The Republic of Uganda

In the High Court of Uganda at Soroti

Civil Appeal No. 0090 of 2023

(Arising from Katakwi Land Suit No. 006 of 2018)

1. Osele Yusuf
2. Arakit Margaret
3. Achan Martha
4. Ekudot Robert
5. Amuge Grace
6. Aede Joseph
7. Isadat John Bosco
8. Ekwe Abdu

:: Appellants

Versus

1. Oruni Odwar John
2. Obol Jacob
3. Okumai James Peter

:: Respondents

<u>Before: Hon. Justice Dr Henry Peter Adonyo</u>

<u>Judgment on Appeal</u>

1. <u>Introduction.</u>

This appeal arises from the judgment of the Chief Magistrates Court of Katakwi at Katakwi delivered by Her Worship Abalo Agnes Oneka on the 20th day of September 2023.

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:..............................

2. Background.

The respondents herein filed Civil Suit No. 006 of 2018 against the appellants jointly and severally for trespass to the suit land, permanent injunction, mesne profits, order of eviction, interests and costs of the suit.

The facts constituting the respondents' case were that the 1st and 2nd respondents are the lawful customary owners of the suit land located at Ngariam village, Ngariam parish, Palam sub-county, Katawki District measuring approximately 2¼ square miles having inherited the same from the father/grandfather one Oruni Yona in 1988.

That the late Oruni was given part of the suit land by the family of the late Atomailing, Amojong and Edeke, the ancestors of the 3rd respondent and part of the suit land was acquired by him when it was idle and virgin.

That in the 1920s during the colonial era, the late Oruni was a tradesman dealing in cattle from Kotido to Mukono and during the course of his trade, Ngariam village was his rest point and having developed a good relationship with the people there he was prompted to establish a trade ground for himself in Ngariam. That the late Oruni was given thirty gardens by the late Atomailing, Amojong and Edeke, the same family which earlier offered land to the colonial settlers.

That on the eastern and north-eastern part of the land given to Yona was no man's land full of bush and wild animals and in a bid to deter wild animals he cleared 2 square miles of land for settlement and agriculture and this is where majority of his descendants currently reside.

That the descendants of the late Atomailing, Amojong and Edeke are still surviving to date and all of them including the 3rd respondent still recognise and respect their borders.

2

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

That in 1950 or thereabout the colonial district administrators vacated the said land and shortly relocated to Achanga village before moving to settle at the current Ngariam sub-county headquarters in 1954.

That by the time the colonial masters were still at Ngariam trading centre, the 1st appellant's grandfather known as Ojematum worked in their Administration as a sub county chief and they were close friends with Oruni Yona, Oruni offered to mentor Ojematum's son Iddi (the 1st appellant's father) into the business.

That when Ojematum resigned from government work in 1930 he returned to his ancestral home in Adonga where he died and was buried.

That in 1937 when the government meat project was located in Adonga, the residents of Adonga were displaced from their land and because of the good relationship Oruni Yona had with Ojematum the 1st appellant's father returned to Ngariam and Oruni Yona welcomed him back and his son the 1st appellant lived on the suit land without any conflicts over land ownership.

That apart from the 1st appellant, many former residents and relatives of Iddi came to Adonga and settled in the surrounding areas neighbouring Yona Oruni and because of the mentorship of Oruni Yona, Iddi became a strong business man with wide knowledge about the land in Ngariam and he was allocating plots in Ngariam however the plots he allocated to his clan mates were outside Oruni's land and the suit land was left intact.

That in 1979 due to the insurgency, majority of the residents in Ngariam, including the 1st appellant was displaced but the 1st and 2nd respondents and their sister one Adoch Mariam remained on the suit land.

That when the insurgency calmed down in 1981 many of the victims of the insurgency returned and settled in a settlement camp established within Ngariam

trading centre and when the 1st respondent's mother returned from Kitgum she requested for a piece of land from the 1st appellant who declined the request and instead advised her to go and settle with other internally displaced people in the settlement camp.

That she did this because her husband's land was not safe at that time and she indeed cleared a plot of land within Ngariam trading centre which plot is currently possessed by the 1st respondent, however the 1st appellant is now threatening to chase the 1st respondent from his mother's land.

That while the 1st and 2nd respondents' father Oruni later died in Kitgum while in refuge and was buried there, the whole village including the appellants recognised and respected his boundary.

That from the year 2009 to date, the appellants jointly started and continued to intimidate, terrorize and harass the respondents and their family members over their land.

That the appellants are working on a false assumption that the respondents cannot have any right of ownership over the land since they are all descendants of an Acholi ancestor while the land is situated in an area predominantly surrounded and occupied by the Ateso people of *Atekok Imangaria* clan.

That on the 31st of March 2014, the 1st appellant invited the Area Land Committee of the area that was then chaired by the 4th appellant to inspect and demarcate the suit premises and the respondents vehemently objected to the 1st appellant's ownership but the Area Land Committee adamantly ignored their objection and continued with their inspection.

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY

That this illegal demarcation was vigilantly brought to the attention of the sub county chief, Palam sub county but it did less or nothing to stop the illegal activity of their land committee.

That the appellants have further embarked on illegal demarcation and survey of the suit land in total disregard of the respondent's interests.

That the matter was promptly brought before the 5th appellant who is the LC1 chairperson of Ngariam but he took no action and instead sided with the appellants.

The appellants in their joint written statement of defence stated that the plaint discloses no cause of action against the 4th, 5th, 7th and 8th appellants.

That the 1st and 9th appellants inherited the suit land from their father Iddi Isadat upon his death in 1991 and the 1st appellant was appointed the heir and they have been staying on the suit land since childhood.

That Iddi Isadat also inherited the suit land from his father Ojematum Acori.

That the 2nd appellant has constructed a home on the suit land by virtue of the 1st appellant, the 3rd appellant is on land having married the late Iriko William a cousin brother to the 1st appellant and the 6th appellant is also cousin to the 1st appellant and an aunt to the 1st appellant who stayed on the suit land from her childhood and only briefly left when she got married.

That Oruni Yona by 1988 never had any land in Ngariam village to be inherited by the 1st and 2nd respondents and the said Atomailing, Amojong and Edeke have also never stayed on the suit land and are not even neighbours to the suit land, hence could not have given out the suit land to anyone and there was no idle and virgin land as alleged.

5

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

That the relatives of the respondents came on the suit land while dealing in cattle business and got in touch with the 1st and 9th appellants' father Iddi Isadat who allowed him a portion of about one plot as a base for his business but not to take it unequivocally.

That this plot is now in occupation of Adoch Miriam and Odolle James, the children of Oruni Yonah.

That Yona Oruni vacated first vacated this plot in 1978 and only came back later in 1980 to pick his property including his wives and animals and left.

That when he was leaving he called a lot of people and thanked Iddi Isadat for having hosted him, and he thereafter peacefully went to his home where he lived and died.

That the 1st respondent only came back recently and stayed at Mr. Ogwang Stephen's home who married him a wife but not on the suit land and only came later to join his mother in the IDP camp.

That it was it was in 2009 that the respondents came in big number and forcefully entered the land and when stopped by the appellants and Area Local Authorities they then went settled in the plot in the IDP camp but only to come back recently claiming the suit land.

That the plaintiffs or any of their ancestors do not own any piece of land in Ngariam village since peace prevailed and should vacate the area they currently occupy as it belongs to the 1st appellant.

That the 1st appellant on behalf of the beneficiaries of the estate of the late Iddi Isadat avers that he has caused a public survey of his land with all his neighbours measuring 257.3 acres and the appellants are in full occupation of the same and

the plaintiffs are in the IDP camp which they should vacate and had never raised any objection to the survey.

The Trial Magistrate having heard the matter found that the plaint discloses a cause of action against the 4th,5th,7th and 8th defendants.

She further found that the plaintiffs had discharged the burden of proving their case on a balance of probabilities and entered judgement in their favour with the following declarations and orders;

a) *The plaintiffs are declared the rightful owners of the suit land located at Ngariam village, Ngariam parish, Palam Sub county, Katakwi District.*
b) *A permanent injunction is hereby issued restraining the defendants and their assignees/legal representatives or anyone claiming through them from trespassing on the suit land forthwith.*
c) *The 1st and 9th defendants to pay general damages of Ugshs. 6,000,0000/= (Six million shillings) and the 2nd and 3rd defendants to pay 2,000,000/= (Two million shillings) to the 1st and 2nd plaintiffs.*
d) *Costs of the suit awarded to the plaintiffs.*
e) *Interest is awarded to the plaintiffs at court rate from date of judgement till payment in full.*

The defendants, now appellants were dissatisfied with this decision appealed to this court on the following grounds;

1. *The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching an erroneous decision.*

2. *The Learned Trial Magistrate erred in law and fact when she held that the plaint discloses a cause of action against the 3rd, 4th, 5th, 6th and 7th appellants.*
3. *The Learned Trial Magistrate erred in law and fact when she awarded general damages against the 1st, 2nd and 8th appellants without any justification given for the same without considering the capacities in which they participated in the said land demarcation exercise.*
4. *The Trial Magistrate erred in law and fact when she awarded costs of the suit against all appellants to all the respondents.*
5. *The Learned Trial Magistrate erred in law and fact when she relied on the uncorroborated hearsay evidence of the respondents to decree the land in dispute to the respondents.*
6. *The decision of the Learned Trial Magistrate has occasioned substantial miscarriage of justice.*

3. Duty of the 1st appellate court.

This Honourable Court is the first appellate court in respect of the dispute between the parties herein and is obligated to re-hear the case which was before the lower trial court by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and to re-appraise the same before coming to its own conclusion as was held in ***Father Nanensio Begumisa and Three Others v. Eric Tiberaga scca 17 of 2000; [2004] KALR 236.***

The duty of the first appellate court was well stated by the Supreme Court of Uganda in its landmark decision of ***Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007*** where it held that;

> *"...the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must*

then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it"

In rehearing afresh, a case which was before a lower trial court, this appellate court is required to make due allowance for the fact that it has neither seen nor heard the witnesses and where it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. See: ***Lovinsa Nakya vs. Nsibambi [1980] HCB 81.***

In considering this appeal, the above legal provisions are taken into account.

4. Representation.

The appellants were represented by M/s Nangulu & Mugoda Advocates while the respondents were represented by M/s Okurut-Magara Associated Advocates.

This matter proceeded by way of written submissions and the same have been duly considered in its determination.

5. Court Determination.

a) Grounds 1 and 2.

- *The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching an erroneous decision.*
- *The Learned Trial Magistrate erred in law and fact when she held that the plaint discloses a cause of action against the 3rd, 4th, 5th, 6th and 7th appellants.*

Counsel for the appellants submitted that the trial magistrate grossly erred making misdirection and non-directions of law and fact when she failed to properly evaluate the evidence on record reaching a wrong decision that the plaint disclosed a cause of action against the 3rd,4th,5th,6th and 7th appellants.

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

Counsel submitted that the record of the lower court clearly shows that the plaint never disclosed a cause of action against the 3rd,4th,5th,6th and 7th appellants as the said appellants led evidence in court to the effect that they had no interest in the suit land and they were only acting in their capacity as local leaders.

That there was overwhelming evidence alluding to the same from both the respondents and their witnesses who told court that the 3rd,4th,5th,6th and 7th appellants never had any interest in the suit land but only participated in the survey process.

Counsel additionally submitted that the 3rd,4th,5th,6th and 7th appellants only demarcated the land in their capacity as local leaders and perhaps if the respondents had halted the same then they could not have continued with the process.

That evidence was led to show that the 3rd appellant the chairperson of the area land committee put up notices to the land in dispute prior to inspection and no one raised any objection.

Counsel further submitted that annexure 'E' relied on by the trial Magistrate in reaching such a finding is dated 1st April 2014 authored by the 4th appellant and it indicates that the demarcation exercise had already been conducted on the 31st March 2014 and was forwarding the 1st and 2nd respondents to other authorities.

That similarly annexure 'F' and 'G' were authored after the demarcation exercise had occurred and as such there is no complaint by any of the respondents anywhere prior to the demarcation exercise that would have notified the 3rd,4th,5th,6th and 7th appellants that there was a dispute on the suit land.

10

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

Counsel for the respondents in reply submitted that this two grounds are without merit and should be accordingly dismissed, having objected to the 1st ground counsel only submitted on the 2nd.

He submitted that the decision of the learned trial magistrate was made in accordance with the law and should be left to stand.

The learned trial magistrate was alive to what constitutes a cause of action and what legal test and resources should be used to determine whether a plaint discloses a cause of action or not. He stated that Her Worship correctly cited the definition of trespass per the Supreme Court in *Justine E.M.N Lutaaya versus Sterling Civil Engineering Co. SCCA No. 11 of 2002* and equally cited that elements of a cause of action and the legal test determining whether a plaint discloses a cause of action per *Kapeka Coffee Works Ltd v NPART CACA No. 22/2000* that is the court must look only at the plaint and attachments if any.

Counsel disagreed with the approach taken by counsel for the appellant in citing extensively matters of evidence which are contained in the record of proceedings to resolve ground 2 which relates to cause of action against the 3rd,4th,5th,6th and 7th appellants.

He invited court to stick to the proper test which is to look at the plaint and annexures if any as was rightly done by the Learned trial magistrate.

Counsel further submitted that while counsel for the appellants is arguing that the 3rd,4th,5th,6th and 7th appellants do not have any interest in the suit land and therefore no cause of action is disclosed against them, the proper position of the law is that the defendant need not have interest in the subject matter in order to be sued under Order 1 rule 5 of the Civil Procedure Rules.

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:

Regarding the appellants' submission that the 3rd,4th,5th,6th and 7th appellants only demarcated the land and had the respondents halted the same they would not have continued with the process, counsel for the respondent contended that halting a demarcation exercise by the Area Land Committee is a two-way process. That firstly a written complaint can be lodged with the Area Land Committee prior to the appointed date and secondly and most applicably to the case at hand, an objection can be made during the actual demarcation exercise.

That Annexure 'E' to the plaint shows that the respondents complained that the suit land does not belong to the 1st appellant and despite the protests to that effect the 3rd,4th,5th,6th and 7th appellants continued with the demarcation.

That annexure 'G' to the plaint further shows that the 7th defendant invited the clan members of the Atekok-Imongoria to come and survey land he claimed to be that of the late Benon Opeitum after the first demarcation exercise failed as a result of a complaint raised by Odeke George William.

That this shows that the 3rd,4th,5th,6th and 7th appellants participated in the demarcation exercise over the suit land, well aware of the existence of a dispute on it.

b) Resolution.

i. *The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching an erroneous decision.*

ii. *The Learned Trial Magistrate erred in law and fact when she held that the plaint discloses a cause of action against the 3rd, 4th, 5th, 6th and 7th appellants.*

A cause of action is established where the plaint shows that the plaintiff enjoyed a right, that right has been violated and that the defendant is liable *(See: **Auto Garage vs Motokov (No. 3) (1971) EA. 514.**)*. If all three elements are present than

12

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

a cause of action is disclosed. To establish the existence of these three elements the court must look only at the plaint and its annexures if any, and nowhere else.

(See: *Kapeeka Coffee Works Limited and Another v Non -Performing Assets Recovery Trust (Civil Appeal 53 of 2000) [2001] UGCA 21 (2 March 2001)*)

In this instant matter, the respondents' claim against the appellants jointly and severally was on trespass to land.

The respondents in their plaint averred that they were the customary owners of the suit land which the appellants started to lay claim to.

That the 1st appellant invited the area land committee to which the 3rd,4th,5th,6th &7th appellants were part with the respondents claiming that they contested the demarcation and survey of the land but the appellants did not heed their objections.

Annexure 'E' to the plaint is a letter from the chairman LC1 dated 1st April 2014 in reference to Mr. Oruni Odwar John and Mr. Obol Jacob.

This letter indicates that the respondents have reported a case of trespass on and illegal and forceful demarcation of their land on the 13th of March 2014 despite their protest before the demarcation.

Annexure 'F' to the plaint dated 2nd April 2014 is a letter from the 1st respondent to the sub county chief Palam Sub-county, herein he states that the Area land committee against its mandate which does not allow it to demarcate land where there is a conflict.

Annexure 'G' is a letter dated 11th June 2017 from the clan of Atekok-Imongoria clan in reference to demarcating the land belonging to the late Benon Opeitum, this letter states that this exercise was scheduled to take place on the 17/06/2017

as it had failed on the 10/06/2017 with reference to the letter written by Odeke George William.

Annexure 'H' to the plaint is a letter dated 16th July 2011 wherein the family of the late Oruni wrote to the LC1 chairperson Ngariam village requesting that his office investigate and stop the existing trespass on their land.

From the plaint is can be seen that the respondents had a right as land owners and the same was violated by the 1st appellant who tried to remove them from the same.

The 3rd,4th,5th,6th &7th appellants helped in the demarcation of the land despite having knowledge of an existing conflict over the same as seen in the above annexures especially annexure 'E' and 'H'.

The trial magistrate in her judgement found that the 3rd,4th,5th,6th &7th appellants well aware of the existence of a dispute over the suit land, made an unauthorised entry on the suit land and participated in the demarcation exercise of the same, and the plaint thus disclosed a cause of action against them.

The above being so, I am in agreement with the trial magistrate's finding in that respect and upon perusing the plaint and its annexures, I am satisfied that the learned trial magistrate did not err in law and fact as she o properly evaluated the evidence on record thereby reached a correct decision.

Further, I am in agreement with the learned trial magistrate that she held that the plaint discloses a cause of action against the 3rd,4th,5th,6th & 7th appellants. Ground 1 and 2 thus fail.

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

c) Grounds 3 and 4.

i. *The Learned Trial Magistrate erred in law and fact when she awarded general damages against the 1st, 2nd and 8th appellants without any justification.*

ii. *The Trial Magistrate erred in law and fact when she awarded costs of the suit against all appellants to all the respondents.*

I note that the appellants sought to amend ground 3 in their submissions to eliminate the words 'without considering the capacities in which they participated in the said land demarcation exercise'.

While this is not the proper process for amendment of grounds of appeal, in the interest of justice of this matter I will ignore that amendment and proceed to determine the said ground as amended.

Counsel for the appellants submitted that the trial magistrate gave no justification for the award of general damages to the 1st and 2nd respondents. That at the locus visit it was found that the land was vacant and bushy with a few patches of cultivation and settlements which all belonged to the 1st and 2nd respondents.

That there was no evidence of disturbance of the respondents to justify the award of general damages.

In regard to costs counsel for the appellants submitted that if any costs were to be awarded then not all the respondents would deserve the same since the 3rd respondent in particular while at locus never showed court any land of his that had been trespassed on by the appellants.

Counsel for the respondents in reply submitted that these grounds are without merit and he prayed that court dismiss them for three major reasons namely that:

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

there is no legal authority for the proposition that failure to give reasons for the award of damages renders the award illegal; trespass is actionable *per se* and there is adequate evidence on court record to support the award of general damages in the manner that the learned trial magistrate did.

Counsel additionally submitted that failure by the trial magistrate to state reasons for the award of general damages is not a fatal error and it cannot in itself enable an appellate court to interfere with the award.

That counsel for the appellants failed to furnish this court with neither a statutory provision nor an authority which supports the argument that failure to give reasons for the award of general damages is reason enough for this honourable court to interfere with the award.

Counsel further submitted that damages for torts are actionable *per se* and are said to be at large, meaning the court taking all the relevant circumstances into account will reach an intuitive assessment of loss which it considered that the plaintiff suffered.

Counsel referred to paragraphs of the respondents' witness statements which show that the respondents were shocked that the suit land which was peacefully owned by the late Oruni Yona

As noted by counsel for the respondents regarding the claim for general damages, 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. 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.

16

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

The award of general damages is in the discretion of court in respect of what law presumes to be the natural and probable consequence of the defendant's act or omission.

In this instance, the respondents and other relatives of the late Yona Oruni after many years of uninterrupted possession and use of the suit land were disturbed by the 1st appellant who with no actual claim of right caused their land to be inspected and demarcated in a bid to have it surveyed.

The respondents who had for many years lived peacefully with their neighbours including the 1st and 8th appellants were shocked and unnecessarily inconvenienced to the extent of filing a suit so as they are declared the owners of the suit land.

Given the fact that the 1st and 8th appellants were aware of the respondents' interest in the suit land and still trespassed upon the same, the respondents were entitled to general damages, the fact the appellants were not found in occupation or use of the land, notwithstanding.

Regarding costs awarded to the 3rd respondent, it was indeed found at locus that his land was not being claimed by the 1st and 8th appellants and was not subject to the inspection exercise.

Consequently, I would find that he is not entitled to costs given that the land he sued the appellants for was never in contention. Accordingly, Ground 3 fails while Ground 4 succeeds.

d) Ground 5.

The Learned Trial Magistrate erred in law and fact when she relied on the uncorroborated hearsay evidence of the respondents to decree the land in dispute to the respondents.

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2025
CERTIFIED TRUE COPY

Counsel for the appellants submitted that the respondents throughout their evidence and that of their witnesses gave court information which they just heard from other persons whom they never mentioned, since they were explaining events they did not witness. Counsel pointed out parts of the evidence of PW1,2 and 4. That their evidence was full of hearsay, uncorroborated and the trial magistrate decreed the land to them based on the same in total disregard of the evidence adduced by the appellants and their witnesses that the suit land belonged to them.

That Section 59 of The Evidence Act admits direct evidence and anything else amounts to hearsay.

Further that the idea of admitting direct evidence is that it is often the best evidence as compared to hearsay.

Counsel for the respondents in reply submitted that there is no other way the respondents could testify to how their father acquired the suit land and how it eventually devolved to them other than narrating the exact history that their father had told them.

That history tracing and telling where the original narrator of the story is dead in the context of customary land has been recognised in common wealth jurisdictions as an exception to the hearsay rule because it is the only best evidence available. He submitted that in Canada for example, the courts have adopted the principled approach to the hearsay rule.

The principled approach requires that the testimony to be admissible under the hearsay rule, it must be both necessary and reliable.

Both necessity and trustworthiness are determined by the common sense and experience by the trial judge but the events referred to *"must have occurred before living memory"*.

Necessity is satisfied if the originator of the oral or a witness to it recounting are dead and cannot be produced before court. Specific facts surrounding the statement (testimony) should provide reliability.

The reputation of the declarant is key and Canadian courts look at whether the statement might have been motivated by litigation and whether the deceased person had any interest in the matter in dispute which might make this testimony untruthful.

Counsel relied on Hope M. Babcock "[This] I Know from My Grandfather:" The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims, 37 AM. Indian L. Rev. 19 (2012), available at "The Battle for Admissibility of Indigenous Oral History as Proof of Tribal" by Hope M. Babcock.

Counsel for the respondent submitted that in the instant case the accounts of acquisition of the suit land by Yona Oruni which ran through the testimonies of PW1, 2 and 4 was both necessary and reliable.

The historical and oral accounts of acquisition of the suit land as narrated by Oruni Yona to his sons PW1 and 2 were necessary because Oruni Yona himself was dead and could not be produced in court.

Counsel further stated that the said accounts were reliable because Yona Oruni did not narrate the same to PW1 and PW2 while anticipating any litigation and he had no interest in the subject matter of the suit in the lower court or the current appeal because he died before the dispute between the parties herein commenced.

19

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

Counsel invited court to find the principled approach to hearsay testimony persuasive and establish a rule of thumb that creates an exception to the hearsay rule in the context of proving customary ownership.

Counsel additionally submitted that the learned trial magistrate established for a fact that the respondents have been in possession of the suit land whereas the 1st and 8th appellants herein had nothing which they relied on to show possession of the suit land.

That this possession in itself corroborates the testimony of all the Respondent's witnesses regarding how they came to acquire the suit land through their father Yona Oruni.

PW1, Oruni Odwar John's testimony in chief was precisely what I noted in the background to this appeal and I will not reproduce the same here.

During lengthy cross-examination he maintained his testimony on how his father acquired the suit land and he stated that his father told him how he acquired the land. He denied the claim that his father acquired land from Iddi Isadat and Ojenatum.

He further stated that there were no complaints over the land during the life time of his father or Iddi Isadat father to the 1st appellant and that the 1st appellant only began laying claims to the suit land in 2014.

PW2 Obol Jacob gave similar evidence in chief to PW1 and during cross-examination he stated that he was not present when his father acquired the suit land rather it was history from father to son.

PW3 Mary Kiyal in cross- examination stated that she married Oruni Yona in 1950 and he was already in possession of the suit land, that her late husband married 10 women and they all stayed on the suit land with their children. That when

20

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

Oruni Yona gave land to Ngariam Primary school and church of Uganda she was present.

PW4 Okumai James Peter during cross-examination stated that his father Ariko Gabriel showed him the land of Oruni in 2010. PW5 testified that he did not know how Oruni Yona acquired the suit land but confirmed that ever since he joined the village, the late Yona and his entire family have been living quietly and peacefully on the suit land.

That when he returned to the village in 1988 having fled due to the insurgency, he found the 1st respondent still in occupation of the suit land. During cross-examination he stated that he saw three of Oruni Yona's women and in 1988 he saw Yona's homestead on the suit land

The evidence of the respondents as to the acquisition of the suit land by Yona Oruni was that he was given 30 gardens by Atomaling, Amojong and Adeke, he then cleared the no mans and around the land that was given to him and this altogether makes the 2¼ square miles of land he owned.

The history of land as told by these witnesses was based on the history of the land given by their father the late Oruni Yona and they maintained the same throughout cross-examination.

The testimonies of **PW3**, one of the late Oruni's wives and **PW5** confirm that the late Oruni and his family have been o the suit land since as far back as 1950 and that in all those years there was never a complaint from Ojenatum and Iddi Isadat the grandfather and father of the 1st appellant.

It is also clearly brought out in the respondent's evidence that the 1st appellant never laid claim on the suit land when his father was alive or immediately after

his death in 1991, rather he waited until 2014, that is approximately 23 years later, to start laying claims over the same.

It is this history that counsel for the appellants' claims is hearsay and should not have been relied upon by the trial magistrate. His submission was that the appellants' evidence proved they owned the suit land.

DW1 Osele Yusuf testified that the suit land formerly belonged to his grandfather Ojenatum who died in the 1930s and Yona Oruni was given a small plot where he had a shop and a homestead on the suit land.

Yona later got issues with his wives and left the land in 1978 leaving Iddi Isadat and his children to use the same. That after the death of his father he continued to use the suit land without any disturbance from anyone.

DW7 Ekwe Abdu and **DW5 Amuge Grace** also testified that the suit land was for Isadat.

During cross-examination DW7 admitted that his grandfather went to Adonga where his land was and that is where he was buried. He stated that Yona was given about 2 plots but he did not measure, and on these two plots Yona stayed with his 10 wives and his very many cattle. He stated that there is nothing of his father or grandfather on the suit land.

The trial court noted that **DW1** kept on smiling when giving answers that he seems to allude he does not know.

DW2 Ipangit James also stated that the land belonged to Iddi Isadat and that Yona Oruni was only given a plot.

During cross-examination he stated that he and his father have permanent structures on the suit land and so does the 1st appellant, he seems to create a

22

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

distinction between the suit land and the surveyed land, claiming no interest in latter.

DW6 Isadat John Bosco claimed no interest in the suit land, stating that he was simply the clan secretary for Ikatekok Imongoria clan.

During cross-examination he stated that the land is for the 1st appellant and Ojenatum's children have houses on the suit land.

DW8 Ekudot Robert testified to have been present during the Area Land committee meeting where fact finding was done and it was proved that the land belonged to the 1st appellant.

During cross-examination he stated that he is well versed with the ownership of the suit land and proceeded to state that he does not know how the 1st appellant acquired the suit land! He also stated that the 1st appellant has houses on the suit land.

DW9 Aede Joseph testified that in the 1960s he used to see Oruni Yona on the suit land occupying a small plot but he left in 1978 and Iddi Isadat occupied the land. That after Iddi's death the 1st appellant remained using the suit land.

During cross-examination he stated that the homestead of Iddi Isadat, the 1st appellant, his children and graves of Iddi are on the suit land.

The trial court visited ***locus in quo*** on the 23rd of June 2023, the 1st respondent showed court the suit land and the 1st and 8th appellant claimed it was the same land they had interest in.

The 2nd to 7th appellants confirmed lack of interest in the land shown by the 1st respondent.

The 3rd respondent showed court the land he claims and the 1st and 9th appellants stated that they had no interest in the same.

The 1st respondent showed court the following features on the suit land; cemented graves of Ajonga his stepmother (1968), Otoo Stephen his brother (1972), Akaro Esther his sister (1997), Agwang Magarita his stepmother (2020) and Otim Wilson his nephew (2020).

The 8th appellant confirmed all these graves as the loved ones of the 1st and 2nd respondents further stating that they contested the burial of Agwang Magarita because the matter was already in court.

The remains of the destroyed houses of the 1st and 2nd respondents' sister and brother Adoch and Oloya were seen and the same was confirmed by the 8th appellant to be true.

The homestead (5 huts) of Kiyai Mary as identified by the 1st respondent and 8th appellant was observed by the trial court.

The trial court further observed a permanent structure belonging to Alule Francis constructed in 2012 and another homestead (7 huts) constructed in 2010 belonging to Odere brother to the 1st respondent.

The 8th appellant showed court the remains of the late Yona's shop that was destroyed in 1978 and confirmed that together with the 1st appellant he planted markstones on the suit land in 2017.

The trial court further observed that there were gardens of the 1st respondent with groundnuts and others had been ploughed but no crops sown yet.

The *locus in quo* proceedings therefore confirmed that the respondent's family had been and was still in possession of the suit land, which awareness was fully in the knowledge of the appellants especially the 1st and 8th appellants.

24

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:

It was also proved that despite the appellants claims otherwise, there was no sign that the 1st and 8th appellant or their father Iddi Isadat ever occupied the suit land.

The evidence on record when considered as a whole indicates that the Yona Oruni the father to the 1st and 2nd respondents acquired the suit land in the colonial era, stayed on the same with his 10 wives and children till 1979 when the insurgency caused him and most of his family members to move to Kitgum his district of origin.

The appellants' claim that Yona was a traveller that was only given a plot which he later left when considered with all the evidence on record is implausible.

Firstly, its claimed he was given one plot where he stayed with all his wives, children and cows, which proposition is completely unlikely.

Secondly, the size of this so called plot was never clear in the appellant's evidence with the 1st appellant claiming they were two plots which he did not measure, DW3 claimed it was 200m by 100m, DW7 claimed it was 50 feet by 100 feet and finally DW9 claimed it was 300m by 300m.

It is also worth noting that apart from claiming the suit land belonged to the 1st appellant, the appellants' witnesses had no knowledge on how the appellant or Isadat acquired the suit land.

I also noted that while the appellants claimed that prior to the demarcation, a meeting was held by the Area Land Committee where fact finding was done and the 1st appellant was found the rightful owner of the suit land, none of the appellants who were part of this committee and participated in the demarcation exhibited these minutes in court.

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY

Interestingly while it was the 1st appellant who approached the Area Land Committee with the request to survey the suit land, he never actually participated in the process and delegated the same to another person.

Under normal circumstances I would not find this unusual, however, given the fact that even at the ***locus in quo*** proceedings he claimed to be ill and unable to move around the suit land, and thus asked the 8th appellant to do so on his behalf makes me wonder as to what he as up to and thus his conduct would only indicate to me the fact of the 1st appellant lacking of any knowledge of the suit land.

In this matter, ***the evidence of uninterrupted possession by the family of the late Yona Oruni for over 50 years would on its on be sufficient to prove the ownership of the suit land as was indeed well established by the trial magistrate in her judgement who went on to found that possession in law confers possessory title and the respondents had sufficiently proved their case on a balance of probabilities.***

On this, the appellants' contention with the respondents' evidence was that it was hearsay evidence.

I do agree that indeed the respondents were not present when the late Yona Oruni acquired the suit land, but in a suit to prove their ownership of the land they were bound to show how the suit land came to their possession through Yona and this necessitated the history of the suit land as noted in the background to the appeal.

Given the fact that Yona through whom they claim had long passed on, they had no alternative other than to give the history of the land as told by him.

This history as told by the respondents and their witnesses was firm, uncontested and not shaken during cross-examination and I would find no reason as to why it

should not be relied especially given the appellants' failure to prove their claim on how Yona came to the suit land.

Consequently, I am of the view that that history tracing and telling where the original narrator of the story is dead in the context of customary land as recognised in common wealth jurisdictions such as Canada is indeed an exception to the hearsay rule because it is the only best evidence available as it is the principled approach to the hearsay rule.

As both the necessity and trustworthiness are determined by the common sense and experience by the trial courts, the events referred to "***must have occurred before living memory***".

Accordingly, I would find that the trial magistrate rightly accepted and found fthe respondents' testimonies as the rightful owners of the suit land based on their clear and unshaken origination of the oral evidence which the recounter was dead and could not be produced before court but the specific facts surrounding their testimonies provided such reliability that the trial court juxtaposed the same with its findings during the *locus in quo* and thus arrived at a logical decision. This conclusion being so, then I would find that the ground that Learned Trial Magistrate erred in law and fact when she relied on the uncorroborated hearsay evidence of the respondents to decree the land in dispute to the respondents to be unwarranted for the reasons given above. This ground thus fails.

e) <u>Ground 6.</u>

The decision of the Learned Trial Magistrate has occasioned substantial miscarriage of justice.

Having determined all grounds 1,2,3 and 5 in the negative, this ground consequently fails.

27

DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
11 JUL 2024
CERTIFIED TRUE COPY
SIGN:.....

6. Conclusion.

This appeal succeeds only in respect to Ground 4 as to costs which was erroneously awarded to the 3rd respondent.

On the other hand, Grounds 1, 2, 3, 5 and 6 fail and save for the orders on costs to the 3rd respondent, the judgement and orders of the lower court are accordingly upheld.

As this appeal has generally failed its costs is awarded to the 1st and 2nd respondents only.

I so order.

.....

Hon. Justice Dr Henry Peter Adonyo

Judge

10th July 2024