

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0010 OF 2017

(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 051 of 2011)

5

KAGGWA MICHAEL APPELLANT

VERSUS

10	1.	OLAL MARK	}	
	2.	OLAL JIMMY	}	
	3.	TABAN PAUL	}	
	4.	OOLA PETER	} RESPONDENTS
	5.	KOMAKECH MARIO	}	
	6.	OCAN CHARLES	}	
15	7.	ANJELINA LATTO	}	

Before: Hon Justice Stephen Mubiru.

JUDGMENT

20 The respondents jointly and severally sued the appellant for a declaration that they are joint owners of a plot of land measuring approximately two and a half acres located at, Kanyagoga "A" sub ward, Kanyagoga "A" Parish, Bar-Dege Division, Gulu Municipality general damages for trespass to land, a *mesne profits*, a permanent injunction, interest and costs.

25 Their case was that the first respondent's father Okumu Lagwee acquired the land in 1935 as vacant land under customary tenure. During 1967, the first respondent's elder brother, Martino Oyugi began paying ground rent for the land to Gulu Town Council under a Temporary Occupation Licence. The first respondent continued with those payments until the year 1995 when they were abolished. During December, 2009 the appellant approached him with a
30 proposal to exchange that plot for one in Atiak Trading Centre, which the first respondent rejected. The appellant nevertheless began trespassing onto the land and brought his mother, Margaret Ngula, to live on the land. The appellant and his mother have since refused to vacate the land and have instead laid false claims of ownership of the land. They have as well falsified and mutilated diverse documents to support their baseless claim. They have since inhibited the

respondents' process of acquiring registered title to the land and prevented the respondents from having quiet enjoyment of the land.

In his written statement of defence, the appellant denied the claim in toto. His case was that the respondents are not customary owners of the land as claimed. The appellant was born and raised on this land but the respondents grabbed it from him by the use of force. He therefore counterclaimed for a declaration that he owns plot 117 Kanyagoga "A" sub ward, Kanyagoga "A" Parish, Bar-Dege Division, Gulu Municipality, measuring approximately three and a half acres, an eviction order, a permanent injunction, general damages, interest and costs.

10

His case in the counterclaim was that he is the administrator of the estate of his late father, Lazaro Okumu, comprising the plot in dispute. His father officially bought the plot in 1954 from his maternal uncle Lodu Yohana although he had been living on it as way back as 1924 before he was joined by the appellant's mother in 1950. It was eventually assigned plot No. 117 during the year 1967 by the then Gulu Town Council. His father paid ground tax for the plot from then until its abolition in 1995. He and his family lived peacefully on that plot until the year 2015 when the respondents began trespassing on it. They eventually took over the land after destruction of houses and crops belonging to the appellant and his family and have since denied the appellant and his family access to the land. The 3rd, 4th, 5th and 6th respondents are refugees who are sisters in law of the first respondent, educated by his late father.

20

The fourth respondent, Oola Peter, testified as P.W.1, and stated that he is the grandson of Okumu Lagwee, a Ugandan by nationality born on 25th December, 1975. His father is Modesto Okumu and mother Ajelina Latto. Both his parents are Ugandan. He is not a refugee. The first respondent was his uncle. He inherited the land in dispute, plot 91, at birth. He presented a letter confirming that his father had been paying ground rent for the plot before his death. The plot numbers have been changing over the years. He began constructing houses on the land around 2007 - 2009. A number of his deceased relatives were buried on the land. Okumu Lazaro is the owner of plot 117 but he does not know him. He first saw the appellant on 23rd December, 2009 when he came to the first respondent to request him to give him apart of the land in dispute in

30

exchange for the one at Atiak Trading Centre which the first respondent rejected. The appellant instructed his mother to occupy the land nevertheless.

P.W.2 Regina Ladul, a neighbour, testified that Okumu Lagwee was an Acholi. He and his wife
5 Ayur, had four children who included the first respondent. They lived on the land in dispute. She never knew nor saw Okumu Lazaro. P.W.3 Acaa Agnes, a neighbour, testified that she grew up with the late Olal Mark, the first respondent. He was an Acholi. The first respondent's father Okumu Lagwee lived on the land in dispute but she did not know how he acquired it. Okumu Lagwee was an Acholi and not Sudanese. The first respondent's father was Modesto.

10

In his defence as D.W.1 the appellant Kaggwa Michael testified that his father, Okumu Lazaro, bought the land in dispute in 1954. He was born on the land in dispute and had five grass thatched houses on it. He met the respondents at the Kiryandongo Refugee Camp in 1995. It is in 2009 that the first respondent brought the rest of the respondents onto the land in order to force
15 the appellant and his family off the land. D.W.2 Omayo John, testified that the appellant's father was Okumu Lazaro and was buried in Atiak upon his death. The appellant was about six years old at the time his father bought the land in dispute. D.W.3 Odur Ensio, testified that the appellant inherited the disputed land from his father Lazaro Okumu.

20 The trial Magistrate then visited the *locus in quo* on 21st December, 2016. He recorded additional evidence from; (i) Auma Olga who stated that Okumu Lagwee and his deceased relatives were buried on the land. Modesto was her neighbour, (ii) Ocalla George, General Secretary L.C1 who stated that the land in dispute was occupied by the first respondent. The appellant's mother came onto the land during the insurgency. The first respondent does not have a house on the land in
25 dispute, (iii) Arach Margaret who stated that Lazaro Okumu was her husband. Her late husband bought the land from Yoana Ladu in 1954 at the price of shs. 200/= She has since then been living on the land. When her husband died he was buried at Atiak at their other home.

In his judgment, the trial magistrate found that the land in dispute is plot 91/65 and not plot 117.

30 The land belongs to the first respondent having inherited it from his late father, Okumu Lagwee. It is him who in the year 2009 invited his nephews, the 2nd to the 7th respondents, onto the land.

The appellant's contention that all the respondents were Sudanese Nationals, refugees in Uganda and not citizens was not proved since the appellant neither worked in the Ministry of Internal Affairs nor in the UNHCR. The appellant and his witness contradicted themselves as to whether the appellant had been born by the time the appellant's father is purported to have purchased the land and therefore their evidence was rejected in its entirety. Judgment was entered for the respondents against the appellant for; a declaration that they are the joint owners of the land in dispute, vacant possession, a permanent injunction, general damages of shs. 15,000,000/= the counterclaim was dismissed and the respondents awarded the costs of the suit and of the counterclaim.

10

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

1. The trial Magistrate erred in law and fact in admitting that the respondents are Ugandans.
2. The trial Magistrate erred in law and fact in rejecting the letter from the Prime Minister's Office confirming the respondents to be refugees.
3. The trial Magistrate erred in law and fact in evaluating the evidence on record and arriving at a wrong decision.
4. The trial Magistrate erred in law and fact by relying on the inconsistencies and contradictions in the evidence of the plaintiffs / respondents on record thus arriving at a wrong decision.
5. The trial Magistrate erred in law and fact in being biased during the trial by not allowing the defendant / appellant to cross-examine the plaintiffs / respondents.

15

20

When the appeal came up for hearing, the court found that ground 3 of the memorandum of appeal was too general and offends the provisions of Order 43 r (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.

25

30

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*). The ground was accordingly struck out.

In his submissions, counsel for the appellant, Mr. Awor Abuga, argued grounds (1) and (2) together and then (4) separately. He abandoned ground (5). He submitted that in paragraph 16 of the counterclaim, paragraphs 3, 77 - 91 of the witness statement for the appellant, and paragraph 6 of the witness statement of D.W.3 Odur Ensio it was asserted that the 3rd - 7th respondents are Sudanese. This was corroborated by D.W.4. when he tendered in documents of refugee family attestation for the said respondents to show that they are refugees. The refugee family attestation documents were received as identification documents only yet they were certified documents from the Office of the Prime Minister. Each of the respondents was identified as a refugee. They should have been received as exhibits and not as identified documents. The respondents never challenged the documents from the Office of the Prime Minister. At page 44 of the record, the appellant explained the source of the documents. The accompanying letter from the Office of the Prime Minister was tendered in court as exhibit No. 10. The data of the respondents was authorised to be taken. This too was not challenged by the respondents. He submitted that by virtue of their status, the respondents can only acquire a lease and not land under customary tenure. They claimed dot have acquire it from their grandfather as customary land.

As regard the fourth ground relating to inconsistencies and contradictions, at page 12 of the record of proceedings the court identified the land in dispute but in the judgement reference was made to plot 65 which was not in dispute. The appellant in his W.S.D stated that he did not have any dispute over plot 81 that the respondents are claiming. He inherited plot 117. It is him in occupation. The respondents claimed that he was a trespasser on their land. Para 7 of the counterclaim states that he inherited the property and his late father who bought it at shs. 200/= and the evidence is corroborated by D.W.2 Omayo John aged 87. The father of the appellant obtained it from a Yoana Lodur in 1954. D.W.2 in para 4 of his testimony stated that he with the

late Yoana Lodur were carpenters. The land was allocated to the late Yoana Lodur by the British Government Officials. The evidence of the respondent witness Auma Olga aged 56 at page 19 para 4 she testified that her husband bought the land from Ayiku. The husband was one of the respondents. P.W.5 at page 20 para 5 of the record, stated that the late Olal Mark had no house
5 on the land.

The respondent's evidence is contradictory as to acquisition. At page 21 of the record they claimed they acquired interest as customary land. The mother of the appellant testified that the respondents occupied the land forcefully. The land is in Kanyogoga "A" in Gulu Municipality. It
10 is an urban setting. Para 13 of the counterclaim, the respondent claimed to be registered in 1967 as plot 117. They paid ground rent from that year until 1995. Receipts though were not tendered. The letter from the Municipality indicated it was registered to the father of the appellant for purpose of Municipal rates. It was received as ID.9 at page 42. It should have been received as an exhibit as it is certified. The evidence explained the possession of the appellant.

15

D.W.1 in his witness statement para 74 he stated that the first respondent was buried at Lacor in his land, where he lived and died in 2012. This evidence was not controverted. P.W.1 testified at page 29 para 3 said he had approved plans which he never tendered in court. Para 7 of P.W.1 said payment of the ground rent was in the name of Martino Oyugi for plot 91. It means Martino
20 Oyugi was the owner and this was a departure from their pleading. Teresa Ladu in para 2 of her witness statement testified that the land was taken over by the barracks and this contradicted the pleading of the respondents. The respondents pleaded that they had receipts for ground rent but they were never tendered in court to prove that the land belonged to their grandfather. The learned trial magistrate erred in stating that plot 117 of Okumu Lazaro was not supported by any
25 evidence on court record. It is supported by the evidence I have alluded to above. It also erred in stating plot 91 / 65 is the land in dispute yet there was no proof adduced before court to that effect. All the evidence related to plot 117. In conclusion the trail magistrate in resolving the first issue when he referred to plot 91 / 65 when the one in issue was 91 or 117. We pray that the appeal be allowed.

30

According to the evidence of Ensio para 4 it was alleged that all were refugees. They did not prove citizenship. Plot 91 / 65 is not one and the same as plot 117. There is no evidence to that effect. The disparity in names, is a mere error in writing the name. The mother of the appellant stated that they had land at Atiak and Okumu Lazaro was buried at their ancestral land. It is clear
5 in evidence that they bought the land in the urban area.

In response, counsel for the respondents, Mr. Henry Kilama Komakech, argued that it is not true that the appellant produced original but rather photocopied documents. Even if they relate to the respondents, the root of title of the appellant was that of a Ugandan. They don't claim in their
10 own. The first two respondents are not refugees. The court should find that the land belonged to them by virtue of that inheritance. With regard to the plot numbers, P.W.1 stated that the plot 91 later became 61, then 65 / 91. The numbering could be different but the property is the same. The name in the register book is Okum Lazaro and not Okumu Lazaro. The latter is the father of the appellant. Only one person lived in that area by that name. At Page 21 of the record of appeal it
15 was said that the home of Okumu Lazaro was in Atiak. There was an attempted exchange with the land at Atiak for the plot in dispute. The burial in Lacor was because the land in dispute is in an urban area. The respondents never departed from their pleadings. The court rightly found the land to belong to the respondents. Plot 117 is not the suit land but it is 65 / 91. Auma Olga is not the respondents' mother and testified in respect of her land, not the land in dispute.

20

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due
25 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
30 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.

5 Before considering the grounds of appeal, I observe that at the *locus in quo*, the trial court recorded evidence from additional witnesses who had not testified in court. Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980] HCB 81). It was an error for the court to have recorded evidence from; (i) Auma Olga, (ii) Ocalla George, and (iii) Arach Margaret.

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

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 complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is

reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the three additional witnesses, since I am of the opinion that
5 there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those three witnesses.

Grounds 1 and 2 will be considered next and concurrently since they relate to the admissibility of documents relating to the respondent's nationality and the finding of the trial court in that regard.
10 The issue of citizenship is relevant to ownership of land since article 237 (2) (c) of *The Constitution of the Republic of Uganda, 1995* and section 40 of *The Land Act*, restrict ownership of land in Uganda, in the case of non citizens, to leasehold tenure only.

In paragraph 16 of the counterclaim, paragraphs 3, 77 - 91 of the appellant's witness statement
15 and paragraph 6 of the witness statement of D.W.3 Odur Ensio, it was asserted that the 3rd - 7th respondents are Sudanese. The respondents never refuted this in their pleadings. This opened up the respondents to the possibility of being found to have constructively admitted the averment since a party's pleading must make it quite clear how much of his opponent's case he or she disputes and merely denying will often be ambiguous (see *Odgers' Principles and Practice in*
20 *Civil Actions in the High Court of Justice*, 22nd Edition, pages 132 - 137). It is trite law that each material allegation of fact should be dealt with specifically in one's subsequent pleading (see Thesiger, LJ, in *Byrd v. Nunn [1877] 7 Ch D 284, at p 287*). An allegation of fact not specifically traversed will be taken to be admitted, whether this was intended or not and once treated as admitted, the party who makes it need not prove it.. A party who makes an allegation of fact
25 admitted expressly or constructively need not prove the fact admitted by his or her opponent (see *Pioneer Plastic Containers Ltd v. Commissioner of Customs and Excise [1967] 1 All E R 1053*).

That being so, in the instant case where the disputed land is held under customary tenure, with the respondents' Uganda citizenship being refuted by the appellants, the burden was on the
30 respondent to adduce evidence of their claimed Uganda citizenship, otherwise their claim would be restricted to land held under leasehold, which the one in dispute is not. This principle is

captured by the Latin expression; *matim ei qui affirmat non ei, qui negat incumbit probatio*. The position was re-affirmed by the Kenya Court of Appeal in *Maria Ciabaitaru M'mairanyi and Others v. Blue Shield Insurance Company Limited, 2000 [2005]1 EA 280* where it was held that:-

5 Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof and is equivalent to our section 102 of the Evidence Act), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. (Emphasis added).
10

The principle is further illustrated in *Jovelyn Bamgahare v. Attorney General S.C. C.A. No 28 of 1993*, where it was decided that he who asserts must affirm. The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that, the burden of proof lies upon him who asserts the affirmative of an issue, and not upon him who denies, since from the nature of things he who denies a fact can hardly produce any proof. To succeed in their claim of being the owners of the disputed land under customary tenure, the burden lay on the respondents to adduce such evidence as would satisfy court that indeed they are citizens of Uganda entitled to hold land under customary tenure. They had to do this by adducing evidence that they are either
15 a citizens by birth, by descent, by registration or by naturalisation as provided for by Chapter three of *The Constitution of the Republic of Uganda, 1995* and Part three of *The Uganda Citizenship and Immigration Control Act, Cap. 66*, as emended in 2006.
20

Under section 32 (2) of *The Uganda Citizenship and Immigration Control Act*, a citizen applying for a National Identity Card must fill in a form D to the third schedule. The information required to be furnished in that form includes; place and date of birth of the applicant, the village, sub-county, county and district of birth, indigenous community to which the applicant belongs, the father's names and place of birth (particulars of clan are required), mother's names and place of birth (particulars of clan are required), two contemporary descendants, etc. It becomes clear from
25 those requirements that whenever court is called upon to decide, even for the limited purpose of rights of ownership of land, whether a person is or is not a citizen of Uganda, the court must carefully examine the question in the context of the constitutional provisions and the provisions of *The Uganda Citizenship and Immigration Control Act*.
30

In determining citizenship status, section 22 of *The Uganda Citizenship and Immigration Control Act, Cap. 66* permits receipt as proof thereof, every document purporting to be a notice, certificate, order or declaration, or any entry in a register, or a subscription of an oath of allegiance or declaration of renunciation, given, granted or made under the provisions of Part III
5 of the Act. Documents in support of proof of citizenship will not be confined to those mentioned in that provision though. Court may admit other documents having a bearing on the question of citizenship in the sense of having some persuasive value on the mind according to ordinary process of reasoning. These may include birth certificates, a passport issued by the Government of Uganda, etc.

10

According to Article 10 (a) of *The Constitution of the Republic of Uganda, 1995*, in order for one to acquire citizenship by birth, a person should have been “born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926, and set out in the Third
15 Schedule to this Constitution.” It was therefore incumbent upon the respondents to adduce all such evidence, documentary or otherwise, concerning such facts as related to;- the places and dates of birth, the village, sub-county, county and district of birth, the indigenous community to which they belong, their fathers' names and place of birth and clan, their mothers' names, places of birth and clan, names of two contemporary descendants, etc.

20

Presentation of documents such as a passports, voters' cards or National Identity Cards would only be *prima facie* evidence of citizenship which could be rebutted, in some cases, by proof of fraudulent acquisition (see for example *Regina v. Secretary of State for the Home Department ex parte Sultan Mahmood* [1981] QB 59). It has also been categorically held in other cases that
25 citizenship obtained by fraud is a nullity (see *R v. SSHD ex p. Sultan Mahmood*, [1981] QB 59; *R v. SSHD ex p. Parvaz Akhtar* [1981] QB 46 and *R v. SSHD ex p. Naheed Ejaz* [1994] QB 496). Therefore citizenship can be annulled even where the claimant is the holder of valid documents if such documents were obtained by fraud. This is further illustrated in the case of *Tohura Bibi (also known as Nuria Begum), Shabana Begum, Shajna Begum, Akik Miah and Masuk Miah v. Entry Clearance Officer, Dhaka*, [2007] EWCA Civ 740.
30

As corroboration of the averments in paragraphs 3, 77 - 91 of the appellant's witness statement and paragraph 6 of the witness statement of D.W.3 Odur Ensio, that the 3rd - 7th respondents are Sudanese, the appellant adduced documentary evidence from the Office of the Prime Minister and that of The United Nations High Commission for Refugees, in Uganda (UNHCR). Whereas the documents from the Office of The United Nations High Commission for Refugees were received and marked as D.ID.1 to D.ID.7 and the covering letter from the Office of the Prime Minister was marked as exhibit D.ID. 10.

It is argued by counsel for the appellant that it was erroneous of the trial court to have declined to receive the documents as exhibits. Once documentary evidence is relevant, it is admissible. A document is admissible if it was made by, or directly or indirectly reproduces, or is derived from statements made by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with by the statements contained in it. It is admissible if it directly or indirectly reproduces or is derived from information from one or more devices designed and used for the purpose of recording, measuring, counting or identifying information, not being information based on a statement made by any person. Unless it is not objected to, the person competent to tender the document in evidence should be called as a witness for proof of its authorship or due execution, unless it is admissible under one of the exceptions provided for the admissibility of a secondary evidence or to the rule against hearsay evidence.

Documentary evidence must be properly authenticated and a foundation laid before it can be admitted at trial. Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either: (a) by anyone who saw the document executed or written; or (b) by evidence of the genuineness of the signature or handwriting of the maker. Documents must be proved by primary evidence except in the cases in which *The Evidence Act* permits secondary evidence (see sections 60 - 64 of the Act). According to section 64 (1) (e) of *The Evidence Act*, secondary evidence may be given of the existence, condition or contents of a document when the original is a public document within the meaning of section 73 of the Act. Under section 73 (a) (ii) and (iii) of the Act, documents forming the acts or records of official bodies and public officers are public documents. The expression "Official Bodies" means the government (whether foreign or domestic) or its political subdivisions, any agency, authority,

department or instrumentality of the government or political subdivision, owned, controlled, directly or indirectly substantially financed by funds provided by the appropriate Government. The trial court therefore had to determine first whether or not the documents presented by the appellant were private or public documents.

5

According to sections 8 and 9 (3) (b) of *The Refugees Act, 2006*, The Commissioner for Refugees is responsible for all administrative matters concerning refugees in Uganda and in that capacity, for co-ordination of inter-ministerial and non-Governmental activities and programmes relating to refugees. The office is also mandated to liaise with the UNHCR and other agencies for the protection of refugees and the formulation of programmes for ensuring that adequate facilities and services for reception of refugees, settlement and integration are available. As an agency and special programme of the United Nations, The Office of the United Nations High Commissioner for Refugees (UNHCR) fits that description of an official body. Moreover under section 73 (b) of the Act, records kept in Uganda of private documents are by law deemed Public Documents.

By virtue of section 73 (b) of *The Evidence Act* all private documents regularly kept as forming part of the acts or records of official bodies and public officers are categorised as public documents. To be admissible, such documents must be shown to have been;- (i) an original entry, (ii) made contemporaneously with the event recorded, (iii) in the routine, (iv) of business, (v) by a person holding the office, (vi) who was under a duty to do the very thing and record it, (vii) and who had no motive to misrepresent. The admission of such evidence does not infringe upon the hearsay rule because its probative value does not depend upon the credit of an unidentified person but rather on the circumstances in which the record is made (see *Myers v. Director of Public Prosecutions*, [1965] AC 1001; [1964]1 All E.R. 877, [1964]3 W.L.R 145; *Omand v. Alberta Milling Co.*, [1922]13 W.W.R. 412, 69 D.L.R. 6, 18 Alta L.R. 383 and *Ares v. Venner*, [1970] SCR 608; 1970 CanLII 5).

According to Regulation 12 (1) of *The Refugees Regulations, 2010*; S.I. 9 of 2010, where a person enters into Uganda and wishes to remain in Uganda as a refugee or where a person applies for refugee status at the point of entry into Uganda, the refugee reception officer is

required to receive that person and register him or her as soon as practicable as a person seeking refugee status. By virtue of section 9 (3) (b) of *The Refugees Act, 2006*, applications for refugee status may be submitted to the Commissioner through an authorised officer or to the UNHCR representative who in turn is required by sub-section 3 thereof to forward the application to the
5 Commissioner as soon as is practicable. Under section 26 (1) of the Act, every member of the family of a recognised refugee who enters Uganda enjoys the same protection as that of the recognised refugee and has the right to be issued with all necessary documents relevant to his or her status. While Regulation 45 of *The Refugees Regulations, 2010* requires the Commissioner to keep and maintain a register of all persons who have been granted refugee status and persons
10 seeking asylum in Uganda, Regulation 40 (1) thereof requires the Commissioner to register the name and particulars of the person granted refugee status in that register, including the members of his or her family, where applicable.

By virtue of section 73 (b) of *The Evidence Act*, documents from the Office of The United
15 Nations High Commission for Refugees that were received by the trial court and marked as as D.ID.1 to D.ID.8 and the covering letter from the Office of the Prime Minister that was marked as exhibit D.ID.10, by virtue of being private documents regularly kept as forming part of the acts or records of official bodies and public officers, are by law categorised as public documents. That being the case, section 75 of *The Evidence Act* authorises public officers having the custody
20 of a public document, subject to payment of fees, to give certified copies on demand by persons interested in such documents. Such certified copies may then be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies (see section 76 of the Act).

25 Then under section 78 of *The Evidence Act*, courts are required to presume every document purporting to be a certified copy, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in Uganda, to be genuine if the document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The court is also required to presume that any officer by whom any such
30 document purports to be signed or certified held, when he or she signed it, the official character which he or she claims in that paper.

Before documentary evidence, may be admitted, the proponent must make a preliminary showing, directly or indirectly, that the proffered evidence is genuine, i.e. that it is what it is claimed to be. The conditions to be established in respect of a certified true copy of a public document are; (i) (where applicable) evidence of payment of the legal fees prescribed; (ii) a certificate written at the foot of or other part of such copy, that it is a true copy of such document or part of it as the case may be (iii) the date on which the certification is made; (iv) subscribed by such officer with his or her name and his or her official title; and (v) (where applicable) sealed with the official seal. The authentication requirement is satisfied by providing evidence sufficient to support a finding that the proffered evidence is what it is claimed to be. A witness with personal knowledge of the circumstances showing that the document is what it claims to be may offer testimony to authenticate a document. Certain documents, such as those executed under seal, certified copies of public records, and ancient documents are self-authenticating, i.e. no prima facie showing of authenticity is required for them to be admissible.

I have examined the documents from the Office of The United Nations High Commission for Refugees that were received by the trial court and marked as D.ID.1 to D.ID.8 and the covering letter from the Office of the Prime Minister that was marked as D.ID.10. They show that D.ID.1 issued on 13th November, 2014 and D.ID.2 issued on 8th June, 2016 respectively are in respect of Charles Ochan (the 6th respondent). He was born on 15th April, 1975 and his nationality is stated to be South Sudanese. D.ID.3 issued on 13th November, 2014 and D.ID.4 issued on 8th June, 2016 respectively are in respect of Peter Ongon Oola (the 4th respondent). He was born on 4th April, 1977 and his nationality is stated to be South Sudanese. D.ID.5 issued on 13th November, 2014 and D.ID.6 issued on 8th June, 2016 respectively are in respect of Komakech Mario (the 5th respondent). He was born on 1st January, 1983 and his nationality is stated to be South Sudanese. D.ID.7 issued on 13th November, 2014 and D.ID.4 issued on 8th June, 2016 respectively are in respect of Paul Okeny (Taban Paul, the 3rd respondent). He was born on 12th December, 1969 and his nationality is stated to be South Sudan. D.ID. 10 is a letter from the Office of the Prime Minister dated 2nd November, 2016. It not only mentions the 3rd, 4th, 5th, and 6th respondents as refugees from South Sudan who arrived on 1st January, 189 and were registered with that office on diverse dates thereafter, but it also lists Angelina Latto, the 7th respondent, among them. She arrived on 1st March, 1989 and was registered on 22nd March, 2005.

Each set of documents marked D.ID.1 to D.ID.8 and D.ID.10 in respect of each of the persons named, bears a certificate written underneath the bio-data of each of the named persons that they are registered with the office as refugees, each bears a distinctive bar code save for D.ID.10 signed by Mr. Bafaki Charles for the Permanent Secretary, the officer certifying each of the sets
5 of documents subscribed his name and official title as Mr. David Apollo Kazungu, Commissioner for Refugees; and each set has a document sealed with the official seal. Being so certified, by virtue of section 78 of *The Evidence Act* the trial court was required to presume each of them to be genuine and to have been signed by persons holding the official character in which they claimed to have certified them. The burden was then on the respondents to rebut that
10 presumption by presenting evidence to the contrary, and this they never did.

In light of those documents, the trial court ought to have considered that by virtue of Regulation 12 (1) of *The Refugees Regulations, 2010*, a person applying for refugee status is required to furnish proof to the satisfaction of the Eligibility Committee that he or she is eligible to be
15 granted refugee status under the Act and the Regulations. By virtue of the fact that the respondents were granted refugee status, they must have satisfied the Eligibility Committee that they are not Ugandans. There is no evidence to show that their status has changed since then. According to section 6 (1) (a) and (d) of *The Refugees Act, 2006*, a person ceases to be a refugee if that person voluntarily re-avails himself or herself of the protection of the country of his or her
20 nationality or when he or she becomes a citizen of Uganda or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality. The third to the seventh respondents never adduced evidence to show that that their status as refugees in Uganda has ever changed since their respective dates of registration as per documents marked D.ID.1 to D.ID.8 and D.ID.10.

25
Being refugees and hence non-citizens of Uganda, the third to the seventh respondents are precluded by article 237 (2) (c) of *The Constitution of the Republic of Uganda, 1995* and section 40 of *The Land Act*, from holding land in Uganda under customary tenure. They are restricted to holding land under leasehold tenure only. It was therefore erroneous of the court below to have
30 decided in their favour when the land in dispute is held under customary tenure.

With regard to the claim by the first and second respondents, their case was that the first respondent's father Okumu Lagwee acquired the land in 1935 as vacant land under customary tenure. During 1967, the first respondent's elder brother, Martino Oyugi began paying ground rent for the land to Gulu Town Council under a Temporary Occupation Licence. The first
5 respondent continued with those payments until the year 1995 when they were abolished. During December, 2009 the appellant approached him with a proposal to exchange that plot for one in Atiak Trading Centre, which the first respondent rejected.

The appellant refuted that claim and stated that his father, Okumu Lazaro, bought the land in
10 dispute in 1954 from his maternal uncle Lodu Yohana. He was born on the land in dispute and had five grass thatched houses on it. The land was eventually assigned plot No. 117 during the year 1967 by the then Gulu Town Council. His father paid ground tax for the plot from then until its abolition in 1995. It is during the year 2009 that the first respondent brought the rest of the respondents onto the land in order to force the appellant and his family off the land.

15

While the respondents claimed the land in dispute was plot 91/65 and the appellant on the other hand claimed it was plot 117, at the *locus in quo*, both parties showed court the same piece of land. While P.W.1 Oola Peter stated that plot 91/65 measured approximately 2.5 acres, the appellant stated that plot 117 measures approximately 2.8 acres. Considering that P.W.1 Oola
20 Peter testified that the plot numbers have been changing over the years, I am inclined to believe and therefore find that plot 91/65 and plot 117 are one and the same. Although the respondents claimed that the first respondent's elder brother, Martino Oyugi paid ground rent for plot 91/65 to Gulu Town Council under a Temporary Occupation Licence from 1967 until the year 1995 when they were abolished, they did not produce a dingle document to back up that claim. There is also
25 no evidence to show that plot 91/65 exists as such in the Municipal Council records. To the contrary, the appellant adduced evidence (D.ID 34) indicating that for purposes of Municipal Council rates, plot 117 is registered in the name of Okum Lazaro. The respondents disputed that to be the name of the appellant's father since to them the appellant's father is "Okumu Lazaro" (i.e. with a "u" at the end as known in Acholi as opposed to one without a "u" at the end as
30 known in Alur tradition).

The misnomer principle would apply to this case, being the process by which a court determines the attribution of a name. Generally, expressions of names should be construed objectively to ascertain what a reasonable person with all of the background knowledge that would reasonably have been available to the author, would attribute the name to the individual to whom it is sought to be attributed. The relevant question is; to which individual would a reasonable person attribute the name? That attribution must generally be construed by reference to the known background facts. The test is whether or not a reasonable person reading the name, in all the circumstances of the case, and looking at it as a whole, may say to himself or herself, “of course it must mean so and so, but they have got his or her name wrong.”

10

The misnomer doctrine applies to correct inconsequential deficiencies or technicalities in names. It has also been applied more broadly, for example, to complaints that what was named was a corporation instead of a partnership, a parent corporation instead of a subsidiary, a building instead of its corporate owner, and a corporation in liquidation instead of its successor (see *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1301-02 (2d Cir.) (parent-subsiary), cert. denied, 498 U.S. 854 (1990); *Montalvo v. Tower Life Bldg*, 426 F.2d1135, 1146-47 (5th Cir. 1970) (building-corporate owner); *Travellers Indem. Co. v. United States ex rel. Construction Specialties Co.*, 382 F.2d 103 (10th Cir. 1967) (parent-subsiary); *Shoap v. Kiwi S.A.*, 149 F.R.D. 509 (M.D. Pa. 1993) (successor corporation); *Dunham v. Innerst*, 50 F.R.D. 372 (M.D. Pa. 1970) (corporation-partnership); *Adams v. Beland Realty Corp.*, 187 F. Supp. 680 (E.D.N.Y. 1960) (same). A classic misnomer is one in which the name contains a minor spelling error of the subject's name, or inclusion of a full middle name rather than merely a middle initial. If it is a case of misnomer, the name could be corrected by replacing the erroneous name for the correct name.

25

The known background facts in the instant case are that; (i) there is no evidence to show that there was more than one person by the name of Okumu Lazaro resident in Kanyagoga "A" sub-ward; (ii) plot 117 is located in Kanyagoga "A" sub-ward; (iii) in the official Municipal Council records, plot 117 is registered to a one "Okum Lazaro"; (iv) it is the person named as Okumu Lazaro who used to pay municipal rates due for plot 117 until the abolition of those rates in 1995; (v) Okumu Lazaro is the appellant's father; (vi) the name Okum when spelt with a "u" at

30

the end is the Acholi version while when it is spelt without a "u" at the end is the Alur version; (vii) the appellant and his father Okumu Lazaro are Acholi. The question then is whether with those known background facts, the name "Okum Lazaro" reflected in the Municipal Council record in respect to plot 117, can be attributed to Okumu Lazaro, the father of the appellant or to
5 someone else unconnected thereto since misidentification is distinct from misnomer.

Misidentification arises when two separate persons actually exist and an author mistakenly writes a name similar or identical to that of the correct person. For the doctrine of misnomer to apply, it is required that: (1) the author intended to name the subject to whom the name is now being
10 attributed; and (2) a reasonable person would attribute the name to the person to whom it is now intended to be attributed. Misnomer arises when the author merely misnames the correct person as opposed to not being able to identify the correct person. Cases of a misnomer are such that the person whose name is written is known and is the one whose name is intended to be written, only that it is written incorrectly or an entirely wrong name is written.

15

The appellant was accused of forgery (D.ID 22 which is a charge sheet dated 17th August, 2011 and D.ID 19, a police bond form dated 17th November, 2010) where it was alleged that he added a "u" to the name appearing against plot 117 for the name to read; "Okumu Lazaro," instead of "Okum Lazaro," that had been written originally. There was no evidence to show that
20 it was the appellant who effected that alteration and he was acquitted on appeal on 1st August, 2014 (D.ID 26). Whatever the case may be, whoever made that alteration did not seek to add or substitute a wholly new and different name but made a mere inconsequential correction since "Okum Lazaro" was in the circumstances of the background facts of this case, a misnomer of what should have been "Okumu Lazaro," the father of the appellant. The misnomer doctrine is
25 applicable when it is obvious, as it is in this case, that the author made a mistake and misspelt the name. That aside, under cross-examination the fourth respondent, P.W.1 Oola Peter, admitted that Okumu Lazaro is the owner of plot 117 only that he did not know him.

The respondents were unable to discredit that evidence. P.W.3 Acaa Agnes, a neighbour,
30 testified that the first respondent's father Okumu Lagwee lived on the land in dispute but she did not know how he acquired it. P.W.1 Oola Peter testified that he began constructing houses on the

land in dispute around 2007 - 2009 and this is consistent with the trial court's finding that it is the first respondent who in the year 2009 invited his nephews, the 2nd to the 7th respondents, onto the land. There is no evidence though of occupancy by Okumu Lagwee prior to 2009 apart from general assertions. The respondents are trespassers on the land since 2009, entitling the appellant
5 to general damages for trespass to land, for their nearly ten years of unlawful occupancy.

In order to decide in favour of the respondents, the trial court had to be satisfied that they had furnished evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by them, might hold that the more probable conclusion is that for which the
10 respondents contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*). Being the administrator of the estate of his late father Okumu Lazaro, (D.ID 27, a grant of letters of administration dated 30th January, 2012), and having proved his counterclaim on the balance of probabilities, the appellant was
15 entitled to a decision in his favour on the counterclaim. The respondents having failed to prove their case on the balance of probabilities, their suit ought to have been dismissed.

Trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is
20 an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. *Halsbury’s Laws of England*, 4th edition, vol. 45, at para 1403, explains five different
25 levels of damages in an action of trespass to land, thus; (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss; (b) if the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss; (c) where the defendant has made use of the plaintiff’s land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that
30 use; (d) where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the

object of making a gain by his unlawful conduct, exemplary damages may be awarded; and (e) if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

5 In *Halsbury's Laws of England*, 4th Ed., Vol. 45 (2), (London: Butterworth's, 1999, at paragraph 526), the law on damages for trespass to land is addressed thus: "a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the
10 claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use...Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

15

The defendant's conduct is thus key to the amount of damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was willful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well. Considering that this was wilful trespass and guided by
20 the acreage of approximately two and a half acres of land in a peri-urban setting occupied since 2009, for each acre I will award nominal damages of shs. 1,000,000/= per annum which translates into shs. 2,500,000/= per annum and for the last nine years, hence a rounded off figure of shs. 20,000,000/= which is awarded as general damages to be paid jointly and severally by the respondents.

25

From his plaint and testimony in court, the basis for the appellants' claim for general damages, in addition to mesne profits, is premised on the loss of use and enjoyment of his land. The reality is that the appellant's rights were invaded and he has been deprived of the use and enjoyment of his property. Nevertheless, I am not satisfied that this is a case which warrants an additional award
30 of mesne profits.

In the final result, for all the foregoing reasons, the appeal is allowed. The judgment of the court below is set aside and in its place one is entered dismissing the suit with costs. Judgment is entered for the appellant against the respondents on the counterclaim, in the following terms;

- a) A declaration that he is the rightful owner of plot 117 at Kanyagoga "A" Zone.
- 5 b) An order of vacant possession of the land.
- c) A permanent injunction restraining the respondents, their agents, employees or persons claiming under them from interference with his quiet possession and enjoyment of the land.
- d) General damages of shs. 20,000,000/= with interest thereon at the rate of 8% per annum
10 from the date of this judgment until payment in full.
- e) The costs of the appeal and of the court below.

Dated at Gulu this 13th day of December, 2018

15

.....
Stephen Mubiru
Judge,
13th December, 2018.