**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT GULU**

**CIVIL APPEAL NO. 17 OF 2021**

**(ARISING FROM CIVIL SUIT NO. 137 OF 2018, NWOYA CHIEF MAGISTRATES COURT)**

**(FORMERLY CIVIL SUIT NO. 008 OF 2012, AMURU GRADE 1 COURT)**

**1. KOMAKECH WALTER**
**2. ORINGA GEOFFREY**
**3. AKOT VENTORINA**
**4. AKIDI HELLEN.....APPELLANTS**

**VERSUS**

**1.KILAMA OWANI**
**2.NYEKO PATRICK (LEGAL REPRESENTATIVE OF OKOT PA-LINA)**
**3. ANEK ROSE.....RESPONDENTS**

**BEFORE: HON. MR. JUSTICE GEORGE OKELLO**

**JUDGMENT**

**Background facts**

This is an appeal from the Judgment and orders of the then Learned Chief Magistrate of Nwoya Chief Magistrates Court, His Worship Matenga Dawa Francis (currently Deputy Registrar High Court), given in Civil Suit No. 137 of 2018, dated 25th February, 2021. The Appellants who were plaintiffs

had lodged the suit in the Chief Magistrates Court of Gulu holden at Amuru in March, 2012. It appears the suit was transferred to the Chief Magistrates Court of Nwoya holden at Nwoya, and allocated Civil Suit No. 137 of 2018. The case was heard by many Magistrates Grade 1 in succession, but was finally heard and determined by the Learned Chief Magistrate.

In their plaint, the Appellants sued the Respondents jointly and severally, seeking a declaration of ownership of the land located at Koc Kal "B" Kiguka, Pakawera, Laminlangele, Koch Goma Sub County, Nwoya District and that, the same forms part of the estate of the Late Odong Stanley Alung; eviction orders; general damages for trespass; permanent injunction; interests; and costs.

In their statement of the cause of action, the Appellants averred that they got the letters of administration to the estate of the deceased, *vide* the Administration Cause No. 12 of 2009, and that the estate include the suit land. They also averred that between the years 2009 and 2011, without any colour of right, the Respondents elected to forcefully occupy, cultivate

and cause destruction of flora and fauna on the suit land, thereby putting the Appellants' land to waste. They further contended that the suit land forms part of the estate of the late Odong Stanley Alung, and as a result of the Respondents' alleged conduct, the Appellants and the beneficiaries of the estate have suffered loss, torture, expense and waste.

In the trial court, the 1st Respondent and the father of the 2nd Respondent (PA-LINA (deceased at the time of the trial)) lodged their joint Defence, while the 3rd Respondent lodged a separate Defence. In the joint Written Statement of Defence, the 1st and the 2nd Respondents averred that they are beneficial customary owners of the suit land, having acquired and occupied through their grandparents who settled thereon from 1970, uninterrupted, until 1996 when they were forced to settle in Internally Displaced Persons (IDPs) Camps at the time of the Lord's Resistance Army (LRA) war in Acholi Sub Region. The joint defendants further averred that the Appellants have no valid lease offer to the suit land which was being occupied by the Respondents and that, in the alternative, if there was a lease offer, the same was obtained through fraud. They claimed that the Appellants are trespassers. This Court however notes that the particluars

of fraud were not pleaded and there was no counter claim/ cross action by the two Respondents as far as fraud, and the alleged trespass are concerned.

On her part, the 3rd Respondent averred that her late husband purchased the suit land from the late Odong Stanley Alung in 1985, and therefore, the land does not form part of the estate of Odong who disposed of the same before his death. However, court notes that, attached to the Defense of the 3rd Respondent, were documents bearing the name of Kesironi Atori Alung but purportedly signed by Odong Stanley Alung. I will revert to these and other matters later in this Judgment.

**Issues before the trial Court**

The trial Court and the parties framed three issues, namely,

i) *whether the plaintiffs are the lawful owners of the suit land;*

ii) *whether the defendants trespassed on the suit land*; and

iii) *What remedies are available?*

**Decision of the trial Court**

The parties adduced evidence and after a full trial, Judgment was given for the Respondents.

On the first issue, the trial Court held that the Appellants have no interest in the portions of the land claimed by the Respondents, having failed to show that the suit land comprised part of the estate of Odong Stanley Alung from whom the Appellants derive their claims. The trial Court thus resolved the first issue in the negative.

On the second issue, the trial Court held that the Respondents are not trespassers on the land that does not form part of the estate of the late Odong Stanley Alung. Court dismissed the suit with costs and issued a permanent injunction against the Appellants, restraining them from interfering with the Respondents' interests in the portions they occupied and occupy currently.

**Grounds of Appeal**

Aggrieved and dissatisfied with the Judgment and decision of the trial Court, the Appellants lodged six grounds of Appeal. I found the grounds

badly drawn. Counsel for the Appellants consistently referred to the trial Court as the 'Learned Magistrate' instead of the 'Learned Chief Magistrate'. This Court has in listing the grounds of Appeal referred to the trial Court by the correct title. The grounds are;

1. The Learned Chief Magistrate erred in law and fact when he held that the suit land is a public land and reverted to the Controlling Authority.

2. The Learned Chief Magistrate erred in law and fact when he held that the Appellants do not have interest in the suit land.

3. The Learned Chief Magistrate erred in law and fact when he ignored immense evidence of the Appellants' possession of the suit land.

4. The Learned Chief Magistrate erred in law and fact when he heavily relied on the evidence of DW4 and ignored the fact that he (DW4) had a pending case with (sic) the Appellants.

5. The Learned Chief Magistrate erred in law and fact when he failed to properly subject the evidence adduced at the trial to exhaustive

scrutiny thereby coming to a wrong conclusion that the Appellants do not own the suit land.

6. The Learned Chief Magistrate erred in law and fact when he held that the Respondents have been in possession of the suit land unchallenged.

**Prayers**

The Appellants prayed that the Appeal be allowed; the decision and judgment of the Learned Chief Magistrate be set aside, and Judgment be entered for the Appellants. In the alternative, they prayed that a fresh trial be ordered before another Magistrate, and that costs of the Appeal and costs in the court below, be awarded to the Appellants.

Having considered the Judgment and decision of the trial Court, this Court finds that the grounds of Appeal are unnecessarily split and are repetitive. I note that some of the grounds should have been consolidated and argued as one, especially those relating to a finding on ownership of the suit land. The foregoing deficiency not withstanding, I will consider the grounds as framed.

**Legal representation**

During the hearing, Learned Counsel Mr. Brian Watmon of M/s Odongo & Co. Advocates represented the Appellants, while Learned Counsel Mr. Owor-Abuga of M/S Owor-Abuga Co. Advocates, appeared for the Respondents. Both Learned Counsel filed written submissions which court has considered.

**Arguments**

In his submission, Mr. Watmon addressed court on the duty of this court, as a first appellate court, sitting in a decision from the Chief Magistrates Court. Counsel proceeded to argue all the grounds of appeal together. I think this was due to the overlapping nature of the grounds. Learned Counsel submitted that the trial court failed to understand the nature of the land in issue, resulting in an erroneous finding that it was public land, whereas not. Counsel asserted that the suit land is owned by the Appellants as customary land, by way of inheritance, and possession.

Learned Counsel went on to evaluate various pieces of evidence and drew conclusions, faulting the findings of the trial court. Counsel contended that the Respondents' claims were not proved. He took issue with the trial Court's reliance on the evidence of DW4 (Odoki Mariano), who, according to Counsel, was not impartial, as he had a land case against the

Appellants, pending before the Court of Appeal. Learned Counsel made prayers alluded to herein before.

In his opposing submissions, Mr. Owor-Abuga equally addressed court on the duty of a first appellate court. He went on to raise points of law, such as alleged lack of cause of action, asserting that none was disclosed in the plaint by the Appellants. He urged that the plaint ought to be rejected on appeal. With the greatest respect to Learned Counsel, I found this objection misconceived as it is of a nature that cannot be taken on appeal, unless it was raised in the trial court and over-ruled. Moreover the trial court gave Judgment for the Respondents, so Counsel's complaint is erroneous. At any rate, the Respondents did not lodge a cross appeal, as none was conceivable having succeeded in the Court below.

Learned Counsel further argued that the plaint did not show whether the Appellants' claim to the suit land was premised on leasehold or customary tenure, and that the size and value of the land was not stated. Again, this objection ought to have been taken at the earliest opportunity before the trial Court. Accordingly, raising it on Appeal more so when the Respondents succeeded in that Court, is legally misconceived. More so, a perusal of the summary of the evidence which is part of the Plaint, under Order 4 rule 1 (2) and Order 6 rule 2 of the Civil Procedure Rules (CPR), discloses the Appellants' averment that the deceased (Odong Stanley

Alung), from whom the Appellants derive their claim (as administrators and beneficiaries), was the customary owner of the suit land. In addition, the case was litigated and adjudicated on the understanding that the suit land was initially the subject of a lease offer by the Uganda Land Commission. The basis of the Appellants' claims were therefore sufficiently pleaded. Having fully appreciated the nature of the suit land, the Respondents' complaints is baseless. Furthermore, given the nature of the objection and the fact that the Respondents succeeded in the Court below, the objection cannot stand on appeal.

The above finding notwithstanding, this Court notes that the nature of the land holding and the land size may become relevant when considering the merit of the appeal, but that in itself does not weigh in favour of the purported objection, which is overruled.

The other objection was that, having sued as administrators of the estate of the late Odong Stanley Alung and as beneficial owners of the suit land, the Appellants ought to have attached a copy of the letters of administration to the plaint, or at least, furnished it to court. It was asserted that, having not established their authority to sue, the Appellants lacked *locus standi,* and a cause of action. To my mind, this particular objection is also misconceived. Although the same was raised before the trial court, it was, in my view, raised at a late stage in the trial. I note that

the trial Court ignored the objection. It was right, in my view, because the letters of administration had been adduced in evidence as PEX 1. The objection is therefore misconceived and I reject it.

Mr. Owor- Abuga also took issue with the alleged departure by the Appellants from their pleading before the trial Court. He contended that, the Appellants' submission that they became owners of the suit land by inheritance, was not pleaded. Upon perusing the plaint, I noted that the Appellants averred that their legal standing to sue flowed from the fact of being administrators and beneficiaries to the estate of the deceased Odong Stanley Alung. In my view, on the face of their pleading, they had legal right to sue, to protect the estate, as administrators, and as beneficiaries. They therefore had powers to protect the estate as well as their interests as beneficiaries thereto. The Appellants' standing before the trial Court is supported by the decision of the Supreme Court in Israel Kabwa Vs. Martin Musiga, Civil Appeal No. 52 of 1995. However, it is my view that, whether or not the Appellants' ownership claims to the suit land were proved to the required standard, would be premature for me to delve into at this stage. I therefore overrule the objection.

Learned Counsel also objected to the Appellants' reference (in the Appellants' submissions) to pieces of evidence alleged as forming part of the record of the proceedings when, according to Learned Counsel, none

exist. He argued that the Appellants contradicted themselves in their testimonies, when compared with their pleading, in so far as the nature of the suit land is concerned. Counsel asserted that, his Learned friend *'manufactured'* new facts on appeal, for instance, those relating to the *locus inquo* proceedings, to aid the Appellants' case. The Learned Counsel therefore invited Court to treat the Appellants' submissions with a lot of caution. I take cognizance of the serious allegations. However whether or not the same is true, cannot, with respect, be competently raised by way of preliminary objection. I will however re-evaluate the case as a whole and consider the material on record.

In his last of the many objections, Mr. Owor- Abuga argued the doctrine of approbation and reprobation, contending that, the Appellants should not be permitted to approbate and reprobate the lease. Again, this objection is, with respect to Counsel, erroneous. On the facts of the Appeal, the doctrine is wrongly invoked.

Before I take leave of the objections, I wish to observe that, lawyers ought to avoid raising preliminary objections which only waste Court's valuable time. A preliminary objection should be capable of disposing of a matter before Court. It should not be raised simply as a matter of course. A party or their Counsel should not go on a fishing expedition by raising several bad points, in the hope that one may succeed. As noted, the objections

taken in the present appeal were all misconceived, yet Court had to consider each of them, thus wasting time and space. This ought to be discouraged in modern litigation. Otherwise, misconceived objections have costs implication. In this Judgment therefore, I will consider the issue of costs of the objection, at the end of the determination of the merits of the appeal. Otherwise all the preliminary objections are over-ruled.

**Merits submission**

On the merits of the Appeal, Learned counsel for the Respondents proposed to combine and argue grounds 1, 2 and 6, followed with grounds 3, 4 and 5 which were also argued together.

Arguing the first three set of the grounds, Learned Counsel contended that whereas the Appellants claim interests under customary ownership by way of inheritance, they failed to confirm exactly how the land was acquired by the person from whom they claim to have inherited. It was urged, the Appellants claim to be successors in title to leasehold land of Odong Stanley Alung, yet they failed to prove that the suit land was acquired by way of lease. Counsel contended that the lease offer was for five years and the lease had expired, and that in any case there was no acceptance of the lease by the late Odong Stanley Alung. Counsel concluded that no lease was granted in respect of the suit land.

On the aspects of possession by the Respondents, Learned Counsel argued that possession of the suit land was established by the 1st and the 2nd Respondents and that, the 3rd Respondent acquired ownership thereto by way of a lease granted to her late husband (Aldo Ojok). Learned Counsel therefore supported the decision of the trial court and asserted that, the Appellants are instead trespassers on the suit land.

As observed earlier, the charge that the Appellants are trespassers, is not available to the Respondents, as the Respondents never counterclaimed in the trial court.

Tackling grounds 3, 4 and 5 next, Mr. Owor- Abuga argued that the grounds purport to fault the trial court on the manner the court evaluated the evidence on record. Learned Counsel contended that the trial court clearly indicated which pieces of evidence it relied on. He argued that the evidence was that the suit land was initially Public land vested in the Uganda Land Commission and not customary land. Counsel also submitted that the lease offer of five years was made to Kasironi Atori Alung (sic) and not Odong Stanley Alung, to whom the same was never extended, transferred or bequeathed. Counsel argued that the trial court relied on documentary evidence which spoke for themselves, regarding the tenure, the history of acquisition, and the size of the suit land.

Counsel also supported the mode in which the trial court evaluated the evidence on record, contending, there was ample evidence to support the conclusions. He prayed that the Appeal be dismissed with costs to the Respondents.

**Court determination**

Before I resolve the Appeal, I have noted that the name of the third Appellant was wrongly stated as "**Okot** Ventorina" yet the proper name ought to be **Akot** Ventorina. The latter is confirmed by the Letters of Administration issued to Akot Ventorina and her co- appellants by Hon. Justice Remmy K. Kasule, the then Judge of this Court on 25th March, 2009, in Administration Cause No. HCT-02-CV- AC-012 of 2009.

By the grant of the Letters of Administration, the Appellants were duly authorized to administer the estate of the late Odong Stanley Alung of Koch Goma, Nwoya County, Amuru District. There, the 3rd Appellant is indicated as Akot Ventorina. Therefore, when the Appellants were described in the Plaint as Administrators of the estate of the late Odong Stanley Alung, the erroneous naming of the 3rd Appellant as Okot Ventorina should have been detected and avoided. The erroneous name is contrary to the Letters of Administration which has never been revoked. It is therefore surprising that the 3rd Appellant did not seek to correct this misnomer. I have further noted that, in some court processes, the third Appellant was properly

referred to by the correct name. Most of the Court documents however bear the erroneous name. The error was carried up to the time of the Judgment of the trial court. The High Court cannot be party to this. Accordingly, in the exercise of my wide powers under Order 1 rule 10 (2) and 13 of the Civil Procedure Rules, S.I 71-1, and section 98 of the Civil Procedure Act, I have decided to correct the misnomer. In this Judgment therefore I have referred to the 3rd Appellant by her correct name and I see no prejudice to the parties by the course I have taken *suo motu*.

**Duty of the first appellate Court**

Turning to the appeal, as a first appellate court, I am aware of my duties. The parties are entitled to obtain from this court, the court's own decision on issues of fact and issues of law. However, in the case of conflicting evidence, I have to make due allowance for the fact that I have neither seen nor heard the witnesses testify, and make an allowance in that regard. I must however weigh conflicting evidence and draw my own inference and conclusions. See: Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002, (per Mulenga, JSC). See also Coghlan Vs. Cumberland (1898)1 Ch. 704, wherein the Court of Appeal of England put the matter succinctly as follows;

"Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and

the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the Judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the full conclusion that the Judgment is wrong...when the question arises which witness is to be believed rather than another and that question turns on the manner and demeanour, the court of appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from the manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witness whom the court has not seen." See: Pandya Vs. R [1957] EA 336. In Pandya, the above passage was cited with approval. Court held that the principles declared above are basic and applicable to all first appeals.

In Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10 of 1997, (the principles of which are applicable to civil cases as well) the Supreme Court held that it was the duty of the first appellate court to rehear the case on appeal, by reconsidering all the materials which were before the trial court, and make up its own mind. The Court added, failure by a first appellate court to evaluate the material as a whole constitutes an error of law.

**Grounds**

Bearing the above principles in mind, I now turn to the grounds of appeal. The complaints raised in this appeal gravitate around the trial court's determination of the three issues framed by the parties at the scheduling conference. I proceed to consider grounds 1, 2, 3, 4 and 5 together, since they relate to the trial Court's finding on the issue of whether the Appellants are lawful owners of the suit land, and the manner the trial court evaluated the evidence. I shall consider ground 6 alone since it relates to the holding that the Respondents are not trespassers on the suit land by virtue of their unchallenged possession.

**Grounds 1, 2, 3, 4 and 5:**

As noted, regarding the first issue of whether the plaintiffs are the lawful owners of the suit land, the trial court held that the plaintiffs have no interest in the portions of land claimed by the Respondents, having *failed to show how they comprised part of the estate of Odong Stanley (Alung) from whom the Appellants derive their claims* because the land was not customary land to be passed automatically from one generation to the next. Court held that the suit land is public land and reverted to the Controlling Authority since the lease thereof had expired after five years. Court was emphatic that, in any case, the lease offer was not made to Odong Stanley Alung, but to a one Kesironi Atori Alung, who is not shown to have accepted the lease. The Court also considered several pieces of

evidence and expressed the view that DW4, Odoki Mariano was a reliable witness and accepted his evidence. The sum total of the trial Court's finding was that DW4's evidence rebutted the Appellants' allegations, while supporting the Respondents' defenses.

In dismissing the Appellants' suit, the trial court issued permanent injunction against the Appellants but only restraining them from interfering with the Respondents' interests in portions they occupied and currently occupy. In other words, as I understand its decision, the trial court did not purport to deprive the Appellants of the portion of the suit land which the Respondents were not claiming. The Court only barred the Appellants from claiming and interfering with part of the land which the Respondents were claiming. As I can gather from the Judgment, those are the portions the Respondents had occupied and/ or used to occupy, or put to use, before the Respondents were displaced by the LRA war hence living in IDPs camps. To the trial Court, those parts of the land remain available to the Respondents for use and occupation, to-date.

**Burden of proof**

In this matter, the burden of proof rested on the Appellants to prove their case before the trial Court. This was so because it is they who were desirous of having the court render judgment in their favour. They were obliged to discharge the burden on the balance of probability. On

discharging that burden, the same would shift on the Respondents to disprove the Appellants' contention. See section 101, 102 and 103 of the Evidence Act, Cap.6 and the case of JK Patel Vs. Spear Motors Ltd, SCCA No. 4 of 1991. In that case, the Supreme Court held that the burden of proof rests before evidence is given on the party asserting the affirmative. It then shifts and rests after evidence is given on the party against whom judgment would be given if no further evidence is adduced. See also Sebuliba Vs. Co-operative Bank Ltd [1982] HCB 129, where Kato, Ag. J (as he then was) held that the burden of proof in civil matters lies upon the person who asserts or alleges, and that a party can be called upon to disprove or rebut what has been proved by the other side.

In the present matter, by their evidence, the Appellants sought to prove that the suit land located at Koc, Kal "B", Kiguka, Pakawera, Laminlangele, Koch- Goma Sub County, Nwoya District, forms part of the estate of the late Odong Stanley Alung. They claimed that the land measures 10,000 acres. Although they sued as administrators and beneficiaries, respectively, the titling of the Plaint was poor and did not help. The Plaint was not titled in the usual style, which ordinarily should show that the Appellants were suing as administrators of the estate of the deceased. In my view, the poor draftsmanship, on the facts, is a curable technicality under article 126 (2) (e) of our Constitution, 1995. This is so because in

the body of the pleading, the Appellants still described themselves as administrators of the estate of the late Odong Stanley Alung.

Further still, although the framing of the first issue, thus, ***"whether the plaintiffs are the lawful owners of the suit land"*** creates some confusion as it did not explicitly capture the fact that the suit land was being claimed as part of the deceased's estate, the evidence on record, nevertheless, show that the Appellants sought to enforce the right of the estate and that of the beneficiaries (which included themselves). Therefore, the poor framing of the issue did not change the nature of the Appellants' claim. The claim was litigated and adjudicated on that basis. There was thus no prejudice to either party and none of them canvassed this point before this Court.

Be that as it may, in an effort to prove their claim, the 1st Appellant (PW1) testified that the suit land belonged to his father, Odong Stanley Alung (deceased.) He asserted that Odong Stanley Alung obtained a lease offer for the land. However PW1 conceded that the Lease (offer) was in the name of a one Kasironi Atori Alung (name typo, as the correct name appears to be **Kesironi** Atori Alung, as per the various official documents on court record (although some refer to him as **Kesiron** Atori Alung). See the Lease Application and Inspection Report; the Lease Offer Form; and a Letter by

Chairman District Land Board Nwoya (DEX2, DEX7, and DEX8, respectively.)

The pieces of evidence on record show that **Kesironi** Atori Alung was the father of Odong Stanley Alung (and a grandfather to PW1/ 1st Appellant) and the 2nd Appellants) (and a father in law to the 3rd and 4th Appellants). Hence Odong was a father to the 1st and 2nd Appellants, and a husband to the 3rd and 4th Appellants. Here lies the heart of the Appellants' ownership claim. The question that comes to mind is; if the lease offer given by the Uganda Land Commission on 3rd January, 1973 was given to Kesironi, could Odong Stanley Alung validly claim that the same was offered to him but in the name of Kesironi? My answer is in the negative. An explanation was proffered by Ouma Otto (PW4), a neighbor to the suit land (on the eastern side). He testified that Odong Stanley Alung applied for lease of the land in 1973 and was granted the lease but in the name of Odong's father (Kesironi). In my view, this testimony cannot displace the documents tendered in evidence which do not bear the name of Odong Stanley Alung. DEX2 and DEX7 (which are Inspection Report and Application for Rural Land; and Lease Offer Form, respectively) are in the name of Kesironi and not Odong.

The above exhibits were tendered in by Anek Rose (the 3rd Respondent) and were not challenged by the Appellants. Actually an attempt was earlier

made by PW1 (1st Appellant) to tender the lease offer in evidence but was only marked as PID1 thus not exhibited through him. In his testimony, PW4 claimed that Odong applied for Lease in the name of Kesironi because Odong feared to have the land in his own name, being a civil servant. This, in Court's view, is not convincing, as to allow the explanation to sail through would, with respect, encourage dishonest dealings by civil servants, to hide their interests in property using other person's names. In this case, it was not shown that Kesironi's name was used by Odong, with the former's consent, knowledge and approval, if at all. Moreover, under the law of evidence, contents of documents can only be proved by the document itself and no facts are allowed to prove it. See section 58, 60, 61, 62 and 63 of the Evidence Act Cap 6. Thus the contents of a document is proved by either primary or secondary evidence where the former is not available, and under the exceptions provided for in section 64 of the Evidence Act.

PW4 further testified that Odong used Kesironi's name out of respect for Kesironi. I am not persuaded by that explanation either. DEX2 and DEX7 are documents which are over 30 years old. And under section 90 of the Evidence Act, they are presumed to have been duly executed and attested by Kesironi Atori Alung whose name appears thereon. Although tendered in evidence by DW3 (Anek Rose), these exhibits were also referred to, and sourced from the Chairman Nwoya District Land Board, the Authority with

custody thereof. See paragraph 21 of the Witness Statement of DW3. I therefore find that DEX2 and DEX7 are some of the documents mentioned by the Chairman Nwoya District Land Board, *vide* DEX8 and thus corroborate the fact of the true history and ownership of the suit land. I also find that the source and custody of DEX2 and DEX7 are credible and proper, thus satisfying the condition of section 90 of the Evidence Act. Their probative value was not impeached by the Appellants either. The exhibits speak for themselves and therefore the attempts to explain their import by oral evidence, especially the circumstances under which the suit land came to be associated with Odong Stanley Alung, instead of Kesironi, is unacceptable at law.

I am further emboldened in my conclusion on these exhibits by sections 91 and 92 of the Evidence Act. These sections bar receiving of oral evidence to contradict the terms of a contract, grant or any form of disposition of property reduced to a document. Rather it is the document itself which should speak on its terms and not oral evidence.

In the instant case therefore, none of the exceptions to section 91 and section 92 of the Evidence Act avail to the Appellants. I am also fortified in my finding by the Learned Authors, Chitty on Contracts, 27th Ed. Para 12-039 cited with approval by the Supreme Court of Uganda in Civil Appeal No. 16 of 2001: Godfrey Magezi and Brian Mbazira Vs. Sudhir

Ruparelia. See: also Kasifa Namusisi & 2 Others Vs. Francis M.K Ntabaazi, Civil Appeal No. 04 of 2005 (SCU), Per Tsekooko, JSC; General Industries Vs. Non Performing Assets Recovery Trust, Civil Appeal No. 05 of 1998 (SCU), Mulenga, JSC; Civil Appeal No. 06 of 2010: National Insurance Corporation Ltd Vs. Lilian B. Mujuni (COA).

Relatedly, I note that Okok Davis (PW3) believed that the Lease application was made by Odong and not Kesironi. He did not state the basis of his belief. At any rate, any explanation by PW3 would not stand, in light of the legal exposition I have just given. In my view, PW3 appeared impartial. He asserted that he (and others) would continue disturbing the Respondents if the latter insisted on making claims to the suit land. PW3 even surmised that the Appellants would win the case in the trial Court. I am of the opinion that PW3 did not know much about the history of the suit land, going by his testimony. He claimed that the lease application was made to the District Land Board in 1974. However I take judicial notice that, as at that time, there was no District Land Board in place. The District Land Board the witness spoke about, is a creature of the 1998 Land Act Cap 227. Moreover, DEX2 and DEX7 show that the lease application was made by Kesironi to Uganda Land Commission. Similarly the Lease Offer was made to Kesironi by the Uganda Land Commission and not to Odong.

Curiously, I have noted with interest that within DEX2 (*supra*), there is a space that captured the names of persons who attended the land inspection. There, within the space capturing the names of persons present during the land inspection, and the nature of their claims in the land, the name of Odong Alung appears, with others. It is stated therein that all (those persons whose name appear) were not interested in the land. The above evidence therefore strongly rebuts the claims by witnesses for the Appellants that Odong Stanley Alung applied for a lease of the suit land, and not his father Kesironi.

Before I conclude this point, I next consider the evidence by PW5, Lakony Livingstone, a cousin to the late Odong Stanley Alung. PW5 testified that Odong applied for the land from the Uganda Land Commission in 1973 and received a lease offer in 1974. The witness added that the offer was in the name of Kesironi because it was during Amin's regime and so Odong Stanley feared for his life. PW5 asserted that, even to buy a bicycle could make one lose life. Again, this piece of evidence falls by the way side, in light of my findings before. I also think PW5 grossly exaggerated the matter. His claim is therefore fallacious. If PW5's claims were true, why didn't Kesironi fear for his own life or why didn't Odong fear for Kesironi's life? I find that since the Law at the time (the Public Lands Act No. 13 of 1969) allowed for Application for Lease of Public Land to be made by any person and there was a Government Policy to that effect, as affirmed by

PW4 (Ouma Otto), the so-called fear, in the year 1973, with respect, is unfounded, and at best, is an afterthought. The regime of the time could have been notorious for not respecting the rule of law, but that in itself is no proof that the regime used to victimize persons who were offered lease on public land as by law authorized. I find no evidence to support PW5's claim. In any case, there is nothing to show that after the fall of the regime in 1979, Odong Stanley Alung applied for lease of the suit land in his own name, the alleged fears having waned.

In light of the foregoing analysis, I reject the explanation by PW5. The explanation is contrary to the provisions of the Evidence Act alluded to. I further note that DEX7 is clear that the suit land on offer was Public Land and was governed by the Public Lands Act. Therefore, Civil Servants were not excluded from applying to be offered lease of Public land in their own right. There was no need to purport to use another's name, as the Appellants allege in respect of their alleged predecessor in title (Odong Stanley Alung).

Accordingly, I find that given that the suit land was not on offer to Odong Stanley Alung, but to Kesironi, the Appellants could not lay claim to it, as forming part of Odong's estate. There is also no evidence that Odong inherited the suit land from his father Kesironi or that the same was devisable in law and that Kesironi bequeathed it to anyone before his death

in 1997. The Appellants and their witnesses conceded to this fact. On the contrary, Odong predeceased Kesironi. Odong died in 1996 while Kesironi died in 1997, as per evidence of PW1.

There is also no evidence that the lease offer was accepted by Kesironi and that he paid the sums indicated on the Lease offer form (DEX7) to the then Controlling Authority (Uganda Land Commission). Just as the trial Court, I too find that the land must have reverted to Uganda Land Commission as per the law on lease, in the absence of the acceptance of the lease offer by Kesironi. I also hold that there was no contractual relation between either Odong or Kesironi, and the Uganda Land Commission. In this case the offeree was to accept the offer within one month from 3rd January, 1973. In the absence of proof of the acceptance, the offer lapsed. Had there been an acceptance of the lease offer within one month from the date of the offer, the lease would have created more than a contract but an estate. See G.C Chesire in his Book, Modern Law of Real Property, 10th Edition, p.373. See also Gabriel Rugambwa & another Vs. Ezironi Bwambwale & another, HCCS No. 359/ 1997, Byamugisha J. (as she then was) (RIP). In this case, there was none, on the evidence available.

I am therefore of the view that even if the Lease Offer had been accepted by whomsoever it was offered to, the same would have expired after five years from the date of the survey, as per DEX7. The offer had a definite

beginning and a definite ending. It has therefore been held that when a lease for a definite term has been terminated by effluxion of time it means the stage has been reached when the lessee or tenant no longer has any legal right on the property and is merely a trespasser. See: Dr. Adeodanta Kekitinwa & 3 others Vs. Edward Maudo Wakida, Civil Appeal No. 3/ 1997 (COA). In the present case however, court cannot hold that the Appellants were trespassers, or that their predecessor (s) were in that category, since there was no Lease in the first place, to write home about. But even then the District Land Board under article 241 (1) (a) of the Constitution, 1995 and section 59 of the Land Act, as the successor in title to the suit land from the Uganda Land Commission, has not challenged any person's occupation and use of the disputed land in any judicial fora thus far. I cannot therefore make any prejudicial finding of trespass against the Appellants, without any allegation being levelled against them as such, by a proper Authority, and in the absence of a trial in that regard. I leave it at that.

On the evidence, I have also found no evidence that Odong's children (the 1st and the 2nd Appellants) and his widows (the 3rd and 4th Appellants) had any letters of Administration to the estate of Kesironi Atori Alung. Accordingly, the Appellants cannot purport to claim, and have not so claimed through Kesironi, as being his successors in title to the suit land.

I have also noted that the acreage of the land that was offered to Kesironi was only 1500, yet the Appellants purport, incredibly, to lay full claim to the whole 10,000 acres. Even if their claim were valid (which I have found not), the Appellants claim would have been limited to only1, 500 acres of land. In the case instant however, even the claim to 1,500 acres have not been made out. Accordingly, the same does not form part of the estate of the late Odong Stanley Alung.

For the foregoing reasons, I am inclined to agree with the holding of the Learned Chief Magistrate in its entirety.

I wish to however consider other matters raised, to fully resolve the complaints in this appeal. Issues of the Appellants' possession of the suit land vis-avis the evidence of DW4 were canvassed by the parties to this appeal. The Appellants contended that the trial court ignored the Appellants' possession of the suit land. They also complained about the trial Court's reliance on the evidence of Odoki Mariano, DW4, contending that, the witness ought not to have been believed because he had a land dispute with the Appellants. The Appellants therefore criticized the trial Court's finding in favour of the Respondents.

In my view, it is not clear whether by their averment of possession, the Appellants now wish on appeal, to claim that their cause of action was

founded on the basis of being in exclusive possession of the land or adverse possession. Either way, I find that the claim of possession was not pleaded in the Court below.

As observed, the Appellants sued and prosecuted their case on the strength of the Letters of Administration, and as beneficiaries of the estate of Odong Stanley Alung. As I understood their case, they felt obligated to protect the suit land, erroneously though, believing the same forms part of the estate of the late Odong Stanley Alung. The Appellants also sought to protect their own and others' interests, as beneficiaries. Having not canvassed the claims of possession at the trial, but rested their claims on other grounds, the Appellants cannot now on Appeal, be allowed to argue a new cause of action. They did not amend their plaint to pursue this claim. To allow them to do so on appeal would be a complete departure from the case as pleaded before the trial Court. This cannot be countenanced on appeal. To do so would be prejudicial to the Respondents and would tantamount to a violation of the Respondents' non derogable right to a fair hearing, protected by article 28 (1) and 44 (c) of the Constitution of Uganda, 1995.

It is trite that the object of pleadings is to ensure that both parties know what the points in issue between them are, so that each may have full information of the case he/she has to meet, and to prepare his evidence to

support his own case, or to meet that of his opponent. Thus a party cannot be allowed to depart from his/ her pleadings, and present a case different from that pleaded. **See: Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 E.A 634, at 643(SCU), Interfreight Fowarders (U) Ltd vs. East African Development Bank, SCCA No. 33 of 1993; Gandy v. Caspar Air Charter Ltd [1956] 23 EACA; Bakaluba Peter Mukasa v. Nambooze Betty Bakireke, Election Petition Appeal No. 04 of 2009 (SC).**

I however note that in their prayer in the plaint, the Appellants sought for injunction, to restrain the Respondents from interfering with the Appellants' quiet possession and ownership of the suit land. In my view, this prayer did not serve any magical qualities and could not imply that another cause of action had been pleaded by the Appellant. Legally, a prayer for reliefs in a pleading materially differs from a statement of the cause of action. The distinction between a statement of the cause of action, and reliefs sought, is clear from the reading of Order 7 rule 1 (e) and (g) of the Civil Procedure Rules.

In light of the above, I find that the claim of possession having not been pleaded and canvassed at the trial, cannot be validly pressed on appeal. The trial Court was therefore not expected to consider this aspect of the

Appellants' claim, as the Court was not addressed on it. The complaint in that regard is therefore misconceived.

Regarding the complaint that the trial court favoured the evidence given by DW4, Odoki Mariano, I have considered the witness statement of DW4. The statement was received as DW4's evidence in chief. He was cross examined at length on it. I note that the witness, *inter alia*, spoke about his own land dispute which he has had with the Appellants. The dispute involved some 2000 acres of land in the same area as that involved in this appeal. DW4 admitted that the Appellants successfully sued DW4 in the Magistrates Court, but DW4 successfully appealed to the High Court. DW4 conceded that there is a further appeal pending before the Court of Appeal, by the present Appellants over the matter. DW4 referred to the High Court Judgment by Hon. Justice Stephen Mubiru.

Quite apart from his own dispute, DW4 also spoke about other facts he knew regarding the Respondents and the Appellants. He knew both parties very well. His evidence about the Respondents' interests in the suit land was corroborated by the Respondents. DW4 and the Respondents were cross examined by Counsel for the Appellants. DW4 confirmed that he was not related to the Respondents. Moreover, the Appellants and their witnesses recognized that the Respondents had occupied and were using portion of the suit land. Therefore, I find nothing on court record to show

that the subsisting land dispute which DW4 had with the Appellants biased him in any way against the Appellants. DW4 spoke from his own knowledge and made concessions, as an objective witness he was. In any case, as at the date of his testimony, DW4 had already secured a favourable Judgment from the High Court, against the Appellants, which was attached to his witness statement. He therefore had no incentive to, and never lied against the Appellants, if at all his credibility was in issue, which I have not found, on the material before Court. DW4 was also categorical that his testimony was not influenced by the dispute he has had with the Appellants. The trial Court also adverted to the High Court Judgment in which DW4 was successful. I think the trial Court was entitled to do so, as the matters there were closely related to that before it and there is no complaint in that regard before me.

I further note that some aspects DW4's evidence related to the 3rd Respondent's history of acquisition of her part of the suit land. Both DW4 and the 3rd Respondent testified that the 3rd Respondent acquired her interest through her husband (Aldo Ojok) who had purchased some 1000 acres of land from Kesironi Atori Alung. Their testimonies, which the trial Court, in my view, rightly believed, were supported by the exhibits on record, especially DEX3, DEX4 and DEX5. Although the 3rd Respondent had pleaded that her late husband had acquired the portion of the land (1000 acres) from Odong Alung, I find that there was no material departure

in her evidence on this issue, given that the documents attached to the Defence showed Odong's purported signature, signed above the name of K. A. Alung (Kesironi Atori Alung). Moreover other documents proving that the 3rd Respondent's husband (Aldo Ojok) had made payments for the survey and lease applications for his own land, were attached to the Written Statement of Defence. These documents were eventually tendered in evidence by the 3rd Respondent (DW3). The exhibits thus confirm the transactions that Aldo Ojok had, were with Kezironi Atori Alung, and not Odong, who all along has been purported by the Appellants as the offeree of the Leasehold land.

The trial Court also agreed with DW4's testimony regarding the areas where DW1 and DW2 (1st and 2nd Respondents) and their predecessors had settled on the suit land. Court accepted that they settled on land which is distinct from that which the Appellants were purporting to claim through Odong. DW4 was not shaken during cross examination. He was truthful, in my view, as he did not hide what he knew in the land conundrum. Moreover the trial Court did not consider the evidence of DW4 in isolation. It considered other evidence on record, which in my view corroborated it. I therefore hold that the Learned Chief Magistrate rightly considered the evidence of DW4 alongside other evidence and came to the correct decision in the matter. Accordingly, the complaint is misconceived.

Relatedly, I also find that the trial Court properly evaluated the evidence on record and came to the correct findings and conclusion.

Given the foregoing analysis, grounds 1, 2, 3, 4 and 5 lack merit and are accordingly dismissed.

**Ground 6: The Respondents' alleged unchallenged possession of the suit land**

As observed, all the Respondents bore no burden of proof to disprove the Appellants' claim. Having sued, the Appellants had to prove that the Respondents were trespassers on the suit land. Trespass as understood, is entry on land without the consent of the owner. See: Sheikh Muhammed Lubowa Vs. Kitara Enterprises Ltd (1992) KLR 127. See also para1205 Volume 38, Halsburys Laws of England, 3rd Edition. In Halsburys (*supra*), it is stated that trespass to land is committed where a person wrongfully or unlawfully sets foot upon, or takes possession of or takes materials from land belonging to another person. See also: Justine EMN Lutaya Vs. Stirling Civil Engineering Company Ltd, Civil Appeal No. 11 of 2002 (SCU).

In the present case, I have already held that the Appellants failed to prove their case before the trial Court that they own the suit land. Accordingly the Respondents could not be held to be trespassers over land which the

Appellants have not shown valid interests in. In any case, the Respondents proved that they were in possession of their portions of the suit land but for the LRA war in the area which caused their displacement for some time. The Respondents also gave the basis of their possession. On her part, the 3rd Respondent (DW3) testified that she derives her claim to her 1000 acres of land from her deceased spouse Aldo Ojok, who duly purchased from Kesironi. On the other hand, the 1st and the 2nd Respondents too adduced ample evidence to confirm that, before the LRA war, they and their predecessors lived on the suit land. Their evidence were corroborated by the *locus inquo* visit. Old structure/ wall and fruit trees were found on their portion of the suit land. These were confirmed to be theirs. Other witnesses also attested to the fact of possession, especially DW4 (Odoki Mariano) and Lado Edisha, DW5. These were not controverted. Similarly, the Appellants and their witnesses conceded that the 1st and 2nd Respondents had settled on part of the suit land. Although the Appellants claimed that the Respondents' settlements were much later, the Appellants did not disprove the fact of long possession. The Appellants also testified, conceding that, they stopped the 3rd Respondent from using her land, thus asserting that she is not in and therefore lost possession. I find the Appellants' acts of restraining the 3rd Respondent from using the land she earlier occupied and used, in the absence of a court order, unlawful. The Appellants cannot brag about it, to argue that, the 3rd Respondent lost possession and is therefore a trespasser.

In my view, the trial Court rightly found that the 3rd Respondent and her co- Respondents had lawful possession of the suit land. I hold that the Respondents' possession cannot be challenged by the Appellants who have no better title than the Respondents. The complaint in ground 6 therefore fails.

In this Judgment, I have also considered the fact that the 1st and the 2nd Respondents claimed in their evidence and pleading that their portions of the land were held under customary arrangement. I find that the land was not held under customary tenure as no proof was furnished to Court under s.46 of the Evidence Act. In my view, proof of custom require expert evidence and cannot simply be assumed. See: Kampala District Land Board Vs Venasio Babweyaka & 2 Others, Civil Appeal No. 02 of 2007 (*SCU*) per Odoki CJ; Ernest Kinyanjui Kimani Vs. Muira Gikanga [1965] 735 at 789. In both cases, it was held that custom has to be proved by a party relying on it.

In the present matter therefore, the trial court did not purport to hold, and rightly in my view, that the land was held by the Respondents under customary tenure. Having considered all the matters raised, given my findings, the appeal wholly fails. I accordingly uphold the decision and orders of the Learned Chief Magistrate (as he then was).

On costs, the law is that costs follow the event, that is, the outcome of the case. See section 27 of the Civil Procedure Act. To award or not to award costs is an exercise of discretion which must be exercised judicially. In this case, I would have awarded full costs of the Appeal to the Respondents but for the baseless preliminary objections which I dealt with herein. Accordingly, I award only ¾ of the taxed costs of the Appeal. The costs of the trial court and all Orders of the that Court are upheld. It is so ordered.

**Obiter**

I have taken judicial notice that the LRA war in Northern Uganda, most especially the Acholi sub region rattled lives and unsettled people, thereby interrupting continual land occupancy and user for over a decade from about the year 1996 as in the case instant. This created land conflicts of various degrees. Court urges the Leadership of the area of situation of the suit land and the District Land Board, to take keen interest in this matter. They should ensure that the present land conflict is permanently solved. Whereas Court has done its part as by law required, it remains for the leaders and the Nwoya District Land Board to join hands to deflate tensions. People should be sensitized and urged not to take laws into their hands. They may require counselling as well. The History of ownership of the suit land appears well documented by Nwoya District Land Board yet dispute still lingers. The Board, the Leadership, and all well-meaning persons, could join hands and play their part. Doing so could deflate

tensions and put a permanent stop to the present and similar land conflicts in the future. Various persons could be assisted on how best to secure their stakes so that the generations coming after them do not find themselves in a similar land conundrum.

Delivered, dated and signed in chambers this 20th December, 2022.

20/12/2022

George Okello
JUDGE HIGH COURT

Ruling read in chambers as per the record below;

**10:10am**

**Appearance**

Ms. Grace Avola, Court Clerk.

Mr. Owor Abuga, Counsel for the Respondents.

1st and the 2nd Respondents are in Court.

The 3rd Respondent is absent.

Mr. Watmon Brian, Counsel for the Appellants in Court.

The 1st and 2nd Appellants are in Court

The 3rd Appellant died.

The 4th Appellant is absent (sick).

**Mr. Watmon (for the Appellants):** The matter is for Judgment. I am ready to receive.

**Mr. Owor Abuga (for the Respondents):** We are ready to receive the Judgment.

**Court:** Judgment read and signed in the presence of Counsel and some of the parties above, in Chambers.

Right of Appeal explained.

20/12/2022

George Okello

JUDGE HIGH COURT

20th December 2022