The Republic of Uganda

In The High Court of Uganda at Soroti

Civil Appeal No. 0032 of 2021

(Arising from Amuria Magistrates Court Civil Suit No. 25 of 2015)

1. Imukot Joseph
2. Owiny William
3. Okello Otwa
4. Orwamo Francis
5. Oumo Mary
6. Ingolet Modesta

:: Appellants

Versus

Arukori Honert Vincent :: Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

1. Background:

This appeal arises from the judgment and orders of the Magistrates Court of Amuria delivered on the 25th day of August 2021 by H/W Awacnedi Freddie, Magistrate Grade One.

The background of this appeal is that Arukori Honert Vincent (The respondent) filed Civil Suit No. 25 at Amuria Magistrates Court against Imukot Joseph, Owiny William, Okello Otwa, Orwamo Francis Oumo Mary and Ingolet Modesta (The appellants), jointly and severally, for the recovery of approximately 26 acres of land situate in Acinga village,

Acinga parish, Acowa sub county in Kapelebyong District which he claimed lawful ownership thereof of which at all material times that the appellants had trespassed on.

The respondent's claim to the suit land arises from an inheritance from his father Ikwap Siraasi who is also said to have inherited the same from his father called Edungot David s/o Odeng. After the death of Ikwap Siraasi, his father, the respondent is said to have been chosen by his clan as the heir to his late father.

He subsequently processed letters of administration to the estate of his late father and thereafter, had a peaceful and quiet enjoyment of the estate of his late father till the appellants, at various times, despite being warned, trespassed on the suit land.

At the onset of the proceedings, the respondent first filed this suit against the first appellant and a one Morutum Alias Major but he later added the 2nd to 6th appellants to the suit.

From the record of the lower trial court, only the first appellant filed a written statement of defence, the rest did not. The first appellant denied trespassing on the suit land and contended that he owned five acres/gardens out of the suit land of which he acquired by way of purchase and or exchange with four heads of cattle from one Ikere Augustino on the 12th of February 2015 and this was with the consent of the Ikere's clan.

He denied having trespassed on the suit land and argued that he was lawfully occupying the part where he was on.

The learned trial magistrate upon considering the pleadings and all the evidence before him accordingly entered judgement in the favour of the respondent and issued the following orders;

a) The plaintiff is declared the rightful owner of the suit land.

b) The defendants are declared trespassers.

c) A permanent injunction issues to restrain the defendants or any other person(s) claiming under their authority from interfering with the ownership and possession of the suit land by the plaintiff.

d) The defendants are given six months from the date of this judgement to willingly vacate the suit land.

e) The defendants will pay to the plaintiff general damages of Shs. 10,000,000/=.

f) The plaintiff is entitled to costs of the suit.

The six (6) appellants herein were dissatisfied with the judgment and orders of the learned trial magistrate and so they appealed to this Honourable Court citing seven (7) grounds of appeal thus;

a) The trial Magistrate erred in law and fact when he failed to conduct the locus in quo in accordance with the recognized principles or law and thereby arriving at an erroneous decision to the prejudice of the Appellants.

b) The trial Magistrate erred in law and fact when he conducted the locus proceedings during court vacation without a certificate of urgency.

c) The trial Magistrate erred in law and fact when he failed to assess and evaluate the evidence of the appellants and thereby arriving at a wrong decision.

d) The trial Magistrate erred in law and in fact when he declined to allow the Zonal clan chairman and the listed witnesses to testify in favour of the appellants and thereby violating the principles of fair hearing.

e) The trial Magistrate erred in law and fact when he declared the Respondent as the owner of the suit land.

f) The trial Magistrate erred in law and fact when he awarded the Respondent damages when the same had not been pleaded.

g) The decision of the trial Magistrate has occasioned a miscarriage of justice to the Appellants.

2. Duty of a first appellate court:

This Honourable Court is the first appellate court in respect of this suit which arose from the magistrate grade one court at Amuria.

The duty of this court as a first appellate court was well stated by the Supreme Court of Uganda in the case of ***Kifamunte Henry vs Uganda SCCA No. 10n of 1997*** where it 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."***

The above position was further emphasised in the case of ***Father Nanensio Begumisa and Three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*** where the Supreme Court stated that;

> ***"This court being a first appeal 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."***

As pointed above, a first appellate court has the duty not only to review the evidence of the case and reconsider all the materials which were before the trial court but additionally is required to re-hear the case by subjecting all the evidence presented to the trial court to a fresh and exhaustive

scrutiny and then reappraise the same before coming to its own conclusion.

The appellate court is then entitled to make up its own mind but should not disregard the judgment appealed against by carefully weighing and considering it.

The above legal positions are taken into account in resolving this appeal.

3. Representations:

In this appeal, the appellants were represented by M/s Malinga, Kinyiri & Co. Advocates while the respondent was represented by M/s Natala & Co. Advocates.

4. Submissions:

Counsels representing the parties filed written submissions in arguing this appeal with M/s Malinga, Kinyiri & Co. Advocates argued grounds 1 & 4, grounds 5 & 7 jointly and grounds 2 and 6 separately.

On Grounds 1 & 4, Counsel for the appellant submitted that the record the trial court shows that the lower trial court in conducting the impugned suit before it ordered that the 4th defendant, 6th defendant, one Ojuro Romlo, Amodoi and Erimu Philip were selected to give additional evidence when the court would subsequently visit the locus in quo in respect of the suit land.

That this order was followed but that though the 1st, 3rd, 5th and 7th defendants had testified in court, none of them including some of their witnesses testified and were cross-examined at locus. That this situation even applied to the plaintiff and his witnesses with some defendants not even being recorded to have been at the locus in quo as required by the provisions of paragraph 3 of Practice Direction No. 1 of 2007

Counsel additionally submitted that the trial court even never made any mention in detail of the graves it found on the suit land especially those of the 4th appellant's father and grandfather

In addition, counsel submitted that even the said record of proceedings at the *locus in quo* did not show the trial court's observations, views and or conclusions as these were either missing or were incomplete.

In response, Counsel for the respondent submitted that it was merely a typing error/omission in the record which tended to show that the defendants/appellants were not present at the locus proceedings but the fact remained that they were present and even testified in the favour of the appellants therein.

Counsel for the respondent further asked this court to note the behaviour of the appellants throughout the proceedings in the lower court who, with exception to the 1st appellant, in spite of being served with summons to enter appearance in the civil suit, failed to not only enter appearance and even did not file their defences and even their appearance in court constantly were not consistent for even during the scheduling of the suit, the 2nd to 6th appellants did not participate in the proceedings but nonetheless the trial magistrate allowed them to participate in all the subsequent proceedings.

According to, counsel for the respondent, with all that lackadaisical behaviour by the appellants throughout it can only be concluded that it was not true that the 4th and 6th appellants were denied a right to be heard rather they denied themselves this right possibly because they believed they had no defence to the head suit and as such this appeal should be found wanting and dismissed accordingly with costs.

5. Determination:

a. Grounds 1 & 4:

I have considered the submissions of counsels in respect of these two grounds. I have also carefully perused the record of the lower trial court. My considered conclusion is that the appellant's argument in respect of these two grounds 1 and 4 is essentially that some of them and their witnesses were denied the opportunity to testify during the hearing of the head suit and even at the *locus in quo* and that the *locus in quo* proceedings were not done in accordance with the law.

The fact of this matter as garnered from the perusal of the lower court record of proceedings is that on the 21st December, 2020, the trial magistrate while in court and in the presence of all parties and after hearing the testimonies from both sides, directed that the 4th and 6th defendants, witnesses Ojuro Romlo, Amodoi Romulas and Erimu Phillip were to further evidence at the *locus in quo*.

The court then set the locus in quo date and went to the locus on the appointed date. Both the handwritten and typed record of proceedings of the lower court indicate that one Amodoi Romulas testified as DW5, one Erimu Philip testified as DW6 and one Domitila Arukorin testified as DW7.

The 4th and 6th defendants, that is, Okello Otwa and Oumo Mary were not present at the locus in quo as shown by the locus attendance list for reasons best known to themselves even though they were in court when the court appointed out the date for the locus visit. No lawful reason is given for the absence of the 4th and 6th defendants at the *locus in quo*.

Given the above, my finding and conclusion is that the appellants, especially, the 4th and 6th by themselves opted to not appear in court while

it was at locus and thus cannot fault the trial Magistrate for not receiving their evidence as the two opted not appear at the locus yet they were in court when the court clearly made orders that all parties and selected witnesses were to be present on the day of locus visit where they would present their evidence.

The absence of the 4th and 6th from the court at locus arose was voluntary and out of their own free will as no lawful reason was given to the court for their absence and as such the non-taking of their evidence was as a result of their own fault and not that of the trial court.

Additionally, on the allegation that the trial Magistrate declined the zonal clan chairman to testify at the locus, I do find that there is no evidence on record in support of this allegation. But more importantly the record of court proceedings clearly show that the zonal clan chairperson called Arukori Simon was not among those listed by the trial Magistrate to give evidence at locus as he had not even testified in court.

It should be noted that the lawful purpose of *locus in quo* proceedings is for the clarification and or amplification of the testimonies of the witnesses who have already testified on behalf of the parties in court not otherwise.

Accordingly, the witnesses which the appellant claim were denied the opportunity to testify at the *locus in quo* unfortunately had not testified in court and were not among those listed and required to further testify at locus and as such could not give be allowed to give evidence at the locus.

Given the unblemished *locus in quo* report with its attendant map and attendance list, this court is satisfied that the *locus in quo* proceedings were properly carried out in accordance with the law as the trial court was only obliged to have those witnesses who had already testified in court to

amplify and or further clarify on their testimonies already given in court. Also it is evident that the 4th and 6th appellants on their own volition, chose to not appear at the *locus in quo* and their absence was not the court's fault. It was their own fault and so with these clear facts, Grounds 1 & 4 accordingly fail.

b. Ground 6:

On Ground 6, Counsel for the appellants submitted that the respondent in his pleadings did not plead or even pray for damages yet the trial court in its judgment and decree awarded the same contrary to the law.

In making this submission, Counsel supported his argument by citing the holding in ***M/s Fang Min v Belex Tours & Travel Ltd SCCA No. 06 of 2013*** where it was held that a party cannot be granted relief which that has not claimed in the plaint or claim.

In response, Counsel for the respondent submitted that though the respondent was not represented in the trial court, he had actually indicated in paragraph (e) of his prayers which was actually part of his pleadings prayers that the court grants him any other remedy that the court deems appropriate and just. Counsel added that the same prayers was further elucidated during the scheduling of the head suit with the respondent/plaintiff requesting the court to consider granting him general damages. That this was not opposed even by the appellants/ defendants.

Furthermore, counsel for the respondent submitted that this same request was further amplified by the respondent's testimony during the lower court trial when he told court that the trespass by the defendants/ appellants denied the opportunity him the to get Ug. Shs. 10,000,000/= per annum from his land where he could have got 100 bags of groundnuts

and his reared animals and as such the court should consider granting him the same. These acts by the appellants, it was argued denied the respondent the use of the suit land which fact is even pointed out in his plaint that the appellants had inconvenienced him and were benefiting from the suit land at his expense despite several warnings to vacate the same.

Furthermore, counsel for the respondent submitted that even in law the award of general damages was discretionary with the court having such powers by virtue of section 98 of the Civil Procedure Act to make such orders necessary for the ends of justice.

In support of this submission, Counsel cited the holding in ***Luzinda v Ssekamatte and 3 Ors [2020] UGHCCD 20*** where it was held that unlike special damages it was not a requirement that general damages be specifically pleaded and proved.

Accordingly, Counsel prayed that even if the court were to find that the respondent had failed to specifically plead for general damages, then in light of Article 126 (2)(e) of the Constitution that the omission should be regarded as a mere technicality.

Counsel finally submitted that the case relied on by the appellant, that is, the case of ***M/s Fang Min v Belex Tours & Travel Ltd SCCA No. 06 of 2013*** was distinguishable from the current one as in that case the Court of Appeal had issued orders arising from issues not raised on appeal and an attempted change to the cause of action which gave rise to the appeal to the Supreme Court.

Counsel prayed that on the basis of all the above, court finds that this ground lacks merit.

In rejoinder, counsel for the appellants submitted that courts of law have overtime termed the prayer for *"any other remedy that court deems appropriate and just as useless surplusage that means nothing"*.

That such a statement in the prayers for relief had no magical qualities and it was not enough by such a statement in the plaint to have the court grant the respondent a remedy which he never specifically prayed for as was pointed out in ***Take Me Home vs Apollo Construction Co. Ltd [1981] HCB 43*** where it was held that;

> ***"Any relief must always be set out in the plaint and a mere legal entitlement is insufficient. In the instant case no claim for damages for breach of contract was actually pleaded and would not be awarded under the prayer for "any other suitable relief" in the plaint."***

Arising from the above positions of the courts, Counsel prayed that the same yardstick should be applied to the instant matter to deny and set aside the award of damages made to the respondent by the lower court yet he had not prayed for the same.

Supplementary to the above submissions, counsel for the appellants argued that this Honourable Court should also ignore the submission by counsel for the respondent who urged this Honourable Court should distinguish the decision of the Supreme Court in ***Fang Min's*** case (above) stating that such a submission was misconceived and not based on law because the principle on award of reliefs by courts of law is clear and time tested. That is, a claimant can only be awarded a relief where such is specifically pleaded before court can grant the same.

In my considering the above submissions in respect of the award of reliefs, such as general damages, I do state that the position of the law, as has

been established by decided cases, is that an award of general damages as the direct probable consequence of the act complained of.

Such consequences may be loss of use, loss of profit, or physical inconvenience.

Likewise, the award of general damages is discretionary one for a court and is in respect of what the law presumes to be the natural and probable consequence of a defendant's act or omission as was held in ***James Fredrick Nsubuga v. Attorney General High Court Civil Suit No. 13 of 1993*** and ***Erukana Kuwe v. Isaac Patrick Matovu and Another, High Court Civil Suit No. 177 of 2003.***

In relations to the instant case, counsel for the appellant argued that since general damages were not pleaded by the respondent then the trial magistrate should not have awarded them.

On the other hand, Counsel for the respondent urged this court to find that since an award of general damages is made within the discretion of a court and that the trial court correctly and legally exercised such discretion, then such discretion should not be interfered with since the respondent proved that the appellants had use of the suit land to the detriment of the respondent for a very long period of time and as such the amount awarded by the trial court as damages was not only just but reasonable.

In considering this point, I must point out that, it is trite that an appellate court will not interfere with an award of damages by a trial court unless the trial court is found to have acted upon a wrong principle of law or that the amount awarded is so high or so low as to make it an entirely an erroneous estimate of the damages to which the plaintiff is entitled.

In the instant case, it is true that the respondent, though did not specifically pray for general damages as seen from his pleadings, makes prayers, under paragraph (e) of his prayers in his pleadings as follows;

> "WHEREFORE: ***The plaintiff prays the Honourable Court be pleased to make orders as to;***
>
> ***(e) Any other remedy that this Honourable Court may deem appropriate and just."***

Besides, during the scheduling of the head suit before the trial court the same prayers for general damages was made and the trial Magistrate while noting in his judgment that it was evident that the defendants/appellants had since the institution of the suit wrongfully enjoyed benefits from the suit land, an amount of Shs. 10,000,000/= as general damages would suffice and went on to award the same to the respondent/plaintiff.

From the position of the law, I would agree with the counsel of the respondent that general damages need not be pleaded but may be awarded discretionally by the court.

In the instant case, I do find and conclude that the award of general damages in the head suit was within the right of the trial court based on its finding and discretion which was exercised judiciously taking into account the long period of time which the appellants had the use of the suit land to the detriment of the respondent. As such the amount of awarded as general damages is in my view just and reasonable under the circumstances and accordingly, I will not interfere with the trial court's discretion in that respect. Ground 6 thus fails.

c. <u>Ground 2:</u>

On Ground 2, Counsel for the appellant faulted the trial Magistrate for conducting locus during court vacation without a certificate of urgency.

Counsel's argument was that according to **Rule 3 and 4 of the Judicature (Court Vacation) Rules** and **Order 51 rule 4 of the Civil Procedure Rules,** a civil matter cannot be heard during court vacation unless one of the parties has applied for a certificate of urgency.

Counsel submitted that the reason given by the trial Magistrate that the *locus in quo* must be carried out sooner than later due to upcoming rainy season cannot stand as it is a notorious fact that between 21st December and 7th January which is the period of court vacation, it is a dry season in Teso with weather conditions not being one of the grounds recognized by the law or precedents so that an urgency is created for a civil matter to be conducted during court vacation.

In reply the above assertion, counsel for the respondent submitted that both parties were in court and were in agreement that there was need for urgency to have the locus in quo proceedings conducted sooner than later in order to avoid the impending rainy season which would render roads impassable and delay the completion of the suit.

Counsel further submitted that it was worth noting that neither party were represented by counsel and had no prior knowledge in relations to the process of granting of a certificate of urgency and as such the court on its own motion with the concurrence of the parties, went ahead to direct the conduct of the locus in quo proceedings during the appointed time.

Additionally, counsel for the respondent submitted that in any event, the appellants were not prejudiced in any way by such an action given the fact of Article 126 of the Constitution of Uganda requiring that justice should be not delayed and that courts should do substantive justice with undue regard to technicalities.

Counsel for the appellant in rejoinder submitted that the agreement of the order of the court by the parties was not a licence to breach the law and the court should have guided the parties on the provisions of the law.

In resolving this ground a look at what the provision of the law is in relations to court vacation is necessary.

The Judicature (Court Vacation) Rules under **Rule 3** provide that;

In each year the court shall be in vacation from the 15th July to the 15th August inclusive and from the 23rd December to the 7th January inclusive.

Rule 4 provides that;

In vacation the court shall deal with criminal business but shall not sit for the discharge of civil business other than such civil business as shall, in the opinion of the presiding judge, be of an urgent nature.

The record of proceedings of the lower trial court indicate that after the trial magistrate had directed that certain defendant and witnesses were to further testify at locus, the respondent/plaintiff prayed that the court fixes the locus visit before the start of the rainy season on the basis that roads would thereafter become impassable. The defendants/appellants also all agreed to this logic that the roads usually become impassable when the rainy season starts.

The trial Court upon getting a consensus from the parties went on to then make a ruling that even though the period between 24th December to 7th January is usually a court vacation as Rule 4 of The Judicature (Court Vacation) Rules provides that during court vacation only criminal matters should be handled, the trial court went on to consider the fact of courts allowed to sit in the discharge of civil business during such a period, other

than such civil business as shall, in the opinion of the presiding judge, is of an urgent matter, he then determined that in the instant case if *locus in quo* is not visited before the rainy season destroy the roads or render it impassable, then suit would delay completion and so , the trial magistrate went on to hold that the visit to locus in this particular case was a matter of urgency and ruled accordingly even though none of the parties had applied for a certificate of urgency.

Drawing from the argument and reasoning of the trial court, I find that the order to have the locus in quo visit conducted during court vacation was based on sound reasoning based on the circumstance of the case and no prejudice was suffered by either party. The parties themselves were interested in the locus visit being conducted sooner than later and even were alive to the effect of the rains in making the roads impassable.

Therefore, given the trial court's intention of finalising the matter as soon as possible, he had the discretion to decide to visit locus in quo during court vacation so as to avoid the risks of not doing it at all or later in the rainy season. He thus went on to classify the visit to locus as a matter of urgency.

It is true that whereas, The Judicature (Court Vacation) Rules does not specify grounds that may amount to what is an urgency and I am of the opinion that what amounts to an emergency is dependent on the facts of each case.

In this case, the trial court was convinced that the locus visit ought to be carried out sooner than later to avoid the rainy season which would make roads impassable and rending the further taking of evidence in time inconsequential. I find nothing wrong with that decision as a court is required to act judiciously in the interest of justice.

In any case The Judicature (Court Vacation) Rules are rules of procedure which are maidens of justice and not fetters to it and should not be used to frustrate a situation like was in the instant case where there was clear and present danger of the onset of the rainy season which would not permit the court to act to complete the case before it within the appointed time. The decision of the court was reasonable under the circumstances. Ground 2 accordingly fails.

d. Ground 3:

On Ground 3, Counsel for the appellant submitted that if the trial Magistrate had properly directed himself, assessed and evaluated the evidence on record he would have found that the balance of probabilities favoured the appellants.

Counsel for the respondent submitted that the trial magistrate rightfully evaluated the evidence on record and the appellant cannot be seen to claim an interest in land owned by two generations on the respondent's family through inheritance.

The trial Magistrate in his judgment while evaluating the evaluated adduced by both parties found that on a balance of probabilities the suit land belonged to the respondent. He also found that the 5th defendant (now 4th appellant) wanted to alienate the suit land by way of a sale and then thereafter go back to his land which is on the west of the suit land.

It is the evidence of the 4th appellant that Counsel for the appellants base their arguments for this appeal as the 4th appellant claims to have inherited the suit land with all the other appellants claiming their portions through him.

According to the 4th appellant, the suit land was for one Omojong Ikwaput his grandfather and that after Omojong Ikwaput died, his paternal uncle

Angodo Gabriel took over the suit land and after Angodo's death his brothers inherited the land and used it and after their death he took over the land which was given to him by his clan as the son of Angodo.

That the respondent's grandfather Odeng was an in-law to Omojong Ikwaput who gave Odeng the suit land to stay on temporarily.

However, during cross-examination, the 4th appellant told court that he did not remember the year his relatives got the land or even whether the land of Angodo was on the west or not of the suit land, though he claimed that he had both the clan minutes and a letter giving him the suit land both of which he did not produce in court claiming that the clan chairman called Ojuri. That claim by the 4th appellant is without any basis and is untruthful as it is inconceivable that he could not bring to court the core document which was the basis of his claim to the suit land yet that document would have gone a long way to prove his case.

From the discredited testimony of the 4th appellant who could not even remember the year his relatives got the land or even whether the land of Angodo was to the west or not of the suit land together with the testimonies of DW5, 6 and 7, it is can easily be confirmed that the respondent's grandfather and father as well as the 4th appellant's grandfather each had their own separate piece of land which were next to each other.

This even more so given the testimony of DW7 who told court that before she lost her sight in 2003, she was living on the eastern side of Acowa Road and Ikwaput and even the father of the 4th Appellant were staying on the west of Acowa road.

Since PW1 in his testimony told court that he inherited the suit land from his father Sirasi Ikwaput who had inherited the land from Edungot and

Odeng, the boundaries of the suit land he stated that on the west of the suit land is a main road for Acowa and Okoboi and this road is a boundary between him and the 5th defendant/4th appellant.

PW2 corroborated the fact that the 4th appellant at all times stayed on the land on the other side of the road and has never lived on the suit land and he was a neighbour to the suit land on the west. He added that the appellants were all just trying to grab the respondent's land.

PW4 who was caretaking the land, gave an unchallenged testimony on how the appellants came to be on the suit land. He stated that the 5th appellant used to cohabit with the father of the 4th appellant and their land was on the west of the suit land while the 6th appellant, who is his in-law left her husband, was on the western side of the suit land but just entered the suit land with the 3rd appellant when he bought a portion of it.

PW4 further told court that the 2nd appellant was born in Ameru village but later came to the suit land to struggle for a piece of though the 4th appellant chased him from the suit land.

From the above pieces of evidence, it is clear to me that the 4th appellant's land is on the west of the suit land leaving the suit land to belong to the respondent who clearly inherited the same from his father.

Accordingly, based on the clear evidence presented before the trial court, I note that though the 1st and 6th appellants bought parts of the suit land from the 4th appellant, the 4th appellant did not own any part of the suit land.

He was a trespasser on the suit land and so are the 1st and 6th appellants who bought *"air"* from the 4th appellant. All of them are unlawfully on the suit land. The remedy for 1st and 6th appellants lies in their seeking for the refund of the land purchase money as against the 4th appellant.

Therefore, I find and conclude that the trial magistrate rightfully evaluated the evidence before reaching his decision. This ground accordingly fails.

e. Grounds 5 and 7:

On Grounds 5 and 7, Counsel for the appellant submitted that the trial magistrate was wrong to find that the land was given to the respondent's grandfather as a gift *inter vivos*. That the evidence shows that the 4th appellant's grandfather gave the respondent's grandfather land to stay on as an in-law and he was therefore a licensee without rights to alienate and bequeath the land.

Counsel for the respondent submitted that there was no better finding by the trial court than the fact that the respondent is the rightful owner of the suit land.

The respondent in his evidence stated that he inherited the land from his father Sirasi Ikwaput who inherited from Odeng and Edungot and this was corroborated by all his witnesses.

The 4th appellant in his testimony stated that Odeng married his father's sister called Isweyi and was given the suit land to stay on. That his grandfather was also staying on the suit land. DW5 stated that the suit land was given to Ikwaput and the northern part to Odeng.

He claims that it is his father who gave the land to Odeng because Odeng married the father's sister called Ojakala.

This is an inconsistency that was never cured for the appellants claim on how Odeng got the suit land was not clear and furthermore DW7, the daughter-in-law of Ikwaput stated that before she lost her sight she recalls he was living on the eastern side of Acowa road and Ikwaput through whom the appellants, especially the 4th appellant lay claim to the suit land

was staying on the west of Acowa road. This piece of evidence proved that 4th appellants grandfather through whom he claims lived on the west of the suit land and indeed had no claim on the suit land as it belonged to the grandfather of the respondent.

Remarkably, in his testimony, the 4th appellant stated that Ikwaput his grandfather and Angodo his paternal uncle were buried on the suit land and their graves were visible, however, the locus proceedings do not indicate anywhere that he showed these graves to court.

I therefore find that on a balance of probability the respondent proved his case and the trial magistrate was right to declare him the owner of the land. Accordingly, no miscarriage of justice was occasioned to the appellants.

On another note, the perusal of the records show that the 2nd to 6th appellants actually did not file any written statements of defence. By doing so they put themselves out of court process. I wonder how the trial magistrate even allowed them to continue appearing in the case yet they ceased to be parties. The 2nd to 6th appellants should have been locked out of the proceedings for in ***Sengendo versus Attorney General (1972) 1 EA 140*** it was held that a defendant who fails to file a defence puts himself out of court and no longer has any *locus standi* and cannot be heard.

Phadke J in the above case at page 141 particularly notyed this when he stated that:

> ***"I drew his attention to the decision of the Court of Appeal in Kanji Devji versus Damor Jinabhai & Co. (19340) 1 E. A.C.A. 87 where it was held; "That a Defendant who fails***

to file a defence puts himself out of Court and no longer has any locus standi and cannot be heard"

Undoubtedly, a party who fails to file a defence puts himself out of court and the trial magistrate ought not to have let the 2nd to 6th appellant appear in court without the appropriate leave of court to give evidence in court.

Considering the above, I would find and conclude that no miscarriage of justice was occasioned to the appellants. These grounds all fail.

6. Conclusion and Orders:

Overall, this appeal fails on all grounds. It is found wanting of any merit. It is accordingly dismissed with costs to the respondent.

The orders and decrees of the lower trial court are thus upheld.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

12th April 2023