5 **THE REPUBLIC OF UGANDA**

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 78 OF 2020

10 **(ARISING OUT OF CIVIL SUIT NO. 023 OF 2013)**

ODONG TARANG..APPELLANT

15 **VERSUS**

OJOK PATRICK..RESPONDENT

20 **BEFORE: HON. MR. JUSTICE GEORGE OKELLO**

JUDGMENT

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Background

The Appellant and another (Anywar Evarito) who is not a party herein, were sued in respect of a piece of land in the Chief

30 Magistrates Court of Kitgum holden at Pader. The Appellant was described as the 2nd Defendant. The other party (hereafter, the 'third party') was the first Defendant. The third party settled the matter amicably after the Respondent (the Plaintiff then) closed his case, before the Appellant and the third party could open

35 their Defenses. In the Plaint, a declaration was sought that the

5 Respondent is the owner of the suit land measuring approximately 20 acres, situate in Gabadin Ward, Otong Parish, Ogom Sub-County, Pader District. The Respondent also sought for a permanent injunction, general damages, interest thereon, and costs of the suit.

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The Respondent averred that the suit land belonged to the Respondent's late father (Watmon Charles) who inherited from his father (grandfather of the Respondent). It was averred that upon the death of the Respondent's father, the land was passed

15 on to the Respondent. Summing up the basis of his action, the Respondent averred that the dispute started in the year 2011 when the Appellant erected (a building) on the suit land.

The Respondent and the third party settled the matter amicably,

20 via clan mediation in which the two agreed to divide and share the suit land equally. The parties and the Mediator reported the settlement terms to the trial Court. The Court allowed the settlement and declared the matter closed as against the third party.

5 In his Defense, the Appellant denied the claim and averred that the Appellant's father, the late Achoka Yusamo owned the suit land and was the one who gave it to the Respondent's father. The Appellant therefore sought for a declaration of ownership of the suit land (although he did not lodge a counterclaim). The 10 Appellant also asserted that the land measures approximately 30 acres (not 20 pleaded by the Respondent). The Appellant prayed for general damages and an order dismissing the suit with costs.

15 The case was heard by three Magistrates Grade One in succession but was finally decided by His Worship Kibuuka Christian who, on taking over the matter, visited the *locus in quo* and wrote the Judgment. In the Judgment dated 24th November, 2020, the Learned trial Magistrate decided the 20 matter on the basis of three issues. Court held that the Respondent owns the suit land and therefore, the Appellant was a trespasser thereon. Court ordered for vacant possession within three months from the date of the Judgment (24/11/2020). It also issued a permanent injunction and

5 awarded general damages of Ugx. 3,000,000 (Three Million Shillings), interest thereon at court rate, plus costs and interest on costs at court rate. Being dissatisfied, the Appellant launched the instant appeal.

10 **Grounds of Appeal**

Four grounds of appeal were framed, namely,

1. The Learned trial Magistrate Grade One erred in law and fact when he relied on the testimony of a witness at the *locus* who never testified in court to arrive at his Judgment
15 thus occasioning a miscarriage of justice.

2. The Learned trial Magistrate erred in law and fact when he allowed a biased witness to give evidence against the Appellant hence occasioning a miscarriage of justice.
20
3. The Learned trial Magistrate erred in law and fact when he demonstrated bias in arriving at his Judgment and effectually when he did not consider that the land in dispute is customary land where each of the family

member should dig where his or her parents formerly occupied, denting (*sic*) the Appellant justice.

4. The Learned trial Magistrate erred in law and fact when he conducted *locus in quo* on the land which was not in dispute as such arriving at an erroneous decision.

The Appellant asked this Court to set aside the Judgment of the trial court and that the Appellant is instead declared the rightful owner of the suit land. The Appellant prayed in the alternative that if this court deems fit, it should order for a retrial in the High Court or another Magistrate Court.

Legal representation

During the hearing, Learned Counsel Mr. Silver Oyet Okeny appeared for the appellant, while Learned Counsel Ms. Beatrice Babra Angufiru represented the Respondent. Both parties were present in court. Learned Counsel filed written submissions which Court has considered and is grateful.

5 **Determination**

As a first appellate court, the parties are entitled to obtain from court, court's own decision on issues of fact and issues of law. However, in case of conflicting evidence, court must make due allowance for the fact that court has neither seen nor heard the

10 witnesses testify and make an allowance in that regard. Court must however weigh conflicting evidence and draw its 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.

15 704, 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

20 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

5 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
10 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
15 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.

20 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 that failure by a first appellate

5 court to evaluate the material as a whole constitutes an error of law.

In this appeal, I will not follow the order in which Learned counsel argued the grounds of appeal. I will resolve ground 3

10 first. I will then consider grounds 1, 2, and 4 together as they relate to the trial court's conduct of the proceedings at the *locus in quo*.

Ground 3 relates to the allegation of bias on the part of the trial

15 court. The ground reads,

"The Learned trial Magistrate erred in law and fact when he demonstrated bias in arriving at his Judgment and effectually when he did not consider that the land in dispute is customary

20 *land where each of the family member should dig where his or her parents formerly occupied, denting (sic) the Appellant justice."*

I must confess some difficulty in appreciating the gist of the complaint.

5 Aside from bearing some grammatical errors, the ground seem to combine two in one. The second limb seems to start from the sentence *'and effectually…"* This limb of the ground, with respect does not make sense. The amorphous ground is also drawn in a very argumentative fashion. With respect, I

10 deprecate poor and sloppy drafting of pleadings. It is even worse as it transpired that the Memorandum of Appeal before me was a modification of an earlier one drawn by the Appellant himself. The improved memorandum by counsel is not any better. Of course the first Memorandum of Appeal was poorly drawn. That

15 could be understandable because the Appellant is not demonstrated to have had some legal training. However, the improved memorandum of appeal drawn by a person whom I believe is a lawyer, as it is signed off by a firm of advocates, is in excusable. Court does not draft pleadings for parties and so

20 lawyers ought to do better. Where a pleading offends the rules of court, Court may strike it out.

In the instant case therefore, ground 3 of the appeal cannot be saved, even if Court were to exercise some flexibility. The ground

5 further introduces factual matters, not informed by any evidence adduced in the trial court. The ground badly offends the provision of Order 43 rules 1 (2) of the CPR. The rule requires a Memorandum of Appeal to be concise, setting forth, under distinct heads, the grounds of objection to the decree

10 appealed from. It does not allow two grounds to be morphed or combined into one. The grounds should not be argumentative or narrative. A ground which offends the rules have been struck out by courts. See: Alimarina Okot & 4 others Vs. Lamoo Hellen, Civil Appeal No. 26 of 2018 (Stephen Mubiru, J.), following

15 binding decisions such as Katumba Byaruhanga Vs. Edward Kyewalabye Musoke, Court of Appeal Civil Appeal No. 2 of 1998; AG vs. Florence Beliraine, Court of Appeal Civil Appeal No. 78 of 2003.

20 I therefore find that the ground of appeal is too badly formulated to be saved under article 126 (2) (e) of the Constitution of Uganda, 1995. I am therefore unable to overlook it. Whereas the Respondent's Learned counsel did not object to the defective ground, Counsel's acquiescence does not help the situation.

5 This court is empowered to take a point material to a matter before it, even where neither counsel raises it. Ground three is accordingly struck out for offending O.43 rule 1 (2) of the CPR.

In case I am wrong, I have considered the material before me,
10 and have come to the conclusion that the allegation of bias is not made out. The test of bias was considered in GM Combined Ltd Vs. AK Detergents (U) Ltd, Civil Appeal No. 9 of 1998, where the Court (Oder, JSC) cited with approval Ex parte Barusley and District Licensed Valuers Association (1960) 2 QB 169, where it
15 was observed,

"in considering whether there was a likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the Tribunal or whoever it may be who sits in a
20 *judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact favour one side at the expense of the other. The court looks at the impression which he would give to other people. Even if he was impartial as could be, on his part, then he should not sit. If he does sit, his decision*
25 *cannot stand. Nevertheless, there must appear to be a real*

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5 *likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may be would think it likely or probable that the court will not inquire whether he did in fact favour one side unfairly. Suffice is that*

10 *reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: the Judge was biased."*

15 I have not been able to find any evidence of bias on the part of the trial court, whether by his conduct or otherwise. No material was placed before me to prove that the trial court was impartial. The submission for the Appellant on this matter, with respect, has not been useful. It was argued for instance that the trial

20 court did not consider certain pieces of evidence. That in my view, is not indicative of bias. Failure to consider evidence, if proved, would constitute an error of law. None was pointed out in this appeal.

5 It was further argued that the trial court did not consider the particular land tenure system of the area (Acholi sub-region), thereby holding that the Appellant's grandfather had abandoned the suit land, and so, that constitute bias. There is no merit in this argument either.

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Counsel further submitted that the court ought to have proceeded with the matter and investigated it, with an open mind, carefully and dispassionately. I do not think these arguments come closer to support the requisites of bias. In my 15 view, the alleged failure by the trial court to consider the claim that *'the land in dispute is customary land where each of the family member should dig where his or her parents formerly occupied'* is without merit. No such evidence was adduced by the Appellant. This ground therefore did not flow from any 20 evidence on record, which the trial court is alleged to have ignored. Even if the quoted part of the ground of appeal was informed by credible evidence, in my Judgment, failure to advert to evidence, would not have constituted bias. A person alleging bias must prove it. See: <u>Shell & 9 Others Vs. Muwema &</u>

Mugerwa Advocates & Solicitors and URA, Civil Appeal No. 02 of 2013 (SCU).

The Appellant's Learned counsel also alluded to matters that transpired during the *locus in quo* proceedings, to further the charge of bias. With respect, the proceedings at the *locus in quo* in which the court allowed the so-called independent witness who had not testified in court to testify at the *locus in quo*, did not in any way influence the Judgment of the trial court. I will elaborate more in this Judgment. At any rate, even if the testimony at the *locus in quo* had influenced the impugned Judgment, that would not come closer to bolster the allegation of bias. Rather, it would support a case of procedural irregularity with the potential of vitiating fair trial. Procedural irregularity do vitiate a fair trial if a miscarriage of justice is occasioned. A miscarriage of justice is said to occur where it is reasonably probable that a result more favourable to the party complaining would have been reached, in the absence of the error.

On record, the trial court noted that it had conducted *locus* visit and had drawn the sketch map. However, the court did not advert to the sketch map and the so-called evidence recorded at the *locus in quo in* its Judgment. It also did not consider any findings made at the *locus in quo* in the Judgment. Therefore, the complaint that the *locus in quo* proceedings influenced the final Judgment, is not grounded on evidence.

Learned counsel for the Appellant contended that, because the trial court allegedly failed to differentiate between question of possession and ownership of land, the court was therefore biased. I disagree and need not repeat myself. As observed, committing an error of law, without more, in is not synonymous with bias.

In this matter therefore, no reasonable person considering the species of the allegations would conclude that the Learned trial Magistrate was biased.

In closing therefore, I pay deference to the wisdom of the Supreme Court espoused in <u>Uganda Polybags Ltd Vs.</u>

5 Development Finance Bank Ltd, Misc. Application No. 2 of 2000, where Court expressed itself on the issue of bias, thus,

"Before we take leave of this matter we would like to reiterate our concern which was expressed in Constitutional Petition No.1 of
10 *1997 Tinyefuza Vs. Attorney General, and GM Combined Vs. AK Detergents over the growing tendency to level charges of bias or the likelihood of bias against judicial officers. We would like to make it clear that litigants in this country have no right to choose which judicial officers should hear and determine their cases. All*
15 *judicial officers take the oath to administer justice to all manner of people impartially and without fear, favour, affection or ill will."*

For the foregoing reasons, I hold that ground three lack merit and I would dismiss it.

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Grounds 1, 2, and 4

Turning to the above grounds of appeal, as noted, the grounds relate to the complaint that, in its Judgment, the trial court relied on the testimony of a witness at the *locus in quo* when the
25 witness had not testified in court. The other complaint is that

the witness was biased. Lastly is the complaint that the learned trial Magistrate conducted the *locus in quo* on a piece of land which was not in dispute.

It was therefore contended by the Appellant that because of the alleged deficiencies, the trial court occasioned a miscarriage of justice and arrived at an erroneous decision.

It is common ground that the Respondent's counsel conceded that the trial court was in error in allowing a witness who had not testified in court (a one Owiny Tom) to purport to testify at the *locus in quo* as an independent court witness. I will not delve into circumstances where it is permissible for Court to invite an independent witness, as the same is not material now. What however remains critical in this appeal is whether the impugned proceedings informed the final decision of the trial court. Counsel Angufiru (for the Respondent) argued that it did not. I agree, because, nowhere in the impugned Judgment did the trial court refer to the purported testimony of the so-called independent witness. Mr. Silver Oyet Okeny, arguing for the Appellant, with respect, did not demonstrate in which part of

5 the impugned Judgment the trial adverted to the evidence adduced at the *locus in quo*. With respect, Learned counsel instead went into conjectures, contending that the proceedings at the *locus* must have influenced the final Judgment. I am not persuaded that was the case.

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Regarding the claim that the *situs* of the court was not at the *locus in quo* but at the Respondent's courtyard, the Respondent's Learned counsel did not agree. Counsel argued, the court clearly described where the suit land was while at the 15 *locus*. I find the Appellant's complaint unfounded. The proceedings at the *locus in quo* was conducted, not on any other land but the suit land. Counsel has not furnished this court with any official record to prove that the proceedings took place at the Respondent's home as alleged. Court is unable to rely on 20 complaints against the trial court unsupported by the record of court. There is no additional evidence adduced on appeal to support the claim. No complaint was raised against the trial court to any authorities that the impugned proceedings amounted to a judicial misconduct. In my view, the complaint

5 on appeal does not serve any useful purpose because the trial court did not advert to the evidence taken at the *locus in quo* in its Judgment.

The allegations that the trial court was also influenced by what

10 strangers to the proceedings said and did at the *locus in quo*, lacks substance. I must observe that a case is made out on the basis of the material placed before court and not on speculations or fear of what a party perceives to have happened.

15 The other argument was that the Appellant was not allowed to show the land boundary to the trial court. With respect, this argument, too, is without merit. The dispute was not about the land boundary, as per the pleadings of the parties. It was about the whole land, with each side claiming to own the whole.

20 During the trial, the Respondent and his witnesses testified that the Appellant trespassed on about 4-6 acres of the Respondent's land by building thereon. Thus the dispute was not about the land boundary. Moreover, the Appellant did not purport so in his evidence. The Appellant did not lodge a counter claim in

25 respect of what he now claims to be his portion of land.

Accordingly, the complaints raised lack merit. I would therefore disallow grounds 1, 2 and 4.

In this Judgment I have proceeded to consider the entire record of the trial court and formed the view that, although the Appellant did not specifically frame any ground of appeal on the aspects of evaluation of the evidence by the trial court, this court has a duty to still consider the whole case by way of rehearing and come to its own conclusion, as a first appellate court. I am therefore bound to consider whether the Judgment of the trial court should stand, on a revaluation of the evidence as a whole.

I have noted that whereas the first trial Magistrate Grade One framed four issues at the scheduling conference, the Learned Magistrate who decided the matter finally limited himself to only three issues. The omitted issue related to what the size of the suit land was. It is also not stated why the court omitted the issue. However, there is no complaint in that respect in this appeal. I also find the issue of land size not relevant as each claimant sought to have the whole land declared as his.

Therefore, whether it was inadvertent or otherwise, I think the Learned trial Magistrate was entitled to strike out the issue although the court did not explicitly say so. In my view, striking out an issue is permissible and falls to the exercise of judicial power under Order 15 rule 5 (2) of the CPR, especially if the issue was wrongly framed. This course is supported by judicial decisions. See: Odd Jobs Vs. Mubia [1970] EA 476, Victoria Tea Estates Vs. James Bemba & another, SCCA No. 49 of 1996; Bashir Ahamed Arain Vs. Uganda Kwegata Construction Ltd, HCCS No.692 of 1999.

The impugned Judgment was therefore rendered on the basis of only three issues. They relate to whether or not the present Respondent is the rightful owner of the suit land. The other one was whether or not the Appellant trespassed on the suit land. The third issue related to the remedies available to the parties.

Evidence was recorded by the first two trial Magistrates in succession. The third Magistrate who wrote the Judgment did not record evidence from the parties. The Learned Magistrate only considered what his predecessors had recorded. Therefore,

5 the only judicial duty the third Magistrate performed was the visiting of the *locus in quo* and recording of the impugned testimony from the so-called independent witness, and then writing of the Judgment of court.

10 As observed, the impugned testimony was not considered in evidence at all. The pieces of evidence which were considered were those recorded way back in 2014, 2015, and 2016 by the first and the second trial Magistrates. The third Magistrate took over the case on 7th April, 2016. Thus during the proceedings of 15 7th April, 2016, the Appellant closed his case. Although the record show that the Appellant gave some document to the third trial Magistrate, the Appellant had nonetheless already testified on 3rd December, 2015 (as DW1). The Appellant's other witnesses (two in number) had also already testified on 29th 20 January, 2016. Therefore, when the matter came up before the third Magistrate, the Appellant had no further witnesses to call. The court therefore fixed the matter for *locus* visit for 2nd May 2016 although the same did not take place. The record shows that the *locus* visit happened a year later on 13th May, 2017 and

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5 the final Judgment was delivered three and half years later on 24th November, 2020.

Having revaluated the evidence adduced by both contestants to this litigation, I am of the view that the trial court appreciated
10 and applied the principles of the burden and the standard of proof correctly. It evaluated the evidence on record although in a summary fashion. That could pass for the style of the trial court but I will comment on the 'style' later in this Judgment.

15 Whereas the names of some witnesses and places were inaccurately captured in the impugned Judgment, I note that few mistakes were made in the typed record of the proceedings which appear not to have been proof- read by any judicial officer. I have therefore decided to peruse both the hand-written
20 and the typed record and compare the two for accuracy. In this Judgment, I decided to use the correct names in my revaluation of the evidence on record. The handwriting of one particular trial Magistrate, with respect, was quite intelligible and appear to have contributed to the misnaming of some witnesses in the
25 Judgment of the trial court. The above notwithstanding, the

5 typist who did the record substantially and fairly captured the accurate record. In this Judgment therefore, whenever I found inconsistency between the names appearing in the hand-written text and the typed text, I proceeded by the handwritten text.

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I note that the trial court considered the evidence adduced by the parties and believed the Respondent (PW1). It held that the Respondent is the rightful owner of the suit land. The Respondent (PW1) supported the case pleaded, that the suit

15 land was originally owned by Watmon Charles, PW1's late father. He stated that Watmon had inherited from his (Watmon's) father a one Gideon Owor. At the time of the testimony (22/01/2014), PW1 was 27 years old and was resident on the suit land. He identified the Appellant (as the

20 Defendant Number 2, as per the order of the names appearing on the Plaint which had two Defendants). PW1 also stated that the suit land is at Gabadin, measuring about 11 (Eleven) acres. This evidence differed from the 20 acres PW1 had pleaded. In my view, this could be due to the fact that the land was

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5 unsurveyed. PW1 also stated that the Appellant had encroached on 6 (six) acres.

PW1 asserted that Owor Gideon (grandfather) had acquired the land in 1932. The trial court recorded that the land was
10 acquired by prescription.

Prescription is a legal term. Therefore, the court ought to have fairly described the mode of the land acquisition in the words of PW1, without recording the technical meaning as understood
15 by legal professionals, when recording that piece of evidence. Nonetheless even the Appellant and his witnesses who spoke about the land acquisition, just as the Respondent, referred to the fact of long use and possession of the suit land by the Respondent's grandfather and father, respectively. This appears
20 to have informed the court's approach in using the technical term to record the nature of the parties' land claims.

Be that as it may, PW1 stated that his grandfather and father occupied and owned the suit land without objection from any
25 one, until the dispute erupted in about the year 2011/ 2012.

PW1 also testified that when his grandfather died in 1993, PW1's father took over, continuing to use the land, until his demise in 2003, upon which PW1 inherited the suit land. PW1 added that he was born on the suit land in 1987 and lived there uninterrupted until the displacement by the insurgency in the area, when he relocated to an Internally Displaced Persons (IDP) Camp in Pajule (Pader District). Although he did not state the specific insurgency, this court takes judicial notice that the witness was referring to the insurgency that caused by the Lord's Resistance Army War (LRA). PW1 also did not state when the displacement happened, but his assertion that he returned from the Camp to the suit land in 2010 supports the conclusion that he was referring to the LRA insurgency.

PW1 also testified that it was on 1st April, 2012 when the Appellant encroached on the suit land by making bricks and building three huts thereon. This slightly differed from the case pleaded where he averred that the encroachment started in 2011. This is a minor inconsistency, in my view.

PW1 continued that, on 26th October, 2012, the Appellant forcefully moved and started staying on the suit land and continued to cultivate it. PW1 said he reported the matter to LCIII Chairperson of the area who allowed the Appellant to stay, prompting PW1 to sue.

In cross examination by the Appellant, PW1 denied that the Appellant's grandfather had any land on the suit land. PW1 however conceded that the Appellant's uncle Achoka Yosam was given a temporary settlement on the suit land by PW1's grandfather on account of Achoka's sickness from where Achoka migrated (Achano). I wish to note that the Appellant pleaded in his Defense that Achoka Yusamo (as he described him) was the Appellant's father, not grandfather. The Appellant's pleading shows that he roots his land claim in the purported ownership thereof by the late Achoka, because Achoka was buried on the suit land in 1985. The evidence however shows that Achoka was rather a paternal uncle of the Appellant, not the Appellant's father *per se*. This evidence is consistent with and corroborated by the Appellant's evidence

5 where he testified that his father was Ogwa Ali, and the grandfather was Luchui Lakoli. I therefore, find that Achoka was not the Appellant's father but paternal uncle.

DW3 who was the appellant's brother claimed that their father

10 died and was buried on the suit land. He was not asked about his father's name. If he meant Ogwa Ali, then DW3 lied. If, however he meant Achoka, then Achoka was not their father but a paternal uncle. It is possible that, that is how DW3 and the Appellant describe their paternal uncles (as fathers). This

15 was not however clarified to the trial court.

PW1 also stated that Achoka died after two years from the time he migrated to the suit land due to sickness. PW1 asserted that the stay of Achoka on the suit land and his burial there, did not

20 qualify Achoka to claim customary ownership of the suit land. As I understand him, PW1 was in effect contending that, by extension, the Appellant could also not purport to claim through the late Achoka. He asserted that Achoka was a brother in law to PW1's father. PW1 concluded that the ancestral land of the

25 Appellant is in Achano (from where Achoka) had migrated). The

5 question here is how the Appellant could inherit through an uncle, if at all the uncle had interest in the suit land? The claim that Achoka was a brother in law to the family of the people of the area where he was buried was not strongly contested by the Appellant. The interests of Achoka to the suit land shall however 10 be further interrogated in this Judgment.

PW2 (Okot Wilson), an 80 year old and an uncle to PW1 denied knowledge of the Appellant. PW2 however stated that the Appellant encroached on 5 acres of the suit land. He said the 15 Respondent's grandfather (great grandfather as the narrative suggests) got the land by prescription in 1925. PW2 named the great grandfather as Ojinga. PW2 further stated that Ojinga's brothers, and the father of PW2 also settled on the suit land. He stated that years after, all the elders migrated in 1929, leaving 20 Ojinga who lived on the suit land until his death. That, the son of Ojinga, (Owor Gideon) (who was the Respondent's grandfather) inherited the suit land. Upon death of Owor Gideon, the Respondent's father (Omon Charles or Watmon Charles) took over. On the death of Omon Charles or Watmon

5 Charles, the Respondent took charge. PW2 stated that the original land of the Appellant is at Te-Opole, about 4 (four) kilometers south of the suit land. It seems to me the name Omon Charles was phonetically miswritten instead of Watmon Charles. No witness for the Appellant questioned the parentage
10 of the Respondent. None claimed that the Respondent's father was not the person described. It seems to me that because the parties were proceeding *pro se,* as unrepresented parties, they did not appreciate the need to clarify on certain matters. Court did not help either, by seeking clarity on issues of names. The
15 omission however is not prejudicial, as this court is still able to make sense of the record.

When cross examined by the Appellant, PW2 denied that the Appellant's grandfather ever stayed on the suit land. PW2
20 however conceded that Achoka settled on the suit land temporarily due to sickness. The witness also asserted that a one Lakot Susan (Akot Susana) who is PW2's niece (daughter of Akello Dolotia, a sister to PW2) had no right over the suit land.

5 PW3 (Ogura Bosco), a 33 year old, at the time (Jan. 2014) testified that the Appellant was his nephew. He stated that the Appellant is a son to PW3's Aunt, Akello Dolotia. PW3 stated that the Appellant's original land was in Luzira, about 02 (two) miles away, south of the suit land. This evidence differed from

10 the Te-Opole mentioned by PW2 (Okot Wilson). What I can draw from the two witnesses however is that, the Appellant's original home is not on the suit land, but somewhere else, south of the suit land, and 2 to 4 miles away.

15 PW3 mentioned Owor Gideon (the Respondent's grandfather) and Charles Dicken Amone (Respondent's father.) The name Amone was not clarified to the trial court, whether the witness was referring to the same Charles Omon/ Watmon or another person. I however find this difference less material, as I shall

20 demonstrate later. PW3 also described Achoka Yosam as the uncle of the Appellant. PW3 spoke about the Appellant's alleged trespass in 2012, saying the Appellant constructed two huts and was cultivating the suit land, and that as at 2014, he had already trespassed on 04 (four) acres. In cross examination,

5 PW3 denied that the grandfather of the Appellant had any land in the disputed area. PW3 stated that Akello (Dolotia) stayed on the suit land for less than 05 (five) years and her husband (Achoka) died. I find that Akello Dolotia was the auntie of the Appellant. It is reasonably safe to infer that she lived on the suit

10 land upon Achoka's migration there. She accompanied her spouse (Achoka). This is a natural occurrence in life.

On his part the Appellant (DW1), a 50 year old at the time (December, 2015) testified that the suit land is their customary

15 land, having been got in 1932 by Luchui Lakoli, grandfather of DW1. He asserted that when Luchui passed away, the father of DW1 inherited the land, and the father of DW1 was called Ogwa Ali. The latter is said to have inherited the suit land together with a brother (uncle of DW1, Achoka Yosamu.)

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DW1 asserted that, in 1980, the grandfather of the Respondent (PW1) also settled on the suit land. DW1's father shifted (migrated from the suit land) in 1952 and went elsewhere (Achano) and died there. DW1 conceded that the Respondent's

25 grandfather remained on the suit land. DW1 also stated that in

5 2012, he returned to the customary land of his uncle (Achoka). DW1 claimed that he had home on the suit land but not in Achano. It is inconceivable that DW1 cut off his ties with Achano, upon encroaching on the suit land in April, 2012, when the dispute erupted. Be that as it may, DW1 conceded that his

10 other siblings remained in Achano where they lived as at the time of his testimony.

In cross examination, DW1 stated that he constructed (a house) for his sister on the suit land but that the sister was still in

15 Lucaci, and DW1 intended to bring back the sister (on to the suit land). DW1 did not state the basis for constructing a house on a disputed land, for the benefit of a person who was not claiming it.

20 Lakot Susan (*alias* Akot Susana), a 65 year old, testified as DW2. She stated that the suit land is for her father. That, the Appellant is a son to DW2's uncle. DW2 testified that her father gave some land to the Appellant's father in 1980. She however did not state which land was given. I think DW2 meant the suit

25 land, considering the flow of her testimony. If she indeed meant

5 the suit land, as I have found was given in 1980, yet the Appellant claimed that the suit land was got in 1932 by his grandfather (Luchui Lakoli). The foregoing contradictions leave the Appellant's historical claim to the suit land shrouded in mystery.

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DW2 also stated that she and the Appellant lived together on the suit land until the insurgency when they left for the IDP Camp. DW2 however did not state for how long she and the Appellant had lived on the suit land before the displacement by 15 the insurgency. This is not unlike the Respondent and his witnesses who laid clearly the historical occupation of the suit land by his great grandfather, grandfather, father, and himself. DW2 claimed that the graves of her father and mother are visible (on the suit land). She however did not testify and show those 20 graves at the *locus in quo,* to confirm what she had said in court. The Appellant did not consider having DW2 testify again at the *locus in quo.*

5 In cross examination, DW2 reaffirmed that the Appellant is her cousin. She also stated that the suit land claimed by the Respondent (plaintiff then) is where she (DW2) was staying. She lied in this respect because she later admitted that she was staying at Lanyatido IDP Camp. DW2 confirmed that the
10 Respondent's (PW1's) father stayed on the suit land before the war (insurgency in the area) when he migrated to, and died in an IDP camp where he was buried. DW2 also stated that the Appellant's father was buried in Achano where he had been staying. She also stated that he (meaning the Appellant's father)
15 had left for Agova in around 1932. DW2 however did not state where the Appellant's father lived, before leaving for Agova.

Opira Justine (DW3) who was the brother to the Appellant, testified that the grandfather of the Appellant got the suit land
20 in 1932. And that the father of the Respondent and the Appellant's father co-existed on the suit land in 1980. DW3 also stated that during the insurgency, people were displaced from the suit land to the IDP camp, where the Respondent's father died. DW3 stated that after the insurgency, the Appellant went

5 back to Achano. DW3 added that the Respondent settled on the suit land first, and that, thereafter the Appellant also sought to return thereon, prompting the dispute.

In cross examination, DW3 stated that the father of the
10 Appellant is a brother to Lakot Susan, DW2 (Akot Susana). DW3 asserted that his father was buried on the suit land, but that the Respondent's father went to the suit land in 1980. In response to court questions, DW3 stated that he and some of his brothers were resident in Achano, and that the Appellant
15 went to the suit land alone (in 2012). I must observe that DW3's claim that their father (meaning Ogwa Ali) was buried on the suit land was incorrect. Their father, as the evidence show, was buried in Achano. DW3 however conceded that the Appellant went to the suit land alone. It is thus a little puzzling why the
20 Appellant alone and not his siblings went to the suit land. If the Appellant's siblings considered the suit land to be their customary land, then their settlement in Achano is not consistent with their claim. I hold that the suit land, on the

5 evidence adduced, is not customary land of the Appellant and his relations.

In conclusion, I wish to make a few observations about some matters as it obtained in this appeal. I noticed that none of the 10 parties knew precisely the size of the suit land, as they all based on approximations. The Respondent pleaded that it is 20 acres but in evidence, narrowed to 11 acres. The Appellant pleaded in his defense that the land is 30 acres, but in evidence, did not confirm the acreage. What however seems clear and material to 15 court is the area allegedly trespassed on. From the Respondent and his witnesses, I find that the area in issue lies somewhere between 4-6 acres. It is also crucial that the Appellant conceded that the Respondent and his ancestors lived on the suit land, at least from about 1980. I however find the year 1980 to be an 20 understatement. The Respondent and his witnesses, especially the 80 year old gentleman (DW2) put the period of occupancy from the year 1932. The Appellant did not rebut the long user and occupation of the suit land by the Respondent's great grandfather (Ojinga), the grandfather (Gideon Owor), and the

Respondent's own father (Charles Watom *alias* Charles Dicken Omon). Whereas the Respondent did not name Ojinga (great grandfather) in his testimony, PW2 spoke about Ojinga. This could be attributed to PW2's better historical knowledge of the Respondent's family tree than the Respondent who was only 27 years at the time. The appellant did not cross examine on this. On the evidence, it was not shown that the Respondent and his ancestors lived anywhere else, other than on the suit land. This is not however the case in respect of the Appellant who had lived in Achano with his siblings, especially brothers.

The Appellant, as noted, did not counterclaim against the Respondent. He never complained that the Respondent's use and occupation of the land prior, constituted an infringement of the Appellant's land rights. The Appellant simply gatecrashed on the suit land, unannounced. Unlike the Respondent who complained to the Local Council III Chairperson immediately, the Appellant never complained. This conduct, in my Judgment, weakens the Appellant's land ownership claim, for being simply an afterthought. No witness clearly proved that the land was the

5 Appellant's customary land or that it was owned by his grandfather. DW2 (LAKOT SUSAN *alias* Akot Susana) stated that the land was her father's. DW2 and the Appellant are cousins yet the Appellant claimed the land is his, having inherited from his father Ogwa Ali. This is incredible! The 10 Appellant and DW2 claim both land yet they are not siblings. The Respondent did not purport to plead or claim that he was suing on the basis of customary ownership, but on the basis of prescription. The concept of prescription is derived from two distinct terms: express grants and long user. Prescription 15 enables a person claiming the right of prescription to refer to a period of long use of an alleged right, over a period of twenty years or more and by dint of the period of use, is effectively granted the right. There is a difference between prescription and adverse possession. While the effect of adverse possession is to 20 extinguish old rights of title impliedly from a period of long use, prescription acts to create new rights impliedly from a period of long use. Prescription is about owner of the servient land being deemed to have acquiesced to the long use. See: Dillon, LJ., in Mills Vs. Silver [1991] Ch. 271, CA.

The essential elements of prescription are; both the dominant tenement owner and the servient tenement owner (relevant parties) must be users of the land for unlimited duration (in fee simple). Thus a tenant for years cannot gain the rights in prescription. See: Pugh Vs. Savage [1970] 2 QB 373, CA, Cross LJ. There must also be continuous user, that is, use of the alleged right exercised by the dominant tenement owner, with frequency. However continuous does not necessarily mean constant or regular, as the requirement may be met where the use of the alleged right is infrequent. In Diment Vs. NH Foot Ltd [1974] 1 WLR 1427, ChD, the condition of continuous user was held satisfied by the application of the alleged right on as few occasions as six to ten occasions in each year of thirty-five years. The other requisite is user as of right. A right of prescription can be acquired where a dominant tenement owner has honestly, yet mistakenly believed that he/she actually owned the disputed land or had an express right of grant. See: Bridle Vs. Ruby [1989] QB 169, CA.

5 For the right of prescription to exist, the acquisition must be without the use of force, that is force against persons, and objects, such as deliberate removal of obstructions previously laid down by the owner of the servient tenement. See: R (On application of Beresford) Vs. Sunderland CC [2003] UK HL 60, 10 Lord Rodger of Earlferry. The user must be open, without secrecy, so the long user must not be concealed by the person seeking to claim the right of prescription, from the servient tenement owner. In Union Lighterage Co. Vs. London Graving Dock Co. [1902] 2 Ch 557, CA it was held that underground 15 fixings which were long undetected could not give rise to a right of prescription. Prescription cannot be allowed where the land owner has given permission or consent to the dominant tenement owner to use the land in a manner intended. See: Odey Vs. Barber (2006) EW HC 3109 (Ch.), Where permission 20 has been granted, prescription cannot apply. The servient tenement owner should know of the acts done by the person claiming the right of prescription; the servient tenement owner should have the power to stop the acts or to sue in order to stop them; and the servient tenement owner abstains from the

5 exercise of such powers. For prescription to apply, there must exist true acquiescence and not merely tolerance or permission. The use of the land must be in a manner such as to bring home to the mind of a reasonable person that a continuous right of enjoyment is being asserted. So in summary, the condition

10 precedent for prescription are; knowledge, power to prevent or stop, and abstaining from acting. Thus the servient tenement owner cannot claim later that he had merely tolerated the user in question. See: R Vs. Oxfordshire CC, ex parte Sunningwell PC [2000] 1 AC 335, HL, per Lord Hoffman. I should add that

15 where a prescriptive easement, whether at common law or in the statutory form is shown to exist by satisfying the requisites above, it is said to attain legal, as opposed to merely equitable status. The common law maintains a fiction in that if a prescription is found to apply, then the court will inevitably find

20 the right of prescription has existed from time immemorial, meaning since the year 1189. Given the arbitrariness of this choice of date, the concept of prescription could easily be frustrated, if the right was exercised over a structure that was constructed after 1189. So, sometimes the term that is

encountered is 'lost modern grant', which is sought to counter the arbitrariness of setting of the year 1189. The idea behind the latter is that it infers from the use of the land for 20 years or more by the alleged dominant tenement owner that some kind of right, as claimed by the alleged dominant tenement owner, had once again been the subject of a formal modern grant that has since become misplaced and lost. This is the basis of the inference of prescription. See: Smith Vs. Brudenell Bruce [2002] 2 P & CR 51, ChD.

So much for the concept of prescription! In the instant case, the Respondent and his witnesses conceded that the Appellant's grandfather was accorded temporary welcome to the suit land due to sickness. This version is more credible, because, the grandfather, as per the evidence, died two years later. He had come from Achano, meaning, that is where his customary land was. Having considered the entire evidence on record, the Respondent's case is more believable than the Appellant's. Although the manner of evaluation of the evidence by the trial court was not as per the quality expected, I think I should

5 excuse it as it seems that was his style of evaluating evidence. However, trial courts ought to do more and better in this regard. I am aware that there is no set format in the evaluation of evidence, just as in revaluation thereof. However, evaluation is not simply a matter of reproducing evidence of witnesses and 10 saying I believe so and so, without giving cogent reasons. In the upshot, I find that there was ample material to support the findings and conclusions of the trial court.

I have therefore come to the conclusion that the appeal lacks 15 merit and ought to fail. The same stands dismissed with costs. The Orders of the trial court are upheld in their entirety. For the avoidance of doubt, I order that whatever structures/ buildings the Appellant or his agents erected or constructed on the suit land shall be removed and the Appellant shall vacate the suit 20 land within three months from the date of this Judgment. The Orders of a permanent injunction, and the award of general damages, costs and interests, given by the trial court are hereby upheld.

5 Before I take leave of this matter, I wish to observe that I noted that Mediation was attempted between the parties but failed. Only the Mediation with the initial first Defendant (not party herein) succeeded. There, the Respondent agreed to share the suit land equally with the said third party. I commend the 10 Respondent for that gesture. However, regarding the attempted Mediation with the Appellant, mediation failed on an unfortunate ground that the Appellant rejected an offer of six (06) acres of the suit land which the Respondent had agreed to surrender. This Court lacks powers to discuss failed mediation 15 offers and counter offers, as such offers/ counteroffers are made without prejudice to a party's legal rights. Therefore, although what I am saying is not legally binding, I would urge the parties, provided there is still some willingness, to resolve their differences once and for all at their clan level, as they had earlier 20 attempted.

The above observation notwithstanding, my Judgment and Orders stand.

Delivered, dated and signed in open court this 9th February, 2023.

George Okello
JUDGE HIGH COURT

5 Ruling read in Court in the presence of;

10:23am

08th February, 2023

10 **Attendance**

Ms. Grace Avola, Court Clerk.

Mr. Silver Oyet Okeny, Counsel for the Appellant.

Counsel for the Respondent, Ms. Beatrice Babra Angufiru, absent.

15 The appellant is in Court.

The Respondent is absent.

Counsel for the Appellant: The matter is coming up for Judgment, and I am ready to receive it.

20

Court: Why is the Respondent's Counsel absent?

Counsel for the Appellant: The cause-list was shared on the Lawyer's Whatsup group, to which Counsel for the

25 Respondent is a member.

5 **Court:** The Judgment of Court is read and signed in open court.

Mr. Oyet Okeny: I take responsibility for the memorandum of Appeal, especially the manner in which it was badly drafted.

10 There is a lot of learning points form the Judgment of this Court.

Secondly, I commend the manner in which the court has handled the gaenology of the parties in this case, to inform the root of the parties' claim. The ancient legal jurisprudence of

15 prescription and adverse possession, long user rights, go against the customary practice of land ownership and usage in Acholi Sub-region. If that were the case, there would be an avalanche of disputes because majority of people would be locked out. So these principles should be used with caution.

20 I am grateful to court.

09/2/2023

George Okello

25 JUDGE HIGH COURT