. He stated that the filing of the suit came first. Although Joseph Obina stated in cross-examination that the power of attorney which was given to him was the basis of the filing the suit, that statement was clearly not true. The Court record is very clear on who filed the suit. As was rightly pointed out by counsel for the Plaintiff, the facts in the case of ***Nanziri Yayeri*** are completely different from those in this case. In that case, the donee of the power of attorney filed the suit on the

basis of the power of attorney and yet the donor of the power of attorney had already died. The court was therefore right to have found that the suit was filed when the power of attorney had abated. In this case before me the Plaintiff did not file the suit on the basis of any power of attorney. I therefore find that the preliminary objection has no merit. It is accordingly overruled.

Issue1: Whether the Plaintiffs suit is res judicata.

[30] The doctrine of *res judicata*, is a well-established common law doctrine primarily underpinned by the need to finality of judicial orders and decisions. In applying the doctrine, the courts have repeatedly stressed the underlying interest of the state in putting an end to litigation and the individual interest in not being repeatedly troubled for the same dispute. The English law employs 3 different doctrines to implement the doctrine of *res judicata.* That is, the cause of action estoppel, issue estoppel and the extended doctrine of res judicata or the abuse of process doctrine.

[31] In Uganda, the doctrine of *res judicata* is encapsulated in **Section 7 of the Civil Procedure Act, Cap 71** provides that;

> "*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."*

[32] In **Ponsiano Semakula versus Susane Magala and Others (1993) KALR 213**, the Court of Appeal held that:

> *"The doctrine of res-judicata, embodied in **s 7 of the Civil Procedure Act**, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-known maxim: '**nemo debt bis vexari pro una et eada causa**' (No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by **res-judicata** appears to be that*

the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of ***res-judicata*** *applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time".*

[33] In ***Daniel Sempa Mbabali V Adminstrator General [1992-1993] Hcb 243*** the Court succinctly explained what has to be proved by any party who seeks to rely on the doctrine of *res judicata*. The court stated that:

"a matter is said to be res judicata when the matter in issue was directly and substantially in issue in a former suit, the subsequent suit should be between the same parties or between parties under whom they or any of them claim; the court which tried the first suit must have been competent to try the subsequent suit and fourthly, the issue in the subsequent suit must have been finally decided by the court in the first suit. The plea of res judicata is one that goes to the jurisdiction of the court. The doctrine is fundamental to the effect that there must be an end to litigation."

[34] In the instant case, although the Defendants pleaded that the Plaintiff's suit is *res judicata*, no evidence was adduced to prove to the required standard that indeed the matter in issue in this court was directly and substantially in issue in a former suit, between the same parties or between parties under whom they or any of them claim. The Defendants did not also prove that the court which tried the alleged former suit was competent to try this suit and the issues in this suit have already been finally decided by the court in the first suit. D.W.4, D.W.5 and D.W.6 testified that the Court had already declared Joska Aboda and Mzee Tito Olworo as the customary owners of their land. D.W.2 (Anyango Molly) testified that Tabu Orim who is a cousin of the Plaintiff sued her father Mzee Tito Olworo before the Magistrate Grade II Court of Kitgum but judgement was given in favor of her father and Tito Okello Lutwa's family was ordered to leave her father's customary land. No evidence was adduced to prove who were the parties in the alleged case, what were the issues in that case and the court which decided the case, if any. The Defendants should have at least adduced a copy of the alleged judgement. I therefore find that the 1st and 2nd Defendants failed to prove that this suit is *res judicata*.

Issue 2: Whether the Defendants are the customary owners of the suit land.

[35] The Defendants pleaded at paragraph 1 of the counter - claim that at all material times they were the customary owners of the suit land. D.W.1 (Joska Aboda) testified that her father in law, Lazaro Lagala, owned the suit land under customary tenure. She further testified that after the death of her father in law in 1968, her husband, Aboda John, took over the entire land under the Acholi custom. When her husband died in 2003, she took over the land. She has been owning the land as a customary owner and occupying it as a widow of Aboda John. D.W.2 (Anyango Molly) testified that her father, Mzee Tito Olworo, owned the suit land under customary tenure. He got the land in 1967 as a gift inter vivos under the custom of Acholi community from a friend/ maternal uncle to his mother, the late Ezekia Amone.

[36] Section 2(1) of the Public Lands Act, Cap 201, which was the applicable law at the time when Mzee Tito Olworo and Aboda John were alleged to have acquired the suit land, defined customary tenure to mean: *"a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons."* The same definition of customary tenure was adopted in Section 54 of the Public Lands Act, 1969. As for the 2nd Defendant, the applicable law is Article 237 (3) (a) of ***The Constitution of the Republic of Uganda 1995***, and Section 2 of the ***Land Act, Cap 227*** which recognize customary tenure. According to Section 3 of the ***Land Act, Cap 227***, customary tenure is a form of tenure which is, applicable to a specific area of land and a specific description or class of persons; governed by rules generally accepted as binding and authoritative by the class of persons to which it applies; applicable to any persons acquiring land in that area in accordance with those rules; characterized by local customary regulation; applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land; providing for communal ownership and use of land; parcels of land may be recognized as subdivisions belonging to a person, a family or a traditional institution; and which is owned in perpetuity.

[37] Section 46 of the ***Evidence Act, Cap 6***, provides that the opinion of experts is relevant in establishing the existence of a custom or customary law. It states that:

> *"**46. Opinion as to existence of right or custom, when relevant***
>
> *When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right, of persons who would be likely to know of its existence if it existed, are relevant.*

Explanation — The expression "general custom or right" includes customs or rights common to any considerable class of persons."

[38] In ***Kampala District Land Board and another versus Venansio Babweyaka and 4 others SCCA No. 2 of 2007*** Odoki C.J held that:

"It is well established that where African customary law is neither well known nor documented, it must be established for the Court's guidance by the party intending to rely on it. It is also trite law that as a matter of practice and convenience in civil cases relevant customary law if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties. In ***Ernest Kinyanjui Kimani v. Muira Gikanga*** *[1965] E.A. 735, Duffus J.A. sai at page 789:*

> ***"As a matter of necessity, customary law must be accurately and definitely established. The Court has the wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done reference to a book or document of reference and would include a judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative text books on the subject or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove relevant facts of his case****."***

[39] Similarly, in ***Atunya Valiryano versus Okeny Delphino High Court Civil Appeal No. 0051 of*** 2017 my brother Judge Mubiru J. held that:

"...a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of

acquisition in accordance with those rules, of a part of that specific land to which such rules apply."

[40] Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative. See: ***Bwetegeine Kiiza and Another versus Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009***; ***Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009***; *and* ***Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of 2010***.

[41] In the instant case, apart from the 1st and 2nd Defendants merely stating that they acquired the suit land in accordance with Acholi custom, no evidence was adduced to prove the relevant clans in Acholi tribe from whom they acquired the land, the customary law applicable to the specific clans, whether the customary laws are authoritative and binding and whether they fulfilled all the requirements of rules applicable. In my view, the 1st and 2nd Defendant failed to prove that they are customary owners of the suit land.

Issue 3: Whether Tito Okello Lutwa was registered as the proprietor of the suit land through fraud.

[42] The Defendants pleaded, in the counterclaim, that Tito Okello Lutwa obtained the certificate of title through fraud. The particulars of the fraud which were pleaded were that, he obtained a certificate of title on land occupied by customary owners without compensation; he extended the boundaries of the land that was given to him and included the land of the Defendants; he surveyed the suit land without the knowledge of his neighbors; he used soldiers and police to drive away the Defendants, local leaders and the community when carrying out survey and opening boundaries; he threatened the customary owners using the government forces to instill fear and then grab the Defendant's land; and he destroyed the fences that clearly marked his plot to facilitate easy encroachment over the land of the Defendants.

[43] Counsel for the Plaintiff submitted that according to the evidence of P.W.1(Obina Joseph) and P.W.2 (Charles Oyuru Onayi), Tito Okello Lutwa obtained the certificate of title for the suit land lawfully/legally after following all the procedures. Counsel for the 1st and 2nd Defendants on the other hand submitted that the application, the inspection and the survey were marred with irregularities. According to counsel for the 1st and 2nd Defendant, P.W.2 (Charles

Oyuru Onayi) who was said to have been present during the inspection, gave contradicting evidence regarding the persons who were present, the boundaries and the date of signing the inspection report. He also contradicted himself on whether he attended the survey or not. Counsel submitted that registering land to defeat the unregistered equitable interest amounts to fraud. In support of his submission, counsel cited the case of ***John Katarikawe versus William Katwiremu & Another HCCS 2/73*** and ***Fredrick J.K Zaabwe versus Orient Bank Ltd and 5 others SCCA No. 4 of 2006.***

[44] I have considered the evidence on the court record and the submissions of counsel. The applicable law in 1990 when Tito Okello Lutwa was registered as the proprietor of the suit land was the ***Land Reform Decree, 1975***. Section 1 of the Decree declared all land to be public land, to be managed by Uganda Land Commission, in accordance with the ***Public Lands Act, 1969***, subject to such modalities as was necessary to bring the Act in conformity with the Decree. Under Section 3 of the Decree, the system of occupying public land under customary tenure was to continue and the customary tenure of any person could not be terminated except under terms and conditions imposed by the Commission, including the payment of compensation approved by the Minister of Land. A customary occupant of public land was only a tenant at sufferance. A lease on land occupied by a customary occupant could be granted by the Commission to any person in accordance with the Decree. There was no requirement for the consent, of the customary occupant, before the Commission could lease out the land. In addition, under Section 5(1) of the Decree, no person was to occupy public land by customary tenure except with the permission, in writing, of the prescribed authority. Under Section 6 of the Decree, it was an offence to occupy land unlawfully. At the district level, there was a Land Committee created by Section 11 of the ***Public Land Act, 1969*** as amended by the ***Public Land Act (Amendment) Decree, 1976***. The function of the Committee was to assist the Commission in the performance of its functions at the district.

[45] The Plaintiff adduced evidence which shows that on the 4th May 1982 Tito Okello Lutwa applied for approximately 30 acres of rural land in Lamit Village in Kitgum near Church of Uganda (EP2). The land was inspected by Kitgum District Land Committee. The Inspection Report was signed on the 2nd August 1982(EP3). A lease offer was given to him under ULC. Min.5/3/83(a) of January 1983 (EP4). On the 26th March 1990 Uganda Land Commission granted to Tito Okello Lutwa a lease of 49 years for the suit land, starting from 1st November

1989. He was consequently registered, as the leasehold proprietor, on the certificate of title of the suit land on the 8th of May 1990.

[46] I have already held in paragraph 26 above that the 1st and 2nd Defendants failed to prove that they were customary owners of the suit land. For that matter, they were not persons envisaged under the Decree whose customary tenure could not be terminated without payment of compensation. The Commission was therefore at liberty to grant Tito Okello Lutwa the lease on the suit land.

[47] Having obtained registration on the suit land, Tito Okello Lutwa became the absolute owner of the suit land. Although Counsel for the 1st and 2nd Defendants submitted that that the inspection and the survey were marred with irregularities, no evidence was adduced to prove any irregularities in the application by Tito Okello Lutwa for the suit land. No evidence was adduced by the 1st and 2nd Defendant to prove their allegation that during the survey of the suit land Tito Okello Lutwa used soldiers and the army. It is evident that the suit land was inspected. This was confirmed by D.W.2. The signatures of the people who attended the inspection are all contained in the inspection report.

[48] Even if the 1st and 2nd Defendants had proved any irregularities in the registration process, which in my view they failed to prove, irregularity in the registration process, cannot in itself be a ground to impeach his certificate of title of Tito Okello Lutwa. Under the Torrens system of land registration, which was first pioneered in South Australia in 1858 by Sir Roberts Torrens and was introduced in Uganda in 1908 by the ***Registration of Land Titles Ordinance, 1908*** and has been applied since then, a Certificate of Title once issued cannot be impeached (called into question its integrity or validity) or defeasible (annulled or made void). Once issued, the certificate of title becomes conclusive evidence that the person named in it is the proprietor of the land. The principle of indefeasibility of title, overlooks any informality or irregularity in the registration process, but only considers the registration itself as conclusive evidence of ownership of the land. The principle of indefeasibility of title is recognized in Sections 59 of the ***Registration of Titles Act, Cap 230*** which provides that;

> *"5**9. Certificate to be conclusive evidence of title***
> *No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in*

the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power. "Underlined for emphasis.

[49] However, under Section 77 of the Registration of Titles Act, a certificate of title procured or made by fraud is void. The Section provides that:

"Any certificate of title, entry, removal of incumbrances or cancelation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud."

[50] In addition, under Section 176 (c) of the Registration of Titles Act, where any person is deprived of land by a registered proprietor by fraud, the registered proprietor losses the protection under the law which provides that no action for ejectment or for recovery of land can be made against the registered proprietor. The person who is deprived of the land can maintain an action for ejectment or other actions for recovery of the land. Section 176 (c) of the Registration of Titles Act thus provides that:

*"**176. Registered proprietor protected against ejectment except in certain cases***
No action of ejectment or other action for recovery of any land shall lie or be maintained against the person registered as proprietor under this Act, except in any of the following cases –
(a)…
(b)…
(c) the case of a person deprived of land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise that as a transferee bona fide for value from or through a person so registered through fraud;"

[51] In ***Fedrick J.K Zaabwe versus Orient Bank Ltd & 5 others SCCA No. 04 of 2006***, Katureebe, JSC relied on ***Black's Law Dictionary 6th Edition page 660,*** where fraud was defined as;

> *"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture…A generic term, embracing all multifarious, means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc. …*
>
> *As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture…"*

[52] In ***Kampala Bottlers Ltd –Vs- Damanico (U) Ltd, (S.C. Civil Appeal No. 22/92),*** Wambuzi, C.J stated at page 7 of his judgment that:

> "*...fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."*

[53] The learned Chief Justice further stated that:

"Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters."

[54] In ***Vivo Energy Uganda Ltd vs Lydia Kisitu, SCCA No. 7 of 2015*** Tumwesigye JSC at page 12 held that;

"Direct evidence is not the only way to prove knowledge of fraud by the transferee. The knowledge can be inferred from circumstantial evidence."

[55] As I have already stated above, the 1st and 2nd Defendant failed to prove that they are customary owners who were deprived of land. They cannot therefore take benefit of Section 77 of the Registration of Titles Act.

[56] Be that as it may, I have carefully considered the evidence of the Defendant as against that of the Plaintiff regarding the alleged fraud. I have found the evidence of the 1st and 2nd Defendants and their witnesses regarding ownership of specific portions of the suit land contradictory and manifestly unreliable. At Paragraph 5 of her witness statement D.W.1 (Joska Aboda) testified that in 1965 when she went to settle at the home of her father in law, Tito Okello Lutwa was a neighbor of her father in law from the northern side. She went on to add at paragraph 18 that her father in law never had any land dispute with Tito Okello Lutwa. However, at paragraph 6 and 7 of the same witness statement, she contradicted herself when she stated that together with her husband, they gave to Tito Okello Lutwa a plot of land measuring 50 meters x 50 meters in 1968. In cross - examination, she again repeated that in 1965, Tito Okello Lutwa was their neighbor from the north. She thereafter again contradicted herself when she stated that the land measuring 50 meters x 50 meters was given to Tito Okello Lutwa in 1968. The contradiction was not explained by P.W.1 First, if indeed Tito Okello Lutwa was not a neighbor to the Lazaro Lagala from the north in 1965 then who was? Secondly, if Tito Okello Lutwa was not a neighbor to Lazaro Lagala why did she say Lazaro Lagala did not have any dispute with Tito Okello Lutwa. No evidence was led by D.W.1 to answer those questions, leaving her evidence on the matter manifestly unreliable.

[57] In addition, although D.W.1 (Joska Aboda) stated at paragraph 7 of her witness statement that together with her husband they gave to Tito Okello Lutwa land measuring 50 meters x 50

meters to build an urban home. When the court visited the locus, the size of the land of the late Tito Okello Lutwa which is not in dispute is significantly large compared to what D.W.1 claimed they gave him. The distance between Kitgum Palabek road southwards to the land which D.W.1 claim to belong to her is 192 meters and not 50 meters as was indicated in her testimony. In re - examination D.W.1 testified that the Plaintiff owns more than 10 acres. D.W.2 on the other hand testified that Tito Okello Lutwa's land is about 6 acres. If indeed D.W.1 and her husband only gave to Tito Okello Lutwa a plot of land measuring only 50meters by 50 meters then how did Tito Okello Lutwa acquire the land which she stated to be more than 10 acres or the 6 acres referred to by D.W.2? The surveyor (Kidega simon) testified that the land of Tito Okello Lutwa which is not in dispute is approximately 4.76 hectares. This discrepancy was not explained at all by any of the witnesses of the Defendants. D.W.2 even made it worse when she testified at the locus that the part of the suit land which is west of the undisputed portion of the suit land was left by Joska Aboda, something which was not stated by Joska Aboda herself. The only logical conclusion is that P.W.1 lied when she testified that Tito Okello Lutwa only had a plot of land measuring 50 meters x 50 meters in the area.

[58] Furthermore, at paragraph 7 of her witness statement D.W.1 (Joska Aboda) stated that Tito Okello Lutwa, fenced the boundaries of the land measuring 50 x 50 which they gave to him using eucalyptus trees. According to her the eucalyptus trees were still on the suit land up to the time of her testimony. However, when the court visited the locus, the court was not shown those eucalyptus trees.

[59] At paragraph 7 and 11 of her witness statement, D.W.1 (Joska Aboda) stated that when they gave the plot measuring 50meters x 50meters to Tito Okello Lutwa, the 1st Defendant (Mzee Tito Olworo) was present. He was therefore aware of the exact size of the land given to Tito Okello Lutwa. Mzee Tito Olworo was one of the people who is indicated, in the inspection report (EP3), to have been present when the land which Tito Okello Lutwa applied for, in Lamit village measuring approximately 30 acres, was being inspected. The inspection was confirmed by D.W.2 who testified that she was present and her father Mzee Tito Olworo signed the inspection report because he was the chairperson of the church. If Mzee Tito Olworo indeed knew the size of the plot which was given to Tito Okello Lutwa, then why did he accept to sign a report which was mentioning land of a different size from what he knew was given to Tito Okello Lutwa. According to the testimony of D.W.2 the church wanted to know the boundaries of its land. She claimed that she did not know the land which was being inspected. Her evidence

in this regard was clearly a lie since the inspection report (EP3) is very clear that it is Tito Okello Lutwa who was the Applicant. Mzee Tito Olworo was an educated man. According to her daughter D.W.2 (Anyango Molly), he was the Principal of Y.Y Okot Memorial Junior School. It is inconceivable that he could have signed the inspection report without knowing who the applicant was and the size of the land which was being inspected.

[60] Although the Defendants pleaded that in the 1960s, Tito Okello Lutwa used police and the army to grab the land of the Defendants and chased them away. In cross-examination D.W.1 (Joska Aboda) testified that the Plaintiff did not exceeded the boundaries of the plot of land which was given to Tito Okello Lutwa on her side. According to her, the Plaintiff instead encroached on the land belonging to Zabuloni Isoke School. She later contradicted herself when she testified that the Plaintiff wanted to re - construct a wall fence, which was initially on his land but he encroached on her land by 10 meters x 30 meters towards the western side. The contradiction was not explained in any way. According to D.W.1 (Joska Aboda), the part of her land which the Plaintiff encroached on has acacia tree, mango tree and mituba tree. When the court visited the locus, the court was not shown any acacia tree or mituba tree at the alleged point.

[61] D.W.1 (Joska Aboda) further contradicted herself when at paragraph 10 of her witness statement she stated that Okello Tito Lutwa built a semi-permanent house on the plot which he was given. He then brought his wife and children to stay on it. In cross examination she changed and said between 1986 and 1982 the plot was vacant although Okello Tito Lutwa had been given. Her evidence was further contradicted by D.W.3 (Abur Perezi Oryen) who testified that when she got married in Lamit Kapim village in 1967 the home of Tito Okello Lutwa existed on the suit land. The contradiction was not explained in any way.

[62] According to the inspection report (EP3), it was signed on the 2nd of August 1982. In cross-examination, D.W.1 (Joska Aboda) testified that the inspection of the suit land was done during the insurgency in 1986. At that time, they had fled to Pajimo. According to her, the 1st Defendant (Mzee Tito Olworo) signed because he was the chairperson of the church. Clearly her evidence was a lie to try to give the impression to the Court that the inspection of suit land was done during the insurgency in the absence of the neighbors. The fact that she did not sign the inspection report when in fact she is a neighbor to the suit land cannot confirm that she was not aware of the inspection. Otherwise how did the other neighbors such as Mzee Tito Olworo,

her daughter D.W.2 and Nasanaire attend the inspection if indeed Tito Okello Lutwa did not involve neighbors in the inspection.

[63] The evidence of defence witnesses regarding the neighbors D.W.1 (Joska Aboda) was also contradictory. At paragraph 5 of her witness statement, D.W.1 (Joska Aboda) mentioned all the neighbors of the land of her father in law. She did not mention 1st Defendant (Mzee Tito Olworo) as a neighbor and yet in paragraph 11 she stated that she invited Mzee Tito Olworo as a neighbor to be present when they were giving the plot to Tito Okello Lutwa. D.W.2 (Anyango Molly) on the other hand testified that Joska Aboda is a neighbor of her father Mzee Tito Olworo from the north. As for D.W.6 (Labeja Bob William), he did not mention Tito Okello Lutwa as a neighbor of Joska Aboda and Muzee Tito Olworo and yet in paragraph 17 he stated that Tito Okello Lutwa was a neighbor to the land of Joska Aboda. In paragraph 8 he suggested that the land of Josca Aboda and Muzee Tito Olworo are all on the southern side of the land of Tito Okello Lutwa. If that evidence is anything to go by, it would mean that the evidence of D.W.4 that Tito Okello Lutwa extended his land towards Bunga Adieri steam, which is east of the land of Tito Okello Lutwa as per the observation of the court at the locus, is not true.

[64] As regards the part of the suit land at the extreme west beyond Bwong Ladeil swamp along Kitgum – palabek road which contained teak trees of the Plaintiff, at the locus D.W.6 testified that the land of Tito Okello Lutwa does not go westwards beyond Bwong Ladiel swamp on the western side. According to him, part of the suit land west of Bwong Ladeil swamp belongs to Lutoo. He later contradicted himself when he said it belongs to Muzee Tito Olworo. I have found this evidence to be a complete lie. This is because, D.W.2 (Anyango Molly) did not mention that on the northern part of her father's land, there is Kitgum – Palabek road. She instead testified that the land of her father is south of the land of Tito Okello Lutwa. This is confirmed by the evidence of D.W.4 (Abwola John), D.W.5 (Opira Martin Luther) and D.W.6 (Labeja Bob William) who all described, in their witness statements, that the land of Mzee Tito Olworo is on the south of the land of Tito Okello Lutwa and not on the west as was being alleged by D.W.6 (Labeja Bob William) at the locus. The same was further confirmed by D.W.3 who testified that Tito Okello Lutwa land is on the Northern part of the land of Joska Aboda and Mzee Tito Olworo is on the southwestern side of the land of Joska Aboda.

[65] D.W.2 (Anyango Molly) contradicted herself regarding the size of the land which she alleged Tito Okello Lutwa grabbed. At paragraph 6 of her witness statement she stated that the family of Tito Okello Lutwa forcefully grabbed 16 acres which is part of her father's land, fenced it and planted pine trees on 6 acres. In cross-examination she contradicted herself when she testified that Tito Okello Lutwa instead encroached on 6 acres of their land and fenced it off using barbed wires. When the court visited the locus, she did not show the court the land of her father where the Plaintiff planted the pine trees.

[66] Furthermore, at paragraph 14 of her witness statement D.W.2 (Anyango Molly) stated that her father got his land neighboring the land of Aboda John in 1967 and yet D.W.1 testified that when she went to settle in Lapem village in 1965 she found when Mzee Tito Olworo was already settled on his land and was a neighbor of her father in law, Lazaro Lagala.

[67] According to D.W.6 (Labeja Bob William) the dispute started between 1988 – 1990 when Orim Tabu abandoned the original boundaries and yet according to the evidence of D.W.1, the dispute started in 1979 when Tito Okello Lutwa returned from exile. D.W.4 on the other hand testified that it was between 1983 – 1984 when Tito Okello Lutwa used soldiers to arrest, beat, imprison Mzee Tito Olworo and fenced off his land.

[68] On the allegation that Tito Okello Lutwa arrested and detained Muzee Tito Olworo at his home and later in the police, no documentary evidence was adduced to prove the allegation. Evidence such as police bond or medical examination report should have been adduced by the 1st and 2nd Defndant. The Defendants 1st and 2nd Defendant therefore failed to prove that Tito Okello Lutwa included their customary land into his certificate of title or used force during the inspection.

[50] In the end I find that the allegation that Tito Okello Lutwa obtained or secured registration of the suit land into his name by fraud was not proved.

Issue 4: Whether the Defendants trespassed on the suit land.

[69] Counsel for the Plaintiff submitted that P.W.1(Joseph Obina) testified that the 1st and 2nd Defendants were cultivating past the boundary of the fence. Counsel for the Defendants on the other hand submitted that the defense witnesses testified that Defendants have always been on

the suit land as owners under customary tenure and it cannot be said they entered on the suit land and interfered with the possession of the Tito Okello Lutwa.

[70] The law on trespass is fairly settled. In ***Justine E.M.N Lutaya vs Sterling Civil Engineering Company Ltd Civil Appeal No. 11 of 2002*****,** at page 6, Mulenga, J.S.C held that;

> *"Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. "*

[71] In ***Sheik Muhammed Lubowa versus Kitara Enterprises Ltd, Court of Appeal Civil Appeal No. 4 of 198***, at page 4, Manyindo V-P held that;

> *"...it seems clear to me that in order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land indeed belonged to him, that the respondent had entered upon that land and that that entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land."*

[72] A person holding a Certificate of Title to land has legal possession of land and therefore can institute a suit against a trespasser for eviction. In the case of ***Moya Drift Farm Ltd versus Theuri (1973) E.A 114***, in which the trial court had dismissed a suit by the registered proprietor of land on the ground that at the time of the unlawful entry complained of, the proprietor was not in possession. On appeal, counsel for the proprietor argued that while the decision may have been in conformity with the English law, it was inconsistent with s.23 of the Registration of Titles Act of Kenya. Spry, V.P. at page 115 held that:

> *"I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as 'the absolute and indefeasible owner' of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor on registration and, unless there is any other person lawfully in possession such as a tenant, I think that title carries with it legal possession."*

[73] In ***Justine E.M.N Lutaya*** (supra) Mulenga J.S.C., cited with approval the case of ***Moya Drift Farm Ltd*** and held that:

> *"...in absence of any other person having lawful possession, the legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser."*

[74] In the instant case, it is evident that the late Tito Okello Lutwa is the registered proprietor of the suit land. He is therefore in legal possession of the suit land. P.W.1(Joseph Obina) testified that the 1st and 2nd Defendants were cultivating past the boundary of the fence. This evidence was not challenged in any way by the Defendants. Their only contention is that they are the customary owners of the suit land, which I have already found that they failed to produce evidence to prove. I therefore find that the Plaintiff trespassed and are trespassers on the suit land.

Issue 5: What remedies are available to the parties.

[75] The Plaintiff prayed for, among others, general damages for trespass, interest; costs of the suit; and any other reliefs that the court deems fit.

General damages:

[76] According to **Halsbury's Laws of England, 4th Edition reissue Volume 12(1) paragraph 812**, general damages are defined as:

> *"... those losses, usually but not exclusively non pecuniary, which are not capable of precise quantification in monetary terms. They are those damages which will be presumed to be natural or probable consequence of the wrong complained of; with the result that the Plaintiff is only required to assert that damage has been suffered."*

[77] I have to add that the principles governing measurement of damages in cases of breach of contract and tort is that there should be *restitutio in integrum*. In ***Simon Mbalire vs. Moses Mukiibi High Court Civil Suit No. 85 of 1995*** Tinyinondi J. held that:

> "*The fundamental principle by which courts are guided in awarding damages is restitution integram. By this principle is meant that the law will endeavor so far as*

money can do it, to place the injured person in the same situation as if the contract had been performed or in the position he occupied before the occurrence of the tort both in case arising in contract and in tort, only such damages are recoverable as arises naturally and directly from the act complained of".

[78] In this case, P.W.1(Joseph Obina) testified that the Defendants interfered with the Plaintiff's development of the suit land. The Defendants were cultivating past the boundary of the fence. According to P.W.1, the trespass started in 2012 when the Plaintiff wanted to reopen the boundaries of the suit land. The Plaintiff has therefore been deprived of use of the suit land for over 10 years. In the circumstances I consider an award of general damages of Ugx 20,000,000/= appropriate.

Interest:

[79] The principles applied by this court in the award of interest are clear and are set out in section 26 (2) of the Civil Procedure Act which provides that:

"Where the decree is for the payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

[80] The above position of the law was reaffirmed in ***Lwanga vs. Centenary Bank [1999] EA 175*** wherein the Court of Appeal held that;

"Section 26(2) of the Civil Procedure Act empowers the court to award three types of interest; interest adjudged on the principal sum from any period prior to the institution of the suit, interest on the principal sum adjudged from the date of filing the suit to date of the decree, and interest on aggregate sum from the date of the decree to the date of payment in full."

[81] On the interest rate to be awarded, in ***Mohanlal Kakubhai Radia vs Warid Telecom Ltd HCCS No. 234 of 2011*** the court stated that:

> *"Court should take into account the ever rising inflation and drastic depreciation of the currency. A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due."*

[82] In my view, interest of 15% per annum from the date of this judgement till payment in full is appropriate.

Costs:

[64] Section 27 of the Civil Procedure Act provides that:

> *"**27. Costs***
>
> *(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.*
>
> *(2) The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection (1); but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.*
>
> *(3) The court or judge may give interest on costs at any rate not exceeding 6 percent per year, and the interest shall be added to the costs and shall be recoverable as such."*

[83] The general rule is therefore that costs should follow the events and a successful party should not be deprived of costs except for good cause. I have not found any good cause in this case why I should deny the Plaintiff the costs in this matter.

Orders:

[84] In the end, after carefully considering the merits of this case, the following orders are hereby made.

1. The suit land is hereby declared to belong to the estate of the late Gen. Tito Okello Lutwa.
2. An eviction order is hereby issued against the 1st and 2nd Defendant from the suit land.
3. A permanent injunction is hereby issued to restrain the 1st and 2nd Defendants and their agents from further interfering and claiming the suit land.
4. The 1st and 2nd Defendants to jointly and severally pay the Plaintiff general damages of Ugx 20,000,000/= (Uganda Shillings Twenty Million Shillings).
5. The 1st and 2nd Defendants shall pay the general damages mentioned in 4 above with interest of 15% per annum form the date of this judgement till payment in full.
6. The 1st Defendant and 2nd Defendants shall jointly and severally pay the Plaintiff the costs of the suit.

I so order.

Dated and delivered by email this 23 day of April, 2024.

Phillip Odoki

JUDGE