THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 43 OF 2021

(ARISING FROM CIVIL SUIT NO. 015 OF 2017, CHIEF MAGISTRATES COURT OF NWOYA HOLDEN AT NWOYA)

1. OLYEL BAZIL
2. NYEKO ROBERT.....APPELLANTS

VERSUS

1.OTTO JUSTINE
2. LALOYO MARGARET.....RESPONDENTS

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background facts

This is an appeal arising from the Judgment and Decree of His Worship Matenga Dawa Francis, the then Chief Magistrate, given on 20th May, 2021, in a land dispute. The Appellants were the Plaintiffs, having sued the Respondents over a piece of land situate at Coo-rom Ward, Pagoro Parish, Lamogi Sub-County, Amuru District. The Appellants, who are father and son,

respectively, alleged that they own approximately 100 acres of land, and that the Respondents trespassed on part thereof. Against the 1st Respondent, the Appellants had contended that the 1st Respondent trespassed on approximately three (3) acres of land, in the year 2009, while the 2nd Respondent is alleged to have trespassed on approximately three to four acres (3-4) acres, in the same year. The Appellants averred that the dispute was mediated at the Local Council II level, before they instituted the suit in the trial court. They averred that the dispute was resolved, with each party shown the land where to stay and/ or relocate to. They alleged that the Respondents failed to respect what was agreed upon during mediation, and instead furthered acts of trespass. The Appellants sought for a declaration of ownership and that the Respondents are trespassers. They also prayed for permanent injunction; eviction order; general damages, and costs against the Respondents.

On their part, the Respondents who are neighbors, denied the claims, contending that the Appellants do not own the suit land having had land elsewhere. They asserted that it was only in the

year 2009 when the Appellants began to claim the suit land as being their customary land, alleging to have inherited from their ancestors.

In his defense, the first Respondent claimed that he inherited his part from his father, while the 2nd Respondent averred that she inherited hers from her late husband by marriage. Both contended that the Appellants are trespassers, having demolished houses and caused damage to the Respondents' land. They denied that mediation was conducted in the matter at the Local Council II level.

After full trial and upon visiting the *locus in quo*, the learned Chief Magistrate held that the entire suit land belong to the 2nd Respondent and that she is not a trespasser thereon. The Court found that the 1st Respondent and the Appellants are trespassers on the 2nd Respondent's land. Court dismissed the Appellants' suit. Court was also of the view that there was a counter claim lodged jointly by the Respondents. It therefore dismissed the 1st Respondent's 'counterclaim' against the

Appellants. It however allowed the 2nd Respondent's 'counterclaim' against the Appellants, and against the 1st Respondent. Court also ordered for eviction of the 1st Respondent from the suit land. It awarded costs of the head suit to the 2nd Respondent only. It also awarded costs of the 2nd Respondent's counterclaim, payable by the Appellants. The 1st Respondent was denied costs of the main suit. Further, Court awarded general damages of shs. 20,000,000 (Twenty Million Shillings) to the 2nd Respondent, to be paid by the Appellants and the 1st Respondent, for trespass to and deprivation of the 2nd Respondent's land.

The 1st Respondent did not prefer an appeal in spite of the adverse findings and orders made against him. On their part, being aggrieved and dissatisfied, the Appellants lodged the present appeal.

Grounds of Appeal

There are five grounds of Appeal. The Appellants however abandoned one ground in their written submission. I will reproduce all the grounds, but will modify, to refer to the trial Court by the correct title, namely;

1. The Learned Chief Magistrate erred in law and fact when he held that the Appellants' customary land is in Otwee, not the suit land.

2. The Learned Chief Magistrate erred in law and fact when he failed to properly subject the evidence adduced at the trial to exhaustive scrutiny and thereby came to a wrong conclusion that the Appellants do not own the suit land.

3. The Learned Chief Magistrate erred in law and fact when he did not conduct the locus as required, and ignored the clear homesteads of the Appellants on the suit land.

4. The Learned Chief Magistrate erred in law and fact when he allowed a Counterclaim that did not exist against the Appellants.

5. The Learned Chief Magistrate erred in law and fact when he awarded general damages of Ugx 20,000,000, which was unconscionable, without a proper basis.

The Appellants prayed that the Appeal be allowed; the decision and judgment of the Learned Chief Magistrate be set aside and instead Judgment be entered for the Appellants. In the alternative, they prayed that, a fresh trial is ordered before another Magistrate. They also sought for costs of the Appeal and costs in the trial Court.

Representation

Whereas the Memorandum of Appeal was lodged for the Appellants by M/s Odongo & Co. Advocates, at the appeal hearing, Learned Counsel, Mr. Otto Micheal Gulamali of M/s

Otto Gulamali & Co. Advocates represented the Appellants. The Respondent was represented by Mr. Douglas Odyek of M/s Kunihira & Co. Advocates. Both learned counsel filed written submission;

Arguments

Learned counsel for the Appellants argued the first two grounds of Appeal together. These relate to the trial Court's holding on the ownership of the suit land, and the evaluation of evidence thereon. The trial Court held that the customary land of the Appellants is in another area (Otwee), and in effect, concluded that the customary land was not in Coo-rom Ward, Pagoro Parish.

It was argued that the Appellants' witnesses testified and confirmed that the Appellants inherited land (at Coo-rom) from their forefather, who acquired it in the year 1947 when it was vacant, forested and free from any encumbrances. It was also urged that during the peak of the (Lord's Resistance Army (LRA)) war in Northern Uganda, the disputants herein were displaced, and relocated to Otwee Internally Displaced Persons Camp (IDP)

where they lived until the year 2009, when they returned to the suit land in Coo-rom. The Appellants argued that, on return, the Respondents and their children trespassed on the Appellants' portion of the suit land by crossing and building thereon, especially on the portion which lies South of Olwal-Coo-rom road, Amuru District.

The Appellants argued that they referred their dispute to a one Olango Jackson (PW2), the then Chairperson Local Council II of Pagoro Parish, who mediated the dispute successfully. That as a result, Mediation Agreement was signed by the parties. The Agreement was dated 28th January, 2011 and adduced in evidence as PEXI. Learned counsel argued that PEX1 carried weight and yet the trial Court ignored it, holding that the same was procured through duress, coercion, threat, undue influence, and thus null and void. It was argued, these vitiating factors were not pleaded, and not proved (by the Respondents). Counsel contended, the trial Court engaged in mere fiction and imagination, thus making conclusions devoid of evidence. He asserted that the Mediation was voluntary. Counsel wound his

argument by citing Odong Jackson Vs. Odongkara Joe, High Court Civil Appeal No. 110 of 2018, where Court (Stephen Mubiru, J.) held that Mediation Agreement freely entered into binds the parties and are legally enforceable. Counsel invited Court to allow grounds 1 and 2 of the grounds of Appeal.

Preliminary issues and resolution

In his response, learned counsel for the Respondents commenced his submissions by bringing to Court's attention what he called *pertinent issues* which had been brought to the attention of the trial Court, but which the Court allegedly did not resolve.

Learned Counsel asserted that the plaint lodged in the trial Court was not signed by the 2nd Appellant, who at the time, was not a party to the original plaint but only the first appellant. Counsel for the Appellants did not respond to this issue.

Having perused the record of the trial Court, I have noted that during the proceedings of 29th October, 2020, Counsel Odyek

raised the objection, immediately after PW1 (Nyeko Robert/ the 2nd Appellant) had been sworn, and his statement admitted as evidence in chief, but before he could be cross-examined by Mr. Odyek. Counsel for the Respondents (Defendants then) responded that an amended plaint had been lodged by consent and signed by an advocate (replacing the original plaint) thus the objection was untenable. The trial Court over-ruled the objection, holding that, parties are free to amend pleadings at any stage, and that the issue raised was a minor technicality.

In light of what transpired, it is therefore not true, as Counsel Odyek would wish this Court to believe, that the Learned trial Court did not deal with the issue of the alleged defective pleading. There is also no appeal against the ruling of the trial court in this regard. At any rate, the effect of amending the plaint meant that the original plaint ceased to exist and any defect in the original plaint was cured by the amended plaint, which was duly signed by counsel. The amended plaint was also consented to by the Respondents' counsel. Counsel cannot therefore lament on appeal. I have therefore found it

unnecessary to delve into a litany of other arguments connected to this issue. The objection is misconceived and overruled.

Learned Counsel for the Respondents also argued that the Respondents had filed a Counterclaim to which the Appellants never replied. He argued that, he applied for default judgment on the counterclaim, but the trial court declined to enter Judgment. Counsel argued, had the trial court resolved this issue, there would have been no need for the tedious trial (as the case would have ended there). Counsel added, this and the first objection are serious, and capable of disposing of the appeal. With respect, Counsel's arguments are misconceived. First, the trial Court dealt with the issue of counterclaim. Court noted that the Respondents (Defendants) dropped off the counterclaim when they filed the amended written statement of Defence. It held that, no default Judgment could issue in the circumstances.

As noted, the trial Court ruled on the issue. The complaint by Counsel Odyek is therefore misconceived. As noted, there is no

appeal against that finding either. Moreover, the court record shows that a Reply to the Counterclaim was lodged for the Appellants (Plaintiffs) in the trial court on 4th August, 2017, drawn by Abore, Adonga & Ogen Co. Advocates. This pleading complied with the requirement of Order 8 rule 11 of the CPR, as it was well within fifteen days after service of the counterclaim on the Appellants on 24th July, 2017. The objection is therefore baseless and is accordingly overruled.

Merit

Responding to the merits of the grounds of the Appeal, Learned Counsel for the Respondents argued each ground consecutively. Regarding the holding forming ground one, Mr Odyek submitted that the Appellants produced only two witnesses to prove their case and that the 1st Appellant (Olyel Bazil) never appeared in Court and never testified, yet he seemed to know the history of the suit land more than the 2nd Appellant (a son). Counsel submitted that, evidence on record show that the Appellants' customary land is in Otwee, and not the suit land in Coo-rom. This, according to counsel, is evidenced by the fact that the

grandfather and grandmother of the 2nd Appellant (parents to the 1st Appellant) were buried in Otwee. Learned Counsel also alluded to the fact that old homestead of the 2nd Respondent was found on the suit land in Coo-rom, thus controverting the Appellants' ownership claim of the land in Coo-rom. He argued that, instead, the Appellants trespassed on the suit land in 2009, and that the land is owned by the 2nd Respondent. Nothing was submitted in respect of the 1st Respondent in this regard. Counsel then supported the holding of the trial Court and invited this Court to dismiss ground one of the grounds of appeal.

Regarding ground two, Learned counsel relied on the evidence of PW2 (Olango Jackson), the then Chairman Local Council II of Pagoro Parish, who, according to counsel, testified that he adjudicated a land dispute between the Respondents (parties before the LCII Court) in the year 2009. Counsel argued that PW2 admitted that the LCII Court decided the dispute, to the effect that both Respondents own the suit land. Specifically, the land towards Alero was held to belong to Laloyo Margaret (the

2nd Respondent) while that towards Pabbo was decreed to belong to Otto Justine (the first Respondent). Learned counsel pointed to other pieces of evidence, and supported the views of the trial Court, contending that, the Court properly evaluated the evidence on record and came to the correct findings and conclusions.

Resolution of grounds 1 and 2

I will deal with the two grounds together. As I do so, I remind myself of the duty of 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, court has to make due allowance for the fact that court has neither seen nor heard the 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);

In Coghlan Vs. Cumberland (1898)1 Ch. 704, the Court of Appeal of England had this to say;

"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 demeanour, 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 where the above passage was cited with approval. In Pandya case (*supra)* 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 principles of which are applicable to civil cases with equal force) 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 court to evaluate the material as a whole constitutes an error of law.

In the instant matter, the trial Court had to resolve the issue of whether the Appellants (Plaintiffs then) are the lawful owners of the suit land. The Appellants had averred in the amended plaint that a one Olal Pellu who was the father of Olyel Bazil (the first appellant and the grandfather of the 2nd Appellant) acquired approximately 100 acres of land in Coo-rom sub-ward, Pagoro

Parish, Lamogi Sub- County, Amuru District, in the year 1947. That, the land was vacant, forested and free from encumbrances. They further averred that upon the death of Olal Pellu, his son Olyel Bazil inherited it. That subsequently, the 2nd Appellant, as the grandson of Pellu also inherited the land, and were jointly using it as the lineage descendants of the late Pellu. They contended that the first Respondent trespassed on approximately three acres thereof, while the 2nd Respondent trespassed on approximately three to four acres. The first Appellant did not testify but the 2nd Appellant did as PW1. He then called one witness (PW2) Olango Jackson. On their part, the 1st Respondent's son, a one Oloya Vincent Otto (a legal representative of the 1st Respondent who at the time was already deceased) testified. The 2nd Respondent (Laloyo Margaret) also testified. They then called three witnesses who testified for the defense.

The trial Court, after considering the evidence adduced by both sides, and the view taken during the *locus in quo* visit, made the impugned holdings.

I have considered the material on record. It is clear that the portion of the land the Appellants allege the Respondents trespassed on, in Coo-rom village, is that which the 2nd Appellant claims was given to him after the impugned Mediation proceedings chaired by PW2 on 28th January, 2011. The 1st Appellant was not a party to the said proceedings. It is however intriguing that the 1st Appellant purport to rest his claim on the impugned Mediation Agreement when he was not a party to it. He certainly had no legal basis to sue on it. Moreover, the 1st Appellant never proved his claim as he chose not to testify in the matter. I will however make further comments on the 1st Appellant's claim, when considering the claims by the 2nd Appellant, and the entire case of the parties.

Before predicating his case on the outcome of the impugned Mediation Agreement, the Appellants made averments in the plaint, detailing what I take to be their historical ownership claim to the suit land. The 2nd Appellant then repeated the same in his witness statement. He was cross examined on it. In cross examination, the 2nd Appellant stated that he began living in

Coo-rom in the year 1974, at birth. He stated that his other siblings were born on the suit land. However, none of the siblings corroborated this claim, and neither did their father (the 1st Appellant), or any other witness. PW1 asserted that he and the siblings were living on the suit land, as at the date of his testimony (29/10/2020). A visit to the *locus in quo* did not however reveal so.

PW1 further testified that Court would find all their structures and homesteads on the suit land (if Court visited it). However, as it turned out during the *locus* visit, the structures and the alleged old homesteads were not found. The trial Court noted this in its Judgment. The sketch map of, and the observations at the *locus in quo*, support the findings. Rather what the trial Court noted were structures and former homesteads of the 2nd Respondent. Visible at the *locus*, were also the then huts of the Respondents.

PW1 also testified that the suit land is on the Southern side of the road to Coo-rom Trading Centre. He also stated that his

grandfather and grandmother once lived on the suit land. However, no proof of settlements by the said ancestors were observed or otherwise proved, apart from bare assertions by PW1. The witness needed to corroborate his assertions in that regard. PW1 also conceded that his grandparents were buried on their land in Otwee in the 1980s. He attempted to explain away why they could not be buried on the alleged customary land in Coo-rom, saying it was because of the rebel activities. Unfortunately, PW1 did not state which rebel activities existed in the area in the 1980s. PW1's statement about the period of 1980s was so broad and needed precision and corroboration by at least PW1's father (Olyel Bazil) who chose not to testify yet he is a party to litigation. The historical factual allegations pressed by the 2nd Appellant who was relatively younger, needed an elderly person who lived during the times, to corroborate, in the absence of documents buttressing the claims. Thus the 2nd Appellant's claim about how his grandparents owned the suit land, lack cogent proof.

PW1 also asserted that his grandfather had planted mango trees in 1960 as well as Caccia tree on the suit land. He however conceded that he was told about these developments by his father, Olyel Bazil (the 1st Appellant). These was hearsay, and goes to show PW1's lack of knowledge of historical facts bearing on the matter, if at all. PW1 further claimed that, the Mango and the Caccia trees were (at the time of his testimony) very mature (he termed them big) and undertook to show Court during the locus visit. Paradoxically, the trial Court could not find those trees. PW1 also stated that his father lived in Coo-rom at the time. He stated that the 1st Appellant built two grass thatched houses in 2009. He also promised to show these to Court. Again, with respect, these were not seen by the trial Court. On the contrary what Court saw in connection with the Appellants, were crops (Sorghum, cassava, maize and groundnuts) growing in the gardens which had been handed to the Appellants by 'mediators'.

The trial Court observed on the sketch map that, the crops were growing in the areas which Laloyo Margaret (the 2nd

Respondent) had testified about during the locus visit. She had told Court that she had been chased from that portion of the land by the Appellants, following the impugned Mediation Agreement. I have reappraised the sketch map. It shows that the gardens where the crops were planted is part of the area and so proximate to that portion where three deceased children of Laloyo Margaret were shown to have been buried. This burial, according to the evidence, was much earlier than the year 2009. It is apparent that the 2nd Respondent gave up the burial grounds, for other reasons I will state shortly. The trial Court however noted that four children of Laloyo were buried, but on further scrutiny of the evidence, especially that given by Laloyo earlier on 11th April, 2009 during a session of the LCII Court involving a land dispute she had against the present co respondent, I find that only three children of the 2nd Respondent were buried on part of the suit land, which also happens to be the land in issue in the present litigation. It is my finding that the fourth grave, was for the 2nd Respondent's in law.

Be that as it may, PW1 further asserted that his father inherited the suit land in 1980s, after the death of Olal Pellu (PW1's grandfather). PW1 however conceded that Laloyo Margaret (the 2nd Respondent) had a husband called Okello Jokodino. The father of Okello was called Owot Sabino (a father in law to Laloyo Margaret). PW1 then conceded that Owot left his former homestead which was on the suit land in 1989 and thereafter, PW1 (and his family) took over the estate of Owot Sabino. I find this evidence telling! This revelation means that PW1 and his family purport to have taken over the land belonging to the family, from whom Laloyo Margaret derives her claim to inheritance. In such a case, it was incumbent on PW1 to prove what rights he and the family had at law, to purport to inherit the estate of Owot Sabino, when he had his own family, comprised of the 2nd Respondent's husband. It is not shown by evidence that Owot Sabino gifted the land to the Appellants' family. Rather there was ample evidence that the 2nd Respondent's husband (Okello Jokodino) took over the said land, and so did the 2nd Respondent, on marrying Okello. This

development is consistent with the law where a widow has right to inherit the husband's property.

It was clearly revealed during the Court sitting at the *locus in quo* on 10th March, 2021 that PW1 and his family only gained access to the suit land in 2009 and not before. Their access thereto was after the impugned Mediation which is said to have resulted into an Agreement. It is now appropriate for me to next consider the questioned Mediation Agreement. Reviewing their pleading, I have already observed that the Appellants rested their cause of action on the impugned mediation outcome, to seek to prove their land ownership claims, and therefore found a cause of action. Interestingly, the cause of action was not in breach of the Agreement *per se*, but trespass to land.

Pursuant to the impugned Mediation Agreement of 28th January, 2011 (PEX1), the suit land was handed to the 2nd Appellant, apparently, by PW2, the then LCII Chairperson of Pagoro Parish. PW2 (Olango Jackson) asserted that it was 'agreed' during the Mediation that the 1st Respondent would

take the land on the 'Northern side' (using the Coo-rom- Olwal road as a guide), while the 2nd Respondent's land would (henceforth) be that situate after the natural boundary marked by some named trees. Effectively, this meant that the land situate below the imposed boundary line, would go to the Appellants. It is however noticeable that, that area which was alleged to have been ceded, is where the graveyard of the 2nd Respondent's children and an in-law were. To resolve this controversy fully, I proceed to give a brief treatment of what a valid mediation ought to entail. I will then juxtapose to the material borne out of the record.

Mediation is a process where parties meet with a mutually selected impartial and neutral person who assists them in negotiation of their dispute or differences. A mediator leaves the decision making power to the parties. He/she does not decide for the parties. He/ she neither attribute blame nor render an opinion on the merits or chances of success, if the matter were to go to litigation. A mediator acts as a catalyst between the two opposing sides, by attempting to bring them together. He/she

facilitates communication, while moderating and guiding the process. He/she will seek concessions from each side during the Mediation process.

Where mediation is successful, it results in an Agreement. Such an Agreement may be enforced as a Contract. However, to be enforceable, the mediated agreement must meet all the common law elements of an enforceable contract. These are; voluntariness or free consent, offer, acceptance, consideration, intention to create legal relations and to be bound, capacity to contract, compliance with public policy/ lawful purpose.

Where one party breaches its terms of mediated agreement, the aggrieved party may hold the party in breach liable. See: Cathleen Cover Payne in her works entitled "Enforceability of Mediated Agreements."

Turning to our jurisprudence on the matter, the Courts have recognized the enforceability of Mediated Agreements. The agreement should however meet the requisites of a valid

contract. See: Odong Jackson Vs. Odongkara Joe, Civil Appeal No. 110 of 2018 (HCT), Per Stephen Mubiru, J.; Oola & 2 Others Vs. Lanen, Civil Appeal No. 18 of 2017 (HCT) (Stephen Mubiru, J.)

Having perused the impugned Mediation Proceedings, embodied in a document titled "Land Mediation among the people of Coo-rom", I proceed to evaluate its import. The document is dated 28th January, 2011. In summary, it shows that the day's proceedings was presided by several persons, namely, Okeny Alfred Abano, Okello Ayiwa, Lacere of Labongo, an unnamed representative of Amao, Oloya William, Onek Peter Abano, Opoka Daniel, Tokwiny Karubi George, Ongwen, Nyeko Oca, Okot Racheal Abic, Ocaya Andrew, Augustino, Omal Santo Opoka, Ojok Batili, and the Chairperson LCII of Pagoro Parish (Olango Jackson). Intriguingly it is not shown that these were mediators, and if so, that they were agreed upon by the parties thereto.

The document also shows that each of the named persons, or majority of them, literally cross examined Laloyo Margaret (the 2nd Respondent herein). I find that conduct alien to a valid Mediation Proceeding. The panelists (as I may call them) did not remain neutral throughout the process but descended into the arena of the dispute, largely favouring one side. Majority of the so-called Mediators made adverse comments against the 2nd Respondent, while others kicked off their expressions with preconceived and fixed conclusions about whom they believed own the disputed land. With respect, they allowed the steam of the dispute to cloud their impartiality. The so-called Mediation proceedings was a disaster and left a lot to be desired.

After the outpouring of their views, the 'panelists' concluded that the dispute had been 'resolved'. What followed thereafter was the thumb-printing of the prepared record of the proceedings. Thereon appears the name of Laloyo Margaret and Nyeko Olyel (the latter, understandably, the 2nd Appellant). Four other names feature. On the impugned document is purported

that, the persons named thereon were neighbors who had divided the land. So much for this document!

Furthermore, attached to the impugned document is an attendance list of approximately fifty persons, including the two disputants, and the alleged neighbors claimed to have divided or overseen the division of the suit land.

At the end of the record is annexed, a sketch map of the 'divided' land.

Noticeably, the map does not bear the thumbprints or signatures of the disputants. The name of the drawer of the document is not stated thereon. Whoever drew it did not testify in the trial court. The sketch map does not state the acreage of the land that was being divided. Was it the 3-4 acres that later become the subject of the suit in 2017 and the present appeal? No ready answer is available. On the other hand, it appears as if the whole exercise was a boundary opening and demarcation exercise. The sketch map also does not show the side that

belonged to Laloyo Margaret (the 2nd Respondent) before the purported division.

In conclusion on this document (PEXI), I find that it lacks the quality of a valid Mediation Agreement. The circumstances under which the document was executed deprives it of legal force. It is unenforceable at law. Although I have not found clear evidence of duress, or coercion or the vitiating elements mentioned by the learned Chief Magistrate, I agree with his conclusion that PEXI is not a valid and binding document. I do so for the reasons I have addressed before. I therefore agree that the Mediation Agreement (PEX I) is null and void and not binding on the 2nd Respondent or any one purported to be bound. I so find.

In light of the above finding, it is my conclusion that the Appellants' land ownership claim was not proved on the balance of probability. I thus agree with the trial Court that the Appellants do not own the suit land at Coo-rom village. Grounds 1 and 2 of the grounds of Appeal are dismissed.

Ground three

This ground relates to the complaint that the learned Chief Magistrate did not conduct the visit to the *locus in quo* as required, and that it ignored the clear homesteads of the Appellants on the suit land. Curiously, this ground was abandoned by the Appellants in their written submission. The Respondents' learned counsel however addressed it. With respect, I think it was unnecessary. The ground therefore fails, having been abandoned.

Ground four

The ground relates to the counter claim which the trial Court allowed. It was argued for the Appellants that when the original plaint was amended, and the amended copy filed in the trial court on 5th March, 2020, the amended plaint was served on the Respondents. Counsel argued, the Respondents replied to the amended plaint, wherein they dropped the counterclaim. The Appellants' counsel also referred me to the trial Court's ruling that the counter claim had been abandoned. This, according to learned counsel, was pursuant to an application and a prayer

for default judgment on the counter claim. Counsel also queried why the trial Court dismissed a non-existent counter claim of the 1st Respondent. Counsel argued that even awarding costs of the counter claim was misconceived.

In response, it was argued for the Respondents that there was a counter claim. Counsel for the Respondents then supported the decision of the trial Court on the counter claim.

The issues canvassed under this ground are fairly straight forward. It is clear on record of the trial court that the Respondents lodged their initial defence and counterclaim on 26th June, 2017. They sought to have the Appellants declared trespassers to the suit land. They also sought for a permanent injunction, vacant possession, and general damages, and costs of the counterclaim. The counter claim was replied to on 4th August, 2017. Whether this reply was filed within 15 days, depends on when the Plaint and summons was served on the counterclaimants. This point is not canvassed in this Appeal. From August, 2017 there was a lull. No action was taken by the

parties, not until about the 13th February, 2020, when counsel for both parties consented to an amended plaint, which was lodged in Court on 20th February, 2020. The amended plaint was a substantial improvement of the original plaint. The land in issue in the old plaint was larger than that pleaded in the amended plaint. Nyeko Olyel Bazil (who happens to be the 2nd Appellant) was the only plaintiff in the original plaint. The amendment impleaded Olyel Bazil, his father, and now the first Appellant.

In their reply to the amended plaint, which technically became their new defense, the present Respondents did not include a counterclaim. The record shows that when learned counsel for the Respondents prayed for a default Judgment on the old counterclaim, the trial Court ruled that the counter claim had been dropped. So no Default Judgment could be entered. I hasten to add that, since the original counterclaim had attracted a reply, no default judgment was conceivable in law.

A counterclaim has the effect of a cross action. It is an independent suit. It enables court to pronounce a final judgment in the same action (commenced by the plaintiff). This is where the counterclaim can be conveniently disposed of within the same action. If not, Court will refuse a defendant the right to counterclaim within the same action. In such a case, the defendant would be advised to file a separate suit. See Order 8 rule 2 CPR. In Friends in Need Sacco Ltd Vs. Lulume Nambi Norah, Civil Appeal No. 89 of 2019 (Hct), Justice Emmanuel Baguma held that a counter claim is treated as an independent action. However, it is my view that, where a Defendant amends the original Defense which had a counter claim, and drops it, then he/she can not claim that the counter claim still stands, for an amendment changes what is amended.

In the instant case, having earlier found that there was no counterclaim, in a brief preliminary ruling given during the proceedings of 29th October, 2020, the Learned Chief Magistrate, with respect, could not again, enter judgment for the Respondents, on the counterclaim, in its final judgment of

20th March, 2021. He was clearly *functus officio*. He was bound by his earlier decision on the matter and could not upset it. See: Goodman Agencies Ltd Vs. AG& another, Const. Pet. No. 03 of 2008 (Const. Court); Paul Nyamarere Vs. UEB (in liquidation), Civil Appeal No. 55 of 2008 (CoA).

In light of the foregoing analysis, I find that the Appellants' complaint in this ground of appeal, is well founded. I would allow ground four of the Appeal.

Ground 5

The ground assails the judgment of the Learned Chief Magistrate for awarding general damages of Ugx 20,000,000, which according to the Appellants, is unconscionable, and lack proper basis.

In arguing for and against the above ground, neither counsel addressed court from the premise that the award of general damages to the 2nd Respondent flowed from the trial Court's finding that there was a counterclaim by the Respondents

against the Appellants. The trial court purported to dismiss the 1st Respondent's counterclaim and purported to allow the 2nd Respondent's counterclaim. With respect, this was a grave error of judgment.

In light of my earlier finding that the there was no valid counterclaim, the award of general damages to the Respondents can not be supported. Similarly, the purported dismissal of the 1st Respondent's counterclaim, with costs, is of no legal consequence, as no valid counterclaim existed at the time of the trial and judgment. No wonder, no issue was framed on it. Consequently, the costs awarded on the counterclaim can not stand.

For completeness, I hasten to observe that if a valid counterclaim existed, the 2nd Respondent would, in my Judgment, have been entitled to some nominal damages, and not the quantum given by the trial court. The amount awarded, in my judgment, is too high, in the circumstances, to amount to an erroneous estimate of damages. I would have instead

awarded shs. 5,000,000 to each Respondent, because they showed some suffering and inconveniences, following the enforcement of a purported mediation agreement by the Appellants. I have however, with respect, found it strange that the trial Court made findings against a co-respondent (the 1st Respondent) when he was never sued by the 2nd Respondent and when he never received a fair hearing from Court, before the adverse orders could be made against him. The findings against the 2nd Respondent cannot stand. This Court has powers to upset them, under Order 43 rule 27 of the CPR.

Conclusion and Orders

In conclusion, the appeal succeeds only in part. Given the partial success, I have deemed it proper to set aside the whole decree of the Learned Chief Magistrate, which I hereby do. In its place, I substitute the following orders;

1. The Appellants' Civil Suit No. 15 of 2017, filed in the Chief Magistrates Court of Nwoya Holden at Amuru, against the present Respondents, stands dismissed,

with full costs in the trial Court, to be paid by the Appellants to the Respondents.

2. It is declared that the Appellants do not own the suit land situate at Coo-rom village, Pagoro Parish, Lamogi Sub County, Amuru Distirct, being the whole land the trial Court visited and identified as being in dispute during the *locus in quo* proceedings of 10th March, 2021, as reflected in the sketch map drawn at the *locus in quo*.

3. The Respondents shall immediately regain their ownership, occupancy and use of their respective portions of the suit land which they owned, used and occupied before the purported division by the then Local Council II Chairperson of Pagoro Parish, Lamogi Sub-County, Amuru District, a one Olango Jackson and his team.

4. The Police, and the Leadership of Amuru District shall render full assistance, as by Article 128 (3) of the Constitution of the Republic of Uganda, 1995,

required, to ensure full compliance with this High Court Order, and to maintain law and Order.

5. The orders made by the trial court in respect of the counter claim and costs associated therewith are hereby set aside.

6. The Orders of the trial court issued against the 1st Respondent (a co-defendant in the trial court) are set aside.

7. The orders of general damages are set aside.

8. The Appellants shall pay 75 % (Seventy-Five percent) of taxed costs of the Appeal to the Respondents.

I so order.

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

09/2/2023

George Okello
JUDGE HIGH COURT

Ruling read in Court in the presence of;

09th February 2023

12:20pm

Ms. Grace Avola, Court Clerk

Mr. Otto Gulamali, Counsel for the Appellants.

Mr. Douglas Odyek, Counsel for the Respondent.

The parties are all in Court. The son of the first Respondent/ a legal representative, is in Court.

Counsel for the Appellants: I appear for both Appellants, and we are ready to receive the Judgment of court.

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

Court: Judgment read in open Court.

09/2/2023

George Okello
JUDGE HIGH COURT