

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**CIVIL APPEAL No. 0053 OF 2017**

**(Arising from Pader Grade One Magistrate's Court Civil Suit No. 011 of 2015)**

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1. **ODONGO KRESENYISIO LANINA** } ..... **APPELLANTS**  
2. **OKELLO C. P. AJWAKA** }

**VERSUS**

10 **OJERA CIPIRIANO** ..... **RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

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The respondent sued the appellants jointly and severally for a declaration that he is the rightful customary owner of land measuring approximately 100 acres located at, Omunyu village, Golo Parish, Latanya sub-county, Pader District, an order of recovery of that land, general damages for trespass to land, a permanent injunction, interest and costs. His case was that the land was bequeathed to him under the will of his late grandfather. He contended that he acquired the land on 28<sup>th</sup> April, 1994 by inheritance from his late grandfather, Odwar Kasiano. He subsequently secured a grant of letters of administration to the estate of the deceased during the year 2015. He enjoyed physical possession of the land until the year 2012 when the first respondent migrated from Dure Wang Lakila village, Ngekidi sub-county, Aruu County in Pader District to trespass onto the land. He was joined by the second appellant in the year 2013. Both of them have since taken over approximately twenty acres of the land and have wrongfully allowed other people to cultivate the land.

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In their joint written statement of defence, the respondents refuted that claim and contended instead that the land in dispute does not form part of the estate of the late Odwar Kasiano. They own approximately 150 acres of land jointly and severally having inherited it from their great grandfathers; Okello Lobule, Onyimu, and Odwar Kassiano. The appellants have always been living on that land save that period during which the first appellant was abducted by the LRA rebels but he later returned onto the land.

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Testifying as P.W.1, the respondent Ojara Cypriano stated that he was born on that land which belonged to the late Odwar Kasiano who bequeathed the land to him in his testamentary document and upon his death in 1994, the respondent took over possession of the land. In the year 2014, he applied for a grant of letters of administration to the estate of the deceased. It is during the year 2011 that the first appellant trespassed onto the land when he came and settled thereon with his family. He thereafter was joined by the second appellant and together have since permitted several other people to grow crops on the land.

P.W.2 Ojela Srafina testified that the land in dispute originally belonged to Odwar Kasiano who on his death was not survived by any child. It is the responded who cared for him before his death. Three days following his burial, a document was read bequeathing the land to the respondent. Later the first appellant emerged claiming to be the son of Odwar Kasiano, hence the dispute. The first appellant had never lived on that land before. P.W.3 Odoc Jolly, the L.C.I Chairman of the village testified that he has since the year 1992 seen the respondent in physical possession of the land in dispute. Before his death, Odwar Kasiano used to live at the home of the respondent until his death in 1994. The appellants came onto the land in 2013 hence the dispute. The second appellant used to live one and a half miles away from the land in dispute.

The first appellant Odongo Lamina testified as D.W.1 and stated that he is the son of Odwar Kasiano while the respondent is a grandson of the said deceased who died intestate. Upon the death of his said father, ownership of the land passed to him. He was abducted by the LRA rebels in 1996 but managed to escape and return during the year 2000. The respondent took advantage of the period of his absence to take possession of the land. Although he was raised in Dure, his father lived on the land in dispute and he used to spend some of the school holidays with him. Although he has not obtained a grant of letters of administration, he inherited the land from his said late father in accordance with Acholi custom. He is the only son of his late father who gave him the land as a gift *inter vivos*.

The second appellant Kwoyelo C. P. Okello, testified as D.W.2 and stated that the first appellant is his paternal uncle and the respondent his cousin. The land, measuring approximately 150 acres, belonged to his grandfather Odwar Kasiano. The land is used communally and has never

been partitioned. The respondent is attempting to stop them from using the land. D.W.3 Ojara Sylverino testified that the land belonged to Odwar Kasiano, the biological father of the first appellant, and he died intestate. Similarly, D.W.4 Oryema Cypriano testified that the land belonged to Odwar Kasiano, the biological father of the first appellant, and when he died, the first appellant took over the land.

The trial Magistrate visited the locus in quo and prepared a sketch map of the land in dispute. He also recorded evidence from two additional witnesses; (i) Ongom Justine who stated that the parties to the suit belong to the same lineage. The respondent cared for the late Odwar Kasiano in his old age until his death. Upon his demise, the respondent took over possession of the land. (ii) Kibwota James Olobo who stated that the land belonged to the late Odwar Kassiano and during his advanced age gave the land to the respondent. It is the respondent who took charge of his burial when he eventually died.

In his judgment, the trial Magistrate decided that the testamentary document of the deceased was not attested in accordance with the requirements of the law. It could not form the basis for a valid claim of ownership by inheritance. The claimed of grant *inter vivos* to the first appellant was not supported by any evidence. Neither was the alternative claim of inheritance by Acholi custom proved. Since both parties are related to the late Odwar Kasiano, the respondent being a grandson and the first appellant being a son, both parties are rightful owners of the land and each is entitled to benefit from the land. The evidence did not establish the actual size of the land in dispute. Since both parties have legal rights to the land, none of them is a trespasser on the land. Both parties are therefore lawful owners of the land; the respondent is to own the Northern part while the respondents are to own the Southern part. The L.C. 1 and II executives are to oversee the sub-division in the presence of the neighbours. No eviction order was issued and no order as to costs was made.

The appellants were dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he held that the respondent was a grandson to the late Odwar Kasiano (the first appellant's father) and was entitled as a beneficiary.
- 5 2. The learned trial Magistrate erred in law and fact when he held that the respondent is entitled to the suit land whereas this is not the respondent's father's land or his grandfather's land.
3. The learned trial Magistrate erred in law and fact when he declared both parties lawful owners of the suit land.
- 10 4. The learned trial Magistrate erred in law and fact when he held that the parties were entitled to an equal share to the suit land and that the same be sub-divided equally.
5. The learned trial Magistrate erred in law and fact when he failed to conduct locus in accordance with the law and allowed witnesses to testify at locus when they were not witnesses in court.
- 15 6. The learned trial Magistrate misdirected and contradicted himself on the custom of inheritance by a son under the Acholi (African) custom.

In his written submissions, counsel for the appellants M/s. Komakech-Kilama & Co. Advocates argued grounds 1 and 2 together stating that the respondent's evidence was to the effect that it is his father Olobo who brought the late Odwar Kasiano from Wili-Wili and thereafter the respondent began taking care of him and his cattle, as his father. The respondent only took care of the late Odwar Kasiano but was not his grandson. Since he died intestate, the estate devolves to his sons and grandsons who do not include the respondent. With regard to Grounds 3 and 4, his argument was that when the court declared both parties to be owners of the land, the implication was that the respondent had failed to prove his case. The Court should instead have dismissed the suit. Lastly, with ground 5 his argument was that it was erroneous for the trial court to have recorded evidence at locus from persons who had not testified in court. If their evidence is disregarded, what remains of the evidence cannot support the decision. Ground 6; having dismissed the appellant's claim of inheritance under Acholi custom, the court contradicted itself when it found that the first appellant both parties could inherit the land by way of custom.

30 Counsel for the respondent did not file any written submissions.

It is the duty of this court as a first appellate court 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 (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). 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 or she 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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Ground five, in so far as it relates to the propriety of the proceedings at the *locus in quo*, will conveniently be considered first. Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*). It was therefore erroneous of the trial court while at the *locus in quo*, to have recorded the evidence of Ongom Justine and Kibwota James Olobo, both of whom had not testified in court.

That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the

evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

An appellate court will set aside a judgment of the court below, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the two additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those two witnesses. Ground 5 fails.

Grounds 1, 2 and 6 will now be considered concurrently in so far as they assail the viability of the respondent's claim based on parentage and inheritance. To take by inheritance is defined as “to take as heir on death of ancestor; to take by descent from ancestor; to take or receive, as right or title, by law from ancestor at his demise” (see *Black’s Law Dictionary, 8<sup>th</sup> edition, 2004*). Inheritance therefore denotes devolution of property under the law of descent and distribution. According to section 180 of *The Succession Act*, an administrator of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such.

Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after the death of the deceased. Although he pleaded that he had acquired the land under a will, the respondent instead placed reliance on a grant of letters of administration which was never submitted in evidence.

What the respondent submitted was a copy of a notice of an application for a grant of letters of administration to the estate of the late Odwar Kassiano. The fact that to-date no grant has ever been made in respect of the estate of the late Odwar Kassiano implies that the issue as to who among the near relatives of the deceased is entitled to the largest share in the estate has not been settled yet. The proper forum for an adjudication and confirmation of entitlement to share in an intestacy based on parentage, is the court to which an application for a grant is made. The documents relied upon by the respondent indicate that the application for grant of letters of administration was filed in the Pader Grade One Magistrate's court, under Probate and Administration Cause No. 51 of 2014. That court is the appropriate forum for adjudication of matters relating to who is a beneficiary of the estate of the deceased and is entitled to benefit under the intestacy, as part of the proceedings leading to the grant.

Moreover section 191 of *The Succession Act* provides that no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction. This provision applies to disputes involving distribution of an estate of a deceased person among persons claiming entitlement thereto, where the dispute is over who the beneficiaries are and their shares.

On the other hand, notwithstanding that in the case of *Law Advocacy for Women in Uganda v. Attorney General, Constitutional Petitions Nos. 13 of 2005 and 5 of 2006*, it was held that section 27 of *The Succession Act* is inconsistent with and contravenes Articles 21 (1) (2) (3) 31, 33 (6) of *The Constitution of the Republic of Uganda, 1995* and is thus null and void for being discriminatory in so far as it does not provide for equal treatment in the division of property of intestate of male and female, it showed the order of preference for near relatives of the deceased in determining the manner of doling out assets of a deceased person, and by implication ranking in priority for a grant of letters of administration, preference being given to the person entitled to the largest share in the estate. It provided for the following line of succession; surviving spouse, children, parents, brothers and sisters and their lineal descendants, grandparents and their lineal descendants, next of kin and if there is no next of kin, then *bona vacantia* to the state.

I have considered in the alternative the possibility of the respondent's acquisition having been consistent with the customs of the area as adverted to in the judgment of the court below. The process of devolution is regulated by the relevant customary law of descent and distribution. The purpose of inheritance is that the property of the deceased intestate should be left to the use and benefit of his or her closest relatives or those who were dependent upon him or her during his or her lifetime. By virtue of the procedural requirements embedded in the concept of inheritance, it follows that an individual who claims property of a deceased person only by dint of social affiliation does not necessarily claim by inheritance unless and until it is proved that the devolution was in accordance with the relevant law of descent and distribution under custom or enactment.

The fact of devolution and administration of a deceased person's estate under a specific customary law requires evidence clarifying or defining what those rules are within the customary context. It comprises established patterns of behaviour that can be objectively verified within a particular social setting or community which is seen by the community itself as having a binding quality. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law" (see *Osborne's Concise Law Dictionary*, Ninth Edition (Sweet and Maxwell, 2001). "Customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws" (see *Black's Law Dictionary*, 8<sup>th</sup> edition, 2004).

Although section 56 (3) of the *Evidence Act* permits a court to take judicial notice as a fact, the existence of practices which are not subject to reasonable dispute because they are generally known within the trial court's territorial jurisdiction. Such judicial notice can be taken within the context of this appeal to the extent that land held under customary tenure may be acquired by customary inheritance, usually by close relatives of the deceased owner of such land. That is as far as judicial notice may go. Under section 46 of *The Evidence Act*, when the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or right of persons who would be likely to know of its existence if it existed, are relevant. Considering that the customary rules, formalities and rituals involved in general

inheritance of property and specifically to inheritance of land may vary from community to community, a person asserting that he or she inherited land in accordance with the applicable customary rules must prove it as a fact by evidence in the event that such rules are not documented.

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Where customary Law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinions adduced by the parties (*Ernest Kinyanjui Kimani v. Muira Gikanga [1965] EA 735*). The ascertainment of customary law requires that the court determines whether the alleged rule is indeed a law as defined by the community, as the source of living customary law is the community itself. It must then proceed to determine whether the specific customary rule satisfies the legal test to constitute enforceable customary law for as the gatekeepers of customary law, courts must ensure that the customary law relied on is not incompatible with the provisions of the constitution, any written law and is not repugnant to natural justice, equity and good conscience.

The onus of proving customary inheritance begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition of the property of the deceased in accordance with those rules. Descent and kinship mould inheritance practices. The inheritance practices determine the settling of the estate and how the estate should devolve. They determine the person with responsibility for distributing the estate, the persons entitled to a share and the proportions to which they are entitled. The trajectory of inheritance in any society is usually associated with the cultural interpretation of kin and is thus not a term that can be applied universally to any situation of property transmission without reference to structuring effects of kinship relationships. Inheritance is conditioned by how, culturally, people define to whom they consider themselves to be related and in what way.

The customary law under which the respondent acquired the land is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the respondent to adduce evidence of the customary law. It was not enough for

him to claim to have inherited the land. He had the onus of adducing evidence of the customary procedures, practices and rules by virtue of which he is recognised as the lawful proprietor of the land, or compliance with the legal process of acquisition of a grant of letters of administration. He did not prove either.

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It is contended in this appeal that the trial court erred when it held that the respondent was a grandson to the late Odwar Kasiano (the first appellant's father) and was entitled as a beneficiary. Further, that the trial court erred when it held that the respondent is entitled to the suit land whereas this is not the respondent's father's land or his grandfather's land. The two grounds in effect question the trial court's finding in relation to the respondent's parentage under the intestacy. A parent and child relationship is a legal relationship existing between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations. The parent and child relationship between a child and the natural father may be established by various methods, including a prior paternity adjudication, a birth certificate, or scientific testing.

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At common law, a man is presumed to be the father of a child if: (a) he and the mother of the child are married to each other and the child is born during the marriage; (b) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation; (c) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce or after a decree of separation; or (d) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is, or could be declared, invalid, he voluntarily asserted his paternity of the child, and there is no other presumptive father of the child, and: (i) the assertion is in a record filed with the Registrar of Births and Deaths; (ii) he agreed to be and is named as the child's father on the child's birth certificate; or (iii) he promised in a record to support the child as his own.

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A parent and child relationship may under some customs also be conferred upon a person by receiving decedent into another's home openly, providing support for him, and holding him or her out as his or her natural child. In such situations, equitable or virtual adoption is a judicial construct used to uphold claims by a child not formally adopted to benefit from his or her "adoptive parents" in the same manner as the parent's natural or legally adopted children. If the parent had held out the adopted child as his or her own throughout the child's life, even if there was no formal adoption, the child may be considered as an adopted child (see *Williams v. Dorrell*, 714 So.2d 574, 23 Fla. L. Weekly D1580 (Fla. 3d DCA 1998)). At common law, virtual adoption does not create a parent-child relationship. It is invoked when the adoptive parents die intestate in order to allow the supposed-to-have-been adopted child to take an intestate share. It is used to ensure fundamental fairness to a child who would otherwise suffer an injustice. This doctrine and the common law presumptions are intended to facilitate the flow of benefits from the father to the child.

These presumptions may be rebutted by genetic testing with results that identify another man as the father or that exclude the presumed father, where such a test would be in the best interests of the child to disestablish the parent-child relationship. A parent and child relationship cannot be conferred upon a person by receiving decedent into another's home openly, providing support for him, and holding him out as his natural child, if genetic testing has excluded him from being the decedent's natural father. It can also be rebutted with evidence to show that the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception.

Therefore, in order to prove a parent-child relationship, there should be evidence of a biological relationship such as an acceptable birth certificate if the birth was registered not too long after the child's birth, cogent evidence explaining the circumstances of birth or infancy such as medical records, school records, and religious records (such as certificate of baptism issued by a church) showing the names of the parents and the child, or a DNA test. In the court below, the respondent did not adduce any evidence to show that he was born to a descendant of Odwar Kasiano. There is no evidence to show that any of the common law presumptions of parentage would apply to his situation. There is no evidence to show either that he was decedent into

Odwar Kasiano's home openly, with the deceased providing support for him, and holding him out as his natural child, before his death. To the contrary, P.W.2 Ojela Sarafina testified that Odwar Kasiano was not survived by any child but it is the respondent who cared for him before his death. Neither a natural nor adoptive father and child relationship is present here. It was  
5 therefore an error when the trial magistrate found that the respondent is related to the late Odwar Kasiano as a grandson and that as such he was entitled to benefit from the land under intestacy. Accordingly, grounds 1, 2 and 6 of the appeal succeed.

Grounds 3 and 4 will be considered concurrently as well in so far as they seek to assail the  
10 finding of the trial court that the parties are joint owners of the land in dispute under custom. Proof of customary tenure at the least requires evidence of a practice that has attained such notoriety that court would be justified in taking judicial notice of it under section 56 (3) of *The Evidence Act* (see *Geoffrey Mugambi and two others v. David K. M'mugambi and three others, C.A. No. 153 of 1989 (K) (unreported)*). Otherwise, the specific applicable customary rule should  
15 be proved by evidence of persons who would be likely to know of its existence, if it exists, or by way of expert opinion adduced by the parties since under s. 43 of the *Evidence Act*, the court may receive such evidence when the court has to form an opinion as to the existence of any general custom or right, such opinions as to the existence of that custom or right, are relevant (see *Ernest Kinyanjui Kimani v. Muira Gikanga [1965] EA 735 at 789* ).

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The customary law under which the respondent acquired the land is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the respondent to adduce evidence of the customary law. He had the onus of adducing evidence of the customary procedures, practices and rules by virtue of which he is  
25 recognised as the lawful proprietor of the land. He did not. Finding that the respondent had not established his case but erroneously having found him to be related to the late Odwar Kasiano without evidence to support that finding, the trial magistrate misdirected himself further when he directed that both parties are rightful owners of the land and each is entitled to benefit from the land. He opined further that since both parties have legal rights to the land, none of them is a  
30 trespasser on the land. Both parties were therefore declared lawful owners of the land; the respondent to own the Northern part while the respondent was to own the Southern part. The

L.C. 1 and II executives were thus directed to oversee the sub-division in the presence of the neighbours.

5 In practical terms, the finding of the trial court is a "draw." In our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other. If a judicial officer finds it more likely than not that something did take place, then it is treated as having taken place. If he or she finds it more likely than not that it did not take place, then it is treated as not having taken place. A judicial officer is not allowed to sit on the fence. He or she has to find for one side or the other. Generally speaking in most cases a judicial officer is able to  
10 make up his or her mind where the truth lies without expressly needing to rely upon the burden of proof. However, in the occasional difficult case, sometimes the burden of proof will come to his or her rescue. "If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). When left in doubt, the party with the burden of  
15 showing that something took place will not have satisfied the court that it did. That being the case, the trial court erred when it in effect directed a sub-division of the land by creating a new boundary, in respect of which no evidence had been led at all. Consequently, grounds 3 and 4 of the appeal succeed.

20 In the final result, the appeal is allowed. The judgment of the court below is set aside and in its place one is entered dismissing the suit with costs. The costs of the appeal and of the court below are awarded to the appellants.

25 Dated at Gulu this 13<sup>th</sup> day of December, 2018

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Stephen Mubiru  
Judge,  
13<sup>th</sup> December, 2018.

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