

belonged to his deceased parents and he was the duly appointed administrator of the estate with authority to use the land. In his counterclaim, he stated that the appellants had on several occasions trespassed on the land which is owned by his family customarily. The land had originally belonged to his great grandfather as way back as 1929. The second appellant had come to live on the land as a herdsman of the defendant's great paternal uncle and it is upon the death of the respondent's father that the appellants had started trespassing on the land. This counterclaim was abandoned at the commencement of hearing of the suit.

During the trial the appellants testified and called three witnesses to support their case. P.W.1 Nganda Charles, testified that he is the son of the second appellant and that the respondent is his nephew who had at one time during his childhood lived in their home. He said he had grown up on this land together with his other nine siblings and had throughout that time seen his father, the second appellant, cultivate the land but was surprised to be served with a notice of intention to sue by the respondent. The total acreage of their land is about 100 acres but the dispute is in respect of an area estimated at 10 acres. He was allowed by the second appellant to cultivate part of the land by growing crops such as rice. He had ploughed the land ready for planting when the respondent stealthily entered onto the land and planted maize instead. Omera Justino's grave is in the compound of the second appellant and so is the grave of Lazaro selle, Omera's son. Before his death, he had handed over all the land to the second appellant. The respondent has no dwelling on the disputed land but his mother's home is about 50 metres away from it.

P.W.2 Ngoli Peter, testified that the disputed land originally belonged to Gwenye who later gave it to the second appellant's father, Zururu during the 1940s. In 1973, Zururu temporarily left it to the second appellant's cousin Omera Justino. It is Omera Justino who brought up the second appellant following the death of Zururu. The graves of both Omera Justino and his son Lazaro Selle are in the second appellant's compound. Following Lazaro Selle's death, the elders gave the second appellant the customary ornaments to look after the land. He and the first appellant utilised the land peacefully until February 2012 when the dispute with the respondent arose. The second appellant used to grow crops like cotton on the land to raise school fees for his children and all his ten children were born on this land. The respondent forcefully planted crops on land the appellants had ploughed. He denied having been employed by Omera Justino as a herdsman.

P.W.3 Arikangelo Kumu, testified that he was the uncle of the late Gwenyi who died before he was born. The second appellant's father Zururu too had died before this witness was born. He came to know the second appellant since 1962 and he has been living on the disputed land since then. He had all his children while living on that land. The respondent's father Drakadarua Sarafino too used to live on the same land but the disputed area was formerly occupied by the late Omera Justino, a brother to the second respondent, who before his death had left it to the second appellant. The appellants had been cultivating the disputed area for the previous four years until the respondent forcefully entered onto it and hence the dispute.

P.W.4 Dominika Eiyo son of the late Lazio Selle, testified that he is the grandson of Omera Justino who was a brother to the second appellant. The disputed land originally belonged to Omera Justino and upon his death Lazio Selle took charge of the land. When he died, the second appellant took over the land and had been in possession for the previous fifteen years. Although the respondent grew up on the same land, he never used to cultivate on it but elsewhere. The dispute had arisen only during the previous year when the respondent forcefully planted crops on the land after it had been ploughed by the appellants.

P.W.4 Suru Baru Simon, testified that he was the Chief of the Pakele Clan. In 1982-83 in his capacity as the then sub-county chief, he had been asked by the Grade II magistrate to participate in demarcating the boundary of land between the second respondent and a one Isiko Geihga who then had a dispute over the land and he would be able to show court at the *locus in quo*, the demarcations that were made.

The respondent too testified and called three witnesses. He testified that the disputed area of about ten acres comprised part of his entire land estimated at about eighteen acres. He inherited the land from his late father Drakadarua Sarafino, who in turn inherited it from Afundi Daniel who in turn inherited it from Ovule, who in turn inherited it from Chinga. The respondent had been using the land until the dispute in March 2012. The second appellant had come onto the land in 1967 as a herdsman of the late Omera Justino, the respondent's paternal uncle. He had been given a hut to live in on the land by Drakadarua Sarafino at the request of Omera Justino. When Omera Justino died, the second appellant was asked to leave the land and he did so,

settling about 500 meters away from the disputed land. When he discovered that they had ploughed the seven acres without his consent, he quickly planted maize in the garden before they could plant any crops. In 2009, the second respondent had encroached on a small portion of the disputed land and the respondent had reported a case to the L.C.1. The appellants were summoned to attend but they never responded. The respondent initiated the convening of a clan meeting on 7th September 2011, at which it was resolved that he was the rightful owner of the land. The appellants had never cultivated the disputed land save for the two attempts.

D.W.2 Terensio Angua testified that the disputed land was previously vacant and used to serve as a grazing area. It originally belonged to the respondent's grandfather Afundi Daniel who had given a small portion of it to this witness to cultivate. It was then inherited by the respondent's father Drakadarua Sarafino and later by the respondent. Early 2012, the appellants had hired a tractor which ploughed the land against the protests of this witness. The second appellant had been brought to the land in 1967 as a herdsman and following the death of his employer Omera Justino, he was asked to leave the land and indeed he left and settled on Baru's land and that is where he lives with his family. He had never before cultivated any part of the disputed land.

D.W.3 Aserua Francisca, widow of the late Drakadarua Sarafino and step-mother of the respondent testified that the respondent inherited the disputed land from his late father Drakadarua Sarafino. She was married to the late Drakadarua Sarafino in 1967 and the land had been utilised as pasture for grazing their cattle until early 2012 when the appellants brought a tractor and started ploughing it. Three years before the appellants had attempted to cultivate the same piece of land but the respondent had stopped them.

D.W.4 Ajika Robert Afundi testified that the respondent inherited the disputed land from his late father Drakadarua Sarafino. The land had been utilised partly as pasture for grazing cattle and partly for cultivation. The appellants don't live on the land but rather at Baru's estate. The appellants started laying claim to the land following the death of the respondent's father.

The court then visited the *locus in quo*, inspected the land, and then drew a sketch map of the disputed area and its surroundings. At the locus the court observed that the land in dispute was

bare with remnants of harvested maize. There was no dwelling on the land. Omera Justino's grave lay on land across the road and the appellant's homestead was about 300 meters away from the disputed land while that of the respondent was about 100 meters away from it. Counsel for both parties thereafter filed written submissions and the court delivered its judgment.

In its judgment, the trial court found that the testimony of the appellants and their witnesses was inconsistent with the observations it made at the *locus in quo*. The court found unexplained contradictions in the appellant's version of the facts and disbelieved it. It found that the appellants were migrants to the area and had not adduced evidence to prove that they had acquired the disputed land in accordance with the local customs. The court found that the evidence from both parties converged in the acknowledgement that the land in dispute originally belonged to Omera Justino but the appellants were unable to establish their genealogy with him compared to the respondent who was able to establish that the late Omera Justino and his father Drakadarua Sarafino were brothers. The appellants having failed to prove their case to the required standard, the court dismissed it with costs.

Being dissatisfied with that decision, the appellants appealed on the following grounds, namely; -

1. The learned trial magistrate erred both in law and fact in finding that the appellants did not have customary ownership of the suit land.
2. The learned trial magistrate erred both in law and fact in finding that the defendant was the right owner of the land.
3. The learned trial magistrate failed to properly evaluate the evidence on record and as a result he arrived at a wrong decision by concluding that the suit land belonged to the defendant.

Submitting in support of those grounds of appeal, Counsel for the appellants, Mr. Ben Ikilai argued that the trial magistrate ignored evidence to the effect that the second appellant was a cousin to the late Omera Justino, who brought him up following the death of his father, Zururu. There was also evidence that the appellants had been cultivating the land and the second appellant had been in quiet possession for over forty years before the intrusion of the respondent.

The trial magistrate instead relied on observations he made at the *locus in quo* which were not recorded.

In response, counsel for the respondents argued that the trial magistrate had properly evaluated the evidence on record and arrived at the correct decision. Citing authority, counsel argued that the appellants had failed to prove customary ownership of the disputed land. They instead adduced contradictory evidence which did not prove the second appellant's claimed inheritance of the land.

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

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

By virtue of Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and s. 2 of the *Land Act, Cap 227*, customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules.

Therefore, 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.

Section 56 (3) of the *Evidence Act* permits a court to take judicial notice as a fact, the existence of practices which are not subject to reasonable dispute because they are generally known within the trial court's territorial jurisdiction. Such judicial notice can be taken within the context of this appeal to the extent that land held under customary tenure may be acquired by inheritance, usually by close relatives of the deceased owner of such land. That is as far as judicial notice may go. Considering that the customary rules, formalities and rituals involved in general inheritance of property and specific inheritance of land may vary from community to community, a person asserting to have inherited land in accordance with the applicable customary rules must prove it as a fact by evidence in the event that such rules are not documented. In this case, the customary rules are not documented.

In the instant case, all that the appellants did was to assert that the second appellant inherited the land from the late Omera Justino. In the attempt to prove the formalities and rituals involved in legitimising that inheritance, the second appellant produced ornaments in the form of a metallic bell and a warhog tooth (Exhibit P.E.X 2 and 3) as the cultural symbols of his inheritance. He also stated that a Tumi Tree with stones around it was the additional symbol of his inheritance. However, under cross-examination, he stated that the ornaments were used for "cleansing in time of spells or threat of famine or strange sickness and above all they are instruments of power for Lalopi clan." In light of the contradictory explanation of the significance of these ornaments, it was necessary to adduce evidence regarding the entire scope of the customary rules symbolised by those ornaments. The second appellant not only failed to adduce such evidence as would satisfy the standard of proof in civil suits that those ornaments symbolised his inheritance of the disputed land but also he did not show court the "Tumi Tree with stones around it" when the court visited the *locus in quo*. The trial court therefore was justified in finding that his mere assertion of having inherited the land was not sufficient proof of his claim.

Furthermore, considering that there was no dwelling on the land in dispute, the trial court's determination of who was the rightful owner largely depended on the credibility of the witnesses and the evidence adduced by both parties. The trial court made correct observations about the contradictions in the appellants' evidence, including the assertions that the graves of Omera Justino and that of his son Lazaro selle were in the second appellant's compound and that the first appellant had a banana plantation on the land. These averments were found to be false. It is settled law that grave inconsistencies unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected (see *Serapio Tinkamalirwe v Uganda, S.C. Criminal Appeal No. 27 of 1989* and *Constantino Okwel alias Magendo v Uganda, S.C. Criminal Appeal No. 12 of 1990*). In the instant case, the contradiction between the appellants' testimony in court regarding the features which existed on the disputed land and what the court actually found on the land upon its visit to the *locus in quo* was not minor. It cast serious doubt on the veracity of the two appellants and the court was justified on that account to disbelieve their version of the history of ownership and user of this land.

In court, the second appellant had claimed to have settled on the disputed land for over 40 years on which he had lived with the late Omera Justino in the same homestead before his death. The sketch map drawn at the *locus in quo* indicates that the second appellant's home was at a distance of approximately 300 meters from that of Omera Justino. He did not offer any explanation for this discrepancy yet the respondent had explained that the second appellant was forced to leave Omera Justino's home upon his death. The respondent's explanation was not discredited by any evidence and once believed, is inconsistent with the second appellant's claim of having inherited the land from Lazaro selle, Omera Justino's son. It is not clear to me how a rightful heir to the property would be forced to leave the land by a stranger without him taking any action to restore his status. His inaction speaks volumes about the veracity of his claim.

Furthermore, although the court did not take detailed notes of proceedings at the *locus in quo*, the trial court record indicates that the magistrate prepared a list of all people in attendance, inspected the land in dispute, drew up a sketch map for the disputed land, and made abridged notes on it such as "land originally belonged to Omera. Both parties agree," "Omera was a brother to Ovuluku," "Omera's land according to the first plaintiff. Defendant says it belonged to his father Sarafino," and so on. Although a more detailed narrative of proceedings and

observations made at the *locus in quo* would have been more desirable, I am unable to find that the manner in which the trial magistrate went about these proceedings involved a fundamental defect that would justify annulling them. His reference to observations he made at the *locus in quo* but which are not reflected on the record of proceedings was a misdirection which in my view did not occasion a miscarriage of justice considering the entire body of evidence before him. Even if these comments were to be disregarded, what is left of the evidence supports his finding that the land was vacant, contrary the appellants' testimony in court.

The decision of the trial court is further criticised for the finding that the land belongs to the respondent. I have perused the judgment and have not found a declaration to that effect. The trial magistrate only commented that compared to the appellants who had failed to establish their blood relation to Omera Justino to his satisfaction, the respondent had done so. The trial magistrate gave reasons for that conclusion and I have not found any reason to come to a different conclusion. The burden in this case lay on the appellants to prove their case against the respondent to the required standard and not vice versa. The trial court found that the appellants had failed to discharge that burden.

This standard was explained by Lord Birkenhead L.C. in *Lancaster v Blackwell Colliery Co. Ltd* 1918 WC Rep 345, thus:

If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the Arbitrator is justified in drawing an inference in his favour.

The trial court in its evaluation of the evidence balanced the two versions and found that of the respondent more believable. I have re-evaluated the evidence and I have come to the same conclusion. The decision in this case hinged on the credibility of the appellants' and their witnesses' testimony and because of the grave contradictions contained therein and their inability to prove the rules of customary inheritance through which the second appellant acquired the

land, I find that the trial magistrate came to the correct conclusion. Balancing the value of the two versions, a reasonable man might hold that the more probable conclusion is that for which the respondent contended and for those reasons, the appellants have not succeeded on any of the grounds of appeal.

Therefore the appeal is dismissed with costs to the respondent.

Dated at Arua this 3rd day of November 2016.

.....

Stephen Mubiru

Judge