THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO.52 OF 2017

(ARISING FROM LAND CIVIL SUIT NO. 038 OF 2013, PADER GRADE ONE MAGISTRATES COURT)

OBUA VINCENT ::APPELLANT

VERSUS

1. **OKOT ALBINO**
2. **ABONGA JIMMY**
3. **ORYEMA MATHEW:::RESPONDENTS**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background

This is a first appeal by the appellant- a litigant in person against the Judgment and decree of the then Magistrate Grade I of Pader, His Worship Kibuuka Christian given on 06 December, 2017. The Appellant unsuccessfully sued the Respondents in the trial court over a piece of land. In his poorly drafted Plaint filed on 29 October, 2013, the Appellant had sought for a declaration that he owns a piece of land situate in Adoo Ward, (Wigweng Parish, Acholi-Bur Sub-County, Pader District). He claims the land measures approximately 40 acres. He prayed for vacant possession, an order of recovery of the suit land, general

damages, and costs of the suit. The Plaint has no statement of facts constituting the Appellant's cause of action, and did not plead facts showing that the trial court had jurisdiction, all contrary to the requirements of Order 7 rules 1(e) and (f) of the Civil Procedure Rules, S.I 71-1 (CPR). However, no objection was taken by the Respondents in the trial court, and rightly so in this appeal, in spite of their representation by counsel. Be that as it may, the Appellant's subsequent pleading, as I will point out, somehow subtly supplied the much needed fact on which his land claim was predicated although this could not cure the defects in the Plaint. The Respondents who had at the initial phase filed their joint Written Statement of Defence (WSD) by themselves on 07 November, 2013, sought to and amended the WSD on getting services of counsel. The amended Defence was lodged after about two and half years later on 18 June, 2015. The record shows that on 18 June, 2015, Mr. Jude Ogik, learned counsel for the Respondents orally addressed court, stating that he had initially prayed to amend 'pleadings' and so he had with him ready copy of the amended WSD for filing. Whereas the court record does not show the exact date when leave of court had been sought, the Appellant (Plaintiff) did not object to the amendment. He requested for more time to internalize the pleading and respond. The court allowed the amended WSD and granted two weeks for the Appellant to respond.

In the amended WSD, there was no titling of the pleading that would suggest that the Respondents were at the same time exercising their right to counterclaim. The Respondents averred that the 1st Respondent who is a parent

to the other Respondents, inherited the suit land, being their customary land, from the 1st Respondent's late father, a one Odwar Lalyang after his demise in the year 1975. The Respondents contended, they were born on the suit land and had had peaceful possession and quiet enjoyment before the Lords Resistance Army (LRA) war broke out. The Respondents denied that the suit land measures only 40 hectares but contended, the same measures approximately 50 acres. They averred that, an elder brother of the Appellant, a one Nyeko James, from about the year 1998 when displaced persons had returned from internally displaced persons camps (IDPs), started selling his own land, and on noting that he was left with less land, decided to encroach on the suit land. Nyeko James sued the Respondents in the Local Council Courts but lost at all levels (Parish, and Sub-County Courts). On further appeals to the Chief Magistrate and thereafter the High Court, Mr. Nyeko lost both appeals. The Respondents contended, having lost "their case" at all levels, the Appellant returned from Pajule and started trespassing on the suit land by forcefully cultivating and building grass-thatched houses thereon.

This court wishes to note that, the Respondents did not purport to plead the doctrine of *res judicata*. They continued to aver that they reported the Appellant to Police and was arrested and charged with threating violence, malicious damage to property and criminal trespass. Nothing however, is said about whether the matter was prosecuted in court. In their prayers, the Respondents urged that, considering all the pleaded events, the trial court ought to dismiss

the suit with costs for lack of merit and ought to declare the Respondents as the lawful owners of the suit land. They further prayed for damages and costs.

In his reply headed "Reply to the Defendants' Counterclaim", the Appellant reiterated his ownership claim. He further contended, he inherited the suit land in the year 2008 from Oryem Evarito (his father). As noted, this was the first factual averment tending to show the basis of the Appellant's purported cause of action. The Appellant denied that Nyeko James (who had unsuccessfully sued the Respondents) was his (blood) brother but a clan brother with his own land. The Appellant denied that the suit involving Mr. Nyeko related to the land at issue in the instant appeal. He denied the rest of the Respondents' averments, and reiterated his prayers.

Observations

I should observe that the Appellant's purported reply to the "Counterclaim" was misconceived because technically, there was no Counterclaim within the meaning of Order 8 rule 2 (2) and 7 of the CPR, which allows, inter alia, for a counterclaim to enforce a right or claim, whether the same sounds in damages or not. It also requires a counterclaim to be contain a summary of evidence, a list of witnesses, a list of documents and authorities, and must plead ground supporting the right to a counterclaim. It should be noted, a counterclaim carries the force of a cross action and thus a suit in its own right. See: ***Simon Tendo***

Kabenge Vs. Barclays Bank (U) Ltd & Phillip Dandee, Civil Appeal No. 17 of 2015 (SCU); ***Ngoma- Ngime Vs. Electoral Commission & Hon. Winnie Byanyima, Election Petition Appeal No. 11 of 2022 (COA); Aria Paul & Nyeko Geoffrey Vs. Nyeko Lonzino Omoya, HC Civil Appeal No. 028 of 2021***.

Therefore, whereas the Respondents purported to claim reliefs in their amended WSD, the claims were untenable at law and misconceived as there was no valid Counterclaim. Therefore, no reliefs could be granted on the basis of a non-existing Counter-claim. ***See: Olyel Bazil & Another Vs. Otto Justine & Another, HC Civil Appeal No. 43 of 2021.***

I have made these observations since there is no ground of appeal within which to canvass it. However this court has power under section 70 of the CPA to take account of such a material error apparent in the proceedings and judgment of the trial court especially where the error affects the merit of the case. In the trial court proceedings, I have noted that the trial court gave some reliefs to the Respondents under the guise of a non-existing counterclaim. I will say more about the reliefs in my concluding part of the Judgment.

The impugned Judgment

The trial court heard witnesses from both sides and visited the locus in quo in the absence of the Appellant. Court drew the sketch map, and wrote its Judgment on 06 December, 2017. The trial court found for the Respondents (Defendants) on all the issues. The issues framed were;

i) *Whether or not the Plaintiff (now the Appellant) is the lawful owner of the suit land?*

ii) *Whether or not the Defendants (now Respondents) trespassed on the suit land?* And

iii) *Whether there are any remedies to the successful party?*

In the final orders, the learned trial Magistrate declared the Respondents (Defendants) to be the lawful owners of the suit land. He issued a permanent injunction against the Appellant restraining him or his agents or persons claiming under him from interfering with the Respondents' peaceful enjoyment and ownership of the suit land. Court also awarded general damages of shs. 3,000,000 to the Respondents, plus costs of the suit. It declined to issue an eviction order, reasoning that the Appellant neither resided nor was he using the suit land.

It is against the above decision and orders that the Appellant preferred the instant appeal. He framed one ground of appeal thus:

5 ***The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence in the case and hence coming to a wrong conclusion thereby occasioning a miscarriage of justice to the Appellant.***

Representation

10 At the appeal hearing, the Appellant was represented by learned counsel Mr. Owor David Abuga. He lodged written submission. Court was informed that the first Respondent has since the appeal lodgment, passed on. The 3rd Appellant, Oryem Mathew being the eldest son of the deceased, was appointed by this court to represent the interest of the deceased. The Respondents were represented by
15 learned Counsel Mr. Jude Ogik. He too filed written submission. I have considered both submissions. I will not reproduce them in this Judgment since they revolve around their evaluation of the evidence.

Preliminary points of law

20 Mr. Ogik objected to the ground of appeal on two grounds. First, he argued that the ground is headed "tentative memorandum of appeal" yet no law provides for *tentative* memorandum of appeal. The second objection is that the ground as framed, is too general. Learned Counsel invited court to dismiss the ground of appeal (strike out). He went on to submit on the merits of the appeal without
25 prejudice to the preliminary objections.

In his response, Mr. Owor David Abuga addressed the second limb of the objection only. With respect, I was unable to comprehend the gist of counsel's submission. I found it very confusing, to say the least.

Resolution of the preliminary points of law

Whereas I agree that there is no place at law for a tentative or provisional memorandum of appeal, as has been held by this court in several cases (see: ***Otto Marcello Lundinya & 4 Others Vs. Kinyera Patrick, Civil Appeal No. 026 of 2017***; ***Kellia Obaya & another Vs. Ovuru Stephano, HC Civ. Appeal No. 02 of 2015***; ***Mayanja Grace Vs. Yusufu Luboyera [1977] HCB 133***; ***Muhutu George Vs. Mpengere Bulasiyo [1982] HCB 55***, ***Westmont Land (Asia) BHD Vs. the AG [1998-2000] HCB 46***) I think each case should be considered on its own facts and special circumstances. I note that in some decided cases, two documents had been lodged by the Appellants, one a tentative or provisional memorandum of appeal, and the other a Memorandum of Appeal. The Appellants in the particular cases sought to rely on provisional memorandum of appeal for the purposes of reckoning time within which to appeal to the High Court. Objections were taken on the competence of provisional/ tentative memorandum of appeals in those cases. The High Court held in the respective cases that provisional or tentative memorandum of appeal does not constitute an appeal. In the present case, the matter is quite different.

The Appellant lodged only one document titled "tentative memorandum of appeal" as constituting his appeal. During the hearing, he never purported to treat the document as temporary/ provisional. The Appellant is also shown to have drafted his own appeal document as he was unrepresented by counsel at the time. Whereas it is possible he might have been assisted by a person knowledgeable in legal matters, the document was poorly drawn. I see however no prejudice to the Respondent if the word "tentative" preceding "memorandum of appeal" is severed or ignored completely so that the appeal retains its substantive character as envisaged by law. In the circumstances, I do not agree that the impugned memorandum of appeal has seriously flouted the requirement of Order 43 rule 1 of the CPR. That provision if read together with rule 10 of O.43, requires that all appeals from the Magistrates Court to the High Court, take the form of a Memorandum of Appeal signed by the Appellant or his/her Advocate. Appendix F to the CPR provides for the Form which a Memorandum of Appeal should take. The Form of course does not carry the title *"tentative or provisional"* Memorandum. That said, I would apply the rules of procedure with reasonable elasticity to do justice in the matter. I would thus treat the word "tentative" as an unnecessary surplusage and a technicality that should not stand in the way of substantive justice. In any case justice is a virtue which transcends all barriers and thus rules of procedure or technicalities of law ought not to stand in the way of administration of justice. See: ***Acayo Santina Franca Vs. Obita Nickson, HC Misc. Application No.07 of 2020***. I thus invoke article 126 (2) (e) of the Constitution of Uganda, 1995, in this appeal, to save the

defective memorandum of appeal. See: ***Uganda Revenue Authority Vs. Stephen Mabosi, SC Civil Application No. 16 of 1995; Utex Vs. Attorney General, SC Civil Application No. 52 of 1995; Horizon Coaches Vs. Edward Rurangaranga & Mbarara Municipal Council, SCCA No. 18/ 2009.***

Accordingly, I over-rule the first preliminary point of law.

The second objection relates to the general nature of the ground of appeal. I agree that the ground is too general. I am cognizant of the legal principles relating to the farming of the grounds of appeal. Where an appeal challenges the manner in which the trial court evaluated the evidence, it should clearly pinpoint how the trial court is alleged to have failed to evaluate the evidence by stating instances of non-evaluation or improper evaluation. Thus whereas I agree that the present ground of appeal as framed, is too general, this court exercises discretion whether or not to strike out an offending ground of appeal. Such discretion ought to be exercised judiciously. See: ***Beatrice Kobusingye Vs. Fiona Nyakana & Another, Civil Appeal No. 5 of 2004 (Supreme Court of Uganda); Otto Marcello Ludinya & 4 Others Vs. Kinyera Patrick, High Court Civil Appeal No. 026 of 2017.***

In the instant case, I have considered that the Appellant drafted his own memorandum of appeal. The appeal also relates to land matter where the question of ownership must be resolved in this appeal one way or the other. I

would therefore, excuse the ground of appeal and consider it on merit. Accordingly, the second objection is disallowed.

Merits of the appeal

The duty of this court as the first appellate court from the decision of the Magistrate Grade 1, as in the case instant, is well settled. The parties' expectations of this court in as far as its duty is concerned, is also clear. The parties are entitled to obtain from this court, the court's own decision on issues of fact and issues of law. In the case of conflicting evidence, this court has to make due allowance for the fact that it has neither seen nor heard the witnesses testify, and make allowance in that regard. Court must, 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)***.

In ***Coghlan Vs. Cumberland (1898)1 Ch. 704***, a decision followed in the Fr. Narensio case (*supra*), 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."

In the case of ***Pandya Vs. R [1957] EA 336***, the passage in the above English case, was cited with approval. Court noted that the principles declared above are basic and applicable to all first appeals. Thus in the case of **Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10 of 1997**, the Supreme Court of Uganda 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 stated, failure by a first appellate court to evaluate the material as a whole constitutes an error of law.

In this appeal, I shall set out in some detail, each party's case as per the evidence adduced. I note that at the scheduling conference conducted on 08 May, 2015, there were some agreed facts. It was for example agreed that both parties are in occupation of the suit land. They also agreed that the land is held under customary land tenure. The parties further agreed on the size of the suit land

although the record does not state what size they had in common. Thus whereas the Appellant had pleaded that the suit land measures approximately 40 *hectares*, the Respondents contended, it measures approximately 50 *acres*. In Court's view, a simple conversion from acres to hectares, shows that 50 acres equals to 20.24 hectares, and 40 hectares equals to 98.842 acres. So the Appellant claims that the land is bigger than that asserted by the Respondents. Be that as it may, the Appellant narrowed the disputed area to only 03 acres.

In his testimony, the Appellant (PW1) who was 46 years old as of 19 November, 2015 stated that, he inherited the suit land from his father, a one Oryem Evarito. The father died from an IDP camp at Amida. PW1 had at one time also settled in the camp. When he was going to the camp, he left from the suit land. On returning from the camp, the Respondents did not want to see the appellant resettle on the suit land. They were claiming that a case over the suit land had been decided in their favour (a case between Nyeko James and the Respondents). According to PW1, the suit that Nyeko James lost was in respect of another piece of land (owned by Latigo) and not the suit land. PW1 volunteered that, the Respondents had come to the suit land initially in the year 1962. He concluded that the Respondents encroached on about three acres of the suit land (that is, 1.214 hectares). In cross examination, PW1 stated that his father died in the 1980s and was buried at Amida IDP camp, about 18 kilometres away from the suit land. The late father was buried at a relative's place because there was no transport for bringing the body back home. He asserted that the Respondents

were cultivating the disputed three acres. In 1998, PW1 was on the suit land but left for Pajule IDP camp in the year 2000, and only returned in 2011. The Respondents had no problem with PW1's father when he was still alive.

PW2 Odong Alex, a 55 year old (as at 08 July, 2016) testified that he neighbours the suit land to the North, which he asserted, is the Appellant's land. He stated that the Appellant inherited the suit land from Evarito Oryem (the Appellant's father) and has been there since the year 1960. PW2 claimed there are mango trees on the suit land as well as the homestead of the Appellant and his father. In cross examination, the answers PW2 gave are not clear and does not convey the questions he might have been asked. For instance, regarding the burial of an unnamed person (I think the Appellant's father), PW2 stated that the person was buried at the home of his relatives in about the year 2006. PW2 also stated that there was no transport to move the remains of the deceased for burial in Adoo Ward (not clear if he meant the suit land or elsewhere). Asked about the concluded civil suit between Nyeko James and the Respondents, PW2 conceded, he was a witness in that matter but the dispute did not relate to the suit land. Regarding a one Odida, PW2 stated, Odida died and was buried on the suit land. At the time, he said Odida died in the 1970s and there was no insecurity.

In their Defence, the 1st Respondent (Okot Albino) who was 89 years old (as at 12 December, 2016) testified as DW1. He stated that he got the suit land in 1991 when it was vacant and he did not inherit it from anyone. DW1 asserted, there are mango and orange trees on the suit land. There were also four grass-thatched houses thereon. DW1 buried his parents and three children on the suit land. According to him the suit land measures approximately 50 acres, and is situated in Adoo Ward where DW1 was living. In cross examination, DW1 denied that the Appellant has land next to Ouma's home (the neighbor to the East of the suit land). DW1, however, asserted, the Appellant stayed in the area because of DW1 and DW1 gave "him" (apparently referring to the Appellant's father) land near DW1-a small portion for residence. DW1 stated that at the time, the Appellant was in Pajule at his in-law's home. DW1 however, conceded he knew the Appellant since the Appellant had come to DW1's "place" long ago, about six years ago. DW1 denied that the Appellant ever went to an IDP camp. Elsewhere DW1 claimed the suit land is for his father. The Appellant's father came to his uncle's place (not clear whether he meant the suit land). In re-examination, DW1 asserted that he gave temporary settlement to the father of the Appellant. The Appellant's father died and was buried in Man-Wak in Kitgum District. DW1 further asserted that the mother (of the Appellant) died and was buried on the land that DW1 had given.

DW2 Abonga Alex (a 35 year old as at 24 January, 2017) testified that the suit land is 50 acres and belongs to himself (it is not clear whether DW2 is the same

as the 2nd Respondent. Note that the 2nd Respondent is Abonga Jimmy not Alex). DW2 asserted that the suit land belongs to his grandfather (referring to Odwar Lalyang the father of DW1. Note that DW2 is a son of DW1). According to DW2, the grandfather got the suit land in 1961. The grandfather died in 1975 and DW1 (Okot Albino) inherited from him. According to DW2, the Appellant came from ; *'Manhoko'* together with his father and was staying on the land with DW2's grandfather who gave them some land temporarily in 1989. DW2 described the features on the suit land, that is, mango trees, pawpaw trees, avocado, guava, and palm trees, plus two permanent and nine grass-thatched houses belonging to the Respondents. DW2 also asserted that the grandfather (Odwar Lalyang) and grandmother (not named) and children of DW2's brothers, are buried on the suit land. In cross examination, DW2 maintained that the land is approximately 50 acres and all of it belongs to them. He asserted that his grandfather came to the suit land in 1961, and the father of the Appellant went to DW1's grandfather for land. DW2's grandfather used to cultivate the entire suit land. DW2 asserted that they have possessed the suit land since 1961. In re-examination, DW2 stated that the father of the Appellant asked for the land in 1989. The Appellant's father left the suit land and was buried in Pajule, but had constructed some grass-thatched houses (DW2 does not state whether the construction were on the suit land or elsewhere). DW2 conceded, he was told (some of the things he testified about) by his father, since DW2 was not yet there (not yet born). At the end of re-examination, DW2 gave an answer *"approximately two acres"*. It is not clear whether DW2 was responding to a question regarding how much of the suit

land was given to the Appellant and his father or he was responding to some other question.

The third witness Oryema Mathew (the 3rd Respondent) who was 50 years old as at 24 January, 2017 testified that he was born on the suit land and grew up there. The land measures 50 acres. The land was occupied by Odwar Lalyang the grandfather of the DW3 before DW3 was born. DW3 inherited from his grandfather and together with DW3's father (Okot Albino), the family have been living on the suit land. There are twenty mango trees on the suit land and the grave of the grandfather is visible on the suit land. DW3 stated that there were approximately 15 grass-thatched houses and one permanent house on the suit land. According to DW3 the Appellant lived within the same Ward in 1989. The Appellant lived at his own home where he was given (land) by the grandfather of DW3. The gift was temporary in 1979, before the benefactor died. In cross, examination, DW3 stated that his grandfather settled on the virgin land (at the time) in 1961 although DW3 was not yet born. In re-examination, DW3 stated, his grandfather settled on the suit land in 1961 and in 1989. He asserted that, the Appellant is not resident on the suit land but the Appellant's children.

DW4, Olwenyi Paulino, a 79 year old (as at 28.02. 2017), testified that the dispute relates to land within Adoo Village. The land measures about 40- 50 acres. According to the witness, the land is for the late Lalyang Odwar and his son the

1st Respondent (Okot Albino- now deceased) inherited it. DW4 did not know how the Appellant came to acquire the suit land. The Appellant is a son to DW4's uncle (a one Latigo), but is not related to the Respondents. The Appellant used to stay with Latigo. Latigo was a clan-mate of the Respondents. The Appellant had some challenges with his uncle, so he decided to request for some piece of land from Lalyang Odwar, approximately 3-4 acres. Lalyang gave the Appellant land temporarily and it was not documented. DW4 was present because he shares the boundary in the south with (unnamed person, although it appears he meant, Lalyang Odwar). According to DW4, it was in the year 1975 (when the land was given to the Appellant.) The grave of Lalyang and his deceased wife, and deceased children, are on the suit land. The homestead of the Respondents are on the suit land. There is also a grave for the relative of the Appellant- the late son of the Appellant's brother, on the suit land. DW4 claimed, the Appellant's father was also buried on the suit land. DW4 stated that Odwar Lalyang came (on the suit land) in 1961 and died in 1975, and his son, the first Respondent has taken over and was at the material time living on the suit land. In 1989 the Appellant's father (Oryem) shifted to 'Man-Woko' in Kitgum District and was buried there. The Appellant then returned from 'Man-Woko' (to the suit land). In cross examination, DW4 stated that he was present when the Appellant's father asked for the suit land. The request was verbal. The Appellant's father requested to stay temporarily and left thereafter. In re-examination, DW4 stated that the father of the Appellant left the suit land for 'Man-Woko' in Kitgum but the Appellant was at the time DW4 testified (28.02. 2017) staying on the suit land.

Okumu Angello, a 78 year old, testified as DW5. He stated that the suit land is located within Adoo Ward. He did not know the size but the land owner Lalyang passed away and his children (the 1st Respondent) inherited it. Lalyang got the land in 1961. DW5 started knowing the Appellant in 1989 when he came with his father and settled there. Lalyang gave the Appellant and his father about 10 acres of the suit land. They were given during the subsistence of the insecurity caused by the Karimojong (cattle) rustlers). After the situation calmed, the Appellant and his father went back. The Appellant's father went back to 'Man-Woko' from where he died. In cross examination, DW5 stated that he knew about the matter because Lalyang was the husband of DW5's auntie. DW5 also claimed that at the material time of his testimony, he had an old homestead on the suit land and that he grew up as a member of the household of Lalyang and lived there for long. The Defence then closed its case. The trial Court visited the locus in quo.

I must state at the onset that this appeal hearing proceeded on the basis of signed hand-written record of the proceedings which was forwarded along with the case file. Despite the requests for typed record by the Deputy Registrars of this court in succession, no record was typed and availed to this court. Apparently the trial Magistrate was long transferred from the station and the successor was not helpful. It is only the trial court Judgment which is typed and certified. I have however, been able to read the hand-written record and found it legible and signed by the trial Magistrate. No counsel expressed any problem

with this appeal proceeding on the basis of the hand-written but signed record of the proceedings. Both learned counsel appears to have perused and based on the same to present their written arguments. Whereas hand-written record is not encouraged and in normal circumstances the record of the trial court ought to be typed and certified for an appellate court, I have found no legal bar to this court proceeding on the basis of hand-written record that have been accepted by the parties. That is the only way this appeal hearing could take off, moreover when the Judgment was long given in December, 2017. The land question could not be delayed further. I note that 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 ordinarily should have been taken and certified during the trial proceedings under Order 18 rule 6 of the CPR. I, however, as stated, find no legal bar to a court proceeding on the basis of the Hand-Witten record in the special circumstances. Sometimes insisting on typed record of the proceedings when none is forthcoming from the trial court, especially where the file is already placed before the appeal Judge, would only serve to delay and deny disputants in appeals substantive justice.

The above aside, I have noted that the trial court in some instances seriously flouted the provision of Order 18 rule 6 of the CPR in the manner the evidence was taken. The rules of civil procedure requires a court to record the evidence of a witness, not ordinarily in the form of question and answer but in a narrative. The only exception is provided for in Order 18 rules 8 and 9 of the CPR where a

question and answer approach may be adopted for special reasons, for instance, where a question is objected to but the court allows the question to be put to a witness. In that case, the court shall record the question, the answer, the objection, and the name of the person objecting.

In this case, I have noted instances where some questions are recorded but the answers given by witnesses are incompletely recorded, while in others, the answers lack prefatory. Again the question and answer approach were not strictly followed because of any purported recorded objections and yet no reason is given by the trial court for adopting that exceptional mode of recording evidence. Thus the style adopted by the trial Magistrate did not follow the rules. Elsewhere, in some instances, no questions were put by the trial court to witnesses where vague or incomplete answers were given, just for clarity's sake. In my view, nothing stopped the learned trial Magistrate from seeking clarity from witnesses during examination. Putting question to witnesses is tenable within the provision of section 164 of the Evidence Act Cap 6. The common law duty of a Judge (and a Magistrate) during the examination of witnesses is aptly reechoed in the wisdom of Lord Denning MR in the case of **Jones Vs. National Coal Board [1957] 2 QB 553**, where the Law Lord observed:

"...**even in England, however, a Judge is not a mere umpire to answer the question 'how's that?' His object above all, is to find out the truth, and to do justice according to law....A judge is not only entitled but is, indeed, bound to intervene at any stage of a witness' evidence if he feels that, by reason of the technical**

nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying." (Underlining is for emphasis.)

The above notwithstanding I have been able to understand the record although the learned trial Magistrate could have done better.

The trial court noted that it would visit the locus in quo on 27. 03. 2017. However the locus sketch map shows that the locus in quo was visited on 19 June, 2017. The trial court also noted that the Appellant was absent at the locus. However I have noted that there is nothing to show that the Appellant was notified of the changed date of the locus visit. The trial court observed that the Defendant (not clear which of the three) was at the locus. The court then remarked:

"Court has come to visit the locus in quo, to identify features on the suit land as claimed by the parties in court. We may consider witnesses, if any. If not, we shall proceed to see the suit land. Action of the Plaintiff not to be at locus is at their (sic) peril, for court cannot move 70 kms for him to absent himself upon notice."

As I have stated, there is no proof of notification sent to the Appellant to attend the scheduled locus in quo sitting.

The record shows that after the remarks, the trial court proceeded to see the features on the suit land. The court again remarked:

"Let's proceed to see the features on the suit land in the presence of the neighbours and local leadership."

I should perhaps point out that, in practice where the locus date is fixed in court, parties are presumed to have taken note of the date although usually a letter is still sent out to the parties or their counsel, reminding them to attend the scheduled locus sitting. The letter is normally copied to the Officer in charge of the Police Station nearest the suit land, who is requested to provide security. Local leadership is sometimes notified, especially the Local Council 1 Chairperson of the area. This is of course not an invitation for them to participate in the exercise but to be aware that court is visiting their area to conduct judicial business. It should be recalled that locus in quo proceedings is purely judicial proceedings as court sits at the place in dispute in the presence of the parties, their lawyers, and their witnesses who testified in court, if parties wish them to clarify on any features mentioned in court.

In the instant case, by the trial court proceeding to see the features on the suit land in the presence of the neighbors and the local leadership, court flouted the rules on the conduct of locus in quo proceedings. It appears the court turned the proceedings into a meeting of neighbors and the local leadership with the Respondents and court. The long attendance list confirms this. Whereas in practice neighbors usually gatecrash such proceedings, a court should ensure

they are not allowed to say or do anything that could influence court. Where they make unsolicited remarks, court should advise them against it, or ignore them all together. It is only witnesses who testified in court who should be allowed to clarify on matters at the locus, if any, for locus proceedings is not a public meeting where opinions are sought from members of the public. See: ***David Acar & 3 Others Vs. Alfred Acar Aliro [1982] HCB 60***.

Therefore, although not framed as a ground of appeal, I find procedural defects with the manner in which the locus in quo proceedings was conducted by the trial court. And this court is duty bound to point out such defects in proceedings as they constitute errors of law. It has been held that a court commits an error of law when it ignores or misapprehends or misapplies a pertinent law or principles of law; or misapprehends the nature, quality, or substance of the evidence; or draws wrong inferences from the proven facts. This was stated by the East African Court of Justice (Appellate Division) in Civil Appeal No. 02 of 2019: ***The Attorney General of the Republic of Burundi Vs. The Secretary General of the East African Community & Hon. Fred Mukasa Mbidde***. See also: ***Angella Amudo Vs. The Secretary General of the East African Community, [2012-2015] EACJLR 592***.

Although not a ground of appeal, this court will still consider in its rendition the matter as part of its duty to re-evaluate the evidence on record because, the

judgment of the trial court, as I will demonstrate shortly, is indicative that the court alluded to some impressions it drew from the locus in quo, although the record is clear that the trial court never recorded any evidence from there. Thus this court will consider whether there is any independent evidence to support the Judgment of the trial court notwithstanding the purported findings at the locus. See: section 166 of the Evidence Act Cap 6.

In its Judgment, the trial court summarized the various testimonies of witnesses. It noted that its visit of the locus was to contrast between the evidence adduced in court and what existed on the ground before writing its judgment. This was a false start, to say the least.

The land ownership question

In resolving the issue regarding whether or not the Appellant (Plaintiff) is the lawful owner of the suit land, the trial court reversed the issue to read *"who is the lawful owner of the suit land?"* To my mind, this suggests that the Respondents (as Defendants) had also instituted a cross action thus, as between the disputants, the court was duty bound to resolve who of the two owns the suit land. This was far from the pleading before the trial court because, as noted, there was no counterclaim. The trial court therefore wrongly exercised its powers to amend issues under O.15 rule 5 (1) of the CPR. The rephrasing of the issue was thus unwarranted.

Be that as it may, the trial court proceeded on the premise that the land at issue is the whole 40 hectares as claimed by the Appellant or the entire 50 acres as averred by the Respondents. This was erroneous because, from the testimony of the Appellant who was the party suing, the land at issue was only 3 acres. The trial court, therefore, ought to have narrowed the dispute to 3 acres and not the whole. The Court thus started off its judicial rendition from a wrong plane. It misapprehended the facts.

The trial court proceeded to opine that the evidence adduced in court and the court observation at the locus in quo, presented untruthfulness on the part of the Appellant. The trial Court singled out the fact that whereas the Appellant claimed to be resident on the suit land, he was in fact not, at least from the locus observation. The trial court noted, having observed no trace of the Appellant on the suit land, he had lied. Court asserted, the homestead the Appellant was not on the suit land.

With respect, I find serious flaws in the trial court findings. First, the purported findings is not borne out of any record of the trial court. Thus the so-called findings could be anything as there is no written record to support it. I should emphasize that a Judgment of court must be rooted on evidence and not on what court thinks it remembers from its impressions made from the locus. Any impression of court must have been recorded. I think the trial court flouted

guideline 3 (d) and (e) of the Practice Direction No. 1 of 2007 which guides trial courts in the conduct of locus in quo proceedings in land matters. The Practice Direction provides that while court is at the locus in quo, it ought to *"record all the proceedings at the locus in quo; and record any observation, view, opinion or conclusion of the court including drawing a sketch plan where necessary."* The Practice Direction was reproduced in the case of ***Bongole Geofrey & 4 others Vs. Agnes Nakiwala Civil Appeal No. 0076 of 2015*** by the Court of Appeal of Uganda.In the case of ***William Mukasa Vs. Uganda (1964) EA 698 at page 700***, the then Chief Justice of the Republic of Uganda, Sir Udo Udoma had this to say on the conduct of the locus in quo:

" A view of a locus in quo ought to be, I think, to check on the evidence already given and where necessary and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view, a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."

In my view, the learned trial Magistrate allowed unrecorded view at the locus, if at all, to cloud its judgment and substitute the evidence adduced in court. The trial court wrongly concluded that the Appellant had lied simply because the

court did not find the Appellant at the locus in quo. It should be recalled that, both parties had agreed during the scheduling conference held on 08 May, 2015 that both parties were in occupation of the suit land. The parties were therefore bound by the agreed fact. Consequently, the trial court had no reason to refuse it. Given that it visited the suit land two years after the evidence in court were taken (on 19 June, 2017) and after the scheduling conference, the trial court should have given allowance for the fact that circumstances could have changed between the time of the court trial and the locus visit. Moreover, if court felt it was absolutely necessary, it should have sought clarity as to why the Appellant was not on the suit land yet it was agreed fact two years before, that he was in fact in possession alongside the Respondents. Thus the holding that the Appellant lied in court, with respect, is baseless.

The trial Court also ought to have considered other pieces of evidence on record. It was conceded by DW3 Oryema Mathew in court that, although the Appellant was not on the suit land, his children were there. DW1 (Okot Albino) conceded in court (two years before the locus visit) that he had given the Appellant's father some land, although he claims it was for temporary settlement/ residence. DW1 had also conceded that the mother (of the Appellant) died and was buried on the suit land. DW2 (Abonga Alex) had testified that the father of the Appellant asked for land in 1989 from the father of DW1 (Okot Albino) who happens to be the grandfather of DW2 and DW3, and that the grandfather gave the Appellant's father land in 1989 albeit 'temporarily'. DW3 (grandson of the benefactor) also

spoke about the 1989 gifting of land to the Appellant by Lalyang Odwar (grandfather of DW2, DW3 and father of DW1). This view was shared by DW4 who said 3-4 acres were given to the Appellant but it was given in 1974 before Lalyang (the benefactor) died in 1975. To DW4, the Appellant stayed with his father in 1975 'temporarily' and left in 1989 (after 14 years). DW5 also testified to the same effect- that the Appellant and father settled on the suit land allegedly in 1989 and were given 10 acres by Lalyang.

From the above pieces of evidence, the purported finding that the Appellant was not present on the suit land on the day of the locus visit, aside from not having been predicated on any record, in my view, was irrelevant in as far as resolving the Appellant's claims to the three acres of land, is concerned.

I will next consider the claim of temporary "gifting" of the suit land to the Appellant or his father or both, by the 1st Respondent's father- Lalyang Odwar during his life time.

Whereas there is consistent Defence evidence that land was given to the Appellant and his father by Lalyang Odwar, the Defence witnesses did not agree on the year this happened, and whether it was temporary or permanent gifting. This is what I seek to unravel next. According to DW1 who was 89 years old, he first of all claimed that it was he who gifted the land to the Appellant's father in

1989 on temporary basis. This witness at the same time claimed that he inherited the land in 1991. I think, with respect, DW1 had faded memory given his age. He first denied inheriting land (50 acres) from anyone and later changed position. Although DW2 supported his father (DW1) regarding the year 1989, DW2 stated that the land was gifted by Lalyang Odwar (grandfather) to the Appellant's father (Oryem Evarito). Lalyang had come to the area in 1961 but died in 1975. So in court's opinion, the benefactor could not have gifted the land in 1989 when he was long deceased (in 1975). DW3 on his part testified that the land was gifted by Lalyang in 1979 and in 1989 the appellant lived there. DW3 claimed the grandfather (Lalyang) settled in the area in 1961 and 1989. Again, whereas the 1961 year of settlement of Lalyang in the area appears correct as other witnesses spoke about it, it is inconceivable that he could have also settled in 1989 when he was long deceased. It is also not correct to claim he gave land in 1979 as DW3 purported. DW4 stated that Lalyang gifted the land in 1974 and died in 1975. Lalyang gave about 3-4 acres temporarily. I find the version by DW4 most believable given that it agrees with others who said Lalyang died in 1975. Since all Defence witnesses agreed that Lalyang gave land to the Appellant and his father, he could not have given after his death but during his life time. I thus take the year 1974 as the year of gifting. I reject the claims that Lalyang gave the Appellant and his father the suit land in 1989 or 1979. The 1989 claim was also made by DW5. However, the witness claimed 10 acres was gifted by Lalyang, a claim I find out of range with the 3 acres being contested by the Appellant.

The next question is whether this was a gift intervivos. Whereas the Defence witnesses claims the gift was temporary, I do not think so, on the evidence. Taking the year 1974 as the year of gifting, by the time the benefactor (donor) passed on, he had not revoked the gift. Second, there is evidence that the donees lived till 1989 and left due to circumstances but not completely, as the children of the Appellant remained on the suit land. Third, the mother of the Appellant died and was buried on the suit land, at least according to DW1. The son of the Appellant's brother also died and was interred on the suit land. The mere fact that the Appellant's father (Oryem Evarito) migrated to 'Man-Woko' in Kitgum where he died and was interred, does not mean the gifted land reverted to the donor as it was never the case during his life time. At the time DW3 testified, he conceded the Appellant's children were resident on the suit land. DW4, Olwenyi Paulino stated that as at 28.02. 2017 (when he testified), the Appellant was living on the suit land. That was also an agreed fact. Whereas Okumu Angello DW5 stated in court that the suit land was given by Lalyang to the Appellant and his father during insurgency caused by cattle rustlers and that the duo left after the situation had calmed, I find the claim not supportive of any view that the gift reverted to the family of the donor. In any case the 10 acres gifting claimed by DW5, was exaggerated and it appears he was less knowledgeable about the precise arrangement. The mere fact that the Appellant and his father are said to have gone back to 'Man-Woko' where the father died, did not mean that the Appellant was barred from returning to the suit land. The son of the donor that is, DW1 and his children DW2 and DW3 appear to have crafted a plan of claiming

the gift back, after the death of the donor, contrary to the wishes of the donor who never revoked the gift during his life time. I think such a conduct should be discouraged by a court of justice.

In my Judgment whereas I have found the Appellant's claim that he inherited the suit land from his father not far-fetched as he did so on the death of the father, but the fact remains that, the suit land was gifted to his father by the father of DW1 (Odwar Lalyang). That does not mean the gift must be revoked by those who never gave it out, that is, the Respondents. They have no such power to do so. The law regarding a gift inter vivos was stated by Mubiru, J., in the case of ***Oyoo Francis Vs. Olanya Martin, Civil Appeal No. 05 of 2017***. While deferring to foreign jurisprudence, the court stated that an inter vivos gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift. See: ***Standard Trust Co. Vs. Hill, [1992 2 W.W.R 1003, 1004 (Alta. Sup. Ct. App D).***

A gift thus involves an owner parting with property without consideration. Regarding land, a gift inter vivos is a voluntary conveyance of land from one person to another, made gratuitously, and not on any consideration of blood or money. See: ***Blacks Law Dictionary 4th Ed. P. 187***. A gift inter vivos of land

may thus be established by evidence of exclusive occupation and user of land by the donee during the lifetime of the donor. A gift is perfected and becomes operative on its acceptance by the donee and such exclusive occupation and user may suffice as evidence of right. It has been held 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 however, appears to be a 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 view which represents the position under English law appears to have been followed in Uganda. See: ***Norah Nassozi & another Vs. George William Kalule*** (supra). Thus regarding titled land, the position that a gift of land inter vivos be by deed appears to be in sync with the provision of section 92 of the Registration of Titles Act which provides that, transfer of registered land can only be effected by the transferor signing transfer forms in favour of the transferee.

However, the above the treatment of the matter does not apply to untitled land whose treatment appears to be different, as gifting of untitled land is not predicated on a deed for its legal effect. See: ***Oyet Bosco & another Vs. Abwola Vincent, HC Civil Appeal No. 068 of 2016 (Mubiru, J.)***.

In the instant case, I find ample evidence that Odwar Lalyang indeed gifted three acres of land to Oryem Evarito, the late father of the Appellant during the donor's life time and it was a permanent gift. I do not agree that the gifting was temporary as the Defence tried to portray. Odwar Lalyang perfected the gift and never purported to retake the property during his life time. The Appellant's father accepted the gift, and so did the Appellant. The fact that the Appellant's mother as well as the nephew of the Appellant were buried on the suit land (the 3 acres) confirms the permanent gifting. The Appellant's children and the Appellant continue to live on suit land. I think equity cannot allow the donor's family members to reclaim the gift. They are not entitled to do so. The Appellant therefore, was within his rights to inherit the suit land from his father.

I note the trial court's reasoning that since the father of the Appellant was not buried on the suit land unlike the 1st Respondent's father, then the Appellant's claim was not believable. With respect, the trial court failed to take into account the fact of burial of the Appellant's mother and Nephew on the suit land, if he deemed relevant.

The trial court also noted that the Respondents were in possession of the suit land. Whereas I do not fault the court because that was an agreed fact, the court ought to have narrowed the matter from the Appellant's perspective as he did not purport that the whole land was in dispute. The trial court also found that it

saw the gardens of the Respondents on the suit land. Unfortunately that statement in the Judgment is not supported by any known record at the locus in quo, as there is none. It is thus not known which gardens the trial court was referring to and who identified the gardens to the court. The court therefore, erred in concluding that the evidence of long residence and user of land by the Respondents prove their ownership and not the Appellant's ownership. The court consequently held on issue two that the Respondents are not trespassers.

Given my analysis, I hold that the trial court did not properly evaluate the evidence on record. It made wrong findings and conclusions unsupported by evidence. On the contrary, I find that the Appellant proved his case on the balance of probability. He was assisted in that regard by the Respondents to prove his claim to three acres of land which was in dispute. The appeal therefore succeeds. Consequently, the decision of the trial court is reversed and set aside. The trial court also erroneously made affirmative findings for the Respondents who never counterclaimed. He also erroneously awarded general damages of shs. 3, 000,000 when there was no counterclaim, and no proof of damages suffered. I would therefore, decree as follows;

1. The Appeal succeeds and the Judgment, Decree and Orders of the Magistrate Grade 1 given in Civil Suit No. 038 of 2013 on 06 December, 2017 is reversed and wholly set aside.

2. The Appellant is decreed to be the lawful owner of three acres of the disputed area situated in Adoo Ward, Wigweng Parish, Acholi-Bur Sub-County, Pader District, being an inheritance from his late father.

3. The Appellant shall be put in possession of the three acres of the land mentioned in 2 above and the Respondents shall vacate the three acres.

4. Should the Respondents fail to vacate the three acres of the land decreed herein, they shall be evicted from the three acres of land on being given 90 days' notice.

5. Given that the parties are neighbors and somewhat related, to allow their reconciliation, I decline to award costs in this appeal and in the trial court to either party. Each party shall therefore, bear its own costs in this court and in the court below.

Delivered, dated and signed in Court this 20th February, 2024

Hutodu 20/2/2024

George Okello
JUDGE

Judgment delivered in open Court.

20th February, 2024

Attendance

Mr. Jude Ogik, Counsel for the Respondents.

1st Respondent is deceased, replaced by Oryem Mathew (son/3rd Respondent)

2nd and 3rd Respondents in court.

Mr. Owor Abuga David, Counsel for the Appellant in court.

Appellant in Court.

Mr. Ochan Stephen, Court Clerk.

20/2/2024

George Okello

JUDGE