THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 127 OF 2015
(Arising from Civil Appeal No.003 of 013)
(Arising from Civil Suit No. 005 of 2006)

1. ODONGO GEOFFREY
2. OGWAL WILSON
3. JURY BABEL OPIO OKORI
4. OGWANG ATOLI BOSCO :::::::::::::::: **APPELLANTS**

VERSUS

ATOKE FRANCIS :::::::::::::::::::: **RESPONDENT**

Appeal from the Judgment and Orders of the High Court of Uganda at Lira (Hon. Justice Simon Byabakama Mugenyi) dated 8th August, 2014, in Civil Appeal No.003 of 2013).

CORAM: HON. JUSTICE S.B.K KAVUMA, DCJ
HON. JUSTICE REMMY KASULE, JA
HON. JUSTICE ELIZABETH MUSOKE, JA

JUDGMENT OF THE COURT

Introduction.

This is a second Appeal from the judgment and orders of the High Court, in High Court Civil Appeal No.003 of 2013, in which the High Court Judge in his appellate capacity, set aside the judgment and orders of the Chief Magistrate's Court at Lira and decreed that the suit land belonged to the respondent.

Background.

The respondent filed Civil Suit No.005 of 2006 in the Chief Magistrate's Court of Lira against the appellants for trespass to land and seeking for a permanent injunction, general damages for trespass and costs of the Suit against the appellants. He claimed that he was appointed an executor of

the will of the Late Abel Olero Marktim and the appellants were relatives of the deceased. Further, that the suit land, situate at Buga Village, Kamdini Parish, Aber Sub-county, Oyam District, measuring 100 hectares, formed part of the estate of the deceased who had acquired the land by first occupation between 1971 and 1973.

The appellants, on their part, denied the above allegations put up by the respondent. They claimed that the suit land did not belong to Abel Olero Marktim (deceased), but to the Late Otim Sezi who was their father and also a father to Abel Olero Marktim. In that regard that the suit land could not form part of the estate of the lat Abel Olero and was not available for him to bequeath in his will.

The trial Magistrate entered judgment in favour of the appellants. He found that the suit land was customary land in which the appellants and the respondents both had beneficial interests. The above was based on his finding that the land belonged to Otim Sezi who was the father to Abel Olero Marktim as well as the appellants.

Being dissatisfied with the decision of the trial magistrate, the respondent appealed to the High Court against the judgment, on the following grounds:-

1. *The Learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and arrived at a wrong decision that the land in question is customary land.*
2. *The Learned trial Magistrate erred in law and fact in holding that the respondents are entitled to benefit from the suit land and as such occasioned a miscarriage of justice.*
3. *The Learned trial Magistrate erred in law and fact when he held that Acen Roseline had successfully proved the counterclaim.*
4. *The Learned trial Magistrate erred in law and fact when he held that the appellant/plaintiff had failed to prove the claim.*

The appellate Judge allowed the Appeal and set aside the orders of the trial Court in regard to the ownership of the land in issue. He made a finding that the respondent, who was the executor of the will of Abel Olero Marktim, was the lawful owner of the suit land.

Dissatisfied with the decision of the High Court, the appellants appealed to this Court on the following grounds:-

1. *The Learned Judge failed to properly evaluate the evidence on record thereby reaching a wrong conclusion that the suit land belongs to the late Olero Abel, not the late Otim Sezi (Olero Abel's father) thereby occasioning a miscarriage of justice.*
2. *The Learned Judge erred in law and fact in holding that the appellants are not entitled to a share of the suit family land.*
3. *The Learned Judge erred in law and fact in holding that the contradictions in the defence witnesses' evidence were so grave that rendered them untruthful.*
4. *The Learned Judge erred in law and fact in holding that the contradictions in the plaintiff's (appellant's) case are minor thus wrongly believing the plaintiffs' case at the expense of the defendants, the appellants herein.*

Representation.

The appellants were represented by Mr. Mike Abwang Otim (Counsel for the appellants), while the respondent was represented by Mr. Wandera Ogalo (Counsel for the respondent).

Counsel for either party filed written submissions and made highlights of the same when the Appeal came up for hearing.

Counsel for the appellant argued grounds 1 and 2 of the Appeal jointly and concluded with grounds 3 and 4 together.

First of all, we note that all the grounds as stated in the Memorandum of Appeal, based upon both law and fact are contrary to Sections 72 and 74 of the Civil Procedure Act as they are not grounds based on law only.

Nevertheless, we shall address the Appeal solely on the points of law raised in the grounds of appeal.

Grounds 1 and 2:

The Learned Judge failed to properly evaluate the evidence on record thereby reaching a wrong conclusion that the suit land belongs to the late Olero Abel, not the late Otim Sezi (Olero Abel's father) thereby was occasioning a miscarriage of justice.

The Learned Judge erred in law and fact in holding that the appellants are not entitled to a share of the suit family land.

Appellants' submissions:

On these grounds of appeal, counsel for the appellants submitted that the appellate Judge failed in his duty of re-evaluating evidence, thus causing a miscarriage of justice.

Counsel submitted that the appellate Judge was wrong in concluding that Odongo Geoffrey (DW1) stated in his evidence that the suit land was not demarcated with "Awila Kot" trees, thus contradicting the evidence of Okuna Richard (DW5) that the suit land was demarcated. He submitted that both DW1 and DW5 stated in their evidence that the land was demarcated by "Awila Kot" except on the eastern side of the land.

Regarding the evidence of Acen Roseline (DW2) that Otim Sezi was poor which the High Court Judge found contradictory to the evidence of Ocen Lakana (DW4) that Otim Sezi was not poor, counsel submitted that the High Court Judge did not take into consideration the fact that being poor or rich was relative. In counsel's view, there are many people who hold land but are not rich and cannot fully utilize it. Further, regarding the contradiction pointed out by the appellate Judge in the evidence of DW1 that Anania Arem (PW5) was not a clan leader, counsel submitted that the Judge relied on the above contradiction erroneously. He indicated that the

appellate Judge mixed up facts and confused the evidence when he referred to Anania Arem as PW5, yet PW5 was John Akenya.

It was counsel's further submission that the appellate Judge did not caution himself before he relied on the evidence of Opio Okori (PW4). He submitted that PW4 was initially a defendant in the suit but was compromised by the respondent. In counsel's view, the evidence of PW4 was biased and based on a promise and fear that he could be sued or arrested by the appellant as had been indicated in the evidence of DW2.

Counsel further made reference to the finding of the High Court Judge that DW2 was telling lies in stating that Otim Sezi gave her part of the suit land. The Judge based his finding on the basis of the evidence of Okuna Richard, (DW5) that Otim Sezi never distributed land to his children by the time of his demise. It was counsel's contention that contrary to the findings of the appellate Judge, DW2's evidence was that Otim Sezi gave her land to settle on upon her return from her matrimonial home. In counsel's view, the above did not amount to distribution of land.

It was counsel's further submission that the evidence of PW4 was biased and ought not to have been relied upon. Further, that it was not believable that PW1 and PW5, who were not immediate relatives of DW2, would have been so interested in the affairs of the family that they would be present whenever anything happened in regard to the land. Counsel further submitted that if indeed Abel Olero gave part of the land to DW2 upon her return from her matrimonial home, then she was still entitled to stay on part of the land given to her.

Counsel made reference to the Lease offer (EXH P1) where Abel Olero Marktim had been offered 100 hectares of land by the Uganda Land Commission, which was approximately 250 acres. He then submitted that there was no proof on record indicating that Abel Olero's request for more land was granted. Counsel contended that there was no evidence as to where the said Abel Olero got the extra 1250 hectares as claimed by the respondent.

Counsel further submitted that the contradiction in the evidence of PW2 and PW5 as to the time when the spray team left the suit land could not be treated as minor. Further, that if the evidence of PW5 were to be believed that the spray team left the suit land between 1981 and 1982, then the evidence of PW2 would be rendered as lies since he would not be in position to know when the defendants entered the land.

Counsel invited this Court to subject the evidence to fresh scrutiny considering that the 1st appellate Court failed in its duty to re-evaluate the evidence on record.

Respondent's submissions:

In reply, counsel for the respondents opposed the Appeal and supported the findings of the first appellate Court.

Counsel submitted that the appellate Judge was alive to his duty as evidenced in his reliance on ***Prince Versus Kalsall [1957]EA 752*** and ***Begumisa & Ors Versus Tibebaga [2004]2 EA 127***.

He submitted that contrary to the submission of counsel for the appellants, DW1 had testified that the land in issue was not demarcated by "Awila Kot" in contradiction with the evidence of DW5. In counsel's view, the above was a major contradiction and the appellate Judge could not be faulted for finding as such.

Further, that while the appellate Judge was criticized by the appellants for equating poverty to landlessness, at no time did the Judge state as such. Counsel pointed out that what was evident was that there was a contradiction as to the financial status of Otim Sezi in the evidence of DW2 and DW4. While DW2 stated that Otim Sezi was too poor to educate his children, DW4 stated that the same person was not poor and educated his children. In counsel's view, there was untruthfulness in the evidence of the two witnesses and the appellate Judge was right in finding that the above was a major contradiction going to the credibility of the two witnesses.

Counsel further submitted that DW1's denial of Anania Arem as a clan head and that he did not attend the meeting of 7th May 2005, was intended to deprive the meeting of its legitimacy. In counsel's opinion, a witness who deliberately lies so as to render a decision against him a nullity is not worthy of belief. In regard to the contention that the appellate Judge mixed up facts when he referred to Arem Anania as PW5 yet PW5 was John Akenya, he submitted that counsel was making a mountain out of an anthill. He submitted that the Judge correctly assigned evidence to the respective witnesses and was alive to the fact that PW5 was John Akenya and PW6 was Arem Anania.

In regard to the submission for the appellants that the appellate Judge ought to have discredited the evidence of PW4 for being biased/compromised, counsel submitted that the witness was cross examined but the issue was not raised. Further, that the issue of bias/compromise did not even arise in the submissions of counsel at trial. Further, that even the trial Magistrate found PW4 to be a plausible and credible witness.

Counsel further submitted that the appellate Judge was right in disbelieving the evidence of Acen Roseline (DW2). First and foremost, that in her evidence, she first claimed that Anania Arem (PW6) was never a clan head and that he never attended the clan meeting. However, she later changed her testimony and admitted that Anania Arem was the clan head. Secondly, that it was unbelievable that Otim Sezi could have given DW2 half of the land in issue yet he had 10 children in total as admitted by DW2.

It was counsel's further submission that the Judge was correct in finding that Olero Abel owned the land in issue over and above the 100 hectares formally offered to him in the lease offer because in applying for a lease of 2000 acres, Olero stated that he had been using the land traditionally. Further, that it was an agreed fact that Abel Olero planted the "Kwila Kot" trees to demarcate the land between 1973 and 1974. Counsel relied on ***Balamu Bwetegaine Kiiza Versus Zephania Kadooba Kiiza, Court of***

Appeal Civil Appeal No. 59 of 2009, where it was held that until the appellant perfected the legal title in law, he had an equitable interest in the land by virtue of the lease offer.

Court's consideration of the Appeal.

The duty of this Court as the second appellate Court is to resolve grounds of law only arising from the decision of the High Court as the first appellate Court. In resolving these grounds, this Court has power under Rule 32(2) of the Court of Appeal Rules, to appraise the inferences of fact drawn by the trial Court. It is also trite law that a second appellate court can only interfere with the decision reached by the first appellate court, if as a matter of law, the first appellate court's decision was made without sufficient evidence to support the findings of fact. ***[See Kifamunte Henry Versus Uganda, SC Criminal Appeal No.10 of 1997, also Court of Appeal Civil Appeal No.10 of 2011 Lubanga Jamada Versus Dr. Ddumba Edward (unreported)).***

We deduce from the grounds of appeal raised by the appellants as stated above that the major question to be addressed by this Court is whether the High Court (1st appellate Court) properly re-evaluated the evidence in coming to its conclusion. While the above is a point of law, it will be necessary for us to consider the facts of the case in reaching our decision.

In order to answer the grounds of appeal appropriately, we need to trace each party's chronology of evidence as presented on record. We shall, therefore, briefly state the evidence as adduced by each of the parties at trial.

Francis Atoke (PW1) who is the respondent herein, testified that he was the Executor of the Will of the late Abel Olero who was her mother's husband. Regarding the suit land, it was his testimony that it was surveyed land situate at Lira- Kamdini Road, measuring about 1500 acres or 100 hectares. Further, that Abel Olero took possession of the land between 1971 and 1973 through first occupation. In 1980, the Late Abel Olero was

granted a lease offer (Exhibit P1 and P2) of the same land from Uganda Land Commission of 100 hectares, although he had applied for 2000 acres.

Edebu John (PW2) testified that in 1978, Abel Olero gave them part of the suit land as a camping ground to control Tsetseflies and they left in 2001. It was his testimony that the appellants entered the suit land in 1990.

Oceng Levy (PW3) testified that the late Abel Olero acquired the suit land by first occupation in 1973, and that he (PW3) helped him to clear the land. Further, that Abel Olero gave Acen Roseline (DW2) part of the land for temporary stay upon her return from Jinja.

Opio Okori (PW4) testified that Abel Olero acquired the land by first occupation in 1973 and that he gave DW2 part of the land to settle thereon temporarily. Further, that in 2006, he had showed Ogwal, who is one of the appellants, their family land which is not the suit land.

John Akenya (PW5) stated that he was a former Tsetseflies Control Officer. It was his testimony that Abel Olero gave him part of the suit land to open up a camp and that he occupied the land from 1977 and that they left the land between 1981 and 1982.

Anania Arem (PW6) testified that he was the Clan Chief of Okarowok-Okwera Amor. It was his testimony that at a meeting (Exhibit P5) held in 2005, the 1st respondent was ordered to stop interfering with the suit land which belonged to the respondent herein. Further, that Abel Olero, who was the owner of the land had passed it on to the respondent.

Ajori Mary Adea (PW7) testified that she was a wife to the late Adea Samson, who was a brother to Abel Olero as well as the 1st appellant Geoffrey Odongo. It was her testimony that her husband had told her that Otim Sezi had only 2½ acres of land which was distributed amongst his children.

Ayella Jude (PW8), who was a State Attorney and Assistant Administrator General testified that the 1st appellant visited his office in Gulu with the intention of obtaining Letters of Administration for the estate of the Late Otim Sezi. It was his testimony that the 1st appellant stated to him that the deceased had only left 10 acres of un surveyed land.

On the other hand, the defence (appellants herein) raised a different version of facts regarding the suit land.

According to Geoffrey Odongo (DW1), the land in dispute measuring about 100 acres belonged to their father the late Otim Sezi who died in 1986. Because he died intestate, that as tradition stands, the eldest son who was the late Abel Olero became the overseer and custodian of the land in issue and he occupied it as such.

Roseline Acen (DW2) testified that the land in dispute belonged to their father called Otim Ssezi. Further, that Otim Sezi gave her 50 acres of the suit land before his demise in 1984 upon her return from her matrimonial home, but no land was distributed to her brothers. It was her testimony that Otim Sezi had inherited the suit land from his father.

Ocen Lakana (DW4) testified that his father (deceased) was a brother to Otim Sezi. He testified that the suit land belonged to their grandfather called Oyo, who passed on the land to Otim Sezi. Further, that Abel Olero did not have any land and upon his return in 1971, he settled on his father's land.

Okuna Richard (DW5) testified that he was the Clan Chief of Okarowok Okwer Amor. It was his testimony that the land in issue was customary land originally belonging to Oyo, who was Otim Sezi's father. It was his testimony that Otim Sezi did not divide and give land to any of his children including DW2.

Alfonsio Omara (DW6) testified that he got to know about the land dispute between the parties herein when he was the Clan Chief. However, that when the respondent was summoned to resolve the issue, he refused to

turn up. According to him, the land was a virgin piece cleared by Oyo, the father of Otim Sezi.

In considering the appeal before him, the High Court Judge first reminded himself of his duty as the first appellate court being to re evaluate evidence and draw conclusions where the trial Court failed to evaluate evidence or where wrong inferences were drawn from the evidence. He cited ***Prince Versus Kelsall [1957] 1 EA 752 and Begumisa & Ors Versus Tibebaga [2004] 2 EA 127,*** as a basis for coming to the above approach.

The High Court Judge then went ahead to make a review of the evidence while relating it to the inferences drawn by the trial court from the evidence on record.

Regarding the history of the land, the High Court Judge faulted the trial Magistrate for placing reliance on the evidence of Ogwang Atoli (DW3). In the High Court Judge's analysis, the evidence of DW3 was not of any substance in determining the past ownership of the land in issue. In determining whether to believe the appellants' or the respondent's evidence, the High Court Judge pointed out that it would depend on the credibility of the witnesses, and we accept that.

The High Court Judge discredited the appellant's evidence on the basis that it was full of contradictions and inconsistencies. He made a finding that the evidence of the respondent's witnesses revealed that the suit land was acquired by the Late Abel Olero in the early 1970's and that he was entitled to include it in his will.

In disbelieving the evidence of Odongo Geoffrey (DW1), the High Court Judge stated as follows:

> *"According to Odongo Geoffrey (DW1), the suit land measuring 100 acres, belonged to their father Otim Ssezi, and his late brother Olero Abel together with his wife Alobo Beatrice settled on the land in 1971 after fleeing Kampala following the military Coup by Idi Amin. Ayella*

Jude (PW8), a State Attorney with the Administrator General's office, testified that in February 2007 DW1 went to his office to pursue matters concerning the estate of his late father Otim Ssezi. He interviewed him and DW1 revealed, inter alia, the deceased father had 10 (ten) acres of unsurveyed family land. PW8 recorded the proceedings of the interview that were tendered in evidence as exhibit P6. DW1 also filed the standard form titled "Report of Death to Administrator General" (exhibit P7) where he listed the properties comprising the deceased's estate. On land he stated "land in Buga Village".

When asked about the ten (10) acres he mentioned to PW8 as recorded in exhibit P6, Ogwang Geoffrey (DW1) stated in cross-examination that he mentioned one hundred acres (100) but that Ayella (PW8) recorded ten which was an error. Interestingly, this aspect was not put to PW8 during cross examination. On the whole, the contents of the said P6 were not challenged during cross examination of PW8. I am inclined to find the belated explanation by DW1 that PW8 made an error when he recorded ten acres was an afterthought.

DW1 also testified that the suit land is not demarcated by "Awila Kot" trees. This is in contrast to the testimony of Okuna Richard (DW5), the clan Chief of Okarowok Okwe Amor clan, who stated he knows well the boundaries of the disputed land and it has "Awila Kot" planted around. The presence of the said trees was confirmed by the trial Magistrate during the locus visit". (sic)

The High Court Judge was faulted for relying on Exhibit P6, which were the certified copies of the minutes of the Report of Death by DW1 to the Administrator General. In the said document, DW1 is recorded to have stated that the late Otim Sezi his father left about 10 acres of unsurveyed land. Counsel for the appellants' contended that the document which ought to have been relied upon was the official report in a standard form (Exh·

P7) which was filed in by the 1st appellant's Lawyer at the Administrator General's office.

First of all, Exhibit P6 was certified by the Office of the Administrator General as being a true copy of the Minutes of the meeting between DW1 and PW8 on behalf of the office of the Auditor General. There was no evidence challenging the document or its contents and we do not find any reason to fault the High Court Judge in relying on the document. Secondly, Exhibit P7, which counsel for the appellant suggests ought to have been relied upon, did not specify the measurements of the land so as to do a comparison between the two documents.

We accept that the declaration of DW1 to the office of the Administrator General that the land left by Otim Sezi was measuring approximately 10 acres, and then changing his mind at trial that the land was measuring 100 acres was a major contradiction raising suspicion whether the 1st respondent had a legitimate claim over the suit land. From exhibit P7 which counsel for the appellants argued should have been relied upon by the High Court Judge, it was stated therein that the estimated value of Otim Sezi's property including land and 15 heads of cattle was UGX 10,000,000. The said value is more consistent with the record in Exhibit P6 that the Otim Sezi left 10 acres of land than the evidence on record that the deceased left 100 acres of land. We do not find any reason to fault the High Court Judge for treating the evidence of DW1 as being contradictory in that regard.

The High Court Judge was also faulted for finding that the evidence of DW1 was contradictory to the evidence of DW4 as to whether the land was demarcated by "Awila Kot" trees or not. Counsel for the appellants contended that the evidence of both DW1 and DW4 was that the land was demarcated by "Awila Kot" trees, except on the eastern side of the land. We have carefully looked at the evidence of DW1 and DW4 respectively. According to the evidence of DW4, he was aware of the demarcations of the land in issue and that it had "Awila Kot" trees planted around it. On the

other hand, during cross examination, DW1 is recorded to have stated as follows:

"This land is not demarcated by Awila Kot".

We find no reason to fault the High Court Judge in finding that there was a contradiction in the evidence of DW1 and DW4. The contention by counsel for the appellants that DW1's evidence was that the land was demarcated by "Awila Kot" trees except on the eastern side is, therefore, unfounded.

Further, regarding the evidence of DW1, the High Court Judge is faulted for having confused the evidence of witnesses when he referred to Anania Arem as PW5 yet PW5 was John Akenya. While addressing the evidence of DW1, the High Court Judge stated as follows:

> *"Another contradiction concerns the meeting of 7-05-2005 that was chaired by Anania Arem (PW6), the clan Chief of Okar of Kamdini Township. The minutes and the list of participants are contained in exhibit P5. According to PW5 the meeting was over a land dispute between Odong Geoffrey (DW1) and the appellant. It was attended by Acen Roseline among others but not DW1. In his testimony DW1 stated that Anania Arem (PW5) was never a clan head and did not attend the said meeting. Later on he admitted Pw5 was a clan leader".*

While it is true that the High Court Judge made a mismatch in the description of Anania Arem and called him PW5 instead of PW6, there is no doubt that the facts/evidence as stated in the Judgment was correctly attributed to the right witness. In our view, the mismatch of the description did not in any way affect the substance of the matter at hand as counsel for the appellants wants this Court to believe. From the record, it is apparent that DW1 contradicted himself as to whether Anania Arem (PW6) was a Clan Chief or not. The said contradiction, which in our view was intended to mislead court, cast doubt to the evidence of DW1. We are

unable to fault the High Court Judge in finding that the evidence of DW1 was contradictory.

It was also the case for the appellants that the High Court Judge did not caution himself when relying on the evidence of PW4 who was first sued together with the appellants but was later compromised by them.

It is not in contention that the respondent had initially sued PW4 as a defendant in Land Claim No. 55 of 2006, that was later consolidated with Land Claim No.94 of 2008 at trial. However PW4 was later withdrawn from the suit and became a witness for the respondent. In the appellants' view, the High Court Judge ought to have treated the evidence of PW4 with caution considering that he had been compromised by the respondent. According to DW2, PW4 had informed her outside Court that he had given evidence in fear that the respondent would arrest him.

While it is true that the evidence of a witness who is not consistent ought to be treated with caution, we find that there was no proof of such conduct on the part of PW4. From the onset in the appellant's written statement of defence filed in Land claim No. 55 of 2006 where he was a defendant, it was contended that his only role was to mobilize people to attend a meeting for the demarcation of the land of the late Sezi Otim. He did not have any interest in the suit land. In our view, his testifying later on, on behalf of the respondent was not in any way an indicator of him being inconsistent.

Further, the allegations of PW4 being compromised were not put to PW4 or to the respondent during cross examination. Therefore, these claims were not proved.

The High Court Judge was also faulted for relying on a document that was not part of the evidence in discrediting DW4. It was contended by the appellants that while the High Court Judge made a finding that DW4 signed as number 14 on Exh P5, Exh P5 on record was a Will of the Late Abel

Olero. In counsel for the appellants' view, the High Court Judge relied on a strange document to fault DW4.

According to the evidence of PW6, on 07/05/2005, a dispute over the land in issue was reported to him as the Clan Chief of Okaro-Wok-Okwera Amor and a meeting was held. The Court Record indicates that the proceedings of the meeting were tendered in evidence as Exhibit P5. During cross examination, PW4 testified that he attended a meeting over a land dispute chaired by Anania Arem, but the dispute was not for the parties herein and not in respect of the land in issue.

In regard to the evidence of DW4, the High Court Judge stated as follows:

> *"DW4 also stated that the subject matter of the meeting was a dispute between Okii George and Taka over land situated at the Centre/Township, but not the suit land. However, the minutes/document (P5) he signed as No.14 clearly show that the dispute was between Odongo Geoffrey (DW1) and the appellant. DW4 was not being truthful in that regard therefore. By his own admission, DW4 testified that the appellant chased him away from the suit land but denied he was driven by bitterness to say late Olero Abal had no land.*
>
> *In my view, given the proven lie regarding the meeting and the fact he was chased from the suit land, DW4's evidence is clearly tainted".*

While it is true that the Will of the late Abel Olero was also marked as exhibit P5, it is also evident that the Minutes of the Clan meeting chaired by Anania Arem were also marked as exhibit P5. This could have been inadvertent error on the part of the trial court during the tendering of the said exhibits. However, this did not affect the evidential value of the said documents. The High Court rightly referred to the Minutes of the meeting as Exhibit 5 and there was no reliance on any extraneous facts/evidence as counsel for the appellants wants this Court to believe. Further, as found by

the High Court Judge, DW4 was not being truthful in regard to the clan Meeting chaired by Anania Arem in relation to the dispute on the suit land.

The contention that the High Court Judge relied on extraneous evidence is without basis.

It was the argument of the appellants that the High Court Judge ought to have treated the contradiction in the evidence of PW2 and PW5 as to the time when the spray team entered and left the land, as a major contradiction. According to the evidence of PW2, the Tsetseflies Control camp was allowed on the land by Abel Olero and it stayed thereon from 1978 to 2001. On the other hand, according to the evidence of PW5, who was also with the Tsetseflies Control camp on the suit land, the land was left between 1981 and 1982. It is evident that there was a contradiction in the evidence of the two witnesses. The High Court Judge made a finding that the contradiction was minor and did not point to deliberate lies on the part of PW2 and PW5. Further, that the mix up in years could be explained by the lapse of time.

We hold the same view that the above contradiction as to when the Tsetseflies Control Camp left the suit land was a minor contradiction which could be attributed to lapses in time. The said contradiction did not in any way raise doubt in our minds about the cogency of the evidence presented that Abel Olero gave the Tsetseflies Control Team part of the suit land to settle temporarily around 1977. This fact was not challenged by the appellants. This was further proof that the owner of the land was Abel Olero and not Otim Sezi.

The 1st appellate court was also faulted for relying on a lease offer (Exhibit P1) in awarding the respondent 1500 acres of land without any basis. We have looked at Exhibit P1, which was a Lease offer by Uganda Land Commission of 100 acres of land. Although the Lease offer was not dated, it can be discerned that it was issued around 1981 considering that the revenue stamp appended thereon was dated 1981. It was also stated that Abel Olero had applied for 1500 acres of land but only 100 acres were

approved for the leases offer. By letter dated 30th January, 1985 (Exhibit P2) Abel Olero made an appeal to Uganda Land Commission to give him more land as had been requested for.

It was on the above basis that the 1st appellate court made a finding that Abel Olero owned customary land over and above 100 hectares he was formally offered. It was not disputed that the above correspondences and Lease offer between Uganda Land Commission and the Late Abel Olero were in respect of the land in issue. We acknowledge that the Lease offer by the Uganda Land Commission to the late Abel Alero was for only 100, despite the fact that he had applied for 1500 acres. However, the fact that the Uganda Land Commission only granted a Lease offer of 100 acres of the suit land does not mean that the late Abel Olero had lost his interest in the rest of the suit land which he occupied. According to the analysis of the trial Magistrate who visited the *locus in quo*, the land in dispute was over 100 hectares and it was demarcated by *"Awila Kot"* trees. From the onset, it appears to us that the suit land and its boundaries were well known to both parties herein and a sketch map of the same was drawn during the locus in quo visit without objection.

We, therefore, find the complaint by the appellants in this regard without any basis.

Regarding DW2's counter claim, the 1st appellate court was faulted for disbelieving DW2's evidence that her father Otim Sezi had given her part of the suit land upon her return from her matrimonial home. In disbelieving the evidence of DW2, the High Court Judge made a comparison of her evidence with that of DW4 and made a finding that DW2 was not being truthful. The High Court Judge stated as follows:

> *"As earlier pointed out, Acen Roseline (DW2) testified that her late father gave her 50 acres of the suit land. This assertion was refuted by Okuna Richard (DW5) who categorically stated that:*

"Otim Ssezi did no divide land among his children. No piece of land was divided and given to Acen."

It is evident that the above was a contradiction in the defence case (Appellant's herein). DW4 clearly refuted the claims of DW2 that Otim Sezi had given her part of the suit land upon her return from the matrimonial home. We note that the High Court did not only rely on the above in disbelieving the evidence of DW2. The High Court Judge also took into consideration that DW2 had told court that she did not attend the meeting of 7/05/2005 that was chaired by Anania Arem to resolve the dispute relating to the land in issue. She testified that she was just passing by the meeting place when she was asked to sign the attendance list. However, DW4 confirmed that DW2 was in attendance at the meeting.

We are of the opinion that DW2 told deliberate lies in order to mislead Court. On the other hand, the respondent's witnesses were more believable as to how DW2 came to occupy the suit land. PW3 and PW5 testified that when DW2 returned from Jinja, Abel Olero her brother allowed her to settle on part of the suit land temporarily. We, therefore, are unable to fault the High Court Judge for believing the respondent's witnesses evidence over DW2's evidence.

It is our finding that the 1st appellate court properly re-evaluated the evidence on record in reaching its decision. We do not find any reason for deciding otherwise.

We, therefore, do not find merit in grounds 1 and 2 of the Appeal.

Grounds 3 and 4.

The Learned Judge erred in law and fact in holding that the contradictions in the defence witnesses' evidence were so grave that rendered them untruthful.

The Learned Judge erred in law and fact in holding that the contradictions in the plaintiff's (appellant's) case are minor thus wrongly believing the plaintiffs' case at the expense of the defendants, the appellants herein.

Appellant's submissions:

Counsel for the appellant submitted that there were no major contradictions in the appellant's case so as to render the evidence unbelievable. It was counsel's contention that some of the contradictions relied upon by the High Court Judge were never part of the evidence on record. Further, that the High Court Judge erroneously referred to the comparisons between the appellants' and the respondent's case as contradictions.

Counsel further submitted that the contradictions admitted by the appellants and pointed out in grounds 1 and 2 above were minor. He made reference to the evidence of DW1 and submitted that regardless of DWI's explanation that Otim Sezi owned 100 acres of land and not 10 acres of land as wrongly recorded by the official from the office of the Administrator General, the High Court Judge treated that as a contradiction on the part of DW1. It was his contention that the High Court Judge closed his eyes to the possibility of error on the part of the official from the office of the Administrator General. In counsel's view, the High Court Judge failed in applying the principal of categorizing contradictions into minor and major ones.

Respondent's submissions:

In reply, counsel for the respondent submitted that the High Court Judge could not be faulted in finding that the discrepancy in the evidence of DW1 as to the actual measurement of the land was a major contradiction. This was also considering that the 1st appellant was a holder of a Masters degree from the University of Coloursive in Canada and could not have been wrong in approximating the size of the land as he did before the official from the office of the Administrator General.

Counsel further submitted that the appellants were coming to this Court with unclean hands. He contended that the parties were ordered by the trial Court in Misc Application No. 42 of 2006 to maintain the status quo of the land. However, that the appellants in contempt of Court Orders had constructed various houses on the suit land. Counsel relied on ***Housing Finance Bank Ltd & anor Versus Edward Musisi, Miscellaneous Application No.158 of 2010***where it was held that a party in contempt of Court by disobeying an existing Court Order cannot be heard in a different but related cause until that person has purged himself/herself of the contempt.

Court's consideration:

The issues relating to contradictions raised in these two grounds of appeal have substantially been addressed under grounds 1 and 2 above. The 1st appellate court addressed its mind to the contradictions in the appellants' case and chose to treat the same as major and pointing to the credibility of the witnesses. The High Court Judge gave reasons for finding as he did as stated in grounds 1 and 2 above. On the other hand, he chose to treat the contradictions in the respondent's case as minor and attributed the same to lapses in time. What is significant is that the court made its re-evaluation in determining whether the contradictions in each party's case were minor or major.

Grounds 3 and 4 of the Appeal must also fail.

In his submissions, counsel for the respondent raised an issue alleging contempt of court orders on the part of the appellants. We have not been availed with any evidence to the effect that the appellants have ever been held in contempt of the said Court Order, nor have any contempt of court proceedings ever been instituted against them. We note with approval as correct in law the holding in ***Ayebazibwe Raymond Versus Barclays Bank Uganda Limited & ors, High Court Miscellaneous Application No.283 of 2012***, that ordinarily a court should enforce its own orders and, therefore, Contempt of Court proceedings ought to be before the

same court that issued the orders. This issue sought to be raised in the court that has to entertain the contempt of court proceedings and that is the court that issued the orders alleged to have been violated.

Accordingly, in light of our findings above, we uphold the orders given by the 1st appellate court and dismiss this Appeal.

We make no order as to costs in this Court and the Courts below given that the parties are relatives who have been litigating over a long period of time. There is indeed need for encouragement for them to reconcile as a family after a protracted period of pulling ropes over this land issue.

We so order.

Dated at Kampala this 14th day of 2017

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Hon. Justice S.B.K Kavuma,
DEPUTY CHIEF JUSTICE

.....

Hon. Justice Remmy Kasule,
JUSTICE OF APPEAL

.....

Hon. Justice Elizabeth Musoke,
JUSTICE OF APPEAL