THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 28 OF 2020

(ARISING FROM CIVIL SUIT NO. 61 OF 2018, GULU CHIEF MAGISTRATES COURT)

1. BETTY AKECH OKULLO
2. OKELLO JACOB
3. AJUGA JANANI..... APPELLANTS

VERSUS

1. OKEMA JAMES
2. OWACGIU ALFRED
3. OCITTI THOMAS
4. AKONGO HELEN
5. OBWONA EDWARD..... RESPONDENTS

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background facts

The first Appellant together with the rest of the Appellants who are her Nephews (sons to late brother) sued the Respondents in the trial Court, jointly and severally, in respect of land measuring approximately 200 acres, situate at Kalamomiya village, Paidwe Parish, Bobi Sub- County, Omoro District. The

Appellants sought for declaration that the Respondents are trespassers, and that the suit land belongs to the Appellants, having acquired by way of customary inheritance and practice, from the 1st Appellant's father, the late Odong Apollo. The Appellants also sought for eviction order, general damages, a permanent injunction and costs. The Appellants made a disclaimer that they recognize that the Respondents have rightful claim to only 10 acres of the suit land which the Appellants allege, had been granted to the Respondents' father, a one Edward Onying in 1989 when Onying allegedly took refuge thereon during the insurgency in Northern Uganda and was buried thereon. The Respondents are alleged to have trespassed in 2017. They are alleged to have cultivated, erected huts, felled trees, planted trees, burnt charcoal, grazed animals, and sold off some portion of the suit land without any colour of right, as they are not lineal descendants of the Appellants' father or grandfather.

In their joint Written Statement of Defence, the Respondents denied the claim. The 2nd Respondent averred that he had no claims to the suit land, had never lived thereon, and was wrongly sued. The rest of the Respondents averred that the suit is an abuse of court process, bad in law, misconceived, frivolous, vexatious, and did not disclose any cause of action against them. They indicated that they would raise a preliminary objection accordingly.

On the merit, the 1st, 3rd, 4th, and 5th Respondents averred that they are lawful customary owners of the suit land, having been born thereon and having inherited it from their fathers, Edward Onying, and Samsoni Otto, who lived, died, and were buried there. They contended that the late Onying inherited from the late Ocol, his father. The Respondents claimed to be in possession and denied the averment that Onying was offered 10 acres by the Appellants' relation. The four contended that the suit was a retrial in disguise, having been earlier tried and finally decided between a party from whom the Appellants claim and the 1st, 3rd, 4th and the 5th Respondents, and *ipso facto* the suit was *res judicata*. They sought for a declaration that they are customary owners of the suit land and prayed for dismissal with costs, a permanent injunction, general, aggravated, exemplary, and punitive damages. They prayed for interest as well.

After full trial including visiting the *locus in quo*, the trial Court (His Worship Matenga Dawa Francis, the then Chief Magistrate) dismissed the suit with costs, in a Judgment delivered on 10th June, 2020. Court declared the 1st, 3rd, 4th and the 5th Respondents to be the customary owners of the suit land. It held that the suit was barred by the doctrine of *res judicata* but nonetheless proceeded to decide the merit thereof. Court issued a permanent injunction, restraining the Appellants from

interfering with the suit land, and costs. Being aggrieved and dissatisfied, the Appellants preferred the present Appeal.

Grounds of Appeal

The grounds formulated for court determination are,

1. The Learned trial Chief Magistrate erred in law and fact in holding that on account of Civil Suit No. 33 of 2013, and High Court Civil Appeal No. 0064 of 2017, between Olanya James and Ociti Tom, Obwona s/o Onying, Okema s/o Onying, and Odongo s/o Onying (Akongo Hellen as in the proceedings), Civil Suit No, 00061 of 2018 between parties herein in this appeal was *res judicata*, thus occasioning a miscarriage of justice.

2. The Learned trial Chief Magistrate erred in law and fact in failing to properly evaluate the evidence on record thereby coming to wrong conclusion that the Appellants were not customary owners of the suit land.

3. The Learned trial Chief Magistrate erred in law and fact in holding that the Appellants failed to prove customary ownership of the suit land thus occasioning a miscarriage of justice to the Appellants.

4. The Learned trial Chief Magistrate erred in law and fact when he took and relied on extrajudicial statements from unsworn witnesses at the locus in quo.

Prayers

The Appellants prayed that the whole Judgment and Orders of the trial Chief Magistrate be set aside and that Judgment be entered for the Appellants. They prayed for costs of the Appeal and costs in the trial Court.

Representation

Learned Counsel, Mr. Silver Oyet Okeny, appeared for the Appellants while Learned Counsel, Mr. Brian Watmon represented the Respondents. Both Counsel filed written submissions which Court has considered and is grateful.

Resolution of the Appeal

Before resolving the Appeal, I remind myself of the duty of this Court, sitting as a first appellate court from the decision of the Magistrates Court. As a first appellate court, the parties are entitled to obtain from this court, the court's own decision on issues of fact and issues of law. However, in the case of conflicting evidence, I have to make due allowance for the fact that I have neither seen nor heard the witnesses testify, and make an allowance in that regard. I must however weigh conflicting evidence and draw my own inference and

conclusions. See: **Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002, (per Mulenga, JSC). See also Coghlan Vs. Cumberland (1898)1 Ch. 704**, wherein the Court of Appeal of England put the matter succinctly as follows;

"Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the Judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the full conclusion that the Judgment is wrong...when the question arises which witness is to be believed rather than another and that question turns on the manner and demeanour, the court of appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from the manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witness whom the court has not seen." See: **Pandya Vs. R [1957] EA 336.** In Pandya, the above passage was cited with

approval. Court held that the principles declared above are basic and applicable to all first appeals.

In **Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10 of 1997**, the Supreme Court held that it was the duty of the first appellate court to rehear the case on appeal, by reconsidering all the materials which were before the trial court and make up its own mind. The Court held, failure by a first appellate court to evaluate the material as a whole constitutes an error of law.

Preliminary complaints raised by the Appellants

Before arguing the appeal, Mr. Oyet Silver Okeny raised complaints about the conduct of the case in the trial Court. They are two. First that the Respondents were unfairly and unethically allowed to cross examine the Appellants' witnesses, before lodgment of the Respondents' witness statements. Counsel contended that the evidence for the Respondents given in those circumstances should have been accorded a trifling weight. Counsel cited **Seruwagi Muhammad Vs. Yuasa Investments Ltd, HCCS No. 334 of 2013** and submitted that, court held that it would be unethical to prepare witness statements having in mind the testimonies of the plaintiff's witnesses and such evidence may be given a trifling weight. Counsel also referred to **Andiazi Vs. Republic [1967] EA 813; Semande Vs. Uganda [1999] 1 EA 321** and Counsel concluded

that, by failing to give the evidence of the Respondents trifling weight, the trial court caused injustice to the Appellants.

The other complaint was that the trial court never mentioned submissions of counsel in its Judgment. That, accordingly, the Judgment is contrary to O.22 rule 4 CPR (I think counsel meant O.21 rule 4 CPR).

I have considered the matters raised. I observe that the manner in which the points have been raised, with respect, is irregular. The complaints were raised in submissions and not by way of grounds of appeal. I am alive to the principle that a defect in the proceedings of court, commonly termed procedural irregularities, can form a valid ground of appeal. Procedural irregularities are wide in scope. In **Attorney General of United Republic of Tanzania Vs. African Network for Animal Welfare, EACJ Appeal No. 3 of 2014**, the East African Court of Justice stated that procedural irregularities are, in character, irregularities that attach to the conduct of proceedings or trial. It comprises such irregularities as the admissibility of documents or witnesses, denying a party the opportunity to be present or to be heard at all, hearing a matter in camera (where it should have been heard in public and vice-versa), failure to notify or serve in time or at all, etc.

In short, procedural irregularity attach to a denial of due process (that is, fairness) of a proceeding or hearing. In **Angella Amudo Vs. the Secretary General of the East African Community [2012-2015] EACJ LR 592**, the East African Court of Justice held that a Court commits procedural irregularity when it acts in the conduct of a proceeding or hearing leading to a denial or failure of due process (that is, fairness) e.g. irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings, etc.

An irregularity is therefore a procedural shortcoming, and not a substantive error of interpretation of the law. It is committed whenever a Court in a proceeding or trial, omits to apply or enforce the applicable normative procedure. See: **Timothy Kahoho Vs. Secretary General of the East African Community [2012-2015] EAC LR, 412**; **The Attorney General of the Republic of Burundi Vs. the Secretary General of the East African Community & Hon. Fred Mukasa Mbidde, Appeal No. 02 of 2019 (Appellate Division)**.

Turning to the instant complaint, whereas they point to an apparent procedural irregularity, the same cannot be entertained in this appeal as they are not part of the grounds of Appeal. Grounds of appeal lodged in this court should accord with the provision of Order 43 rule 1 (1) and (2) of the CPR. The rule requires an appeal to the High Court to be preferred in the

form of a Memorandum of Appeal. The Memorandum must therefore set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from. It also provides for other matters not relevant in this Appeal. Moreover, under O.43 rule 2 (1) CPR, an appellant shall not, except by leave of the High Court, urge, or be heard in support of any ground of objection not set forth in the memorandum of appeal.

In the circumstances, since the Appellants never sought leave of court to amend the Memorandum of Appeal so as to include their complaints, they were irregularly raised. In **Beutco (U) Ltd & another Vs. Barclays Bank of Uganda Ltd & 3 others, Civil Appeal No. 01 of 2017 (SCU)** where the Appellants sought to raise a new ground of appeal without seeking leave of the Supreme Court, the Court held that the Appellants could not be allowed to raise and argue a ground on which they had not appealed, as the same would be impermissible under rule 98 (a) of the Rules of the Supreme Court. I must add that rule 98 (a) of the Rules of the Supreme Court is to the same effect as the provision in the CPR regulating appeals in the High Court.

For the foregoing reasons, the Appellants' complaints are misconceived and fail.

Be that as it may, if the complaints had been properly raised, I still would have dismissed the same for lacking merit. Beginning with the first, I have noted that it is true the Respondents opened their defense after the close of the Appellants' case. They

lodged witness statements after the Appellants had closed their case. In my view, the Appellants and their counsel should have objected at the earliest opportunity and brought the procedural irregularity to the attention of the trial court. They did not. Accordingly, they could not be seen to complain to the trial court in their final submissions, having by their conduct acquiesced to the irregularity.

Moreover, the Appellants' counsel extensively cross examined witnesses for the Defense on their witness statements. No prejudice was therefore shown to have been occasioned. It has also not been shown that the Respondents' witness statements were largely influenced by what the Appellants' witnesses had already testified about. It is also not pointed out from the impugned Judgment how the trial court accorded undue weight to the pieces of evidence adduced by the Respondents. Furthermore, this court is not told which persons attended court when the Appellants and their witnesses were testifying. In a nutshell therefore, no miscarriage of justice has been demonstrated as a result of the alleged procedural lapses.

The other complaint relating to lack of deference to counsel's submission by the trial court, would also fail. In my view whereas a court should generally defer to submissions by counsel, that is not a hard and fast rule. A similar issue was considered in **Charles Onyango Obbo & Andrew Mujuni Mwenda Vs. Attorney General, Const. Appeal No. 2 of 2002**

(SCU) where Court (Tsekooko, JSC (RIP), while dealing with the doctrine of precedent, had this to say,

"A precedent is a judgment or decision of a Court of law cited as an authority for deciding similar or set of facts. Therefore, a precedent is a case which serves as an authority for the legal principle embodied in its decision. A case is only an authority for what it actually decides. "It has been said that 'the only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding a case before him' See Hallet (1880)13 Ch.D. 712. An authoritative precedent is one which is binding on the court to which it is cited and must be followed. A persuasive precedent is one which need not be followed but which is worthy of consideration. *Courts should at least as a matter of courtesy acknowledge the effort of advocates who produce relevant and useful or binding decided cases*. A binding authority would normally be a decision of a superior court within the same jurisdiction." (The underlining is for emphasis).

So, as noted, Courts are not obligated to reproduce submissions of counsel in their Judgments/ Rulings but may only do so as a matter of courtesy. This, I should say, may depend on the individual judicial officer. I would, speaking for myself, think it right for court to refer to counsel's submissions in

Judgment/Ruling, even if in a summary fashion. This builds respect between the bench and the bar. At any rate advocates are officers of court and assist court in the noble duty of administration of justice. What however is important is that in deciding any matter, a Court should be guided by the law and evidence, where required. For it to be a valid Judgment/ Ruling, as far as the High Court and the Chief and Magistrate Grade 1 Courts are concerned, the Judgment/ Ruling should meet the peremptory requirement of Order 21 rule 4 of the CPR. That is, it must contain a concise statement of the case, the points for determination, the decision on the case and the reasons for determination. Therefore, not reproducing laws cited by counsel, in a Court Judgment or Ruling, is not on its own a basis for concluding that the Court has not taken into consideration submission by counsel. What matters is that Court has applied the principles involved in the statutes and case law without necessarily expressly reproducing them. This ofcourse depends on the circumstances of each case.

In the instant case therefore, it was not suggested that the trial Court ignored precedent. If it were so, the complaint would have been valid. I have noted that the trial court was alive to some key principles of law canvassed by learned counsel without expressly quoting them. I think different cases should dictate different approaches by judicial officers. It could as well be a

question of style of each adjudicator. On the facts this appeal therefore, the complaint is not meritorious. I would disallow it.

Submitting for the Respondents, Mr. Watmon, with respect, also raised what he termed a preliminary objection. He indicated that the objection was strictly in regard to the 2nd Respondent (Owacgiu Alfred). Learned Counsel argued that the 2nd Respondent was wrongly *'sued in this appeal'* and that no ground of appeal relating to the 2nd Respondent affects him. Counsel argued that impleading the 2nd Appellant in the appeal constitute an abuse of court process. Counsel referred to the decision of the trial court, to the effect that there was no cause of action against the 2nd Respondent as he had no interest in the suit land.

With respect, the objection is misconceived. In my view, learned counsel erroneously believed that an appellant who was found by the trial Court to lack a cause of action against an adversary, is estopped from proceeding against that adversary on appeal. Learned Counsel also seems to be of the view that where the ground of appeal does not directly challenge a specific finding favourable to one party to an appeal, then the successful party in the lower court should not feature as a Respondent to the Appeal. This view of course lacks legal force. In the impugned Judgment, the trial court awarded costs against the Appellants, infavour of all the Respondents. The trial Court neither rejected

the plaint as against the 2nd Respondent nor struck out the 2nd Respondent's name under O.7 rule 11 (a) of the CPR. Court only made a finding in the final Judgment that there was no cause of action against the 2nd Respondent. In this appeal, one of the Appellants' prayers is that the whole Judgment and Orders of the trial court should be set aside.

Given the above circumstances, the objection by Mr. Watmon is misconceived. Moreover, the objection does not go to the root of the appeal and would not dispose of the appeal. I reject it.

Ground 1

Arguing ground 1 of the Appeal relating to the plea of *res judicata,* Mr. Silver Oyet Okeny submitted that although the courts that decided Civil Suit No.33 of 2013 (and the High Court Civil Appeal No. 0064 of 2017) lodged by Olanya James against Ociti Tom, Obwona s/o Onying, Okema s/o Onying and Odongo s/o Onying (correct name is Akongo Hellen, not Odongo s/o Onying) were competent, none of the present Appellants was a party thereto, and that, no evidence was adduced in that regard. Learned counsel cited section 7 of the CPA and several authorities on *res judicata.*

I must point out that, reference to the Judgment of an appellate court, for *res judicata* purposes, is not supported by law. *Res judicata* is concerned with the decision of the trial Court, which must have had jurisdiction. It is not concerned with the

competence of the appellate court. See: **Mario Ali Vs. Opoka Santos, Misc. Application No. 14 of 2022.** Therefore it is the competency of the trial court which determined the 'former' 'suit' that must be looked to, and not that of the appellate court in which that suit was ultimately decided on appeal, or of executing court. See also: **Toponidhee Vs. Sreeputty (1880) I LR 5 Cal 832; Bharasi Vs. Sarat Chunder (1896) I LR 23 Cal 415; Official Asignee of Madras Vs. Aiyu Dikshithar (1925) 48 Mad LJ 530.**

Counsel also argued that the suit between the present parties is different and founded on customary ownership of land by different persons in their own right. He submitted that the matter is based on claim of inheritance and ownership of customary land which follow clearly distinct linage and family holding, and thus quite different from the land that was the subject of litigation in the first suit.

Learned counsel contended that none of the Appellants are descendants of the father to Olanya James (Plaintiff in the first suit.) Counsel claimed that the father of Olanya was called Ageli Nyalamoyi. In my judgment, I find this claim to be incorrect because the 1st Appellant (PW1) testified (in cross examination) that the father of Olanya James was a one Opiyo Cambo. PW1 also admitted being Olanya's cousin sister so she is deemed to

know Olanya's parentage better than Counsel. PW1 was categorical that Nyalamoi (the record states 'Nyaramoi', a typo) was the grandfather of Olanya, meaning Nyalamoi was Opiyo Cambo's father. I think learned counsel inadvertently mixed up the point.

In my view, the issue of names and consanguinity becomes important in guiding court in establishing the linage of Olanya James and the Appellants. Consequently, as I understood Counsel, the same should then assist court in resolving the issue of whether Olanya's suit bound the Appellants on the principle of privity and whether the Appellants' suit therefore was *res judicata.*

Responding to the Appellants' submissions, Mr. Watmon Brian did not agree. He made detailed submissions, justifying why his clients maintain that civil suit No. 61 of 2018 between the Appellants and the 1st, 3rd, 4th and 5th Respondents is *res judicata.* I will not reproduce Learned Counsel's submissions but I do take it into account.

In the present matter the 1st Appellant (PW1) stated in para.2 of her witness statement that she was informed by her father, Odong Apollo (information which she says she later confirmed) that, PW1 had a grandfather (Okech Tomaci). That, Okech Tomaci was a brother to Onyac Ageli Nyalamoi and Yakobo Agat.

That, these persons had separate pieces of land parceled out, which each inherited from Koyo Akeng, the father of the three.

By the foregoing evidence, the Appellants sought to draw a distinct lineage and inheritance rights to the suit land, and demonstrate that those rights are not in any way related to that of Olanya. They therefore sought to claim that Olanya had his separate customary land which he also inherited from his forefathers. According to the Appellants, the first suit between Olanya and the Respondents was different and its adverse outcome could not have affected the Appellants' distinct claims.

The 1st Appellant aside from conceding in re-examination that Olanya James is her paternal cousin, denied ever sharing any land with Olanya, save for a common boundary. The first Appellant asserted in re-examination that her land measures approximately 400-500 acres. This claim regarding the 400-500 acreage was not pleaded and was not adverted to in evidence in chief. Asked in cross examination, the 1st appellant said she did not know the land size. The 1st Appellant's claim about the acreage in re-examination was therefore quite contrary to what was pleaded, which was 200 acres of land. This piece of evidence about the acreage, in my view, was intended to move the mind of the court away from the pleaded acreage of the suit land. It was in my view also intended to defeat the issue of identical land

claims by Olanya and the Appellants, because they claimed the 200 acres in their respective suits.

I should also observe that the evidence in re-examination that the land was about 400- 500 acres, was bare statement, not supported by other evidence, be it documentary or evidence recorded at the *locus in quo*. PW1's earlier concession in cross examination that she did not know the exact size of the suit land, weighs heavily against her subsequent claim that the suit land measures 400- 500 acres. I therefore find that the 1st Appellant (PW1) was bound by her pleading where she had averred that she and the co-appellants inherited 200 acres of land from Odong Apollo. The Appellants could not therefore be permitted to make an inconsistent case from that pleaded. I am fortified in this view by the precedent of **Ms Fang Min Vs. Belex Tours and Travel Ltd, Civil Appeal No. 06 of 2013, consolidated with civil Appeal No. 01 of 2014: Crane Bank Ltd Vs. Belex Tours and Travel Ltd (SCU).** In that case, the Supreme Court cited with approval **Bullen and Leake and Jacobs Precedents on Pleadings, 12th Ed, p.3**, where the learned authors state,

"Issues are framed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set out and covered by the issues framed therein. A party is expected and bound to prove the

case as alleged by him and covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings." (Underlining is mine.)

I now turn to the law on *res judicata*. This is set out in section 7 of the CPA. The section provides,

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by the court." (Underlining is for emphasis.)

Section 7 CPA has six explanations. The relevant one for the purposes of this appeal, is explanation No. 6, thus,

" where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the

purposes of this section, be deemed to claim under the persons so litigating." (Emphasis is added.)

Therefore, for a matter to be *res judicata*, the following conditions must be satisfied;

i) The matter must be directly and substantially in issue in the two suits.

ii) The parties must be the same or the parties under whom any of them claim (representatives/ privies), litigating under the same title.

iii) Court must have been competent.

iv) The matter must have been previously and finally decided in the previous suit.

The above provision has been subject of judicial discussions. In **Ponsaino Semakula Vs. Susane Magala & others (1993) KALR 213**, court held that the doctrine of *res judicata* is a fundamental doctrine of all courts that there must be an end to litigation. Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test

whether or not a suit is barred by *res judicata* is whether the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action, a transaction which he/she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If the answer to the foregoing question is yes, then the plea of *res judicata* should apply not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. See also: **Kamunye & others Vs. the Pioneer General Assurance Society Ltd (1971) EA 263**; **Godfrey Magezi Vs. National Medical Stores & 2 others, HCCS No. 636 of 2016**; **Boutique Shazim Ltd Vs. Norattam Bhatia & another, Civil Appeal No. 36 of 2007(COA).**

Applying the above principles, I note that the trial Court dealt with the issue of *res judicata* in an overly summarized manner. The decision was in a sentence of five words. There was no analysis of the evidence whatsoever with regard to *res judicata*. The brevity of court, if I may term it, naturally deprived the parties and the appellate Court of the benefit of the reasoning behind the holding. That said, I proceed to reappraise the material on record and assess whether the finding can or cannot be supported on Appeal.

The burden of proving *res judicata* is on the person alleging. See the dictum in **Onzia Elizabeth Vs. Shaban Fadul (as legal representative of Khemisa Juma), Civil Appeal No. 0019 of 2013 (per Stephen Mubiru, J.)**

The trial Court, with respect, did not refer to the pleadings or evidence on record before making the affirmative holding of *res judicata.*

Be that as it may, it is common ground that the first civil suit no. 33 of 2013 was lodged by Olanya James in the Chief Magistrates Court of Gulu. Olanya impleaded as Defendants, Ociti Tom, Obwona s/o Onying (meaning son of), Okema s/o Onying, and Odongo Hellen (should read Akongo Hellen). The then Defendants are the very Respondents to the present appeal, except Owacgiu Alfred (the 2nd Respondent herein). In my view, adding Owacgiu was possibly a litigation strategy crafted to defeat any *res judicata* plea, since Owacgiu was not a party to the earlier suit. Interestingly the 1st Appellant who was the only plaintiff who testified (the 2nd and 3rd Appellants did not) conceded in cross examination that she had never seen Owacgiu at all. She (PW1) however claimed to know Owacgiu. How PW1 could claim to know a person whom she had never seen, was not explained to the trial Court. In the Joint Written Statement of Defence, it was averred from the onset that

Owacgiu neither claimed any interest nor was he present on the suit land. Unsurprisingly it was disclosed during the trial that Owacgiu was resident in Pakwach (District) and not on or anywhere near the suit land. The Appellants' witnesses did not know Owacgiu either. He was not known in the entire Kalamomiya village where the suit land is.

Since the Plaintiff in the first suit was Olanya James, the question I proceed to resolve is whether Olanya was a representative of the Appellants in as far as the earlier suit is concerned.

In answer to the foregoing question, I find that whereas Olanya made a private rights claim, he in effect claimed for himself and others who belonged to the Bobi Paidwe clan, as the suit land was not exclusively his, although he purported it was. Therefore, when Olanya sued, his action bound the Appellants. The Appellants and Olanya belong to the same clan, Olanya being a paternal cousin to the 1st Appellant and therefore, an uncle to the 2nd and the 3rd Appellants. Whereas Olanya structured his suit as if it were a purely individuated customary land claim, on the evidence by the elders who testified for the Appellants, the suit land is customary land said to be owned by Bobi Paidwe clan, to whom Olanya and the Appellants belong. The evidence also show that the Respondents belong to the same clan. I will deal with this bit later. It is also significant that

the Appellants did not deem it necessary to sue Olanya over the same piece of land but the Respondents. Yet, as I shall show, it is the very land which the Appellants litigated over. I will further expound on this aspect of sameness later.

I therefore find that the principle of privity applies squarely and hold that the Appellants claim through Olanya.

Regarding whether the subject matter of the two suits are identical, I find in the affirmative. The two suits involved customary land measuring approximately 200 acres situate at Kalamomiya village, Paidwe parish, Bobi sub county, Omoro County in Gulu District (now Omoro District). The Appellants however asserted that on the ground, the suit land is different from that of Olanya, although identically described in their respective suits. PW1 asserted that the Appellants and Olanya only share a common boundary.

I have considered the proceedings at the *locus in quo* which was of great assistance in my verification of the competing contentions. At the *locus in quo*, the 1st Appellant (PW1) identified the land she and the co-appellants were litigating over. As it transpired and as confirmed by the trial court, it turned out to be the suit land litigated over between Olanya and the 1st, 3rd, 4th and the 5th Respondents. I cannot therefore do

better than reproduce excerpts from the record of the proceedings at the *locus in quo*.

While showing where the area in dispute begins, the 1st Appellant (PW1) first erroneously, in my view, stated ***"the dispute begins from the land outside the former homestead of Apollo Odongo (PW1's father), the Mango tree at the boundary, and (land westwards of) Lucoro trees."***

To the above claim by PW1, Ociti Thomas (the 3rd Respondent/ DW1) quipped, correcting PW1. Ociti then stated that the area pointed out and described by PW1 was actually not in dispute. Having got it wrong, the 1st Appellant then subtly retracted the claim (by keeping quiet to Octiti's correction). PW1 then moved the trial court and pointed to another portion of the suit land which she claimed was in dispute. To quote PW1, she said,

"The dispute begins from land east of the line of Lucoro trees- down to Tochi stream, eastwards extending to Layierac stream."

PW1 then led court to the Kraal which she said ***belonged to Olanya James*** (the 1st Kraal as per the sketch plan at the *locus*). Whilst at the first kraal, PW1 exclaimed,

"I don't have cattle here. They should be grazing."

To the above statement, Ociti Thomas (DW1) responded,

"Part of the Kraal of Olanya James is on our land. It is the portion we litigated over with Olanya James- stretching North East from the Owak tree."

I note that, as the record shows, PW1 neither denied nor rebutted the above quoted bit of the testimony of Ociti Thomas. Appearing to support Ociti, PW1 added, ***"The Kraal has not had animals for a long period- more than a month."***

In light of the above pieces of evidence, I hold that the first Kraal identified by PW1 and DW1 while at the *locus in quo* was partly on the disputed area which was litigated in the first suit between Olanya and the 1st, 3rd, 4th, and the 5th Respondents.
Furthermore during the *locus in quo* proceedings, PW1 asserted the basis of her claim, thus
"My possession is by the Kraal. The herding of the cattle is proof of possession. I established the kraal in 2007 when we bought our animals."
At that point, as the record shows, PW1 was referring to the kraal of Olanya James.
In addition, the record shows that after the first kraal, PW1 (in showing court the area in dispute) moved court to the second kraal, an old one (described on the sketch plan as **kraal 'B'**),

with barbed wires. There, DW1 (Ociti Thomas) testified that kraal 'B' belonged to Olanya James and was part of the area litigated in the first suit.

PW1 made no response to the above claim. At that point, Olanya James appeared at the *locus* uninvited. Without being asked to say anything, Olanya claimed, thus,

"The litigation did not extend to the kraal. They were not supposed to come here (I think he was referring to the court, the parties present and their witnesses.)"

Olanya continued, ***"This is not my land. The old kraal is for Betty (meaning PW1)."***

Supporting Olanya, PW1 exclaimed, ***"I built the kraal in 2006 and 2007."***

While arguing this appeal, the Appellants' Learned counsel argued that the trial court took in evidence and considered in its Judgment, extra judicial statements by Olanya. I find that this complaint is not entirely accurate. The impugned judgment shows that the quoted statements by Olanya were not considered by the trial court. This was a proper course to take. In this appeal whereas I have adverted to the statements by Olanya, the alien 'witness' at the *locus*, I did so to complete my

appraisal of what transpired at the *locus in quo*, and to demonstrate how the Respondents (through DW1) attempted to prove the elements of *res judicata* as far as their dispute is concerned. I have also alluded to the pieces of evidence to show how the Appellants attempted to rebut the claim of res judicata.

Therefore, having evaluated the above pieces of evidence together with other material on record, especially the evidence adduced in Court, the pleadings, and the Judgment in the first suit, I find that the 200 acres of land litigated in the first suit was the same land litigated in the second suit.

Regarding the issues canvassed in the two suits, I find that the issues in the first suit were directly and substantially those involved in the later suit. In the first suit, although there was a counterclaim by the 1st, 3rd, 4th and the 5th Respondents, the issues for determination were two fold, namely, ***who is the rightful owner of the suit land***, and ***what remedies are available to the parties***. In the later suit between the present parties, the real issues gravitated around ***who the proper customary owner of the suit land is***, and ***remedies available***. The issue of trespass was, in my view, secondary and perhaps diversionary. This is so because the Respondents who had been on the suit land, with developments thereon, could not be trespassers, against the Appellants, who, on the

evidence, were neither in constructive nor physical possession thereof.

Given my finding that the land involved in both suits is the same, and the issues involved were substantially not different, I hold that the issues in the two suits satisfied the requirement of section 7 of the CPA.

Regarding the jurisdiction of the court, the same was not contested and so was the issue of finality of the decision in the first suit. Therefore, considering all the circumstances of the matter, I find that the facts fit within the elements of the plea of *res judicata*. I therefore uphold the finding of *res judicata*. I wish to add that, to allow the argument by the Appellants that their lineage of inheritance of the suit land is different from Olanya's, would in my view, tantamount to encouraging gross abuse of the legal process. I say so because litigants would be incentivized to use proxies to sue and where unsuccessful, re-litigate himself/herself. This would be contrary to public policy which encourages fairness in litigation and adjudication. It is common knowledge that Public Policy frowns upon reopening of closed disputes. Therefore, a party ought not to be vexed twice over the same matter unless a party is appealing to a higher Court.

Accordingly ground 1 of the grounds of appeal fails.

Grounds 2, 3 and 4

I will consider the three grounds together. They relate to the finding that the Appellants are not customary owners of the suit land. They also cover the issue of evaluation of evidence. The complaint also covers the aspect of the alleged reliance on extrajudicial statements from unsworn witnesses at the *locus in quo*.

Learned Counsel for the Appellants commenced his address by arguing that a trial court is expected to evaluate evidence as a first appellate court. With respect, I do not agree. I am of the view that the considerations a first appellate court takes into account in performing its task is quite different from that of a trial Court. What a trial court is expected to do is to write a Judgment/ Ruling conformable to O.21 rule 4 of the CPR. Of course, inevitably, writing a reasoned Judgment or Ruling may come with aspects of evaluation of evidence where such evidence was adduced. I do not therefore think that adverting to the principles laid down in cases such as **Pandya Vs. R (1957) EA 336** support the Appellants' arguments regarding the duty of the trial court.

Learned counsel also submitted that the evidence supporting the fact of inheritance of the suit land by the Appellants was not controverted. He further argued that the Respondents did not prove their claim of inheritance, unlike the Appellants. The trial

court is also faulted for relying on some findings made at the *locus in quo*. Such findings include the conclusion that the appellants had not proved the fact of possession of the suit land. Regarding the finding that no cattle were found on the suit land, contrary to the earlier claims that the Appellants were using the suit land for cattle rearing, among others, Counsel argued that cattle in Acholi graze freely and *ipso facto*, as confirmed by PW1, the mere fact that during the visit at the *locus in quo* there were no cattle, was no basis for denying the Appellants' land possessory claim. Counsel asserted, finding or not finding cattle, was not primary evidence of proof of land ownership.

The Appellants' Learned Counsel also argued that the trial court, having found that the first Appellant's father had left the suit land in 1958 owing to sickness, the court could not have held that possession was not proved by the Appellants. Counsel claimed that the trial Court ignored the evidence given by PW3 for no reason. Learned counsel also argued that unlike the Respondents, the Appellants showed that they inherited the suit land through their great grandfather, Koyo Akeng. Counsel asserted that the trial court cherry-picked evidence to decide against the Appellants.

Regarding the *locus in quo* proceedings, learned counsel argued that Olanya James (a non-party/ a non-witness to the proceedings) and the 5th Respondent (Obwona Edward) testified

at the *locus in quo*. He asserted, Obwona was not a witness in the matter as his witness statement had been dispensed with and not admitted in chief. Counsel referred to Practice Direction No.1 of 2007 and judicial precedents, which guide on how trial courts should conduct proceedings at the *locus in quo*. He asserted that the trial court relied on evidence of unnamed witnesses, as well as evidence of the 5th Respondent, to hold that the Respondents customarily own the suit land. He concluded that, a huge error was occasioned which vitiated the proceedings. Learned counsel summed up his arguments by addressing the aspect of proof of customary land ownership. Relying on article 237 (3) (a) of the Constitution of Uganda, 1995, and section 2 of the Land Act, Cap. 227, as well as the Research by Robert Kakuru on Customary Land Practices in Acholi entitled 'The Protection of Customary Land Ownership in Acholi Region (Trocaire Uganda, December, 2017), counsel contended, the 1st Appellant proved that the suit land was acquired through inheritance from the lineage of Koyo Akeng to Okech Tomaci, to Odong Apollo, and then to the Appellants. He argued, the trial court did not consider this evidence. Counsel claimed that the trial court did not traverse the whole of the suit land. Learned Counsel asserted, the suit land stretched across Layierac stream to the east. Counsel submitted that, witnesses proved that the Respondents' grandfather (Ocol) was gifted land at Kabedoling by Chief Andrea Olal where relatives of the Respondents lived. He added that, mere occupancy and user of

land, however long, without more, is no proof of customary ownership, and likewise, non-possession is not inconsistent with it. Counsel cited **Mubiru J.,** in **Atunya Valiryano Vs. Okeny Delphino, HC Civil Appeal No. 0051 of 2017.** Counsel claimed that the Respondents' inheritance is at Opaya, not the suit land. He asserted that the Respondents trespassed on the suit land in 2006/2007. He also argued that the Respondents have no connection with Bobi Paidwe clan, being non clan members who do not recognize the clan ritual of Okwe Pala. Learned Counsel deduced therefore that, the Respondents have no connection to the suit land. He also argued that the parents of the Respondents, Onying Edward and Otto Samsoni were not buried on the suit land. Counsel was emphatic that the groups' relationship with the land is paramount (I think he meant the Appellants and their ancestors), and that physical possession as understood by the modern common law, is not enough. He submitted that the 1st Appellant and witnesses showed clearly two kraals at the *locus in quo*, although not in use by cattle since the year 2019. Counsel contended that the cattle kraals helped to prove that the Appellants own the suit land customarily. Counsel also submitted that customary law is informal, and is neither codified nor documented with agreed upon conditions, as rules are passed orally from generations to generations. He concluded that the Appellants inherited the whole land that belonged to Koyo Akeng lineage in respective portions of their parents, and grandparents. Learned Counsel then invited court

to find that it is the Appellants and not the Respondents who are the rightful owners of the suit land by virtue of Acholi customary practice and rights.

On the other hand, Learned Counsel for the Respondents, Mr. Watmon, did not agree. Submitting on grounds 2 and 3 together, Mr. Watmon argued that the Appellants failed to prove their case that they own the suit land under customary land tenure system. Counsel referred to pieces of evidence adduced by the Appellants' witnesses. He criticized the witnesses, rubbishing their testimonies and other pieces of evidence, claiming they were worthless. Learned Counsel supported the testimonies of his clients' witnesses. Counsel also cited several authorities in support of his submissions, and supported the decision of the trial court.

The Respondents' counsel also argued that the claim in trespass was misconceived, as the dispute was about establishing land ownership. Counsel asserted that, in any case, the suit in trespass was time-barred. Arguing ground 4 separately, Mr. Watmon submitted that the proceedings at the *locus in quo* was regular. Counsel claimed that the trial court acted correctly to seek clarity from an unsworn witness, Olanya, who had not testified in Court. Counsel however conceded that the purported statements made by Olanya can be expunged from the record, arguing, that would have no effect on the case.

Learned counsel also cited section 166 of the Evidence Act and submitted that the improper admission or rejection of evidence is no ground for ordering a new trial or reversal of court decision, especially if it appears that the evidence received would not vary the decision of court. Counsel also cited section 70 of the CPA, contending that, no decree should be reversed or modified for error, defect, irregularity in the proceedings, not affecting the case or the jurisdiction of the court. Counsel concluded by submitting that there was no error in the proceedings at the *locus in quo*. He prayed that the Appeal be dismissed with costs to the 1st, 3rd, 4th and 5th Respondents. As against the 2nd Respondent, counsel asked this court to strike out the appeal with costs, for being bad in law.

Resolution of the grounds of appeal

I have considered the elaborate submission by both Counsel and I am grateful. There is no gainsaying that the Appellants bore the burden of proof in the matter since they wanted the trial court to believe their contentions and render judgment in their favour. They were expected to discharge the burden on the balance of probability. That burden would only shift if the Appellants first discharged it. See section 101, 102 and 103 of the Evidence Act, Cap.6 See also **JK Patel Vs. Spear Motors Ltd, SCCA No. 4 of 1991.**

In their plaint, the Appellants averred that they acquired the suit land through customary inheritance and practice. To prove their claim, the Appellants relied on a letter (PEI), dated 29th October, 2018. They also adduced other evidence which I will consider.

Beginning with PEI, it was a letter adduced in evidence by PW2 (Otema Benjamin), PW3 (Ojera Marciliano) and PW5 (Okello Richard). The letter was addressed to the Office of the Grade One Magistrate, Gulu. PE1 is not shown to have been received by that Court. However, PE1 was also attached to the plaint and filed along with it in the trial court on 9th November, 2018. As at the date of the letter, a suit had not yet been filed. As I will point out, the letter made premature conclusions about a matter that was yet to be filed in court. In summary, PE1 is headed ***"Land dispute between Akech Betty and Ociti Thomas and three others."*** It should have been four others, as later developments indicate. It seems the persons behind that letter had no qualms with the 2nd Respondent (Owacgiu), therefore blostering the view that impleading Owacgiu was a strategy to defeat the *res judicata* bar. The body of the letter is reproduced below;

"My Lord, as Kaka Bobi Paidwe (sic) knows this land matters clearly, we were born in (sic) this land. The first person to begin living in (sic) this land was Okech Thomas who later

died and left it to his late son Odong Apollo who later left it to his daughter Betty Akech who is still alive. The elders who know more about this land are still alive and they are ready to declare the truth and they are;

1- Ojera Marcelino Bobi Paidwe 80 years

2- Otim Peter Bobi Paidwe 76 years

3- Okello Richard Bobi Paidwe 63 years

4- Odongping Jackson, Jago Kaka (meaning Clan Head) 48 years

5- Rev. Ocen Charles Bobi Paidwe, 71 years

6- Musisi Odoch, Chairman land Bobi Paidwe."

The letter continues,

"Therefore Kaka (clan) Bobi Paidwe confirms that the land belongs to Betty Akech. No neighbors were chased away from their land but they have no right to trespass in Betty Akech's land. We are ready to cooperate with your office. Thanks."

The letter bears the stamp of Jago Kaka (clan head) Bobi Itegot, stamp of Rwot Kaka Bobi Paidwe Kal, and stamp of Office of Kal Kwaro Puranga Bobi Division. Below the stamps are names of Odongping Jackson, Okello Richard. Against the name of Okello Richard is an indication that he is the Jago Kaka (clan head) Bobi Paidwe Central.

The letter (PE1) does not capture any interests of the 2nd and the 3rd Appellants to the suit land, but only the 1st Appellant's alleged interest.

Otema Benjamin (PW2) testified that he wrote the exhibit, although his name does not appear on it. He claimed he wrote because the 1st Appellant had reported trespass to her land. I find that by that exhibit, PW2 (the author), PW3 (Ojera Marceliano), PW5 (Okello Richard), and PW6 (Odongping Jackson) showed their lack of impartiality in the dispute and had taken sides in the matter much before the case was lodged in court.

According to PW2 (page 12 of the record), the **purpose of the letter was to confirm that by the resolution of the clan elders, the defendants were trespassers on the land of the 1st Appellant.**

PW1 stated in her witness statement (admitted as evidence in chief) that she was born in 1954 to Odongo Apollo at the present day Kalamomiya village. She stated that her siblings too were born and bred on the suit land. The siblings named are Okello Tomaci (name identical to the grandfather), Akot Janeti, Anyeko Christin, Adong Santa, and Oloya Dicken. PW1 stated that she shares the suit land with these siblings and never surrendered to any other person. PW1 also stated that her co-appellants are

sons of Oloya Dicken (thus they were claiming their father's share.) PW1 also testified that their family had homes on the suit land, and buried loved ones there. She asserted that, they cultivated crops, planted mangoes, bananas, grazed animals, and kraal remnants were visible on the suit land.

In cross examination, PW1 admitted that she did not know the size of the suit land. I note that none of PW1's living siblings corroborated PW1's testimony that they were born, bred and were living on the suit land at the material time. I further note that PW1 did not name any deceased relative who was buried on the suit land. I find that a visit to the *locus in quo* did not confirm PW1's claims about the occupancy and the alleged graves on the suit land. In cross examination, PW1 conceded that her father was not buried on the suit land but at Lukwi. PW4 (Rev. Ocen Charles) who presided over the burial of the late, said the burial took place in Opit. The contradictions in the two statements aside, I find that the father of the 1st Appellant (grandfather of the 2nd and 3rd Appellants) was not buried on the suit land. This court wonders why the late Odong Apollo (RIP) was not buried on the suit land yet the same was claimed to be the customary land of the late. This evidence is inconsistent with the Appellants' customary land claim.

The foregoing pieces of evidence contradicted PW1's witness statement. The only claim in PW1's overall evidence that could be verified at the *locus*, was the presence of kraals, which

paradoxically were confirmed by PW1 to belong to Olanya James, PW1's cousin. As I have already noted, PW1 first told Court that the area of the kraal was in dispute. PW1 had also claimed that her cattle and goats were being kept on the suit land. However, during the *locus in quo* proceedings of 19th March, 2020, no livestock was sighted on the suitland. Thus PW1's claim that cattle in Acholi move freely, was not supported by any other evidence. PW1 was simply trying to explain away the findings of 'no cattle' yet she had in court, created the impression of being in occupation and use of this unregistered land. The finding at the *locus in quo* therefore contradicted PW1's testimony of 5th March, 2020 (14 days earlier), that her animals were using the suit land for grazing. No signs of grazing at the material time or weeks prior to the *locus* visit, were visible.

PW1 also contradicted herself at the *locus* when she identified the kraal thereat as being Olanya's. The Third Respondent (DW1) confirmed that the first kraal belonged to Olanya but asserted that part of the kraal was situate in the Respondents' land, and therefore an act of trespass. However, kraals 'B' and 'C' (2nd and 3rd kraals) were shown by DW1 (Third Respondent) to be deep inside the suit land. This claim, I note, was successfully resolved in the counterclaim lodged by the 1st, 3rd, 4th and the 5th Respondents *vide* the suit involving Olanya. Thus, Olanya's attempts to disown the kraal on the suit land during his unwelcome presence during the *locus in quo*

proceedings, was of no legal consequence. I note that Olanya's so-called evidence in that regard was ignored by the court below, and rightly so. PW1 had confirmed that the kraal was Olanya's. DW1 had said the kraal used to be Olanya's but was inside the Respondents' land.

I however note that the trial court referred to the purported testimony of the 5th Respondent yet he had not testified in court. The 5th Respondent had spoken about the old banana trees and groundnuts, he claimed to have planted on the suit land. He also purported to show other kraals and graves of his wife and other relatives, to court. The 5th Respondent also purported to show shrines and other artefacts used for his family cultural practices. In those circumstances, I agree with the Appellants' counsel that it was a misdirection for the trial court to allow and rely on the purported evidence of the 5th Respondent. He had not been sworn and had never testified in court in the matter, yet he was a party. However, as to whether the 5th Respondent's evidence vitiated the proceedings, I think not. This is because the record shows that some of the statements made by the 5th Respondent were shared by DW1. To that extent, such evidence would not be impeachable, as they are not exclusively attributable to the 5th Respondent, but DW1. To illustrate, DW1 spoke about their own family kraal, and spoke separately about Olanya's kraal (see page 30 of the record). DW1 also testified on matters touching his siblings' claims to the suit land (in the witness statement and during cross examination.) I would

however expunge all material on record exclusively attributed to the 5th Respondent. I do so in the exercise of court powers under section 33 of the Judicature Act and section 98 of the Civil Procedure Act.

Having expunged some statements exclusively attributed to the 5th Respondent, I will still however proceed to consider the Judgment of the trial court, well aware that references made to the statements of the 5th Respondent and Olanya, have been expunged. Without the prejudicial statements of the strangers at the *locus in quo* proceedings, the Appellants still had the burden of proving their case. The Appellants' ownership claims were chiefly founded on the strength of PE1. This is so because in cross examination on that exhibit, the 1st Appellant stated that the persons named in PE1 are the persons who confirmed to the 1st Appellant that she owns the suit land. This, in my view, is surprising because if the 1st Appellant truly owned the suit land, she would not have required the elders to confirm to her. She would have asserted her claims right away, and the elders would have merely corroborated it. They did not need to write to Court either. In this case, the witnesses for the Appellants failed, as their evidence, were contradictory. The witnesses were also impartial. If PW1 had a valid land claim, yet she was not sure about her land boundary and size whilst at the *locus,*

I also note that the Appellants waited till Olanya had lost the appeal on 29th October, 2018, to sue on 9th November, 2018. Such conduct was more than what meets the eye. It was not a mere coincidence, in my view.

PW1 confirmed the Respondents' claim that the Respondents planted mango trees on the suit land in 2006. DW1 (Ociti Thomas) confirmed this fact. He also testified about other developments on the suit land. Court therefore wonders why the Appellants did not complain so soon after discovering the adverse claim by the Respondents in 2006, as alleged. It is therefore not clear why the Appellants waited 12 years later, to sue. It is not farfetched to infer that the suit by Olanya provided some level of comfort to the Appellants.

PW1 testified that she sued because the Respondents were using the suit land and that they would disallow the Appellants' animals from grazing thereon. PW1 however contradicted her allegation of the barring of the cattle. She had testified that her cattle and goats were on the suit land. So the claim of blockade was not supported. In any case, PW3 (Ojera Marciliano) claimed that the Respondents and the 1st Appellant would jointly graze animals on the suit land. In my view however, it is not clear when this co-use of the land last occurred, given that no signs of the appellants' cattle were visible on the suit land. I have noted that, by and large, and with the greatest respect, PW1

either lacked facts to support her claim or simply held back crucial facts. For instance, PW1's denial of any relationship with the Respondents, speaks louder. On the contrary, PW4 stated that the father of the (1st, 3rd, 4th and 5th) Respondents and that of PW1 were clan-mates. DW1 testified that he belongs to the same clan just as the Appellants (Bobi Paidwe clan). Although DW1 conceded lack of knowledge of certain clan rituals, in my view, that is no basis for denying him his clan. No one proved that DW1 and his siblings ((1st 3rd and the 5th Respondents) and their cousin (the 4th Respondent) belong to any other clan other than Bobi Paidwe clan. Their belonging to that clan was corroborated by the claim that Andrea Olal (the past cultural leader) gave the parents of the Respondents land at Labedoling. It is significant that Andrea Olal was an uncle to the 1st Appellant. It is thus probable than not, that if Andrea Olal ever gave some land to Onying Edward (father of the 1st, 3rd and 5th Respondents) at Labedoling, then it was in recognition of Onying as a clan-mate. The bare allegation of land gifting was made by PW1. She did not render more information about the land size and what became of that land, and whether that in itself meant the Respondents could not equally own the suit land they were in possession of and had significant development on. I think PW1's claim was designed to show that the customary land of the Respondents is elsewhere, not the suit land.

In stark contrast with the Appellants' claim, PW4 testified that the suit land is clan land, and could only be acquired by a clan member on request. Certainly no proof of such request was presented to court, be it written or verbal, by the Appellants, if at all. PW4 changed his position, claiming that the suit land was given to Odong Apollo (the 1st Appellant's father) by the clan. PW4 did not state when this was so. If it was, then why didn't Odong and his family settle thereon or use it consistently? On his part, PW3 stated that in 1958, Odong Apollo left the suit land. This witness did not state when Odong started occupying the suit land. The visit to and the findings at the *locus* betrayed this claim, as no signs of old settlements by the Appellants' relations could be shown or seen on site. Thus the alleged occupancy which even PW1 had testified about, could not be supported on the ground. PW3 was not categorical as to when Odong left the area for Lukwi. PW3 conceded that at the time, PW3 was absent from the area as he was in school.

It is therefore my finding that the claim of land occupancy by Odong or the Appellants, remain bare. If, as it was alleged, Odong had settled on the suit land earlier but left due to sickness of his children, why didn't he or his children return when they became well and mature adults? On their part, DW1 testified in chief (vide the witness statement) that he was born on the suit land and had lived there since 1956. This claim was not controverted, as evidence on the ground proved it. It was

not shown that DW1 and his siblings or cousin (the 4th Respondent) were born and lived somewhere else. However, the claims that DW1's relations died and were buried on the suit land was not proved at the locus by himself or any witness who had testified in Court. This gap was created, understandably, by the failure of the 5th Respondent to testify in Court, but at the locus about, the graves of his relatives. This was a blunder by the then counsel for the Respondent. As noted, I have expunged some of the 5th Respondent's statements at the locus, especially those not shared by DW1.

I note that DW2 (Okello Mahmoud) claimed that he attended burials of the Respondents' relatives at the suit land, however, he did not name the spouse and children of the 5th Respondent as being some of the persons buried on the suit land. He only named Onying, and Otto Samsoni, but their graves were not identified during the *locus* visit. DW2's claim that he dug the grave of Edward Onying who died in about the year 1992/93, was not supported at the *locus*. Equally the claim by DW3 (Ojok Richard) that Onying was buried on the suit land in 1992 is not supported. In respect of Otto Samsoni (father of the 4th Respondent), DW2 claimed that Otto died between 1990- 2000. This is incredible as the testimony lacked specificity. DW3 (Ojok Richard) claimed Otto Samsoni died in 2007. This too is not credible.

Therefore, I find that DW2's claim that Otto was buried on the suit land is not supported. Court wonders why Otto's daughter (the 4th Respondent) did not testify to that fact at all as a party to the suit. The 4th Respondent is not shown to have attended any court proceedings. Otto's Nephews such as the 1st, 3rd and the 5th Respondents did not testify to the fact either. Having been relatively young at the time, being a born of 1970, DW2 could not tell much about the history of ownership of the suit land by either side to this litigation. DW2 however denied PW1's earlier claim that the 1st Appellants' father gave 10 acres of the suit land to Edward Onying. Crucially, none of the witnesses corroborated this land gifting claim.

I accordingly find that whereas the Respondents purport to trace their inheritance from their fathers, Edward Onying and the father of the 4th Respondent, the late Samsoni Otto, their claim is also not strongly made out. These elders are not shown to have customarily owned the suit land. There is however stronger evidence that the land belong to the Bobi Paidwe clan, to whom all the disputants belong. The Respondent's only credible reason for being on the land is not based on their alleged inheritance *per se,* but long possession since birth. I have noted the testimony of PW5 (Okello Richard) that the suit land is customary land. This claim was also shared by PW4. They both testified that the land is owned by Bobi Paidwe clan. The fact that PW3 (Ojera Marciliano), a clan member, had been

using the suit land for performing rituals seem to corroborate the clan claim. He was not challenged by the Respondents. Ojera could not certainly perform rituals on another's land, unless their permission was sought.

Given the foregoing analysis, I am of the view that the suit land did not belong to the Appellants in their own right through inheritance. It also does not belong to the Respondents through inheritance, but long possession. The Appellants' Learned counsel asked me to disregard the want of occupancy by the Appellants. With respect, I am not persuaded. There is no fixed rule for determining customary land practices, given its varied nature. In this case, no expert witness proved that within Bobi Paidwe clan, very sizeable tract of land running in 200 acres could be given to only one family and that it was given to the 1st Appellant's father.

In the circumstances, having appraised the evidence on record, I have come to the conclusion that the Appellants' claim to be the exclusive owners of the suit land was not proved to the required standard. The Respondents too did not prove their claim that they inherited the land from their fathers. The suit land belong to Bobi Paidwe clan. However, the clan has not disturbed the Respondents' long possession and use of this land. No one therefore has a right to disturb that long

possession and use. I would therefore find for the Respondents, for slightly different reasons, as stated herein.

Given my above findings, the appeal is dismissed with costs. The permanent injunctive order and costs of the trial Court are upheld.

I so order.

Delivered, dated and signed in Court this 17th February, 2023

17/2/2023

George Okello

JUDGE HIGH COURT

Ruling read in Court in the presence of;

10:45am

17th February, 2023

Attendance

Ms. Grace Avola, Court Clerk.

Mr. Silver Oyet Okeny, Counsel for the Appellants.

Mr. Brian Watmon, Counsel for the Respondents.

The Plaintiffs are in Court.

The 1st, 3rd and 5th Respondents are in Court.

The 2nd Respondent is absent. Not known to the other Respondents.

The 4th Respondent is absent (sick).

Counsel for the Appellants: The Appeal is coming up for Judgment. We are ready to receive it.

Counsel for the Respondents: We are ready to receive the Judgment of Court.

Court: Judgment read in open Court. Right of appeal explained to the parties.

17/02/2023

George Okello

JUDGE HIGH COURT