

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0053 OF 2015

(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 007 of 2012)

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ACAA BILENTINA APPELLANT

VERSUS

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OKELLO MICHAEL RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The respondent sued the appellant for a declaration that he is the owner of land under customary tenure, measuring approximately 15 acres, situated at Baraming village, Bwobonam Parish, Alero sub-county, Nwoya District, an order of eviction, permanent injunction, general damages for trespass to land, interest and costs. His case was that he inherited it from his late father Onasimo Banya, who acquired it from his brother in law, Faustino Okok in 1954. He was surprised when in 2007 the appellant encroached onto the land.

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In her defence, the appellant stated that she is customary owner of the land having inherited it from her late husband Paulinus Owot who in turn inherited it from his father Lacete. The respondent only came to live with his aunt who is a neighbour to the appellant and there is a clear boundary between that land and hers. She lived on the land until the abduction and murder of her husband. It in the year 2008 on return from the IDP Camp that the respondent began claiming the land.

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The respondent testified as P.W.1 and stated that the land in dispute is 50 acres. His father, Nasimo Banya acquired it from the husband of the respondent's Aunt, Faustino Okok, in 1954. His father died in 1962 and was buried at Alero Pangur. The appellant lived on the land in dispute for only one year, 1967 and then relocated to the neighbouring land across the Kulu Kic stream in 1968, which is to the East of the land in dispute and never returned to the land in dispute. In 2008 she returned to the land in dispute and established a garden. She ceased the

encroachment when the respondent's brother Okot Galdino reported to the L.C.II. He lost the case but appealed to the L.C.III. The appellant lost, never appealed, but continued utilising the land. The Chief magistrate directed a trial de novo.

5 P.W.2 Okello Jacinta testified that the land in dispute belonged to her late father, Faustino Okok, husband to the respondent's Aunt. The appellant's father Onasimo Banya came to live with his sister, Yolanda Adonge, wife of Faustino Okok. When Faustino Okok died, the family of Onasimo Banya remained in occupation of the land. The appellant and her father in law Lacede, never lived on the land. He lived across the road to Chwa. It is the respondent who was using the
10 land during the insurgency. The respondent's land is far from the land in dispute with which it has no common boundary. It is the road to Chwa that forms the boundary between the appellant and the respondent's land.

P.W.3 Lakwo Genaro testified that both litigants are his neighbours. The land in dispute belongs
15 to the respondent. It is Okok Faustino who gave the land to his bother in law, the respondent's father Banya Onasimo, in 1954. The appellant was the wife of Okok Faustino's clan brother, Paulino Owot. The parties do not share a common boundary since between them is land belonging to a one Okot Aluji. Lacede, the appellant's father in law, neighbours the land in dispute and the boundary is a rock. The respondent has is former homestead on the land but the
20 appellant does not. That was the close of the respondent's case.

In her defence, the appellant testified as D.W.1 and stated that she lived with her father in law across the stream but the respondent has encroached on her land. All had vacated the land during the insurgency but upon return, instead of going to his former home, the respondent occupied her
25 land instead. Since 1952, Kulu Agulu Stream is the boundary between her land and that of the respondent. D.W.2 Okot Galdino, the respondent's biological brother, testified that from 1954, the family of Onasimo Banya moved in to live with that Faustino Okok, husband to the sister of Onasimo Banya, Yolanda Adongpiny. Faustino Okok offered them land extending up to the Agulu stream. The land to the West belonged to the appellant and her husband, Paulino Owot.
30 The boundary was Agulu and Yago streams. The appellant once sued him and he concede that

the land belongs to her. He vacated the land and returned to the land that was given to them by Faustino Okok.

D.W.3 Otto Charles testified that the land in dispute belongs to his father Lacede, the appellant's father in law. Faustino Okok's land neighbours that land to the East. Agulu stream is the boundary between them. All the respondent's other siblings reside on Faustino Okok's land. The respondent encroached on the land in dispute in 2009 on his return from the camp. Before leaving for the camp, he used to reside on Faustino Okok's land.

10 The court then visited the *locus in quo* where it recorded evidence from three additional witnesses on each side. For Respondent; - (i) Omona Charles who stated that the land originally belonged to Aluji Okot who gave it to Okok Faustino in 1952 who in turn gave it to the respondent's father, Onasimo Banya. The boundary is a rock; (ii) Abola Richard, who stated that he is the grand-son of Aluji Okot. He lives between both parties. The appellant left her land, 15 went past his land to claim the respondent's land. It is his grandfather Aluji Okot who gave the land to Okok Faustino who in turn gave it to the respondent's father, Onasimo Banya; (iii) Awo Rujina the respondent's sister, who stated that the land belonged to Faustino Okok who gave it to his brother in law Onasimo Banya, the respondent's father. He re-occupied it after the insurgency.

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For Appellant; (iv) Okello Inyacio who stated that he found Lacede, father of Owot Paulino, the appellant's husband, on the land and has lived there for 67 years. Aluji Okot accommodated Okok Faustino for six years and left for Lungulu. The part Aluji Okot gave to Okok Faustino stops at Agulu Stream. The respondent occupied the land East of the stream while the appellant 25 occupied land East of the stream. Owot Paulino was buried on the land in dispute. The dispute is about the boundary and not the entire land. the respondent trespassed onto the appellant's land after the war; (v) Loka Romano, who stated that the land given to Onasimo Banya was up to Angulu stream. Both parties had activities on their respective pieces of land and used to stop at Angulu stream before the insurgency; (vi) Okwera Augustino stated that the Angulu Stream is 30 the boundary between the two parties. The land in dispute belongs to the appellant and she occupied it from 1962 henceforth.

At the *locus in quo*, the court observed further that the respondent claimed the entire land while the appellant only claimed land up to the stream. The respondent then said he was claiming only the part where the appellant's son was constructing a home. Unfortunately, time ran out at 4.30 pm before the land in dispute could be inspected. Therefore, no map was drawn.

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In his judgment, the trial magistrate found that the two disputants are closely related by intermarriage between their respective families. Having considered the witnesses of both parties and those at *locus in quo*, he found that the appellant's father in law and the respondent's father each owned land at Baraming village. The evidence of D.W.2 was taken with caution because of the sibling rivalry between him and the respondent. The evidence of the independent witnesses was most instructive, most particularly that of Okwera Augustino. He therefore found that the land belonged to Faustino Okok who gave it to Onasimo Banya, the respondent's father. The respondent being the son of the late, Onasimo Banya, he was declared the rightful owner of the land in dispute. The appellant was thus a trespasser on the land. The court issued an order of vacant possession and a permanent injunction. It did not award general damages since the respondent was in occupation, but awarded the costs of the suit to the respondent.

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

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1. The learned trial Magistrate Grade One erred both in law and fact when he failed to properly evaluate the evidence on record regarding ownership of the suit land as a whole thereby arriving at a wrong conclusion.
2. The learned trial Magistrate Grade One erred both in law and fact when he failed to find that the respondent had departed from his pleadings thereby occasioning a miscarriage of justice.
3. The learned trial Magistrate Grade One erred both in law and fact when he rejected the appellant's defence especially that of D.W.2 without analysing the same, hence occasioning a miscarriage of justice.
4. The learned trial Magistrate Grade One erred both in law and fact when he admitted P.E.1 to P.E.3 thus occasioning a miscarriage of justice.

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5. The learned trial Magistrate erred both in law and fact when he failed to properly conduct the *locus in quo* visit thereby occasioning a miscarriage of justice.

In his submissions, counsel for the appellant, Mr. Watmon Brian, argued with regard to ground
5 five that the trial magistrate recorded evidence from six witnesses at the *locus in quo* who had
not testified in court. He named them as in depended witnesses. They were three from either
side. In the judgment the trial magistrate extensively relied on their evidence. It was wrong for
the trial court to rely on that new testimony. In *Okello Anthony and 2 othres v. Odonga Alfred
and 2 other C.A. No. 22 of 2016*, such evidence was disregarded. The effect is that what remains
10 in the evidence is not sufficient to support the finding. The trial magistrate also relied on
observations and findings he purported to have made. which are not captured in the record of
proceedings. In *Registered Trustees of the Archdiocese of Tororo v. Wesonga and five others, CA
96 of 2009*, it was held that failure to record the proceedings and make them part of the record, is
a fatal omission. Thirdly, The trial magistrate never reached the suit land, he stopped at the new
15 home of the appellant. The respondent stated that he was claiming land where the sons had been
constructing and not at the home where they were. They were therefore not on the suit land. He
also failed to inspect the suit land. He closed locus at 4.00 pm promising to go back on 23rd June
2014 at 10.00 but that was not done. The appellant passed on 3rd July, 2014 and was buried on
the suit land as per his wishes. These errors and omissions are fatal and a retrial is possible since
20 all other witnesses are still available. It was a boundary dispute and the name of the location of
the suit land became an issue, possession, size and usage of the land became an issue.

He argued in the alternative that D.W.2 and D.W.3 were consistent that the boundary between
the land of the appellant and the respondent is Aguru Stream. For the respondents P.W.2
25 admitted that the parties are neighbours but that the boundary is a road from Twaa to Limuru.
P.W.3 too admitted that the parties are neighbours but stated that the boundary was a rock.
Regarding the name of the location of the suit land; at para 3 of the amended plaint, the
respondent stated that the suit land is at Baroming village and at para 4 (f) that the appellant was
living at Bogonam B village. At the trial P.W.1 stated that it is elsewhere. It was necessary
30 therefore to visit the *locus in quo*.

Submitting in respect of grounds 3 and 4, the magistrate dealt with the evidence of D.W.2. It was wrong for the trial magistrate to have admitted those documents since there was no foundation or basis for the documents. D.W.2 never authored them and the authors were never produced. D.W.2 did not disclose the author and there is no evidence to show he had seen them before. Counsel for the appellant was never called to commented on them. P.E 3 is dated 28th May, 2013. It was authored by the former counsel for the respondent. She was the one who stated that Acca Vicentina's witness is D.W.2. It should not have been given that weight. P.E 2 is a summons and hearing notice by the L.C.III. It was irrelevant under section 11 of the Local Council Courts Act, 2006. It is an appellate court and the document was between the respondent and his brother D.W.2 over their father's estate which is not the suit land and D.W.2 stated so.

It was the land on the Eastern side across Aguru Stream. P.E.1 is a notification letter. It would appear that it was motivated by P.W.3 because it was written after. It was relied on at page 11 of the judgment. It stated the respondent had won the case before the L.C.III. It was irrelevant because under par 4 (i) of the amended plaint a retrial had been directed. That evidence ought to have carried no weight. It states in the past P.W.2 supported the respondent and an inspection of the land was done. The trial magistrate found it was not controverted by D.W.2 which was wrong. He stated that the disputed land was never inspected by the sub-county court. It was the Eastern side land, their father's estate, that was inspected. It was wrong for the trial magistrate to have treated that evidence as truthful. Had D.W.2's evidence been properly evaluated, the court would have come to a different conclusion. As regards possession, at the time of trial it was not important because D.W.1 stated that after the camp was dispersed, the respondent went to the former homestead of P.W.1. In the absence of P.E.3 the evidence of P.W.1 remains unchallenged. He prayed for the execution that was partially done to be set aside and the costs of the appeal and of the court below to be awarded to the appellant.

In response, counsel for the respondent, Mr. Michael Okot argued that a visit to the *locus in quo* is guided by the provisions of Order 18 r 3 of *The Civil Procedure Rules* (sic). It is true that the trial magistrate recorded evidence at the *locus in quo* but there was no miscarriage of justice occasioned. It is not fatal because even if the evidence of the these witnesses is not considered, this was a case of ownership of the whole land. All the witnesses testified as to the long history

of ownership and of possession. It did not require a visit to the locus. Even if the evidence of locus is disregarded the rest can be re-evaluated and the court will come to the same conclusion as the court below. With regard to grounds 4 and 5, the trial magistrate analysed the evidence of D.W.2 but cautioned himself at page 10 when he noted that D.W.2 and the respondent were
5 brothers but did not see eye to eye because of previous disputes. He questioned the motive of this witness to testify against the case for the respondent but nevertheless evaluated his evidence and came to the conclusion that it could not sustain the claim of the appellant. The trial court considered that evidence but found it insufficient.

10 In respect of ground 4, he conceded that exhibit P.E.1 was admitted irregularly but even in the absence of exhibits P.E. 1 to P.E 3, the evidence can still support the finding. He invited the court to find that that even if it disregards that evidence, it will find the trial court duly discharged its mandate. The prayer for a re-trial is untenable because the principal witness has since passed on. He invited the court to dismiss the appeal with costs to the respondent and to
15 confirm the judgment of the court below.

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*
20 *17of 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
25 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
30 generally.

I have considered the first ground of appeal and found it to be too general. It 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. 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*). This ground is accordingly struck out.

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With regard to the fifth ground of appeal, I have considered the record of appeal and the submissions of both counsel. In find that the decision by the trial magistrate to record additional testimony of persons who had not testified in court to have been erroneous. A visit to the *locus in quo* is an exercise intended 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*).

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. I have therefore decided to disregard the evidence of the "independent witnesses," since I am of the opinion that there was sufficient evidence on basis of which a proper decision could be reached, independently of the evidence of those witnesses.

Grounds 2 and 4 will be considered concurrently in so far as they canvass departure from pleadings and admissibility of exhibits. I have reviewed exhibits P.E.1 to P.E 3. They are correspondences containing a narration of alleged history of the dispute over the land in issue and the conflict existing between the respondent and his brother D.W.2 Okot Galdino. They are
5 authored by the Chairman Alero sub-county Local Council Court, who unfortunately never testified in court. Section 59 of *The Evidence Act* requires that oral evidence must in all cases be direct; if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it; if it refers to a fact which could be perceived by any other sense, or in
10 any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner.

Any statement made out of court that is offered in court as evidence to prove the truth of the matter asserted is generally inadmissible as hearsay. This is because statements made out of
15 court normally are not made under oath, a judge cannot personally observe the demeanour of someone who makes such a statement outside the courtroom, and an opposing party cannot cross-examine such a person. Such statements hinder the ability of the court to probe the testimony for inaccuracies caused by ambiguity, insincerity, faulty perception, or erroneous memory. Thus, statements made out of court are perceived as untrustworthy. There are a number
20 of exceptions, none of which apply to this case.

The requirement that evidence of a witness should be given orally in person in court, on oath or affirmation, so that he or she may be cross-examined and his or her demeanour under interrogation evaluated by the court, has always been regarded as the best evidence. The theory
25 of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. In this case, the author of the correspondences was not called as a witness. The duty of calling the maker of a document as a witness lies on the party who tenders the document in evidence. It is wrong for a trial court to
30 rely on a document when its authenticity has been seriously challenged and when its maker is

not called as a witness. This part of the ground therefore succeeds. The court should not have admitted nor relied on those documents.

As regards departure from pleadings, not every inconsistency between the pleadings and
5 evidence adduced during the trial constitutes a departure. When an inconsistency is a mere variation that is in essence only a modification or development of what is averred, then it is not a departure but if it introduces something new, separate and distinct, then it is a departure (see *Waghorn v. Wimpey (George) and Co. [1969] 1 WLR 1764*). The test is whether the opposing party's conduct of the case would have been any different had the adversary pleaded the
10 impugned aspect of their case. The question is if the impugned allegations had been made in their pleadings in the first place, namely allegations based upon the facts as they eventually emerged in evidence, would the opposing party's preparation of the case, and conduct of the trial, have been any different?

15 The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his or her evidence to the issue disclosed by them (see *Esso Petroleum Company Limited v. Southport Corporation [1956] AC 218*). The rules on pleadings require the parties to set out fully the nature of the question to be decided by stating the facts upon which the parties rely and the orders which they seek, otherwise the courts risk embarking on a roving
20 enquiry. The function of the court in a civil trial is to decide the dispute as formulated between the parties, rather than undertaking a roving inquiry. For that reason, when a departure from the pleadings occurs, the party not in breach has the remedy of applying for an order to strike out the offending pleading before or during the hearing and failure to do so is not a bar to bringing up matter in submissions (see *Kahigiriza James v. Busasi Sezi [1982] HCB 148*).

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Where departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that such evidence is not permitted unless the pleading is appropriately amended. Therefore, in the event of an inconsistency between the pleading and evidence adduced in court, such that the inconsistency is revealed in the course of hearing of
30 evidence, the offending part of the evidence may be rejected or the offending part of the pleading may be struck out on application (see *Opika-Opoka v. Munno Newspapers and Another [1988-*

90] *HCB 91* and *Lukyamuzi Eriab v. House and Tenant Agencies Limited* [1983] *HCB 74*). However, where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, is likely to give permission to amend the pleading, the other party may be sensible not to raise the point since not every departure will be fatal to the proceedings (see *Uganda Breweries Ltd v. Uganda Railways Corporation* [2002] 2 *EA* 634).

I have considered the respondent's pleadings and the evidence he adduced during the trial. I have no found any set of facts that introduced something new, separate and distinct, from what he pleaded so as to constitute a departure. Any inconsistencies there may be is a mere variation that is in essence only a modification or development of what is averred in his pleadings. They did not constitute a material and radical departure from the case he pleaded. This part of the appellant's argument fails.

Grounds 3 canvasses the rejection of evidence of D.W.2 and general evaluation of the appellant's evidence at the trial. An appellate court will be reluctant to reject findings of specific facts, particularly where the findings are based on the credibility, manner or demeanour of a witness. However, an appellate court will far more readily consider itself to be in just as good a position as the court below to draw its own inferences from findings of specific facts where such findings are not based on demeanour of the witness. Assessment of evidence is an evaluation of the logical consistency of the evidence itself. When a finding of fact depends on a matter such as the logical consistency of the evidence rather than the manner of the witness, an appellate court may be more readily willing to reject a finding of a specific fact (see *Benmax v. Austin Motor Co. Ltd* [1955] *AC* 370 and *Faryna v. Chorny* [1952] 2 *D.L.R.* 354). It appears to me that the trial court partly came to the conclusion it did based on the credibility of the witnesses before it and the available corroborative evidence observed during its visit to the *locus in quo*. The veracity of witnesses may be tested by reference to contemporaneous evidence that does not depend much upon human recollection, such as objective facts proved independently of their testimony.

The respondent testified that the appellant lived on the land in dispute for only one year, 1967 and then relocated to the neighbouring land across the Kulu Kic stream in 1968, which is to the East of the land in dispute and never returned to the land in dispute. P.W.2 Okello Jacinta

testified that the land in dispute belonged to her late father, Faustino Okok, but the appellant's father Onasimo Bany a came to live with his sister, Yolanda Adonge, wife of Faustino Okok. When Faustino Okok died, the family of Onasimo Bany a remained in occupation of the land. P.W.3 Lakwo Genaro testified that both litigants are his neighbours. Lacede, the appellant's
5 father in law, neighbours the land in dispute and the boundary is a rock. In her defence D.W.1 the appellant stated that she lived with her father in law across the stream but the respondent has encroached on her land. D.W.2 Okot Galdino testified that from 1954, when the family of Onasimo Bany a moved in to live with that Faustino Okok, husband to the sister of Onasimo Bany a, Yolanda Adongpiny, Faustino Okok offered them land extending up to the Agulu stream.
10 D.W.3 Otto Charles stated that the land in dispute belongs to his father Lacede, the appellant's father in law. Faustino Okok's land neighbours that land to the East. Agulu stream is the boundary between them. All the respondent's other siblings reside on Faustino Okok's land. The respondent encroached on the land in dispute in 2009 on his return from the camp. Before leaving for the camp, he used to reside on Faustino Okok's land.

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It emerges from the evidence adduced by both parties that the appellant's father Onasimo Bany a was given some land by Faustino Okok came when he came to live with his sister, Yolanda Adonge, wife of Faustino Okok. It is not the presence of the appellant within that area that is disputed, but rather the extent of the land he is entitled to pursuant to that gift *inter vivos*. This is
20 in essence a boundary dispute. A court faced with contradictory or inconsistent evidence as to the location of a boundary between two adjacent pieces of land will look to extrinsic evidence when seeking to determine the true position of a boundary. Regulation 21 (1) of *The Land Regulations, 2004* provides the following sources as a guide;- a statement on the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land matters in
25 the parish or the urban area; (ii) simple or customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects; (iii) human activities on the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land; (iv) maps, plans and diagrams, whether drawn to scale or not, which show by reference to any of the matters referred to in sub-paragraph (ii) or (iii) the
30 boundaries of the land. In short, there are any number of factors which a court may consider

when determining the true boundary between two properties, and the court is entitled to give what weight it feels appropriate to each element in order to reach a decision on all the evidence.

In his book, *Law Relating to Land Boundaries and Surveying*, published by the Association of Consulting Surveyors Queensland, (1980) at page 155, Brown Allan suggest the following hierarchy of giving weight to evidence of cadastral boundaries to guide the reinstatement of cadastral boundaries; (i) the greatest weight must always be given to lines actually marked on the ground; (ii) next most important are natural monuments mentioned in the deed; (iii) Adjoiners, “a well established line of adjacent survey,” often rank as natural monuments; (iv) artificial monuments rank next; (v) maps or plans actually referred to in the deed rank after artificial monuments; (vi) unmarked lines which are well recognised rank next to maps and plans in importance (vii) bearings and distances will over-ride other calls only, in most cases, where there is no trustworthy evidence of such other calls; (viii) as between bearing and distance, neither is given overall preference, if they are inconsistent with each other the circumstances dictate which is preferred; (ix) Area, will in general be the least valued evidence, but may in some cases be the key to the problem; and (x) finally, but most important of all, any one of these rules may be of more (or less) weight in one case than another. The rules set out are for cases of conflict, they are general rules, to be used as a guide but not as a straightjacket (see also *Donaldson v. Hemmant* (1901) 11 QLJ 35 at p41;) *Fulwood v. Graham*, 1 Rich. 491 (1844) and *Walsh v. Hill* 38 Cal. 481 (1869). The hierarchy is merely an indication and it should yield to the particulars of a case.

The location of a boundary is primarily governed by the expressed intention of the originating party or parties or, where the intention is uncertain by the behaviour of the parties. Therefore one of the keys to ascertaining the intention of the parties is resolving how it was expressed in the actions of the parties. The visit to the *locus in quo* was meant to determine if the physical evidence of boundaries is in accord with the oral testimony of the boundaries. Evidence of occupation that is contemporary with the boundary creation may resolve the boundary position. A long occupation authorised by the original owner, and acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which was conveyed to the occupant. In such cases the occupier is not to be driven to rely on a mere possessory title; but has a right to assert that the land he or she holds is the very land

granted (see *Equitable Building and Investment Co. v. Ross (1886) NZLR 5SC 229* often referred to as the *Lambton Quay Case*). Boundary positions publically agreed to and observed by neighbours over long periods of time by neighbours, will be binding even when found later to be inaccurate (see *South Australia v. Victoria (1914) AC 283*).

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In his testimony, the respondent stated that the appellant lived on the land in dispute for only one year, 1967 and then relocated to the neighbouring land across the Kulu Kic stream in 1968, which is to the East of the land in dispute and never returned to the land in dispute. P.W.2 Okello Jacinta on his part stated that it is the road to Chwa that constitutes the boundary between the appellant and the respondent's land. Lastly, P.W.3 Lakwo Genaro testified on one hand that the parties do not share a common boundary since between them is land belonging to a one Okot Aluji. On the other hand he stated that Lacede's land, the appellant's father in law, neighbours the land in dispute and the boundary is a rock. The respondent's version this did not bring out one consisted feature as the true boundary.

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To the contrary, the appellant Acaa Bicentina as D.W.1, testified that Kulu Agulu Stream has since 1952 constituted the boundary between her land and that of the respondent. D.W.2 Okot Galdino stated that Faustino Okok offered them land extending up to the Agulu Stream. The land to the West belonged to the appellant and her husband, Paulino Owot. The boundary was Agulu and Yago Streams. D.W.3 Otto Charles too testified that Agulu Stream is the boundary between them. Unlike the evidence adduced by the respondent which was inconsistent as regards the true location of the boundary, that adduced by the appellant was very consistent. The general principle in the evaluation of evidence is that if the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not (see *Miller v. Minister of Pensions [1947] 2 All ER 372*).

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In the absence of survey marks, there can be no better indication of the land to which ownership relates than long and unchallenged occupation. If a boundary is a theoretical line that marks the limit of a parcel of land, then it is desirable that adjoining parcels have the same boundary, otherwise there would exist small strips of ownerless land or worse still strips of overlapping land that are in dispute. Streams may be some of the most satisfactory of monuments because

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they are durable and their course not easily shifted (see *Horne v. Struben* [1902] AC 454). It was the evidence of the appellant that she had lived with her father in law across the stream until they were all forced to vacate the land during the insurgency. It is therefore a fact that the stream, had been observed as the boundary from 1952 until the breakout of the insurgency (around 1987, hence a period of over thirty five years). She testified further that it is upon return from the IDP Camp that instead of going to his former home, the respondent occupied her land. Had the trial court properly evaluated the evidence, it would not have come to the conclusion that it did. The appellant had enjoyed long and unchallenged occupation of land to her side of Agulu Stream in respect of which she was entitled to protection from trespass by the respondent. This ground of appeal therefore succeeds.

In the final result, the appeal is allowed. The judgment of the court below is set aside. Instead the suit is dismissed, but with the following orders;

- a) A declaration that Agulu stream is the natural boundary between the appellant and the respondent's land.
- b) An order of vacant possession against the respondent for occupation of any land beyond that stream, on the appellant's side.
- c) A permanent injunction restraining the respondent, his agents, employees or persons claiming under him from further acts of trespass beyond that stream, onto the appellant's land.
- d) The costs here and below are awarded to the appellant.

Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.