

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0027 OF 2016**

**(Arising from Adjumani Grade One Magistrate’s Court Civil Suit No. 0029 of 2013)**

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**AKUKU EBIFANIA (as Administrator of the     }**  
**estate of the late VURAA KAJOLE             }**             ..... **APPELLANT**

**VERSUS**

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**1. VICTORIA MUNIA                             }**             ..... **RESPONDENTS**  
**2. REGISTERED TRUSTEES OF ARUA DIOCESE   }**

**Before: Hon Justice Stephen Mubiru.**

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**JUDGMENT**

In the court below, the first respondent sued the appellant for general damages for trespass to land, an order of eviction, a permanent injunction and costs. The first respondent’s case was that before his death, her late father Cirilo Odoru owned land under customary tenure situated at Molokpoda and Adjumani Central villages, Gbere Parish, Adjumani Town Council. The deceased acquired that land as a gift *inter vivos* from the elders of Palanyua and Lajopi clans under the chieftainship of Chief Lumara in 1936. He subsequently acquired an extension to that plot in a similar way in 1950 and established thereon an agricultural show ground. The total acreage was approximately 35.095 acres. Upon his death, the family of the deceased appointed the first respondent as administrator of the estate of the deceased. She applied for and was granted letters of administration to the estate on 7<sup>th</sup> April 2005 by the Grade One Magistrate’s Court at Adjumani. Without any claim of right whatsoever, the said The appellant, a brother of the deceased Cirilo Odoru, took advantage of having lived as a neighbour of the deceased at the time of his death and encroached on part of the land by planting teak trees thereon and began selling off portions of the deceased’s land despite the first respondent’s attempts to stop him, hence the suit.

In his written statement of defence, the appellant contended that he had since his migration to Pavuraga village in 1944 – 1946 at the behest of his brother, Primo Kongu, restricted his activities on land he acquired on that village and has never trespassed on land belonging to the deceased. Although he shared common boundary with the late Cirilo Odoru to one side of his  
5 land, he has never encroached on land belonging to the late Cirilo Odoru. It was the first respondent instead who had recently begun claiming part of his land as belonging to the late Cirilo Odoru. He contended further that during the year 2000, the first respondent's elder brother Agwe Donato had filed Civil Suit No. 29 of 2000 over the same suit land and during the hearing of that suit Agwe Donato had claimed that the land in dispute belonged to a one Elia Drani. He  
10 denied having sold any part of that land as claimed by the first respondent.

In his counterclaim, the appellant claimed against the first and second respondents jointly and severally for general damages for trespass to land, an order of eviction, mesne profits, a permanent injunction, costs and interests. His claim was that at all material time, he was the  
15 lawful proprietor of land situate at Mbgwere near Adjumani Youth Centre measuring approximately two acres on which he had planted a teak tree forest. Sometime during the year 2012, he was approached by a catholic priest of Arua Catholic Diocese on behalf of the second respondent with a request to cut down that forest as it was posing a security threat to the Adjumani Youth Centre. The appellant accepted compensation in the sum of shs. 5,600,000/= as  
20 the value of the trees before they were cut down, but on condition that he continues to use the land for purposes that do not pose a security threat to the Youth Centre. He was surprised when after he had cut down the trees, the first respondent, by a memorandum dated 25<sup>th</sup> February 2012, donated that land to the second respondent and allowed them to take over the land and begin undertaking activities thereon.

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In their defence to the counterclaim the second respondents refuted the appellant's claimed ownership of the land in dispute. The land instead belonged to the first respondent who donated it to the second respondent for purposes of construction of a Multi Purpose Training Centre as part of Adjumani Catholic Mission. The appellant's claim over the land was limited to the trees  
30 he had planted thereon for which he was compensated in the sum of shs. 5,600,000/=.

Counsel for the second respondent raised a preliminary point of law at the commencement of hearing of the suit contending that the counterclaim did not disclose a cause of action against the second respondent. The objection was overruled and the trial magistrate decided further that since the contested area of two acres that was the focus of the counterclaim was comprised in the  
5 over 35 acres of land in dispute in the main suit, the decision on the counterclaim will abide the decision of the main suit.

During the hearing of evidence in the main suit, the first appellant who testified as P.W.1 stated that his late father, Cirilo Odori acquired land at Pavuraga village in Mgbwere Parish by gift  
10 from the Palanyua Clan. Later in 1952, the same clan gave him the over 35 acres at Molupkwoda village in Mgbwere Parish the land now in dispute, which he used as a public agricultural show ground for demonstration on how to use ox-ploughs, for cattle vaccination drives and partly for grazing his livestock. Following his death in the year 2005, the appellant planted teak trees on the two acres claiming that he was doing so for the better protection of his late brother's interest  
15 in the land from encroachers. When the first respondent later reclaimed the land from him, the appellant chased her away. The second respondent subsequently compensated the appellant for the trees which were posing a security threat to the second respondent's activities on adjacent land and thereafter the first respondent donated the then vacant two acres to the second respondent. When the first respondent's brother Agwe Donato sued the appellant during the year  
20 2000, he did so to protect the interest of their late father in the land.

P.W.2 Adua Patrick testified that the land in dispute measures approximately 35 acres and the appellant lived on land across the Openzizi Road. The first respondents father owned the land in dispute and used to undertake agricultural extension work on it including demonstration on how  
25 to use ox-ploughs. Those activities stopped around 1968 and from then on the first respondent's late father began to grow his food crops on the land. The appellant had never undertaken any activities on that land during the lifetime of the first respondent's father and only did so after his death by planting teak trees on the two acres contested in the counterclaim. The appellant was sued by Agwe Donato but the latter lost the case.

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P.W.3 Dramere Augustus Ariyuku testified that the Palanyua clan gave the land in dispute at Molupkwoda village in Mgbwere Parish to the first respondent's father, for purposes of establishing a demonstration field on the use of ox-ploughs. It is during the year 2005 that the appellant began planting teak trees on the land now in dispute. P.W.4 Idri Federico testified that  
5 it was the first respondent's father who in 1964 gave him the land where he now lives. At that time, it was the first respondent's father who occupied the land now in dispute by grazing cattle on it. The appellant had land on the side across the road to Pavuranga village, separate from that owned by the first respondent's father. The first respondent's father, with the assistance of the appellant, also used to undertake demonstrations on using ox-ploughs on the land now in dispute.  
10 The appellant never undertook any activities of his own on the disputed land and it is when the appellant stopped the first respondent from utilising the land that the suit was filed. Before that, Agwe Donato had during the year 2004 sued the respondent over the same land, claiming that it belonged to his late father Leonard Ijja, who gave it to the first respondent's father, Cirilo Odori. The suit was decided in favour of the appellant. That was the close of the first respondent's case.

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In his defence, the appellant who testified as D.W.1 stated that he had utilised the land in dispute since 1947 for during that time, people were free to occupy and own any available free land. The land in dispute at that time was being used by the Odronopi Clan for grazing which clan later migrated to the banks of river Nile. The land never belonged to the Palanyua clan. He used to  
20 grow a variety of food crops and cereals on that land. Two of his wives had their homesteads on the disputed land. In 2004, Agwe Donanto sued him in respect of that land before the Grade One Magistrate's Court at Adjumani but Donato lost the suit and never appealed the decision. He was compensated for the trees on the land but not the land itself by the second respondent. Occasionally agricultural demonstrations would be undertaken on the land in dispute but were  
25 not being directed by the first respondent's father the late Cirilo Odori.

D.W.2 Kareo Juliet testified that it is the appellant who during 1987 had given her mother, the late Dominica, land where she lived until 1990 when the area became swampy and she vacated it. That area now forms part of the land under dispute. When she died, she was buried on land  
30 belonging to the first respondent's father Cirilo Odori which she all along thought belonged to the appellant. D.W.3 Million Bathlemio testified that when he became of age during the 1970s, he

was the appellant growing crops on the land in dispute and also grazing cattle on it. The appellant would occasionally ask him to help weed his crops near the area now occupied by Youth Centre. The late Cirilo Odori never undertook any activity on the disputed land. The appellant had planted teak trees on the land around the year 2004 - 2005 which a priest later  
5 forcefully cut down prompting the appellant to report the matter to the police. The trees had been planted on the area which had in the past been given to Dominica with the intention of preventing encroachers from taking over the land. During her childhood, she used to see livestock being vaccinated and sold from that land.

10 D.W.4 Drasi Ben testified that he had between 1976 to 1987 been using the land in dispute on temporary terms with the permission of the appellant. Sometime during the year 2002, Eria Drani had encroached on the land and his brother Agwe Donato had sued the appellant over the same land following the death of Eria Drani. The suit was decided in favour of the appellant. D.W.5 Akutinatali Dramundru a son of the appellant testified that since his childhood it is the appellant  
15 who has been utilising the land in dispute. Around 2010 - 2012, the second respondent's agents had cut down the appellant's teak trees on the land in preparation of a centennial celebration. By mutual agreement, the second respondent paid the appellant compensation in the sum of shs. 5,600,000/= for the trees. The first appellant thereafter illegally gave that part of the land to the second respondent.

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In his judgment, the learned trial magistrate found that since the appellant and the late father of the first respondent were brothers who came from Metu sub-county in Moyo District during the mid 1930s and 1940s respectively, the appellant having arrived after the first respondent's father, the court should restore harmony between a torn family in a suit which pitted a niece against her  
25 uncle. Considering that there had been an earlier suit over the same land between the appellant and the first respondent's cousin Agwe Donato decided on 15th July 2004, during which suit her brother Lenga Zakeo testified in support of Agwe Donato and which suit was decided in favour of the appellant, the land was decreed to the appellant in that suit. However on the other hand, the appellant had waived his rights over the land when he accepted compensation for the teak  
30 trees and allowed the second respondent to occupy the land. Hence he dismissed the counterclaim on grounds that the second respondent's activities on the land should not be

antagonised. In the final result, he decreed part of the land to the appellant and the rest of it to the first appellant in an apparent sub-division. Each party was to bear its costs of the suit.

Being dissatisfied with the decision the appellant raised one ground of appeal, namely;-

- 5 1. The learned trial magistrate failed to properly evaluate the evidence on record thereby reaching a wrong decision dismissing the appellant's counterclaim and distributing the suit land.
2. The learned trial magistrate erred in law in proceeding to determine a matter he had found and was already aware to have been *res judicata*.
- 10 3. The learned trial magistrate erred in law and fact in making orders distributing the suit land between the appellant and the first respondent, a matter that was not before court.
- 15 4. The learned trial magistrate erred in law and fact when he indulged in assumptions, conjecture and speculation which influenced him to reach a wrong decision dismissing the counterclaim and giving away part of the appellant's land to the respondents.

In his submissions, counsel for the appellant, Mr. Ambrose Tebyasa argued ground 2 independently and combined grounds one, three and four. The complaint of the appellant is that the trial magistrate tried a matter that was *res judicata*. In the amended WSD and counterclaim in  
20 paragraph 9 the appellant contended that there had been an earlier suit relating to title to the land, i.e. C.S. No 29 200 before the same magistrates Court between Agwe Donato and Vura Martin alias Kajoale. A one Lenga Zakeyo a brother to the first respondent was one of the witnesses in that case supporting the claim of Donato to be the owner of the suit land. In paragraph 5 of the reply to the defence by the 1st respondent he conceded that the suit had been in court before but  
25 claimed that Vura Martin was defending the rights on behalf of Cerilo the plaintiff's father. The subject matter is the same land. The defendant in the two suits is the same. The issues were similar in that in the earlier suit as well as in the subsequent one it was about ownership of the land. The claim was customary ownership of the land and the jurisdiction of the Grade One Magistrate is unlimited. At page 11 lines 2 – 4 the plaintiff confirmed the existence of the suit.  
30 At page 12 lines 8 – 9 the plaintiff confirmed listing the plaintiff in the earlier suit Agwe Donato as a witness. The judgment of the lower court was tendered and is at page 23 of the record of appeal in paragraphs 2 and 4. In the judgment out of which the appeal arises at page 3 first paragraph, the trial magistrate evaluates the evidence relating to the existence of the earlier judgment and notes the witnesses and how Agwe was a plaintiff witness. Last line of the

judgment he observed that *res judicata* was applicable. The subsequent court would not have jurisdiction it was issue one in the lower court. It was tried and the submissions in the lower court at page 17 paragraph 4. The suit should have been dismissed for *res judicata*.

5 Grounds one, three and four relate to page 4 of the judgment where the counterclaim was dismissed. The second respondent did not defend the counterclaim throughout. At page 8 of the record of proceedings last two lines and page 9 lines one and two. The ruling of the trial magistrate at page 9 and 10. The second counter defendant was claiming title through the plaintiff. At page 4 of the judgment paragraph 2 the trial magistrate dismissed the counterclaim  
10 on grounds that the current appellant appeared to have waived his rights when he accepted compensation for his cut trees and secondly that the second counter defendant was a development partner in the area. In paragraph 13 and 14 of the counterclaim, it was pleaded that the 2<sup>nd</sup> Counter defendant cut down the trees because they were causing a security threat. Compensation was for the trees erroneously cut but not for the land. It was not by mutual  
15 consent. It was not for expansion of the compound. The cause of action arose in 2012 – 2013 the conversion was done in December 2012. The counterclaim was filed within a period of one year. Page 25 the last two lines. The agreement between the first respondent giving the land to the second respondent Exhibit D3. The development partner argument was weak. The land is measuring about two acres is occupied by the second respondent. The first respondent could not  
20 pass title to the second respondent. There is a perimeter wall on the land. There should have been a demolition. At page 4 the trial magistrate distributed the suit land giving one part to the first respondent and the other to the appellant. It was not one of the claims by the parties. He did not decide any of the five issues framed. Under Order 43 r 27 of The Civil Procedure Rules, the court may in exercise of the appellate jurisdiction decide on those issues. He prayed that the  
25 appeal be allowed with costs in this court and the court below.

In reply, counsel for the first respondent, Mr. Odama Henry argued that he opposed the appeal. In respect of ground one, he submitted that the trial magistrate properly evaluated the evidence. He determined all the issues before court. On the first issue he found, by construction, that the  
30 suit was not *res judicata*. He rightly found that the suit was not time barred. Third issue page 4 paragraph 3 the finding is by construction. Fourth issue there is no finding on that.

Ground two on the issue of *res judicata*, he submitted that the subject matter is different. The two acres are distinct from the 35 or so acres in the earlier suit. The parties were different as well. They were not claiming under the parties to the earlier suit. On ground three the  
5 distribution of the suit land; under section 98 of the Civil Procedure Act a trial magistrate enjoys a discretion to promote harmony. Had he applied the standard correctly he would have come to the same decision. He prayed that the appeal be dismissed.

In a further reply, counsel for the second respondent, Mr. Michael Ezadri Onyafia argued that  
10 with regard to grounds one and two, there was proper evaluation of the evidence by the trial magistrate. He made a lump-sum judgment without specifying the issues. There is no specific finding on *Res judicata* since did not apply because the parties are different. The distribution of land was in exercise of the inherent jurisdiction of the court. Regarding the counterclaim the trial magistrate was not speculative. He heard the evidence, visited locus and listened to submissions.  
15 At page 8 of the record and page 9 the preliminary objection was overruled at page 10 lines five to 9 of the ruling. Counsel for the appellant is estopped from complaining when he was part of the understanding that a decision on the main suit would apply to the counterclaim as well. The subject matter is fully developed and the appellant is enjoying the facilities available on it. The appeal should be dismissed with costs.

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In rejoinder, Counsel for the appellant submitted that as regards *Res judicata*, the amended plaint in paragraph 3 describes the land as measuring 35 acres. In the judgment itself at page 1, the trial magistrate states so as well. The two acres are part of the 35 where the trespass occurred in 2012. The parties are claiming under the same title. The judgment in the earlier suit is one in rem. At  
25 page 2 of the record of appeal, the parties reported that the mediation failed. The magistrate should not have continued with the mediation. The findings of court should be clear on the issues raised. They should not be inferred. The concession counsel for the appellant made that a decision in the main suit would dispose of the counterclaim was overruled by court and it proceeded to decide the matter. The second respondent did not defend the counterclaim out of  
30 that ruling which he did not appeal. He reiterated his earlier prayers.



This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000*; [2004] KALR 236 thus;

5           It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

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This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

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In the second ground of appeal, it is contended that the learned trial magistrate erred in law in proceeding to determine a matter he had found and was already aware to have been *res judicata*. According to section 7 of *The Civil Procedure Act* and section 210 of *The Magistrates Courts Act*, no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

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The basis of the rule of *res judicata* is that an individual should not be vexed twice for the same cause. A person should not be twice vexed in respect of the same contest as to his or her rights and on the other hand, the time of the Courts should not be wasted by trying the same matter several times. The plea of “*res judicata*” is in its nature an “*estoppel*” against the losing party  
5 from again litigating matters involved in previous action but does not have that effect as to matters transpiring subsequently. The judgment in first action operates as an “*estoppel*” only as to those matters which were in issue and actually or substantially litigated. It is matter of public concern that solemn adjudications of the courts should not be disturbed. Therefore, where a point, question or subject-matter which was in controversy or dispute has been authoritatively  
10 and finally settled by the decision of a court, the decision is conclusive as between parties in same action or their privies in subsequent proceedings. A final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in the former suit. In short, once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in  
15 another suit afresh (see *In the Matter of Mwariki Farmers Company Limited v. Companies Act Section 339 and others* [2007] 2 EA 185). By *res judicata*, the subsequent court does not have jurisdiction.

For the doctrine to apply, it must be shown that; a) there was a former suit between the same  
20 parties or their privies, i.e. between the same parties, or between parties under whom they or any of them claim, or parties who claim through each other, litigating under the same title; b) a final decision on the merits was made in that suit, i.e. after full contest or after affording fair opportunity to the parties to prove their case; c) by a court of competent jurisdiction, i.e. a court competent to try the suit; and, d) the fresh suit concerns the same subject matter and parties or  
25 their privies, i.e. the same matter is in controversy as was directly and substantially in issue in a former suit (see *Ganatra v. Ganatra* [2007] 1 EA 76 and *Karia and another v. Attorney-General and others* [2005] 1 EA 83 at 93 -94).

Being a question of mixed law and fact, the proper practice is for the trial Court to try that issue  
30 and receive some evidence to establish that the subject matter has been litigated upon between the same parties, or parties through whom they claim (see *Karia and another v. Attorney-*

*General and others [2005] 1 EA 83*). In the instant case, a certified copy of the record of proceedings in Adjumani Grade One Court Civil Suit No. 0029 of 2000, between Agwe Donato and the appellant was tendered in court as exhibit D. Ex. 3. According to that record, the suit was originally filed by Agwe Donato's brother Elia Drani who died on 26th June 2001. Agwe  
5 Donato replaced him as plaintiff upon being granted letters of administration to the estate of the deceased. In that suit, the plaintiff claimed that the land in dispute at Molupkwoda village belonged to his late father Leonardo Icca. The evidence before court was to the effect that Leonardo Icca had given the land temporarily to the late Cirilo Odori in 1936 for agricultural extension work. Cirilo Odori in turn allowed the appellant to utilise this land for grazing his  
10 cattle and later for growing crops from 1947 - 1951. The dispute that time erupted in 1996 when the appellant brought surveyors to the land in an attempt to have it surveyed. On his part, the appellant claimed that the dispute arose when in 1996 the late Elia Drani attempted to construct houses for rent on the land. In his judgment, the trial magistrate found that the land did not belong to Leonardo Icca as claimed by Agwe Donato. In the second paragraph at page 5 of that  
15 judgment, the court found the land in dispute not to be the one given to Cirilo Odori for his agricultural extension work but rather one where both Cirilo Odori and the appellant used to graze their cattle. The appellant had taken over the land after closure of the agricultural show. The appellant had utilised the land since 1944 and Leonardo Icca had never instituted a suit for its recovery. The appellant had even built a house on that land for his daughter. By that long  
20 user, he had established himself on the land as customary owner. Agwe Donato had not only failed to establish any proprietary interest in the land but was also barred by limitation the appellant having been in occupancy for over forty years. The suit was dismissed with costs.

In light of that evidence, at page 3 of his judgment, the trial magistrate in the court below  
25 commented as follows;

Having closely followed this case, I realise that this particular suit land started having issues in the [year] 2000 when one Agwe Donato sued the defendant (Vurra Kajoale) in this very court under civil suit No. 0029 / 2000 and was concluded on  
30 15/7/2004 with the defendant (Vurra Kajoale) being the successive (sic) party. You will recall that the Claimant Munia Victoria had listed Agwe Donato as her third witness in the amended plaint, though counsel for the plaintiff applied to have him (Agwe Donato) delisted from the list of claimant's witnesses. It also should be noted that in that case of Agwe Donato versus Vurra Kajoale, the claimant's late elder

brother Lenga Zakeo testified for Agwe Donato against his paternal uncle Vurra Kajoale.....so the most important thing for this court is to restore harmony and peaceful coexistence of this torn apart family.... from the outset one would go for *res judicata*, considering the outcome of Civil Suit No. 0029 but that may not solve the bigger problem this family is facing.

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It is apparent from the above extract that the court below opted to overlook the issue of *res judicata* in the interest of restoring "harmony and peaceful coexistence of this torn apart family" and because it would " not solve the bigger problem this family is facing." In the result, the trial court failed to address an issue placed before it for decision. Whereas Article 126 (2) (d) of *The Constitution of the Republic of Uganda, 1995* provides that in exercising judicial authority, reconciliation between parties shall be promoted, which provision requires courts to be guided by the principles of alternative forms of dispute resolution including conciliation, mediation, arbitration and traditional dispute resolution mechanisms, the court misdirected itself in the manner it went about promoting reconciliation.

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Court-annexed or facilitated alternative dispute resolution procedures, after a suit is filed, are guided by well established rules of procedure. Courts promote such alternative dispute resolution mechanisms through Order 12 rule 1 of *The Civil Procedure Rules; The Judicature (Mediation) Rules, 2013*; and *The Judicature (Commercial Court Division) (Mediation) Rules, 2007*. Upon the parties reaching a compromise, as a result of any of those processes, then the role of court is limited to ordering the agreement, compromise, or satisfaction to be recorded, and thereafter pass a decree in accordance with the agreement, compromise or satisfaction so far as it relates to the suit, as guided by Order 25 rule 6 of *The Civil Procedure Rules*. The Judicial officer cannot be both mediator and adjudicator in the same cause. Where a judicial officer is actively engaged in the process of mediation as a *de facto* mediator, still the outcome is a consent Judgment which is a judgment of the court in terms which have been contractually entered into by parties to the litigation, and then validated by Court under Order 25 Rule 6 of *The Civil Procedure Rules* (see *Brooke Bond Liebeg (T) Ltd v. Mallya [1975] E.A 266*). The terms of such a judgment are not settled by the court but by the parties, adopted, validated and pronounced by the court.

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In the instant case, the trial magistrate in the court below, in a bid to restore "harmony and peaceful coexistence of this torn apart family" and to "solve the bigger problem this family is facing," abdicated his role as adjudicator and turned himself into a mediator. The parties did not contractually enter into the terms which he eventually pronounced in his judgment but rather it is  
5 him who came up with terms contained in his judgment. The terms he pronounced were not settled by the parties but are rather of his own determination. In the adjudicative role, issues in a civil suit are not determined by compromise but on the balance of probabilities. The court in effect came up with a forced compromise instead of a decision on the issues. The court therefore failed to properly direct itself when it sought to decide the suit based on principles of  
10 compromise rather than on the preponderance of evidence, yet the parties at page 2 of the record of proceedings had reported that attempts at reaching an amicable out-of-court settlement had failed. What was then left for court to do at that stage was to decide the issues rather than impose a compromise.

15 When parties to a suit are given an opportunity to reach an out of court settlement and fail to strike a compromise, then Order 15 of *The Civil Procedure Rules* requires the Court or the parties themselves to frame the issues to be tried and decided. Under Order 15 rule 7 (c) of *The Civil Procedure Rules*, once the parties have agreed on an issue to be tried and court decides that the question is fit to be tried and decided, the Court is required to proceed to record and try the  
20 issue and state its finding or decision on the issue in the same manner as if the issue had been framed by the court; and, upon the finding or decision of the issue, pronounce judgment according to the terms of the agreement; and upon the judgment so pronounced a decree should follow.

25 Although it was not framed as one of the five issues in the parties' joint memorandum of scheduling which five issues are repeated at page 2 of the judgment, while submitting in respect of the first agreed issue as to whether the plaintiff had any claim over the suit land, counsel for the appellant argued that the judgment in Civil Suit No. 0029 of 2000 was a judgment *in rem* that affected not only the land but also persons interested in it as third parties. He argued that  
30 since the court had previously pronounced itself on the ownership of the suit land and its decision had never been set aside, the first respondent had failed to prove that she holds any

interest in the land. According to Order 15 rule 1 of *The Civil Procedure Rules*, issues arise in a suit when a material proposition of law or fact is affirmed by one of the parties and denied by the other. For that reason, the court is empowered by Order 15 rule 5 (1) of *The Civil Procedure Rules*, to at any time before passing a decree amend the issues or frame additional issues, as may  
5 be necessary for determining the matters in controversy between the parties, on such terms as it thinks fit.

Counsel for the appellant having made a material proposition that Civil Suit No. 0029 of 2000 was a judgment *in rem* that affected not only the land but also persons interested in it as third  
10 parties, which proposition was refuted by counsel for the respondents, the trial court ought to have framed the issue of *res judicata* and decided it since it was necessary for determining the matters in controversy between the parties. The court misdirected itself when it chose instead to ignore that issue in a bid to restore "harmony and peaceful coexistence of this torn apart family" and to "solve the bigger problem this family is facing." Since the court below failed in its duty in  
15 that aspect, this court now proceeds to determine whether or not the suit was indeed *res judicata* as contended in the second ground of appeal.

- i. A decision by a court of competent jurisdiction, i.e. a court competent to try the suit.

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For *res judicata* to apply, it must be shown that the earlier decision was by a court of competent jurisdiction, i.e. a court competent to try the suit. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. In determining the  
25 applicability of the rule of *res judicata*, the Court is not concerned with the correctness or otherwise of the earlier judgment. All that is necessary to establish is that the Court that heard and decided the former suit was a Court of competent jurisdiction.

The court has to consider jurisdiction in all its four aspects; *Ratione Materiae* (by reason of the  
30 subject matter - pecuniary jurisdiction), *Ratione Loci* (by reason of the place - geographical or local jurisdiction), *Ratione Personae* (by reason of the person concerned- no immunities to the

person involved) and *Ratione Temporis* (in relation to the passage of time - the action is not barred by limitation). In some cases where the matter directly and substantially in issue has been tried between the parties by the earlier Court, it may have to be tried again in a subsequent suit because the earlier Court had no jurisdiction to try it having regard to any of the four aspects of jurisdiction in civil matters. In the instant case, the land in dispute in Civil Suit No. 0029 of 2000 was described as customary land at Molukpwoda village in Adjumani District.

According to section 212 (1) (d) of *The Magistrates Courts Act*, Subject to the pecuniary or other limitations prescribed by any law, suits for the determination of any right to or interest in immovable property should be instituted in the court within the local limits of whose jurisdiction the property is situate. Since the land in dispute was situated in Molukpwoda village in Adjumani District, it was within the local, geographical or territorial jurisdiction of the Grade One Magistrate's Court of Adjumani where it was transferred to by order of the High Court in Gulu, where it had originally been filed. According to section 207 (2) of *The Magistrates Courts Act*, where the cause or matter of a civil nature is governed only by civil customary law, the jurisdiction of a Magistrate Grade One is unlimited. Each of the parties in that suit claimed the land in dispute as customary owners. For that reason the jurisdiction of a Magistrate Grade One was not limited by the value of the land in dispute. There is nothing to suggest that the defendant in that suit, who is the appellant now, was protected by any immunities. Finally, in dismissing the suit, one of the considerations stated by the court in its judgment (exhibit D. Ex. 1) at page 9 was that if the plaintiff in that suit had any interest in the land, which he did not, he was limited by time. I therefore find that in the decision in Civil Suit No. 0029 of 2000 was by a court of competent jurisdiction.

ii. A final decision on the merits was made in that suit, i.e. after full contest or after affording fair opportunity to the parties to prove their case.

For *res judicata* to apply, the decision must be shown to have been final on the merits in that suit, i.e. after full contest or after affording fair opportunity to the parties to prove their respective cases. It will not be *res judicata* where the suit or plaint is struck out at the preliminary stage on such grounds as; limitation, *res judicata*, mis-joinder, insufficient court fees

on the plaintiff, jurisdiction or a like technical and preliminary ground such that the court does give a finding on the merits against defendants. Such decisions are not on an issue arising in the suit itself but are really on matters collateral to the suit which have to be decided before the suit itself can be proceeded with. The decision in situations of that nature does not lead to the  
5 determination of any issue in the suit. However, where there has been in fact a fair contest on a question in dispute between the parties and the Court has given a final decision on that question, the result will be different. When a question of fact or a question of law has been decided between two parties in one suit, or proceedings, and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or that no appeal lies  
10 from such a decision, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.

In the instant case, although limitation was one of the factors the court considered in dismissing Civil Suit No. 0029 of 2000, it was among several others after a full contest or after affording  
15 fair opportunity to the parties to prove their case. The decision was arrived at after the court had heard testimonies of five plaintiff's witnesses, three defence witnesses and visiting the *locus in quo*. There is nothing to indicate that an appeal was filed thereafter against the decision. I am therefore satisfied that the judgment delivered on 15th July 2014 in Civil Suit No. 0029 of 2000 was a final decision on the merits in that suit, i.e. that it was a decision made after full contest or  
20 after affording fair opportunity to the parties to prove their respective cases.

iii. The fresh suit concerns the same subject matter, i.e. the same matter is in controversy as was directly and substantially in issue in a former suit.

25 For *res judicata* to apply, the decision in the former suit must also be shown to have concerned a matter that is directly and substantially in issue in the subsequent suit. Where a former decision is relied on as *res judicata*, it and its contents should be strictly proved and mere ambiguous passages in the judgment should not be pressed in favour of the party claiming *res judicata*. A mere expression of opinion in a judgment or an *obiter dictum* will not have the effect of *res*  
30 *judicata*. The matter must have been directly and substantially in issue in a former suit and not merely incidental only to the substantial issue. A matter which was collaterally or incidentally in



issue for the purpose of deciding the matter which was directly in issue in the case, cannot be made the basis of a plea of *res judicata*.

The party relying on *res judicata* therefore has to prove that not only is the physical subject matter of the subsequent suit directly and substantially in issue in a former suit, but also that the issues decided concerning it in the former suit, were not merely collaterally or incidentally in issue for the purpose of deciding matters which were directly in issue in the case. The decision should be demonstrated to have made pronouncements on matters directly and substantially in issue as opposed to mere expression of opinion on incidental matters.

10

Both in her testimony and in her pleadings, the first respondent described the land in dispute in the instant case as not being the one given to her late father Cirilo Odori by the elders of Palanyua and Lajopi clans under the chieftainship of Chief Lumara in 1936, located in Adjumani Central. Instead she said it was the one given to her late father in 1950 at Molokpoda village, Gbere Parish, Adjumani Town Council on which he established an agricultural show ground and whose total acreage is approximately 35.095 acres. She testified that her late father used part of that land as a public agricultural show ground for demonstration on how to use ox-ploughs, for cattle vaccination drives and the other for grazing his livestock together with the appellant.

20 In the judgment (exhibit D. Ex. 1) at pages 1- 7, the court described the location of the land that was the subject matter of Civil Suit No. 0029 of 2000 as follows;

....land holding at Molukpwoda village, Adjumani District.....He further said that he was the one who authorised the building of the Youth Centre in 1999 on the land.....PW1 told court that Icca settled on the land on the part where the Youth Centre is built. PW3 told court that Icca settled on the land in dispute and that is where he was buried. He later shiftly (sic) changed his statement that Icca was buried near the land in dispute and not within the land in dispute, he further said Icca was cultivating the land before the agricultural show. DW1 told the court that he came to the land in 1944 and by then the land was vacant, and it was him who was cultivating this land. That Icca first settled near River Minia then around 1942 came and settled near the Youth Centre is built, on land different from the one in dispute and that if the Court went to the locus it would find no grave.

25

30

When the court visited the *locus in quo*, the part where Icca settled is behind the Youth Centre and it is completely outside the land in dispute. From the above evidence of both the plaintiff and of the defendant it is clear that Icca never settled on the land in dispute. There is also no evidence to show that Icca ever cultivated this land after 1944. Indeed when the court visited the locus no grave of Icca was found on the land in dispute.

The defendant utilised this land since 1944 and Icca never took any action against [the] defendant up to the time of his death. This shows that he recognised the land as his. His part is near the Youth Centre where the Court found his former house and not within the land in dispute.

The land which was alleged to have been given to Odori for the agricultural show is not the land in dispute as per the evidence of PW1, the land in dispute is where Cirilo Odori and Vura used to graze cattle, and Vura is on record to have said he found the land vacant.....therefore it is clear that Elia started claiming ownership at a much later stage when the defendant had long been utilising the land.....From the evidence of both the plaintiff's witnesses and that of the defendant, there is no doubt that Vura has been on the land from 1944 up to 1998. He even built one hut on the land for his daughter. He was grazing and cultivating on the land, for 52 years, up to 1998 and his stay on the land was never challenged by either Icca or Elia Drani in any court of law. This shows to me that Vura has successfully established himself as customary owner of the land in dispute

It emerges from comparison of the subject matter in the two suits that they both relate to land situated in Molukpwoda village, Adjumani District near the Youth Centre. However, in both suits, a distinction is drawn between land where Cirilo Odori and Vura used to graze cattle (as so described in Civil Suit No. 0029 of 2013); on which the appellant used to graze cattle, cultivate crops and on which he built one hut for his daughters (as so described in Civil Suit No. 0029 of 2000) from that part which used to host the agricultural show (as described in both suits). The dispute in Civil Suit No. 0029 of 2000 (the former suit) was in respect of the former (the land where Cirilo Odori and Vura used to graze cattle and which the appellant subsequently occupied) while the dispute in the latter suit, Civil Suit No. 0029 of 2013 was in respect of the latter (the part where Cirilo Odori used to host the agricultural show / conduct demonstrations on how to use ox-ploughs and for cattle vaccination drives).

The history of user of the two parts as canvassed in both suits indicates that although the land was given to Cirilo Odori as one moiety by Leonardo Icca the father of Eria Drani and Agwe Donato together with other elders of the Palanyua and Lajopi clans (the appellant claimed though to have found it vacant), over the years there developed a distinctive use that practically sub-  
5 divided the land into two parts; one part was jointly used by the appellant together with Cirilo Odori as land for grazing and cultivation while the other part was used by Cirilo Odori alone for agricultural extension work. Over the years, the appellant took over unilateral occupancy and user of the former while the latter remained vacant. The court below found in Civil Suit No. 0029 of 2000 that due to the inaction of the plaintiff in that suit, the appellant had acquired  
10 customary ownership by adverse possession in respect of the land over which he had actual physical possession (on which he and Cirilo Odori formerly grazed cattle and engaged in cultivation). This distinction is clear in the judgment of the court in Civil Suit No. 0029 of 2000 where it held "the land which was alleged to have been given to Odori for the agricultural show is not the land in dispute as per the evidence of PW1, the land in dispute is where Cirilo Odori  
15 and Vura used to graze cattle, and Vura is on record to have said he found the land vacant."

It is clear from the judgment in the former suit, Civil Suit No. 0029 of 2000 (exhibit D. Ex. 1), that one of the issues that had to be decided by court was "whether the defendant (the appellant in the instant appeal) has any interest recognised by law in the suit land." The suit land in that  
20 suit was, according to the appellant, was vacant at the time he occupied it in 1944 while according to the plaintiff in that suit Agwe Donato, it was part of the land given by his father Leonardo Icca to Cirilo Odori in 1936 for an agricultural show (see page 5 of the record of proceedings in exhibit D. Ex. 1). The implication is that in the resultant decree, the court did not only stop at dismissing the suit but also addressed the question of title to the land in dispute. A  
25 specific issue was framed arising directly and substantially on the pleadings. It was a specific issue framed with regard to the question of the appellant's ownership and a finding was given on the basis of ownership, whereupon the suit was dismissed accordingly. The pronouncement of the court was not a mere expression of opinion but a finding which operated to support the ultimate decision. In the result the finding regarding the appellant's ownership of what turned out  
30 in the subsequent suit to be the land on which he and Cirilo Odori formerly grazed cattle and

engaged in cultivation, was on a matter that was directly and substantially in issue which was thus by its character incorporated in the decree of that court.

5 This court is mindful of the fact that a party cannot avoid the bar of *res judicata* by merely adding or splitting causes of action in a subsequent suit and thereby taking such suit out of the jurisdiction of the Court which had tried the previous suit and also that if a portion of the claim in the subsequent suit was finally decided by a competent Court in a previous suit, the subsequent suit would be barred by *res judicata* to the extent of such portion, particularly when it was severable. The phrase "directly and substantially in issue" as used in section 7 of *The Civil*  
10 *Procedure Act* means directly and substantially in question, which would include everything necessarily involved. It includes issues as well as subject matter that ought to have been made a basis of claim or defence with respect to the suit even when it was not. In deciding whether any matter is *res judicata*, the question is, what is necessarily involved in the actual judgment of the Court in the earlier suit, not what relief was granted by the decree, because it is the matter  
15 decided (expressly or by necessary implication) that becomes *res judicata*. I have nevertheless failed to perceive how in a suit for that part of the land where the appellant was in effective physical adverse possession, another part that was vacant and claimed by a different person, Cirilo Odori, who was not a party to the suit, ought to have been made a basis of claim or defence of either party with respect to that suit. I have not found an express finding to that effect  
20 in the judgment delivered in Civil Suit No. 0029 of 2000 and neither have I found that the decision in respect of that one part was by necessary implication a decision on the other.

The evidence on record in both suits established that distinctive user of the land over the years, (approximately five decades), practically sub-divided it into two parts with the appellant  
25 acquiring adverse possession over one part and not the other. Without the court in Civil Suit No. 0029 of 2000 having explicitly decided that the appellant was in actual adverse physical possession of land on which Cirilo Odori used to host the agricultural show / conduct demonstrations on how to use ox-ploughs and for cattle vaccination drives, and since it has not been demonstrated that a decision in Civil Suit No. 0029 of 2013 would practically re-open the  
30 actual decree in the previous suit, I am unable to hold that the subject matter of the subsequent suit was directly and substantially in issue in the former suit. I find therefore, that the land where

Cirilo Odori used to host the agricultural show / conduct demonstrations on how to use ox-ploughs and for cattle vaccination drives, over which the appellant was not in adverse possession and which was the subject matter of the dispute in the subsequent Civil Suit No. 0029 of 2013, was neither directly nor substantially in issue in the former Civil Suit No. 0029 of 2000.

5

- iv. Between the same parties or their privies, i.e. between the same parties, or between parties under whom they or any of them claim, or parties who claim through each other, litigating under the same title.

10 A decision that is not inter parties cannot operate as *res judicata* in a subsequent suit. The general principles of *res judicata* require that the earlier decision should have been between the same parties, their successors in interest or their privies.

What constitutes a party as a privy to another was considered in *Lotta v. Tanaki and others*  
15 [2003] 2 EA 556. In that case, the second respondent in the matter before court had filed suit against the mother and sister of the appellant, for possession of land. The court found in favour of the second respondent and ordered the appellant's mother and sister to vacate the suit land. The appellant subsequently commenced proceedings against the second respondent and two others, claiming ownership of the land. He averred in his plaint that the land had been donated to  
20 him by his mother, and that the respondents had since 1986 trespassed on the land. The respondents raised the preliminary objection of, inter alia, *res judicata*. The objection was upheld by the trial court and the High Court on appeal. On further appeal to the Court of Appeal, it was contended that the appellant was not claiming through his mother and therefore the suit was not *res judicata*. The Court of Appeal held that a person does not have to be formerly enjoined in a  
25 suit, but will be deemed to claim under the person litigating if he has a common interest in the subject matter of the suit. The suit property was at one time in the occupation of the appellant's mother and sister, giving all three a common interest therein. Since the appellant's mother and sister had sued on the same subject matter, the appellant could not be dissociated from that litigation but was deemed to claim under.

30

It therefore follows that the rights claimed by the litigants in the previous suit should be identical to the ones claimed in the subsequent suit. The earlier decision does not bind the parties to the subsequent suit when those parties are litigating with regard to an entirely different right. In order to succeed on a plea of *res judicata*, the appellant in the instant case therefore had to prove not only that the subject matter in Civil Suit No. 0029 of 2013 was directly and substantially in issue in Civil Suit No. 0029 of 2000, but also that the latter suit was between the same parties or between parties under whom they or any of them claim, by proving the existence of a common interest in the subject matter of dispute between them.

Having examined the record of proceedings and judgment in Civil Suit No. 0029 of 2000, I find that the plaintiff in that suit, Agwe Donato as administrator of the estate of his late brother Eria Drani, claimed the land in dispute in that suit as forming part of the estate of his late father, Leonardo Icca; while in Civil Suit No. 0029 of 2013, the first respondent's claim was premised on the averment that the land belonged to his late father Cirilo Odori. Whereas Agwe Donato the plaintiff in Civil Suit No. 0029 of 2000 testified that it is his father Leonardo Icca who gave land to Cirilo Odori, the implication is that by that gift the land ceased to form part of the estate of his father Leonardo Icca and became part of the estate of the late Cirilo Odori. Agwe Donato therefore did not sue as a legal representative of Cirilo Odori. A person claiming title in himself independently of the deceased cannot be a legal representative of that estate. As a person whose name the court entered on the record in the place of his deceased brother he sufficiently represented the estate of the deceased Eria Drani for the purposes of the suit and in the absence of any fraud or collusion the decree passed in Civil Suit No. 0029 of 2000 binds the estate of Eria Drani and by extension that of Leonardo Icca on whose behalf he claimed.

It is trite that in order to constitute one as a legal representative, it is not necessary that he or she should have a beneficial interest in the estate. Nevertheless, it must be shown either that the parties to the subsequent proceedings legally represent the parties to the first proceeding or that they are their privies in estate or interest. The party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which the facts which the evidence states were relevant. Although the first respondent and the plaintiff in Civil Suit No. 0029 of 2000 traced the land back to more or less a

common owner, no privity of estate or interest was established between Agwe Donato and Cirilo Odori such as would constitute the legal representative of one to legally represent the legal representative of the other. the two estates were distinct and so where their claims over the land.

- 5 Beside the requirement to prove that the parties in the subsequent suit are privies to a party in the former suit, there is the additional requirement that the parties must have been litigating under the same title in the former suit.

The meaning of “litigating under the same title” was considered in the case of *Saleh Bin Kombo Bin Faki v. Administrator-General, Zanzibar [1957] EA 191*. In that case, the plaintiff sued the Administrator General as administrator of the estate of a deceased broker named Kassamali Alibhai, for Shs. 6,200/-, alleging that this sum was paid by the plaintiff to the deceased towards the purchase price of certain shambas which the deceased as broker sold to the plaintiff by public auction in January, 1954, on the instructions of the Administrator General as administrator of the estate of the late Hassanbhai Dadabhai. The plaintiff claimed that he had not been credited with that payment as being made towards the purchase price of the shambas out of Hassanbhai Dadabhai’s estate. In support of his contention the plaintiff produced four receipts for sums totalling Shs. 6,200/= made out by the deceased. The defendant contended that in a case in the previous year the court had held that these four receipts were not proved to relate to the present plaintiff’s purchase of the deceased Hassanbhai Dadabhai’s shamba property through the broker Kassamali Alibhai and that the issue was therefore *res judicata*. In that case the defendant in his capacity as administrator of the late Hassanbhai Dadabhai was the plaintiff and the plaintiff was the defendant. It was held that the defendant’s contention as to *res judicata* must fail as although in each of the two cases the (plaintiff as) Administrator General was a party, he was not in both cases “litigating under the same title”: in the former case he sued as administrator of the estate of the late Hassanbhai Dadabhai and in the latter case he had been sued as administrator of the late Kassamali Alibhai.

Now in that case, where the Administrator General was plaintiff and the present plaintiff was defendant, the question whether these four receipts now produced as exhibit A related to the present plaintiff’s purchase, through the broker Kassamali, of the shamba property of the estate of Hassanbhai Dadabhai, was certainly the principal issue in the case, and this court decided that the present plaintiff had failed

to prove that the four receipts related to that sale. At first sight, then, the matter might appear to be *res judicata*. The defendant's contention must, however, fail on one point, namely that although in each of the two cases the Administrator General was a party, he was not in both cases "litigating under the same title" for the purpose of s. 6 of the Civil Procedure Decree, which deals with *res judicata*. For in the former case he sued as administrator of the estate of the clove shamba owner Hasanbhai Dadabhai, whereas in the present case he is sued as administrator of the broker Kassamali Alibhai. Mulla, in his Commentary on the Indian Civil Procedure Code, (9<sup>th</sup> Edn.) at p. 62 makes it clear, citing Indian decisions in support of his views, that the expression "the same title" in s. 11 of the Indian Code (which is reproduced in s. 6 of the Zanzibar Decree) means "the same capacity", that is to say the same representative capacity. The Administrator General having been a party in a different representative capacity in the two cases, the defence of *res judicata* must fail, notwithstanding that the matter is indeed *res judicata* in every other respect.

In the instant case, whereas in Civil Suit No. 0029 of 2000 Agwe Donato litigated as a legal representative of the estate of Eria Drani and by extension that of Leonardo Icca over land where Cirilo Odori and the appellant used to graze cattle, but the appellant claimed to have found vacant, in Civil Suit No. 0029 of 2013 the first respondent litigated as the legal representative of the estate of Cirilo Odori over land alleged to have been given to Cirilo Odori for the agricultural show, in respect of which the appellant in his defence admitted sharing a common boundary with the late Cirilo Odori but denied having encroached on the land.

It was argued by counsel for the appellant that because a one Lenga Zakeyo, a brother to the first respondent was one of the witnesses in Civil Suit No. 0029 of 2000 who testified supporting the claim of Agwe Donato to be the owner of the suit land, and Agwe Donato was also listed as one of the witnesses for the first respondent in Civil Suit No. 0029 of 2013, then Vura Martin was implicitly defending rights in the same land against the claim by Cirilo Odori, the first respondent's father. This argument cannot hold in light of my finding that the subject matter in the two suits is not the same and that the estate of Eria Drani and by extension that of Leonardo Icca is different from that of Cirilo Odori. Although the defendant in the two suits is the same, and in both suits the issues related to ownership of land, the subject matter was different and the parties were litigating under different titles. I therefore find that in filing Civil Suit No. 0029 of 2013, the first respondent was neither a successor in interest nor privy to that of Agwe Donato in Civil Suit No. 0029 of 2000 or her representative in interest. In the final conclusion, Civil Suit



No. 0029 of 2013 was not *res judicata* and had the court below properly directed itself, it would have come to that conclusion. the second ground of appeal fails.

5 Grounds one, three and four are best handled jointly since they all relate to the trial court's failure to properly evaluate the evidence before it. This court has already observed that the trial court abdicated its role as adjudicator when it turned mediator. Since the court did not apply the standard applicable to the determination of civil suits i.e. on the balance of probabilities / preponderance of evidence, it is the duty of this court, being a first appellate court, to evaluate that evidence itself.

10

In this regard, At the trial, the burden of proof lay with the first respondent. To decide in favour of the first respondent, the court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the appellant such that the choice between his version and that of the appellant would be a matter of  
15 mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the appellant, might hold that the more probable conclusion was that for which the first respondent contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*).

20

The first respondent's traced ownership of the land to 1952, when it was given to her late father Cirilo Odori for use as a public agricultural show ground for demonstration on how to use ox-ploughs, for cattle vaccination drives and partly for grazing his livestock. The appellant only planted teak trees on two acres of it following Cirilo Odori's death in the year 2005, claiming that  
25 he was doing so for the better protection of his late brother's interest in the land from encroachers. She was supported in this by P.W.2 Adua Patrick and P.W.3 Dramere Augustus Ariyuku whereby P.W.2 also testified that the appellant lived on land across the Openzizi Road and had never undertaken any activities on that land during the lifetime of the first respondent's father and only did so after his death by planting teak trees on the two acres contested in the  
30 counterclaim. P.W.4 Idri Federico, the person who the sketch map drawn by court at the locus in quo indicates is the most immediate neighbour of the two cares in dispute in the counterclaim,

testified that it was the first respondent's father who in 1964 gave him the land where he now lives. At that time, it was the first respondent's father who occupied the land now in dispute by grazing cattle on it. The appellant had land on the side across the road to Pavuranga village, separate from that owned by the first respondent's father. The first respondent's father, with the  
5 assistance of the appellant, also used to undertake demonstrations on using ox-ploughs on the land now in dispute. The appellant never undertook any activities of his own on the disputed land and it is when the appellant stopped the first respondent from utilising the land that the suit was filed.

10 In his defence, the appellant stated that he had utilised the land in dispute since 1947 having obtained it freely as vacant land. He at the same time said it was at that time being used by the Odronopi Clan for grazing which clan later migrated to the banks of river Nile and that the land never belonged to the Palanyua clan. He used to grow a variety of food crops and cereals on that land. Two of his wives had their homesteads on the disputed land. Although admitting that  
15 occasionally agricultural demonstrations would be undertaken on the land in dispute, he refuted the claim that they were being directed by the first respondent's father the late Cirilo Odori. His version was supported by D.W.3 Million Bathlemio testified that The late Cirilo Odori never undertook any activity on the disputed land. The appellant had planted teak trees on the land around the year 2004 - 2005 which a priest later forcefully cut down prompting the appellant to  
20 report the matter to the police. The trees had been planted on the area which had in the past been given to Dominica with the intention of preventing encroachers from taking over the land. D.W.2 Kareo Juliet testified however that when her mother Dominica died, she was buried on land belonging to the first respondent's father Cirilo Odori which she all along thought belonged to the appellant. D.W.3 too further testified that during her childhood, she used to see livestock  
25 being vaccinated and sold from that land. D.W.5 Akutinatali Dramundru a son of the appellant testified that since his childhood it is the appellant who has been utilising the land in dispute. D.W.4 Drasi Ben testified that he had between 1976 to 1987 used the land in dispute on temporary terms with the permission of the appellant.

30 This court has juxtaposed the testimony of the two parties as summarised above with the observations of the trial court made at the *locus in quo*. The two acre area reflected on the sketch

map drawn by the court below on 19th October 2015, which is available as part the original trial record, shows that between the land occupied by the appellant, which is to the North West of the Youth Centre, and the land that now is in dispute, is the Openzizi Road. The appellant occupies land that is to one side of Openzizi Road while the land in dispute is on the opposite side across  
5 that road. Save for the area that was previously covered by teak trees, there are no visible activities of the appellant within that area of land in dispute, lying between the Youth Centre and Openzizi Road. The two homesteads of his wives which the appellant claimed existed on the disputed land are not reflected on the sketch map at all. To the contrary, the residences of P.W.4 Idri Federico and the first respondent's brother Agwe Donato are indicated as the closest  
10 developments to the two area in dispute in the counterclaim.

It is trite that uninterrupted and uncontested possession of land for over twelve years, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see *Perry v. Clissold* [1907] AC 73, at 79). In respect of  
15 unregistered land, the adverse possessor acquires ownership when the right of action to terminate the adverse possession expires, under the concept of “extinctive prescription” reflected in sections 5 and 16 of *The Limitation Act*. In such cases, adverse possession has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v. Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*). As a rule, limitation not only cuts off the owner’s right  
20 to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto.

In the instant case, in light of the observations of the court made at the *locus in quo*, the appellant failed to establish any possessory activities in respect of the land that is the subject of the  
25 counterclaim, which by his own admission and that of his witnesses were planted only in 2004 - 2005. The first respondent's claim that the appellant planted these trees under the guise of protecting the land of her late father, who happens to have been the brother of the appellant then becomes more persuasive and credible. Whereas the appellant himself and the defence witnesses corroborated aspects of the first respondent's version that the land in dispute was used for  
30 livestock vaccination, sale and occasionally for agricultural demonstrations, I have not found similar corroboration of the appellant's version by any of the first respondent's witnesses. The

appellant's refutation of the fact that these are activities which were undertaken on this land by Cirilo Odori are in the circumstances a bare denial.

5 Having subjected the evidence as a whole to exhaustive scrutiny, I find that although the trial magistrate failed in his duty, had he properly directed himself, he would have come to a similar conclusion. I find that the first respondent adduced evidence which a reasonable man, after comparing it with that adduced by the appellant, might hold that the more probable conclusion was that for which the first respondent contended.

10 In the final result, I find merit in the appeal only to the extent that the trial magistrate failed to make proper findings on the issues that were placed before him for final determination. For that reason the judgment and decree of the court below are hereby set aside. In their place, I enter judgment in favour of the first respondent in accordance with the prayers stated in the plaint filed in the court below. The appellant's counterclaim is dismissed. The costs of the appeal, of the suit  
15 and of the counterclaim are awarded to the respondents.

Dated at Arua this 27<sup>th</sup> day of July 2017.

.....

Stephen Mubiru  
Judge  
27<sup>th</sup> July 2017

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