THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL No. 013 ~~(014)~~/2023

(ARISING FROM CIVIL SUIT No. 044/2013: THE CHIEF MAGISTRATE'S COURT OF PADER HOLDEN AT PADER).

OLUM BAZILO **APPELLANT**

Versus

1. **OWEKA PAUL**
2. **OWINY TONNY (Administrator, Estate of the Late Okidi Alfred)**
3. **NYEKO JOSEPH (Administrator, Estate of the Late Okidi Alfred)**

RESPONDENTS

BEFORE HON. MR. JUSTICE PHILIP W. MWAKA.

JUDGMENT.

Background.

[1]. This Appeal was instituted *vide* Memorandum of Appeal filed in this Court on the 22nd day of February, 2023. The Appeal is in respect of the decision of His Worship Ongwee Stanislaus Okello, Magistrate Grade One Pader, Chief Magistrate's Court of Pader. The cause of action in the suit in the Lower Court as evidenced by the pleadings – the Plaint and Amended Plaint - filed on the Record of the Court is founded in claims of ownership of and trespass to land described as being under customary tenure at Wanna Ward, Kazi Kazi Parish, Arum Sub County in Agago District stipulated as measuring approximately Seven (7) acres in total - albeit disjointed which the Court understands to mean is not in a single land mass or plot but rather is a combination of plots or parcels.

[2]. The Certified Copy of the Judgment indicates the decision as having been delivered on the 27th January, 2022; while the Certified Record of Proceedings indicates the decision as having been delivered on the 27th January, 2023. The Decree restates the date of Judgment as the 27th January, 2023. The Court deduces the correct date of delivery of the Judgment as 27th January, 2023, with the year 2022 indicated more probably than not being a typographical error. In any case, no contention was made in respect of limitation or the timeliness of filing the Appeal.

[3]. In his Judgment, the Learned Trial Magistrate determined the suit in favour of the Defendants (the Respondents herein) on all the issues and in so doing held thus - following the order of issues framed at Page 2 of the Judgment.

[4]. On the first issue framed regarding whom is the lawful owner of the suit land, on the basis of his evaluation of the evidence and having observed inconsistencies, discrepancies and contradictions in the testimony of the Plaintiff and his Witnesses; while conversely observing consistency, corroboration and cogency in the testimony of the Defendants and their Witnesses determined that it was more reasonable than not to conclude that the suit land belongs to the Defendants. In his view, the evidence of the Defendants was corroborated by the findings of the Trial Court at the *Locus in Quo* while disproving the Plaintiff's evidence. Page 16 of the Judgment indicates the *Locus in Quo* visit as the 2nd December, 2022; Page 32 of the Record of Proceedings indicates the visit as the 23rd December, 2023. Analysis is at Pages 8 - 9 of the Judgment.

[5]. On the second issue framed based on preliminary points of Law raised by the Defendants on whether the Plaintiff has *Locus Standi* (to institute the suit for and on behalf of another Legal entity – Gulu Catholic Church) and whether the Plaintiff has a Cause of Action against the 2nd and 3rd Defendants (Herein the 2nd and 3rd Respondents) the objections were determined as follows: -

[6]. The first point of objection to the effect that the Plaintiff (Appellant) did not have *Locus Standi* – stated as the right to sue the 2nd and 3rd Defendants on behalf of the Catholic Church described in the Judgment as the Registered Trustees of Gulu (Arch) Diocese without the Church's written permission or authority - was resolved in favour of the 2nd and 3rd Defendants and the Trial Court upheld the objection on the basis that the suit land had previously been given (donated) by the Plaintiff's father to the Catholic Church and the land (ownership) had already passed to the Catholic Church. See: Page 10 of the Judgment.

[7]. The second point of objection to the effect that the Plaintiff (Appellant) did not have a Cause of Action against the 2nd and 3rd Defendants and which included considerations of whether the suit was barred by limitation (as a third point of objection) under **Section 5 of the Limitation Act, Cap. 80** for recovery of land after more than Twelve (12) years was upheld on the basis that litigation must come to an end and no exception to the bar by limitation was brought to the attention of the Court concluding that the suit did not disclose a Cause of Action against the 2nd and 3rd Defendants. See: Page 11 and 12 of the Judgment.

[8]. The Learned Trial Magistrate therefore concluded that the preliminary points of Law ought to have disposed of the suit which should have been dismissed. See: Page 12 Paragraph 1 of the Judgment.

[9]. On the third issue framed regarding trespass to the suit land, the Trial Court concludes that the Defendants did not trespass on the suit land finding that they are settled on their rightful land on which are graves of their relatives, settlements, areas of cultivation, grass thatched houses and trees. It is in fact the Plaintiff who is in trespass. In his view, this was corroborated and ascertained during the *Locus in Quo* visit. See: Page 12 and 15 of the Judgment.

[10]. On the fourth issue framed regarding remedies, the Orders of the Trial Court are reproduced *verbatim* hereunder in the order issued.

[11]. **"A declaration that the suit land measuring approximately 200 acres located in Wanaa Village, Kazi Kazi Parish, Arum Sub-County, Agago District belongs to the Defendants."**

[12]. **"A Permanent Injunction is hereby issued against the Plaintiff/Respondent, her workmen, agents, family members, relatives, and any other person deriving interest from her from interfering with the Defendant/Counter-Claimant's quiet enjoyment of the suit land."**

[13]. **"General Damages of Uganda Shillings Two Million (UGX 2,000,000/=) are hereby granted to the Defendants."**

[14]. **"I decline to grant any interest at Court rate from date of Judgment until payment in full since they were not prayed for."**

[15]. **"The Plaintiff is hereby ordered to vacate the suit land within Six (06) months from this Judgment."**

[16]. **"I grant costs of the suit to the Defendants for the inconvenience they have gone through from 2013 to date."**

[17]. **"On any other remedies that this Honourable Court deems fit, I make the following Orders: -**

[18]. **"That the Traditional Leader (RWOT) is hereby ordered to hold a reconciliatory between the two clans of Plaintiff and Defendant with the sole purpose of reconciling the Plaintiff and Defendants."**

[19]. **"That the Traditional Leader (RWOT), LC 1 Chairperson of Wanaa Village and the Parish Intelligence Security Officer of Kazi Kazi Parish, Senior Assistant Secretary (SAS) Acholi Pii Sub-County, LC3 of Arum Sub-County hereby ordered within Two (02) months from to date to hold a meeting between the Plaintiffs and Defendants for purposes of facilitating the Plaintiff to return to his father's land."**

[20]. **"That report in (g) and (h) above should be availed on Court record on or before the 28th day of March, 2023."**

Appellant's Grounds of Appeal.

[21]. The Appellant *herein*, who was the Plaintiff in the Lower Court, raises and framed Twelve (12) Grounds of Appeal of mixed Law and Fact which are reproduced hereunder: -

1. **The Learned Trial Magistrate erred in Law and in Fact when he passed Judgment that the 200 acres of land belongs to the Respondents/Defendants when the Defendants/Respondents did not put a Counter-Claim.**
2. **The Learned Trial Magistrate erred in Law and in Fact when he passed Judgment that the 200 acres of land belongs to the Respondents/Defendants, when the Plaintiff/Appellant sued the Respondents/Defendants for only approximately 7 acres of land and the Respondents/Defendants did not put a Counter-Claim.**
3. **The Learned Trial Magistrate erred in Law and in Fact when he issued a Permanent Injunction against the Plaintiff and referred to the Defendants/Respondents as Counter-Claimants/Defendants.**
4. **The Learned Trial Magistrate erred in Law when he ordered that the Appellant/Plaintiff vacates the suit land within Six (6) months.**
5. **The Learned Trial Magistrate erred in Law and in Fact when he awarded general damages of UGX. 2,000,000/- to the Respondents/Defendants without a Counter-Claim.**
6. **The Learned Trial Magistrate erred in Law when he awarded costs for inconveniences they have gone through from 2013 todate.**
7. **The Learned Trial Magistrate erred in Law when he ordered that among others the Parish Intelligence Officer, Senior Assistant Secretary and LC1 hold a meeting for purposes of relocating the Appellant/Plaintiff from his land.**

8. **The Learned Trial Magistrate erred in Law and in Fact when he held that the suit was caught by limitation.**
9. **The Learned Trial Magistrate erred in Law and in Fact when he held that the Appellant/Plaintiff did not have *Locus* to sue the 2nd and 3rd Defendants/Respondents.**
10. **The Learned Trial Magistrate erred in Law and in Fact when he failed to properly conduct the Locus visit and record the proceedings of the same thus causing an injustice to the Appellant/Plaintiff.**
11. **The Learned Trial Magistrate erred in Law and in Fact when he ignored the inconsistencies in the case of the Defendant(s) and decided that the suit land belongs to the Defendants/Respondents.**
12. **The Learned Trial Magistrate erred in Law and in Fact when he failed to properly evaluate the evidence of (sic) record and wrongly held that the land belongs to the Defendants/Respondent(s).**

[22]. The Appellant seeks the following Orders from this Court: -

1. The Appeal be allowed and the Judgment and the Orders of the Lower Court be set aside.
2. Declaration be made that the suit land is for the Appellant/Plaintiff.
3. Costs of this Appeal and the Court below be awarded to the Appellant.

<u>Pleadings and Proceedings in the Lower Court.</u>

[23]. The initial Pleadings instituting the suit and Defences responding were filed by the Parties themselves with indications that they would represent themselves *Pro Se*. The Plaint instituting the suit is remarkable in that the Court stamp indicating its receipt on the Record of the Court is unclear and indeterminate. Suffice it to say that a Summons to file a Defence was issued by the Magistrate Grade One on the 16th May, 2013, the same day as the Plaintiff signed the Plaint.

[24]. A Written Statement of Defence was filed for the 1st Defendant dated 9th December, 2014 as reflected by the Court stamp and is dated the same day. Another Two (02) Written Statements of Defence signed by the then 2nd Defendant Okidi Alfred, prior to his demise, and dated 31st October, 2013 and 9th December, 2014 respectively are on the Record of the Court with the Court stamps being equally unclear and indeterminate. An Amended Written Statement of Defence was filed for the 1st Defendant on the 27th June, 2019.

[25]. Subsequently, the Parties had the benefit of Counsel and the Plaintiff/Appellant filed an Amended Plaint on the 4th September, 2019 and in response an Amended Written Statement of Defence was filed for Defendants on the 19th September, 2019. This was followed by yet another Written Statement of Defence filed by the 1st Defendant himself.

[26]. A review of the numerous Written Statements of Defence filed include denials by the respective Defendants but do not include a Counter-Claim and, or a Cross-Claim raised by any. This is contrary to references of the Trial Court in issuing a Permanent Injunction in respect of ***"Defendant/Counter Claimant"***.

[27]. Both Parties filed a Joint Scheduling Memorandum on the 4th March, 2020 with the issues framed in respect of claims of ownership of and trespass to the suit land as well as remedies thereof.

[28]. The only agreed fact was in regards to the location of the land and the Parties made their respective representations therein.

Representation.

[29]. Counsel, Mr. Julius Ojok, represented the Appellant. The Appellant was present in Court.

[30]. Counsel, Mr. Odyek Douglas, represented the Respondents. The 1st and 2nd Respondents were present in Court.

Proceedings before this Court.

[31]. At the proceedings of the Court on the 24th October, 2023 both Counsel informed Court that they had previous appeared before the Hon. Justice George Okello on the 11th July, 2023 and at the proceedings were directed to file Written Submissions with the Appellant's due on or by the 28th July, 2023 and the Respondents' due on or by the 21st August, 2023.

[32]. Both Counsel confirmed to the Court that they were satisfied that the Certified Copy of the Judgment and Record of Proceedings were accurate and complete.

[33]. It was further clarified that the correct number of the Civil Appeal was No. 13 of 2023. Not No. 14 of 2023 as indicated on the Court Case Administration System (CCAS) – which was an error to be corrected – hence the correction in the heading of this Judgment. The original suit before the Trial Court was Civil Suit No. 44 of 2013.

[34]. Finally, both Counsel had no objection to my assumption of the conduct of the Appeal at this stage.

Considerations of the Court.

[35]. **Section 80 of the Civil Procedure Act, Cap. 71** provides for the powers of this Court in considering and determining Appeals and the scope of its mandate.

[36]. The Court is conscious of its duty as a first Appellate Court - including its duty to reconsider and re-evaluate afresh the evidence of the case and reconsider the materials adduced before the Learned Trial Magistrate in the Lower Court and then make up its own mind not disregarding the Judgment Appealed from but carefully weighing and considering it. In the event that questions arise as to which witness should be believed over another and that question turns on their manner and demeanour, the Appellate Court must be guided by the impressions made on the Trial Court which saw the witnesses.

[37]. Other circumstances, apart from the manner and demeanour of witnesses, may show whether a statement is credible or not and which may warrant the Appellate Court in differing from the Trial Court even on a question of fact turning on credibility of a witness which the Appellate Court has not seen.

[38]. Furthermore, even where the Trial Court has erred, the Appellate Court will interfere where the error has occasioned a miscarriage of Justice.

See: Kifamunte Henry Vs. Uganda: SCCA No. 10/1997 citing with approval Pandya Vs. R (1957) EA 336; Okeno Vs. Republic (1972) EA 32; Charles B. Bitwire Vs. Uganda SCCA No. 23/1985; and, SCCA No. 4/2016: Fredrick Zaabwe Vs. Orient Bank Ltd; and, Maniraguha Gashumba Vs. Sam Nkundiye: Civil Appeal (Court of Appeal) No. 23/2005.

[39]. The Court is obliged to re-hear the case by subjecting the evidence presented to the Trial Court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion(s).

[40]. Should the Court find conflicting evidence, it has to make due allowance for the fact that it neither saw nor heard the witnesses' testimony before the Trial Court and it must weigh the conflicting evidence and draw its own inferences and conclusions.

[41]. The Appellate Court may interfere with a finding of fact if it is evident that the Trial Court overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the Trial Court.

[42]. The first Appellate Court is not bound to necessarily follow the Trial Magistrate's findings of fact where it appears that he either clearly failed to take into account particular material circumstances or probabilities to estimate the evidence or if the impression based on demeanour of a witness is generally inconsistent with the evidence in the case.

<u>See: Father Begumisa Nanensio & 3 Others Vs. Eric Tiberaga: SCCA No. 17/2000. [2004] KALR 236; Lovinsa Nankya Vs. Nsibambi: [1980] HCB 81; and,</u> Acaa Bilentina Vs. Okello Michael: Civil Appeal No. 053/2015 (High Court, Gulu - Hon. Justice Stephen Mubiru).

[43]. **<u>Section 101 – 106 Evidence Act, Cap. 6</u>** guides the Court on the burden of proof on a balance of probabilities especially considering inconsistencies, discrepancies and contradictions in the evidence highlighted by the Learned Trial Magistrate.

[44]. The Appellant filed Written Submissions on the 28th July, 2023. The Respondents filed Written Submission on the 21st August, 2023. There are no Written Submissions in Rejoinder on the Record of the Court. The filed Written Submissions have been duly taken into consideration.

[45]. A review of the Memorandum of Appeal in relation to the decision of the Learned Trial Magistrate indicates that it can be distilled into: -

i. The technical aspects of the decision being points of Law raised in Grounds 8 and 9;

ii. The substantive aspects of the decision of the Learned Trial Magistrate based of the evidence, materials and testimony presented to the Trial Court which require a complete and fresh evaluation contained in Grounds 11 and 12 considered together with Ground 10 regarding the *Locus in Quo* visit as well as Grounds 1 and 2; and,

iii. The complaints about the exercise of discretion of the Learned Trial Magistrate in the Remedies Awarded and Orders given and the propriety of those Remedies and Orders in Grounds 3, 4, 5, 6 and 7.

iv. The Court will commence with its primary duty to reconsider and re-evaluate the evidence presented to the Trial Court afresh.

Re-evaluation of the Evidence Presented to the Trial Court.

[46]. The primary duty of this Court sitting in a first Appellate role to reconsider and re-evaluate the evidence adduced at the Trial Court afresh is constituted in Grounds 11 and 12 of the Memorandum of Appeal which when considered together with Grounds 1 and 2 form the Substantive decision of the Trial Court.

[47]. Ground 10 in respect of the visit to the *Locus in Quo* shall also be addressed at this stage in view of the fact that the evidence gathered therein constitutes part of the evidence and material considered by the Trial Court in reaching its final determination and accords the Parties and witnesses the opportunity to confirm aspects of their testimony referenced at the Trial. The cited Grounds of Appeal shall all be considered together.

[48]. This Court has had occasion to review the entire Typed and Certified Record of Proceedings of the Trial Court and where necessary for clarity has reviewed the hand written notes in the Record of the Lower Court.

[49]. Both Counsel had at the earlier proceedings indicated that they were satisfied with the Record's completeness and accuracy.

[50]. The Record of the Trial Court and its Certified Record of Proceedings indicates that the Plaintiff - Olum Bazilo (PW1), in addition to his own Witness Statement, filed the Witness Statements of Two (2) other Witnesses Agwai Marcelliano (PW2) and Ojok Everisto (PW3). They were all subjected to cross examination.

[51]. The Record also indicates that in addition to the 1st Defendant - Oweka Paul (DW1) and the 2nd Defendant – Owiny Tonny (DW6) – being One (1) of the Two (2) Administrators of the Estate of the original 2nd Defendant – Okidi Alfred who died during the Trial, the Defendants filed the Witness Statements of Onyoro Obol Angel (DW2), Otoo Wilson (DW3), Adonga Wokorach Gabriel (DW4), Agwar Vincent (DW5) Okidi John Achan (DW7) and Wokorach Patrick Ojok (DW8). They were all similarly subjected to cross examination.

Analysis of the Case and Evidence Presented by the Respective Parties.

[52]. It transpires that the Plaintiff, who serves as a Catechist, and the 1st Defendant are from the same clan. The testimony of PW2 and PW3 indicates that they share a common grandfather and their Late Fathers, Okot Joseph and Edward Agwen Odong respectively, were brothers – this being initially denied but later admitted by the Plaintiff and not clearly ascertained by the 1st Defendant. They both live with their families at Wanna Ward, Kazi Kazi Parish, Arum Sub County in Agago District and both testified and maintained in cross examination that they obtained land from their Late Fathers, through inheritance, which land their Fathers occupied as unutilized and uninhabited virgin land in or about 1958 and 1955 respectively which they claim was the practice (custom) for acquiring customary land in Acholi at the time. Clearly, they could not have themselves known definitively being infants or unborn at the time.

[53]. A recurring contention in the suit and the Appeal is in regards to the ambiguity of the actual description and dimensions of the ***"suit land"*** being the subject matter of the litigation and it is material to this decision.

The Plaintiff's Case: Re-Evaluation of the Evidence Presented.

[54]. The core and thrust of the Plaintiff's claim pleaded in this suit is in respect of seven (07) acres of customary land described as "disjointed" which he claims ownership of through inheritance and alleges that the 1st Defendant, Oweka Paul, and the original 2nd Defendant, the late Okidi Alfred, represented herein by his sons the 2nd Defendant (DW6) and 3rd Defendant (who did not testify) as Administrators of his Estate respectively trespassed upon at different times.

[55]. The ***"suit land"*** is described as bordering the road from Kazi Kazi to Acholi Pii, Acholi Pii Health Centre III to the South, Wanna stream to the West and Agwar Vincent (DW5) and Agwai Marcelliano (PW2) to the North and is situated at Wanna Ward, Kazi Kazi Parish, Arum Sub County in Agago District.

[56]. Quite significantly the Plaintiff stipulates in paragraphs 27 and 28 of his witness statement being consistent with paragraphs 3 and 4(g) of the amended Plaint the particular areas in dispute against the 1st Defendant which he describes as –

"… for the avoidance of doubt the suit land against the 1st Defendant is limited to the area having a hut occupied by Yeka Charles a son to the 1st Defendant, a piece of land left by the 1st Defendant to his son Komakech Alex Oweka which has three grass thatched huts where his son Komakech Alex Oweka has added one big grass thatch hut built with burnt bricks and planted tick trees and recently planted a life fence leading to the compound, the area where the 1st Defendant is staying with his wife and has built 4 (Four) grass thatched huts and one of them is till incomplete … the area where the 1st Defendant's wife Margaret is occupying and has 3 (Three) grass thatched huts near the road and the hospital. The area where the 1st Defendant and his wife are cultivating various gardens is also trespassed upon by the 1st Defendant which I will show this Court"

[57]. The Plaintiff contends that the specific land the late Okidi Alfred trespassed upon had been given to Arum Chapel by the late Okot Joseph in or about 1972 and on which a foundation had been built, stipulated in paragraph 29 of his witness statement describing the particular area of dispute as being where –

"… The father of the 2nd and 3rd Defendants planted about 37 (Thirty-Seven) eucalyptus tree(s) and a jack fruit and 5 (Five) grass thatched huts on the suit land". **<u>See: Paragraph 4(k) and (h) of the amended Plaint.</u>**

[58]. He testified that upon his father's death in 1989, he was ***"… buried on the land which he owned … near the suit land"*** and ***"… the suit land constitutes part of his land"*** and his mother the late Arach Yomia continued with cultivation, rearing animals and settlement on the suit land. Upon her death in 1991 she was ***"… buried near the suit land where her husband was buried"***.

[59]. In cross examination the Plaintiff stated that also buried on the ***"suit land"*** is his brother the late Otwale Matia who died in 1996 as well as the graves of many Children about Six (6). This testimony turned out to be one of the principal factors on which the Trial Court's decision turned in favour of the Defendant's.

[60]. These descriptions reproduced *In Extenso* are material and would form the basis for the Trial Court's visit to the *Locus in Quo* in confirming existence of the features, ascertaining the extent of the "suit land" as well as the credibility of the evidence of the Parties.

[61]. According to the Plaintiff, during the insurgency in Northern Uganda in 1986 and displacement of the population into Internally Displaced Persons (IDP) camps the 1st Defendant requested his late father – through him - for an acre of land for temporary settlement with the understanding and condition that the land would be returned at the end of the insurgency which was allowed but upon the insurgency ending in 2007 he declined to leave constituting trespass.

[62]. Similarly, in regard to trespass against the late Okidi Alfred, he allegedly also requested and was allowed by the Plaintiff and the then Parish Priest, Father Olum, in 1991 to temporarily settle on the suit land when he arrived in the area to serve as a Medical Officer at Acholi Pii Health Centre III as well as the Chairperson of Arum Chapel land on which land he cultivated, reared animals, constructed huts and later without consent built an iron sheet (*Mabaati*) house but upon the insurgency ending in 2007 declined to leave.

[63]. This testimony was seized upon by the 2nd and 3rd Defendants in raising points of objection as a matter of Law on *Locus Standi* and in their view the Plaintiff's claim that as a Catechist he acted for and on behalf of the Priest and Bishop in representing the Catholic Church was an illegality which was upheld by the Trial Court on the basis that the land had already passed to the Church. See: Page 10 of the Judgment. Paragraph 4(i) of the amended Plaint is instructive stating –

"… the Catholic Church has not formalized the transfer of the land to its name and all along it … remained under the care and control of Plaintiff and the members of the Chapel. The Plaintiff is a catechist of the Chapel".

[64]. The Court finds that the testimony of PW2 and PW3, elders in the area, was largely consistent with and corroborated the Plaintiff's testimony - the former being a neighbour of the Plaintiff to the North since the 1960's and the latter formerly being ***"Nyampara Lamiyo"*** of the area from 1975 – 1995 in which role he says he collected taxes, including from the fathers of both the Plaintiff and 1st Defendant, and would settle minor disputes as well as having enumerated both their fathers during the 1980 census at their respective homes. Both state that the 1st Defendant settled ***"on the opposite (other) side of the road"***.

[65]. PW2 testified in regard to custom in relation to land stating that people used to settle on empty land and the custom in Acholi was known as ***"Mako Ngom"*** of which she was a beneficiary and acquired her land in the same way in the 1960's. **See: Constitutional Petition No. 28/2019: Hon. (Rtd.) Justice Galdino Okello Moro Et Al Vs. The Attorney General Et Al.**

[66]. The Defendants took great issue with the testimony of PW2 and PW3 in regards to the place of burial of the Plaintiff's father - allegedly at ***"Dog Atup"*** said to be in another village outside the suit land and sought to use it to impeach their credibility which they successfully did and was a material factor in the suit being determined against the Plaintiff following the Trial Court's visit to the *Locus in Quo* and finding otherwise. See: Pages 7 - 8 of the Judgment.

[67]. The Record of Proceedings constituting their testimony in cross examination is instructive: - PW2 stated at Page 10 – ***"Okot Joseph was buried on the suit land. I can show the graves"*** adding shortly after – ***"… It is the one of Okot Joseph that is in dispute. I don't know the area in dispute. It is the whole land of Okot that is in dispute."***

[68]. Meanwhile, in cross examination PW3 stated at Page 14 – ***"Okot Joseph never left the suit land at any one time. He is now deceased and was buried on the suit land near his homestead."***

[69]. The Court has observed much ambiguity in the description of the ***"suit land"***. As shall be seen, this is evident in the testimony of all the Parties and respective witnesses on all sides – moreso the Plaintiff and 1st Defendant - with each having their own points of reference and descriptions resulting in obscuring the land constituting the subject matter of the suit stipulated by the Plaintiff as elaborated herein-above and failing to delineate it from other uncontested land described as being separate and distinct and not being the subject of dispute.

[70]. This is material and as a consequence this Court holds contrary to the determination of the Learned Trial Magistrate that the variations in the description of the suit land by PW2 and PW3 cited herein-above in relation to the burial place of Okot Joseph do not amount to deliberate untruthfulness on their part.

See: SCCrA No. 27/1989: Sarapio Tinkamalirwe Vs. Uganda; Baluku Samuel Vs. Uganda [2018] UGSC 26; Uganda Vs. F. Ssembatya [1974] HCB 278; and, Uganda Vs. Abdallah Nassur [1982] HCB 1.

[71]. This Court, therefore, finds that the Trial Court occasioned a material injustice to the Appellant (Plaintiff) in impeaching his entire evidence based on perceived inconsistencies in the description of what constitutes the suit land.

[72]. In the considered view of the Court, it was increasingly apparent that the Trial Court would be required to visit the *Locus in Quo* to duly and properly confirm and ascertain the evidence presented and its findings would be core in determining the litigation. This will be considered in detail later when this Court examines and re-evaluates the Proceedings at the *Locus in Quo*.

The 1st Defendant's Case: Re-Evaluation of the Evidence Presented.

[73]. The 1st Defendant (DW1) denied the allegations made by the Plaintiff and claims inheritance of up to 200 acres of land from his father on which he was born and raised and his family has since cultivated, settled on and grazed their livestock.

[74]. He stated and testified that in 1964 his late father allegedly gave the Plaintiff's father Okot Joseph land on a temporary basis upon his request which he left in 1968 and allegedly settled at ***"Dog Atup in Arum Village, Arum Sub County"*** where he died and was buried. In cross examination he maintained that – ***"Okot Joseph was not buried on the land in dispute … Okot Joseph was buried in Atup …"***.

[75]. Later, in 1986, the Plaintiff allegedly requested him for a portion of land which was granted and he built at the place where his father had first lived and in 1990 left the land and shifted to another place where he built his home and lives todate. These are not part of the land contested in this litigation.

[76]. In 2009, the Plaintiff's son, Ocan Benedict, allegedly trespassed on his land whereupon a Mediation process was instituted within the Clan where it was resolved that he leaves the land. He was requested to give a portion of land which he did of approximately Six (6) acres of land which was declined and instead Ocan Benedict continued to trespass on his land allegedly resulting in a Law Suit which was later withdrawn following Mediation.

[77]. The features on his land as described by the 1st Defendant include – graves of Apiyo Juliana, Veronica Okello, Okello Tito, Acen and Opio, Omara Abec and Akulu Marina. The Plaintiff alleged wants to grab his land occupied by his Three (3) wives and Children. The Plaintiff's land is allegedly separate and distinct with his loved ones buried there, including – Arach Yomima (the Plaintiff's Mother"), Acholi, Min Otoo Akwinya and others on approximately Eighty (80) acres.

[78]. Concerning land given to him on temporary basis by the Chapel, he testifies that he gave it back on the 10th February, 2020. This would be easily established having transpired during the course of the litigation and would be another core feature to be established at the *Locus in Quo* proceedings.

[79]. In his testimony DW2, the Chairperson of the Pageya Clan (Eastern Zone) the clan to which the Plaintiff and 1st Defendant belong, who allegedly Mediated between the Parties, claims he is conversant with the ***"suit land"*** stating that it belongs to the 1st Defendant through his father and claiming that the Plaintiff's father lived on part of the land on a temporary basis and left for ***"Dog Atup"*** where he was buried. In cross examination he concedes: ***"the suit land is very big … I do not know the size of the Plaintiff's land in Wana Village"*** - thus highlighting the ambiguity of the description of the ***"suit land"***.

[80]. DW3 echoes the same asserting that the ***"suit land"*** belongs to the 1st Defendant having inherited it from his father and that the Plaintiff's land is separate and distinct with some areas having been given to him by the 1st Defendant.

[81]. The testimony of DW4 must be taken with caution since he strangely fails to include material information specifically that his late mother Akulu Marina (sometimes ***"Mariana"***) was buried at the 1st Defendant's home yet he purports to testify authoritatively in regards to the location of graves on the Plaintiff's and 1st Defendant's land. The Learned Trial Magistrate made the following observation – ***"Court – The demeanour of this Witness is that of (an) untruthful Witness, he is telling deliberate lies and refusing to answer questions put to him."*** The Trial Court however went on to consider and placed reliance on his evidence. This Court holds that in in view of the finding of deliberate untruthfulness the Trial Court should have rejected this evidence. This Court therefore rejects the entirety of the evidence of DW4.

[82]. The testimony of DW5 is also doubtful and unreliable as he purports to testify about events in 1964 and 1968 when he was an infant and at Sixty-Two (62) years of age is the same age as the Plaintiff who was also born in 1958. The matters he testifies to are unlikely within his knowledge. Moreover, he alleges that in 1986 the Plaintiff was given land by the 1st Defendant apparently measuring Eighty (80) acres. This is inconsistent with all other testimony and undermines his credibility. He later denies mentioning Eighty (80) acres. This Court shall not place any reliance on his testimony.

The 2nd Defendant's Case: Re-Evaluation of the Evidence Presented.

[83]. The 2nd Defendant, who testified as DW6, is the son of and an Administrator of the Estate of the Late Okidi Alfred and he denied the allegations in the Plaint thereby putting the Plaintiff to strict proof. In his testimony he alleges that his father acquired ***"the land in dispute"*** by way of purchase from a certain Ocen Albino in 1993 – referring to a translated Land Sale/Purchase Agreement for 3 ½ (Three and a Half) acres dated 10th March, 1993 - Exhibit **"DEX5"**.

[84]. A careful scrutiny of the Agreement indicates the Address of the RC 1 Arum Ikom, Acholi Pii Parish, Omot Sub County - which would appear to be an entirely different area from the suit land as described and stipulated by the Plaintiff as Wanna Village, Kazikazi Parish, Arum Sub County. This inconsistency was not explained with DW6 admitting in cross examination that the LC1 of Wanna Village was in fact different from the LC1 of Ikom Village and further admitting that he was born on the 28th August, 1993 meaning he could not competently testify on the Land Sale/Purchase Agreement which is dated and was executed prior to his birth.

[85]. The Court considers his testimony as unreliable considering that he testified in regard to matters not within his knowledge.

[86]. DW7 claims to know both the Plaintiff and Defendants and he is a Former LC 3 Chairperson having served from 2001 – 2005 in Omot Sub County which he claims became Arom Sub County. He also claims to know the suit land from his duties as LC 3 Chairperson and he knows the ***"suit land"*** claiming it did not belong to the Plaintiff but to the 2nd Defendant's Father who bought land from Ocen Albino in 1993. The Court considers the evidence of PW 7 generalized and non-specific in relation to the Parties and transactions on the suit land. PW7 does not indicate that he was present at the land sale and purchase in 1993. As a consequence, his evidence on the ownership of the land is unreliable and of limited value.

[87]. DW8 a teacher by profession testifies for the 2nd and 3rd Defendants and was present when the Late Okidi Alfred purchased land from Ocen Albino in 1993 which he witnessed. The Court notes that his name appears as the 1st Witness where he signed on the Land Sale/Purchase Agreement **DEX5**. DW8 in his Witness Statement claimed to be a resident of Wanna Village but in cross examination admitted to being a resident of Ikom Village and claims to knows the land seller Ocen Albino who is from Pabo and Odong who was then RC of Ikom Trading Centre. He claimed that there is an Iron Sheet (*Mabaati*) house on the land. Curiously, DW8 did not explain the material inconsistency in the Address of **DEX5** which states the RC 1 as Arum Ikom, Acholi Pii Parish, Omot Sub County which is a different area from the suit land in dispute.

[88]. It is also apparent from the testimony of the Defendants and their witnesses that the ambiguity of what constitutes the suit land continued throughout the Trial.

[89]. This Court finds, contrary to the determination of the Trial Court, that there were material inconsistencies and contradictions in the evidence of the Defendants and their witnesses. In the circumstances, it was necessary for the Trial Court to establish the truth of the claims at the *Locus in Quo*.

Re-Evaluation of the *Locus in Quo* Proceedings.

[90]. It is clear from the evidence of the Plaintiff and Defendant when juxtaposed that their claims are so divergent and irreconcilable that without visiting the *Locus in Quo* the truth of their testimony cannot be ascertained and the nagging question remains as to what is referred to by the Parties and witnesses as the ***"suit land"***.

[91]. As previously indicated the Judgment (Page 13) indicates the date of the *Locus in Quo* visit as the 2nd December, 2022 while the Record of Proceedings (Page 32) indicates the visit as the 23rd December, 2023.

[92]. Notwithstanding, the Court has reviewed the entire Certified Record of Proceedings of the Trial Court to evaluate the conduct of the *Locus in Quo* proceedings and observed that there are no notes of the *Locus in Quo* visit whatsoever with the only indication of a *Locus in Quo* visit at Page 32 in which the Plaintiff stated – ***"Matter for Locus"***, the Defendant stated – ***"Ready"*** and the Trial Court simply noted **"*Locus Conducted"***.

[93]. The entire procedures for *Locus in Quo* visits specified in **Order 18 Rules 4 of the Civil Procedure Rules SI 71 -1** read in conjunction with the **Judicature (Locus in Quo) Practice Direction No. 1/2007** including - allowing Parties and witnesses to adduce evidence; allowing cross examination; recording all proceedings; recording observations, views, opinions and conclusions of the Court - are not reflected.

[94]. Further and as of necessity, the Court has gone beyond the Certified Record of Proceedings and reviewed the entire file – specifically the hand written notes of the Learned Trial Magistrate – in order to scrutinize them for *Locus in Quo* proceedings upon which the entire substantial decision of the Trial Court turned based on perceived inconsistencies between the testimony of the Parties and witnesses and the findings of the Trial Court at the *Locus in Quo*.

[95]. The documents on the Record of the Trial Court referencing the *Locus in Quo* visit include: -

i. An undated attendance list which the Court observes includes the names of some of the Parties – the Plaintiff, the 1st Defendant and the 2nd Defendant. The 3rd Defendant's name is not included in the list. Other names appear which seem to include some of the Witnesses.

ii. A Sketch Plan dated 23rd December, 2023 indicating areas in disputes with "B", "√" and "X" among others in the Key.

iii. Photographs of the event with notes on the photographs at the side.

[96]. Besides the Certified Record of Proceedings, there are no hand written notes recording the *Locus in Quo* proceedings constituting testimony and cross examination as envisaged by the **Judicature (Locus in Quo) Practice Direction No. 1/2007** to be reviewed and relied on by this Court in its Appellate function to re-evaluate the findings and determination of the Trial Court.

[97]. Aspects of material importance and interest at the *Locus in Quo* from the previous testimony would specifically include; –

i. The land in dispute the Plaintiff pleaded and testified to stipulated as seven (7) acres of "disjointed land" delineated from other lands which constitute scores and hundreds of acres belonging to both the Plaintiff and 1st Defendant in Arum Sub County;

ii. The dimensions of land referred to as "Church land" said to have built upon it, *inter alia*, a Chapel foundation and an iron sheet (*Mabaati*) house built by the Late Okidi Alfred as well as the land which the 1st Defendant testified that he returned on the 10th February, 2020 – during the course of the Trial - after temporary use;

iii. The dimensions of land allegedly bought by the Late Okidi Afred in 1993 constituting 3 ½ acres and if at all it is in the disputed area as opposed to being in an entirely different area - Ikom village.

iv. Other features abound based on the testimony of the respective witnesses.

[98]. The Sketch Map reflects a single area of indeterminate size and is not representative of the disjointedness described by the Plaintiff and further does not reflect the core features – especially those outlined in the preceding paragraph. Without the required procedures the sketch map is insufficient.

[99]. In the event that a Trial Court fails in its core duty at the *Locus in Quo* to ascertain the testimony of the Parties and Witnesses presented during the Trial and in so doing fails to record the required evidence at the *Locus in Quo* including testimonies and cross examination and its features, observations, conclusions - outlined in Regulation 3 for ease of reference a miscarriage of justice is occasioned – the Appellate Court will find itself handicapped in executing its primary role of re-evaluating evidence since there would be no evidence from the *Locus in Quo* to re-evaluate afresh against the evidence presented in the Court.

[100]. The Appellate Court would find itself unable to ascertain the truthfulness, inconsistencies and contradictions on the one hand and, or the consistency, corroboration and cogency of the evidence of the Parties and witnesses.

[101]. Whereas an Appellate Court may make determinations based on the available evidence in the absence of *Locus in Quo* proceedings, where the decision of the Trial Court turns on the *Locus in Quo* visit and as is in this case the evidence is so divergent reflecting deliberate untruthfulness, falsifications and, or disingenuity by one or either of the Parties such a determination would not be possible – one way or the other.

[102]. Any decision would amount to guess work which would occasion a further miscarriage of justice this time by the Court sitting in an Appellate function.

[103]. In his Judgment, the learned Trial Magistrate references the *Locus in Quo* visit at Pages 7, 8, 9, 12, 13 and 15 as the basis of his decision where he claims to have founds inconsistencies and contradictions in the Appellant's (Plaintiff's) evidence but with no record of the proceedings at the *Locus in Quo* to substantiate or justify his findings. This occasioned a miscarriage of justice.

[104]. Where the miscarriage of justice is of a serious nature the Appellate Court is empowered to order a retrial. This should however be exercised with care and caution. Consideration should be given as to whether it would be possible to have a fair trial due to flux of time and adverse impact on evidence and Witnesses over time.

See: SCCA No. 08/2018: Kamo Enterprises Ltd Vs. Krystalline Salt Ltd; CACA No. 076/2015: Bongole Geoffrey Vs. Agnes Nakiwala, De Souza Vs. Uganda (1967) EA 784; Fernandes Vs. Noroniha (1969) EA 506; Nsibambi Vs. Nankya (1980) HCB 81; and, William Mukasa Vs. Uganda (1964) EA 698 at 700; David Acar Vs. Alfred Acar (1982) HCB 60; J.W. Ononge Vs. Okallang [1986] HCB 63; Badiru Kabalega Vs. Sepiriano Mugangu HCCA No. 7/1987 [1992] KALR 110; CACA No. 65/2012: Kutambaki Augustine Vs. Byaruhanga Paul; and, HCCA No. 22/2014: Oyua Enoch Vs. Okot William (High Court, Gulu – Hon. Justice Stephen Mubiru).

[105]. Most fundamentally, at the Trial the Learned Trial Magistrate determined from his visit to the ***Locus in Quo*** that the "suit land" stipulated by the Plaintiff in his Pleadings and testimony to be Seven (7) acres was in fact Two Hundred (200) acres which he held belongs to the Defendants and ordered the Plaintiff to vacate. Nowhere in the available Record of the Court can this be referenced or established. This is against the background of the 2nd and 3rd Defendants claiming only 3 ½ acres and the 1st Defendant described the Plaintiff's other lands as "separate and distinct". This undoubtedly occasioned a miscarriage of justice.

[106]. In the Judgment and Orders issued, specifically the 2nd remedy awarded in which the Trial Court issued a Permanent Injunction, there is reference to a ***"Counter Claim"***. It has already been observed that there was in fact no Counter Claim pleaded by the Defendants.

[107]. The numerous Written Statements of Defence filed do not include any semblance of a Counter Claim which could be considered.

See: High Court Civil Suit No. 1/1989 (Fort Portal – Hon. Justice Mukanza): Christopher Katuramu Vs. Maliya & 3 Others.

[108]. The circumstances under which the Trial Court was under a supposition that a Counter Claim existed are not clear. Contrary to the submissions of the Respondents, a Counter Claim cannot simply be presumed or otherwise imputed.

[109]. In conclusion on issues 12, 11, 10, 2 and 1 the Court, upon a fresh consideration and re-evaluation of the evidence, finds that the circumstances of the suit required a visit to the *Locus in Quo* to confirm the divergent and seemingly irreconcilable testimony of the respective witnesses on both sides and as it emerged neither the evidence presented by the Plaintiff nor the Defendant was duly ascertained at the *Locus in Quo* visit in the manner provided.

[110]. The unsubstantiated determination of the Trial Court purportedly arising from the *Locus in Quo* visit incredibly ordering that land measuring Two Hundred (200) acres belongs to the Defendants occasioned a miscarriage of justice which cannot be allowed to stand by this Court.

[111]. It is inexplicable how the Trial Court reached and awarded this land area to the Defendants.

[112]. Even exercising discretion, the award cannot be justified as a judicious exercise of discretion under any circumstances.

Determination of the Court.

[113]. Having considered the Memorandum of Appeal and the grounds raised therein, the Typed and Certified Judgment and Record of Proceedings of the Trial Court, the hand written notes of the Learned Trial Magistrate, the Submissions of the respective Parties filed on Court Record and the entirety of the proceedings, testimony, exhibits and evidence adduced before the Trial Court, this Court is of the considered view that the testimony and evidence of the respective parties was so varied, divergent and irreconcilable with each other that its truthfulness could not be merely deduced requiring the truthfulness of the witnesses to be ascertained by properly reconciling their testimony with the situation at the *Locus in Quo* and duly exhausting the procedures required by the **Judicature (Locus in Quo) Practice Directions 1/2007.**

[114]. It is the finding of this Court that the failure by the Trial Court to properly execute the *Locus in Quo* visit and its inexplicable award purportedly arising therefrom granting Two Hundred (200) acres of land in favour of the Defendants against the Seven (7) acres pleaded by the Plaintiff as the subject matter of the suit and without a Counter Claim occasioned a miscarriage of justice.

[115]. The Defendants found themselves beneficiaries of a land distribution bonanza exceeding the suit subject matter by almost Thirty (30) times probably to their surprise and delight.

[116]. The Court further finds that compounding the foregoing was the ambiguity in the reference to the ***"suit land"*** by all the witnesses which constituted a material departure from its specifications as pleaded giving rise to the confusion in the testimony of the respective witnesses and culminating in awards nowhere near the subject matter of the suit pleaded.

[117]. Consequently, the substantive grounds in the Memorandum of Appeal 12, 11, 10, 2 and 1 succeed. The substantive findings of ownership and in trespass by the Trial Court in favour of the Defendants are overturned and the resultant discretionary remedies awarded and orders are set aside.

[118]. Therefore, this matter is referred back to be considered and resolved by a Trial Court consciously adjudicating the matter on the basis of the pleadings and restricting itself to the stipulated description of the suit land – inevitably requiring a Re-Trial.

[119]. This Court has been careful not to make any dispositive decision on the merits so as not to pre-empt the consideration and determination of the Court which shall conduct the Re-Trial.

Limitation.

[120]. In regards to Ground 8 on limitation, upon consideration of the Pleadings, arguments presented and determination of the Trial Court, this Court finds that the cause of action in the suit was for both declarations of ownership of land and trespass.

[121]. Trespass is a continuing tort. The claims for declarations of ownership by the Plaintiff arose in 2007. The testimony and evidence adduced at the Trial revealed that this was after the insurgency in Northern Uganda ended and the Defendants who had allegedly been allowed temporary use of the suit land Two (2) decades earlier as a result of the insurgency supposedly refused to leave to return to their homes. The suit was filed in 2013. This would be within the Twelve (12) year period of limitation provided in **Section 5 of the Limitation Act, Cap. 80**.

[122]. This Court therefore finds that the claims are not barred by limitation and in any case in regards to ownership the point of law could not be determined on the basis of the Pleadings only and would require consideration of the merits.

[123]. In conclusion, it constituted a miscarriage of justice for the Trial Court to find as a preliminary point of law raised by the Defendants against the Plaintiff that the suit was time barred and ought to have been dismissed; yet regardless continue to consider the merits and find in favour of the Defendants against the Plaintiff on the very same supposedly time barred causes of action resulting in the exorbitant awards and orders herein-above being set aside.

[124]. In the final result, Ground 8 succeeds.

Locus Standi.

[125]. In regards to Ground 9 on *Locus Standi*, upon review of the Pleadings, it is apparent that the Plaintiff instituted the suit in his own capacity and he does not therein claim or purport to represent any person or entity by way of any express, actual, implied or ostensible authority including power of attorney or agency or otherwise. This Court finds that the testimony of the Plaintiff in regard to his being a Catechist fell short of asserting any actual or ostensible authority to represent the Church.

[126]. The finding of the Trial Court that the land had already passed to the Catholic Church is not consistent with other representations and testimony of the Plaintiff detailed in the considerations herein-above that the Church had not formalized the transfer of the land to its name and all along it remained under his care and members of the Chapel Land Committee. The entire testimony should have been considered as opposed to only referring to excerpts of the testimony.

[127]. Clearly property had not passed and the finding that the Plaintiff did not have *Locus Standi* to sue the 2nd and 3rd Defendants is therefore set aside.

[128]. Besides, the Trial Court initially found that the suit land (property) had passed to the Church and then later found that the same "Church" property belongs to the 2nd and 3rd Defendants. This cannot stand. In the final result, Ground 9 succeeds.

See: Freeman & Lockyer Vs. Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, Lloyds Vs. Grace Smith & Co. [1912] AC 716 at 731, Edmund Schluster & Co. (U) Ltd Vs. Patel [1969] EA 239 at 241, HCCS No. 693/2000: Active Automobile Spares Ltd Vs. Pearl Merchantile Co. Ltd & Anor, HCCS No. 425/2003: Doshi Hardware (U) Ltd Vs. Alam Construction Ltd, HCCA No. 33/2017: Twongyeire Peter Vs. Muhumuza Peter, Patel Vs. Yafesi Mukasa & Others [1971] EACA 10.

Discretionary Remedies.

[129]. In regards to grounds 3, 4, 5, 6 and 7 on discretionary remedies and orders issued by the Trial Court, as a result of the substantive findings on the merits of the suit and other findings, this Court sets aside the discretionary remedies and Orders issued by the Trial Court.

[130]. Specifically, in regards to ground 7 of the Memorandum of Appeal and discretionary remedies described as "other remedies", it is incumbent on Courts to issue remedies founded and known in Law and enforceable.

[131]. In this instance there is no indication on the Court file or Record that there was compliance with any of the Orders and deadlines issued by the Court.

[132]. In the final result Grounds 3, 4, 5, 6 and 7 succeed.

Conclusion.

[133]. In conclusion, the Appeal succeeds on all grounds. The findings of the Trial Court are set aside. Civil Suit No. 044/2013 is remitted for Re-trial.

[134]. The Trial Court is urged to give due consideration to the specific subject matter (suit land) dimensions as pleaded and in dispute as distinguished from other suit lands described as separate and distinction not subject of dispute.

Orders of the Court.

[135]. Accordingly, the Court makes the following Orders: -

1. The Appeal hereby succeeds on all Grounds.
2. The Orders issued by the Learned Trial Magistrate are hereby set aside.
3. This Court Orders a Re-Trial of Civil Suit No. 044/2013.
4. Each party shall bear its own Costs.

It is so Ordered.

Signed and Dated on the 29th day of January, 2024. (High Court, Kitgum).

Philip W. Mwaka

Acting Judge of the High Court.

Delivery and Attendance.

This signed and dated Ruling was delivered in Kitgum High Court on **Monday, the 29th day of January, 2024 at 09:00am** and the parties present are recorded.

1. Counsel for the Appellant: - Mr. Patrick Abore holding brief for Julius Ojok.
2. The Appellant: - Mr. Olum Bazilo – Present.
3. Counsel for the Respondents: - Absent. Respondents: - 1st Respondent, Mr. Oweka Paul and 2nd Respondent, Mr. Owiny Tonny – Present.
4. Court Clerk/Interpreter: - Lubik Jennifer – Present.

Philip W. Mwaka

Acting Judge of the High Court.

29th day of January, 2024.