THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 028 OF 2021

(ARISING FROM CIVIL SUIT NO. 023 OF 2018, CHIEF MAGISTRATES COURT OF NWOYA HOLDEN AT AMURU)

1. **ARIA PAUL**
2. **NYEKO GEOFFREY ..... APPELLANTS**

VERSUS

NYEKO LONZINO OMOYA ..... RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Introduction

This is a land appeal arising from the Judgment and Decree of the then Chief Magistrate of Nwoya Chief Magistrates Court. The court rendered the decision during the court sitting of 6th May, 2021 in Civil Suit No. 023 2018 at Amuru. The Appellants were Defendants. The suit involved a piece of land measuring approximately 350 acres, situate in Pogo Village, Pogo Okuture Parish, Pabbo Sub County, Amuru District. The Appellants are an uncle and a Nephew, respectively. In the suit against them, the Respondent sought a declaration that he is the lawful customary owner of

the suit land. He also sought for a permanent injunction, vacant possession, eviction order, general damages, interests, and costs of the suit. The Respondent contended he inherited the suit land from his father, a one Gabriel Omoya, who had also inherited it from a one Dire, grandfather of the Respondent. He averred that whereas he was born in Pawel Village in 1951, he grew up and lived on the suit land and produced all his five children from there, undisturbed. The Respondent asserted that, it was when the Lords Resistance Army (LRA) war erupted, that he temporarily left the suit land in 1995 and lived in Atiak IDP Camp. He claims to have returned to the suit land in 2010 and found when the Appellants had encroached on it. According to the Respondent, the Appellants destroyed property such as houses by burning, while laying claim to the suit land. The Respondent also averred that the Appellants evicted him from the suit land.

The Defence

In their joint Defence, the Appellants denied the claim. The first Appellant counterclaimed. He contended that he inherited the suit land from his late father, Alwak Bicencio who had also inherited it from Otyeka Lokodito, the grandfather of the first Appellant. The Appellants averred that, the Respondent's father was given two acres of the suit land in 1984 on temporary basis but vacated it in 1985 and settled in Auci Village, Atiak Sub County, Amuru District. The first Appellant further averred that the

Respondent's father was a Watchman guarding a Cooperative Society on the suit land at the time. Both Appellants denied that the Respondent ever occupied, cultivated, controlled, settled on, or grew up on the suit land.

Specific averments

In the counterclaim, the first Appellant averred that his grandfather migrated to the suit land in 1943 with his children (including the first Appellant's father). The grandfather found the land bushy and vacant. He cleared it and engaged in agriculture. The first Appellant was born on the suit land, grew up there and has lived there ever since. It was until the year 2009 when the dispute erupted. The Respondent forcefully cultivated one acre of the suit land on returning there in 2009 yet he had left the suit land in 1985. The Respondent was stopped from using the suit land and he obliged. In the year 2017, the Respondent went back to the suit land having been allowed by the cultural leaders of Pabbo Pogo. In his prayers, the first Appellant sought for a declaration of ownership; a permanent injunction; eviction order against the Respondent; general damages; and costs.

Decision

After court hearing, the learned Chief Magistrate visited the suit land. In its Judgment, the court found for the Respondent (Plaintiff then) and granted some reliefs. It ordered for vacant possession, issued a permanent

injunction against the Appellants, awarded general damages of shs. 20,000,000 for trespass and deprivation of land, and granted costs of the suit to the Respondent. The trial court dismissed the counterclaim and declared the Appellants trespassers and land grabbers. Court was, however, silent on the costs of the counterclaim. However a Decree was extracted by the Respondent in which it was purported that the counterclaim had been dismissed with costs, which is not explicit in the judgment. Aggrieved and dissatisfied, the Appellants lodged this appeal on 6th May, 2021.

Grounds of Appeal

There are four grounds of appeal, namely;

1. **The trial Magistrate erred in law and fact when he declared that the Respondent is the owner of the suit land hence arriving at a wrong decision.**

2. **The trial Magistrate erred in law and fact when he declared that the banana plantation and mature mango tree were planted by the plaintiff/ respondent hence arriving at an erroneous decision.**

3. **The trial Magistrate erred in law and fact when (sic) ignored that the Plaintiff departed from pleading hence arriving at erroneous decision.**

4. **The trial magistrate erred in law and fact when he failed to properly conduct locus in quo according to the law thus occasioning a miscarriage of justice.**

Prayers

The Appellants pray the appeal be allowed; the judgment and orders of the trial court be quashed and set aside; the Appellants be declared the rightful customary owners of the suit land; general damages be awarded to the Appellants; and costs of the Appeal and in the lower court go to the Appellants.

Representation

Learned counsel Mr. Owor David Abuga appeared for the Appellants. The first Appellant was present at the hearing while the second appellant was reportedly sick. The Respondent was represented by learned counsel Mr. Calvine Kilama. The Respondent was as well present in court. Both parties had earlier lodged written submissions which they sought to adopt. Court allowed them to adopt. Learned counsel orally clarified on a few aspects of the case. I have perused the submissions for which I am grateful. I will not reproduce them for brevity save where necessary. I have noted that a great deal of the arguments rested on aspects of evidence although no ground of appeal was framed around the evaluation of evidence.

Duty of the first appellate court

As a first appellate court, the parties are entitled to obtain from this court, the court's own decision on issues of fact and issues of law. However, in the case of conflicting evidence, Court has to make due allowance for the fact that Court has neither seen nor heard the witnesses testify. Court must, however, weigh conflicting evidence and draw its own inference and conclusions. See*:* ***Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002, (per Mulenga, JSC)***.

In the above case, the Supreme Court cited with approval, the statement in ***Coghlan Vs. Cumberland (1898)1 Ch. 704***, in which the Court of Appeal of England had put the matter lucidly, thus;

"Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the Judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it, if on full consideration, the court comes to the full conclusion that the Judgment is wrong...when

the question arises which witness is to be believed rather than another, and that question turns on the manner and demeanour, the court of appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from the manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witness whom the court has not seen."

In ***Pandya Vs. R [1957] EA 336,*** the passage in the ***Coghlan case*** (*supra*) was followed with approval. In ***Pandya,*** the then Court of Appeal for East Africa held that **'*the principles declared above are basic and applicable to all first appeals.*'**

See also: ***Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10 of 1997***; ***Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 8 of 1998*** which followed the same principles.

An appeal is by way of a retrial, and this court, as an appellate court is not bound to follow the trial court's findings of fact if it appears either that the trial court failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is

inconsistent with the evidence generally. See the case of ***Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968) E.A 123***; ***David Muhenda & 3 others Vs. Margaret Kamuje, Civil Appeal No. 9 of 1999 (SCU).***

This court may thus 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.

Preliminary matters

Before I tackle the grounds of appeal, I have, with respect, found all the grounds to be poorly drawn. First, the impugned decision was rendered by the then Chief Magistrate of Nwoya sitting in Amuru. Strangely, in the grounds of appeal nowhere is the learned Chief Magistrate referred to as such. On the contrary, learned counsel for the Appellants all through refers to the trial court as "the trial magistrate". The proper reference should have been "the learned Chief Magistrate" or the "learned trial Chief Magistrate". These are basic matters which every advocate ought to know.

I have also noted that all the grounds of appeal do not specify in what respect the trial court is alleged to have erred. This could perhaps explain why some of the grounds were not argued at all. No wonder, at the commencement of his address, learned counsel for the Respondent raised

a preliminary objection regarding the first ground of appeal. He contended that, the ground offends the provision of Order 43 rule 1(2) of the Civil Procedure Rules (CPR).

Ground one is couched, thus:

"***The trial Magistrate erred in law and fact when he declared that the Respondent is the owner of the suit land hence arriving at a wrong decision."***

Learned counsel submitted that the ground purports to attack the trial court's order of declaration of ownership of the suit land in favour of the Respondent. Learned counsel contended that the ground falls short of pointing out the alleged specific error committed by the trial court. He concluded that the ground offends the provision of the CPR which guides on what should be contained in a memorandum of appeal. Learned counsel cited case law, to buttress his objection.

In his response, Mr. Owor David Abuga contended that all the grounds of Appeal were drawn in compliance with the rules of this court. He asked court to over-rule the objection.

Resolution of the Respondent's preliminary objection

Order 43 rule 1 (2) of the CPR provides:

"The memorandum of appeal shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively."

The provision of the CPR and its some-what equivalent which apply in the Court of Appeal and the Supreme Court, have been interpreted in several decided cases. It has been held that a ground of appeal should be concise, setting forth, under distinct heads, the grounds of objection to the decree appealed from. A ground of appeal should not be narrative or argumentative in nature. It must challenge a holding, a *ratio decidendi*, and must specify points which were wrongly decided. Courts of law frown upon badly drafted grounds of appeal. A properly framed ground of appeal enables the opposite party to get reasonable and adequate notice of the complaints against the decision which is the subject of the appeal. Parties and court may not easily comprehend a vague ground of appeal. A ground of appeal should, therefore, be well drafted, to enable the appellate court understand the alleged errors in the decision of the lower court which it is being asked to set aside. Clarity of a ground of appeal frees the appellate

court from any confusion which flow from a vague or poorly drawn ground of appeal. A ground of appeal must be substantial and valid.

See: ***Sietco Vs. Noble Builders (U) Ltd, Civil Appeal No. 31 of 1995 (SCU); Katumba Byaruhanga Vs. Edward Kyewalabye Musoke, CACA No. 2 of 1998 (Court of Appeal); National Insurance Corporation Vs. Pelican Air Services, Civil Appeal No. 15 of 2003 (Court of Appeal); Lagedo Christine & 3 others Vs. Fabiano Obwoya, HC Civil Appeal No. 82 of 2019; Dr. Baveewo Steven Vs. Kaggwa Anthony, HC Civil Appeal No. 001 of 2020;***

Applying the principles in these authorities, I find the objection well founded. Whereas the objection touches on only one ground of appeal, I find that all the grounds of appeal flout the rules of this court. Specifically the grounds do not specify in what respects the trial court is alleged to have erred. However, while courts have struck out offending grounds of appeal, in some cases courts have excused, depending on the facts and circumstances of each case. It appears it is discretionary whether or not court should strike out an offending ground of appeal. This view is supported by the observations made in the Supreme Court case of ***Beatrice Kobusingye Vs. Fiona Nyakana & George Nyakana, Civil Appeal No. 5 of 2004***, where the court (lead judgment of Tsekooko, JSC (RIP)) while quoting rule 65 (2) (now 62 (2)) of the Judicature (Supreme

Court Rules) Directions, S.I 13-11, observed at page 17 thus ***"Grounds or any of them <u>may ordinarily</u> be rejected if all or any of them offend the rule."*** **(Underlining is mine.)**

A badly drawn ground of appeal may only be ignored in the interest of doing substantive justice as may be dictated by the circumstances of the given case. This is in light of article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995, enjoins courts to do substantive justice in given circumstances but of course subject to law. In the case of ***<u>Utex Industries Ltd Vs. Attorney General, Civil Application No. 52 of 1995, the Supreme Court of Uganda (Oder, Tsekooko, and Karokora, JSSC)</u>*** expounded the matter, thus:

"Regarding Article 126 (2) (e) and the Mabosi case (Stephen Mabosi Vs. Uganda Revenue Authority, Supreme Court Civil Application No. 16 of 1995) we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting Article 126 (2) (e). Paragraph (e) contains a caution against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaids of justice-meaning that they should be applied with due regard to the circumstances of each case..."

In **Horizon Coaches Vs. Edward Rurangaranga & Mbarara Municipal Council, SCCA No. 18/2009, Katureebe, JSC,** as he then was, had these to say:

"Article 126 (2) (e) of the Constitution enjoins Courts to do substantive justice without undue regard to technicalities. This does not mean that courts should not have regard to technicalities. But where the effect of adherence to technicalities may have effect of denying a party substantive justice, the Court should endeavor to invoke that provision of the Constitution."

The above views were shared by the Supreme Court in the case of ***Mulindwa George William Vs. Kisubika Joseph, Civil Appeal No. 12 of 2014, p.12.***

In the present case, all the offending grounds of appeal are liable to be struck out. However, I am of the view that, I should excuse the defects given the nature of the dispute, being land. It is the general view of courts that land disputes as far as possible ought to be decided on merit. In this case, striking out the grounds of appeal would cause a grave miscarriage of justice to the Appellants who would suffer due to the fault of their counsel who did not do a good job in drafting the grounds of appeal. It is thus fair in the circumstances that the appeal be heard on merit so that the parties can receive from this court, court's views on the parties'

competing land claims. Advocates are, however, advised to do better as Article 126 (2) (e) of the Constitution of Uganda, 1995 was not designed to encourage sloppy drafting of pleadings. The article is applied subject to the law. The consequences of poor drafting of appeals was well stated by George Kanyeihamba, JSC, in the case of ***Ismail Serugo Vs. Kampala City Council & Attorney General, Constitutional Appeal No. 2 of 1998***, where the learned Justice of the Supreme Court noted:

"In my opinion, the ruling and reasoning of the Constitutional Court together with the principles upon which this appeal is based indicate quite clearly that the only ground which is validly listed as (sic) ground three of the appeal. The others are either mere amplifications of that same ground or superfluous and irrelevant. It is possible that this tendency will only be discouraged if expeditions of Advocates in futility, verbosity and wilderness are taken into account in the awards of costs regardless of the results in trials and appeals." (Emphasis is mine.)

For the foregoing reasons, I disallow the preliminary objection although well founded, in the interest of determining this land appeal on merit.

Preliminary objection by the Appellants

Learned counsel for the Appellants also raised a point of law. The objection is that the plaint in the lower court did not disclose a cause of action. I think the objection can be summarily dealt with. The objection was not raised before the trial court at scheduling conference or soon thereafter. By the objection, learned counsel wishes this court to resolve a matter which was appropriate for the trial court to deal with, and only come to this court on appeal. The nature of the objection is such that it cannot be raised on appeal for the first time. Had the Appellants as Defendants in the court below raised the preliminary objection in the trial court, that court might have dealt with it. If the Appellants had raised but were overruled, the decision would have competently formed a ground of appeal in this court alongside other grounds against the final decision of the trial court. See: ***Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd, Civil Appeal No. 9 of 1969, and reported in [1969] E.A 696 at p. 701 (Sir Charles Newbold, P.)***

I also find it rather strange that the appellants are the ones raising a preliminary objection in their appeal. There is nothing lodged by the Respondent which the Appellant could purport to raise a preliminary objection about. With respect, I think the Appellants did not quite appreciate when a preliminary objection may be competently raised on appeal and by which party. In any event, the contention that there was a

non-disclosure of a cause of action in the Plaint would, in my view, have failed, given that the facts pleaded, whose summary I have captured at the start of this Judgment, clearly showed the Respondent's rights in the suit land, the alleged violation of those rights, and the Appellants' liability. There is thus no way the trial court could have rejected the Plaint within the purview of Order 7 rule 11 (a) of the CPR if the point had been canvassed. See: ***Auto Garage & Others Vs. Motokov (No.3), Civil Appeal No. 22 of 1971, and reported in [1971] E.A 314.*** In any case the mere fact that a party may have a valid defence to the Plaint does not necessarily mean there is no cause of action. See: ***Blasio Bifabusha Vs. Elikanah Turyazooka, Civil Appeal No. 3 of 2000 (Court of Appeal of Uganda), per C.M Kato, JA (as he then was) (RIP).***

For the foregoing reasons, I find the preliminary objection misconceived and accordingly over rule it.

Merit of the Appeal

Grounds 3 and 4

Regarding the grounds of appeal, I agree with learned counsel for the Respondent that the Appellant is deemed to have abandoned grounds 3 and 4. This is because the two grounds were not argued at all. Therefore the complaints embodied in ground three to the effect that the trial court ignored the Respondent's departure from his pleading and in ground four

that the court did not properly conduct proceedings at the locus in quo, ought to fail.

Grounds 1 and 2

Ground 1 relates to the trial court's finding that the suit land is owned by the Respondent. The second ground touches on the evidence the trial court considered in arriving at its conclusion on the land ownership issue.

In my view, ground two should not have been framed as a separate ground. If the Appellants wished, they should have coined the ground to encapsulate the aspects of improper evaluation of evidence, if at all. However there is nothing in the appeal to suggest that the Appellants take issue with the trial court's evaluation of evidence. Given these views, I proceed to consider only ground one. The ground relates to the affirmative finding that the Respondent is the owner of the suit land. The resolution of that ground turns on the evaluation of the evidence on record and consideration of the relevant laws.

<u>Issues before the trial court</u>

At the trial court each party captured issues distinctly in their written submission. Apart from the issue of remedies and trespass which were common to all, the issue of ownership varied. The Respondent framed the issue thus ***"whether the plaintiff is the lawful owner of the suit***

land?" On their part, the Appellants framed the issue ***"who is the rightful owner of the suit land".***

In its judgment, the trial court adopted substantially the issue as framed by the Appellants (Defendants then) but modified the issue to read ***"who owns the suit land?"*** I agree with the issue as modified by the trial court, I think, in the exercise of its powers under Order 15 rule 5 (2) of the CPR (although not explicit in the judgment). Amendment of issues is supported by judicial decisions. See: ***Odd Jobs Vs. Mubia [1970] E.A 476***; ***Victoria Tea Estates Vs. James Bemba & another, SCCA No. 49 of 1996***; ***Bashir Ahamed Arain Vs. Uganda Kwegata Construction Ltd, HCCS No. 692 of 1999***; ***Okwonga George & another Vs. Okello James Harrison, HC Misc. Application No. 132 of 2021***, to mention but four.

Before the trial court, the common issue framed by the trial court was on trespass, thus, ***"whether or not there is trespass by the Defendants"***. The other issue related to remedies available to the parties. The variations in the parties' framing of the issue regarding ownership could have been avoided if a scheduling conference had been properly conducted by the trial court. Although the record of court does not clearly show that a scheduling conference was conducted, from the Respondent's written submission lodged in the trial court, it appears a scheduling conference was held though not explicitly stated on record. As a matter of procedure,

the record should have indicated the fact that a scheduling conference was held. This is because the holding of a scheduling conference is mandatory in our rules of civil procedure under Order 12 rule 1 of the CPR. The Supreme Court of Uganda has since underscored this point in the case of ***Tororo Cement Co. Ltd Vs. Fronika International Ltd, Civil Appeal No. 2 of 2001 (SCU) per Tsekooko, JSC, (RIP) at pages 5 to 6***.

In this appeal, the issue regarding the conduct of the scheduling conference has not been canvassed. Whatever could have happened, it seems no miscarriage of justice was occasioned. In any case the parties still addressed more or less the same issue which the trial court considered albeit with modification. It is, however, hoped that trial courts will always conduct mandatory scheduling conference and ensure the court record reflect it.

The evidence adduced at the trial

The case proceeded on witness statements. The present Respondent (Plaintiff at the time) testified as PW1. He then called three other witnesses. PW1 (Nyeko Lonzino Omoya) who was 70 years old (as at 12th November, 2020) stated that, he inherited the suit land from his father (Omoya Gabriel, deceased). PW1's father had migrated to the suit land in 1958 from Pawel Langeta Village. The land was vacant and no one had interest in it. The father was a hunter. The father discovered the suit land while

hunting. The father decided to migrate with his family. The family settled and tilted the land and reared cattle. In the year 1995, the Respondent and the rest of the family members got displaced by the LRA insurgency. They sought refuge in Atiak IDP Camp. In 1967, the Respondent's father allowed a Cooperative Society to be built on part of the suit land, on request of the Area Authorities. The Respondent's father died in 1993 and was buried within the IDP Camp due to the insurgency. In the year 2010, on return of relative peace, the Respondent and family members returned to the suit land and started constructing grass-thatched houses. They were shocked to see the Appellants leave their far away land to come to the suit land. The Appellants burnt houses constructed by the Respondent. The matter was reported to the LCII of Pogo Village who resolved in the Appellants' favour. The Respondent appealed to the Clan Chief of Pabbo who decided in his favour. The Clan Chief ordered the Appellants to vacate the suit land but the Appellants ignored. The Respondent again constructed huts on the suit land in 2017. The Appellants destroyed the houses. They also uprooted bananas the Respondent had planted. The matter was reported to LCII Chairman who warned the Appellants in writing to stop trespass and to vacate the suit land.

The Respondent also testified that the Appellants are in control of the whole land (about 350 acres) which forced the Respondent to seek refuge

at a relative's land near-by (across Ayugi stream.) The Respondent mentioned some features on the suit land such as; a big mango tree planted by his father in the 1960s, a plantation of bananas planted in 1960s, and graves of relatives (he names two). The Respondent stated that the Appellants own land about five kilometers away from the suit land.

In cross examination, PW1 stated that his home is in Ayugi Village and his father (Omoya Gabriel) was buried there. He conceded he did not have a home on the suit land and was not cultivating it at the time he testified. He, however, explained why that was so, saying, his attempts to regain control of the suit land were blocked by the Appellants. PW1 conceded it is the Appellants who were using the suit land and who have built homes on it. He also stated that he left for Atiak IDP Camp, not from the suit land but from Ayugi Village. He, however, explained that, he left from Ayugi Village because the Appellants had resisted his occupancy of the suit land. In re-examination, PW1 maintained the same stance. He also asserted that the Appellants started occupying the suit land in 2012. PW1 reported the destruction of his houses to Police. He told court he could not recall the Police case Reference Number. He stated that his current home is in Ayugi Village and not the suit land because his land (meaning the suit land) was grabbed and he is not allowed to reach it.

PW2 (Obonyo Paul) who was 81 years old at the time (October 2020) testified that he came to know the Respondent in the year 1962. PW2 used to sell cotton to a Cooperative Society which was housed on the land of the Respondent's father, being the suit land. PW2 started knowing the Appellants when the dispute erupted in 2010. According to PW2, in the year 1943, the British Colonial Government declared the area including the suit land unfit for human habitation (due to tsetse fly infestation). People left the area, including the Respondent's parents. However, in 1957, people were allowed to migrate back to the area. In 1956, the Respondent's father migrated/ returned and settled on the suit land. However, before then, the Respondent's father lived at Ayugi stream (sic). PW2 named persons who settled in the neighbouring areas of the suit land. He explained that the first Appellant's land is situate in Auci stream (sic), where the first Appellant's father and grandfather were buried. To PW2, the dispute arose when displaced persons were returning from the IDP camps. He added that, when the Respondent attempted to settle on the suit land the Appellants chased him and instead occupied it.

In cross examination, PW2 stated he lived in the same Pogo Parish, although in a different Village from the parties (Ceri Village). PW2's home is five miles away from the suit land. According to PW2, the Respondent's father was a Security Guard at Pogo Cooperative Society. PW2 used to sell cotton at the Cooperative Society. The Society was at the home of the

Respondent's father. The father lived there till the LRA insurgency when he fled. When the Respondent returned to the suit land, the Appellants chased him away, claiming the suit land does not belong to the Respondent. PW2 testified that the Respondent's house on the suit land was burnt down. The Appellants are in occupation of the suit land and have houses thereon. PW2 clarified that when persons were evacuated from the suit land in 1943 by the Government, the Respondent's father was living in Pawel Village and he was not among those evacuated. PW2 maintained that the Respondent's father was employed by the Cooperative Society and the Society store was built on the land of the Respondent's father (suit land.)

PW3 (Olum Masimo) who was 68 years old at the time (October 2020) testified that, he knew both parties. He grew up with the Respondent in the same Village. The Appellants were from the same Village as PW3. PW3 told court he had known the Respondent's father (the late Omoya Gabriel) as far back as the year 1961. PW3 was a pupil at Okuture primary school. Mr. Omoya was a member of the School Management Committee. Mr. Omoya used to attend the School meetings and PW3 could see him. When PW3 was in primary two, the school had a program where pupils could dig in exchange for a goat. PW3 recalls digging the suit land and the Respondent's father (Mr. Omoya) gave the pupils of Okuture Primary School a goat. According to PW3, there was no other home on the suit land

except that of the Respondent's parents. The Respondent's father also had a makeshift home across Ayugi stream but at the same time retained the home on the suit land. Some of the Respondent's siblings used to study across Ayugi stream at Pupwonya Primary School because of the flooding of the stream. In 1967, the people of Pogo Village started a Cooperative Society named Apoolacen Cotton Society whose chairman was a one Daniel Ocaya. Its treasurer was Rafael Tude while Salvatore Okech was the secretary. PW3 and others used to sell Cotton to the Society and it would from there, be taken to Gulu Union. PW3 further testified that the Respondent's father planted a mango tree on the suit land, which is still there. The Respondent's father also planted bananas in four locations within the suit land. The Respondent's father had three houses on the suit land. The Respondent's father utilized the suit land peaceably until displacement by the LRA insurgency. On return from the IDP camp, the Respondent started building on the suit land but the grass and bricks were destroyed by the Appellants, who are occupying the suit land after chasing away the Respondent. In cross examination, PW3 substantially maintained his evidence in chief. In re-examination, he stated that the Appellants begun to occupy the suit land in 2010 when displaced persons started returning from IDP camps. He also was categorical that, other persons who moved to occupy the suit land were taken there by the Appellants. He clarified that, the first Appellant's home is approximately

four miles away from the suit land and one passes three streams before getting there.

PW4 (Opok John Odeco) who was 73 years old as at the time (October, 2020) stated that, the Respondent was a neighbor with whom PW4 grew up in the same village. PW4 also knew the Respondent's father. The latter and PW4's father were supporters of Democratic Party and were neighbours. PW4 neighbours the suit land in the north. PW4 also knows the Appellants as residents of the same Parish as PW4. PW4 stated that, he knew the suit land. According to him, the Respondent's father planted a mango tree on the suit land where his compound was, and the mango tree is still there. PW4 claimed some of the relatives of the Respondent died and were buried on the suit land and their graves exist. In 1967, the people of Pogo Parish requested and the Respondent's father allowed for the construction of Apoolacen Cotton Society Store on the suit land. PW4 claimed the remnants of the store was still present. According to PW4, the land dispute started in the year 2010 when people returned from IDP camps and the Appellants destroyed the huts of the Respondent and assumed occupation of the suit land. PW4 added that the Appellants cut down trees and uprooted bananas planted by the Respondent's father, and replaced with their own.

In cross examination, PW4 conceded it was his father who told him that the Respondent's father used to occupy the suit land. PW4 also maintained that the Respondent left the suit land in 1995 (for the IDP camp) on the advice of the Government when the insurgency intensified.

The Defence case (the present Appellants')

In their Defence, the first Appellant testified as DW3 while the 2nd Appellant testified as DW1. They called DW2 to support their case. I will begin with the first Appellant's testimony (DW3).

According to DW3, he was 56 years old (as at 24th February, 2021). He testified that, the suit land was acquired by his father through inheritance from DW3's grandfather upon the latter's death in 1995. DW3 asserted, he was born on the suit land in 1964 and has been there ever since. He testified, he has two grass thatched houses on the suit land, the third having collapsed due to heavy rains in October 2020. DW3 listed physical features on the suit land, namely, banana plantation along Ayugi stream, a mark of a pit where bricks were made from to construct cotton store, five mature mango trees, three lemon trees, moringa trees, eucalyptus trees, pawpaw trees, acacia trees, avocado trees, and stones on which the (former old) granaries stood. DW3 also stated that, he is cultivating crops on the suit land which he listed. DW3 stated the Respondent is a resident of Pupwonya North Village, and that, that is where the Respondent's

ancestral home is and where the Respondent has always lived. DW3 denied that the Respondent ever lived on the suit land. According to DW3, the father of the Respondent (Omoya Gabriel) only worked as a Guard at the Cooperative Union which was built on the suit land (he calls it the 1st Appellant's land). The Union, according to DW3, was constructed with the permission of DW3's father (Lokolito) in 1964. According to DW3, the Respondent's father (Omoya Gabriel) died and was buried at his ancestral homestead in Ayugi Village. DW3 knew the home of Omoya very well. On 15th January, 2009, the dispute over the suit land was taken before the local Chiefs of the area (three in number), locally termed 'Rwot Kweri' who know the suit land very well, who 'mediated' in favour of the first Appellant. The Respondent disagreed with the outcome and lodged a complaint to the LCII of Pogo who again 'ruled' in favour of the first Appellant. On 26th January, 2018, the Respondent lodged the dispute in the LCIII Court of Pabbo who 'mediated' and decided in favour of the first Appellant. Having been unsuccessful, the Respondent sued the Appellants. According to DW3 (the first Appellant), the second Appellant is a Nephew (a son to the uncle of the first Appellant) who grew up at the home of the first Appellant. The second Appellant has since relocated to his parent's home in Ayugi Village. In cross examination, DW3 stated that he has four brothers, and that some live on the eastern side of Auci stream while others live on the western side of the stream. None of the first Appellant's siblings live on the suit land. Where the father of the first Appellant settled is not in dispute.

The father's home is on the eastern side of Auci stream. The eastern side of the stream is not in dispute. The father's compound where he died and was buried is on the western side of Auci stream. However, other deceased relatives of the first Appellant were buried on the eastern side of Auci stream. He, however, names a one Lubangakene only, a Nephew, raised by DW3 who was buried on the suit land in 2020 when the dispute was already before court. The first Appellant conceded, this was the only relative buried east of Auci stream (suit land). DW3 reaffirmed, the disputed land is on the eastern side of Auci stream. He claimed that some of his relatives had a home on the eastern side of Auci stream before the insurgency. The house east of Auci stream was built in 1953 and that is where DW3 is staying (as at the date of his testimony). DW3 testified, he has two wives who live separately (short distance apart) on the western side of Auci stream. The suit land is on the eastern side of Auci stream. The grand parents of the first Appellant died after 1953 but none of them was buried east of Auci stream (disputed area) but rather, they were buried west of the stream where their homes were located. None of DW3's brothers were buried on the suit land. According to DW3, there are three huts on the suit land. Two of them belonged to the Nephew of the first Appellant, a one Abangi (deceased). The other hut belonged to the late son of the first Appellant (Okema). Both Okema (son) and Abangi (Nephew) died at the age of 30 and 25, respectively. Their huts were built after the LRA insurgency. The Respondent had no previous house at that exact location. The

Respondent had no bricks in that location either. There were no grass in that location, belonging to the Respondent. Neither the first Appellant nor his father, planted the big mango tree on the suit land. It grew on its own. The other young mango trees on the suit land were planted after the return from the IDP camp and after the first Appellant had lived on the suit land for some time. The banana plantations on the suit land belong to the father of the first Appellant. The first Appellant allowed the second Appellant to plant on the lower side of the suit land. At the time the first Appellant went to the IDP camp, they were already consuming bananas from the suit land. According to the first Appellant (DW3), there used to be a Cooperative Society on the suit land. In re-examination, DW3 testified that, he used to live '*on the land'* prior to relocating to the IDP camp, and *it is on that land where DW3 buried his father* before going to the IDP camp.

The second Appellant (Nyeko Geoffrey), a 47 year old at the time (February, 2021) testified as DW1. His witness statement bore the year 2020 which was pretyped, but no date and month is indicated by the witness. DW1 stated that, the first Appellant (DW3) owns the suit land since DW3 has a homestead there and that is where DW3 settled. DW1 claims he also settled on the suit land from 1988 to 1997 when DW1 went to IDP camp and never returned to the suit land. DW1 spoke about DW3's cultivation of the suit land. He repeated the physical features on the suit land as mentioned by DW3. DW1 asserted he knows the Respondent, a son of

Omoya Gabriel, a former askari/ guard at Pogo Cotton Society store erected on the suit land. According to DW1, the Respondent is DW1's neighbor in Pupwonya Village. The Respondent used to serve in the army of 1986 (alleged as that of Obote II) and when the then Government was overthrown, the Respondent went and settled at their ancestral home in Ayugi Village which is very far from the suit land, and the Respondent has never settled on the suit land. Even the Respondent's late brother (Olal) and father, were buried in Pupwonya where the Respondent stays, and not on the suit land. In cross examination, DW1 testified that he is the son of a one Anek Sabina (DW2), a resident within Atiak Sub County. The suit land is in Pabbo Sub County and not Atiak Sub County. DW1's mother (Anek Sabina) has always lived in Atiak Sub County even before the LRA insurgency. Regarding his interest in the suit land, DW1 stated, he does not claim the suit land but merely requested for it and started cultivating in 2015 and he was given four (4) acres by the first Appellant (DW3). To DW1, their customary land is situate in Pabidi, less than four kilometers from the suit land. DW1 was categorical that none of his parents lay claim to the suit land. He testified that, prior to 2015, he had never used the suit land. The father of DW1 was a one Asaba (deceased) while the father of the first Appellant (DW3) is Alwak Vincent Lakolitoo. Alwak's home was in Gwili Village. Alwak died. He was not buried on the suit land due to insurgency. Other relatives of the first Appellant has homes in Gwili Village. DW1 further testified that the first Appellant and *'his brother'* has

homes on the suit land but DW1 did not know when the houses were built as DW1 had already left the land. DW1 only returned to request the suit land for cultivation. DW1 claimed the trial court would find the home of DW3's brother during the locus visit. DW1 denied that the first Appellant was living in Gwili Village with his father prior to relocating to the suit land. He, however, did not know where the first Appellant lived prior to going to the suit land. DW1 conceded, the home of the first Appellant's father (Lakolitoo) was in Gwili Village. He also admitted that, other relatives of Lakolitoo had their own homes in Gwili Village. DW1 was not aware of any graves of the relatives of the first Appellant on the suit land. According to him, the father of the first Appellant was not buried on the suit land. According to DW1, the father of the first Appellant was buried elsewhere due to the then insurgency in the area. DW1 agreed that the suit land used to have a house (store) belonging to a Cooperative Society. DW1 also was aware the land dispute was at one time referred to the local Chiefs (Rwot Kweri) although he did not know that it was also referred to Pabbo Clan. DW1 said he relied on the case which DW3 had 'won', to ask DW3 for part of the suit land for cultivation.

DW2, Anek Sabina, described herself as a biological mother of the second Appellant (DW1). She calls the first Appellant (DW3) a son to an auntie. Therefore, the first appellant is a cousin to DW2. DW2 was aged 78 years (as at 24th February, 2021). Regarding the suit land, she testified that,

Auci stream separates the suit land from the land of the first Appellant (DW3). She claimed that, even the land situate in the west of Auci stream (owned by the first Appellant) is also in dispute. She testified that the suit land was acquired by the grandfather of the first Appellant (Otyeka Lakolitoo) in 1943. That, the land was trespassed on by the Respondent in 2007. DW2 asserted that, the father of the Respondent (Omoya Gabriel) only worked as an askari (Security Guard) at Pogo Cotton Society which was constructed on the suit land. The land housing the Cooperative Society, according to DW2, belonged to the first Appellant's grandfather. DW2 added that, Omoya (the Security Guard) never settled on the suit land at Pogo but was resident in Pupwonya North in Ayugi Village where their ancestral home is. According to DW2, the Respondent has been resident at their ancestral home in Ayugi Village since the year 1958, and the Respondent's father used to commute therefrom to work at the Cooperative Society in Pogo. DW2 denied any (blood) relationship with the grandfather of the 1st Appellant (Otyeka Lakolitoo). DW2 also stated that, in 1984, the Respondent's brother, a one Olal took refuge on the suit land but was killed by the LRA rebels and was buried at their ancestral home in Pupwonya Village, and not on the suit land. DW2 maintained that the Respondent never reached the suit land, never settled thereon and never cultivated it. DW2 further testified that, the first Appellant (DW3) was in possession of the suit land, with three houses, although other houses collapsed due to heavy rains, in 2019 and in October 2020. The witness

described the physical features on the suit land, as described by DW1 and DW3. DW2 crowned her testimony in chief, by stating that, the Respondent's father never took his family to his work place (suit land) and after his death, he was buried in Ayugi village. In cross examination, DW2 stated that Auci stream separates the suit land and land of the first Appellant. She also clarified that, there are two huts in occupation (of the first Appellant) on the suit land, and two others collapsed. DW2 conceded, the existing houses on the suit land belong to Abangi (deceased), a Nephew of the first Appellant. Abangi constructed the two huts at the time the displaced persons returned from the IDP camps. DW2 claims Abangi had a home on the suit land, prior to the displacement and after the return of peace, Abangi merely went back to their former homestead. DW2 stated Abangi's father had died, and Abangi lived with the first Appellant, an uncle. The other houses that collapsed belonged to a one Okema (deceased) who was a son of the first Appellant (DW3). Okema died at the apparent age of 20. He was buried at his father's compound, across Auci stream, about two kilometers away from the suit land. The huts of Okema were built after the return from the IDP camp. They were built in 2016. At the time the father of the first Appellant also died, people had not yet fled to the IDP camps. According to DW2, the *father* of the first Appellant was buried on the suit land, just as the *grandfather* of the first appellant (Lokolitoo). DW2 promised to show the graves of the deceased persons to court. In cross examination, DW2 conceded, the big mango tree on the suit

land was not planted by the 1st Appellant or 1st Appellant's father. However, in re-examination, she insisted the first Appellant planted the big mango tree.

Typographical errors in the record and the impugned judgment

I perused the typed record of the proceedings and the judgment. I noted that in some instances sentences lack flow. There is a mix up in the name of some places. For instance whereas the locus map correctly show that the suit land is bordered by Ayugi stream in the east, and Auci stream in the west, the phonetics in the two names appear to have caused some bit of confusion such that the typed record and judgment carried the name "Ayugi" stream almost throughout. However, the hand-written record and the hand-written judgment bear the distinctions. I also noted that in the final judgment, mention is erroneously made of the *'Respondent's two wives'* yet the Respondent throughout his testimony never spoke about the two wives. Rather it is the first Appellant who spoke about his own two wives. I also note of a paragraph in the judgment where it is claimed the Respondent (plaintiff at the time) *is buried across Ayugi stream* (meaning he was dead yet he was and is still alive). I also note that punctuations are lacking in the typed judgment, making some sentences vague. I, therefore, decided to peruse the hand written signed record of the proceedings and the hand-written signed judgment, alongside the typed ones and compared them, so as to better understand the case holistically. I noticed that the

record and the judgment were typed and certified after the particular judicial officer had long been transferred, I think on promotion. It appears the person who supervised the typing and certification of the record did not bother to peruse it, to ensure the accuracy with the hand written record. The task this court embarked on, of comparing the record was time consuming and energy sapping, to say the least. If the trial court had done its job effectively, these would have been avoided. I think trial courts can always do better to ensure accurate record are availed to appellate courts. In this case, I noted that learned counsel for the Appellants complained in his submission generally about the quality of the record. He was right to complain. Learned counsel went on to surmise, of course, without any iota of proof, that some information was doctored. I have also noted that throughout the judgment, the trial court did not advert to specific pieces of evidence given by witnesses. Court only indicated generally that it had considered the evidence, without demonstrating which ones it did, and why it believed the particular witnesses and not others. The court, I think, having read the evidence, merely formed a mental view of the case and came to a conclusion. The judgment was written in a summary manner without the court specifically alluding to any particular pieces of evidence it accepted or rejected. It is not clear why Court avoided dealing with the specific pieces of evidence. I can only fairly paint the picture of what transpired in the trial court by quoting from parts of the impugned

judgment. After framing the issues for resolution, the trial court addressed the issues, thus:

"On the issue of ownership, this court has examined the evidence and the pleadings and what comes out clearly are the following. That the plaintiff had his original homestead across Ayugi stream where he is buried and where their actual homesteads are located. This is confirmed by the plaintiff's answers in cross examination. It is also my finding that the plaintiff's father was in possession of the suit land before the insurgency. This is admitted in both the written statement of defence and the witness statement of the 1st defendant who claims the plaintiff's father was a watchman at the Cooperative Society on the suit land where he was given land but to settle temporarily which could not be established. It is also clear from the evidence of the 1st defendant that their ancestral homes and the land are across Auci (wrongly typed Ayugi) stream more than 2 km away and that other than cultivation by the 1st defendant and D2 the huts on the land were for the Nephew of D1 and son to D2 all put after insurgency. It is clear from the evidence of the defendants, D2 has no claim or basis to lay a claim on the suit land he requested from D1. There is no evidence the suit land originally belonged to the forefathers of D1 who passed it to D1 so as to give him rights to access the land. It is clear from the evidence at locus the only plausible inference is that much as the defendants have some

features to prove possession these were put after insurgency after the plaintiff had fled…"

The trial court continued:

" if indeed PW1 (it should have been recorded as DW1) owned and inherited the suit land then why live with his two wives west of Ayugi stream (stream wrongly captured in the judgment for the hand-written record reads Auci stream) where his relatives are buried and brothers live unlike the defendants (vague), the proximity of the plaintiff's ancestral land to the suit land leaves an inference that the plaintiff's father moved and occupied the suit land where the Cooperative Society was established and most likely also worked as a watchman for the Cooperative and not that the defendant's father (should read, 1st defendant's father) or grandfather gave him land to live on temporarily because their land is across Ayugi stream (should read Auci stream as per the hand-written record.) It is my finding the suit land belongs to the Plaintiff upon the inheritance from his father who migrated and occupied vacant land unchallenged. On the issue of trespass, it is clear when the plaintiff's father left the land due to insurgency, the defendants without the authority of the plaintiff or father, forcefully and amidst threats, entered the suit land and established themselves amidst protests from the plaintiff. The counterclaim thus fails and the defendant is declared trespassers. On the remedies, the plaintiff is declared….."

In my opinion, the above style of judgment writing, if it is a style anyway, is the most unsatisfactory, to say the least. It is so most especially when the trial court nowhere refers to the pieces of evidence adduced by the parties and their witnesses, even if in a summary manner, to at least support the trial court's findings and conclusions. The trial court did not state which witness said what and the court's views on their evidence. This style of judgment writing deprives the appellate court of sufficient material and base from which to properly proceed. The appellate court may in such a case not be able to tell with certainty which pieces of evidence the trial court believed and which ones it did not. It is also clear that the trial court did not allude to primary facts from which some inferences were drawn. There was no proper assessment of the weight of evidence to support some conclusions reached. The trial court had a duty to consider the evidence adduced by the parties as a whole before accepting and making findings of fact. This should have been demonstrated in the Judgment, even if in a summary manner. Doing the mental weighting of the evidence and drawing conclusions without pointing to specific pieces of evidence that were accepted and rejected, a trap the trial court found itself in, in my opinion, demonstrate an improper evaluation of evidence and cannot be countenanced by a court of justice. I take serious exception to the manner the trial court did its work, although there is no specific ground of appeal relating to it.

In the case of ***Attorney General Vs. Florence Baliraine, Civil Appeal No. 79 of 2003, the Court of Appeal of Uganda (per the lead Judgment of Kenneth Kakuru, JA (RIP)***, noted (at page 6) thus:

"Evaluation of evidence usually entails court looking at the evidence as adduced by both parties and contrasting it with the law."

In my opinion, a court should not gloss over evidence and mention them in general terms as it happened in this case. Specifying the evidence a court relies on to support a finding, among others, for example, helps an appellate court to gauge whether the trial court relied on inadmissible evidence or not, and whether it performed its task of evaluating the evidence on record. Judicial decision must therefore be supported by evidence and law although a court need not cite all the law(s) or any at all on every issue, depending on the nature and circumstances of the case under adjudication. A court must, however, show by its judgment that it was alive to the law and the principles of law and that it applied evidence to the law and such principles of law, to reach a fair and just decision. A process to a judicial conclusion even where the conclusion is generally correct, must be thorough. Thoroughness must be seen in the Judgment of court.

It is for the reason of the above deficient judgment, besides the duty of this court to rehear the case as a whole, that I have decided to set out in detail, the relevant aspects of the evidence given in the trial court. As noted, this court still has a duty to subject the entire evidence to a fresh and exhaustive scrutiny given that an appeal is by way of a retrial. Be that as it may, trial courts still ought to effectively discharge their judicial duties in a way that assist the appellate court in the performance of their duty. Trial courts should not simply gloss over matters simply because they know the appellate courts will still do the job any way, albeit in a different setting. I think there is no room for trial courts to be less effective in the discharge of their judicial duties. This court is aware of the huge workload and the attendant work pressure and the need for courts to dispose of more cases than sometimes humanly possible. Court is alive to the mounting case load that often become backlog and the strict targets set for quick disposal. It may sometimes become increasingly difficult for a judicial officer to strike an intricate balance between quality and quantity of judicial output. However, I think at all times, it is the quality justice that the consumers of justice desire although justice should not also be unexplainably delayed. But even so, justice should not be rushed. A healthy balance has to be struck. It is common knowledge that justice must at all times be rooted in confidence and the integrity of its process. Justice must, therefore, not only be done but must be seen to be done.

The courts of course must be prepared at all times to meet the expectations of the consumers of justice.

The burden of proof

The first issue before the trial court related to who the rightful owner of the suit land is, especially as between the Respondent (Plaintiff) and the first Appellant (counterclaimant) who were the real disputants. It is noted that the Respondent sued first, claiming ownership of the suit land in which the first Appellant lodged a Defence and a Counterclaim, asserting ownership. A counterclaim is a suit in its own right. See: **Simon Tendo Kabenge Vs. Barclays Bank (U) Ltd & Phillip Dandee, Civil Appeal No. 17 of 2015 (SCU) per Opio- Aweri, JSC (RIP) at p.14.** In the case of **Ngoma-Ngime Vs. Electoral Commission and Hon. Winnie Byanyima, Election Petition Appeal No. 11 of 2002, the Court of Appeal of Uganda (lead judgment of C.K Byamugisha, JA (RIP), stated on the counterclaim at page 11, thus**:

"Whereas under Order 8 rule 8 of the Civil Procedure Rules a defendant can set up a counter-claim as a defense to the whole or part of the plaintiff's claim, such a counter-claim is treated as a separate suit. Normally separate fees will be paid and the counter-claim may be tried separately in the event of the plaintiff's suit being dismissed, stayed or discontinued. Also under order 6 rule 5 of the

same rules, a defendant or a plaintiff can raise by his or her pleadings all matters which show the action or counter-claim not to be maintainable."

In the circumstances of the present case, both the Respondent as the plaintiff and the first Appellant as the counterclaimant bore the burden of proving their respective land ownership claims. This is so because each wanted court to believe in what each asserted, and therefore, give a judgment in their favour. Each thus had a duty to prove their allegations on the balance of probability. This view is supported by section 101, 102 and 103 of the Evidence Act, Cap.6. It is also supported by case law. See: ***JK Patel Vs. Spear Motors Ltd, SCCA No. 4 of 1991*** where the Supreme Court of Uganda held that the burden of proof rests before evidence is given on the party asserting the affirmative. It then shifts and rests after evidence is given on the party against whom judgment would be given if no further evidence is adduced. Furthermore, in the case of ***Sebuliba Vs. Co-operative Bank Ltd [1982] HCB 129***, the High Court of Uganda (Kato, Ag. J., as he then was) held that the burden of proof in civil matters lie upon the person who asserts or alleges, noting that, a party can only be called upon to disprove or rebut what has been proved by the other side.

In the instant matter, I note that the second Appellant did not counterclaim. He, therefore, bore no burden of proving anything. It was

the Respondent as the Plaintiff then who bore the burden of proving the allegations against the second Appellant. In resolving the rival ownership claim, I seek to begin with the Respondent's claim as against the second Appellant. Whereas the Respondent claimed in the court below that the second Appellant was laying claims to the suit land, the second Appellant testified that he has no legal claim whatsoever in the suit land. He was also categorical that neither he nor his parents ever laid a claim to the suit land. According to the second Appellant (DW1), he merely requested for the suit land from the first Appellant, an uncle. He needed it for cultivation. The request was accepted. DW1's testimony was supported by the first Appellant (DW3). This was not controverted by the Respondent. In the circumstances I find that the second Appellant has no claim to the suit land. I accordingly hold that the trial court reached a correct conclusion as regards the second Appellant that he has no valid claim to the suit land.

As between the Respondent (plaintiff then) and the first Appellant (Defendant/ counterclaimant), each side adduced evidence in support of their competing claims. A deeper look at each side's evidence, however, reveal apparent gaps. The Respondent sought to prove that he inherited the suit land from his late father, Gabriel Omoya. He testified and called three independent witnesses. The substance of their evidence is that, the Respondent's father migrated to the suit land with his father (the Respondent's grandfather) in about the years 1956/1958. The suit land

was at the time vacant. The Respondent's father discovered the land while on a hunting mission. He decided to settle there with his family. They cultivated it and also reared cattle. Court notes that the evidence regarding the alleged early settlement is largely verbal. Although admissible, the evidence could not be verified on the ground. At the locus, the remains of the houses allegedly built in the earlier years, which apparently were huts, could not be seen after the long passage of time. The banana plantation which it is alleged the family of the Respondent had planted in four locations on the suit land, were not confirmed as it was alleged all had been uprooted by the Appellants. It is alleged the Appellants replaced the Respondent's old banana plantation with their own. This court has thus been able to consider other pieces of evidence respecting the alleged facts of historical occupation of the suit land, given the foregoing observations regarding the oral accounts of the parties.

On his part, regarding the allegation of historical possession by him and his ancestors, the first appellant (DW3) testified that, he was born on the suit land in 1964 and has lived there ever since. Court notes that this claim is not supported by any other independent witness. DW3 does not state how he got to know he was born on the suit land in 1964. He does not state the source of his information. Court cannot guess. DW3 also does not state the earlier user of the suit land. Anek Sabina (DW2), a cousin sister, however, asserted that the suit land was acquired by the

grandfather of the first Appellant in 1943. DW2 did not state the mode of the acquisition. This is unlike the Respondent who claims his father was hunting in the area and found the land vacant and decided to settle there. Of course the Respondent's claim also required corroboration. Back to DW3 and his aunt, they do not state the earlier user of the suit land. DW2 (Anek Sabina) as noted, is a cousin of the DW3, just as DW1 (Nyeko Geoffrey) who is a Nephew to DW3. The Defence did not call any independent witness to corroborate the testimony about the alleged acquisition events of 1943. It is only Anek Sabina (DW2) who spoke about the 1943 alleged acquisition by the first Appellant's grandfather yet both Appellants were silent about it. Be that as it may, when the evidence by the two sides are considered at this point, the alleged competing land acquisition claims, remain largely scanty and inconclusive as to who rightfully owns the suit land.

Apart from the land acquisition mode, both the Respondent (PW1) and PW3 (Olum Masimo) spoke about an alleged earlier settlement of the Respondent and his parents on the suit land. PW1 (the Respondent) claims he was born on the suit land, and that his father had migrated there earlier before he was born. These witnesses also spoke about a big mango tree which the Respondent's father is said to have planted on the suit land. PW1 and PW3 were emphatic that the mango tree was still in existence. During the locus visit, the trial court observed a big mango tree on the suit

land. In in their response to this piece of evidence, the first Appellant (DW3) conceded that the big mango tree was there and was neither planted by himself nor his father. DW3, however, claims the big mango tree grew on its own. DW3 went on to speak about young mango trees and other trees especially fruit trees planted on the suit land, which the trial court noted, were planted much later by DW3 when they returned from the IDP camp after the year 2009. The issue regarding the big mango tree as it was described (I think the proper word in the context should have been, the oldest mango tree) was shared by DW2 (Anek Sabina). She first conceded in cross examination that the big mango tree was neither planted by the first Appellant nor his father. However, in re-examination, DW2 changed stance and claimed that the big mango tree was planted by the first Appellant. In court's view, DW2 was not honest in her answer about who planted the oldest mango tree on the suit land. She materially contradicted the first Appellant in that regard. The answers around who planted the big/oldest mango tree was significant as it tended to connect one of the competing claimants to the suit land. At the locus, the Respondent (PW1) clarified that, where the big mango tree is, is where the homestead of PW1's father's existed. As noted, this claim could not be verified at the locus because the area pointed out by the Respondent has the present homestead of the son of the first Appellant (Komakech Geoffrey). What is crucial here, however, is that, the homestead was said to have been established after the 2009 return from the IDP camps. There is also

evidence by PW1 that, the first Appellant allowed his son and a Nephew to build on the suit land after the return from the IDP camps. The Respondent's witnesses were not strongly challenged when they testified that, the Respondent's houses hitherto constructed on the suit land, were destroyed by the Appellants. This was stated by PW1, PW2, PW3 and PW4. It was thus reasonable for the trial court not to find the old houses of the Respondent on the suit land during the locus visit. This is of course not all. PW4 (Opok John Odeco) who testified in court that the Respondent's father planted a mango tree on the suit land (referring to the big/oldest mango tree) also stated that the Respondent's compound used to be where the mango tree is situate. PW4 and PW1 were not challenged in this respect. But this evidence is not itself conclusive.

Regarding what I would call historical features on the suit land, apart from the old mango tree talked about favourably for the Respondent, for the first Appellant, he spoke about a house he claims was built on the suit land in the year 1953. However, during the locus visit, no such house was seen. Rather the only houses found were those of the first Appellant's Nephew, the late Abangi (25 year old), and that of Okema (30 year old), the late son of the first Appellant. It was conceded by DW3 (first Appellant) that the houses were built from about the year 2016 after these relatively young men had returned from the IDP Camps. In court's view the fact that the son and nephew of the first Appellant built huts on the suit land in 2016

when the Respondent had already taken issue with the Appellants' claim, does not lend credence to the counter-claimant's ownership claims.

This court further notes that, whereas both sides spoke about some old graves on the suit land, none were verifiable. PW1, however, spoke about the grave of a one Lubangakene Christ, a relative. It was agreed that the deceased was interred on the suit land only in the year 2020 when the dispute was already before the trial court. So the evidence of the alleged old occupancy, in my judgment, is more closely linked to the Respondent by virtue of the old mango tree planted by his father. Regarding the old graves alleged by the Respondent also, none was seen by the trial court. So the issue of which relatives of either party were buried on the suit land is not material at all, in solving the land ownership puzzle. Had old graves been found, that in themselves would not have been conclusive in resolving the ownership claims. Court has before held that the mere fact of burial in a place on its own, without more, is not necessarily evidence of ownership of the land where a person is buried. See: ***Ocaya Samuel Owen (Administrator of the estate of the late Ochan H.K Vs. Akena Kristy Rose & 3 others, HC Civil Appeal No. 30 of 2015.***

I have further considered the evidence adduced by both parties relating to a store built by a Cooperative Society on the suit land. Both parties agree to this fact. Interestingly all sides claim it is their relations who allowed for

the construction of the store on the suit land. Whereas the Respondent (PW1) claims it was his father who permitted the store to be built on the suit land in 1967, the first Appellant (DW3) insisted it was his grandfather who allowed the store to be built in 1964. I have noted that the first Appellant was born only in 1965 going by his age of 56 years as at the time he testified in 2021. His claim therefore needed corroboration as he testifies about events that allegedly happened in 1964 before he was born. As he said, he was born in 1965. Turning to the Respondent, I note that, going by his age of 70 when he testified in 2020, he was 17 years old in 1967 when he claims the store was built. I thus find that the Respondent was older enough in 1967 to know about what was happening on the suit land. The Respondent was supported on this stand by PW2 (Obonyo Paul, an 81 year old) who said he first came to know the Respondent in 1962. PW2 also testified that he used to sell cotton to the Cooperative Society whose store was situate on the suit land. PW3, Olum Masimo, a 68 year old, testified to the same effect. He asserted that, in 1967 the people of Pogo Village started a Cooperative Society named Apoolacen Cotton Society. The Society had leaders. The chairman was Daniel Ocaya. The treasurer was Rafael Tude, while Salvatore Okech was its secretary. PW3 said he and others used to sell Cotton to the Society and from there, cotton would be taken to Gulu Union. PW4 (Opok John Odeco), a 73 year old, corroborated these witnesses. He spoke about the Cooperative Society, asserting, it was built on the land of the Respondent's father. I note that,

although PW4 claimed that the court would find the remains of the store on the suit land during locus visit, I find he exaggerated matters. Of course the trial court did not find any old store or signs of it. It is inconceivable that a store built in 1967 or thereabouts could have had its ruins as at 19th March, 2021 when court visited the locus (54 years later). It is not indicated that the store had been constructed using some durable material for the ruins to still be there after such passage of time. Just like PW4 who made a little exaggeration, the first Appellant also exaggerated matters. He for instance told the trial court that, some pit on the suit land is where soil used for making (I think blocks) for building the Cooperative Society store was dug from. I note that the trial court did not record that it had seen the pit. Even if it had seen and recorded the ocular observation, the claim still needed corroboration because the store was, in DW3's version, built before he was born. In my view, whereas some exaggerations may not necessarily point to a lie by a witness, I think DW3's claim regarding who authorized the construction of the store, was not proved. Regarding PW4, whereas his claim that the trial court would find the relics of the store was incorrect, the Defence never disputed that a store used to be on the suit land. PW4 therefore, did not lie. I note that DW3 (the first Appellant) who said the store was built in 1964 was supported by his Nephew, DW1 (the second Appellant Nyeko) and DW2 (Anek Sabina, the cousin sister). However, neither Ms. Anek nor her son (Mr. Nyeko) were able to tell court the year they purport the store was built on the suit land. So DW3's claim that the

store was built on the authorization by his father or grandfather, remained unproven, more so, when DW3 speaks of a time when he was not yet born. Worse still, DW3 does not tell the source of his information about the store.

I have also considered pieces of evidence regarding the status of the Respondent's father (Gabriel Omoya) at the Cooperative Society, in resolving this puzzle. All the Defence witnesses agree that the Respondent's father was an employee at the Cooperative Society. He was a Guard/ Askari (as interchangeably stated). The Respondent did not strongly rebut this fact. Although he attempted to deny it, the Respondent's witnesses agreed with the Appellants and Anek Sabina that Gabriel Omoya was indeed a security guard at the store. I do not take the Respondent's denial of his father's job as a sign of dishonesty. He did not explain the basis of his denial. I cannot surmise why he denied his father's job. He was not further cross examined on the point. Whereas it is common ground that the Respondent's father was a Guard at the store, the trial Court was not told under what arrangements and on what terms he was employed to guard the store. It is for instance not shown that the employment was in consideration of his having offered land for the construction of a store. Court thus cannot guess about it. However, the fact remains that Mr. Omoya was employed at the store. However, from other materials on record, it appears Omoya's presence on the suit land

did not diminish the fact that he had some interest in it. I have thus decided to consider the pleadings the Appellant lodged in the trial court.

In paragraph 10 of the Written Statement of Defence, the Appellants volunteered crucial information that, the Respondent's father was given two acres of the suit land in 1984 but on temporary basis. Curiously, the Appellants were silent about this revelation in their evidence in court. I find the pleaded matter relevant in the resolution of the controversy. The pleading binds the Appellants. In **Esso Petroleum Co. Ltd Vs. Southport Corporation [1955] 3 All E.R 864** Lord Radcliffe stated at page 871 thus:

"My Lords I think this case ought to be decided in accordance with the pleadings..."

In the above case, Lord Radcliffe went on to note that, a party is entitled and or obliged to conduct its case and confine its evidence in line with the pleadings.

In the present matter, the Appellants refrained from adducing evidence regarding the pleaded matter. I think they realized it would be adverse to their claims. The Appellants crucially did not state under what circumstances the Respondent's father came to be offered the two acres of the suit land. They thus claim the Respondent's father was a mere licensee

on the suit land (temporary user as they call it). I find the license claim not proved. The first Appellant also claims the Respondent's father left the suit land (area he was allegedly given) in 1985 for Auc Village (the alleged ancestral customary land of the Respondent). The question that remains unanswered by the Appellants is, why was the Respondent's father given a whole two acres of the suit land? What was the consideration? This Court notes that, regarding the alleged license claim, the first Appellant sharply contradicted himself in his pleading when in paragraph 9 of the counterclaim he averred that the Respondent's father was given only one acre of the suit land in 1984. He claims it was given by the father of the first Appellant/ counterclaimant, in the latter's presence. These plea, although contradictory, as the first Appellant pleads one acres and two acres at the same time, cannot be ignored by this court. They tend to connect the Respondent's late father, and by extension, the Respondent, to the suit land as early as the year 1984. The favourable plea also destroys the Appellants' subsequent denials in evidence that, neither the Respondent nor his father, ever lived on the suit land. I have also noted DW2 (Anek Sabina's) evidence where she came out vehemently denying that the Respondent's father settled on the suit land. She does so in paragraph 5 of her witness statement. She claims Mr. Omoya was only a security guard on the suit land. DW2 does not, however, mention the fact of the settlement by Mr. Omoya on the suit land. She goes on to claim that Omoya used to commute to and from his work place. To my mind, if DW2's

version were true, then why was Mr. Omoya given one or two acres of land as pleaded by the Appellants? Why did he need it yet he was merely at work? I think Ms. Anek (DW2) was oblivious that the counterclaimant (the first Appellant) had made some favourable concession in his pleading. Ms. Anek (DW2) also volunteered some information in paragraph 8 of her witness statement when she asserted that, in the year 1984, the brother of the Respondent (a one Olal) sought refuge on the suit land. Whereas Olal was unfortunately killed by the LRA rebels, I think DW2 accidentally volunteered relevant information without appreciating its implications. Crucially, DW2 did not expound why Olal chose the suit land for refuge and not anywhere else. I think on the strength of the matters I have already considered, the late Olal sought refuge on the suit land because it was his father's. Being the late brother of the Respondent, Olal's action in a way lends credence to the Respondent's claim to the suit land.

In my evaluation, I have found more pieces of evidence pointing to the Respondent's interest in the suit land than the first Appellant. PW3 (Olum Masimo, the 68 year old) for instance, testified that when he was a pupil at Okuture primary school, the school pupils could tilt the suit land under a program where the Respondent's father could give a goat to the pupils. The goat was consideration for the work done on the farm by the pupils. PW3 also stated that the Respondent's father (Gabriel Omoya) was a member of the School Management Committee. PW3 was able to recall that

a goat was given to the pupils of the school when he was in primary two. PW3 asserted that the home of the Respondent's parents was the only home on the suit land at the time. He went on to explain that, the Respondent's father also had a makeshift home across Ayugi stream but retained a home on the suit land. PW3 who appears to have known the family so well, stated that, some of the Respondent's siblings used to study across Ayugi stream at Pupwonya Primary School because of flooding of the stream. In my view, these evidence was not controverted. PW3 was supported by PW4. The latter stated that he knew the suit land. Although PW4 conceded in cross examination that he was told by his father that the Respondent's father used to occupy the suit land, PW4 was categorical that as a neighbor in the north of the suit land, he knew the suit land very well.

Considering the versions by the two sides to this appeal, I find that much of the Appellants' evidence relate to the occupancy and user of the suit land post the 2009/2010 return from the IDP camp. Thus the scanty evidence respecting to prior years could not be independently corroborated. The available evidence on record, therefore, support the Respondent's case more than the Appellants'.

As noted in my analysis, the Appellants' possession of the suit land is more recent but was also challenged almost immediately by the Respondent.

The same applies to the crops and trees planted by the first Appellant on the suit land. This also goes for the Banana plantation. It was said the older banana plantations of the Respondent were uprooted and replaced by the Appellants'. This was not strongly contested by the Appellants. Although the first Appellant claims they planted bananas on the suit land much earlier and were able to harvest some prior to their seeking of refuge in the IDP Camp in 1995, I find the claim bare. The evidence by other witnesses were that, bananas and other fruit trees were planted after the Appellants' return from the IDP Camp. There is also abundant evidence by the Respondent that the Appellants replaced the old banana plant that existed on the suit land with their own. This conduct obviously weighs against the Appellants who destroyed evidence of the old occupancy of the suit land by the Respondent and their relations. They may not have had this suit in mind at the time but the Appellants cannot be allowed to benefit from such conduct. I note that the Appellants and their witness (Anek Sabina) vehemently deny and attempted to position the Respondent and his ancestors in Ayugi Village as being their ancestral home, and not the suit land. This was disingenuous, to say the least. Whereas there is ample evidence that the Respondent's father migrated from somewhere to the suit land and maintained a great link just as his son (the Respondent) however, the LRA insurgency displaced them from the suit land in 1995. Thereafter, the Respondent who took over from his father, sought to regain occupancy and possession of the suit land. He was not successful as he

was resisted by the Appellants who had taken possession. The Appellants burnt huts built by the Respondent and destroyed the old banana plantation. Where access to land is gained illegally he/she who gains possession cannot brag about it and contend that the one who has lost possession is not the lawful owner. See: ***Komakech Walter & 3 Others Vs. Kilama Owani & 2 Others Civil Appeal No. 17 of 2021*** where this court expressed similar views.

On the evidence, I find that the Appellants took advantage of the LRA insurgency that caused massive displacement, to gain access to the suit land. That explains why the Appellants resisted the Respondent's attempt to regain access. This court takes judicial cognizance of the adverse effects of the LRA atrocities and the fact that displaced persons started returning home gradually. Relative peace was regained in peace meal in the Acholi sub region from about the years 2006/2007. This state of affairs has been recognized by courts. At least my noble and learned brother, Mubiru, J., did so in the case of ***Oyoo Francis Vs.Olanya Martin, Civil Appeal No. 0005 of 2017.***

The position of the law is that possession is good against the whole world except the person who can show good title. See: **Asher Vs. Whitlock (1865) LRD 1 Q.B1 (Cockburn CJ at p.5)**. Thus in the instant case, I find it undisputed that the first Appellant is in possession but as noted, he

gained possession illegally. The first Appellant, supported by his nephew, the second Appellant, took advantage of the long period of the LRA war that caused displacement of the Respondent, to destroy crucial evidence of the Respondent's previous occupancy and possession of the suit land. The Appellants cannot be allowed to take benefit of it. I, therefore, share the views expressed by Mubiru, J., in that regard, in the case of ***Odoch Geoffrey Vs. Adong Karamela & 2 others, HC Civil Apeal No. 107 of 2018.***

In the instant case, I also note that the Respondent conceded in cross examination that when he was going to the IDP camp, he left from somewhere else (Ayugi Village) and not from the suit land. The Appellants' learned counsel capitalized on this concession, in his address in this appeal. Learned counsel pressed the view that that means the Respondent does not own the suit land. With respect, I cannot accede to the view. It is because the Respondent clarified in re-examination that he left from Ayugi Village because his occupancy of the suit land had been resisted by the Appellants. I accept that explanation as evidence support it. Other witnesses corroborated the Respondent's version. The Appellant's conduct towards the Respondent bordered on illegality. They gained possession contrary to the law. A court of justice cannot support it. I reiterate the views I expressed in a similar regard in the case of ***Lagedo Christine & 3***

others Vs. Fabiano Obwoya, Civil Appeal No. 82 of 2019 whose facts are similar.

It is the legal position that, evidence that an original possessor of land was forced to abandon his/her land, will defeat the claim by a subsequent possessor especially where a party was forced by insurgency to vacate the property, as it implies that there was no abandonment *per se*. Therefore, a person who was forced to abandon land can repossess what belongs to him/her at the end of the insurgency. See: ***Oketa P' Alal & 3 others Vs. Lakony David Livingstone, HC Civil Appeal No. 0038 of 2015 (Mubiru, J.)*** Accordingly, involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before. See: ***John Busuulwa Vs. John Kityo & others, Court of Appeal Civil Appeal No. 112 of 2003***. In ***Oyoo Francis Vs.Olanya Martin, Civil Appeal No. 0005 of 2017***, the High Court held that the temporary abandonment of the Respondent in that case, having not been voluntary, his rights as the owner of land were revived when he returned after the LRA insurgency. I agree.

In closing, therefore, I find ample evidence that the Appellants' possession of the suit land was challenged by the Respondent immediately the Respondent's attempts to regain access was resisted. There is evidence of attempts by the Respondent to challenge the Appellants, first, before the

LCII Court. He then attempted before the Land Chiefs (Rwot Kweri), and, lastly, he petitioned Pabbo Clan. Whereas the jurisdiction of these offices to conclusively resolve the issue could have been lacking, at least the Respondent disapproved of the Appellants' conduct. This Court, however, bemoans the parties' failure to adduce documentary proof of the alleged 'decisions' each party claims to have secured from these offices. The decisions of those offices could have assisted this court to appreciate the full import of their views regarding the competing claims. The decisions of the respective offices could have constituted relevant evidence before the trial court, but as noted, none was adduced by the parties. I think they were comfortable with mere verbal claims. It is clear from the record that learned counsel for the parties, with respect, did not do enough to assemble such evidence. Thus the case the disputants placed before these offices, remain scanty. Some relevant documents regarding what happened before some of those offices, which remain attached to the Respondent's witness statement, were not admitted in evidence, having been objected to. Some of the documents were simply abandoned by learned counsel for the Respondent. Learned counsel for instance claimed the documents were not translated into English. This claim was not entirely correct. Court has therefore not considered those documents in this appeal. The documents might have assisted in one way or the other to resolve the controversy further. Aside from the documents, this Court has thus given no weight to the conflicting oral testimonies of the parties

regarding the alleged outcome of those processes they engaged. What is important is that the dispute finally found its way before the trial court.

In conclusion, having evaluated the evidence, I find that the Respondent, and not the Appellants, was able to prove on the balance of probability that it is the lawful owner of the suit land. I, therefore, agree with the findings, conclusions, and orders of the trial court notwithstanding my reservations on the quality of evaluation of the evidence. Having dealt with the matter afresh, I see no reason to upset the conclusions and orders of the trial court as it was not urged in this appeal. There is ample evidence on record to support the conclusions and orders of the learned Chief Magistrate. I, therefore, uphold the orders of the trial court in their entirety. Consequently the Appeal stands dismissed with costs to the Respondent.

It is so ordered.

Delivered, dated and signed in Court this 16th day of November, 2023

16/11/2023

George Okello
JUDGE HIGH COURT

Judgment read in Court

10:30am

16th November, 2023.

Attendance

Mr. Owor Abuga, Counsel for the Appellants.

1st Appellant in Court.

2nd Appellant absent (sick).

Kilama Calvine, Counsel for the Respondent in court.

Respondent in Court.

Ochan Stephen, Court Clerk.

16/11/2023

George Okello

JUDGE HIGH COURT