The Republic of Uganda

In The High Court of Uganda at Soroti

Civil Appeal No. 26 of 2020

(Arising from Katakwi Grade One Court Civil Suit No. 035 of 2013)

1. Amaitum Samson
2. Eerut Michael
3. Eerut Augustine
4. Opajak Tom
5. Onyanga Simon
6. Ariko Peter
7. Arukude Deborah
8. Adepi Jane

..... Appellants.

Versus

Angole Benjamin .....Respondent

Before: Hon. Justice Dr. Henry Peter Adonyo.

Judgment:

1. Background.

This appeal arises from the judgment and orders of the Magistrates Court of Katakwi delivered on the 07th day of May 2020 by H/W Awacnedi Freddie.

The respondent filed civil suit no. 035 of 2013 in the Magistrates Court of Katakwi against the appellants for an order declaring him the owner

of the suit land, a permanent injunction and eviction order. The respondent's claim was that the suit land originally belonged to his father Ogit Nasoni and his brother Abura Samson and after their death he inherited it. The respondent and his relatives were later in around 1987 displaced by the Karamojong warriors. A camp was established on the suit land and when peace was realised people returned to their respective places of origin but the appellants adamantly refused to leave.

The appellants on the other hand denied the respondent's claim and contended that they inherited the land from their ancestors.

The trial magistrate after hearing all the evidence entered judgment in favour of the respondent with the following orders;

a. The plaintiff is declared the rightful owner of the suit land.
b. The defendants will be found to be trespassers on the suit land.
c. An eviction order will issue against the defendants if they do not give vacant possession of the suit land within six months.
d. A permanent injunction issues against the defendants and their agents and assignees from further trespassing on the suit land.
e. The defendants shall pay shs. 10,000,000/= to the plaintiff as general damages.
f. The plaintiff is entitled to costs of the suit.

The appellants dissatisfied with the judgement appealed to tis Honourable Court.

2. Grounds of Appeal:

a. The learned trial magistrate erred in law and fact in not negatively applying the revelations at the visit to the locus to the facts of the respondent's case.

b. The learned trial magistrate erred in law and fact in not applying the limitation period to the respondent's case.

c. The learned trial judge erred in law and fact in making an arbitrary award of general damages against the appellants.

d. The judgment of the learned trial magistrate is uncertain as to the land decreed to the respondent in the light of the respondent's claim.

e. The trial magistrate erred in law in shifting the burden of proof on the appellants who were not the plaintiffs.

f. The trial magistrate ignored contradictions in the respondent's evidence.

g. The trial magistrate erred in law in disbelieving the administrator on matters relating to revocation not relevant to the suit before him.

h. The decision of the trial magistrate is not in conformity with the evidence on record.

i. The learned trial magistrate erred in law in accepting submissions of counsel for the respondent on alleged facts not supported by evidence.

j. The locus in quo was perfunctorily conducted.

k. The decision of the trial magistrate has occasioned a miscarriage of justice.

3. Duty of the 1st appellate court.

In ***Kifamunte Henry vs Uganda SCCA No. 10 of 1997***, it was held that;

"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

In ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236,*** it was held that;

"This being a first appeal, this court is under an obligation 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."

The above legal positions care taken into account in resolving this appeal, given the fact that this is a first appellate court.

4. <u>Evidence on record:</u>

PW1, Angole Benjamin, testified that he knows that appellants, D1 is a son to the late Ogulo Joshua who was a son to the late Ezekiel Amaitum and he was their immediate neighbour on the south east. D3 is a son of the late Omoding who was their neighbour to the east together with his brother called Ekure Wilson and the rest of the defendants/appellants were from the family of the late Igira who is a foreigner in their village having been born in another village called Majengo Omukunyu Parish in Ongongoja sub county which is about 15-20km away from the suit land. The suit land is approximately 200 acres located in Okocho village, okocho parish, Ongongoja sub-county in Katakwi District. The appellants entered

his land in 2002 when government established a barracks on the land and civilians took refuge and settled within the vicinity of the barracks due to the Karamojong insurgency. The appellants happened to be among the people who settled there during that time. In 2006 when peace relatively returned some of the people who had camped peacefully relocated to their various places of origin however, the appellants became adamant and refused to go back claiming ownership of the land. That the land is customary land which he customarily inherited from his father Nason Ogit and his brother Abura Samson who died in 1984 and 1987 respectively during the Karamojong insurgency in the various places where they had taken refuge. He inherited the land in 1987 after the death of his uncle Abura. There's a footpath passing through the land via Okoro primary school and a health centre. The old homestead of his late grandfather called Ilukor is not visible but there are two trees in the homestead including an 'Ecomai' tree. That his father also had a home on the suit land which is exactly where Amaitum Samson has put up his home so it is not visible however there was a mango tree that was in compound and it is still there. That the house of his Uncle is also not visible but it was near 'Ebule' tree and it had sisal but Aroko Peter tempered with it put up a home there and removed the sisal and tried to put a fence to his current home. There is a church and Primary school which were constructed on land donated by his father and uncle. The primary school was set as a pilot primary school and that was where he did early primary education in 1958 and is now called Okoro P/S.

During cross-examination by the 1st appellant he stated that he has not put up a home on the suit land because the appellants have perpetually resisted his attempts to come and settle thereon. That he left the land due to insurgency. His biological brother Opeitum John Michael is settled on part of the suit land. The he could not tell the exact year his father planted

the mango tree because by the time he was born in 1952 the tree was already in existence. His clan is Isuguro Ibobola and those at the neighbourhood and from his clan are among others Opei George William who is a nephew to his father, Aupal Kupulia and the family, Ogiel s/o Yobo and Okori Ignatius s/o late Ojula. That it has taken long for him to bring the appellants to court because he thought other amicable means would solve the problem including meetings with elders and Lcs of the village.

During cross-examination by the 2nd appellant he stated that Igira just like any other person came to take refuge on the land and he couldn't chase him away since there was still insecurity and in fact Igira was not staying on the suit land but in the camp where he died and was buried, he was not buried on the suit land. That unfortunately Igira was even co-habiting with his late brother's wife and that was where he died and was buried in Adacar Camp. That Ogit and Ezekiel are not related.

During cross-examination by the 3rd appellant he stated that the 3rd appellants home was on the suit land but if he now relocated he can't tell.

During cross-examination by the 4th appellant he stated that his grandfather, sister and many of his relatives were buried on the suit land.

During cross-examination by the 5th appellant he stated that he kept on checking on the suit land numerous times and he sent his children to cultivate and before establishing a home but they were chased away. That he sent Ingole Samson, Ogel Gabriel, Ilukor Charles, Simon Ogit and others.

When cross-examined by the 6th appellant he maintained that he inherited the land from his father and uncle per the principles and practice amongst Iteso people with respect to land succession. That his neighbour to the

north is Ogiel s/o late Modo Yobo however, there is a recent development where someone called Otworot has established a home, neighbour to the west is Aupal Kupiliano s/o Otenge, to the east it is the 3rd appellant and the wife of the late Wilson Ekure and on the southern side it is Opeei s/o Keeya. He maintained that the appellants entered the land in 2002 and before that they weren't on the suit land. That what he knows is that the 6th appellant's father used to stay with his sister Aongorie the mother of D3 and they were not staying on the suit land. That the said Angorie was married to the late Cronulia who was their neighbour. That his parents gave the school land and he has no complaint over it, however, he was not aware that the late Ogulo (father of the D6) gave land to the school.

He further stated that the 7th appellant's husband didn't die on the suit land.

PW2, Etoke Jafes testified that he knows some of the appellants and the respondent. He became friends with the respondent in 1959 and they began visiting each other, the respondent's father's home was within the suit land. That Ogit's home was on the suit land from 1959, 60s and even in the 70s. In 1986, people ran away due to the insurgency including Ogit. That from 1959 to the 80s Amaitum Ezekiel was a neighbour to Ogit Nason and the two had no dispute at all. Later Amaitum passed on and was buried in ancestral land and Ogulo Joshua took over but he lived happily with Ogit. That when Ogulo Joshua passed away he was taken to the ancestral grave yard about 2km from the suit land.

During cross-examination he stated that the respondent comes from Isuguro clan, there are natural trees on the land as well as a school nearby and a health centre. That Ogit came from the Isuguro clan and there are other Isuguro clan members there and Isuguro clan is the nearest to the suit land. That the 3rd appellant is currently not staying on the suit land

but at the time the suit was filed he was on the land. That the land belongs to the respondent because it is his father's land. That the appellants come from Iworokwan clan and some of them are staying on the suit land. That by 1980 no relative of the appellants stayed on the suit land.

PW3, Icokot George William, retired parish chief of Ogoria Village, Okocho Parish, Ongongoja Sub County, Katakwi District. Angole's father married his aunt. He knows all the appellants as well; the 1st is his nephew, 2nd,4th,5th and 6th are Igira Francis' children, 7th and 8th are Igira's wives and the 3rd is his Iworopom clan-mate. He corroborated PW1's evidence that the land originally belonged to Ilukor and later Ogit who was using it for farming and settlement and later died in the place where he took refuge due to the insurgency and he was therefore not buried in the suit land. Igira's home was in Opian village, Okoco Parish 2½ miles from the suit land. Ariko was born in Apoloin where people took refuge while Oyanga, Opajak and Eerut were all born on the suit land. Igira was buried in Adacar centre when he died in 2003, but before he died he was living with his wives at Adacar Centre and that is where he married them from and this is how the defendants came to live on the suit land. He served in Okocho from 1974 to 1977 and Angole was using the land for cultivation prior to the coming of the Karamojongs, however, when the Karamojongs came people in the area took refuge away from the area. That the appellants came to the suit land after peace returned, the suit land is approximately 300 acres but out of that land was given by Ogit, Abura and Otenge to Okocho SS and Okocho C.O.U. That the barracks were near the suit land and not thereon and it is still there to date. That there came a time when the respondent wanted to settle on the suit land but the appellants denied them a chance. There was a camp on the suit land but after peace returned Amaitum didn't go back he remained on the land. In 2003, the 1st

appellants father passed on and he was buried in Okocho Village not the suit land.

During cross-examination he stated that none of the respondent's relatives are on the suit land because the appellants denied them access to the suit land. There are plants and mango tree planted by Ogit as well as natural trees on the land. He corroborates PW2 that Angole's Clan members neighbour the suit land. That the area is occupied by people of different clans. He welcomed the soldiers as a parish chief.

PW4 Otim Samson testified that he knew the suit land and it is approximately 250 acres and it originally belonged to Nason Ogit and Abura Samson and after their death the respondent inherited the same. That they had been using the land peacefully for cultivation and settlement. That the appellants are using part of the suit land and another part is being used by the respondent's brother Obwokor. That during the time of the Karamojong insurgency people ran away and the place remained vacant and later government established a camp on the land in the 1980s. When the respondent came to the land he was denied access by the appellants which resulted into a community meeting to mediate the case but the appellants stubbornly refused to vacate the land. The brother of the respondent is on the suit land and also Ogit established a home on the suit land way back. That Igira who was his friend before he produced children told him that the appellants came from Ngariam.

The appellants/ defence case was as follows.

DW1, Amaitum Samson, testified that he only got to know the respondent after he filed the case. He is related to all the appellants with the 2nd, 4th,5th and 6th as his cousins, and the 7th & 8th are his stepmothers. That the suit land belongs to the appellants and they derive their interest through inheritance from their parents. Ibwakit Jonathan his uncle is

currently the administrator of his father's (Ogulo Joshua) estate. That his father died on the suit land and was buried thereon in 2009 and he also had a case against Ogit Nathan over the suit land. This matter reached Soroti High Court and it ended in his father's favour. That in 2013 when the respondent started claiming ownership of the land he disagreed with him because he has stayed on the suit land from the time of his birth. That his grandfather Amaitum Ezekiel who died in 1968 was buried on the suit land and the grave is visible and the same applies to his grandmother. During cross-examination he stated that he didn't know whether his grandfather had land bordering the suit land, he further stated that his father had over 500 acres and some of it is not part of the suit land, but the fathers land not in dispute shares a common boundary with the suit land. That his father only used the land for cultivation and not settlement. His brothers are using the land which is not in dispute, that he also has relatives who have ever lived on the suit land e.g. Eerut Augustine who to date is living there, and have lived there-both the suit land and the land not in dispute since the time of their birth. He agreed that there was an IDP camp on the suit land and that apart from the suit land he has not heard of any other land Ogit had. That the respondent's brother does not stay on the suit land but neighbouring it and its owned by Opeei George William and he entered there in 2013.

DW2, Eerut Michael testified that he doesn't know the respondent but is related to the appellants and that the suit land belongs to his father the late John Francis Igira who died in Adacara Camp and was buried there in 2002 due to the insurgency. That Igira inherited the land from Ezekiel Amaitum. During cross-examination he stated that by the time of his death, Igira was not living on the suit land. That his uncles do not come from Majengo but Okocho, he added that his paternal uncles do not stay on the suit land but stay about 4 miles from the suit land. That his uncles

once stayed on the suit land but left in 2015 when the suit was in court. That his father once stayed with his sister Aongor who married Omoding Cornelius and is the mother of D3, furthermore, where they live borders the suit land. He admitted that Ogit stayed on the suit land and the respondent is his son.

DW3, Eerut Augustine testified that he knows the respondent and he once stayed in Okocho, his father was Ogit. That the land originally belonged to Amaitum Ezekiel and there are two families on it including Eerut and Amaitum Ezekiel. That Eerut and Amaitum Ezekiel are brothers who inherited the land from Ogwel. That Amaitum Ezekiel was the clan chairman and the land was in his control and when he passed on Ojulo became the clan Chairman, then later Ibwakit Jonathan. His mother was buried on the suit land. That Ogit used to stay 6 miles away from the suit land.

DW4, Opojak Tom, testified that he doesn't know the size of the suit land but it belonged to their grandfather Amaitum Ezekiel. He is currently cultivating about 4 to 5 acres which he began using with the permission of his father Igira who later died in 2003. During his father's funeral, the clan Iworopom had a meeting and the issue of land was not discussed. All the co-appellants are on the suit land but their father did not divide land, he showed them spots where to put their homes. During cross-examination he stated that his father and mother were not buried on the suit land but in Olela where his father had another home. That he had never had of Abura or Ogit living on the suit land.

DW5, Onyang Simon, testified that the land is for their grandfather Amaitum Ezekiel. He was born on the suit land and his father Egira showed the portion he is living on; however, he doesn't know the number of gardens. His grandfather was called Eerut brother to Amaitum Ezekiel.

His father was buried in Adacar camp, he was also living in this camp and only came back to the suit land in 2007 and he found nothing there. He did not know when Amaitum Ezekiel died but Ogulo Joseph showed him Amaitum's old homestead on the suit land though he did not know when this was. He was in Adacar village when he fled with his father during the insurgency and his father gave him the history of the suit land. (At this point the trial magistrate noted that the witness looked uneasy). His mother was buried in Adidit because of the insurgency. During cross-examination he stated that his father's brothers do not stay on the suit land but in Aeomai-Opyam village where they bought land, they went there in 2007. That Amaitum, his brothers Omoding Cornelius and Ekwee as well as the appellant's sister Kongai were buried on the suit land.

This witness also refused to answer further questions.

DW6, Ariko Peter, testified that the suit land is approximately 300 to 400 acres and it belongs to their forefathers and he inherited from his father Igira Francis who died in 2003 and Ibwakit became the administrator of his estate. That Igira inherited the land from his father called Erutu and all the 7 defendants are staying on the land which is clan land. That the suit land has ancestral cites composed of homes where his father and grandfather used to live, graves of their relatives like Onyang, Kongai Annah, his stepfather. The land also has acacia trees, tamarin trees, mango and sisal which were planted by his forefathers. That the plaintiff has no structure or gardens on the suit land. During cross-examination he stated that there was no camp on the suit land in 2003. That his grandfather did not live in Majengo village and he heard that he was buried on the suit land however his grave is not visible. His father was not buried on the suit land but in Adacar camp about 5 hours from the suit

land and it is where he was living at the time of the insurgency. That there was a camp on the suit land in 1998 and he is not sure when it closed.

DW7, Arukude Deborah testified that the suit land belongs to her husband who inherited it from Eerut and he showed it to her when they got married. Her home is on the suit land and there is even an old homestead where she lived with her husband. Before her husband died he did not have any problem with anybody over the suit land. By the time Museveni came into power she was already married. Eerut was not buried on the suit land and she doesn't know where he was buried.

DW8, Ogwel Ronald, testified that the land belongs to the appellants and they inherited it from their forefathers Onyang, Ezekiel Amaitum and Wilson Ekwee and they were all buried on the suit land. The suit land is for Iworopom Ikorinyanga clan to which all the defendants belong. The respondent belongs to the Igoria clan, has no relatives or activities on the suit land. Abura Samson cohabited with his aunt Naume Akole on the suit land but he left for after Naume's death, Ogit on the other hand stayed in Ogoria village but he doesn't know where his land was. During cross-examination he stated that Abura came to cohabit with his aunt on her land not his. Onyang, Eerut, Ongaria and Igira were not buried on the suit land.

DW8 (b), Adepi Jane testified that when she married Igira Francis he took her to the suit land and she produced all her children on the suit land, by the time of her marriage her father-in-law had already died. That the suit land has trees planted by her husband and his brothers, homesteads and graves. That the suit land does not belong to the respondent and he has no houses or even gardens on it. During cross-examination she stated that there have been any meetings held to solve the case and she had never had of Ogit. Eerut the father of Igira was buried in Soroti. She further

stated that Awongore was not a sister to Igira and she stayed with him as a stepmother and the land where they stayed is in the neighbourhood of the suit land, she later changed and said that there is no distance and it is the suit land. She knows Opeitum and he stays on the suit land but she did not know that he is the respondent's brother, however, when she got married she did not find him on the suit land and he recently moved there.

DW9, Ociro Mary, testified that Ogit was her in-law. She corroborates DW8 on the ownership of the suit land. Wilson Ekwee was her husband and when he died he was buried on the suit land. Amaitum Ezekiel and Eerut were also buried on the suit land and their graves are visible. That before his death, Ogit lived in Opian village which is four miles from the suit land and she never saw him on the suit land When she got married to Ekwee she found Amaitum Ezekiel, Oeremu and others living on the suit land. During cross-examination she stated that Igira's brothers, Ogwel and Ogwang have homes on the suit land. She further stated that she is aware that the suit land does not include the land she is staying on, that all the defendants are staying on the land where Abura lived but she doesn't know its size. During re-examination she stated that Abura cohabited with Naume Akol who was a sister to her husband and settled on Eerut's land.

DW10, Ibwakit Jonathan testified that Ogit used to stay in his aunt Naome's home who also cohabited with Abura Samson who came from Acowa. Abura came to cohabit with his aunt in 173 and in 1974 Ogit joined him and they stayed there for 3 years, Ezekiel and Joshua told them to leave thereafter. Abura and his aunt left for Acowa but Ogit resisted and stayed on the suit land resulting in his brother taking him to court, the case was decided in Ogit's favour but on appeal to the High Court the appeal was allowed and Ogit left the land and followed his brother to

Acowa. Ogit followed the brother together with his son the respondent in 1976. That the land belonged to Ogel and when he died it devolved to Amaitum Ezekiel, then Joshua. Ogel and Eerut were brothers and they owned the land jointly and to date the land is not yet divided. Eerut was buried on the suit land and he can show court the grave. He is in charge of the suit land does not know why the plaintiff did not sue him. During cross-examination he stated that he first saw the respondent in his uncle's home with the father and they were living on the suit land and he did not know his age. (The trial magistrate at this point noted that the witness was evasive on the question of the respondent's age when he was staying with the father on the suit land) He and the respondent on the suit land but separately. He has lived in Okocho since 1998. The Late Igira's brother are on the suit land, but Akol is not buried on the suit land. There was a camp on the suit land from 2000 to 2004 and they only came back to the suit land when there was relative peace.

DW11, Angorio Paul Benson testified that the neighbours to the suit land are Isuguro clan to the west and east, Igoria clan to the north, Igetoma clan to the south. That the suit land belongs to Iworopom clan to which all the appellants belong. Igira was a son of Amaitum and was buried on the suit land. That there was a case heard in Soroti between the respondent and the appellants which was decided in favour of the appellants. Since 1957 when he was born he saw Amaitum Ezekiel and Ogulo Joshua on the suit land. All the years he has lived next to the suit land he has never seen the respondent on the suit land. During cross-examination he stated that Amaitum Ezekiel, Omoding Cornelius, Ogwel and Onyang were not children from the same father though he didn't know the father of the omoding, onyang and ogwel. Eerut was buried on the suit land and he could show court the old homestead of Eerut, his brothers Ogwel and Onyang are still alive and on the suit land. Abura

Samson was a brother to the respondent. He further stated that he did not know that the portion where the graves are is not in dispute. The appellants were on the suit land before the camp was established.

During the locus visit, the appellants showed two graves belonging to Ariko who died in 2010 and Kongai the daughter of Igira who passed on in 2009. Opeitum Michael's home was also seen on the suit land; this is the brother of the respondent. The respondent identified the spot where his grandfather lived. The trial Magistrate took also took note of what various elders said but given that they were not witnesses in court and not scheduled to give evidence at locus I will not consider what they said.

5. Submissions and decision of court:

The appellants changed counsel from M/s Echipu & Co. Advocates to M/s Natala & Co. Advocates and some grounds of appeal were dropped, accordingly counsel for the appellant submitted on all the grounds of appeal.

On **ground 1**, Counsel for the appellant submitted that it was clearly established in evidence that the suit of the Respondent was barred by Limitation and the trial Magistrate should have ruled in the same direction and dismissed the Respondent's suit but he did not.

Counsel stated that in his Plaint, in an attempt to survive the limitation period, the Plaintiff intentionally and technically avoided to indicate the year in which the Appellants entered into the suit land. However, during cross-examination on **page 15 of the record,** the Plaintiff/Respondent clearly stated to court that the Appellants entered the suit land in the year **2000.** Even **PW 3** on **page 26 of the record,** agreed that it was in the

period of the year **2000** that the Appellants allegedly entered the suit land. It should be observed that the Plaintiff filed his suit on the **13th, November, 2013** which is a period on **13 years** from the time the Appellants allegedly entered on the suit land.

Counsel further submitted that whereas, it was the Respondents evidence that the Appellants entered the suit land in 2000, which still put him outside the limitation period, it clearly came out in evidence from the Appellants' case that they have been on the suit land for a very long period of time. In fact, the 1st – 6th Defendants who are all adults were all born on the suit land and they have been living thereon since then. To further corroborate the fact that the Appellants have lived on the suit land for a long period of time, the Respondent himself stated that he last used the suit land in 1986 and PW3 confirms that the Respondent attempted to re-enter the suit land in 2013. From 1986 to 2013 when the Respondent eventually filed the suit against the Appellants is a period of clean **27 years** since the Respondent was disposed of the suit land. All this overwhelming evidence which was not challenged in cross examination indicated that the Appellants have been on the suit land for a period of more than 12 years which barred the Respondent from suing the Appellants on grounds of limitation.

Counsel additionally submitted that **Section 5 of the Limitation Act**, provides that **No action shall be brought to recover any land after the expiration of <u>twelve (12) years</u> from the date on which the right of action accrued to him or her, or, if it first accrued to some person through whom he or she claims, to that person.** And **Section 6 of the Limitation Act, the right of action is deemed to have accrued on the date of the dispossession.**

Counsel further relied on ***F.X Miramago V Attorney General [1979] HCB 24*** and ***Dima Dominic Poro Versus Inyani Godfrey & Anor Civil Appeal No. 0017 of 2016*** to support their submissions.

In reply to this counsel for the respondent M/s Obore & Co. Advocates submitted that at page 12 of the proceedings when the Respondent was testifying in the lower court he said,

> ***"the Defendants entered on the suitland in 2002 when government had established a barracks in our land and civilians took refuge of the barracks due to Karamojong insurgency".***

The suit in the lower court was entered as **Civil Suit No 35 of 2013.**

This implies that from 2002 when the Appellants entered onto the suit land up to 2013 when the suit was filed is a period of 11 (Eleven) years and as such the limitation period does not apply in this context.

The respondent indeed in his testimony stated that the appellants entered the suit land in 2002 but as seen in his pleadings and testimony in court he first tried amicable means to settle the dispute out of court including meetings with elders, LCs of the village. I find that even though no documentary evidence of attempted out of court settlement was adduced the respondents evidence on these meetings was unchallenged. This ground accordingly fails.

On **ground 2,** counsel for the appellants submitted that in ***Jephtar & Sons Constructions & Engineering Works Ltd Vs. The Attorney General HCCS No. 699 of 2006,*** it is the general principle that general damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is that they are awarded to compensate the plaintiff, not as punishment to the defendant.

Counsel additionally submitted that she is alive to the fact that award of general is discretionary but the discretion must be exercised judiciously.

In **Opus vs. Harvest Farm Seeds, SCCA NO. 2 OF 2013**, it was held that it is now well settled that an appellate Court will not interfere with the award of damages made by the trial Court unless the assessment of such damages by the trial Court was based either on an erroneous principle of law, or the award was outrageously high or ridiculously low, so as not to reflect the measure of damages the successful party to the suit ought to have been awarded.

Counsel further submitted that in the instant case, whereas the Respondent prayed for general damages in his Plaint, he did not adduce any evidence to show how he could be entitled to an award of general damages. There was no evidence to prove that the Respondent has ever stayed and cultivated the suit land for which he was denied use of the same by the Appellants. The entire evidence shows that the Respondent was on guess work as whether the suit land is his property. The trial magistrate at page 11 of the judgment concluded that the Appellants denied the Respondent a right to settle on the suit land for all the time the case was in court. The trial Magistrate also reasoned that because of the case, the Respondent was evidently frail and sickly and awarded him general damages of 10,000,000/=.

Counsel for the respondent in reply submitted that the award of general damages is at a discretion of a judicial officer and the justification for the award of the said money is at Page 11 of the judgment which he reproduced verbatim:

> ***"The Plaintiff has since become frail. His appearance in court shows that he is now sickly. The defendants have also derived benefits from the Suitland as the Plaintiff***

looked on. A combination of all these caused a lot of mental anguish to the Plaintiff. I will award the plaintiff Shs. 10,000,000/= as general damages to atone the suffering the Plaintiff underwent".

Counsel additionally submitted that in ***Robert Cuossens versus Attorney General (Civil Appeal No. 8/1999)*** Justice Oder made reference to Lord Blackburn in ***Livingstone versus Ronoyard & Coal Co. (1880)*** where he defined measure of damages as;

"That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".

In light of the foregoing counsel submitted that the award of General Damages to the Respondent was justified and not arbitrary.

I agree with counsel for the respondent that the award was not arbitrary and I find that given how long the respondent was denied use of his land- and there's unchallenged evidence of this on record- the trial magistrate judiciously exercised his jurisdiction when he made an award of Ugx. 10,000,000/= to the respondent. This ground fails.

Regarding **ground 3**, counsel for the appellant submitted that the Respondent did not indicate in his Plaint the size of the suit land he was claiming from the Appellants. He merely sought for eviction of the Appellants from the suit land, but as to the size of the suit land, he did not indicate, for obvious reasons because he did not know what he was claiming. In the scheduling notes on page 3 of the record, the Respondent stated that the suit land is between 200-300 acres. During evidence, the

Respondent and his witnesses were not certain as to the size of the suit land. On Page 3 of the record, the Plaintiff/Respondent (PW1) testified that the suit land is approximately between 200-300 acres. On page 12 the Respondent is seen re-testifying, which is suspicious because he had already testified and closed his testimony. This is an illegality that we bring to the attention of this court. He nonetheless stated that the suit land is 200 Acres. PW2 testified on page 17 of the record that the land the Respondent/Plaintiff is claiming is approximately 100 Acres. On page 18 he emphasized that Angole (father of the Respondent) had 100 Acres. DW3 testified on page 21 that the Suit land is about 300 Acres. PW4 testified on page 24 of the record that the suit land is about 250 acres.

Counsel further submitted that the Respondent did not know what his claim was in court, neither did his witnesses. The Plaintiff was just on a fishing expedition. This was the Plaintiff's case and he had the onus under **Section 101 of the Evidence Act, Cap 6** to prove his claim. But how could he prove his claim when he does not even know the size of the land he was claiming. That the trial Magistrate delivered judgement in favor of the Respondent and he made an order that the Plaintiff is the rightful owner of the suit land but he did not indicate what the size of the said suit land is. Counsel claimed that they were left wondering whether the Respondent was decreed, 200 acres, 300 acres, 250, acres, 100 acres or 230 acres? This is very dangerous especially considering the fact that the Appellants have established in evidence that their total land is about **500 acres,** and if the Respondent is to do execution, we wonder how many acres is he going to evict the Appellants from?

Counsel for the respondent in reply submitted that the Respondent (formerly Plaintiff) while giving his testimony averred as follows;

"The suit land is approximately 200 acres. I have sued the Defendants because they have entered, built homes and are cultivating the land in issue. They are also denying me and my relative's ownership and use of the Suitland"

The above evidence was ably corroborated by the Respondent's witnesses in the lower court.

Premised on the Respondent's testimony, the trial Magistrate at Page 11 of his judgment declared the Plaintiff (now Respondent) the rightful owner of the Suitland.

Counsel further submitted that it goes without saying that the Respondent filed the suit in the lower court seeking to recover 200 acres being utilised by the Appellants and that was the land which was decreed to him by the learned trial Magistrate. The allegation by the Appellants that the Judgment of the learned trial Magistrate is uncertain as to the land decreed to the Respondent is not only misleading but also absurd to say the least.

Counsel further submitted it on the allegation that the Respondent re-testifying was an Illegality however he does not qualify the statement. At Page 11 of the proceedings court held as follows;

"The Plaintiff will give fresh evidence in the interest of fair flow of the case and give opportunity for all the defendants to examine him. Pursuant to the enormous changes and time taken I find it in the best Interest of justice to allow the hearing to begin afresh. Costs in the cause"

Counsel additionally submitted that the Respondent re-testifying was actually after 2 years and the trial Magistrate felt that in the interest of

justice given that not all the defendants who were unrepresented had cross-examined the Respondent in 2014. He found it prudent that the Respondent re-testifies and is cross-examined by all the Appellants which was actually in the Appellants. We therefore wonder what illegality was occasioned to the Appellants by the Respondent re-testifying.

Counsel for the respondent submitted that the discrepancies in the acreage of the suit land by Respondents witnesses are minor technicalities curable under **Article 126 2(e)** of the 1995 Constitution which provides for substantive justice being rendered without undue regard to technicalities.

I will consider the appellant's submissions on the respondent re-testifying. As rightly pointed out by counsel for the respondent the trial Magistrate directed that the respondent re-testify so that he could be cross-examined by all the appellants who were unrepresented. The respondent first testified on the 24.06.14 and only 3 of the appellants were present i.e. D1, D3 and D6 and they all cross-examined the respondent. On 11.10.16 the matter came up and the Trial Magistrate directed that the plaintiff (respondent) gives fresh evidence in the interest of fair flow of the case and give opportunity for all the defendants to cross-examine him. The trial magistrate further said that pursuant to the enormous changes and time taken he found it in the best interest of the justice to allow the hearing of plaintiff start afresh. Additionally, the trial magistrate who heard the plaintiff in 2014 was different from the one in 2016. In light of the foregoing I find that no illegality was occasioned.

Turning back to the acreage of the land, the respondent testified both in examination-in-chief and cross-examination that the land was approximately 200 acres. PW3, testified that the land was approximately 300 acres but out of the 300 some was given to the Secondary School and

Okocho Church of Uganda. PW4 stated that it was approximately 250 acres. The key term used by the witnesses is approximately, it should also be noted that is customary land that has not been subjected to a survey. I find that the respondent was clear on the size of the suit land i.e. approximately 200 acres, the acreage given by PW3 was together with the amount given to the school and church and the 250 stated by PW4 is not so far off from 200 acres to become irregular. I find that the respondent was clear about the size of the suit land and the trial magistrate did not decree an uncertain piece of land. This ground accordingly fails.

With regard to ground 4 counsel for the appellant submitted that the trial Magistrate shifted the burden of proof to the Appellant who were defendants. It is trite law under **Section 101 of the Evidence Act Cap 6** that the burden of proof lies with the person who alleges. In the instant case it lay with the Respondent who was the Plaintiff and not otherwise. The standard of proof is on a balance or probabilities. Counsel further submitted that Magistrate when evaluating the evidence of the Defendants/Appellants vis-à-vis the evidence of the Plaintiff/Respondent instead of the other way round. When resolving the Issue of ownership of the suit land, on page 6 of the judgement, the trial Magistrate makes reference to the fact that the suit land is customary in nature and referred to Section 2 and 3 of the Land Act to define what customary tenure. The trial Magistrate then went straight away to attack the evidence of the Appellants that it did not suffice to constitute their customary attachment to the suit land.

Counsel for the respondent submitted that the Appellants allegation that the burden of proof was shifted to the Appellants is not only miss leading and shocking but also unheard of in our Jurisprudence. It is trite Law that in Civil matters the Plaintiff is required to prove his case on the balance of

probabilities. At Page10 of the Judgment the trial Magistrate rightly so in our opinion addressed this ground. He held as follows;

> ***"I will arrive at a finding that the Plaintiff convinced this Court on a balance of probabilities that the Suitland belongs to him by way of inheritance from his late father Ogit and Uncle Abura Samson.***
>
> ***On the other hand, I reject the evidence of the Defendants because they were riddled with inconsistencies and false hoods".***

Counsel for the respondent further submitted it is evident from the foregoing that the burden of proof was upon the Plaintiff (now Respondent) which he ably discharged resulting in Judgment being entered in his favour.

Counsel for the respondents further submitted that the Appellants wild allegation that the Respondent did not plead and pray for any of the remedies that the lower court granted him. That Plaint that the Respondent filled in the lower Court received on the 22/07/2013 and specifically paragraph 12 of that plaint shows the prayers that the Respondent pleaded, to further buttress this submission at Page 13 of the proceedings the Respondent in his testimony in the Lower Court prayed that judgment be made in his favour, an eviction order against the Appellants and Costs of the suit which remedies the Lower Court granted.

I find that the allegations by counsel for the appellants are not tenable, what counsel for the appellant terms as attacking the appellants was the trial magistrate evaluating their evidence and finding it wanting.

The trial Magistrate analysed evidence given by both sides and rightly applied the standard and burden of proof before arriving at his judgment. This ground also accordingly fails.

With regard to ground 5 counsel for the appellant submitted that DW1 testified that the suit land belongs to them and they derive their interest through inheritance from their parents. How currently his paternal uncle Iwaki Jonathan is the administrator of the estate of my father. DW10 gave a chronology of how the suit land was inherited by different persons who are not deceased and that he is the one holding letters of administration.

Counsel submitted that it is the Defendants who brought the issue of letters of administration to the attention of court to indicate that DW10 is the administrator of the original owner of the suit land late Amateur Ezekiel.

Counsel further stated that the trial Magistrate diverted from this line of argument and erroneously dealt with issues of failure to file inventory and declared the grant expired yet the issue before court was not about failure to file inventory or revocation of the grant. The case before court was whether the suit land was for the Appellants or for the Respondent. The trial magistrate framed and resolved his own issue of revocation of letters which was not the case before him.

Counsel for the respondent in reply submitted that the 1st Defendant (now 1st Respondent) in his testimony averred,

> ***"The land belongs to us, we derived our interest there on through inheritance from our parents. Currently my Paternal uncle Ibwakit Jonathan is the administrator of the estate of my father".*** **And during cross- examination still at the 1st Defendant averred** ***"Ibwakit Jonathan is a***

brother to my father, he lives on the Suitland. He is still alive".

However, the Locus visit by the trial Court proved otherwise for at page 8 of the judgment, the trial Magistrate had this to say;

"The 1st Defendant also told Court that his Uncle Ibwakit Jonathan lives on the Suitland. He was unable to show Court the home of Ibwakit Jonathan ..... I think the 1st Defendant did not imagine that this Court would visit the land in dispute when Court visited Locus it turned out the 1st Defendant told court a pack of lies moreover under Oath".

Counsel submitted that from the foregoing evidence alone any Judicial officer would have known that the letters of Administration that Ibwakit Jonathan holds do not include the Suitland and that's why he and his next of kin do not live on the Suitland and are not buried on the same either.

Furthermore, at page 9 of the Judgment the Trial Magistrate held;

"The 3rd Defendant Eerut Augustine told Court that Ogulo Joshua litigated with Angole Benjamin and that case was decided in favour of Ogulo Joshua, he did not tender in the Judgment of that case instead the Defendants tendered in evidence of Letters of Administration granted to Ibiwakit Jonathan on the 8th of July 2013 in respect of the estate of the Late Amaitum Ezekiel".

Furthermore, the trial Magistrate analysed the foregoing at page 10 of his Judgment.

"I *think the Defendants together with Ibwakit Jonathan grossly misunderstood what Letters of Administration*

was granted for. Letters of Administration is a temporary document. It is not a document of title".

Counsel further submitted that the Appellants were under a false illusion that the Letters of Administration of Ibwakit decreed to them the Suitland. The trial Magistrate then correctly in his opinion evaluated the relevance of those letters of Administration still at page 10 of his Judgment.

"Since 2013 when Ibwakit got the grant of Letters of administration to-date is 7years. The Letters of Administration granted to him commanded him to file an inventory within six months. He has not filed any inventory or account of how he divided or administered the estate of the deceased. He is now proudly waving this document which became invalid a long time ago. He is holding the Letters of Administration under a false belief that he is still administering the estate of the Late Amaitum Ezekiel's land when actually he is holding nothing of value. The land was decreed to Ogit Nason in 1975 by order of Grade 11 Magistrate Katakwi Court".

Counsel stated that the above holding by the trial Magistrate is self-explanatory and he need not delve into it lest he waters down the trial Magistrate's Judgment which he entirely agrees with is well reasoned and spot on.

Counsel further stated that the Letters of Administration of Ibwakit has no nexus with this case, he's failure to file an inventory within six months automatically made them invalid according to **Rule 31 of the Administration of Estate (small estates) (Special Provision) (Probate and Administration) Rules.**

Counsel finally submitted that as already highlighted in his earlier submissions the said Letters of Administration did not include the Suitland and be that as it may with the evidence of a Grade 2 Judgment of katakwi Court which decreed the Suitland to Ogit Nason (Respondent's) father in 1975 there's simply no way the Appellants could have a better claim to the Suitland than the Respondent.

Upon perusal of the record of proceedings it becomes clear as why the trial magistrate had to add the letters of administration to his judgment.

The appellants in their evidence made it a point to testify to the letters of administration that the Ibwakit holds and Ibwakit himself stated that he held letters of administration to the suit land and was in charge of it and he did not know why the respondent had not sued him but instead gone after the children and wives of his cousin brother. He also testified that his relatives were on the suit land which was a part of the letters of administration he held. When one considers the evidence given by the appellants in court and the way they gave an image that they were all on the suit land with all their loved ones buried on it, in comparison to the observations made by the trial Magistrate during locus one cannot fault the trial magistrate for commenting on the letters of administration. The appellants were holding them as prove of land ownership and yet not even the holder of the letters could show court his house during locus. The trial magistrate could not ignore the letters of administration and not make a comment on them even if the suit was on ownership of the suit land. This ground accordingly fails.

On **ground 6,** counsel for the appellant submitted that the Respondent had the onus under **Section 101 of the Evidence Act** to prove his case on a balance of Probabilities and he failed to discharge this burden but the trial Magistrate erred when he held that the Respondent had done so.

Counsel further submitted that it is puzzling to believe that the Respondent and his father fled the suit land during the Karimojong insurgencies yet the Appellants took refuge on the same suit land because of the same Insurgency. The Respondent wants this honorable court to believe that he and his family ran away from the suit land because it was not safe, yet the Appellants and some other people chose to go to the suit land because it was safe. The Respondent did not name any of those other people that he claimed took refuge on the suit land and left when relative peace was restored, neither did he call any of them to confirm and corroborate his allegation that indeed people had taken refuge on the suit land. counsel additionally stated that the Respondent did not inform court where he and his father took refuge, the period or year when he and his family allegedly fled the suit land. He claimed that his father had a home on the suit land, but no such sign of an old homestead was shown by the Respondent to court during the Locus Visit.

The allegation that the 1st Appellant has put his home exactly where the home of the Respondents father his is too unsubstantiated and should not be believed. He also claims that his uncle Samsom Agula had a home on the suit land, but that the homestead is no longer visible. Moreover, the Respondent did not even describe to court what kind of homes these were. Were they grass thatched houses or not and how many were they? He merely alleged that his father and uncle had homes on the suit land. That the respondent did not make a breakdown of how much of the suit land was owned by his father, and how much of the suit land was owned by his uncle. Moreover, the Respondent did not care to explain to court why he inherited the land of his uncle.

Counsel further faulted the Respondent did not call his own biological brothers, Abura Samson and Opeitum John Robert whom he alleges to be

living on part of the suit land. The Respondent stated that he inherited the suit land in 1987, yet at this time he was not even in occupation of the suit land. In fact, as he testified, he and his father fled the suit land around 1986 due to the insurgency and since that time he has never utilized the suit land. **PW 2** had no knowledge about the suit land. He testified that he became a friend of the Respondent in 1959 and that the Respondent's father had a home on the suit land. Like the Respondent, he did not describe the nature of the home that the Respondent's father had. He did not also corroborate the allegation of the Respondent that his Uncle Agula Samson also had a home on the suit land. The witness did not inform court where he used to come from when he used to visit the Respondent. **PW3** testified that originally the suit land originally belonged to Ilukor who was a father of Ogit Nason. He testified that Onyanga (5th Appellant) Opajak (4th Defendant-now deceased) and Eerut Michael (2nd Appellant) were all born on the suit land. All these persons listed to have been born on the suit land are adults. Eerut Michael was aged 48 years by 2017, Opajak Tom was aged 42 years by 2018 and Onyang Simon was aged 30 years by 2018.

Counsel after lengthy submissions on the evidence adduced in court finally submitted that in this case, court was dealing with customary land which is characterized by usage and acquired through inheritance; had the trial Magistrate judiciously evaluated the entire evidence on record, he would have noticed that the Appellants are the rightful owners of the suit land having inherited from their fathers who also inherited from their fathers. The Appellants, unlike the Respondent; were consistent in their testimony on how they acquired the suit land. It also came out clearly and unchallenged from cross examination that the Appellants have been on the suit land for a very long period of time and the trial Magistrate should have taken this into account but he did not.

Counsel for the respondent in reply submitted that analysed the evidence of DW10 (Ibwakit Jonathan) and submitted that Premised on his testimony the trial Magistrate critically analysed DEX1 which he had tendered in at Page 7 of his Judgment.

> ***"Reference is made to your letter dated 24/5/1978 and bearing Ref CHS/C. A/179/76. I forward herewith the above mentioned case file. Our records reveal that when you requested this Office to forward this case file to you on 21/7/1976, it was in the custody of Mr. Ojako, the former Magistrate Grade 11 who had then retired and since then, this office seems not to have bothered to send the file. I issued an attachment warrant for this Suit on the 8/5/1978 while not aware that this Suit was on appeal. By a copy of this letter I am directing N. Ogit to give back the six goats which were attached to the Appellant and await the disposal of the appeal".***

The Trial Magistrate then analysed DEX1 still at Page 7 of his Judgment.

> ***"What the above letter shows clearly is that by 1975, when Nason Ogit filed a Suit against Ogulo Yoswa who happens to be one of the grandparents the Defendants referred to in their submission, the said Nason Ogit (father of Plaintiff Now Respondent) had already acquired interest in the Suitland".***
>
> ***The Defendants did not produce the outcome of the appeal by Ogulo Yoswa to the Chief Magistrate, Soroti. What this means is that the Judgment of the Grade II Magistrate of this Court which decreed the Suitland to Ogit Nason still stands to date".***

Still at page 7 of the judgment the trial Magistrate held as follows,

> ***"The Judgment of the Grade 11 Magistrate is a boost to the Plaintiffs claim over his customary inheritance of ownership of the Suitland from his late father Ogit Nason. It shows that as far back as 1975 Ogit Nason had already secured a Judgment of a competent Court and therefore, a legally protected right over the Suitland. The Defendants who claim they inherited the Suitland from Ogulo Yoswa and other ancestors have not demonstrated any interest in that appeal, save for an Affidavit sworn by Ibwakit Jonathan on 29/8/2014".***

The above evidence right from the Court proceedings to the judgment shows that the decision of the trial Magistrate was not fabricated as Counsel for the Appellants imagines but was rather in conformity with the evidence on record.

Counsel further submitted that whereas the first Defendant averred that he inherited the Suitland from Ogulo Joshua, DW2 Eerut Michael at averred that the Suitland belonged to his late father Igira Francis who had also inherited the same from his late father Ezekiel Amaitum, DW3 (Eerut Augustine) averred that the Suitland is for 2 families i.e. Eerut and Amaitum. The inconsistencies in the ownership of the Suitland from the 1st, 2nd, and 3rd Defendants further watered down the Appellants case in the lower Court.

The Trial Magistrate also noted this glaring inconsistency in his Judgment at Page 10.

> ***"The Defendants evidence was riddled with lots of contradictions that this Court could not believe that this***

were telling Court the truth. Whereas the first Defendant claimed the Suitland belonged to Ogulo Joshua (his Father), other Defendants claimed the Suitland belonged to their father Igira Francis".

The trial Magistrate then qualified his Judgment still at page 10,

"I will arrive at a finding that the Plaintiff convinced this Court on a balance of probabilities that the Suitland belongs to him by way of inheritance from his late father, Ogit Nason and Uncle Abura Samson. On the other hand, I reject the evidence the Defendants because they were riddled with inconsistencies and falsehoods".

He finally submitted that they have laboured to show that the Judgment of the trial Court is in conformity with the evidence in the proceedings and there is no departure whatsoever.

Counsel for the appellant laboured to point out various areas not consistent with the judgment.

The fact that the respondent and his father fled the suit land during the insurgency yet the appellants took refuge on the land is not puzzling because the time frame for each event is different. The respondent left the suit land in 1987 and the camp and military barracks were established on the suit land in the 2000s. There is nothing puzzling about this, the security situation in 1987 cannot compared to that in 2002. The reason why the respondent inherited his uncle's land was of no concern to the lower court and this court, the main issue was ownership of the suit land questions of lineage and inheritance within a lineage.

The appellants also fault the respondent for not calling his brothers witnesses. I find this an unnecessary attack as the witnesses he called were

able to give sufficient evidence to prove his claim as seen above. Furthermore, the fact that all the appellants" witnesses denied the presence of the respondent's brother (Opeitum Michael) on the suit land only for court to see his house on the suit land during locus was enough to strengthen the respondent's claim that the suit land was for his family. What the respondent managed to prove through calling the witnesses he did was his presence on the suit land prior to the insurgency which was critical to his case. The fact that there was a judgment made in 1975 in favour of the respondent's father in respect of the suit land further strengthens the respondents claim that he was on the suit land with his family before the insurgency and before the appellants. The inconsistencies in the respondent's evidence were minor and mainly related to the acreage, the location of the barracks and camp and exact year they were established. These inconsistencies cannot on their own change the outcome of the case.

The evidence of the appellants on the other hand had inconsistencies that went to the route of their alleged ownership of the suit land. The witnesses as seen above did not have a clear idea on their lineage and the actual original owners of the suit land. These inconsistencies were mainly on the elders they sought to rely on especially Eerut, the appellant's witnesses had varying testimonies on where he was buried and if he stayed on the suit land.

The same applied to Igira, some of the witnesses insisted he was buried on the suit land while most state he was not buried on the suit land. The appellants through DW9 and 10 also tried to prove their claim by claiming that the respondent's Uncle Abura was cohabiting with Akol a sister to Amaitum however, nowhere is she mentioned as a sibling or cousin to Amaitum or any of his brothers till these two witnesses appeared.

Furthermore, during his testimony DW10 tried to evade questions on the age at which he saw the respondent on the suit land. This story that DW9 and 10 tried to spin on how the respondent wound up on the suit land is not consistent. First DW9 testified that the respondent's uncle came from Acowa to cohabit with Akol and DW10 corroborated this, however, after this their stories split ways DW9 claimed that Akol died and was buried on the suit land and the respondent's uncle left, DW10 on the other hand claims that Akol and the respondent's uncle left together for Acowa but the respondent's uncle stubbornly refused to live.

DW10 in his testimony also stated that he has been on the suit land since 1998, this means he was not born on the suit land, this further puts his evidence on Akol in question because he claimed that he saw Akol and Abura cohabiting in 1974, if indeed he has been on the suit land from 1998 where did he see Akol and Abura.

This kind of discrepancy points to a forged tale. DW7 blatantly refused to answer any more questions in court during cross-examination by respondent's counsel on the relationship between the various ancestors they claim to have inherited the suit land from.

DW11 claimed he studied in the same school with the respondent and Abura a brother to the respondent; Abura was the respondent's uncle how could they be in primary school at the same time?

DW3, testified that he fled together with his father during the insurgency and he came back to the suit land in 2007 and he found nothing there and that while in Adacar village his father gave him the history of the suit land and at this point the trial magistrate noted that the witness looked uneasy. If he came back in 2007 and there was nothing on the land where were the appellants and their homesteads?

Another interesting thing to note is that the brothers of the late Igira from whom some of the appellants draw their claim do not stay on the suit land, it was the evidence of the appellants that they bought land elsewhere and that is where they are staying.

Why would people abandon ancestral land of approximately 200 acres and buy land elsewhere if it was really theirs? This just goes to show that the appellants have no ancestral routes on the suit land.

It should also be noted that as brought out in the evidence of DW11, the area which has the appellant's grave yard was not in dispute, meaning the appellants encroached on the suit land belonging to the respondent and his family.

It should also be noted that a main aspect in proving the respondent's claim to the land was the land given to the school and church and he testified of the same.

The appellants on the other hand made no mention of this till locus when they stated that the respondent's clan did not participate in the donation of the land.

All these inconsistencies show that the trial magistrate's decision was consistent with the evidence on record. This ground accordingly fails.

Counsel for the appellant did not make any submissions with regard to the 7th ground and I will take that it was abandoned.

On **ground 8** counsel submitted that the trial Magistrate did not properly conduct the locus. Counsel submitted that it was held in the case of ***Badru kabalega versus Sepriano Mugangu (1992) 265,*** that;

> **"The *purpose of visiting the locus in quo is for each party to indicate what he is claiming and each party must testify on oath and be cross-examined.*"**

In the instant case as seen from the locus visit proceedings, it is clear that the witnesses did not swear before testifying.

The Respondent was the one to testify first but he did not take oath before he gave his testimony and all the other witnesses did not take oath which is an illegality which should not be sanctioned by court. Furthermore, the court called new witnesses to give evidence yet they had not been called earlier as witnesses in court.

On the locus visit proceedings, it can be that persons dubbed as **'Elders'** that is Onyang Robert, Angiroi John, Otworot Yonah, Okori Ignatius gave evidence during locus, moreover without being sworn in yet they had not testified in court.

In ***Paineto Omwero V Sauro s/o Zebuloni HCCS 31 of 2010,*** it was held that,

> ***"the standard procedure must be adhered to when the court decides to visit the locus in quo, the record of proceedings does not bear the evidence of steps taken at the locus in quo. Also, the four witnesses indicated as having given evidence at the locus in quo had not attended the earlier trial court and had not been summoned as witnesses to state what they had stated in court before such evidence was procured in error. <u>This error vitiated the trial rendering the decision of the lower court null and void</u>".***

The trial Magistrate did not also move around the suit land during the locus visit to confirm what witnesses had stated in court. From the Proceedings, it just indicated when the Plaintiff stated that *we are at the suit land*, and thereafter the witnesses started testifying. There is no record to show any indication that the court observed, moved around, was shown the land etc.

All that is on record is just a recording of evidence as it is normally done in open court.

In the case of ***Edward Owor & Ors Versus Ochwo Melo & Ors, Civil Appeal 173 of 2015*** where the record of proceedings did not indicate that the trial Magistrate had moved around the suit and had made observations, the court held "***that the procedure was flawed as the usual practice of visiting locus is to check on the evidence given by witnesses and not to fill in the gaps.***"

Counsel for the respondent submitted that that the proceedings including the testimonies of the witnesses, those present and the drawing of the map at the locus in quo were carefully carried out and recorded by the lower court and premised on the proceedings at the locus visit the lower court in its Judgment then made its final decision that indeed the respondent had proved his case on a balance of probabilities.

As I have already observed above the testimonies of the so called "***Elders***" cannot be relied on because they were never witnesses who testified in court neither were they scheduled to testify at locus. I see no reason to go through this again.

With regard to the locus proceedings, I find that it was not perfunctorily conducted, the appellants' witnesses throughout their testimonies kept

promising to show court all the features they mentioned from trees and houses to the graves of their loved ones.

However, at locus as seen above, none of them showed these features to court. The witnesses are the ones to move the trial magistrate around the land pointing out various features they mentioned during hearing and if they fail to do so it cannot be faulted on the trial magistrate. No wonder the trial Magistrate held as follows: -

> ***"On the other hand the Defendants informed this Court that all their ancestors lived, died and were buried on the Suitland the Defendants were only able to show Court two graves of recent burials in 2009 and 2010. The 1st Defendant, Amaitum Samson, had told Court that he would show graves of Ogulo Joshua (his late father), Ekwee Wilson (Brother to Ezekiel), Omoding Cornelia (brother to Ezekiel Amaitum. But during the Locus visit the 1st Defendant could not point at any of the above graves. The 1st Defendant also told his Uncle Ibwakit Jonathan lives on the Suitland. He was unable to show Court the home of Ibwakit Jonathan 1st Defendant also told Court that his mother stays on the Suitland. He could not show Court the home. I think the 1st Defendant did not imagine that this Court would visit the land in dispute. When Court Visited Locus it turned out that the 1st Defendant told Court a pack of lies moreover under Oath".***

This ground accordingly fails.

On **ground 9** counsel for the appellant submitted that in ***Omona vs. Amito, HCCA No. 5 of 2015***, a miscarriage of justice occurs when it is

of reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. That despite the shaky and false evidence of the Respondent, the trial magistrate in his judgment declared the plaintiff to be the owner of the suit land, declared the Appellants as trespassers on the suit land, ordered the defendants to give vacant possession of the land, ordered a permanent injunction against the defendants, ordered general damages of 10,000,000/= and costs of the suit.

Counsel for the respondent submitted that in ***Mukenye Guster Versus Kamina Tomasi*** Civil Suit No.06 of 2006; Justice Kaweesa made reference to the well-known case of ***Matayo Okumu Versus F. Oundite 1979) Hcb 229*** where it was held that ***"A miscarriage of justice includes any circumstances where the decision of a Court or tribunal primafacie appears not to be supported by evidence".***

In the instant Appeal before this Honourable Court the evidence on record overwhelmingly shows that the suit land belongs to the Respondent. The Trial Court was alive to its duty and rightly so entered judgement in favour of the Respondent. Having considered the record and judgment I find that no miscarriage was occasioned by the trial magistrate and this ground accordingly fails.

6. <u>Conclusion:</u>

Arising from my analysis of all the grounds above, I would conclude that this appeal lacks merit and it is accordingly dismissed with orders as below.

7. Orders:

a. This appeal lacks merit and it is dismissed.
b. The Judgment and orders of the lower court is accordingly upheld.
c. The costs of this appeal and in the lower court are awarded to the respondent in any event.

It is so ordered at the High Court of Uganda Holden at Soroti this 30th day of September, 2022.

.....

Henry Peter Adonyo

Judge

30th September 2022