THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

CIVIL APPEAL NO. 13 OF 2022

(Arising from Civil Suit No. 068 of 2016)

ODONG DENIS (The lawful attorney of Okot Godfrey) ========== APPELLANT

VERSUS

1.OJERA CHARLES ONYUTA

2.OWEK RICHARD

3.ODONG DAVID========== RESPONDENTS

BEFORE HON. MR. JUSTICE PHILLIP ODOKI

JUDGMENT

Introduction:

[1] This appeal arises from the judgment of the Magistrate Grade 1 of Gulu (His Worship Kwizera Vian) dated 16th December, 2022 in Civil Suit No. 068 of 2016, wherein he dismissed the Appellants' suit against the Respondents with costs to the Respondents. The Appellant, being dissatisfied with the judgement, appealed to this Court. He seeks that the appeal be allowed; the decision of the trial Magistrate be set aside; he should be declared the rightful owner of the suit land; the court should grant him any other relief it deems fit; and an order that the Respondents should bear the costs of this appeal.

Background:

[2] The Appellant (Okot Godfrey), through a holder of his Power of Attorney (Odong Denis), instituted Civil Suit No. 068 of 2016 in the Chief Magistrates Court of Gulu against the Respondents. He pleaded that the land situate at Labworomor Village, Paidongo Parish, Bobi Subcounty, Omoro District measuring approximately ten (10) acres (hereinafter referred to as 'the suit land') belonged to his father Lukulu Paihto who acquired it since time immemorial when the same was still virgin without any person claiming interest in it. When Lukulu Paihto died in 1954, he left his children on the suit land, the Appellant inclusive. The Appellant and his family have been utilizing the suit land undisturbed by anybody, including the 3rd Respondent and neighbors, until 1996 when the LRA insurgency intensified forcing him and

his family to take refuge in Bweyale, in the present day Kiryadongo District. However, when he and the family returned to the suit land in 2006, they found the 3rd Respondent had trespassed onto the suit land. All attempts to stop him was in vein. In 2011, he took the matter to the local chief. The local chief summoned the 3rd Respondent for a meeting but the 3rd Respondent refused to attend the meeting. He (the Appellant) was then prompted to take the matter to the Local Council II Court of Paidongo Parish who decided the matter in his (the Appellant's) favor. The 3rd Respondent ignored the decision of the Local Council II Court and refused to give vacant possession. The 3rd Respondent thereafter sold the suit land to the 1st and 2nd Respondent. The Appellant contended that 1st and 2nd Defendant purchased the suit land knowing very well that it does not belong to the 3rd Respondent and that it was a subject of a dispute before the Court which gave a decision in his favor. The Appellant sought for, a declaration that the suit land belongs to him; an eviction order against the Respondents; A permanent injunction to restrain the Respondents and their agents from further interfering with the suit land; general damages for trespass; interest; and any other reliefs that the Court would deem fit.

[3] The 1st and 2nd Respondents filed their Written Statement of Defense in which they denied the allegations of the Appellant. They admitted purchasing the suit land from the 3rd Respondent. The 1st Respondent pleaded that he purchased 7 and ½ acres from 3rd Respondent on the 16th November 2014 and the 2nd Defendant pleaded that he purchased 5 acres from the 3rd Respondent on the 2nd November 2015. They contended that they purchased the suit land upon the representation of the 3rd Respondent that his father was the owner of the suit land and authorized him to sell it. They further contended that after the purchase of the suit land, they started using it and did not receive any compliant from the Appellant. According to the 1st and 2nd Respondent, Appellant confirmed during the mediation meeting held on the 20th July 2015 that the 3rd Respondent was the rightful owner of the suit land. They further contended that the dispute between the Appellant and the 3rd Respondent was resolved by the LCII Court in favor of the 3rd Respondent, but that decision was quashed on appeal to the Chief Magistrate and a retrial was ordered.

[4] The 3rd Respondent filed his Written Statement of Defense in which he also denied the allegations of the Appellant. He pleaded that the suit land belonged to his grandfather called Oyoo. Upon the death of Oyoo, his son Ojwiya Vincent (father to the 3rd Respondent) inherited the suit land and utilized it. In 1994 he was given the suit land by his father (Ojwiya Vincent)

as a gift inter vivos. He further pleaded that he was born in 1975 opposite the suit land. He utilized the suit land until when he sold it to the 1st and 2nd Respondents. According to him, the father of the Appellant (Lukulu Paihto) never utilized or owned the suit land. He further pleaded that although the Appellant reported the matter to the LC11 Court, the office of the Resident District Commissioner resolved the matter in his (3rd Respondent's) favor.

[5] Two issues were framed for the determination of the court. Issue 1 was whether the Appellant was the rightful owner of the suit land and issue 2 was whether the sale between the 1st, 2nd and 3rd Respondents was lawful. The Appellant testified as P.W.1. He called Albino Odwar who testified as P.W.2; Odong Denis Okot who testified as P.W.3; and Doroteya Korong who testified as P.W.4. The Respondents testified as D.W.1, DW2 and DW3 respectively. They called Ojok Kizito, the chairperson LCI of Labworomor Village who testified as D.W.4.

[6] On the 16th December 2021 the learned trial Magistrate gave his judgement dismissing the suit. On issue 1, the trial Magistrate held that the suit land belonged to the 3rd Respondent. He reasoned that the Appellant testified that he inherited the suit land from his grandfather Balmoi Onyang who was buried on the suit land, but his evidence was contradicted by that of his son (P.W.3) who testified that none of his relatives has a home or is using the suit land. The trial Magistrate further reasoned that when the court visited the locus in quo, the Appellant failed to show to the court where the grave of his grandfather was. Furthermore, the trial Magistrate reasoned that the Appellant testified that he saw 2nd Respondent using the suit land but he did not report to the police. In addition, the trial Magistrate reasoned that the Chairperson LCI and the local chief were present during the sale, they confirmed that the land belonged to the 3rd Respondent and the Chairperson LCI sanctioned the sale. According to the trial Magistrate, the grandfather of the 3rd Respondent gave the suit land to Ojwiya Vincent who in turn passed it on to the 3rd Respondent and the Chairperson LCI described the boundaries very well. On the 2nd issue, the Trial Magistrate held that the sale was lawful because, the agreement was made during daytime; there was inspection of the land before the sale; after verification and confirmation of ownership of the suit land, the parties executed the sale agreement; and the local chief was present during the sale.

Grounds of appeal:

[7] The Appellant formulated 6 grounds of appeal.

1. The Learned trial Magistrate erred in law and fact when he failed to find that the Appellant is the lawful customary owner of the suit land thereby arriving at a wrong decision.
2. The Learned trial Magistrate erred in law and fact when he held that the sale between the 1st, 2nd and 3rd Respondents was lawful thereby arriving at a wrong conclusion.
3. The Learned trial Magistrate erred in law and fact when he held that there was a major contradiction between the of the Appellant and his witnesses thus causing a miscarriage of justice.
4. The Learned trial Magistrate erred in law and fact when he failed to determine the boundaries between the parties thereby occasioning a miscarriage of justice.
5. The Learned trial Magistrate erred in law and fact when he ignored the visible evidence of possession of the suit land by the Appellant and his relatives thereby arriving at a wrong conclusion.
6. The Learned trial Magistrate erred in law and fact when he failed to properly conduct the proceedings at the locus in quo thereby occasioning a miscarriage of justice.

Legal representation:

[8] The Appellant was represented by Mr. Christopher Oneka of M/s Adonga Ogen Associated Advocates. The Respondents were represented by Mr. Brian Watmon of M/s Odongo & Co. Advocates.

Legal submissions:

[9] On ground 1 of the Appeal, Counsel for the Appellant submitted that the Appellant and his witnesses adduced evidence to show that he is the customary owner of the suit land, which evidence was not controverted by the Respondents and yet the trial Magistrate failed to find that he was the customary owner of the suit land. Counsel relied on the case of ***Atunya Valiryano versus Okeny Delphino High Court Civil Appeal No. 0051 of 2017*** on what has to be proved by any person claiming customary ownership of land. On ground 2, he submitted that much as the 1st and 2nd Respondent alleged that they did due diligence and inspected the

suit land in the presence of neighbors and the local chief, they did not adduce any of the neighbors as witnesses. According to counsel, there was no reason why the neighbors did not sign the sale agreement. On ground 3, counsel submitted that the trial Magistrate introduced facts which were extraneous to the court record when he held that the Appellant testified that his grandfather Balmoi Onyang was buried on the suit land, but his evidence was contradicted by that of his son (P.W.3). On ground 4, he submitted that the trial Magistrate ignored the evidence of the Appellant that the boundary between him and the 3rd Respondent was a road from Palenga to Kidi Kal. On Ground 5, he submitted that the trial Magistrate ignored the visible evidence of mongo trees which the Appellant testified that he planted in 1971 and the house of the niece of the Appellant which the Appellant testified was on the suit land. On ground 6, counsel submitted that at the locus, the trial Magistrate confirmed the jack fruits which the Appellant testified that it belongs to him but the trial Magistrate did not consider it in his judgement.

[10] In reply, counsel for the Responded raised a preliminary objection that Odong Denis instituted Civil Suit No. 068 and this appeal in his name as a donee of a Power of Attorney of Okot Godfrey instead of the suit and this appeal being instituted in the name of Okot Godfrey. Counsel argued that the plaint was illegal and incurably defective since Odong Denis had no cause of action against the Respondents. Counsel relied on the case of ***M/S Ayiguhugu &Co Advocates versus Munyankindi Muteeri Mary [1990- 1991] KALR 163*** and ***Boutique Shanzim Ltd versus Noratham Bhatia and Another CACA No. 36 of 2007.***

[11] On the merits of the appeal, counsel for the Respondent argued, on ground 1 of the appeal that the Appellant did not adduce any evidence to prove customary ownership. Counsel further submitted that although the Appellant pleaded that Lukulu Paihto acquired the suit land when it was still virgin, in his evidence he testified that he did not know how his grandfather acquired the suit land. On ground 2, he argued that the 1st and 2nd Respondent explained to the court that they purchased the suit land after doing complete due diligence by inquiring from the local leaders and the owner of the suit land. On ground 3, he submitted that the Appellant's case was marred with contradictions which were highlighted by the trail Magistrate. On ground 4, he submitted that the issue of the road being a boundary mark between the Appellant and the 3rd Respondent was not pleaded by the Appellant. In addition, counsel submitted that D.W 3 testified that the road is not a boundary and he was not cross-examined on that evidence. On ground 5, counsel submitted that at the locus, there was no visible evidence of possession by

the Appellant. On ground 6, he submitted that there were no errors during the locus hearing. What was stated by the Appellant is what was captured on the court record.

[12] In rejoinder to the preliminary objection by counsel for the Respondent, counsel for the Appellant submitted that right from the lower Court, the suit was bearing the name of Odong Denis, suing as a holder of a Power of Attorney of Okot Godfrey. The Respondents never raised any objections to that effect. In addition, counsel submitted that Odong Denis instituted the suit by virtue of the Power of Attorney granted to him by Okot Godfrey but not in his own name. Counsel argued that the facts in the case of ***M/S Ayiguhugu &Co Advocates,*** which was cited by counsel for the Respondents, are distinguishable from those in this case. According to counsel, in the case of ***M/S Ayiguhugu &Co Advocates,*** the agent instituted the suit in their name and yet they did not have a cause of action. In the instant case, the suit was instituted by Odong Denis, suing as a holder of a Power of Attorney of Okot Godfrey. Counsel invited the court to the overrule the objection in light of Article 126(2)(e) of the Constitution.

Consideration and determination of the court:

[13] Before determining the merit of this appeal, I shall first determine the preliminary objection which was raised by counsel for the Respondents. I agree with counsel for the Appellant that the Respondents did not raise the objection in the lower court. The issue therefore is, whether this court, on appeal, can determine the matter. In ***William Twakirane versus Viola Mamusede High Court Civil Appeal No. 0046 of 2007*** where the appellant argued, on appeal, that the suit was barred by time limitation and yet he had not raised the matter in the lower Court, Owiny – Dollo, J., as he then was, held that:

> *"For a Court of appeal, as this one, to exercise its discretion and determine such a point of controversy which was not at all pleaded or canvassed before the trial Court, it must have before it sufficient evidence on which it could carry out an investigation and determine whether if the matter had been raised in at the trial, the lower Court would have had sufficient material to determine the issue."*

[14] In the instant case, both the Plaint and the Power of Attorney are on the court record. If the matter had been raised before the trial court, it would have had sufficient material to determine it. This Court can therefore exercise its discretion to determine the matter.

[15] It is a settled position of the law that an agent acting under a Power of Attorney should, as a general rule, act in the name of the principal. If he is authorized to sue on the principal's behalf, the action should be brought in the principal's name. The reason is simple, it is the principle who has the cause of action and not the agent. See the case of ***M/S Ayiguhugu &Co Advocates*** cited by counsel for the Respondents.

[16] In the instant case, the relevant part of the plaint reads; *"ODONG DENIS (Suing through Power of Attorney of OKOT GODFREY)"*. I note that the plaint was drawn by the Appellant who is a lay person. It would have been desirable that the plaint should have read, "*OKOT GODFREY suing through his donee of a power of attorney ODONG DENIS"*. However, the plaint in its current form, clearly discloses the principal as being Okot Godfrey on whose behalf Odong Denis was acting. It was Okot Godfrey who had a cause of action against the Respondent. The plaint clearly shows that the land belongs to Okot Godfrey. He utilized it undisturbed by anybody until when the 3rd Respondent trespassed onto the suit land and subsequently sold it to the 1st and 2nd Respondent. I therefore agree with counsel for the Appellant that the facts in this case are different from those in the ***M/S Ayiguhugu &Co Advocates*** where the suit was in the name of the agent and not the principal.

[17] In addition, I have considered the preliminary objection in light of Article 126(2)(e) of the Constitution. This Article has been interpreted severally by the Supreme Court to mean that it gives the constitutional force the well settled common law position that rules of procedure are handmaidens of justice. The Supreme Court has guided that the Article, was not intended to do away with the requirement that litigants must comply with the rules of procedure in litigation; can only be applied subject to the law, which includes the rules of procedure; and is not a magic wand in the hands of defaulting litigants. A litigant who relies on Article 126(2)(e) of the Constitution must satisfy the court that in the circumstances of the particular case, it is not desirable to pay undue regard to a relevant technicality. See: ***Mulindawa George William versus Kisubika Joseph, SCCA No. 12 of 2014***; ***Utex Industries Ltd versus Attorney General, SCCA No. 52 of 1997***; and ***Kasirye & Braruhanga and Co. Advocates versus Uganda Development Bank, SCCA No. 2 of 1997***.

[18] In my view, the Appellant has satisfied the Court that in the circumstances of this case where the plaint clearly discloses the principal as being Okot Godfrey on whose behalf Odong Denis was acting, it would not be desirable to pay undue regard to the technicality that the

plaint should have read that Okot Godfrey was suing through his donee of a power of attorney Odong Denis. I therefore find no merit in the preliminary objection; it is accordingly overruled.

[19] I shall now proceed to determine the merits of this appeal. All the grounds of appeal shall be handled together. Before I do so, I wish to point out that the duty of this Court, as a first appellate Court, is to reconsider all material evidence that was before the trial court and to come to its own conclusion on the evidence. This settled position of the law was stated by the Supreme Court in ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000***. At page 7, Mulenga J.S.C stated that:

> *"It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on the evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re – evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court."*

[20] Both counsel made submission regarding whether the Appellant proved that he was the customary owner of the suit land. Customary tenure is recognized by Article 237 (3) (a) of ***The Constitution of the Republic of Uganda 1995***, and Section 2 of the ***Land Act, Cap 227*** as one of the four land tenure systems in Uganda. According to Section 3 of the ***Land Act, Cap 227***, customary tenure is a form of tenure which is, applicable to a specific area of land and a specific description or class of persons; governed by rules generally accepted as binding and authoritative by the class of persons to which it applies; applicable to any persons acquiring land in that area in accordance with those rules; characterized by local customary regulation; applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land; providing for communal ownership and use of land; in which parcels of land may be recognized as subdivisions belonging to a person, a family or a traditional institution; and which is owned in perpetuity.

[21] In ***Atunya Valiryano*** (supra), my brother Judge Mubiru J. held that:

"…a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply."

[22] Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative. See: ***Bwetegeine Kiiza and Another versus Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009***; ***Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009***; *and* ***Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of 2010***.

[23] In the instant case, Appellant (P.W.1) testified that the suit land belongs to him, having inherited it from his grandfather called Onyang Balmoi who is from Paidong clan. He stated that he did not know when his grandfather acquired the suit land. He testified that he was born in 1935 on the suit land. He planted mongo trees on the suit land in 1971. The mango trees are 3, some of the them were cut. He further testified that there were also bananas on the suit land which were planted in 1958, but the 3rd Respondent burnt them. When the court visited the locus (as per the hand written record of the trial magistrate) he showed to the court his banana plantation on the suit land. He further testified that the suit land also has 12 jack fruit trees which he planted in 2007 on the suit land but they were also burnt. Accordin to him, the suit land also had his maize and a house belonging to Apacu who is the daughter of his brother. He testified that he left the suit land in 1996 due to insurgency and took refuge in Bunyoro. In 2006 when he returned from Bunyoro he found the 3rd Defendant cultivating the suit land. He stopped the 3rd Respondent but in vein. He then reported the matter to the local chief of the area who referred him to Local Council II of Labworomor Parish. The Local Council II decided that he (the Appellant) was the owner of the suit land. However, the 3rd Respondent refused to vacate the suit land. He (the Appellant) then reported the matter to Bobi subcounty where it

was found that the land was not for the 3rd Respondent. The 3rd Respondent then sold the land to the 1st and 2nd Respondents. The 1st and 2nd Respondents destroyed his maize. According to the Appellant, the boundary mark separating the suit land and the land of the father of the 3rd Respondent is Palenga – Kidi Kal road which is on the southern side of the suit land. He further testified that the 3rd Respondent came with his mother in 1979. At that time, he (the Appellant) was slashing the banana plantation.

[24] P.W.2 stated that the Appellant is a brother to his father and the 3rd Respondent is a son of his brother called Ojwiya Vincent. He testified that the suit land belongs to the Appellant. He knew it because he used to graze on the suit land. According to him, the Appellant was in occupation of the suit land together with his father Lukulu before 1958. He testified that the Appellant acquired the suit land in 1958. The boundary between the suit land and the land of the 3rd Defendant is a road from Palenga to Labworomor. Before the Appellant left for Bunyoro he was staying on the suit land. He further stated that there is a well on the suit land called "Wang Ojwiya" which was dug by Ojwiya. He stated that while he was growing up, the well was not there.

[25] P.W.3 stated that the Appellant is his father. He testified that his father told him that he inherited the suit land from Lukulu Paito. According to him, there is a road that separates the suit land and the land of the 3rd Respondent. He testified that the dispute started in 2005 when the 3rd Respondent started burning the bananas of the Appellant and cultivating the suit land. According to him the well on the suit land called "Wang Ojwiya" was named after the father of the 3rd Respondent because he is the one who dug it.

[26] P.W.4 stated that she comes from the same village where the suit land is situated. She testified that the suit land belongs to the Appellant. According to her, the land of the 3rd Respondent is on the opposite side of the road from Labworomor to Palenga.

[27] D.W.1 (the 1st Respondent) testified that Odong Denis is not a neighbor to the suit land. D.W.2 (2nd Respondent) testified that Odong Denis is a neighbor to the suit land. He further testified that at the time he bought the suit land, the land of Odong Denis which neighbors the suit land was still a bush. D.W.2 further testified that Apaco is a neighbor to the suit land.

[28] D.W.3 (the 3rd Respondent) testified that the suit land was given to him by his father called Ojwiya Vincent. Ojwiya Vincent inherited the suit land from his father Oyo Thomas. He testified that he used the suit land for 40 years. He was using the suit land for farming, planting cassava. According to him, ever since he was born in 1973, the Appellant has never used the suit land. He testified that his father told him that the well on the suit land was showed to him by his father (Oyo). He further testified that the well was named before he was born. According to him, the road on the suit land is not a boundary.

[29] D.W.4 stated that he was the LC1 chairperson of Labworomor Village. He testified that he first came to know the suit in 1994 that it belonged to the 3rd Respondent. He further testified that the 3rd Respondent inherited it from his father, Ojwiya Vincent, who also inherited it from his father Oyo. According to him, the suit land has a well called "Wang Ojwiya" because it was near the home of Ojwiya.

[30] From the above evidence, it is very clear that the Appellant did not prove that he acquired the suit land in accordance with any known customary rule accepted as binding and authoritative. His evidence that he was born on the suit land; inherited the suit land from his grandfather; and was in possession until 1996 when he left the suit land because of insurgency falls short of proving that he acquired the suit land in accordance with any known customary rules accepted as binding and authoritative. I have to add that even the 3rd Respondent did not adduce any evidence to prove that he acquired the suit land in accordance with any known customary rule accepted as binding and authoritative. Although he testified that he inherited the suit land from his father, no evidence was led to prove that the inheritance was in accordance with any known customary rule accepted as binding and authoritative.

[31] I note that both the Appellant and the 3rd Respondent relied on evidence of long use and occupation of the suit land as evidence of ownership. In ***Boiti Bonny versus Imalingat Lawrence Court of Appeal Civil Appeal No. 239 of 2016 Gashirabaki*** J.A, held that:

> *"Possession confers a possessory title upon a holder of land and a recognizable enforceable right to exclude all others but persons with a better title. Possession of land is itself a good title against anyone who cannot show a prior and therefore better right to possession (see Asher v.Whitlock(1865) LR 1 QB1)."*

[32] Similarly in ***Atunya Valiryano*** (supra), my brother Judge Mubiru J. held that:

> *"At common law, factual possession of land signifies an appropriate degree of exclusive physical control. For vast lands, possession requires knowledge of its boundaries and the ability to exercise control over them (see Powell v. McFarlane (1977) 38 P&CR 452). In respect of claims over adjacent unoccupied land, there should be evidence that the claimant deals with the cleared and un-cleared portions of the land, co-extensive with the boundaries, in the same way that a rightful owner would deal with it Once there is evidence of open, notorious, continuous, exclusive possession or occupation of any part thereof as would constructively apply to all of it, in such cases occupancy of a part may be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by the claimant. A person exercising such possession therefore, for all practical purposes, is the "owner" of the land since it is trite that* ***"possession is good against all the world except the person who can show a good title" (see Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5).****"*

[33] In the instant case, the Appellant testified that he was born on the suit land. He planted mango trees on the suit land in 1971. There were also bananas on the suit land which were planted in 1958. When the court visited the locus (as per the hand written record of the trial magistrate) he showed to the court his banana plantation on the suit land. He testified that he left the suit land in 1996 due to insurgency and took refuge in Bunyoro. According to him, the land of the father of the 3rd Respondent is different. The boundary mark separating the suit land and the land of the father of the 3rd Respondent is Palenga – Kidi Kal road which is on the southern side of the suit land. The 3rd Respondent on the other testified that ever since he was born in 1973, the Appellant never used the suit land. he testified that it is him who used the land for 40 years until when he sold to the 1st and 3rd Respondents.

[34] I have evaluated the evidence of the Appellant and his witnesses as against that of the 3rd Respondent and his witnesses. In my view, the 3rd Respondent did not adduce evidence to prove that he was in exclusive possession of the suit land. Although it was common ground that there exist a well on the suit land which was named after his father, that evidence does not prove that it is the 3rd Respondent who was in exclusive possession of the suit land. No evidence was adduced to prove when this well was dug to determine the duration of the use of the well. P.W.2

testified that while he was growing up, the well was not there. I have not believed in the evidence of 3rd Respondent that the well was named before he was born. This is because he was merely told of the well by his father. In addition, he testified that his father told him that the well was shown to him by his father Oyo. If that were to be the case, then why was the well named after his father if it was already in existence before Ojwiya got to know of it. The evidence of P.W.2 and P.W.3 is more logical that the well was named after the father of the 3rd Respondent because he is the one who dug it. In my view, the 3rd Respondent lied to the court as to when the well came to be in existence on the suit land.

[35] In addition, although the 3rd Respondent testified that he used the suit land for 40 years for farming, there was nothing on the suit which he pointed to court at the locus as evidence of 40 years of use the suit land. His witness D.W.4 only came to know of the suit land in 1994 during the period of insurgency in northern Uganda. Although the 3rd Respondent claimed that the road was not a boundary between his land and that of the Appellant, he failed to explain the land of the Appellant which D.W.2 told the court that it neighbors the suit land.

[36] The Appellant on the other hand testified that he was born on the suit land and planted crops on the suit land as early as 1971. The handwritten record of the trial court at the locus shows that the Appellant clearly showed the court his banana plantation on the suit land. Strangely, the trial Magistrate noted in the Map that that he banana plantation was for the 2nd Respondent when he did not testify both in court and at the locus that he had a banana plantation on the suit land. The evidence of the Appellant regarding ownership of the suit land was supported by that of P.W.2 who was 72 years old and P.W.3 who was 80 years old. Their evidence was not discredited in any way. P.W.2 is an uncle to the 3rd Respondent and as per his evidence he knew the land very well since he used to graze on it. I have not found any reason why he would lie about the true ownership of the suit land.

[37] Although the trial Magistrate held that Appellant testified that his grandfather Balmoi Onyang was buried on the suit land, but his evidence was contradicted by that of his son (P.W.3) and when the court visited the locus in quo, the Appellant failed to show to the court where the grave of his grandfather was, the finding was not based on evidence on the court record. Nowhere did the Appellant testify that his grandfather was buried on the suit land. The Appellant was very clear that his grandfather (Balmoi Onyang) was not buried on the exact area that was being disputed. P.W.3 did not testify about where Balmoi Onyang was buried. I

therefore agree with counsel for the Appellant that the Trial Magistrate introduced facts which were extraneous to the court record in that regard. It was pointless for the Trial Magistrate to have expected the Appellant to point at the locus where Balmoi Onyang was buried when it was very clear from his evidence that he was not buried on the suit land. In my view, the Appellant proved on the balance of probabilities that the suit land belongs to him.

[38] The 1st and 2nd Respondents' case in essence was that they are bona fide purchasers for value of the suit land. In ***Ndimwibo Sande and 4 others versus Allen Peace Ampaire Court of Appeal Civil Appeal No. 65 of 2011*** the Court held that the doctrine of bona fide purchasers for value without notice does not apply to unregistered land. At page 16, the Court stated that:

> *"It appears clearly to us that the doctrine of bonafide purchaser for value without notice is a statutory defence available only to the person registered as proprietor under the RTA. It is not an equitable remedy although its history stems from the common law. It would not even qualify as a remedy for it is only a defence, by a person registered as proprietor under the RTA."*

[39] In this case no evidence was adduced to prove that the suit land is registered under the ***Registration of Titles Act, Cap 230***. The 1st and 2nd Respondent cannot therefore take benefit of the defense of bonafide purchasers for value without.

[40] Be that as it may, D.W.1(the 1st Respondent) testified that during the inspection they made an agreement of sale. In cross-examination he changed and stated that at the time of inspection, the neighbors to the suit land were present, but at the time of payment the neighbors to the suit land were not there because they were not his witnesses. It therefore means that he lied to the court that the agreement was made during the inspection. Otherwise, the signatures of the neighbors would have been on the agreement of sale. In addition, D.W.1(1st Respondent) testified that Odong Denis is not a neighbor to the suit land. D.W.2 (2nd Respondent) contradicted the evidence of D.W.1. He testified that Odong Denis is a neighbor to the suit land. He further testified that at the time he bought the suit land, the land of Odong Denis which neighbors the suit land was still a bush. If indeed the neighbors to the suit land participated in the inspection, there was no reason why Odong Denis was not invited. The 3rd Respondent testified that he did not call Odong Denis as a witness because when the Odong Denis does his land transactions he does not call him. Furthermore, the Appellant testified that Apaco, who is

the daughter of his brother, has a house on the suit land. D.W.2 testified that Apaco is a neighbor and yet she did not witness his agreement. It is therefore very clear that the Respondents did not want the Appellant and his son Odong Denis to know of the purchase. The only logical reason was because the Respondents knew that Appellant and his son Odong Denis would have objected to the sale.

[41] Having found that the suit land belongs to the Appellant, it follows that the Respondents occupation on the suit land without the permission of the Appellant amounts to trespass for which the Appellant is entitled to general damages. The Appellant was denied use of his land for over 17 years. In the premises, I consider an award of general damages of UGX 20,000,000/= (Uganda Shillings Twenty Million) appropriate as general damages.

[42] In the end, this appeal succeeds with the following orders;

1. The decision of the trial Magistrate in Civil Suit No. 068 of 2016 dated 16th December 2021 is hereby set aside.
2. The suit land is declared to belong to the Appellant.
3. The Respondents are hereby ordered to give vacant possession of the suit land.
4. A permanent injunction is hereby given to restrain the Respondents and their agents or any person deriving authority from them from trespassing onto the suit land.
5. The Respondents to jointly and severally pay the Appellant general damages of UGX 20,000,000/= (Uganda Shillings Twenty Million) for trespass on the suit land.
6. The Respondents to jointly and severally bear the costs of this appeal and the costs in the lower Court.

I so order.

Dated and delivered by email this 15th day of April, 2024

Phillip Odoki

Judge.