IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 13 of 2018

In the matter between

ORYEMA MARK **APPELLANT**

And

OJOK ROBERT **RESPONDENT**

Heard: 12 February 2019

Delivered: 28 February 2019

Summary: dispute over customary ownership of land.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for a declaration that he is the rightful customary owner of land measuring approximately forty acres located in Arut Central village, Kaluma Parish, Paicho sub-county, Aswa County, Gulu District, general damages for trespass to land, an order of vacant possession, a permanent injunction, interest and costs. His claim was that sometime in 1933 following their refusal to grow cotton, members of the Angaya Clan were relocated by the colonial government administrators to Paicho. The appellant's grandfather was a member of that clan and was among the people so re-located. The appellant's uncle, the late Yowasi Oola was born in 1959 in Paicho on the land in dispute. The appellant's grandfather helped dig two communal wells in the

area which wells exist to-date. During the year 2010, the appellant then living in Kiryandongo, learnt that the respondent and his brother, a one Ongeir-giu David, both sons of the late Francisco Ononociko, had exceeded the established boundary and intruded onto the appellant's family land by planting crops.

[2] In his written statement of defence, the respondent contended that his grandfather, Albino Odida, obtained the land in dispute from Rwot Obol in 1930 and occupied it from then until his death. The respondent and his brother inherited it from him. They only vacated the land in 1986 when the brother of Albino Odida killed his wife but returned in the year 2008 to re-occupy the land. The respondent has since then been in possession of the land.

The appellant's evidence in the court below:

[3] Testifying as P.W.1 the appellant, Oryema Mark, stated that the land in dispute belongs to the Angeya Clan. The clan was settled onto the land in 1930 during colonialism. The respondent's father was an askari to one of the clan chiefs Ker Kwaro. He stayed in the area for a short while and later re-located to Kitgum but later the respondent returned and settled on the land. Acederi Adoch, a brother to the respondent's grandfather Albino Odida lived with the aunt of the appellant. In 1963, Acederi Adoch killed the appellant's aunt with an axe and set her hut ablaze. He was arrested and on release never returned to the land but went to their home at Pangora in Awach sub-county. Matters relating to that death have never been settled traditionally to-date. In 1988 the area was evacuated as a result of war forcing the appellant and his family to eventually migrate to Masindi on 4th April, 1989. The appellant returned briefly in the year 2007 but went back to Masindi. He finally returned in the year 2010 when he was informed of the respondent's return and possession of the land. The respondent's brother Ongeir-giu David left the land when told to do by the elders but the respondent refused to vacate. He has since constructed a house on the area formerly occupied by the appellant's late brother Albino Okello, whose wife Nyesilina Akot

is still alive. The respondent's father Francisco Onono, whom he came to know in 1972, lived near Lamin Owek and not on the land in dispute.

[4] P.W.2 Juliana Ongany, testified that the appellant's father Yowasi Oola lived on the land in dispute from 1959 until the breakout of insurgency in the 1980s. Upon the death of his aunt, the respondent's father fled from the area. The respondents returned in the year 2008 and trespassed onto the land belonging to the appellant's father Olum. The appellant sued on behalf of the children of Yowasi Oola. P.W.3 Fabio Kitara testified that the respondent's grandmother was his sister. He was a neighbour to Yowasi Oola, the grandfather of the appellant. He settled on the land in 1959 and died thereon in 1964. He dug a well, planted papyrus reeds and a palm trees all of which still exist on the land. The respondent has since built a house on that land. The respondent's grandmother, after the failure of her marriage, lived with the witness and the respondent's father for over thirty years. They later went to Lamin Owek and never claimed the land now in dispute as their own. Albino Odida only worked as a security guard to the sub-county chief Chico Obol for about two years but did not own land in the area. He lived in the government quarters and later returned to Kitgum. His wife was the respondent's grandmother with who they separated. The respondent's father Albino Odida had land in the area but when his brother Akena killed his wife, the aunt of P.W.2, and he fled from the area.

[5] P.W.4 Okumu Dickson testified that the land in dispute belongs to the Angaya Clan. Yowasi Oola lived on the land and later left it to one of his wives after a domestic dispute. His wife died in 1986 during the insurgency. The respondent's father was only a civil servant at the sub-county and he lived in the staff quarters. The Clan Chief ordered the respondent to cease their trespass onto the land. His brother left the land but the respondent did not. The appellant's father Yowasi Oola planted fruit trees on the land such as mango trees, palm trees, and dug a well popularly known as Yowasi's well. The respondent's grandfather killed the brother of the witness and ran away from the land. The appellant's father Olum

was a brother to Yowasi Oola who raised him. The only surviving son of Yowasi Oola is a one Opiro who tried to use the land but left it when the dispute arose. He now lives about half a mile away. That was the close of the appellant's case.

The respondent's evidence in the court below:

[6] In his defence as D.W.1 the respondent Ojok Robert, testified that the land in dispute belonged to his late grandfather Odida Albino who was a guard to Chief Obol. He found vacant land and occupied it in 1930. His father was born on that land. He himself had never lived on it but was told about it by his late father. He began living on the land in 2008. Before that he was living on his uncle's land nearby. His uncle Olii Francis killed his wife Tenda a relative of P.W.4, and fled the area. The land now in dispute was vacant and was used as a hunting ground until he occupied it in 2008. He and his brother Ongiegu David requested the relatives of the late Tenda, Ocen Yolam and Ocen Yokoyandi to be allowed back onto the land since they had been forced to vacate as a consequence of the murder. They were given permission to re-occupy the land. They showed them the boundaries. Opio the son of Yowasi has never challenged their occupation and lives on the land further of that belonged to his father. The land had mango trees planted by his uncle rabbi, a palm tree and a well. The appellants father occupied the land temporarily when it served as a market place but later re-located to his land that is now occupied by his son Opio. This is the reason why there are graves of the appellant's relatives on the land. His father occupied the land before he began working at the sub-county.

[7] D.W.2 Ocan Yokoyadi testified that the appellant's father is Edward Olum while that of the respondent is Oola Yowasi, brother to Edward Olum. The land in dispute belonged to the respondent's grandfather Odida Albino. He occupied it during the time he was a guard at the sub-county. There was a market opposite the land and Yowasi Oola requested for a portion of Odida Albino's land and used it for one year. He went to fish and on return went to live with his uncle Ogal

Cwak in Aruut Central. The land remained vacant following the flight of the respondent's father when Acederi Adoch, a brother to the respondent's grandfather killed his wife. At the time the respondent constructed his house on the land, the appellant was living in his father's land in Aruut Central. He has never lived on the land or utilised it. The land belongs to the respondent's grandfather and not the appellant. The appellant's father was only allowed to use a small portion of it for only two to three years during the market days and he vacated thereafter.

[8] D.W.3 Yolam Onen testified that the appellant lives about a mile away from the land in dispute. His father was Olum Edward. In 1958 the appellant's uncle Yowasi Oola rented a piece of land from the respondent's father during the time he worked as a guard to the sub-county Chief. The respondents' paternal uncle had occupied it for some time but it fell vacant until the year 2008 when the respondent took possession. He helped the respondent by showing him the boundaries. Yowasi Oola's children have never live on nor claimed the land. The respondent's father worked with the Administration Police.

Proceedings at the *locus in quo*:

[9] The trial court visited the *locus in quo* where it observed mango tress which the appellant claimed were planted by Yowasi Oola while the respondent claimed they were planted by his grandfather. The respondent showed the court a grave which he claimed to be his father's but the appellant disputed that and contended it was the grave of Yowasi Oola. There was a well which D.W.2 admitted was called Kulu pa Yowasi. The court also recorded additional evidence from; (i) Emmy Opio son of Yowasi Oola; (ii) Okello Alfred the L.C.1 Chairman; (iii) Buladina Laryang; (iv) Okot Thomas; (v) Okema Saverio; (vi) Ladur Josephine and (vii) Odong Erick.

Judgment of the court below:

[10] In his judgment, the trial magistrate found that the appellant is not the biological son of Yowasi Oola but his nephew. The appellant's father was Olum Edward of Arut. The nephew could not institute the suit without authority of the beneficiaries of the estate. Having been raised by Yowasi Oola, the appellant is a beneficiary of that estate and has the capacity to sue without a grant of letters of administration. It was not clear whether or not Yowasi Oola held the land in his own right or on behalf of the entire Angala Clan. The appellant failed to prove his claim on the balance of probabilities. On the other hand the respondent adduced evidence to show that the land belonged to his grandfather Albino Odida and later it was inherited by his father Onono Francis. The respondent occupied it in the year 2010 at the end of the insurgency. The respondent's evidence was consistent and he could not be a trespasser on the land. He was declared the rightful owner of the land. The suit was therefore dismissed with costs to the respondent.

The grounds of appeal:

[11] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he failed to find that the suit land belongs to the estate of the late Yowasi Oola, of which the appellant is a beneficiary.
2. The learned trial Magistrate erred in law and fact when he failed to find that the respondent is a trespasser on the suit land.
3. The learned trial Magistrate erred in law and fact when he failed to inquire into the value of the land to ascertain whether or not he had jurisdiction to entertain the suit.

Arguments of Counsel for the appellant:

[12] In his submissions, counsel for the appellant argued ground 3, 1 and 2 in that sequence. He submitted that the magistrate had to inquire into the value of the land since the pleadings did not disclose the value. They stated that it was 40 acres. In his judgment he confirmed that to be the area of land in dispute and thus had notice of the size of the land. The claim was not for trespass but for ownership of the land located in Aruti Central village, Gulu District. The trial was conducted by a Grade One magistrate yet it should have been heard by the Chief Magistrate. Unlimited jurisdiction is limited to matters of customary nature. The magistrate could not have relied on customary law only and matters of jurisdiction supersede pleadings. Yowasi was his uncle although he referred to him as his father and this could be a question of translation. He was raised by his uncle as he stated on record while under cross-examination. He said he was suing on behalf of his father. He was out of possession and this was an action for recovery of land.

[13] He argued in the alternative in respect of ground one that there were three other witnesses who testified in support of the appellant, all of whom were consistent in their evidence that the land belonged to the family of Yowasi Ola. Each of the four was cross-examined and none of them was discredited. The trial magistrate only states without giving reasons in the judgment that the plaintiff failed to prove the fact on the balance of probabilities. No reason was given. He stated that he found the defence reliable and consistent but did not reason out the evidence. Perusal of all the documents indicates that the appellant claimed the land as his own. He was self represented. The magistrate should have found that the land belonged to the estate of the late Yowasi and he should not have ignored that alternative cause of action. Lastly the court should have found that the respondent was a trespasser. If the land belongs to the estate of Yowasi, it follows that the respondent who is on land without the consent of the beneficiaries is a trespasser. He prayed that on basis of the arguments made in

support of ground three, the entire proceedings be declared a nullity because the court had no jurisdiction. In the alternative, on basis of the other two grounds, the court should on re-evaluation of the evidence find that the land in dispute belongs to the estate of the late Yowasi of which the appellant is a beneficiary. The respondent should be declared a trespasser. The rest of the prayers in the plaint too ought to be given.

Arguments of Counsel for the respondent:

[14] In response, counsel for the respondent submitted with regard to the third ground of appeal that having been the plaintiff in the court below, the appellant is estopped from challenging jurisdiction. The pleadings of the court below show that the claim was over customary land. Section 207 (2) of *The Magistrate's Courts Act* conferred unlimited jurisdiction on the trial court since the dispute was exclusively over a matter governed by customary law. Where the issues are entirely customary nature, jurisdiction is unlimited. The trial court had jurisdiction.

[15] With regard to ground one, he submitted that the alleged failure is not consistent with the pleading. It was never pleaded. It was a departure from his pleadings. The trial court was right to reject that claim. At page 4 of the record, the appellant testified that his father was Yowasi Ola who came onto the land in 1979 by P.W.2 stated that the father was Olum and not Ola and that is at page 11 of the record. That Yowasi took care of the appellant and was not his father. He was not credible in not disclosing that fact. The respondent stated clearly how he acquired the land He stated it belonged to his grandfather and that the killing of the aunt forced displacement until he regained possession in 2007. The decision in *Akullu Hellen v. Odong Jino Gwore, H.C. Civil Appeal No. 21 of 2018* to the effect that the more a version seems removed from common experience the more implausible it would be, should be followed. He did not plead, and then concealed the fact that he was not a biological son. The respondent was truthful

and his version was not far removed from common experience and therefore this ground should fail.

[16] On the last ground, he submitted that trespass is a possessory claim. There is need to actual possession at the time of entry. Even at scheduling it was stated that it was the respondent in actual possession and evidence was led that the appellant has a home on the land of his father and he did not have any form of control over the suit land. He could not sue in trespass without any relation to the land. The appeal lacks merit and should be dismissed with costs.

Duties of a first appellate court:

[17] This being a first appeal, it is the duty of this court 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 (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). The appellate court may interfere with a finding of fact if the trial court is shown to have 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. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

A point or argument raised for the first time on appeal:

[18] It is contended in the third ground of appeal that the trial Magistrate should have inquired into the value of the land to ascertain whether or not he had jurisdiction

to entertain the suit. The contention is that the Magistrate Grade One Court exercised a jurisdiction not vested in it in law when it tried a suit whose subject matter is land whose value is beyond its pecuniary limit of shs. 20,000,000/= as set by section 207(1) (b) of *The Magistrates Courts Act* (as amended by Act No.7 of 2007), which provides for the pecuniary jurisdiction of a Magistrate Grade One and limits it to subject matters whose value does not exceed twenty million shillings.

[19] Firstly, this is paradoxical in that it is the appellant who filed the suit in that court. Secondly, this point was never raised nor argued in the court below. It is being raised for the first time on appeal, yet there is general prohibition against new arguments on appeal due to the overarching societal interest in the finality of litigation. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Despite this general rule, there have been exceptional cases in which courts have entertained issues on appeal for the first time. Consequently**,** a new point of law not argued at the trial will only be permitted on appeal if court is satisfied that had it been raised at the trial, no new evidence could have been adduced by the adverse party at the trial to contradict it. Where it is evident that evidence could have been gathered and introduced to rebut the issue in the trial court, this establishes the likelihood of prejudice to the adversary and the appellate court will not permit such a point to be raised for the first time on appeal. The bottom line is that appellate courts are not designed, nor permitted, to receive evidence. They will only look at the evidence that was properly admitted at the trial court and properly made part of the record on appeal**.**

[20] Nevertheless, this court is satisfied that had this point been raised at the trial, no new evidence could have been adduced by the respondent to contradict it. The evidence that was adduced by the respondent covers it and on appeal it is being presented as an alternative argument dependent on the same facts as those presented to the trial court. Consequently the court has not found any likelihood

of prejudice to the respondent and for that reason will consider it as an argument raised for the first time on appeal.

The unlimited jurisdiction of Magistrates' Courts:

[21] Section 4 of *The Civil Procedure Act,* provides that nothing in the Act is to operate to give any court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits, if any, of its ordinary jurisdiction. Section 207(1) (b) of *The Magistrates Courts Act* (as amended by Act No.7 of 2007), limits the pecuniary jurisdiction of a Magistrate Grade One to subject matter whose value does not exceed twenty million shillings. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

[22] Whereas the general pecuniary jurisdiction of a Magistrate Grade One court is limited to shs. 20,000,000/= on the other hand section 207 (2) *The Magistrates Courts Act* provides that the court has unlimited jurisdiction with regard to disputes relating to a cause or matter of a civil nature governed only by civil customary law. The question therefore is whether the suit filed by the appellant was governed only by civil customary law, where section 1 (a) of *The Magistrates Courts Act* defines civil customary law as the rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by Parliament.

[23] The expression "subject-matter" connotes the issue about which a right or obligation has been asserted or denied. A subject matter in a suit can either be property i.e. the particular thing in respect of which the suit has been filed, or some personal rights of the plaintiff, i.e. the type of legal issues in dispute, or both. It may have reference not to the property but rather to a right in the property which the plaintiff seeks to enforce, or both. That expression includes the cause of action and the relief claimed. It means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject matter"

means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him or her.

[24] Upon perusal of the plaint as filed in the Magistrate's Court, it is evident that the suit concerned both the property and rights in the property which the plaintiff sought to enforce. Despite its size, the appellant claimed to own the land in dispute under customary tenure and so did the respondent in his defence. Pecuniary jurisdiction is imposed on courts to ensure that complicated disputes over large sums of money will be heard in courts that have the time and resources to hear such cases. The controversy in this suit did not concern the value of the land. There was no amount of money involved in the dispute, in other words the monetary value of the land was never in dispute, but rather rights in it, claimed by each party to have been derived under custom, which rights each of the parties sought to enforce. The subject matter of the suit was therefore the assertion of rights of ownership predicated exclusively upon customary law of inheritance and the transmission of property rights in land.

[25] The evidence and arguments presented to the trial court were limited to the derivation of those rights exclusively under custom. There were no arguments premised on the common law nor laws formally enacted by Parliament. The rights litigated between the parties were based exclusively on civil customary law. The facts on which the rights were claimed and the law applicable to the determination of the issues i.e. both the cause of action and defence to it, were based exclusively on civil customary law. Therefore the Grade One Magistrate's Court had unlimited jurisdiction. Consequently ground three of the appeal fails.

Pleadings by unrepresented litigants:

[26] With regard to the second ground of appeal, it is contended that the trial court erred in not finding that the suit land belongs to the estate of the late Yowasi Oola, of which the appellant is a beneficiary. It should be noted that the appellant

was unrepresented during the trial. He sued in his individual private capacity and not as a beneficiary of the estate of the late Yowasi Oola. The judgment of the court below manifests the challenge met by the trial magistrate trying to discern the essence of an unrepresented party's claim. The unrepresented party's lack of knowledge of legal rights and process typically compounds the difficulty for the court, the litigant, and the opponent. It is predictable in cases like this that the trial court will face challenges discerning substantive issues and in dealing with procedural deficiencies.

[27] Be that as it may, *The Civil Procedure Rules* provide no guidance and do not address the specific difficulties created by unrepresented litigants. One way of looking at it is that when a litigant accepts the risks of proceeding without counsel, he or she should be entitled to the same, but no greater, consideration than other litigants represented by counsel and should not be able to cast off an unfavourable judgment than he or she would if represented by counsel. The rules of civil procedure must apply equally to parties represented by counsel and those who forgo representation. As a general principle, exceptional treatment of parties who represent themselves would be unfair to the other parties to litigation (see *Brown v. Kindred Nursing Centers East, L.L.C., 364 N.C. 76, 692 S.E.2d 87*). Procedural rules are not to be belittled or dismissed simply because their non-observance may have resulted in prejudice to a party's substantive rights. While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to insure an orderly and speedy administration of justice.

[28] When dealing with situations of non-compliance, the construction most consistent with the object and purpose of *The Civil Procedure Rules* should be adopted and its context would be a narrow one, lest the rules are rendered useless. *The Civil Procedure rules* exist essentially to enhance equity and fairness in trial rather than create an obstacle thereto. Compliance with the rules is a precondition for meaningful justice since conducting trials on broad principles of justice without

regard to technicalities may well lead to uncertainty and injustice. For example provisions on time periods are strictly applied, indispensable as they are to the prevention of needless delays, and are necessary to the orderly and speedy discharge of judicial business. Indeed, a record barren of any evidence to show that a litigant, at least, tried to offer an explanation or justification for delay, indicative that the litigant simply ignored the rules, does not call for relaxation of the rules. Hence liberal application of the rules of procedure should not be invoked if it will result in the wanton disregard of the rules or cause needless delay in the administration of justice.

[29] However on the other hand, courts ought to be mindful of the "interest of justice" relief under article 126 (a) of *The Constitution of the Republic of Uganda, 1995* which allows for relaxation of the rules in pursuit of substantive justice. Waiving strict compliance with the rules of procedure in the "interest of justice" should therefore be extraordinary relief granted for the most compelling reasons where in the circumstances of the case, strict application of the rules would yield a result that is contrary to the spirit, intent or purpose of the administration of justice whose overriding objective is the just, expeditious, proportionate, efficient and affordable resolution of civil disputes. Procedural legal technicalities should be applied to enable rather than restrict access to justice in courts. Like all rules, the rules of procedure are required to be followed except only for the most persuasive of reasons when they may be relaxed to relieve a litigant of an injustice not commensurate with the degree of his or her failure to comply with the procedure prescribed.

[30] That being the case, where the matter at hand touches issues of jurisdiction or the need for finality in litigation and the need to discourage stale claims, strict application of the rules would be justified while in others, the hardship likely to be occasioned by waiving the rule is far lighter compared to the effect of denying a party access to the court to afford the parties the opportunity to fully ventilate their cases on the merits, for example where failure to comply with the rules does

not affect the substance of the dispute or deprive the other party of a substantive defence. As a result, minor procedural lapses or technicalities in course of the proceedings committed by unrepresented litigants should ordinarily be overlooked.

[31] Generally unrepresented litigants are likely to lack the skills required for the preparation of proper pleadings. When a plaintiff proceeds unrepresented by counsel, his or her pleading ought to be liberally construed and his or her complaint, however inartfully pleaded, ought to be held to less stringent standards than formal pleadings drafted by lawyers (see *Erickson v. Pardus, 551 U.S. at 94*). When only represented litigants have their legal needs met, justice will remain an unrealised ideal. Therefore in dealing with rules that guide pleadings, most courts will be much more lenient to an unrepresented litigant but not in every aspect of litigation. Drafting a pleading inartfully is one thing, failing to follow the rules of civil procedure is something different all together. A court cannot advise an unrepresented litigant as to how to follow the rules over and over and over again, without giving legal advice. There is a presumption that the appellant is not a pauper if he owned, or had equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property that did provide sufficient means to enable him to pay the fee prescribed by law for the plaint in the suit. A person who has not sought to sue as a pauper should be held to certain minimal standards of compliance with *The Civil Procedure Rules*, for example in matters of the law of limitation.

[32] The rules of procedure and justice are not synonymous. The rules are a means. Justice is an end. As we know all too well, the rules do not always operate to advance the cause of justice. The rules have at times served to obfuscate and entrap rather than clarify and liberate. Hence under article 126 (a) of *The Constitution of the Republic of Uganda, 1995* technical rules may be relaxed for the furtherance of justice and to benefit the deserving, in the interests of substantive justice as a means for releasing the liberating and equalising

energies latent in the core values of the administration of justice. Having in mind the peculiar circumstances of the instant case, the fact that the appellant sued in his individual private capacity and not as a beneficiary of the estate of the late Yowasi Oola, was rightly overlooked by the trial court when it found that having been raised by Yowasi Oola, the appellant is a beneficiary of that estate and has the capacity to sue without a grant of letters of administration. This is because upon death of the owner, a beneficiary has, in equity, a proprietary interest in the estate property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

Locus standi for a beneficiary to an estate before a grant of administration:

[33] Save for actions instituted against the violation of another person's or group's human rights under article 50 (2) of *The Constitution of the Republic of Uganda, 1995*, for any person to have *locus standi*, such person must have "sufficient interest" in respect of the subject matter of a suit, which is constituted by having; an adequate interest, not merely a technical one in the subject matter of the suit; the interest must not be too far removed (or remote); the interest must be actual, not abstract or academic; and the interest must be current, not hypothetical. The requirement of sufficient interest is an important safe-guard to prevent having "busy-bodies" in litigation, with misguided or trivial complaints. If the requirement did not exist, the courts would be flooded and persons harassed by irresponsible suits. The Supreme Court decision in *Israel Kabwa v. Martin Banoba, S.C. Civil Appeal No. 52 of 1995*; *[1996] 1 KALR 109,* is to the effect that a beneficiary to an estate of a deceased person has the capacity to sue, even without a grant of letters of administration. As a matter of principle, a beneficiary has standing to sue in his or her own right provided the interests which such beneficiary seeks to protect are germane to the estate and the claim nor the relief sought requires individual participation of the rest of the beneficiaries.

[34] Whereas *The Succession Act* generally confers rights of inheritance only on blood relatives in a line of descent or ascendance, including a series of persons who have descended one from the other or all from a common ancestor, placed in a line in the order of their birth showing the connection by blood, adopted children, adoptive parents, the surviving spouse and dependants, common law and custom recognise the fact that the parent and child relationship may also be conferred upon a person by receiving a decedent into his or her home openly, providing support for him or her, and holding him or her out as his or her natural child. In such situations, equitable or virtual adoption is a judicial construct used to uphold claims by a child not formally adopted to benefit from his or her "adoptive parents" in the same manner as the parent's natural or legally adopted children. If the parent had held out the adopted child as his or her own throughout the child's life, even if there was no formal adoption, the child may be considered as an adopted child (see *Williams v. Dorrell, 714 So.2d 574, 23 Fla. L. Weekly D1580 (Fla. 3d DCA 1998*).

[35] According to section 14 (2) (b) (ii) of *The Judicature Act*, the jurisdiction of the High Court is to be exercised subject to any written law and insofar as the written law does not extend or apply, in conformity with any established and current custom or usage. At the same time, section 15 (1) of that Act confers on the High Court the right to observe or enforce the observance of, and not to deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with any written law. Similar provisions are found in section 10 of *The Magistrates Courts Act*. Article 37 of *The Constitution of the Republic of Uganda, 1995*, guarantees to every citizen, the right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. Moreover, Article 247 of *The Constitution of the Republic of Uganda, 1995* requires courts to construe existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution

bearing in mind as well that Article 126 (1) thereof too requires such application to be in conformity with law and with the values, norms and aspirations of the people. By recognising the cultural practice that having been raised by Yowasi Oola, the appellant is a beneficiary of that estate and has the capacity to sue without a grant of letters of administration, the trial court is backed by those principles.

[36] In the instant case, the uncontoverted evidence on record is that the appellant was raised from childhood to adulthood by the late Yowasi Oola. There is no evidence to show that Emmy Opio the only surviving child of the deceased Yowasi Oola, was opposed to this suit meant to recover, protect and preserve land claimed to constitute the estate of his late father. The only question that remained is whether or not this land was indeed part of the estate of the late Yowasi Oola. In a bid to make that determination, the trial court not only received evidence in court, but it laso visited the *locus in quo*

Errors in conducting proceedings at the *locus in quo*:

[37] Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81)*. The trial court therefore erred when during the visit to the locus in quo, it received evidence from persons who had not testified in court, namely; (i) Emmy Opio son of Yowasi Oola; (ii) Okello Alfred the L.C.1 Chairman; (iii) Buladina Laryang; (iv) Okot Thomas; (v) Okema Saverio; (vi) Ladur Josephine and (vii) Odong Erick.

[38] That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

[39] A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the seven additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those witnesses.

Oral evidence when corroborated by physical evidence carries more weight:

[40] The appellant's version briefly is that his late uncle Yowasi Oola was born in 1959 in Paicho on the land in dispute. He helped dig two communal wells in the area which wells exist to-date. The appellant lived on the land and grew up in the home of Yowasi Oola. On the other hand, the respondent's version is that his

grandfather, Albino Odida, obtained the land in dispute from Rwot Obol in 1930 and occupied it from then until his death. The respondent and his brother inherited it from him and only vacated the land in 1986 when the brother of Albino Odida killed his wife. In evaluating the two versions, the trial court found that the appellant failed to prove his claim on the balance of probabilities since it was not clear whether or not the land in dispute belonged to the Angaya Clan or to Yowasi Oola. On the other hand the respondent's evidence was consistent and it showed that the land belonged to his grandfather Albino Odida and later it was inherited by his father Onono Francis. The respondent occupied it in the year 2010 at the end of the insurgency.

[41] Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed (See *Peters v. Sunday Post Ltd [1958] E.A. 429*).

[42] The minimum requirements of evaluation of evidence are met where the decision demonstrates on the face of it; (i) a discussion of the evidence in favour of the claim; (ii) a discussion of the evidence against the claim, and (iii) a reasoned explanation as to why one set of evidence outweighs the other set, or that the evidence is in equal balance for and against the claim. The process entails assessing the credibility and probative value of evidence before weighing the evidence in order to arrive at a decision. In order to distil the truth from the evidence presented, the court must consider the body of evidence as a whole, as well as evaluate the persuasiveness of each individual piece of evidence.

[43] Weight should not be assigned unjustly or arbitrarily. For all types of evidence, whether oral or documentary, direct or circumstantial, reliability must be assessed in order for the court to decide how much weight should be attached to it. One factor that affects reliability is verifiability. Evidence is credible when it is inherently believable or has been received from a competent source such as when it is based on direct personal knowledge or experience of the witness. Such evidence will ordinarily be accepted at face value unless called into question by other evidence on record or by lesson drawn from sound common experiences or legal principles. Evidence that is incredible carries no weight or probative value for example where a witness materially relies on a recounted narration of unsupported historical occurrences. Such evidence may be discounted. Because of the difficulty in determining the accuracy or clarity of the individual's memory, evidence that rests solely on the word of a witness will be accorded a lesser weight in the face of that which can be independently and objectively verified. However, even verifiable evidence must be scrutinised for accuracy. More weight is usually attached to evidence that can be independently and objectively verified.

[44] Evidence is reliable only if it has been shown to be correct. Even without corroboration, correctness may be assessed upon considerations such as; whether the witness has a personal interest in the issue; if there is a basis for bias; if one party had a better opportunity to know the facts, and which version is more reasonable and probable. If the evidence shows a significant imbalance that tilts the scale, then the evidence requires a decision in that direction, either for or against. If all available evidence, after being weighed, is found in approximate balance or equipoise, the suit ought to be dismissed.

[45] In the instant case, the two versions have only two facts in common; the fact that the respondent's grandfather Odida Albino was a guard to one of the clan chiefs Ker Kwaro or Chief Obol, and the fact that it is during or around the year 1963

when his brother Acederi Adoch killed the appellant's aunt with an axe and set her hut ablaze that he fled the area, never to return. In the respondent's version, Odida Albino and his son the late Francisco Ononociko alias Onono Francis occupied the land until that flight. According to D.W.2 Ocan Yokoyadi there was a market opposite the land and Yowasi Oola requested for a portion of Odida Albino's land and used it for one year. The appellant's father was only allowed to use a small portion of it for only two to three years during the market days and he vacated thereafter. D.W.3 Yolam Onen testified that in 1958 the appellant's uncle Yowasi Oola rented a part of land from the respondent's father. The respondent's father worked with the Administration Police. Indeed Yowasi Oola's children have never lived on nor claimed the land. In his defence as D.W.1 the respondent Ojok Robert, contended that the appellant's father occupied the land temporarily when it served as a market place but later re-located to his land that is now occupied by his son Emmy Opio. His father, who was a civil servant at the sub-county, occupied the land before he began working at the sub-county.

[46] On the other hand, the appellant's version is that his uncle Yowasi Oola lived on the land in dispute from 1959 until the breakout of insurgency in the 1980s. According to P.W.4 Okumu Dickson, the respondent's father was only a civil servant at the sub-county and he lived in the staff quarters. It is Yowasi Oola who planted fruit trees on the land such as mango trees, palm trees, and dug a well popularly known as Yowasi's well. P.W.3 Fabio Kitara testified that Yowasi Oola, dug a well, planted papyrus reeds and a palm trees all of which still exist on the land. In his defence as D.W.1 the respondent Ojok Robert, contended that it his uncle Rabbi, who planted a palm tree and dug a well on the land. This is the reason why there are graves of the appellant's relatives on the land.

[47] While the appellant testified from personal knowledge the respondent stated that he himself had never lived on the land but was told about it by his late father. It was D.W.2 Ocan Yokoyadi and D.W.3 Yolam Onen who showed the respondents the boundaries of the land. Of the two versions, the observations

made by court at the *locus in quo* are supportive of the appellant's rather than the respondent's. In their testimony in court, none of the respondent's witnesses alluded to any trees planted by Odida Albino, which are key features that were found on the land. At the *locus in quo*, the respondent suddenly claimed that they had been planted by his uncle Rabbi. The respondent showed the court a grave which he claimed to be his father's but the appellant disputed that and contended it was the grave of Yowasi Oola. Notably, the respondent in his defence admitted there are graves of the appellant's relatives on the land. This is inconsistent with the claim that Yowasi Oola requested for a portion of Odida Albino's land and used it for one year; that he was only allowed to use a small portion of it for only two to three years during the market days and he vacated thereafter. It is more consistent with a more prolonged occupation and established user. P.W.4 Okumu Dickson testified that Yowasi Oola dug a well popularly known as Yowasi's well and the court found a well which D.W.2 admitted was called Kulu pa Yowasi.

[48] Unlike oral testimony, physical evidence does not lie, it cannot be impeached, it cannot be intimidated, does not forget or pursue a self interest. Unless manipulated or staged, physical evidence sits there and waits to be detected, preserved, evaluated, and explained. Once examined and compared with the witnesses' testimony, the court may then determine the reliability of their respective accounts. The court looks at the physical evidence and attempts to determine how it fits into the overall scenario as presented in the contending versions. Had the trial court properly considered the physical evidence at the *locus in quo* and applied it to the two sides of the case, it would have found that the evidence was supportive of the appellant's rather than the respondent's version. Since the respondent's version rested only on the word of witnesses, it should have been accorded a lesser weight in the face of the appellant's version which could be independently and objectively verified by the physical evidence found at the *locus in quo*.

[49] The trial court wondered whether this land belonged to the Angaya clan or the estate of the late Yowasi Oola. Section 22 (1) of *The Land Act* recognises the fact that that even for land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, where the customary law of the area makes provision for it. Evidence at the locus in quo showed that the late Yowasi Oola dealt with the land in the same way that a rightful owner would deal with it. His had open, notorious, continuous, exclusive possession or occupation of a part thereof as would constructively apply to all of it. His occupancy of a part should be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by any other person. In the process of coming to the conclusions that he did, the trial Magistrate did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. For that reason ground one of the appeal succeeds. Had the trial magistrate properly directed himself, he would have found that the land in dispute belongs to the estate of the late Yowasi Oola, of which the appellant is a beneficiary.

[50] Lastly, in ground two it is contended by the appellant that the trial court should have found that the respondent is a trespasser on the land in dispute. Having found in resolving the first ground that the land in dispute belongs to the estate of the late Yowasi Oola, of which the appellant is a beneficiary, it follows that the evidential burden was on the respondent to show that he had a claim of right or permission to occupy the land. P.W.2 Juliana Ongany, testified that it is during the year 2008 that the respondent trespassed onto the land. P.W.3 Fabio Kitara testified that the respondent has since built a house on that land. P.W.4 Okumu Dickson testified that the Angaya Clan Chief ordered the respondent to cease his trespass onto the land. His brother left the land but the respondent did not. In his defence as D.W.1 the respondent Ojok Robert, testified that he began living on the land in 2008 after securing permission from relatives of the late Tenda, Ocen Yolam and Ocen Yokoyandi who allowed him back onto the land. He was given

permission to re-occupy the land and they showed him its boundaries. D.W.3 Yolam Onen testified it is during the year 2008 that he helped the respondent by showing him the boundaries.

[51] There is no evidence to show what authority relatives of the late Tenda, Ocen Yolam and Ocen Yokoyandi and D.W.3 Yolam Onen who allowed him occupy the land and showed him its boundaries had over it. They had no authority to permit that occupation. His unauthorised entry onto the land therefore constitutes an act of trespass. This ground of appeal succeeds too

Order :

[52] In the final result, the appeal is allowed. The decision of the court below is set aside and in its place judgment is entered for the appellant against the respondent, for;

a) A declaration that the land in dispute forms part of the estate of the late Yowasi Oola.
b) An order of vacant possession.
c) A permanent injunction restraining the respondent, his agents, workers or persons claiming under him from disturbing quiet possession and enjoyment of the land by beneficiaries of the estate of the late Yowasi Oola.
d) The costs of the appeal and of the court below.

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Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : Mr. Stephen Muhoozi.

For the respondent : Mr. Michael Okot.