

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**CIVIL APPEAL No. 0045 OF 2016**

**(Arising from Kitgum Grade One Magistrates Court Civil Suit No. 23 of 2016)**

5 **OBITA CHARLES** ..... **APPELLANT**

**VERSUS**

1. **KILAMA FRANCO** }  
2. **OYET JOHN** }  
10 3. **OPIRA INNOCENT** } ..... **RESPONDENTS**  
4. **AYELLA THOMAS** }  
5. **OKELLO JAMES** }

**Before: Hon Justice Stephen Mubiru.**

15 **JUDGMENT**

The appellant sued the respondents jointly and severally for a declaration that he is the owner of land under customary tenure, measuring approximately four acres, situated at Pagen West West village, Pagen Parish, Labongo Layamo sub-county, Kitgum District, an order of eviction, permanent injunction, general damages for trespass to land, *mesne profits*, interest and costs. His case was that the Pagen Kal Clan gave him that land in 1987 and he settled thereon peacefully until 18<sup>th</sup> May, 2016 when the respondents without any claim of right forcefully entered onto his land, cut down trees and distributed the land among themselves, hence the suit.

25 In their joint written statement of defence, the respondents refuted his claim and contended instead that the land in dispute originally belonged to the Pagen Kal Clan who used it for communal grazing from time immemorial. Being members of that clan, they are entitled to use the land for grazing. The appellant's claim to the land is fraudulent since the alleged grant was not made by the Pagen Kal Clan community. The dispute began on 18<sup>th</sup> May, 2016 when the  
30 appellant began claiming the land as his private property.

Testifying as P.W.1 Obita Charles, the appellant stated that the respondents are sons of his late brother. The land in dispute was given to him by the Chief Cultivator of the Pagen Kal Clan in 1987, a one Olak Justino. He grew seasonal crops on that land until 18<sup>th</sup> May, 2016 when he

found the respondents on the land, cutting down trees and apportioning the land among themselves. It had initially been used for grazing but when the cattle were rustled, the Chief cultivator decided that it should be converted to agricultural use. Growing crops would be a temporary user but when the community acquired livestock again, it would revert to pasture.

5 Although the respondents own land, the clan has never demanded the land back for grazing purposes. He is not willing though to return the land to the administration of the Pagen Kal Clan since he intends to use it as his private property. He gave the land to CICO Construction company who have since levelled the land.

10 P.W.2 Omoya Francis testified that the land in dispute belongs to the appellant and not the Pagen Kal Clan. The appellant acquired it when it was still vacant land in 1987. He saw the appellant cultivating the land but he did not know who gave it to him. On 18<sup>th</sup> May, 2016 he saw the respondents on the land, cutting down trees and apportioning the land among themselves. Before that, the respondents had never grazed any livestock on that land. P.W.3 Obone Peter testified  
15 that he did not know how the appellant acquired the land in dispute, but he had seen him use it for about ten years by growing seasonal food crops. On 18<sup>th</sup> May, 2016 he saw the respondents on the land, cutting down trees and apportioning the land among themselves. The appellant closed his case.

20 In his defence, D.W.1 Kilama Franco, the first respondent, stated that he is the Pagen Kal Clan Defence Secretary. The land in dispute belongs to the Pagen Kal Clan. It was from time immemorial used as a common grazing land. All members of the clan, the appellant inclusive, are entitled to use the land. They never cut down any trees or apportioned the land as claimed by the appellant, but are simply grazing their livestock on the land. The appellant intends to sell the  
25 land off to CICO Construction company. D.W.2 Oyet John, the second respondent who is also the General Secretary L.C.1, testified that all parties to the suit are members of the Pagen Kal Clan. The land in dispute belongs to Pagen Kal Clan. It has since time immemorial been used by members of the Pagen Kal Clan communally for grazing. There was insurgency in the area in 1987 and it is not true that Rwot Kweri gave the land to the appellant that year. He denied having  
30 cut down any trees or apportioning any of that land since he does not own any land in that area.

The dispute arose when the appellant attempted to sell off the land which belongs to the Pagen Kal Clan community and the respondents in their capacity as leaders stopped him.

On his part, D.W.3 Opira Innocent, the third respondent and Chairperson of the Pagen Kal Clan,  
5 testified that the land in dispute is used communally for grazing livestock. It was deliberately left vacant for that purpose by their fore fathers. It belongs to the Pagen Kal Clan. D.W.4 Ayella Thomas, the fourth respondent and Chairperson of the Pagen Kal Clan, testified that the land in dispute belongs to the Pagen Kal Clan and is used communally for grazing livestock. He has never cut down any trees on the land, partitioned or apportioned it. The clan has never given that  
10 land to any individual and in 1987 the community had fled to South Sudan due to insurgency. The appellant had not been using the land until May, 2016 when he attempted to sell or hire it out to CICO Construction company.

D.W.5 Okello James, the fifth respondent and the L.C.1 Chairperson of the village, testified that  
15 the land in dispute belongs to the Pagen Kal Clan who have been using it for cultivation. Before that, the clan had been using it from time immemorial for grazing livestock. He did not know how the appellant acquired the land but was only surprised when he learnt that the appellant had sold the land to CICO Construction company. The respondent did not trespass onto the land, cut down any trees or apportion the land. D.W.6 Anywar Serepino, the appellant's neighbour,  
20 testified that the land in dispute belongs to the Pagen Kal Clan who have been using it as grazing land, a decision that was taken by the clan in 1978 in the presence of the appellant. A cattle crush and water dam were established on the land for that purpose. He was surprised when he learnt that the appellant had sold the land to CICO Construction company. The land has never been apportioned for distribution to any individual members of the clan. The respondents closed their  
25 case.

The court then visited the *locus in quo* where it took note of the owners of adjacent land. It also recorded evidence from one person in attendance who had not testified in court. This was a one Odok Casiano who stated that the land in dispute belongs to the Pagen Kal Clan. Individuals  
30 were permitted to grow crops on the land after their cattle were raided by the Karimojong. Before that it was used as communal grazing land.

In his judgment, the trial magistrate stated that customary ownership of land is recognised by *The Constitution* and *The Land Act*. All parties to the suit are members of the Pagen Kal Clan. The appellant did not present any witnesses to his claim of having received grant of the land from Olak Justino, the Rwot Kweri of the Pagen Kal Clan. Even then, he admitted, though equivocally  
5 that the land was given to him temporarily, until such a time as members of the calm re-acquired livestock. The respondents have such livestock but he has refused to yield the land back to common use as grazing land. At the locus, he found a cattle crush, a dam and the terrain was consistent with grazing land, except the part from which CICO Construction company had excavated for murrum. The appellant failed to discharge the burden of proof that the land  
10 belonged to him. The land belongs to the Pagen Kal Clan wherein the appellant has only usufructuary rights. Such use was subject to clan regulation. the suit was accordingly dismissed with costs to the respondents.

Being dissatisfied with the decision, the appellant appealed to this court on the following  
15 grounds;

1. The trial Magistrate erred in law and in fact when he failed to evaluate the evidence on record thereby arriving at a wrong conclusion and occasioning a miscarriage of justice.
2. The trial Magistrate erred in law and fact when he held that the suit land belongs to the respondents, whereas not.

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Due to a mix-up in the date of hearing the appeal, Counsel for the appellant Mr. Ogik Jude was unable to file his written submissions. On his part, Counsel for the respondents Mr. Conrad Oloya, in his written submissions argued that the grounds raised by the appellant are too general and ought to be struck out. In the alternative, he submitted that the trial court made a proper  
25 evaluation of the evidence and came to the right conclusion. It was an agreed fact that the land initially belonged to the Pagen clan and that all parties are members if that clan. The evidence adduced by the respondents was to the effect that from time immemorial the land was used as communal grazing land for the Pagen Clan. The appellant claimed to have acquired the land as a gift from Olak Justino the then Rwot Kweri of the Pagen Kal Clan, sometime in 1987 but was  
30 unable to prove it. In the same breath, he admitted that it was given to him temporarily, recoverable by the clan when its members acquired cattle again.

This being a first appeal, it is the duty of this court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000*; [2004] KALR 236). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. This duty may be discharged with or without the submissions of the parties as the court proceeds to do now.

In the first place, both grounds of appeal are too general and offend the provisions of Order 43 rules (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998*; (1999) KALR 621; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*).

That on its own would have disposed of this appeal but I thought it necessary to consider the merits of appeal under the general duty of this court to subject the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.

5 The trial court erred when at the *locus in quo*, it recorded the evidence of a one Odok Casiano, a person in attendance who had not testified in court. This was a procedural error. Visits to a *locus in quo* are essentially for purposes of enabling a trial court to understand the evidence better. They are intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific  
10 aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980]  
15 HCB 81).

That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the  
20 evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be  
25 demonstrated that the irregularity occasioned a miscarriage of justice.

A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error  
30 complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been

reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of this "independent witness," since I am of the opinion that there was sufficient evidence to support a decision, independently of the evidence of this witness.

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It is common ground between the parties that the land in dispute was in the past, held communally by the Pagen Clan as communal grazing land until sometime before 1987 when their cattle was raided by the Karimojong. Customary land tenure recognises communal "ownership" and "use" of land (see section 3 (1) (f) of *The Land Act*). Under section 15 (1) of *The Land Act* an association may be formed for the "communal ownership and management" of land. By providing for customary tenure of a communal type, *The Land Act* deals with various forms of what is essentially the authority over the use and disposition of land, such as; "ownership", "use", and "management." A system in which resources are governed by rules whose point is to make them available for use by all or any members of the society, is in essence is a "collective property" system. In this context, the word ownership is misleading. A person does not really own land: but rights in land. Communal customary tenure is in essence a bundle of rights, which may vary from community to community. Land ownership is defined in terms of user rights and not exclusive ownership rights.

The rights can be placed in three broad categories; - (i) user rights; such as the right to access the land, draw benefits from the land or exploit it for economic benefit; (ii) control or decision-making rights, such as the rights to manage the land (plant a crop, decide what tree to cut, where to graze) or exclude (prevent others from accessing the land); and (iii) powers of alienation, such as the right to rent out, sell, or transfer the rights to others. In most cases, there are overlapping sets of rights, underneath the general classifications. An area within land held under customary tenure may be classified as common property, but individuals and groups are often allowed to use the land, either for access (e.g. recreation), withdrawal (cutting grass for thatching of fetching firewood), or even management, under co-management arrangements or concessions. At the other end of the spectrum on individual private property, members of the community may have rights, e.g. to cross the land with their animals (access), or to take drinking water or harvest particular products (withdrawal), or the right of the community to regulate alienation or the land

use (manage). The holder of all these interests, if they vest in one person in relation to land, will have the whole bundle of rights and interests. Thus the "owner" of a piece of land forming part of communal land only has an interest or estate in the land, since communal land is collectively owned. The community is assumed to hold the complete bundle of rights, including alienation  
5 rights.

In the Act, communal "ownership," presents the idea of "collective property," based on the notion that the community as a whole determines how important resources, such as land, are to be used. The idea is that the community allocates land for the private use of its members. These  
10 determinations are made on the basis of social interest through mechanisms of collective decision-making or collective control, of varying levels of formality; anything from a leisurely debate among the elders of the community to the formation and implementation of strict rules. Usually rights to family garden plots and fields are decided at the household or sub-clan level, while communal resources such as grazing lands and water are regulated communally. Access to  
15 land is through the right of avail which is a general right held by the community as a whole, but in which every member automatically participates. In this sense, under customary tenure of the communal type, land is "owned" by the community and the individual members enjoy only rights of user, otherwise known as usufructuary rights, based on accepted membership to the particular community. The more common practice is for a traditional authority to distribute land  
20 parcels to clans or sub-clan heads who, in turn, distribute the land to households. The household head then has the responsibility of distributing the land among household dependents.

Alongside the idea of "communal ownership," the Act provides for "use" and "management," through providing for the setting aside of one or more areas of land for "common use" by  
25 members of the group for such activities as; the grazing and watering of livestock, hunting, the gathering of wood fuel and building materials, the gathering of honey and other forest resources for food and medicinal purposes, or such other purposes as may be traditional among the community using the land communally (see section 23 (1) of *The Land Act*). The Act thereby creates a right of commons within a community where each member has a right to use  
30 independently the holdings of the community. Under a communal land ownership system, non-members of the community are excluded from using the common areas, except with permission



of the community. In most systems of common property, not even the collective have alienation rights.

This is to be contrasted with section 22 (1) of *The Land Act* which recognises that even under  
5 land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, where the customary law of the area makes provision for it. Individuals or households may as well cause their portions of the land to be demarcated and transferred to them, if such portions are in accordance with customary law, made available for the occupation and use of that individual or household (see section 22 (3) (b) of *The Land Act*).  
10 This presents the reality of limited private ownership rights existing even within communal ownership. It is an avenue for a process of devolution involving the shifting of rights from the community to the family (households) and individual as exclusive private property.

In contrast, a tract of common land, may be used by everyone in a community for grazing cattle  
15 or gathering firewood. Any restrictions on use are aimed simply at securing fair access for all and to prevent anyone from using the common resource in a way that would preclude its use by others, and also so as to have the minimum adverse impact on the natural and socio-economic environment. Therefore, the system of customary communal land ownership and use established by *The Land Act* is one of "collective property" alongside "common property" and "private  
20 property." This complex communal customary tenure comprises communal rights of free access to pastures alongside more or less exclusive private rights to agricultural and residential parcels.

Under communal customary tenure, the traditional authority responsible for allocation of land does so to an individual on a semi-permanent rights basis (the only real limitation being that the  
25 land cannot be sold, especially to a person who is not a member of the community) for agricultural and residential purposes, while land for grazing remains a communal resource. The range of land use rights in-between the extremes of individual rights on the one hand to common property use on the other, depends on internal customary practices adhered to by local communities, which rules and practices are also dynamic, changing over time with new  
30 leadership, and often interacting with new rules imposed by external regulations or market opportunities. These practices are as a result often obscured and require explicit evidence of the

customary norms of the particular community, which unfortunately, as in the instant case, is very often not canvassed during the trial. There is a pressing need to represent evidence of these norms and practices in order to give visibility to the internal complex practices within the customary tenure system, if their judicial protection and enforcement is to be attained.

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That notwithstanding, the fact that the land in dispute in the instant case is communal grazing land, presents a perfect usufruct, in the sense that it is land which can be enjoyed without altering its substance, though its substance may be diminished or deteriorated naturally by time or by the use to which the rights are applied, land. Beneficiaries of "usufructuary" rights do not own the property, but do have an interest in it, which is sanctioned or contractually allowed by the community who is the true "owner." These rights are held by the community indivisibly as common property rather by the individual members or groups of members. Such property is completely open for access by members of the community. A court cannot rely on mere assertions in pleadings or evidence regarding a claimed gift of such land. Clear and unequivocal evidence must always be presented to make out a case for a gift of land of this nature. The appellant did not establish by pleadings and evidence that the Rwot Kweri had the capacity under customary law to grant to him the disputed land as a gift and that the land in dispute was a gift absolute made to him by the Rwot Kweri.

Section 19 (2) of *The Land Act* envisages that once formed, the managing committee of a communal Land Association holds the land for and on behalf of all members of the association. Section 22 (3) (b) of *The Land Act* envisages that when an individual member of the community claims to own, in his or her own capacity, land which is held communally, it is possible for such a member to apply to the association to transfer to him, her or it, his or her or its portion of land, and the association shall consider the application and take a decision in the matter. The application is subject to the approval of the association. This not only is an indication of the fact that even for land held in a private capacity but forming part of communal land, the community may have some rights to regulate what can be done on or with the land, but it is also a tacit acknowledgement of the fact that the administrative responsibilities associated with communal land often rest with individual traditional leadership or councils as trustees of the community, in areas that observe customary land law. An avenue is now created by the Act for the

incorporation of those bodies into legal persons as a representation of the collective, and streamlining their roles.

By way of analogy, in respect of land communally held but for which a communal land association is yet to be created, the functions of a managing committee of a communal Land Association are currently performed by the Rwot Kweri. The Rwot Kweri is the traditional authority vested with entrusted ownership over the community's land, and the concomitant responsibility of land distribution. He should be deemed to hold the land for and on behalf of all members of the community. As a trustee of the community, the Rwot Kweri owes fiduciary duties to the community, under which he is bound to deal with the land only in the best interests of the community. The power of the Rwot Kweri to allocate communal land must be to the benefit and welfare of the members of the community. As a trustee of the community, the Rwot Kweri has no right to make gifts of the communal land in his own right. When an individual member of the community claims to own, in his or her own capacity, land which is held communally, then the burden lies on such a member to adduce evidence to show that the land was made available for the occupation and use of that individual, in accordance with customary law. Before the Rwot Kweri makes a decision on the matter, the claim ought to be subjected to the approval of the community.

I am partly persuaded by the jurisprudence from Nigeria to the effect that a sale, transfer, grant or gift of land under customary law is constituted by the handing over of the land so transferred in the presence of witnesses. The presence of witnesses is not only merely of evidential value, it is also a necessary part of the transaction. The presence of witnesses gives the transaction not only solemnity but also validity (See *Kamalu v. Ojoh* (2000) 11 NWLR (Pt.679) P.505 at p. 517 Paras D-E; *Cole v. Folami* (1956) 1. F.S.C 66 at p. 68; *Ajayi v. Olanrewaju* (1969) 1 All NLR 382 at p. 387; and *Orun-nengimo v. Egebe* (2008) 9 S.C.L.R (ph.7) pg. 82 at p. 102) While I do not accept this as a general principle with regard to land privately owned under customary tenure, the gift of which may in some exceptional circumstances be proved by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor (it suffices in those situations that the person who made the gift was the actual owner and there were circumstances warranting the giving of gift), the principle ought to apply with full force to gifts

of "common property" under communal customary tenure because in those situations the person making the gift is not the actual owner and the circumstances may not necessarily warrant the giving of a gift. The title of the Rwot Kwero as owner and donor of the disputed land, hitherto communal grazing land, was in issue and was never proved. As a trustee of the community, the  
5 Rwot Kweri had no right to make a gift of the communal land in his own right.

The appellant nevertheless sought to assert exclusive rights over what was for all practical purposes hitherto communal grazing land. In order to succeed with such a claim, the appellant bore the burden of proof not only of that fact the decision by the Rwot Kwero to give him  
10 exclusive rights over a part of what was communal grazing land at the time, was a decision in the best interests of the community at large, but also that those rights were created in accordance with customary law and that the claim was subjected to the approval of the community. The appellant proved neither. He only stated that he was given the land temporarily.

15 This implies that the appellant was only granted a licence to use the land rather than legal or equitable exclusive rights or interests in the land. Being a license in respect of a "common property," the Rwot Kwero had the duty of administering the land and its related resources on behalf of the households in the community. Open access is inimical to established exclusive private property rights. A license granted in respect of this category of land could only give rise  
20 to non-exclusive rights such that its validity still depended on proof that the appellant's permitted user did not in any way prevent other members of the community from using the common resource or that the appellant's user would not in a way preclude use of the land by other members of the community or limit fair access to the land by other members of the community.

25 This does not seem to be the case here. The appellant not only sought to exclude other members of the community by asserting exclusive private rights over the land, but also attempted to alienate it to CICO Construction company. In principle, all members of the community could claim rights to land in the category of "common property." In the prevailing circumstances, as beneficiaries of the communal interests in the "common property," the respondents were justified  
30 in preventing the appellant's transaction that attempted to alienate the land to a non-member of the community, without the prior consent of the community. Even if it had been valid, a licence

of this nature would be personal to Licensee and could not be transferred or assigned for any reason without the prior consent of the community, and any purported transfer or assignment was void. The trial court therefore came to the correct conclusion when it decided in favour of the respondents.

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In the final result, there is no merit to the appeal. It is dismissed and the costs of the appeal and of the court below were awarded to the respondents.

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

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Stephen Mubiru  
Judge,