THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 0112 OF 2019

(ARISING FROM CIVIL SUIT NO. 016 OF 2012, KITGUM MAGISTERIAL AREA HOLDEN AT PATONGO)

NATALIA ACALA::APPELLANT

VERSUS

1. **OWOR VINCENT**
2. **ALUNG CELESTINO**
3. **ODONG JOSEPH**
4. **OKIDI KAMILO:::RESPONDENTS**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background

The Appeal to this court is against the Judgment and Decree of the then Magistrate Grade One of Patongo Magistrates Court, His Worship Oji Phillips, given on 11 October, 2019 in Civil Suit Kit-02-CR-CS No. 0016 of 2012. The Appellant who was the Plaintiff had sued the Respondents over a piece of land situate in Tangu Opota, Lalur-Onywal Village, Latin-ling Parish, Omot Sub-County, Agago County, Agago District. Apparently, the

suit was first lodged in Pader Magistrates Court but was later transferred to and adjudicated from Patongo Magistrates Court. Among the Respondents sued, was a one Ocen Kabaka but the Appellant withdrew the action against him on 15 May 2012, noting, he had since vacated the suit land. The trial court struck out the name of Ocen Kabaka from the proceedings but the Judgment still erroneously carried his name, and so is the Memorandum of Appeal. In this Judgment, I have decided to omit the name of Ocen Kabaka. For the avoidance of confusion, I shall refer to the Appellant as the Plaintiff and the Respondents remain as designated. The facts as averred in the Plaint are as follows;

The Plaintiff inherited the suit land from her late husband Raphael Amet in the early 1980s. The late had acquired the land from his uncle, a one Cilo Yenge in the 1970s as a gift. The Respondents wrongfully took possession of the suit land at the time the Plaintiff was living in an Internally Displaced Persons Camp (IDP) due to insurgency. The Respondents constructed residential houses on the suit land and have been cultivating it, hence acts of trespass. The suit land measures 7.5 acres, (although the trial court found it to be six (06) acres while the

Respondents claim it measures 5 and half acres). The Plaintiff contends, she was deprived of using the suit land, and, therefore, suffered damages. The matter first started in the Local Council (LC) Courts where the Plaintiff lost but on a further appeal to the Chief Magistrate, a retrial was ordered on 24 August 2011 by His Worship Rutakirwah Praff. The retrial was to be conducted before a Magistrate Court since the original LC Courts' record could not be found. Following the retrial order, the Plaintiff lodged the suit on 04 October, 2011. In the suit, she prayed for a declaration of ownership of the suit land with the right to possession; an order of vacant possession; general damages for trespass; a permanent injunction against the Respondents; interest, and costs of the suit.

In their Joint Written Statement of Defence (WSD) in which they counterclaimed, the Respondents denied the claims save that a retrial was ordered by the Chief Magistrate. The Respondents contended that, the suit land originally belonged to their father, a one Opio Orocino from whom they inherited. The Respondents averred, their late father started settling on the suit land in the year 1949 when it was virgin. At the same time, the Respondents averred, their father gave portions of the suit land to them in

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1987 when he was still alive. They also claim ownership by the fact of long use and possession. They averred that their father and relatives used the suit land without interference until the year 2002 when the Plaintiff trespassed on it. Being counterclaimants, the Respondents prayed for a declaration of ownership, general damages, a permanent injunction, and costs of the suit.

In her reply to the counterclaim, the Appellant denied the Respondents' averments and reiterated the averments she made in the Plaint. She averred that she continued using the suit land while resident within an IDP camp and without interference from anybody, until the year 2002 when she discovered that the counterclaimants had trespassed on it.

In his Judgment, the learned trial Magistrate dismissed the Plaintiff's suit with costs. The court allowed the Respondents' counter-claim, holding that the Respondents own the suit land and are not trespassers. Nothing was said about the costs of the counter-claim.

Grounds of Appeal

Being aggrieved and dissatisfied, the Plaintiff lodged the instant appeal. She framed three grounds of appeal, namely,

1. The learned trial Magistrate erred in law and fact when he found that the suit land belong to the Respondents instead of the Appellant despite all the evidence adduced by the Appellant.

2. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby causing a miscarriage of justice.

3. The learned trial Magistrate erred in law when he failed to properly conduct locus thereby causing a miscarriage of justice.

The Plaintiff (Appellant) prayed that this court allows the appeal and sets aside the judgment of the trial court; that the appeal court declares the Appellant as being the rightful owner of the suit land; an eviction order issues against the Respondents and their agents and servants; and that costs in this court and in the trial court be awarded to the Appellant.

Representation

At the appeal hearing, Mr. Ogen-Rwot Simon Peter appeared for the Appellant on *pro bono* arrangement, while the Respondents were represented Mr. Calvin Kilama and Mr. Lobo-Akera Stephen. Court was informed that the first Respondent was at the time of the appeal hearing, already deceased. He was replaced by Tabu Alex Mackay as personal representative for the appeal purposes. Court ordered both learned counsel to file written submissions. Unfortunately, both learned counsel did not comply and no reason was given. Such practice is discourteous to court and ought to be discouraged.

Duty of a first appellate Court

The duty of this court is well settled. As a first appellate court in this appeal, the parties are entitled to obtain from this court, the court's own decision on issues of fact as well as issues of law. In case of conflicting evidence, this Court must make due allowance for the fact that it has neither seen nor heard the witnesses testify before the trial court. Court will, however, weigh conflicting evidence and draw its own inference and conclusions. See: ***Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002, (per* Mulenga, JSC (RIP)).**

In the case of ***Selle & another Vs. Associated Motor Boat Company Ltd & Others [1968] E.A 123***, at page 126, Sir Clement de Lestang V-P of

then East African Court of Appeal set out the principle on which a first Appellate court acts, in these terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court (Court of Appeal) from a trial by the High Court (as trial court) is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that, this court must reconsider the evidence , evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

Resolution of the grounds of Appeal

I will bear the above principles in mind while resolving the grounds of appeal. To my mind, the determination of this Appeal will revolve around a discussion of the issue of whether or not the trial court erred in making a finding of ownership in favour of the Respondents. That itself will turn

on the evaluation of the evidence adduced by the parties. The evidence evaluated by the trial court include that which was taken at the locus in quo. In this appeal, I will assess whether the evidence recorded at the locus in quo was properly taken.

In its rendition, the trial court set out to resolve four issue, namely; *whether it is the Plaintiff or the Defendants who own the suit land?*; *what is the size of the suit land?*; *whether the Defendants trespassed on the suit land* (in light of the counterclaim, the issue should have been framed thus: who of the parties trespassed on the suit land?); and, lastly, *what remedies are available to the parties?*

The procedural posture

The record of the trial court shows that the Appellant (PW1) testified on 10 June, 2014. She was 67 years old. She was guided in chief by learned counsel Mr. Egaru Emmanuel Omiat, and was cross-examined by the 1st Respondent. She was then re-examined by counsel. The case was then adjourned to 26 June, 2014 for further hearing, implying, the Appellant would call other witnesses at the resumed hearing. It should be recalled that on 10 June, 2014, the 1st Respondent had purported to cross-examine the Appellant on his own behalf and on behalf of the other Respondents who were then absent. So the cross examination of PW1 was deemed to have closed. The adjourned hearing did not take place as scheduled. The

matter was further adjourned, and when the case came up on 31 March, 2015, the Plaintiff informed court she had no witness and had decided to withdraw the services of counsel. Strangely the trial court allowed the Appellant to testify again in chief. In my view, this was procedurally erroneous because, once the hearing started, it should have continued from where it had stopped, without the trial court repeating the process that had closed, unless for good reason, court was moved to recall PW1, which was not the case. See O.18 rule 11 and 13 of the CPR. The Plaintiff was cross-examined by each of the Respondents who were all present. The fresh evidence, I have noted, left out a lot of information that the Appellant had given during the earlier testimony under guidance of learned counsel. In her fresh cross-examination, the record does not indicate that PW1 was informed of her right to clarify on anything in re-examination. This was contrary to the provisions of Order 18 rule 4 of the CPR, and sections 136 (3) and 137 (1) of the Evidence Act Cap 6.

The above procedural shortcoming notwithstanding, to avoid prejudicing the Appellant, I have decided to evaluate what the Appellant (PW1) testified about on both occasions, alongside the evidence on record adduced by the two sides. I will only ignore repetitions in PW1's testimony.

The Appellant (PW1) testified that the suit land measures about 7 ½ acres. She got the suit land upon marriage in the 1960s. She was given the suit

land by her mother-in-law, a one Martha Owiny. Martha had been given the suit land by her brother, a one Cilo Oyenge (or Yenge as interchangeably recorded), and a one Nyutta. Cilo was an uncle to PW1's husband- Amet Raphael. At the same time, PW1 stated she got the suit land during the regime of Obote II (1981-85). When her husband died, PW1 took full control of the suit land. She had earlier together with their children, used the suit land during the husband's lifetime and after his death. The husband (Amet) had inherited the suit land from his mother (Martha Owiny) upon her death. According to PW1, the Respondents have their own land in the North of the suit land. The Respondents started trespassing on the suit land in 2007 and PW1 has since then not been able to recover it. The Respondents have at all material times been cultivating the suit land. They continue to cultivate about 5 and half acres. In cross examination, PW1 maintained that the suit land is hers and not the Respondents' or their father's. She asserted that the Respondents encroached on the suit land after displaced persons had left IDP camps (to resettle home). PW1 further asserted that she buried seven deceased persons on the suit land, mostly the children of her daughter (grand-children), and her own son. She named the persons interred on the suit land. According to her, the graves were marked with stones although the stones were no longer traceable, having been cleared. PW1 also stated, there were mango and orange trees on the suit land but some were cut down. There used to be eucalyptus trees on the suit land but they were

burnt down. The dispute started in the year 2002 and the case went up to Gulu (before the Chief Magistrate on appeal who ordered a retrial). The Respondents built grass-thatched houses on the suit land. They also cut down trees. There existed no land dispute when the mother-in- law of PW1 and Amet (PW1's husband) were still alive. PW1 co-existed with the children of Cilo Oyenge (the benefactor) on the suit land and no relative of Cilo claimed the suit land (exclusively). PW1 denied ever shifting from the suit land. She was on the suit land even in 1986. She only had a shop at a near-by place (Gere-Gere) but remained on the suit land. When PW1 lived in an IDP Camp, she never left the suit land vacant.

PW2 Yasinto Oywelo, aged 45, a cousin sister of PW1, testified on 14 June, 2016 that the suit land is owned by the Appellant. When PW2 was born (and of age), he found the Appellant and her husband were already using the suit land for cultivation and settlement, and had also planted trees. There was no dispute. The Appellant and her husband lived on the suit land for a long time until 1986 when they left. They left the suit land because the son of the Appellant had killed his young brother. The Appellant (and family) shifted to Kalongo. They have lived in Kalongo since then. The 1st Respondent built on the suit land in 1987 without authorization of the Appellant, and was living there (as at the time of his death). The rest of the Respondents, especially the 2nd and 5th Respondents also built on the suit land. There was a court case that went

up to Gulu and the parties were referred back. In cross examination, PW2 maintained that as he was growing-up, the Appellant's husband (Amet) and Amet's mother, were already living on the suit land. PW2 did not know the year Amet left Amyel to settle on the suit land. According to PW2, the Appellant inherited the suit land from her husband and mother in law who gave her. The Appellant left the suit land escaping after the killing mentioned before.

PW3 Tuda Chongomoi, a 67 year old, stated that the Appellant was married to his uncle. PW3 knew the Respondents. He also knows the suit land. The 2nd Respondent had built on it. The homestead is old. There are graves of the Appellant's children, among others, on the suit land. PW3 asserted that the land is for the Appellant, having inherited from her mother- in- law. PW3 was present when the Appellant got the land in 1958. The Appellant settled there with her family and cultivated the land and planted trees. The Respondents never lived on the suit land before. It was the 2nd Respondent (Alung Celestino) who was allowed by Amet (the Appellant's husband) to temporarily live on the suit land given that Amet would be away 'having killed' someone. The dispute started when Amet passed on. The Respondents did not want the Appellant back in the area. The Respondents started making false claims to the suit land saying they gave it (to the Appellant's side) yet it is the reverse. Cilo (who originally owned the suit land) had no children. PW3 denied that the 1st Respondent

owns the suit land. Regarding the 2nd Respondent, PW3 insisted he would not have testified against the 2nd Respondent (whom the witness calls 'father') if the 2nd Respondent owned the suit land. He insisted the suit land was given (to the Appellant's spouse) in 1958, and all the grandparents of PW3 were buried on the suit land.

In his Defence, the first Respondent Owor Vincent testified as DW1 (has since passed on). DW1 was 70 years old as at 05 April, 2017. DW1 and the respondents were relatives. According to DW1, the suit land is 5 ½ acres and has trees. DW1 had home thereon, and so are the other Respondents. According to DW1, he got the suit land from Opio Horicino (pleaded as Oricino) in 1987 by way of inheritance and used it for cultivation and settlement since then. DW1 knew the Appellant's husband (Amet). DW1 and Amet were related. The fathers of the two were cousins (from mother's side). The mother-in-law of the Appellant lived on the suit land in 1979 till 1985 when she left and handed the land back to Opio Horicino (Oricino) (the father of DW1). The land does not belong to the Appellant. In cross examination, DW1 conceded, the Appellant lived on the suit land which her mother in law had been given. DW1 claimed the Appellant (and mother in law) lived there only for a short while from 1959 to 1962. According to DW1, the Appellant went to Amyel from Gere-Gere because the Appellant had killed somebody (and so migrated to Amyel and has lived there since then.) DW1 insisted, the Appellant's mother in law handed the land back

to the benefactors. He maintained, it is his father and uncles who had given the mother-in-law of the Appellant 7 ½ acres of the suit land. He denied that Cilo Yenge gave the suit land to the Appellant's mother-in-law. DW1 denied that some deceased relatives of the Appellant were buried on the suit land. He, however, conceded, a one Abmol was buried on the suit land. DW1 asserted, the husband of the Appellant (Amet) died in 1994 when the Appellant had long left the suit land in 1986.

The 3rd Respondent Odong Joseph testified as DW2. He was 39 years (as of 28th June, 2017). He stated, he was a Nephew of DW1. He stated that the suit land is for Korontino Opio (Horicino Opio) and it is five acres. Opio died in 2013. DW2 admitted, he and the co-Respondents were cultivating the suit land. He conceded, the Appellant's husband used the suit land long time ago and left in 1986. The Appellant's husband did not leave the land for anybody. Amet (Appellant's husband) came to live on the suit land with his mother (Appellant's mother-in -law) because the mother had been given the suit land by Korontino Opio long ago. DW2 was still young when his father (Opio Korontino) gave the suit land. In DW2's view, having gone back to her mother's home, the suit land does not belong to the Appellant but the Respondents. According to DW2, the land has been handed back to the Respondents. DW2 prayed they be declared the owners of the suit land. In cross examination, DW2 claimed he was present when his father gave the suit land to the Appellant's mother- in- law.

The 4th Respondent Okidi Kamilo, a 55 year old (as of 28 June, 2017) testified as DW3. He stated that DW1 is a brother. He knew the suit land. It measures about 05 acres. He denied that the suit land is for the Appellant. DW3 claimed he inherited the suit land in 1987, and all the Respondents were in occupation as at the time he was testifying in court. DW3 stated, they were displaced by the insurgency but re-settled on the suit land in 2007. The land has since been divided among the Respondents. DW3 uses about 02 acres, while the rest of the Respondents each use 01 acre. The Respondents divided the suit land in 1987 when their father Opio Korotino was still alive, he having died in between the years 2014-2015. According to DW3, Amet Raphael (husband of the Appellant) followed his mother on the suit land and stayed there in about 1960s and left in 1968 and went to their original land in Lapono Sub-County. In cross examination, DW3 conceded, the Appellant is older than him, and by the time the Appellant was married, DW3 was not yet there (not yet born), He conceded, the land was given to the Appellant's mother-in- law who was cousin to the grandfather of DW3. The mother-in-law of the Appellant was from Agoro Lwala clan.

The 2nd Respondent Alung Celestino, a 76 year old at the time, testified as the DW4. He was the father of Odong Joseph (the 3rd Respondent) and a Nephew to Okidi Kamilo (4th Respondent). DW4 stated that the Appellant

was married in the area to Amet Raphael. According to DW4, the suit land measures about 2 ½ to 3 acres. DW4 admitted being in occupation of the suit land together with the other Respondents. He stated that, initially it was their father who was using the suit land. The Respondents were born and grew up on the suit land. The Appellant was resident in Kalongo (as at the time DW4 testified), about 29 miles away. The customary land of the Appellant's late husband is in the same village as the suit land but not the suit land. The Respondents lived on the suit land prior to being displaced to an IDP Camp, and after returning therefrom to-date. DW4 concluded that the Respondents inherited the suit land from their "father" and lived peacefully thereon until the year 2002 when the Appellant made claims to it. DW4 admitted, the suit land was at first being used by the Appellant's mother in law, but claims, it was temporarily given to her for use by the Respondents' "fathers", namely, Opio, Odong, and Ocen. Consequently, the Appellant's mother-in-law handed the land back to these benefactors, who subsequently gave the suit land to their children (the Respondents). In cross examination, DW4 stated that when the land was being handed back to the Respondents' fathers, the Appellant was living with her second husband within Lalur-Onywal Village and not on the suit land. DW4 denied that the Appellant ever buried any child on the suit land.DW4 maintained the suit land measures 03 acres and not 07 acres as claimed by the Appellant. DW4 insisted that when Cilo Yenge was giving land to the Appellant's mother-in-law, DW4 was present, and the land that was

given differs from the suit land. DW4 insisted the homestead of the Appellant's mother-in-law was still visible on the land she was given, not the suit land. DW4 maintained that all the mango trees that were cut from the suit land (15 in number) belonged to the Respondents, having been planted by a one Jibidayo Kibwoya. He however, conceded, he could not recall the year they inherited the suit land. DW4 spoke about the litigation that happened before the LC courts.

DW5 Akullo Ritah, who at the time was aged 80 years (11 September, 2018), testified for the Respondents. She stated that, the Appellant was a sister-in-law (the witness was a sister to Amet Raphael). According to DW5, before her late brother died, he and his wife (the Appellant) lived on the suit land. The land is big in size. The Appellant had since left the suit land long time ago. The Respondents are the new occupants. The original owner of the suit land was Ochieng Opio- a Nephew to Amet Raphael. Ochieng Opio was the father of the 1st Respondent (Owor Vincent- deceased). According to DW5, the Respondents are the owners of the suit land because it originally belonged to the 1st Respondent's late father. The Appellant left the suit land voluntarily. No body chased her away. Amet was buried in Kalongo, and not on the suit land. Ochieng Opio was not buried on the suit land either. He was buried elsewhere after shifting from the suit land. DW5 admitted she could not know the persons who were buried on the suit land as she lived far away from it. She maintained, the

Respondents are in possession of the suit land having built homes on it. According to DW5, the customary land of the Appellant is in Amyel Village in Kalongo. In cross examination, DW5 insisted the Appellant temporarily lived on the suit land with her late husband, although she could not recall the exact duration the Appellant spent on the suit land. DW5 further stated that the Appellant vacated the suit land and the children of Cilo took over. DW5 conceded, the Appellant had children but denied that the Appellant buried any of her deceased children on the suit land. She insisted the Appellant has her own land in Amyel and that is where she would be free to take her (surviving) children and not the suit land where, according to DW5, the Appellant has no rights.

***Locus in quo* visit**

The trial court visited the land in dispute on 22/10/2018. The record of the locus proceeding is not typed but hand-written and I have considered it in this appeal since no law bars an appellate court from considering hand-written but signed record of the proceedings and Judgment where there is no typed and certified record, especially if court is to do substantive justice and determine the appeal without further delay. Whereas the rules of Civil Procedure envisage typed and certified record of proceedings for appeal purposes, within the provisions of Order 43 rule 10 (2) and (3) of the CPR, which record would have been taken and certified during the trial proceedings under Order 18 rule 6 of the CPR, however,

where none is typed and certified, in my view, a court can still proceed to determine an appeal once the appellate court is certain about the accuracy and authenticity of the record. Sometimes, insisting on typed record of the proceedings when none is forthcoming from the trial court, especially where the file is already before the appeal Judge and the trial Magistrate has long been transferred and the successor judicial officer is not forthcoming, would only serve to delay and deny disputants in appeals, substantive justice. Thus this court could not insist on first having a typed record of the locus in quo proceedings before it could proceed to determine the appeal, when the hand-written copy is legible and duly signed by the trial Magistrate.

The procedural matters aside, this court notes that the trial court drew the sketch map of the suit land. The sketch map shows that the Respondents' homes are on a portion of the suit land (at the Centre thereof). The Appellant's former homestead is also within the centre of the suit land and appear proximate to the Respondents' homes. There is also a former homestead of a one Abul, whom DW1 affirmed at the locus (in cross-examination), was a co-wife of Martha Owiny (the Appellant's mother-in-law). There are some trees near the homesteads of the parties such as, mango trees, orange trees, and local palm trees. This court recalls, the Appellant had testified about mango and orange trees as being on the suit

land. Oyenge Cilo's land (the Appellant's benefactor) is shown to neighbor the suit land to the South-West and South, respectively.

In its judgment, the trial court noted that the suit land measures approximately 06 (six) acres. The learned trial Magistrate also adverted to the testimonies of witnesses briefly. It noted what it took to be observations and findings made at the locus in quo. Unfortunately for the trial court, the observations are a mix of fresh evidence taken at the locus in quo, not to clarify on any features at the locus but the fresh evidence was majorly unnecessary repetitions of how each party alleges to have acquired the suit land. For example, in its judgment, the trial court stated that he discovered at the locus that the suit land originally belonged to Ochieng Opio (Respondents' father who was interchangeably referred to as Oricino). By this finding, the trial Court was prematurely making a conclusion about the historical ownership of the suit land, without first considering the whole evidence adduced in court. This was procedurally wrong. In any case, the Appellant had adduced evidence to the effect that, the suit land originally belonged to Cilo Yenge who gifted it to the Appellant's mother who was a sister to the benefactor. The Appellant's husband inherited from the mother, and upon his death, the suit land passed to the Appellant. These testimony was conceded to by some Defence witnesses especially DW4 and DW5. The two witnesses agreed that Cilo indeed gave land to the Appellant. Whereas DW4 denied that it was the suit land, DW5 conceded,

it is the suit land. The locus sketch map also show that the Appellant's former homestead and that of her co-wife, were visible on the suit land. Whereas the Defence claimed that their father and uncles had given the suit land to the Appellant and her relations, and that the land reverted to the benefactors, their assertions were controverted. First, the Defence historical claim to the suit land, on the evidence, starts from 1987 when the Appellant had been forced out of the suit land by circumstances beyond her control, that is, the LRA insurgency and the killing of a human being by a member of her household. Whereas the Defence pleaded in the counterclaim that their father first owned the suit land in 1949, they adduced no evidence to that effect. It thus remained a pleaded matter. Furthermore, the Defence failed to explain how their father and uncles could have gifted the whole suit land to the Appellants, without retaining anything for themselves. If that were true, where did the settle at the time? The Defence did not explain the existence of the former homestead of the Appellant's co-wife on the suit land. Thus, when taken with the concession by some of the Defence witnesses that Cilo Oyenge had given land to the Appellant's mother-in-law, the Defence claim that the gifting was by their own relatives, becomes shallow.

It is therefore, my view that the learned trial Magistrate failed to consider these pieces of evidence alongside what the Respondents stated in court. Had the trial court considered the matter holistically, it would have found

to the contrary. I thus find that the suit land was perfectly gifted by Cilo to his sister. The mere fact that the gifting was not documented in writing does not affect the gift, in my view. In any case there is no evidence that the donor purported to revoke the gifting and retain the property or that any of his family member contests it. The law is that a gift *inter vivos* takes effect when three situations are fulfilled, namely, the intention to gift, the delivery of the property by the donor, and the acceptance of the gift by the donee. See: ***Norah Nassozi & another Vs. George William Kalule, HC Civil Appeal No. 05 of 2012 (Tuhaise, J (as she then was); Joy Mukobe Vs. Willy Wambuwu, HCCA No.055 of 2005***. There also appears to be requirement that in case of registered land, the gift must be by a deed. See: Mellows, the Law of Succession, 5th Ed. Butterworth 1977, pp.9-10 This English view appears to have received support in Uganda in the case of ***Norah Nassozi & another Vs. George William Kalule*** (supra). The position of the High Court appears to be in consonance with the provision of section 92 of the Registration of Titles Act which provides that transfer of registered land is effected by the transferor signing transfer forms in favour of the transferee. Thus, legal interest in registered land can be transferred by deed only. This, in my view, does not apply to gifting of untitled land. See: ***Oyet Bosco & another Vs. Abwola Vincent, HC Civil Appeal No. 068 of 2016 (Mubiru, J.)***. Thus verbal gifting can suffice so long as it can be proved. It has also been held that the giving of gifts is a physical symbol of a personal relationship and an expression of social ties

that brings individuals together. Therefore, if the relationship between the donor and donee at the time of gifting is personal, then it's more likely to be a gift. See: ***Muyingo John Paul Vs. Abasi Lugemwa & 2 Others, H.C Civil Suit No. 24 of 2013.***

As noted, the evidence on record was that the Appellant's husband inherited the suit land upon the mother's demise, and so did the Appellant on her husband's death. Whereas there were variances in the Appellant's evidence as to when the actual inheritance happened, that is, whether it was in the early 1960s or thereafter as variously claimed by the Appellant, the Defence witnesses appear to have corroborated the Appellant's story that the Appellant, her husband and mother-in-law lived on the suit land in the 1960s and in the years after, until 1986 when they left. Thus, having inherited the suit land on the death of the husband, in my opinion, the Appellant's inheritance was perfectly lawful. As a widow, she enjoyed the right to inherit the husband's property. Her inheritance is perfectly legal and constitutionally protected under articles 26 (1), 31 (2), 33 and 45 of the Constitution of Uganda, 1995. The trial court thus ought to have considered the evidence adduced by the two sides in totality before making premature conclusion based on its purported findings at the locus which was not based on any properly adduced evidence. Needless to say, there is no evidence adduced at the locus supporting most of the trial court's findings at the locus.

In its summary findings at the locus, the trial court further asserted that the Appellant had lived on the suit land temporarily. With respect, the trial court failed to expound on how temporary the Appellant's stay was. No specific evaluation was done in this regard yet the evidence given in court was that, the Appellant had first lived on the suit land from about 1958 to 1960s, and thereafter, and only left in the year 1986. Some of the Defence witnesses, as noted, especially DW3, corroborated this, therefore, affirming that the Appellant lived on the suit land in 1960s to 1968. DW1 spoke of the period 1979 to 1985 (7 year stay) although elsewhere he contradicts himself by mentioning the period 1959 to 1962 (04 year stay only). Thus in such a case, the trial court's conclusion regarding the four years occupancy by the Appellant, with respect, is confirmatory of poor evaluation of the whole evidence adduced by the parties. The trial court strangely observes that he found from the locus that Amet Rapheal (the Appellant's husband) died in 2001 and that, that was the year the Appellant voluntarily left the suit land where they had lived for four years. There is obviously a problem with this finding. The learned trial Magistrate appears, with respect, to have turned himself into a witness because, he does not disclose who told him at the locus that the Appellant had lived on the suit land for only four years, and that she left voluntarily. In any case the locus record does not show that either side testified to the same effect. This is testament of poor conduct of the locus in quo proceedings.

The trial court ended up filling the apparent gaps by his own investigative findings from undisclosed sources. The conduct of the court at the locus in quo seriously flouted the rules and left a lot to be desired. See: ***Bongole Geoffrey & 4 Others Vs Agnes Nakiwala, Civil Appeal No. 0076 of 2015 (COA)***.

Therefore, the claim by the trial court that Amet died in 2001, was contrary to DW1's revelation that Amet actually died in the year 1994. The trial court, therefore, erred in finding that the Appellant and her husband lived on the suit land for only four years. The trial court also erroneously found that the Appellant and her family had left the suit land voluntarily. The evidence by the Appellant, which was supported by others, was that, she was forced to exit the area due to circumstances not of her own making. Although the circumstances varied in that the Appellant attributed the exit to the LRA insurgency, while PW2 and PW3 as well as some Defence witnesses, attributed it to a homicide committed by a member of the Appellant's household, such in my view, remain an involuntary factor. I thus find that the Appellant's departure from the suit land in 1986 was forced by the circumstances beyond her control. It is now well established that involuntary abandonment of land does not extinguish a person's interest in it. See: ***Aria Paul & another Vs. Nyeko Lonzino Omoya, HC Civil Appeal No. 028 of 2021***. Thus, on returning years later, the Appellant had a right to claim what originally belonged to her.

The trial court also made a finding at the locus that, the Respondents had lived on the suit land for 31 years from 1987 without being challenged by the Appellant. To the trial court, their long stay meant the Respondents were in adverse possession. With respect, this was erroneous. First, whereas the Respondents pleaded they had been in long possession of the suit land, nowhere did they plead adverse possession as a Defence or so as to support their right to a counterclaim. In my view, long possession per se is not the same as adverse possession. Adverse possession means the enjoyment of real property with a claim of right when the enjoyment is opposed to another person's claim and is continuous, hostile, open and notorious. See: ***Blacks Law Dictionary, 9th Ed. P. 62***. In the instant case, therefore, the Respondents merely pleaded the fact of long possession without purporting that their possession was known to the Appellant who acquiesced to it. See: ***Hope Rwaguma Vs. Jingo Mukasa, HCCS No. 508 of 2012 (Bashaija, J.); Kintu Nambalu Vs. Efulaimu [1975] HCB 222.*** Thus having not expressly pleaded adverse possession, the trial court erred in finding that the Respondents were in adverse possession of the suit land. In my opinion, a court should not base its decision on unpleaded matter. Therefore, founding a court decision on unpleaded matter or on issue not properly placed before court for determination constitute an error of law. See: ***Attorney General Vs. Paul Kawanga Ssemogerere & Zachary Olum, Constitutional Appeal No. 3 of 2004 (SCU) (Mulenga,***

JSC); Julius Rwabinumi Vs. Hope Bahimbisimwe, Civil Appeal No. 10 of 2009 (SCU) (Katureebe, JSC (as he then was); Ms Fang Min Vs. Belex Tours & Travel Ltd, Civil Appeal No. 6 of 2013 (SCU) (Dr. Odoki, Ag. JSC).

In the instant case, therefore, the trial court ignored the uncontroverted evidence that the Respondents took advantage of the Appellant's involuntary abandonment of the suit land in 1986, to divide it amongst themselves in the year 1987. There is no evidence that the illegal division was made known to the Appellant and she acquiesced to it. There is on the contrary, abundant evidence that the dispute erupted in 2002 and the trespass started in 2007. Whereas the Respondents divided the suit land in 1987, it appears their use thereof was disrupted by the LRA insurgency, as attested to be the Defence, driving them into concentration camps. It is thus safe to infer that, the Appellant discovered the unlawful acts of the Respondents only in the year 2002 and immediately challenged it in the Local Council Courts, albeit unsuccessfully. Thereafter, she sought redress from the Chief Magistrate of Gulu H/W Praff who ordered a retrial before a Magistrate Court. In the circumstances, the trial court erroneously misapplied the principle of adverse possession to the dispute, to find for the Respondents. The Respondents, in my Judgment, were not in adverse possession.

The trial court further held that the Appellant sat on her rights for so long. With respect, this was an error. This is because upon learning about the illegal activities of the Respondents on the suit land, the Appellant challenged it. The whole period after 1987 when the Respondents divided the suit land, was that of insurgency during which no meaningful challenge of the Respondents' acts could be taken, had it been made known to the Appellants, which was not the case, on the evidence. The Respondents also appear to concede that they went into IDP camps, and that the dispute started only in the year 2002. Thus the LC Court proceedings that the Appellant launched is testament of the Appellant's challenge of the Respondents' illegal acts. She could not, therefore, be taken to have sat on her rights for too long, as found by the trial court.

The trial court concluded on the basis of the impugned findings at the locus in quo, that, the Appellant had failed to prove her case on the balance of probabilities. I respectfully disagree. On the evidence adduced, the Appellant's evidence was more credible than the Respondents'. The Respondents merely pleaded the year 1949 contending that their father settled on the suit land at the time. However, they never adduced evidence to prove the claim. The year 1949, therefore, remain a pleaded matter without proof. The Respondents' evidence revolved around the events of 1987 onwards, and not prior. The year 1987 becomes critical because it followed the year 1986 when the Appellant had involuntary exited the suit

land. Thus unlike the Respondents, the Appellant led clear and convincing evidence of her 1960's occupancy of the suit land, and the occupancy during the years thereafter. Interestingly she was supported by some of the Defence witnesses. I thus find that the Respondents took advantage of the Appellant's involuntary exit from the suit land, to divide it amongst themselves. This was wrong as they had no right to do so. Of course when the Appellant returned and sought to repossess the suit land, she was resisted. I hold that the Respondents had no basis for resisting the Appellant's quest to reclaim what she had inherited from her late husband. In my view, having acceded that the Appellant at one time occupied and used the whole of the suit land, the inescapable conclusion is that, the Respondents failed to show that the Appellant hitherto occupied and used the whole land without any claim of right. Thus the Respondents' claim that the suit land was a gift to the Appellant's relation by their own father and uncles, with respect, was unsupported. If it were true, as rhetorically posed, where were the Respondents settled during the period of the Appellant's exclusive occupancy of the so-called gifted land? In my opinion, the Respondents or their so-called predecessors in title, never owned or settled on the suit land prior to 1987 but the Appellant and her relations. Thus on the evidence adduced, I find that the whole of the suit land originally belonged to Cilo Yenge who gifted it to her sister (the Appellant's mother –in-law) from whom Amet (the Appellant's husband) inherited, and ultimately the Appellant. In any case, the locus sketch map

show that Cilo's land neighbor the suit land to the West and South. This lends more credence to the fact that Cilo at one owned the whole of the suit land which he gifted to a sister during his life time. The Defence didn't call any family member of Cilo Yenge to rebut this evidence.

In conclusion, I hold that the Appellant was able to prove her claim to the suit land on a balance of probability. I, therefore, allow the appeal in its entirety and set aside the Judgment, decree and orders of the Magistrate Court. Consequently, I make the following declarations and orders;

1. The Appeal is allowed and the Judgment, decree and orders of the Learned Magistrate Grade One, dated 11 October, 2019, are set aside.

2. The Respondents' counterclaim stands dismissed with costs to be paid to the Appellant but limited to disbursements only since she enjoyed only partial legal representation on *pro bono* scheme in the trial court.

3. Civil suit No. 0016 of 2012 is allowed and the Appellant is hereby declared to be the lawful owner of the suit land measuring six acres as found by the trial court and situate at Tangu Opota, Lalur-Onywal Village, Latin-ling Parish, Omot Sub-County, Agago County,

Agago District. The Appellant is free to deal with the suit land as she pleases.

4. The Respondents are hereby declared trespassers on the suit land and shall give vacant possession thereof within 90 days from the date hereof.

5. The Respondents and their agents or those claiming under them shall be evicted from the suit land in the event of failing to give vacant possession as ordered in 4 above.

6. A permanent injunction is hereby issued restraining the Respondents and those claiming under them from further trespass and interference with the Appellant's ownership of the suit land and from any interference with the Appellant's or her agent's activities thereon or activities of those lawfully claiming under the Appellant.

7. The Appellant is awarded general damages of shs. 15,000,000 for deprivation of the use of the suit land and trespass.

8. The general damages in 7 above shall carry interest at the rate of 8% per annum from the date of this Judgment till full payment.

9. The Appellant is awarded costs of the suit in the Magistrates Court and costs in the High Court but all limited to disbursements only

given the *pro bono* legal services she received in court below and in this court.

Delivered, dated and signed in Court this 22nd February, 2024

Hkodw 22/2/2024

George Okello

JUDGE

Judgment read in Court

Attendance

Mr. Geoffrey Borris Anyuru, holding brief for Mr. Ogen-Rwot Simon Peter, Counsel for the Appellant.

Mr. Calvin Kilama, Counsel for the Respondents.

Appellant absent.

Representative of 1st deceased Respondent – Tabu Alex Mackay, in court.

2nd Respondent – absent (grandson – Bosco Otim, in Court).

3rd and 4th Respondents – present.

Mr. Ochan Stephen Court Clerk.

Hkodw 22/02/2024

George Okello

JUDGE