THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 67 OF 2021

(ARISING FROM CIVIL SUIT NO. 070 OF 2018, FORMERLY CIVIL SUIT NO. 056 OF 2013, NWOYA CHIEF MAGISTRATE'S COURT)

OPOBO ENEYA..... APPELLANT

VERSUS

1. **LANEK FRANCIS**
2. **OLYEL RICHARD**
3. **OJOK NELSON.....RESPONDENTS**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background

This is an appeal from the Judgment and Decree of the then Chief Magistrate of Nwoya Chief Magistrate's Court, His Worship Matenga Francis Dawa (at present Deputy Registrar), delivered on 4th March, 2021, in Civil Suit No. 070 of 2018 in a land matter. The suit was initially lodged as Civil Suit No.057 of 2013 but the number changed to 056 of 2013. The original suit

number somehow kept changing, as per the pleadings and documents lodged by the parties, for reason which is not apparent on the court record.

Be that as it may, the Appellant was the defendant and a counterclaimant in the trial Court. In the last amended Plaint lodged on 23rd November, 2018, the Appellant was sued over approximately 02 (two) acres of unsurveyed customary land situate at Got-Ringo Village, Pangur Parish, Alero Sub County, Nwoya District. It was averred the entire land is 30 acres but the disputed area was limited to two acres. The 1st Respondent sued as an administrator of the estate of his late father, a one Maroko Odongo, as per the Letters of Administration, although in the the pleadings and other court documents, the deceased is named as 'Odong Marko. The rest of the Respondents sued as beneficiaries to the estate.

The Respondents sought, among others, a declaration of ownership of the suit land, contending the Appellant was a trespasser, having allegedly planted pine trees on a portion thereof and verbally claimed ownership of eight acres of the land.

The Appellant denied the claims. In his amended written statement of defence filed on 23rd November, 2018, the Appellant averred that he lawfully owns the suit land by

inheritance from his parents who were given by the Appellant's maternal uncle in the year 1980. He averred that the parties lived peaceably, each keeping possession of adjoining land. The Appellant averred that the parties' land are separated by old natural trees like owak, Locoro, Ojaa, among others, and the Appellant does not claim the estate of the deceased. The Appellant also claimed, *inter alia*, a declaration of ownership, contending the Respondents are trespassers on approximately three acres of the suit land.

The matter was first heard by Her Worship Anyeko Susan, Magistrate Grade One, who after partial recording of the oral testimony from the 1st Respondent (Lanek Francis) stopped the proceedings, on an application for adjournment, to enable the Appellant amend his written statement of defence. At the resumed hearing a month later, the Appellant's Counsel informed the trial Magistrate that he had discovered the existence of a similar civil suit no. 59 of 2014 over the same subject matter, although the land was of varying size, with some parties being the Respondents herein. Learned Counsel for the Appellant also claimed that some of the Defendants in civil suit no.59 of 2014 were not competent to lodge it, being mere beneficiaries who lacked letters of administration. Counsel prayed for the striking out of some defendants from that suit. Counsel also addressed the trial Court on the alleged lacked of *locus standi* of the 2nd and 3rd Respondents. He sought to have

their names struck out, contending they lacked letters of administration to sue. In response, Counsel for the Respondents who doubled as counsel for the Plaintiffs in civil suit no. 59 of 2014 did not strongly oppose the prayers. He merely submitted that the 2nd and the 3rd Respondents derive sustenance from the suit land as beneficiaries. The Learned Magistrate Grade One, with respect, acceded to the erroneous views of the Appellant's then Counsel and struck out the name of the 2nd and the 3rd Respondents from the plaint. The Court directed the parties to amend their pleadings. Interestingly, in the amended pleadings lodged the same day of the strike out order, none of the parties removed the name of the 2nd and 3rd Respondents from the Plaint and Defence/ Counterclaim.

When the matter next came up before Her Worship, Counsel for the Respondents applied that the suit be heard by the Chief Magistrate since that Court was already handling another similar matter (I suppose civil suit no. 59 of 2014.) Her Worship obliged, and placed the file before the Chief Magistrate for consideration. The matter proceeded by way of witness statements before the Learned Chief Magistrate, with all the parties as before, notwithstanding the strike out order, which parties themselves appear to have ignored, yet they had contributed to its issuance. The strike out order was not set aside either. The partial testimony of the 1st Respondent (1st Plaintiff) was left hanging and not expunged from the trial Court

record. The Learned Chief Magistrate took over the matter but also simply ignored what had transpired before the Magistrate Grade One, and started the hearing afresh.

After hearing three witnesses from each side, the Learned Chief Magistrate visited the disputed land (*locus in quo*). In his Judgment, the Learned Chief Magistrate found for the Respondents. He held that the suit land belongs to the Respondents (the 1st Respondent as an administrator, and the 2nd and 3rd Respondents as beneficiaries, respectively). Court ordered for vacant possession of the suit land by the Appellant and his agents; issued a permanent injunction restraining the Appellant and his family from further trespassing on the land, and awarded costs of the suit to the Respondents. Regarding the Counterclaim, the trial Court dismissed it with costs. Aggrieved and dissatisfied, the Appellant lodged the instant appeal.

Grounds of Appeal

1. The Learned trial Chief Magistrate erred in law and fact in failing to properly capture the record and evaluate evidence at the trial thereby coming to a wrong conclusion that the Appellant is not the owner of the suit land.

2. The Learned trial Chief Magistrate erred in law and fact in holding that the suit land belongs to the estate of the late

Odong Marko (*sic*) thus vested in the first Respondent thereby occasioning grave injustice to the Appellant.

3. The Learned trial Chief Magistrate erred in law and fact when he failed to properly appreciate the features and boundaries on the suit land while at the *locus in quo* thereby coming to the wrong conclusion that the Respondents did not trespass on the Appellant's land.

4. The Learned trial Chief Magistrate erred in law and fact in dismissing the Appellant's Counterclaim without considering admissions made by the Respondent that the suit land was gifted by the Appellant's late mother.

The Appellant prayed that the whole judgment and orders of the Learned Chief Magistrate be set aside; Judgment is entered in favour of the Appellant; Costs of the Appeal and costs of the trial Court is awarded to the Appellant; and any other consequential relief this Court deems fit.

Representation

The Appellant was represented by Mr. Silver Oyet Okeny while the Respondent was represented by Mr. Byron Ojara who held brief for Mr. Sabiti Omara. Learned Counsel filed written submissions which Court has considered and is grateful.

Duty of a first Appellate Court

Before I resolve the Appeal, I remind myself of the duty of this Court, sitting as a first appellate court from the decision of the Chief Magistrate. As a first appellate court, 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 demeanor, 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 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 held, failure by a first appellate court to evaluate the material as a whole constitutes an error of law.

Determination

The grounds of Appeal revolve around the finding that the Respondents own the suit land and that the appellant is a trespasser thereon. It also faults the manner in which the trial

Court captured and evaluated the evidence adduced in Court and at the *locus in quo*, thereby dismissing the counterclaim.

I will resolve all the grounds together. Learned Counsel for the Appellant commenced his address by submitting that the Judgment of the trial Court is unsigned and hence there is no valid judgment. With respect, this argument is misconceived. The original Judgment is hand-written and signed. It was read in open Court in the presence of the then Counsel for the parties. The hand-written Judgment, therefore, meets the requirements of Order 21 rule 3 (1) of the CPR which applies to Chief Magistrate and Magistrate Grade One Judgments, by virtue of section 219 (1) of the Magistrates Courts Act, Cap.16. I also note that the Judgment was eventually typed and certified by the trial Court. The objection lacks merit and is overruled.

Learned Counsel also argued that the Judgment lacks legal reference such as statutes and case law, and is loaded with personal opinion and inaccuracies, making it a complete nightmare to be comprehended. Counsel contended that the Judgment is a guess work and has occasioned a gross miscarriage of justice to the Appellant.

With respect, the arguments lack merit. Whereas the typed copy of the Judgment contains some typographical errors as it is apparent the Learned Chief Magistrate did not proof read as he

was already transferred to another station on promotion at the time the Judgment was typed, this Court has had the benefit of reading the hand-written Judgment and found it clearer with only minor errors. This Court was, therefore, able to comprehend both the hand-written and typed Judgment of the trial Court. It would of course be good practice if trial Courts type their own decisions in this era of information and communication technology, for greater judicial efficiency and quicker dispensation of justice.

Learned Counsel's argument about lack of reference to statutes and case law in the impugned Judgment, is appreciated, but with respect, is flawed and does not go to the root of the appeal. Nevertheless, because this kind of objection has become common in some matters that have come before this Court, I will say more on it.

I start from the premise that generally every judicial officer is presumed to have requisite knowledge of the law pertaining to the proper discharge of his/her judicial duties. Writing Judgment/ Ruling by any judicial officer is a matter of style. In my view, a judicial officer who states the facts of the case, outlines the issues/points for determination, makes decision on those points/ issues, and gives reasons for the decision, would have met the threshold required for a Court judgment. See Order 21 rule 4 of the CPR. Of course, applying the law is part

of the judicial exercise, as court makes a determination with reasons. I am therefore of the view that, although application of the law does not necessarily call for citing all decided cases or expanding the legal philosophy or principles that may be relevant, a Judgment/Ruling should speak for itself. It should show that the adjudicator is alive to the law and principles of law. This Court is aware that sometimes, and this may depend on the nature of the case, over consideration of every point of law canvassed in the arguments may not be necessary. I am also aware that some judicial officers delight in technicalities, fine distinctions and esoteric developments of particular themes. Others (and I say so with the greatest respect) may also engage in a scholarly exercise for personal gratification rather than resolving the real legal issues. These approaches may be fine for appellate Courts, and may not necessarily be of importance in the Magistrates Courts as they do not make precedents. I must put a disclaimer here that I am in no way suggesting that Magistrates Courts are in any way excused from writing quality Judgments in accordance with the well known conventions for Judgment writing. It is common ground that a Judgment pronounced on the bench which is a product of intellect should stand on a class by itself. There is no gainsaying that Courts speak with authority which should come with befitting dignity. Courts at all levels should therefore be impressive and convincing by its reasoning. Thus clarity of expression is essential. That said, a Judgment should however

not miss out on its important object- to do and to seem to do justice. Inescapably, embellishments of a good judgment such as style, elegance, and happy phrasing need no over emphasis. In a nutshell, the quality of Judgment/Ruling may depend on the demands of the business of the Court which comes with aspects of economy of labour in Judgment writing. There is however a rider to this, in that, the demanding nature of the job should, come least when it comes to quality of Judgment/Ruling coming from a Court of Justice. See: **An Introduction to Judicial Conduct and Practice by B.J. Odoki, pp.118-130**

Turning to the objection, having considered the impugned Judgment, I find nothing to suggest that the Learned Chief Magistrate was not alive to the legal principles applicable to the matter before him, by not citing case law and statutes. In any case, Learned Counsel for the Appellant pointed no errors of law. This finding however does not resolve the gist of the appeal.

In closing, it is my finding that although reasons for Court decisions should be founded on the law and supported by the facts, I do not think an omission to cite relevant precedents and statutes, on its own, should lead to the conclusion that an error of law has been occasioned by the trial Court. I would accordingly reject the criticisms for being misplaced.

Learned Counsel for the Appellant also argued that the record of the proceedings was poorly captured and evaluated. Counsel alluded to several aspects of evaluation of the evidence by the trial Court.

On the other hand Learned Counsel for the Respondents supported the findings of the trial Court and prayed for the dismissal of the appeal with costs.

Regarding the issue of *locus standi*, the Appellant's Counsel argued that the 2nd and the 3rd Respondents lacked *locus standi* to sue the Appellant in the trial Court. Counsel claimed that, being from a separate clan, the 2nd Respondent could not sue over land which was owned by his maternal grandfather unless gifted in his Will.

In respect of the 3rd Respondent, Learned Counsel submitted that the 3rd Respondent lacked letters of administration to be able to sue unlike the 1st Respondent.

Court finds the arguments misconceived because the issue of *locus standi* was first raised and determined by the Learned Magistrate Grade One who struck out the name of the 2nd and 3rd Respondents, without costs. However, and with respect, having possibly realized their lack of good sense and that they had misled the trial Court, the then Counsel refrained from

amending their pleadings to remove the name of the two Respondents which had been struck out. The Appellant did not complain in the trial Court. He did not raise the issue of lack of *locus standi* before the Learned Chief Magistrate who had taken over the trial. I, therefore, find that even if the strike out order by the Learned Magistrate Grade One was not set aside by that Court, the order was in my view erroneous. This is because the 2nd and the 3rd Respondents were suing as beneficiaries of the estate of their late grandfather in their own right, the estate having been distributed to them by the 1st Respondent who was their uncle and an Administrator of the estate. In my view, a beneficiary of an estate need not obtain letters of administration before having the *locus standi* to commence legal action to protect his/her interest in the estate of a deceased person. **See: Komakech Walter & 3 others Vs. Kilama Owani & 2 Others, Civil Appeal No. 17 of 2021 (Hct); Israel Kabwa Vs. Martin Musiga, Civil Appeal No. 52 of 1995 (SCU).**

For the foregoing reasons, I find that the Learned Chief Magistrate properly allowed the matter to proceed with the 2nd and the 3rd Respondents as parties. I, therefore, see no prejudice by the course taken. At any rate, the complaint was not framed as a ground of appeal. The complaint fails.

Turning to the issue of evaluation of the evidence by the trial Court I note that the trial Court was confronted with three

issues, namely; ***who is the rightful owner of the suit land***; ***whether the Defendant trespassed on the suit land***; and ***the remedies available***.

I must point out from the outset that the issues farmed did not clearly encompass the counterclaim in so far as the counterclaimant (the Appellant) alleged acts of trespass by the Respondents and sought declaration of ownership.

Be that as it may, the trial Court considered the evidence of PW1, Lanek Francis (the 1st Respondent) who testified that the suit land allegedly measuring 08 (eight acres) out of the total acreage of 30 (thirty) belonged to Lanek's father (Odongo Maroko) who died and was buried on it. The trial Court noted that from the *locus* findings, the entire land of Odongo Maroko is not in dispute. Court opined that Odongo's land *is where the homestead and graves are*, and are not affected. The trial Court also observed that *the suit is concerned with a boundary issue between the uncontested land of Odongo Maroko on the one hand, and the present appellant and his brothers on the other hand*.

As regards the Appellant's claim, the trial Court noted that the Appellant (DW1) testified that the suit land was given to DW1's father (Leone Lalobo) in 1980 by Delfino Abola, a brother in-law of Lalobo, upon Laobo marrying Auma Natalia, a sister to

Delfino Abola. The trial Court believed the Appellant's evidence in this respect. The trial Court then held that the land given to the Appellant's father is separate as per the *locus* findings, from that of Odongo Maroko. Court concluded that what was in dispute was the boundary between the land claimed by the Appellant, and the Respondents.

I have perused the entire record which include the *locus* proceedings and the sketch map drawn at the *locus*. With respect, and contrary to the findings of the trial Court, the *locus* map did not show the so-called separate land of the Appellant's father and separate land of Maroko Odongo. The sketch map did not show where the grave of Odongo Maroko and any of the Respondents' relations were buried. On the contrary, the sketch map shows that the entire land so drawn, is claimed by the parties to this litigation, and not just a portion of.

The record also shows that each side showed the trial Court where each believes a boundary ought to be. The effect of that, going by the Respondents' assumed boundary, would suggest that the entire land west of their assumed boundary, belong to the Respondents. Their supposed boundary was the area dotted with two shea nut (butter) trees, and footpath, situate to the east of the disputed area.

Regarding the Appellant's assumed boundary, he described it as being in in the west with owak tree, Aree Stream tributary and pine trees marking the supposed boundary. In my view, that would mean the entire suit land lying in the easterly direction (using the Appellant's positioning) is claimed by the Appellant.

I, therefore, find that the trial Court started its analysis from a wrong premise that there was an *uncontested land of Odongo Maroko* on the one hand, and the uncontested land of the present appellant and his brothers on the other hand. If the trial Court had shown by the sketch map which areas are not in dispute, and which areas are in dispute, it would have narrowed the dispute with clear specificity. I think it would be good practice for a trial Court to draw clear sketch map of the *locus* to delineate areas in dispute, but also showing what is not in dispute. This helps an appellate Court in forming an opinion on the whole area in dispute, more so where the dispute, on the face of it, is fashioned as being of a boundary nature. An appellate Court has no opportunity to visit *locus in quo* as the rules and the Practice Direction No. 1 of 2007 which regulates the *locus in quo* proceedings is limited to trial Courts.

I am aware that an Appellate Court, as this Court, can in specified circumstances allow for adduction of additional evidence on appeal under Order 43 rule 22 of the CPR. However,

I do not think the situation for the invocation of Order 43 rule 22 applies to *locus in quo* visit in an appeal matter. *Locus in quo* visit is allowed by Order 18 rule 14 CPR where Court may at any stage of a suit inspect any property or thing concerning which any question may arise. The provision, in my view, does not apply to appeals but suits before trial Courts. Thus, the provision of Order 43 rule 23 of the CPR on the mode of taking additional evidence on appeal is in no way related to *locus* visit. In other words, no law allows for a second chance to visit *locus in quo* by any Court unless a trial de novo is ordered which technically would be a fresh hearing. It is, therefore, my view that an appellate Court lacks powers to visit *locus in quo*.

In the instant appeal, I find that the sketch map was not very helpful in clearly delineating the areas in dispute from that allegedly not in dispute, as the whole area is in issue. This deficiency notwithstanding, this Court will still use the sketch map as a guide, together with the evidence on record and the pleadings, to resolve the controversy.

I have noted that whereas the Respondents pleaded that only 02 (two) acres were in dispute, in their evidence they departed and claimed 08 (eight) acres, out of the alleged total of 30 acres they said they own. On his part, the Appellant pleaded one square mile of land but in his testimony departed and narrowed the area he claims to approximately 30-40 acres.

In their last amended plaint lodged on 23rd November, 2018, the Respondents averred that the area trespassed on is situate at Got-Ringo village, Pangur Parish, Alero Sub-County, Nwoya District. They averred that Maroko Odongo had inherited that land from his father (Ajunga) and Odongo lived there until his death in 2012 and was buried there. The Respondents asserted that they only lost possession during the insurgency when the family moved to Alokolum Internally Displaced Persons Camp (IDP). It was averred, after the insurgency the Respondents went back to their original home (suit land) but the Appellant instead of going back to his original home in Kati-Kati, Amuru District, also went to the suit land (act of trespass) and planted pine trees, claiming to own the land.

In his witness statement (admitted as evidence in chief), the 1st Respondent (Lanek) claimed that the 30 acres is in two villages, Got-Ringo, and Lalar village. This was a departure from the Got-Ringo village which had been pleaded and was an agreed fact at scheduling. In cross examination, PW1 stated he was born in Lalar village and the disputed land is where he was born. This was false and contradicted an agreed fact. PW1 later retracted, conceding the suit land is in Got-Ringo village. PW1 also admitted that the Appellant's brother (Okello Santo) has land in Got-Ringo village but denied that the Appellant also has land there. PW1 further admitted that the father of the Appellant who

also doubled as the father of Okello Santo died and was buried at the Got-Ringo land on the part occupied by Okello Santo.

This Court notes that the sketch map of the *locus* shows the garden of Okello Santo as being situate on the eastern part of the suit land. PW1 also admitted that another brother of the Appellant (a one Dr. Lalobo Oryema) planted pine trees on part of the land (western side) in about the years 2012/2013. PW1 claimed this happened when the suit was already in the trial Court. This Court notes that the first plaint was lodged in September, 2013, obviously after the pines had already been planted in about the stated period (2012/2013) by Dr Lalobo. PW1 first conceded the pine plantation is on the land boundary, with a portion inside the Respondents' land. He however didn't state what portion fell within the Respondents' land. PW1 changed stance and contradicted himself, stating the boundary is a shea nut (butter) tree (in the easterly side) where the garden of Okello Santo is. PW1 then admitted that there are other shea nut (butter) trees on the suit land, though not many. Whereas the Appellant also contradicted himself during cross examination when he said he did not know the boundary of the suit land, I find that, that could be so because the boundary of the suit land in the west could have only been confirmed by Dr. Lalobo who planted pine trees there. Neither Dr. Lalobo (when he was still alive) nor his estate was sued. The Appellant's ignorance about the exact boundary of the land in the west,

could not, with respect, be used to deprive Dr. Lalobo of the area where he planted pine trees, without any legal challenge by the Respondents. Moreover, the 1st Respondent conceded that, that was the boundary.

In its findings, regarding the boundary, the trial Court first noted that there were several shea nut (butter) trees scattered on the suit land, with only two on straight points in the eastern side where foot path was. The trial Court then held the latter to be the land boundary. With respect, the holding was a flaw. This is because PW1 had contradicted himself in a material particular about where the land boundary is. PW1 had also conceded the land boundary is in the west, constituted by the pine trees planted by Dr. Lalobo. This meant all land straddling from that boundary, easterly, do not belong to the Respondents. The 1st Respondent's contradiction was not resolved by the trial Court. Moreover, PW1 had stated that the shea nut (butter) trees in the easterly side form a boundary between PW1 and Santo Okello only. He did not say it formed a boundary between the Appellant and any person, or that those features formed a boundary between Dr. Lalobo and any person. The fact that PW1 never lived on the suit land as he conceded, he could not claim a common boundary with Santo Okello. So, PW1's claim that he shared a boundary with Okello Santo was baseless.

This Court notes that Okello Santo is the Appellant's brother, and the sketch map positioned him on the suit land, on the eastern side. Interestingly, he was not sued, yet the Respondents purport to claim the same area from the Appellant. It is not shown why Okello Santo was left out of the dispute. Just as the Appellant, Okello Santo claims through his parents (Lalobo Leone and Auma Natalia) who were gifted the area by Delfino Abola in 1980. This is clear from Okello's testimony as DW2. Similarly, Okello's other sibling Dr. Oryema Lalobo had his beneficial interests in what the parents own, being the 30 acres. As noted, it is Dr. Lalobo and not the Appellant who planted the pines west on the suit land, and yet he was not sued or his estate. Whereas it was said that Dr Lalobo had passed on, the year this happened was not stated. PW1 admitted that the Appellant only verbally claimed the pine area and the suit land. With this concession, this Court wonders why PW1 and the rest of the Respondents sued the Appellant in the first place.

From the evidence adduced by the Appellant (DW1), his brother Okello Santo (DW2) and DW3, a maternal uncle (Acaye Davina Olango), and from the Respondents' own evidence adduced through PW3 (Okello Thomas), Court notes that the Appellant's parents were given approximately 30 acres of land by Delfino Abola, a brother to the Appellant's mother. The Appellant therefore showed that he too had a share in the parent's land. The Respondents did not challenge that claim. The Respondents

did not point out which other area comprised the 30 acres given to the Appellant's parents. The trial Court didn't establish in its Judgment, where the 30 acres start and end. However, in my Judgment, I find that the area where Dr. Lalobo Oryema planted pines, stretching easterly towards Okello Santo's homestead/ garden, and stretching southerly but ending at the point where the 2nd Respondent (Olyel Richard) planted pines, are genuinely claimed by the Appellant in his own right and for the benefit of his siblings, parents and the bigger family.

In contrast, PW1 (the 1st Respondent) failed to show that his approximated 02 acres which he says was trespassed on by the Appellant, stretches to the areas claimed by the Appellant and his family. In any case, the 1st Respondent, as noted, conceded that he was not in any way on the suit land and was not using it and had long vested his father's interests therein, to the 2nd and the 3rd Respondents. PW1 was however unable to show the exact acreage he gifted to the 2nd and the 3rd Respondents, being his Nephews (children of Catherine Aling). PW1 could neither show where his father's former land start and end. The 1st Respondent could not therefore purport to challenge the Appellant over the land which he had already divested himself of and whose exact coordinates he knew nothing about. In any case, the 1st Respondent failed to prove trespass by the Appellant. He failed to demonstrate that the area claimed by the Appellant was part of the estate of Odongo Maroko.

On his part, **PW2 (Olyel Richard) the 2nd Respondent testified about his settlement in the southerly part of the land**. The sketch map shows that he built houses (hut and semi-permanent house), planted coffee and bananas in the area where his mother used to lay bricks and another adjacent area, and planted pine trees above the Ngang stream tributary, next to Ojaa tree. It was also shown that the mother of the 2nd and the 3rd Respondents (Aling Catherine) settled and had a home on the south westerly side of the land, but outside the line drawn on the sketch map, which appears not to be in dispute. These occupancy and use of the southerly part of the land by the 2nd Respondent was not challenged by the Appellant. The southerly part of the land where Olyel Richard (the 2nd Respondent) settled therefore seems to me to be the area the 1st Respondent gifted the 2nd and the 3rd Respondents. There is evidence that the 2nd Respondent has been there since the year 1989, with his mother. Whereas the Appellant attempted to rebut this evidence, I find the Appellant's testimony that the 2nd Respondent went there only in 2007 incredible. The Appellant last resided in the area from 1980-1988, so by the time the 2nd Respondent says he shifted there (1989), the Appellant was not on the ground. Moreover, the Appellant never sued the 2nd Respondent over that settlement. The counterclaim purporting to challenge the 2nd Respondent's settlement only came in much later in November, 2018. That, in my view, was an afterthought.

I find that no case of trespass was proved against the 2nd Respondent by the Appellant.

Similarly, **the 2nd Respondent failed to prove that, beyond the southerly part he occupies and uses, the 2nd Respondent has valid claims to the area gifted to the Appellant's parents**, which the **Appellant claims as a beneficial owner**.

In light of the foregoing analytical findings, I hold that apart from the southerly part, which the 2nd Respondent settled on and put to use as described, and the south westerly part occupied and in use by his mother (Aling Catherine), the 1st Respondent failed to prove that he owns more than that area. The 1st Respondent did not show any occupancy or use of any other portion. For emphasis, all the Respondents did not show that they own the westerly area where the Appellant's brother (Dr. Oryema Lalobo) planted pine trees, stretching to the easterly part where the Appellant's brother (Okello Santo) has gardens, and southerly part proximate to the pine trees of the 2nd Respondent. I also find that PW1's admission of the burial of the Appellant's father (Leone Lalobo) on the suit land where Okello Santo settled, weakens the Respondents' case. This is the land gifted to Lalobo and his spouse Natalia Auma, by Delfino Abola in 1980 and it is 30 acres, as confirmed by the Respondents' own witness, being the son of Delfino who confirmed the fact of gifting. This was not challenged.

Regarding the 3rd Respondent's claim, the 3rd Respondent (Ojok Nelson) neither appeared in Court as a party nor as a witness, to prove the claims. Strangely, both sides spoke about the 3rd Respondent's interests. In the amended plaint, it was pleaded that the 3rd Respondent also claims as a child of Aling Catherine, alongside the 2nd Respondent, and thus a beneficiary to the estate of their late grandfather (Marako Odongo). It appears the 3rd Respondent enjoyed a special place in the whole litigation duel. The 3rd Respondent was admitted by the Appellant and his witnesses to have been accommodated by the Appellant (and his extended family) as an elder 'son', so the Appellant and his relations gave the 3rd Respondent a place next to Okello Santo in the easterly part of the land, without any qualms and the 3rd Respondent has been there since the year1980. Whereas PW3 (Okello Thomas) tried to water down this narrative, saying the 3rd Respondent initially lived on the western side, and not on the suit land, PW3 could not change the favourable concession by the Appellant and his witnesses regarding the 3rd Respondent's position on the land. PW3 did not testify at the *locus* so as to be able to indicate the alleged area of previous occupancy by the 3rd Respondent.

In light of the foregoing, I find that trespass against the 3rd Respondent was not proved by the counterclaimant/ Appellant as there was no serious allegation against the 3rd Respondent. In the same vein, as a person who indisputably was welcomed

and accommodated by the Appellant and his relations, **the 3rd Respondent could not purport to sue his benefactor and** having not testified in the trial Court, the 3rd Respondent failed to prove his claim against the Appellant. Therefore, the trial Court erred in finding for the 3rd Respondent.

For the reasons given, I hold that the learned trial Chief Magistrate failed to properly evaluate the evidence on record. Accordingly, the trial Court erred in material respects. The Judgment cannot stand. The Appeal is allowed and the Judgment and Decree of the Learned Chief Magistrate is set aside. Given my findings, and for the avoidance of doubt, I make the following declarations and orders;

1. The Respondents' suit in the trial Court is hereby dismissed.

2. The Counterclaim in the trial Court substantially fails and is dismissed.

3. The Appellant is the beneficial owner of the land gifted to his parents, stretching from the pine trees planted by Dr. Lalobo Oryema in the westerly side of the suit land, then stretching southward and ending at the Oja tree, neighboring the 2nd Respondent's pine plantation, and

thence straddling eastward to two shea nut (butter) trees and foot path, as described in the locus sketch map.

4. The Appellant's beneficial interest and his siblings' and family interest does not extend to the area gifted to and occupied by the 3rd Respondent (Ojok Nelson.) The 3rd Respondent is the beneficial owner of the area he occupies and cultivates, as per the sketch map of the *locus*.

5. The Appellant's beneficial interest in the area specified in 3 above is not exclusive but joint with his siblings, parents, and those claiming under them.

6. The 2nd Respondent (Olyel Richard) is the beneficial owner of the land gifted by the 1st Respondent in the southerly part of the land as per the sketch map and as described in this Judgment which for the avoidance of doubt, comprises of the area where he planted pine trees, bananas, coffee, and erected buildings. The 2nd Respondent does not own any land beyond the Ojaa tree, next to his Pine plantation, as per the sketch map.

7. A permanent injunction issues, restraining the parties from in any way interfering with each other's ownership, occupation and use of the others' clearly delineated portion of land as specified in this Judgment.

8. The parties are free to plant mark stones delineating their respective areas but in the case of the Appellant, subject to the interests of his siblings and parents and those claiming under them, but also taking into account the beneficial interests of the 3rd Respondent (Ojok Nelson.)

9. Given that the parties are related and that this Judgment has clarified on parties' respective positions, the parties shall bear their own costs in this Court, and in the trial Court.

Delivered, dated and signed in Court this 24th March ....., 2023

HCT-00-Civ. 24/03/2023

George Okello

JUDGE HIGH COURT

Ruling read in Court

10:25am

24th March, 2023

Attendance

Ms. Grace Avola, Court Clerk.

Mr. Silver Oyet Okeny, for the Appellant.

The Appellant is in Court.

The Respondents are in Court.

Counsel for the Respondent is absent (in another court).

Mr. Oyet Okeny: The matter is for Judgment. We are ready to receive.

The Respondent: We are not ready to receive the Judgment in the absence of our lawyer.

Court: Matter stood over for one hour, to allow Mr. Odyek to attend Court, as he is reportedly before my brother Judge within the precincts of this court.

Hearing. 24/3/2023

George Okello

JUDGE HIGH COURT

Later at 11:25am

Mr. Odyek appears for the Respondents. I am ready to receive the Judgment of Court.

Court: Judgment delivered in open court and signed.

George Okello

JUDGE HIGH COURT