THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA
CIVIL APPEAL NO.106 OF 2022
Formerly, Masindi Civil Appeal No. 12 of 2022
(Arising from C.S No.009 of 2017)

1.ERIAKIM KASEGU (Thru' Administrator)
2.JOHN ABAYO
3.RICHARD UKUMU
4.MANUEL UKELLO
5.SEMARITA AROMBO
6.EVELINE AROMBO **:::::::::::::::::::::::: APPELLANTS**
7.PERESI MUPANGA
8.KUNIHIRA JOHN KAGORO
9.MALITABU JONATHAN
10.BUSOBOZI KANKABI
11.OTHERS OF KISIIMO COMMUNITY
YET TO BE ESTABLISHED

VERSUS

FRANCIS KAAHWA :::RESPONDENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] This is an appeal from the decision of the Chief Magistrate of Masindi at Masindi, **H/W Ssejjemba Deo John** dated 19/1/22 in **C.S No.009 of 2017**.

Facts of the Appeal

[2] The facts of the case as found by the trial Magistrate are that the plaintiff/Respondent in 2017 filed a suit against Tullow Oil/defendant for a declaration that the plaintiff/Respondent was the rightful owner of land

comprising **Kasemene, 3 Oil site** located in **Kisiimo cell, Buliisa Town Council, Buliisa District**, having purchased it from the family of the late **Deema** and **Karoli** on 14/1/2010, an order directing the defendant, **Tullow Oil** to compensate the plaintiff/Respondent for its use, general damages, interests and costs of the suit.

[3] The plaintiff/Respondent was complaining that Tullow Oil/Defendant carried out oil exploration and drilling activities on his 3 acre piece of land comprising the **Kasemene 3 Oil pad** without paying him compensation as required by the **Petroleum (Exploitation, Development and production) Act 2013**.

[4] The defendant however, filed an interpleader application naming the 1st - 11th Respondents as adverse claimants to the compensation. They claimed that the suit land was communally owned by the **Kisiimo Community**.

[5] The trial Magistrate heard the suit and upon evaluation of the evidence before him, found that the 3 acre piece of land which the defendant, Tullow Oil was utilizing was not communal land but individually owned by the families of **Deema** and **Karoli** from whom the plaintiff/Respondent derived interest by purchase. Judgment was therefore given in favour of the plaintiff/Respondent in the following terms, inter alia;

1. That the 3 acres of land comprising the Kasemene 3 oil pad at Kisiimo cell, Northern Ward, Buliisa Town Council, Buliisa District is the property of the plaintiff.
2. That Total Energies EP Uganda B.V, the successor in title of Tullow Oil Uganda Operations Pty Limited pays due compensation to the plaintiff for the use of his land.

[6] The 1st - 11th Respondents were dissatisfied with the decision of the trial Magistrate and filed the present appeal on the following grounds of appeal:

1. *The trial magistrate erred in law when he entertained new witnesses at the locus in quo and relied on their testimony in arriving at his decision.*
2. *The trial magistrate erred in law and fact when he reached a decision to the effect that even without letters of administration, the purported*

sellers of the Suitland passed on interests in the estate of Deema and Karoli (Estate Suitland) to the respondent by way of sale.

3. *That the trial magistrate erred in law and fact when he reached a decision that the purported sellers of the Suitland to the respondent had customary interests in the Suitland which they passed unto the respondent.*
4. *The trial magistrate erred in law and fact when he attached no weight to the confession/admission of one of the sellers of the Suitland to the effect that the land they purportedly sold to the respondent did not belong to them.*
5. *The Trial Magistrate erred in law and fact when he failed to evaluate pieces of evidence on record in proof of the Appellants' customary communal land rights in the Suitland.*
6. *The trial Magistrate erred in law and fact when he relied on presumptions other than evidence adduced to conclude that the Suitland had houses, graveyards of the purported sellers.*
7. *The trial magistrate erred in law and fact when he reached a decision that the Suitland was sold to the Plaintiff/respondent.*
8. *The trial magistrate erred in law and fact when he failed to evaluate evidence on record in totality hence arriving at a wrong decision.*
9. *The trial Chief Magistrate's decision occasioned a miscarriage of justice.*

Duty of the 1st Appellate Court

[7] This being a first Appellate Court, it is duty bound to re-evaluate the evidence adduced before the trial court as a whole by giving it fresh and exhaustive scrutiny and then draw its own conclusion of fact and determine whether on the evidence, the decision of the trial court should stand; **Selle & Anor Vs Associated Motor Boat Co. [1968] EA 128** and **Lugazi Progressive School & Anor Vs Sserunjogi & Ors [2001-2005] 2 HCB 12.** To arrive at a decision, this court is therefore under duty to take into consideration the evidence as a whole, weigh and evaluate all the material evidence on issues that were to be determined. It would be an error to selectively consider evidence favouring one side, without any regard to that which is unfavourable; **Wepukhulu Nyunguli Vs Uganda, S.C Crim. Appeal No.21/2001.**

Counsel legal representation

[8] The Appellants were represented by **Mr. Idambi Paul** of **M/s Bashasha & Co. Advocates, Kampala** while the Respondent was represented by **Mr. Jarvis Lou** of **M/s KMA Advocates, Kampala**. Both counsel filed their respective written submissions for consideration of the appeal as permitted by this court.

Consideration of the Appeal

Preliminary points of law

[9] Counsel for the Respondent raised a preliminary point of law to the effect that the Appeal is incompetent for the following reasons;

1. That the 1st Appellant passed away during the hearing of the suit by the trial court and hence cannot file the instant appeal. That the deceased **Eriakim Kasegu** (1st Appellant) cannot instruct counsel.
2. That the 2nd, 3rd, 4th, 5th, 6th and 7th Appellants in the trial in the main suit deponed affidavits and confirmed that the suit land belongs to the Respondent and therefore, that it is not possible that they instructed the instant counsel to appeal the judgment of court.
3. That the 11th Appellant cannot institute an Appeal for unascertained persons and cannot institute an appeal and or instruct counsel.

[10] As regards the 1st preliminary point of law, counsel for the Appellant submitted that he filed the present appeal in the same manner in which the parties appeared on the judgment. Counsel however fell short of disclosing how and whether he had instructions from the deceased 1st Appellant to appeal the judgment (in the premises where the "administrator" is unnamed/undisclosed and or in absence of his or her existence).

[11] **At page 3** of the typed copy of the judgment, the learned trial Magistrate observed as follows;

"Also the person named as Eriakimu Kasegu in the group of

'2nd defendant' now passed away... the case had to continue in respect of that bundle of defendants."

On death of parties and their rights to sue, **O.24 r. 1 CPR** provides as follows:

"The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives."

r. 4 therefore provides thus;

"4. Procedure in case of death of one of several defendants or of the sole defendant

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or the sole defendant or sole surviving defendant dies or the action survives or continues, the court on an application made for that purpose, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) ...

(3)Where within the time limited by law no application is made under sub rule (1) of this rule, the suit shall abate as against the deceased defendant."

[12] In the instant case, it appears not in dispute that the 1st Respondent passed on during the pendency of the suit. What is not clear is when or at what stage of the proceedings of the suit the 1st Appellant passed away. However, the fact that the 1st Appellant never testified and or filed a witness statement in court, makes it appear that he could have passed on during the preliminary stages of the trial. It therefore follows that since there was no application made for causing the legal representative of the deceased defendant to be made a party and or in the absence of any evidence regarding the existence of the 1st Appellant's legal representative, the suit against the deceased defendant abated accordingly. The Respondents/defendants claim to had owned the suit land communally and for that reason, it follows the cause of action survived or continued against the surviving defendants.

[13] In the premises, I find that the trial Magistrate rightly permitted the suit to continue in respect of the surviving "bundle of defendants". The death of

the 1st Appellant did not affect the rights of the other defendants. The inclusion of the 1st Appellant's name on appeal may be merely technical, it did not therefore occasion the Respondent any miscarriage of justice. I find it as a mere formality that ought not to be taken to vitiate the entire appeal where there are other Appellants in view of **Article 126(e) of the Constitution** which requires us to administer substantial justice without regard to technicalities.

[14] As regards the 2nd, 3rd, 4th, 5th, 6th and 7th Appellants/defendants' admission that the suit land belonged to the Respondent/plaintiff, counsel for the Appellants submitted that this objection ought to have been raised in the trial court. I am however not able to comprehend and appreciated this averment of counsel for the Appellants. There would be no need for the Respondent/plaintiff to raise this point of law because the admission by these Appellants/defendants was, first of all, during trial of the suit and secondly, the admissions were all in his favour and indeed, at the conclusion of the trial, the suit was decided in his favour, and court based its decision on, inter alia these admissions. It is not disputed by counsel for the Appellants that indeed, the 2nd, 3rd, 4th, 5th, 6th and 7th Appellants/defendants admitted in their affidavits vide **Civil Revision No.1/2018** and **Misc. Application No.28/2017** wherein they were dragged in the suit by the defendant, **Tullow Oil** as adverse claimants of the suit land, that the suit portion of the land belonged to the Respondent. The Respondent/plaintiff is therefore in the premises justified to doubt whether actually the Appellants/defendants instructed counsel to appeal the judgment of court.

[15] In the premises, I would find that there is no evidence that the 2nd - 7th Appellants/defendants instructed counsel to appeal the judgment, especially in view of the fact that they never even participated by way of filing either witness statements or oral testimonies in the lower court proceedings. It is therefore apparent that the names of the 2nd - 7th Appellants/defendants were being used by either the Defendant, **Tullow Oil** or the "other defendants" to justify their claim that the suit land is for the **Kisiimo/Basiimo Community** so as to defect the Respondent's interest.

[16] As regards the status of the 11th Appellant, **"others of Kisiimo Community yet to be established",** I agree with counsel for the Respondent that such unascertained persons cannot institute an appeal or instruct counsel, they are an amorphous non entity not capable of suing or being sued; **The Trustees of Rubaga Miracle Centre Vs Mulangira Ssimba, HCMA No.576/2006.**

[17] In the premises, from the foregoing reasons, this court is entitled to strike out the **1st** and the **11th Appellants** who were added at the instance of the defendant, under **O.1.r.10 (2) CPR,** as wrong parties for they are an embarrassment to the Respondent/plaintiff.

[18] As a result, in conclusion, I generally find that the 1st & 3rd preliminary objections raised have merit and I accordingly do uphold them. The 2nd objection is rejected for it is devoid of merit.

Grounds of Appeal

Ground 1: The trial Magistrate erred in law when he entertained new witnesses at the locus in quo and relied on their testimony in arriving at his decision.

[19] The Respondent's case at trial is simple, that he purchased the suit land measuring 3 acres from the families of the late 2 brothers **Deema** and **Karoli** on the 14/1/2010. Counsel for the Appellants' complaint on this ground is that the learned trial Magistrate erred in law and fact when he entertained a new witness, **Oyenboth Kolis** and **Tepolo** at locus and heavily believed and relied on their testimonies to arrive at the decision he arrived at hence causing a miscarriage of justice.

[20] Again, I am not able to comprehend and appreciate counsel for the Appellants' argument. This is so because the locus proceedings on record show that he is the one who demanded these 2 witnesses for a stand to testify so that he cross examines them. Indeed, as correctly observed by the trial Magistrate, since they were the vendors of the suit property to the Respondent/plaintiff, he permitted their testimony at locus so as to give

the counsel for the Appellants/defendants, the sought opportunity to cross examine them.

[21] In any case, as I observed in **Baturumayo Rwamukaga Vs Muhingwa Mukamba & Anor, HCCA No.12/2011 [2022] UGH CLD 64**, and I still hold that view as the correct position on the law that;

> *"Under O.16 r.7 CPR court is entitled to require any person present in court to give evidence and record evidence of any witness found to be material to the case and this is permissible at locus as long as the witness is not intended to bolster up the case of either party."*

[22] Proceedings at locus are part of the trial of the suit. In the instant case, the trial Magistrate permitted both **Oyenboth Kolis** and **Tepolo** to testify at locus because counsel for the Appellants applied to have them testify and 2ndly, **S.100 of the MCA** provides;

> *"Any Magistrate's court may, at any stage of any trial or other proceedings under this Act, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness...if that person's evidence appears to be essential to the just decision of the case..."*

The section permit the approach adopted by the trial Magistrate at locus. That person's evidence must be essential to the just decision of the case and the either party must be given an opportunity to cross examine this witness upon his/her evidence if it is adverse to his or her case. This is what I find occurred at locus in quo in the present case. The 2 witnesses were the sellers of the suit land. Their evidence was therefore essential to the just decision of the case. They testified at locus at the instance of counsel for the Appellants/Defendants and their evidence merely clarified and or confirmed what had already been testified in court.

[23] The trial Magistrate cannot in the premises be faulted on the procedure he adopted in receipt on the evidence at locus. As a result, I find this ground of appeal devoid of any merit and it accordingly fails.

Ground 2; The trial Magistrate erred in law and fact when he reached a decision to the effect that without letters of administration, the

purported sellers of the suit land passed on interests in the estate of Deema and Karoli to the Respondent by way of sale.

[24] Counsel for the Appellants submitted under **S.191 of the Succession Act,** subject to **S.4 of the Administrator General's Act,** no right to any part of the property of the deceased or a person who has died intestate shall be established in any court of justice, unless letters of administration have been granted by court of competent jurisdiction. Counsel relied on the authority of **John Kihika & Anor Vs Absolom Tinkamanyire, CACA No. 086/2014** where it was held **that by virtue of Section 180 of the Succession Act, without a grant of letters of administration, no person has any right whatsoever to sell or otherwise deal with the property of a deceased person.**

[25] That in the instant case, the Respondent testified that he bought the property of the deceased persons, **Deema** and **Karoli,** from their children but that there is neither evidence that at the time of the sale of the estate property, children of the deceased had authority to sale nor that all the children of the deceased persons had inherited their deceased fathers' respective properties.

[26] I however found the above argument out of context and absurd in as far as counsel for the Appellants purports to argue for the safe guard and preservation of the deceased's persons; **Deema** and **Karoli** property when none of the children and or beneficiaries of the 2 deceased persons are either contesting or complaining about the sale of the property to the Respondent.

[27] **S.191 of the Succession Act** which restricts rights to estate property to acquisition of letters of administration for the estate of the deceased in my view, is concerned with or its application is limited to disputes involving distribution of an estate among persons claiming entitlement thereto, where the dispute is over who the beneficiaries are and their shares/entitlements, rather than disputes involving 3rd parties to the estate of the deceased. It provides for the management of deceased estate property under the **Succession Act.**

In this case, it is the Respondent's case that he purchased the suit land from the children of the 2 families who sold him their inheritance.

[28] In Uganda, inheritance is one of the forms of acquiring property/land under customary law. It is a transfer of property by operation of customary law upon the death of the property holder without explicit provision by will or bequest as to who will inherit it or take after words. The majority of the indigenous citizens of this country still live in accordance with their customary traditional values, customary law. Almost all ethnic groups and community villages in Uganda practice patrilineal inheritance. Normally, when a man dies, his property passes to his family by inheritance, a practice under customary law that has attained such notoriety that court would be justified under **S.56(1)(b) & (3) of the Evidence Act** to take judicial notice of the customary law of inheritance and the practice. See also **Mifumi Vs A.G Constitutional Petition No.12 of 2007** where Justice Kavuma observed that **Section 56 of the Evidence Act** is not exhaustive. It is notorious in the sense of being a class so generally known as to give to the presumption that all persons are aware of it; **Holland Vs Jones (1971) CLR 149.** When a court takes judicial notice of something, then there is no need to call evidence or formal proof in that regard; **R Vs Simpson [1983] 3 All ER 789 [1983] 1 WLR 1494.**

[29] In recognition of this form of acquisition pf property, **Article 129(1)(c) & (d) of the Constitution of Uganda,** it is provided that judicial power of Uganda shall be exercised by the courts of judicature which shall consist inter alia, the High court and such subordinate courts for inter alia, **inheritance of property** and guardianship, as may be prescribed by Parliament. Then, under **Ss.15 of the Judicature Act** and **10 of the MCA,** Courts are, not to deprive any person of the benefit of, any existing custom which is not repugnant to natural justice, equity and good conscience and not compatible either directly or by necessary implication with any written law, this includes the **Succession Act.**

[30] In the instant case, I find that the families of **Deema** and **Karoli** cannot be deprived of the benefit of the custom of inheritance which entitles them to acquire property from their father. In the instant case, upon inheriting their fathers' property, they jointly disposed of their respective shares by

way of sale to the Respondent. I take judicial notice of customary laws of inheritance as one of forms of acquisition of property and this mode of acquisition of property is governed by customary law and not the **Succession Act.** It would therefore follow that **S.191 of the Succession Act** would not govern transactions of the deceased families disposing off their legally acquired property by inheritance from their deceased parents. This is what distinguishes the case of **John Kihika & Anor Vs Absolom Tinkamanyire (supra)** from **Okumu Marnoi Thomas Vs Opio Alice, HCCA No.26/2016** whereby in the former, the issue of succession did not arise but in the latter, the argument that in the absence of letters of administration, the Respondent could not sell land was rejected, but that where there is cogent evidence of inheritance under custom as part of the claim of ownership previously owned by the deceased person, the deceased's legal interest in property inherited can be passed to another person. However, if the sale is purported to be by a personal representative of the deceased, then it is necessary to show how the deceased's legal interest in the property passed to the personal representative of the deceased. In such case, the grant of probate or letters of administration as the case may be must be shown or presented.

[31] In the instant case there was ample uncontested evidence both in court and at locus that the families of the late **Deema** and **Karoli** had been on the land in question where they had had homes and in utilization of the suit portion of land in question. The Respondent testified that he had known the families of the vendors of the suit portion of land since he was young. The Appellants/defendants conceded that the families of the vendors have been in occupation and in use of the suit land for a long time with structures and graves of their people save for regarding them to be Congolese, an allegation the Appellants could neither prove nor substantiate.

[32] In the premises, I find this ground also devoid of merit. It accordingly fails.

[33] Grounds 3-9 are to be resolved jointly for they all revolve around how the trial Magistrate evaluated the evidence before him.

Grounds 3,4,5,6,7,8 & 9; Evaluation of Evidence on whether suit portion of land is or forms part of the communal land.

[34] According to **Francis Kaahwa,** the Respondent/plaintiff (PW1), he purchased the suit portion of land measuring 3 acres of the seller's land from the families of the late **Deema** and **Karoli** as per **P.Exh.1.** During cross examination at **p.5 of the typed proceedings** he stated;

> *"I first ascertained that the land belonged to the sellers. There were houses, structures and graves. Part of the land where the graves were is where they sold to me."*

At locus in quo, **PW1** demonstrated as follows;

> *"I have about 3 acres of land because it is now not accessible because it is submerged in the flood waters…I bought the land from people…**Benjamin Tepolo** and **Kolis Oyenboth.**"*

[35] To further prove his case, the Respondent plaintiff presented evidence on oath in form of affidavits by the 2nd – 7th defendants/interpleader dragged to court in this case by the defendant **Tullow Oil** vide **M.A No.28/2017** as adverse claimants to the suit land which were admitted and collectively exhibited as **P.Exh.4,** all who adduced evidence that the suit land belonged to the Respondent, that they had no claim to it at all.

[36] On the other hand, the **8th 9th** and **10th Appellants** contested the Respondent's claim, asserted that the suit land forms part of the **Kisiimo Communal land** for which no individual would be able to sell and that therefore, the family of **Deema** and **Karoli** had no authority to sell the suit portion of land to the Respondent. They presented the following pieces of evidence in support of their claim.

a) **A CERTIFICATE of communal ownership** as proof of ownership of the land by Basiimo Community **(D.Exh.1**).
b) **Correspondences from the 1st Appellant (Deceased)** as the L.CI chairperson Kisiimo cell addressed to Tullow Oil, **letter of introduction of the family of the 8th Respondent by Bugungo Parish C.O.U, IGG Report on the investigations into alleged abuse of office and corruption by urban-area land Committee and the District Land Board of Buliisa**, the Hon. Minister of lands, Housing and urban Development, **letter/directive for rescinding of**

approvals of land by the District Land Board Buliisa, **letter/directive by the Principal Private secretary to His Excellence, the President halting and or restricting applications for acquisition of land in Buliisa** and letters by **H.E the President, Permanent Secretary Ministry of lands, Housing and urban Development** together with the solicitor General's opinion regarding **restriction and halting of titling of land in Buliisa District.**

c) **Benja Tepolo's** document admitting sale of the Kisiimo village land.

Certificate of Communal ownership

[37] As regards the certificate of communal ownership **(D.Exh.1),** it was issued under **Land Regulation 78 of the Land Regulations of 2004**. Communal land Associations are formed under **S.15 of the Land Act**, by any group of persons for any purpose connected with communal ownership and management of land, whether customary law or otherwise. Under **Ss.23** and **24 of the Land Act,** the Association is to establish **Areas of Common Land use in Commonly owned land** for purposes of establishing the boundaries of any area of land which have been set aside for common use by members of the group and **A common land management scheme** for management of areas of common; land use which may include all or any of the following matters as seems most appropriate to the Association:

a) A description of the area of common land to which it applies.
b) Where common land is to be used for the communal grazing and watering of livestock, the details of the numbers of livestock owned by each member, locations within the common land for grazing etc.
c) Where the common land is to be used for hunting, the terms and conditions on which hunting may take place etc.

The above provisions and requirements under **Ss.23 and 24 of the Land Act** are proper identification and utilisation of communally owned land by members. In this case, no evidence was adduced by the Appellants to that effect.

[38] In the instant case, it evident that the Respondent purchased the suit portion of land on 14/1/2010 before the incorporation of **Kisiimo cell Communal Land Association** of 22/1/2019 which is being relied on by the Appellants. This probably explains why the Appellants opted to

individually defend the Association's interests rather than the Association itself being made a party. However, a litigant who sues as a steward in protection of group interests must present evidence of membership and or authority of the community as party of the evidence of the community ownership. Communal land ownership refers to groups of people who are closely bound together by historical ties with one another, common interests and values, sharing the land mainly for purposes of subsistence. No individual may claim exclusive use of land.

[39] Therefore, a public spirited individual within the community who intends to enforce community rights in a collective or common property may be faced with issues of locus standi. For example, in the instant case, it is not clear whether the **8th, 9th and 10 Appellants'** action is a **"derivative"** action on behalf of the Communal Association itself or a **Representative action** on behalf of the Appellants as individuals and on behalf the other members generally. It is however apparent that Appellants' actions were on behalf of the Appellants themselves as individuals but purporting to protect and safeguard the rights and interests of the Association.

[40] In my view however, in the absence of any evidence of the group membership and or Authority of the community or Association or a Representative order under **O.1 r.8 (1) CPR,** this rendered the Appellants' claim and defence incompetent and untenable; See also **Eliud Mathiu & 2 Ors Vs Gareth George & 2 Ors [2001] KLR 325** where it was held that court cannot take recognisance of such a suit before the requirements of **O.1 r.8 CPR** are complied with. The Appellants are and were not **Kisiimo cell Communal Land Association**.

[41] The above notwithstanding, it is clear that the instant case presents two competing customary land ownership rights/interests; Communal and private ownership rights. They are both forms of holding exclusive rights to land under customary tenure.

[42] In communal ownership, rights in land are conferred on the basis of accepted group membership, and there is a degree of group control of occupation, use, management and allocation or supervision of land. However, under **S.22(1) of the Land Act,** the law recognises that for land

communally owned, part of the land may be privately owned, i.e, occupied and used by individuals and families for their own purposes and benefit. Thus the "owner" of a piece of land forming part of communal land only has an interest or estate in the land. Such interest is transferable. Individuals or households may therefore, as well, cause their portions of the land to be demarcated and transferred to them.

[43] In the instant case, there is overwhelming undisputed evidence that the families of **Deema** and **Karoli** enjoyed private customary land ownership interest of the suit portion within the larger "communal land", later evidenced by **Kisiimo Cell Communal Land Ownership Association Certificate** (D.Exh.1). It was conceded by the Appellants that the families of **Deema** and **Karoli** had been in occupation of the suit portion of land for a long time. According to **Tepolo** and **Oyenboth**, the children of the 2 families of **Deema** and **Karoli** as per the locus proceedings, they were born and have been on the suit land since 1964. "Possession" is good against all the world except the person who can show a good title", **Asher Vs Whitlock (1865) LR 1 QB, 1 per Cock burn CH at 5**.

[44] There is no evidence that there existed any custom that prohibited the transfer of customary land interest by the customary land holder to any other person. It therefore follows, that the families of **Deema** and **Karoli** were entitled, and rightly sold their customary inherited interest in the suit land to the Respondent.

[45] The **Kisiimo Cell Communal Land Association** whose certificate of ownership of the communal land the Appellants relied on was incorporated in **2019.** The Association is however neither a party to the suit nor is there evidence of its representation as a party. It follows therefore, even if one is to find that the suit land of the families of **Deema** and **Karoli** formed part of the **Kisiimo Communal Land** which is apparent, it follows that under **S.22 (3) (a) of the Land Act**, the families of **Deema** and **Karoli** would still have a right over their land and even to apply for a certificate of customary ownership under **S.4** or for a freehold title under **S.10 of the land Act** in respect of their remaining unsold portion of land if they are interested. Likewise, the Respondent is also entitled to apply for a certificate of customary ownership or freehold title as the case may be in

respect of the 3 acre portion of land he purchased from the families of **Deema** and **Karoli**.

[46] The later incorporation of the **Kisiimo Communal Land Association** and its certificate of land ownership therefore, is not conclusive evidence that the families of **Deema** and **Karoli** could not have valid individual customary land interests in the Kisiimo land which they would be entitled to pass to the Respondent by way of sale.

Locus proceedings

[47] The 8th, 9th and 10 the Appellants as **DW1, DW2** and **DW3** testified in court that they, as a community were utilizing the suit land for cattle keeping and cattle paths, grass harvest, cultural sites and herb collection before part of it was taken over by the Respondent. As I have already observed, there ought to be evidence of open access to members of the community for such activities, grazing, drawing water, cutting firewood, hunting, performing sacred ceremonies etc. The opportunity was nevertheless available for the Appellants during locus visit.

[48] As however correctly put by counsel for the Appellants, the practice of visiting locus in quo is to check on the evidence by the witnesses and not to fill gaps in their evidence; **Nsimbi Vs Nankya [1980] HCB 81**. In this case at locus, **DW1**, the only Appellant recorded present, nowhere did he demonstrate to court or show user of the communal land activities such as grazing and cattle watering joints, the cattle paths, spots of cultural sites etc, or any other physical feature of importance as proof that that the suit land was under use by the community as opposed to exclusive use by the families of **Deema** and **Karoli**.

[49] In his submissions, counsel for the Appellants appear to suggest that the Appellants were not enabled to conduct court around the suit land. This court, in absence of any evidence on record of counsel protesting the failure and or refusal by court to give the Appellants opportunity to conduct court around the suit land, finds such claims a mere afterthought and therefore un acceptable.

[50] In any case, the question before the trial court appear to had been not whether the families of **Deema** and **Karoli** sold the suit land/their customary interest to the Respondent (because there was never a contest that the sale took place), rather, whether the suit land formed part of the communal land of the **Basiimo** and if so, whether the families of **Deema** and **Karoli** had a right or authority to sell the suit portion of land. The locus in quo visit was therefore intended to confirm the evidence in that regard.

[51] The trial Magistrate explained why court could not tour, the suit portion of land. It had been submerged in floods at the time, a fact parties and their counsel must have witnessed. The complaint by counsel therefore that the trial Magistrate ought to had recorded that no locus took place because of the suit land being submerged with floods is devoid of substance. As per the record, court conducted locus from a vintage point. In any case, the evidence regarding houses and graves that were reported submerged was intended to prove the **Deema** and **Karoli** interests in the suit land which, as court found, were not in dispute.

[52] In the premises, I find that the submerging of the suit portion of land was not, in my view prejudicial to either party to warrant a retrial as counsel for the Appellants demand. The mode in which the trial Magistrate conducted locus in quo did not in my view occasion any miscarriage of justice.

Correspondences regarding the status of land in Buliisa

[53] Upon perusal of all the correspondences on record that were attached to the witness statements of **DW1** and **DW2**, I found none of them conferred ownership of the suit land to the Appellants or could deprive the families of the late **Deema** and **Karoli**, their interest in the suit land-which interest, they lawfully sold to the Respondent. Similarly, the correspondences which, I generally found, were restricting and or halting titling of land in Buliisa District, had no effect at all on the Respondent's acquired customary interest in the suit land.

[54] As regards the introductory letter of the 8th Appellant/**DW1** by Bugongu Parish C.O.U dated 28th/9/2020, I find instead it bolstered the case for the Respondent as it was proof that actually the suit land was never part or formed part of the communal land since the late **Isaac Kagoro** could in his capacity individually donate a portion of the land to the church.

Benja Tepolo "Apology" letter

[55] The letter read thus;

> *"I Benja Tepolo have agreed that I sold the land belonging to Kisiimo and I have accepted to return back the money tomorrow to those who bought the land..."*

Definitely, the circumstances under which this apology was written talk for themselves. It does not reveal which subject of land was sold that belonged to Kisiimo and sold to who?

[56] Nevertheless, the trial Magistrate considered this letter and rightly found, in my view thus;

> *"I have considered the evidence in the document where Tepolo (one of the sellers) is seen confessing that he sold land which belongs to Kisiimo village and undertaking to refund the purchase money. This was meant to show that the land belongs to Kisiimo clan and that sellers had no right to sell it... at locus in quo proceedings...it was stated that they did it under threat."*

[57] Indeed, both **Tepolo** and his brother **Oyenboth** appeared at locus. Under the protest of counsel for the Respondent, counsel for the Appellant successfully had them for cross examination, neither of them was cross examined about their disowning the document that they were threatened by the **Basiimo** to write it. The trial Magistrate believed them and found the document virtually of no evidential value, and I equally place little or no evidence to the document in question.

[58] For the above various reasons, I find the 3rd - 9th grounds of the appeal as having no merit and they all fail. All in all, the entire appeal is found to

lack merit and it is accordingly dismissed, with costs to be borne by the **8th, 9th and 10 Appellants**.

Signed, Dated and Delivered at Hoima this **22nd day of December, 2022.**

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Byaruhanga Jesse Rugyema
JUDGE.