THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL No. 064 OF 2021

(Arising from Civil Suit No.057 of 2020)

1. **OCENG FRANCIS**
2. **JACKSON OPWONYA**
3. **ST. JOHN PAUL II COLLEGE LTD**
4. **OJOK SIMON.. APPELLANTS**

VERSUS

LUCY LARUBI... RESPONDENT

BEFORE: HON. MR. JUSTICE GEROGE OKELLO

JUDGMENT

Background facts

The Appellants appeal to this court against the Judgment and decree of the then Chief Magistrate of Gulu, His Worship Matenga Dawa Francis given in Civil Suit No. 057 of 2020 on 29th July, 2021 arising from a land claim. The Judgment indicates, erroneously, that it was dated on 28th July, 2021 and delivered on 29 September, 2021 yet the decree states that the Judgment was given on 29th July, 2021. The appeal was filed on 9th August, 2021, and states the date of 29th July, 2021 consistent with the correct date of the Judgment which this court accepts. That aside, the Respondent had sued the Appellants, seeking to be declared as being the rightful owner of land situate at Laliya Dwol Village, Laliya Parish, Bungatira Sub-county, Gulu District, among other reliefs.

In her amended plaint, the Respondent sued the Appellants together with the Board of Directors of St. John Paul II Schools Ltd (the third Defendant in the suit), although in this appeal, the Board of Directors do not feature. The proper

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name of the school which is St. John Paul II Schools Ltd is also misstated on appeal. The misnaming originated from the Judgment of the trial court which did not carry on the amended name, contrary to the amended plaint. The school was the 4th Defendant while the present 4th Appellant (Ojok Simon) was the 5th Defendant. Ojok's name had "Owila" as part of the name in the amended plaint but was not carried through in the impugned Judgment. For the purposes of this appeal, since the parties did not bother to move the trial court to correct the errors in some names, under section 99 of the Civil Procedure Act Cap 71, I will not disturb the names as there appears to be no prejudice.

As the basis of her action, the Respondent averred that she entered into a sale agreement with the 1st Appellant's mother in which the later allegedly sold the suit land to the Respondent in 1994. The buyer then started cultivating the land immediately and planted eucalyptus trees, among others, with the knowledge of the 1st Appellant, and 2nd Appellant- a neighbor. The Respondent then connected piped water and constructed a poultry house on the suit land in 2011. It was at this point that the dispute erupted, because, apparently, the 1st appellant chased away the Respondent and her workers from using the suit land. The Respondent first lodged Civil Suit No. 65 of 2014 against the 1st Appellant only but withdrew on learning that the 1st Appellant had since sold the suit land to the present 4th Appellant in April 2014 who later sold to the 2nd Appellant in December 2019. The latter who owns the school extended the school boundary to the suit land and fenced off. The Respondent contended that the acts of the Appellants were fraudulent, among others.

In their amended joint Written Statement of Defence, the 1st Appellant contended that he was born on, and inherited the suit land from his parents. He was abducted by the Lord's Resistance Army rebels (LRA) in 1994 but on returning home in 2011, he found when the Respondent had started constructing a temporary structure (chicken house) yet she had in 19994, only requested to use the suit land temporarily for planting elephant grass. The temporary request was

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made to the mother of the 1st Appellant. The 1st Appellant denied that the Respondent purchased the suit land. He contended that the Respondent had offered to buy the suit land in 2011 but failed, prompting the 1st Appellant to sell to the 4th Appellant who developed it by building a permanent house to the wall plate (roofing level), before selling to the 2nd Appellant. These purchasers contended that they rightfully bought the suit land from persons who had right to sell.

Two issues were framed by the parties, and adopted by the trial court, namely; *who is the lawful owner of the suit land?* And *remedies available to the parties.* In my opinion, the first issue should have been framed thus: *whether the Plaintiff is the lawful owner of the suit land?,* in the absence of a counterclaim by the Appellants (Defendants at the time).

After hearing the parties and their witnesses and on visiting the *locus in quo*, the trial court found for the Respondent. In its Judgment, the court held that, despite the fact that she had no copy of the sale agreement, the evidence of the Respondent demonstrated that she had purchased the suit land from the mother of the 1st Appellant because, in the trial court's view, the Respondent had developed the land by connecting piped water and constructing poultry house thereon, facts the court found inconsistent with temporary use of the land. The trial court rejected the 1st Appellant's Defence, holding it as being an afterthought and tainted with fraud- all designed to unjustly deprive the Respondent of her land, in collusion with the other co-Appellants. The trial court declared the Respondent to be the rightful owner of the suit land. It granted vacant possession- ordering for eviction and demolition of all unauthorized developments on the suit land. It also awarded general damages of shs. 20,000,000 and taxed costs of the suit to the Respondent, hence the appeal.

Grounds of Appeal

1. The learned trial Chief Magistrate erred in law and fact when he held that the suit land was purchased by the Respondent thereby arriving at a wrong conclusion.

2. The learned trial Chief Magistrate erred in law and fact when he held that the features on the suit land and the act of taking possession by the Respondent pointed to permanent usage of the suit land.

3. The learned trial Chief Magistrate erred in law and fact when he held that the eucalyptus trees formed a boundary mark between the suit land and the adjacent land formerly belonging to the family of the 1st Appellant thereby arriving at a wrong conclusion.

4. The learned trial Chief magistrate erred in law and fact when he held that the transactions by the Appellants were tainted with fraud thereby occasioning a miscarriage of justice.

5. The learned trial Chief Magistrate erred in law and fact when he ordered for payment of Ugx 20,000,000 as general damages without any basis thereby arriving at a wrong conclusion.

6. The learned trial Chief Magistrate erred in law and fact when he ignored the grave inconsistencies and contradictions in evidence of the Respondent thereby arriving at a wrong conclusion.

The Appellants pray the appeal be allowed; the 2nd appellant be declared the rightful owner of the suit land; and costs of the appeal and costs in the trial court be paid by the Respondent.

Representation

The Appellants were represented by Ms. Roselyne Kunihira while the Respondent was represented by Mr. Donge SD Opar. Both learned counsel filed written arguments.

Arguments

Submitting on grounds 1 and 6, Ms. Kunihira argued that the Respondent failed to adduce a sale agreement in evidence pursuant to which the Respondent allegedly purchased the suit land from the mother of the 1st Appellant. Learned counsel contended that, the Respondent subsequently claimed that the sale agreement disappeared yet she had not pleaded it. Counsel asserted, the Respondent should not be allowed to depart from her pleading. She cited Order 6 rule 7 of the CPR, and several authorities including ***Twed Consulting Company Ltd Vs. Springwood Capital Partners Ltd, C.S No. 550 of 2014***; ***Jani Properties Ltd Vs. Dar es Salaam City Council [1966] EA 281***, and ***Struggle Ltd Vs. Pan African Insurance Co. Ltd (1990)***, in support.

Learned counsel also discredited the claim that the Respondent's alleged planting of eucalyptus trees on the boundary of the suit land; act of connecting piped water thereon, and constructing temporary chicken house, proved her ownership of the suit land. Learned Counsel alluded to the Defence evidence and submitted that, the Local Council 1 Chairman who recommended the Respondent for water connection by National Water and Sewerage Corporation testified that he had recommended the Respondent for water connection to a different piece of land owned by her and not the suit land. Counsel added, at the locus, the Respondent did in fact confirm that she owns land north-west of the disputed land- and that is the land for which the recommendation was given. Regarding the eucalyptus trees, Ms. Kunihira contended that, the 2nd Appellant testified that the trees had been on the suit land since 1980s (meaning it existed before the year 1994 and thus discredits the claim that it was the Respondent who planted them.) Learned Counsel referenced the testimony of DW6 (Akello

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Alice) that the eucalyptus trees were planted by her late brother (Odong Santo) in the 1980s. Regarding the chicken house, learned counsel argued that the Appellants were consistent before the trial court that, the Respondent had erected it temporarily, and indeed, removed it when ordered by the Local Council 1Chairman of the village. It was also submitted that the Respondent connected piped water with no claim of right to the suit land. Thus, the enumerated features in the impugned judgment are no proof of the Respondent's land ownership. Learned counsel also contended that the Respondent had been temporarily allowed to use the suit land by the mother of the 1st Appellant. Counsel referred to testimonies of witnesses for the Appellants who stated that, in about the year 1994, the Respondent requested several people in the village (of situation of the suit land), to be allowed to use portions of their land to plant elephant grass which was a pre-condition for getting dairy cattle from Accord (an NGO). It was stressed that, that is how the Respondent came to be permitted by the mother of the 1st Appellant to plant elephant grass on a portion of the suit land (the bit of the roadside). Ms. Kunihira further submitted that the Respondent waited for the death of the 1st Appellant's mother, to lay claims to the suit land. Learned counsel wound up her submission that, the Respondent in any case contradicted herself when she claimed that she purchased the suit land in 1993 whereas in the amended plaint, she had pleaded the year 1994. Learned Counsel also alluded to pieces of evidence where the Respondent had indicated in her witness statement, names of some persons, as having been present during the alleged sale transaction, and not others, yet during cross examination of her own witness (PW3 Arach Judith), Ms. Arach claimed she had witnessed the purchase transaction yet the Respondent never mentioned Ms. Arach. Learned Counsel asserted, PW3, moreover, claimed she was present when the Respondent allegedly went to measure the suit land in 1984 (ten years before the alleged transaction) which was ironical. In learned counsel's view, the contradictions of the Respondent and her witnesses were grave. She prayed court allows grounds 1 and 6 of the grounds of appeal.

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In his response, Mr. Donge submitted that, the Respondent was able to prove that she bought the suit land at the end of the year 1993 and took over possession in 1994. Learned counsel asserted, these are one and the same process. He argued, the trial court agreed that the suit land was purchased in 1994. Counsel contended that allowance ought to be given for lapse of time and memory loss. He reasoned, in any case, the difference (in the years) is not much. Mr. Donge added that, the trial court in any case considered other supportive pieces of evidence to arrive at its conclusion. Counsel submitted that the sale agreement was witnessed by the 1st Appellant before he was abducted by the LRA rebels. He further argued that, the Respondent explained that the sale agreement got lost, and the trial court rightly believed her. Regarding the departure from pleadings, learned counsel conceded, but was quick to assert that, the departures were not serious. Counsel proffered, there was memory loss and memory loss which is explained is not a departure. Learned Counsel contended that the 1st Appellant knew about the sale by his mother, and to confirm that he was aware, the 1st Appellant testified that the Respondent was allowed to plant elephant grass on the suit land. Learned Counsel supported the trial court's findings regarding the features on the suit land as proof of the Respondent's ownership. Counsel supported the trial court's rejection of the evidence of the LCI Chairman whom it found to be a liar.

Ground 2: **features on the suit land and possession as constituting permanent usage.**

Learned counsel for the Appellant touched on aspects of this ground when arguing grounds 1 & 6. She added that, the Respondent had requested the mother of the 1st Appellant to be allowed to temporarily use the suit land to plant elephant grass. Counsel referenced the testimony of DW6 (Akello Alice)- a sister to the 1st Appellant) who stated that, the Respondent planted only elephant grass and nothing else, along a small portion on the roadside. Counsel asserted, the temporary chicken house was built without authorization and was removed on

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the orders of the LCI Chairman. She further argued that, the remains of the chicken house and where the tap water was, were not traceable during the locus visit. According to learned Counsel, the Respondent conceded, she used the suit land only during the years 1994-6, and permission had been given to plant elephant grass only. Counsel asserted, there is no evidence that the Respondent used the suit land after the year 1996.

In his response, learned Counsel for the Respondent submitted that there is ample evidence, and the parties agree that the Respondent lived on the suit land. Counsel asserted, the Respondent testified that after buying the suit land, she took possession and planted eucalyptus trees, elephant grass, and constructed poultry house, but also connected tap water. Counsel stressed, the Appellants conceded, they saw these features. He also argued that most of the features were put on the suit land when the 1st Appellant was in captivity. According to Counsel, permanent features such as trees and piped water, could not be put on land by a person who does not own it, or who has only temporary use thereof. Counsel contended that the 2nd Appellant (a neighbor before he purchased the suit land) saw crops on the land having been planted by the Respondent. According to Mr. Donge, the Respondent purchased the land either in 1993 or 1994 and the 1st Appellant only returned from captivity in 2011. He found when the Respondent already had property on the land. Counsel argued, the 1st Appellant's mother never chased away the Respondent from the suit land for 17 years. Counsel rejected the assertion that the Respondent used the suit land from 1994-1996, and left. He argued, the fact that the LC1 Chairman asked the Respondent to remove her property in November 2013 meant she was still in possession, otherwise, she would not have been directed to remove her property if she had long left.

Ground 3: Findings regarding the eucalyptus trees as forming boundary of the suit land with adjacent land formerly owned by the family of the 1st Appellant.

It was submitted for the Appellants that, the trial court held, erroneously that, the cut old eucalyptus trees formed a common boundary of the land sold to the Respondent. Counsel argued that the court erred in holding that it was the Respondent who planted those trees. According to learned Counsel, the 1st Appellant and other witnesses testified that, the said trees were planted in the 1980s along the path to the home of the late brother of the 1st Appellant (Odong Santo). It was asserted, the trees existed before the alleged purchase. Counsel wondered what the size of the land allegedly sold and its boundary was, as at the time of the alleged sale.

On his part, Counsel for the Respondent submitted that it was conceded that, eucalyptus trees existed between the suit land and that of the seller. He added, at the *locus*, a tree stump was seen. The trees had been planted in a straight line along the boundary. Learned Counsel claimed, when the LCI Chairman wrote to the Respondent to remove her property, the tree stump was one of the property to be removed, meaning, it was planted by the Respondent. He concluded, the trees demarcated the land sold to the Respondent from the reminder portion for the family of the 1st Appellant.

Ground 4 Findings of fraud against the Appellants

It was submitted by Ms. Kunihira that the trial court misdirected itself in holding that the Appellant's transactions were tainted with fraud. Counsel contended, there was no evidence of fraud. She submitted that the Appellants went through the due process of acquisition, and in good faith. Counsel referred to the testimony of the 1st Appellant to the effect that he sold the suit land to the 4th Appellant in 2014 because the Respondent who had expressed interest to buy,

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failed. Having bought from the 1st Appellant in 2014, the 4th Appellant sold to the second appellant in 2019.

In his submissions in response, Mr. Donge contended that there was fraud because, during the period the Respondent was cultivating the suit land, the Appellants were aware. The 2nd Appellant was a neighbor and knew of the activities. The 4th Appellant knew of the dispute between the Respondent and the 1st Appellant and his suspicion ought to have been aroused yet he still went ahead to purchase the land. Winding his arguments, Counsel submitted that the suit land was sold by and between the Appellants without affording the Respondent a hearing, therefore, fraudulently.

Ground 5: General damages of shs. 20,000,000

It was submitted for the Appellants that the trial court did not state what it based on in awarding the impugned amount of general damages. Counsel contended that, a case for award of general damages had not been established by the Respondent. In any case, it was argued, the 4th and the 2nd Appellants were purchasers in good faith.

Learned Counsel prayed that the appeal is allowed with the orders sought in the memorandum of appeal.

For the Respondents, Mr. Donge supported the award of general damages. He submitted that each of the Appellants was ordered to pay shs. 5,000,000, thus a total of shs. 20,000,000 given that they all committed wrongs individually against the Respondent. Counsel submitted, fraud and trespass was proved against the Appellants. The developments on the land were destroyed and the Respondent was prevented from using it.

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Mr. Donge concluded that the grounds of appeal have not been made out and ought to be dismissed with costs.

Determination of the appeal

This being a first appeal, this Court has a duty to subject the evidence as a whole to a fresh and exhaustive examination and reach its own decision on the evidence. The Court must weigh conflicting evidence and draw its own conclusions. It is not merely to scrutinize the evidence and see if there was some evidence to support the lower court's findings and conclusions, and only then can the court decide whether the trial court's findings should be supported. In doing so, the appellate court should make due allowance for the fact that the trial court had the advantage of hearing and seeing witnesses. In short, an appeal from a trial court is by way of a retrial and an appellate court is not bound to follow the trial court's findings of facts if it appears either that it failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. See***: Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968) E.A 123***; ***Pandya Vs. R (1957) E.A 336***; ***David Muhenda & 3 Others Vs. Margaret Kamuje, Civil Appeal No. 9 of 1999 (SCU)***; ***Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002.***

In ***Kifamunte Henry Vs. Uganda, Criminal Appeal No. 10 of 1997***, the Supreme Court held that, it was the duty of the first appellate court to rehear the case on appeal, by reconsidering all the materials which were before the trial court, and make up its own mind. The Court observed that, failure by a first appellate court to evaluate the material as a whole constitutes an error of law.

I will be guided by the above principles.

In resolving the appeal, I shall combine grounds 1, 2, 3 and 6 as they are inter-related. I will then tackle grounds 4 and 5 separately.

Grounds 1, 2, 3 and 6

The Respondent anchored her land ownership claim on the alleged purchase transaction entered into by the mother of the 1st Appellant. As I understand her case, having allegedly bought the suit land, the 1st Appellant and his family had no basis for selling it again to the 4th Appellant. The 4th Appellant also had no basis for selling to the 2nd Appellant and the latter was wrong to buy and expand his school coverage to the disputed area. This explains why the Appellants were sued jointly and severally. As things stand, it appears the 2nd Appellant is the party currently using the suit land.

Before the trial court, the Respondent (PW1) by witness statement, testified that she bought the suit land from **Ayoo Deresi** who was the mother of the 1st Appellant and this was in **1994**. The transaction was witnessed by the 1st Appellant (Oceng Francis), Amone Alfred, Omona Julius and Betty Omona. The land was ½ acre. The land is situate on the southern part of the road to St. John Paul II School and bordering the 2nd, 3rd and 4th Appellants. The Respondent planted eucalyptus trees along the boundary separating the suit land from the 1st Appellant's reminder family land. According to PW1, **the sale agreement got lost in 2006**. It must have been destroyed by her children at the time PW1 was hospitalized. The children burnt many papers and books, thinking they were burning waste paper. PW1 only realized in 2011 that the agreement was missing. It was at the time when she wanted to connect tap water on the suit land. She reported the loss of the sale agreement to Police, who summoned PW1, the **Akello Alice** (daughter of the vendor), **Arach Judith,** and Amone Alfred, to confirm the transaction, and they did confirm, it was claimed. In cross examination, PW1 stated that, she bought the land in **October, 1993**. The family of the vendor wanted her to buy again (in 2011), but she refused. PW1 claimed the year 1994 written in paragraph 4 of her witness statement was a typing error but the actual sale and purchase was in 1993. She had two witnesses to the transaction- Omona and his wife Betty, while the vendor had her **two sons**. Neighbors were not present. PW1 said she never involved any local leader

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because the vendor requested so. Since the agreement was lost, the LC allegedly mobilized the two sides and drew a map which he backdated and it became the agreement.

Omona Julius (PW2) stated that the alleged vendor (Ayoo Deresi) expressed interest to sell the suit land in 1993. He contacted the Plaintiff who agreed to buy, and in **1994**, the transaction was concluded. The buyer paid shs. 126,000 and the land measured ½ acre. Before selling, PW2 advised the vendor to involve the local chief but she declined for avoidance of losing 10% of the proceeds to the chiefs and LC Officials. In cross examination, PW2 said he did not recall the year of the sale/purchase transaction. He claimed the land **chief was present during the transaction**. For the vendor, the first Appellant (son) and **Adong** (daughter of the vendor) were present.

Arach Judith (PW3) stated that, PW1 bought the suit land. According to PW3, the first Appellant, Amone Alfred, Omona Julius, and Omona Betty, were present. In cross examination, PW3 twice claimed she was absent but later said she attended and witnessed the transaction for the buyer. The buyer went to measure the land and PW3 attended. **It was in the year 1984**.

The 1st Appellant (DW1) vehemently denied that his mother sold the suit land to the Respondent. He stated that, what happened was that, the Respondent requested to use a portion of the land alongside the road to plant elephant grass, and the mother of 1st Appellant allowed. Whereas the 1st Appellant was not around at the time the grass were planted, he had not yet been abducted by the LRA rebels. PW1 was abducted in 1994 and returned from captivity in 2011. The 1st Appellant was supported by DW6 (Akello Alice) a sister. She stated that, her mother was a member of women's group headed by the Respondent. The group was eligible for receiving donation from Accord, an NGO who would offer dairy cattle to women. The condition was that, one had to plant elephant grass. The Respondent asked Ayoo Deresi (the mother of 1st Appellant and the witness) to

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be allowed to plant elephant grass temporarily on the suit land- along a portion nearer the road. The Respondent also requested other village-mates, such as the late Bazilio Ocitti, and Karla Okot. According to the two siblings, their mother never sold land to the Respondent. DW6 stated that, it was in 2011 when the Respondent heard that the 1st Appellant had been released from captivity (apparently before reaching home) that she applied to connect tap water to the suit land (apparently to put permanent ownership claim to it).

In making its finding on ownership, the trial court based, not on any sale document, as there was none, but on other pieces of evidence to hold that the Respondent own the suit land, and that she had purchased it from the mother of the 1st Appellant.

In my resolution of the grounds, I approach this matter, first from the Respondent's pleading. In paragraph 4 (a) of her amended plaint, filed on about 16 November, 2020, the Respondent averred that, she purchased the suit land from the mother of the 1st Appellant (Ayoo Deresi) and the 1st Appellant was present. The Respondent did not attach any sale agreement, contrary to the provision of Order 7 rule 14 of the CPR. See the persuasive Tanzanian case of ***Moses Elisante Mkony Vs. Tendar Property Holding Ltd & China Commercial Bank Ltd, Land Case No. 134 of 2019 (at Dar es salaam), per Maige, J.*** which, while interpreting the equivalent of our Order 7 rule 14 of the CPR (the Tanzanian Order 7 rule 14 (1) of the Civil Procedure Code) underscored the need for a plaintiff to plead and attach to his plaint, documents on which the cause of action is constituted, as long as the document is in his power and possession. Where the document on which the suit is founded is not within the power and possession of the plaintiff at the time the plaint is filed, an averment to that effect ought to be made in the plaint. I agree. See also ***Ugafin Limited Vs. Beatrice Kiwanuka, HCMA No. 682 of 2014 where Luswata, J (as she then was)*** interpreted and applied the provision of Order 7 rule 14 of the CPR to the matter before her.

In the instant case, as noted, the plaint is silent on whether a sale agreement was ever executed and if so, what became of it. I note that the Respondent for the first time, claims the loss/ destruction of the sale agreement in her witness statement made on 12th March, 2021. She claims she realized the agreement was missing in 2011 at the time she needed to connect piped water to the land (apparently for poultry business as she had no home there). The amended plaint was drawn by Donge & Co. Advocates, the firm that drew the witness statement. It is not clear why the amendment did not speak to the alleged loss. The plaint also is silent about the consideration paid for the purchase, although the witness statement mentions it. Of course, the Respondent was not permitted to depart from her pleading as she did in her witness statement, in the absence of amendment to the plaint. In the case of ***Ms Fang Min Vs. Belex Tours and Travel Ltd, Civil Appeal No. 06 of 2013, consolidated with civil Appeal No. 01 of 2014: Crane Bank Ltd Vs. Belex Tours and Travel Ltd (SCU)*** the Supreme Court of Uganda underscored the requirement that a party ought to prove the case pleaded. The Authors of Bullen and Leake and Jacobs Precedents on Pleadings, 12th Ed, at p.3 write on the subject, thus ***"a party is expected and bound to prove the case as alleged by him and covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."***

In the present matter, my opinion is that the departure in the Respondent's case at the hearing from what she pleaded, was material and can not be ignored. The departure must have occasioned prejudice to the Appellants who have complained in this appeal. I think they did not envisage the Respondent's claim that the sale agreement was lost, having been allegedly burnt by children, and so, the Appellants did not plead in response to that allegation. This is confirmed by their joint written statement of defence. The Appellants, therefore, did not have a fair notice of that claim. They only met it for the very first time in the

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Respondent's witness statement. In the circumstances, I do not think the departure was a mere irregularity. It should be recalled that, pleadings help define and delineate with clarity and precision, real matters in controversy between the parties, upon which they can prepare and present their respective cases, and upon which the court will be called upon to adjudge between them. See: ***Uganda Breweries Ltd Vs. Uganda Railways Corporation, SCCA No. 6 of 2001***; ***Interfreight Fowarders (U) Ltd Vs. East African Development Bank, SCCA No. 33 of 1993***.

Be that as it may, the evidence regarding the alleged land purchase by the Respondent, in the absence of a sale agreement, ought to have been cogent, relevant but also coming within the purview of section 91 and 62(e) of the Evidence Act Cap 6, as I shall expound shortly. However, that aside, there were several material contradictions in the testimony of the Respondent and her witnesses, in their attempts to prove the land ownership claim of the Respondent.

Starting with the Respondent (PW1), she stated that the sale and purchase transaction took place in the year 1993, and that the year 1994 she had asserted in paragraph 4 of her witness statement, was an error (apparently a typo). To my mind, it seems PW1 had forgotten that she had affirmed the year 1994 also in paragraph 2 of her witness statement. Furthermore, in paragraph 3, the year initially indicated was 1993 but it was crossed with a blue pen and corrected to read 1994. In my opinion, therefore, when PW1 states in cross examination that the year 1994 was a typo, she was not being truthful to court. On his part, PW2 (Omona Julius) who had claimed that he was a witness to the transaction, and that the transaction happened in "1994", conceded in cross examination that, he did not know the year when the sale took place. This witness had made his witness statement only on 12th March, 2021 and was being cross examined on 31st March, 2021 (as per hand-written record although erroneously typed as 3rd March, 2021), so, there was no reason why he could have forgotten so fast. Of

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course Mr. Donge asserted that these witnesses suffered memory losses, being humans. I do not believe learned counsel, because, nineteen clear days between the date of making a witness statement and cross examination, was too short a period for a witness to suffer sharp memory loss, as has been claimed. On her part, PW3 (Arach Judith) went to the extreme. She claimed that the sale happened in the year 1984, in her presence. I have observed that PW3 at the same time, denied ever being present during the transaction.

The Respondent and PW2 stated in the trial court that Ayoo Deresi (the alleged vendor) wanted to sell the suit land so as to raise money for organizing the last funeral rites of her son- the late Odong Santo. However, according to Akello Alice (DW6) a sister to the late, Odong died in May, 1994, and his last funeral rite was performed in March, 1995. In my analysis, going by the Respondent's assertion that Ayoo Deresi wanted to sell land (in 1993) to raise money for the stated purpose, it is hard for court to believe the Respondent's claim which defeats logic. Last funeral rites, as is being claimed, was being mooted for a person who was alive as at the year of the alleged sale.

It is also strange that no close neighbor knew about the alleged land sale/purchase transaction. The Respondent conceded, in cross examination that, no neighbor to the suit land was present during the alleged transaction. Although Arach Judith (PW3) (neighbour) claimed that her father's land was close to the suit land and the Respondent purchased it, which claim is not disputed, it is unbelievable that she was a witness to the alleged transaction between the Respondent and Ayoo Deresi. This is because she was completely not knowledgeable about the whole disputed sale/purchase transaction. In my view, PW3 was merely paraded to court to attempt to bolster the sale/purchase narrative. That is why she denied being present, but at the same time, claimed she was there. Of course the claim that the transaction occurred in 1984 seriously exposed her flaw.

With the above sharp contradictions in the testimony of the Respondent's witnesses, and coupled with the material departure from the amended plaint, the trial court ought to have proceeded with its consideration of the other "pieces of evidence" with a lot of caution. This is because it is trite law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies unless they point to deliberate untruthfulness will be ignored. In this case, the contradictions were grave and touched on material aspects of the case. See: ***Alfred Tajar Vs. Uganda, EACA Cr. Appeal No.167 of 1969.***

Be that as it may, the trial court proceeded to consider "*other factors*" to try to connect the seriously flawed claim of purchase having taken place. Before I set out what was considered, the law on adduction of evidence of terms of a contract of sale of land or generally disposition of property, is well settled. Section 91 of the Evidence Act Cap 6 provides, inter alia, to the effect that, when the terms of a contract or of any disposition of property have been reduced to the form of a document, no evidence, except as mentioned in section 79 (presumption to genuineness of documents produced as record of evidence in judicial proceedings) shall be given in proof of the terms of that contract or disposition of property except the document itself. Under section 91, where the document itself is not available, secondary evidence of its contents may be admissible under section 62 (e) of the Evidence Act. The latter section allows oral accounts of the contents of a document to be given by some person who has himself or herself seen it. Such oral account is treated as secondary evidence. Section 62 (e) is supported by the third explanation to section 91 of the Evidence Act. The explanation is that- the statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

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In my view, the above provisions of the Evidence Act provide the limited scope of admission of the evidence regarding written contracts of sale of land, and no other.

I wish to state that, no witness for the Respondent purported to attest the contents of the alleged lost sale agreement. The day and month it was executed is not mentioned by the witnesses. The precise terms are not stated either. Whereas PW1 claimed in cross examination that, she paid shs. 126,000 for the land, she never stated that amount in her witness statement. She also did not plead the amount. It was PW2 who claimed in paragraph 7 of his witness statement that PW1 paid shs. 126,000 for the land. However, these claims are discredited by the fact that neither witness knew precisely the exact year of the transaction. Their claims, be it in chief, or cross examination, needed at least independent corroboration.

The foregoing aside, in the absence of proof of a sale agreement, the trial court proceeded to consider factors it believed, supported the Respondent's ownership claim. Court considered the following factors; the connection of piped water from National Water and Sewerage Corporation (NWSC) to the suit land by the Respondent; planting of elephant grass on the land; and constructing of the chicken house. The court concluded, the above meant the Respondent's possession of the suit land was not temporary, but permanent.

In my view, these were irrelevant considerations, as I shall elucidate. It should be recalled that the law places a contract of sale of land in a special category. To be enforceable, such contract must be in writing, or the person relying on it must have taken possession of the land with the vendor's consent. See: ***Stanley Beinababo Vs. Abaho Tumushabe, Civil Appeal No. 11 of 1997***, per G.M Okello, J.A (as he then was), with whom the rest of the court agreed.

Hutsan

The learned authors ***R.E Meggary and H.W.R Wade, in their Law of Real Property, 4th Ed. Page 542*** underscore the importance of having a written contract for sale of land, for its enforceability.

Since the trial court purported to allow the Respondent to assert her right to the suit land, standing on a non-existing sale agreement, the court ought to have established whether the Respondent's purported occupation of the land on the so-called permanent terms as it held, was with the consent of the alleged vendor. The court should have, therefore, established as a matter of fact whether the alleged vendor (Ayoo Deresi) allowed the Respondent to connect water to the suit land. As I have observed elsewhere, what is apparent is that the water connection was not intended to supply any home as no home was built by the Respondent. Rather, it appears the water supply was for the purposes of the poultry business. The witnesses for both sides appear to agree that the chicken house was temporary. So this concession militates against the finding of the trial court. The piped water connection could not also be said to have been permanent as it was supplying a temporary business need. Importantly, at the time of the water connection in 2011, it appears Ayoo Deresi was already deceased. It was also at the time the 1st Appellant had not yet reached home although he had left the LRA captivity. It appears he was on transit. That is why when he arrived home, he immediately challenged the Respondent's water connection and activities on the suit land. From his evidence, it appears he was released in April, 2011 when the recommendation for water connection had been done in March, 2011. It thus appears he came back when water was already connected. The testimony of Akello Alice (DW6) supports this narrative.

In the circumstances, there was nothing permanent about the Respondent's user of the suit land, to lend credence to the holding that she had acquired ownership. I think the learned Chief Magistrate erred in his holding on the matter.

Hutoo

I have noted the Respondent's claims that the suit land was inspected before recommendation was given by the LCI Chairman to NWSC. It was also claimed that the daughter (unnamed) of the alleged vendor was present and that the LCI Chairman sort of reconstructed and backdated the map of the suit land, in substitution of the lost sale agreement. PW1 claims another son of the alleged vendor, a one Amone Alfred alias Anywar, was also present. (See paragraphs 10 and 11 of the Respondent's witness statement). In paragraph 8, the Respondent had claimed the 1st Appellant was also aware of the water connection. This claim is false, since at the time, the 1st Appellant had not yet reached home. It contradicts paragraphs 10 and 11, because, there, the Respondent does not purport that the 1st Appellant was present. Regarding the alleged inspection, the claims were not proved as neither the Chairman LCI nor the daughter of the alleged vendor, spoke to it. The alleged substitute document was not adduced in evidence either. In any case, DW6 (Akello Alice) and the Chairman (DW5 Nyeko Johnson), denied these claims. The trial court believed the Respondent and held the Chairman to be a liar. With respect, the trial court went conjectural, reasoning that, the chairman had been paid to mislead court, and must have been a beneficiary of the subsequent sales transactions. With respect, this was wrong and unsupported. In any case, the sale of 15th December 2014 between the 1st Appellant and the 4th Appellant, and that of 23rd April 2019 between the 4th Appellant and the 2nd Appellant were both witnessed by LC1 Chairman Acaye Richard, not Nyeko Johnson as claimed by the trial Court.

The trial court also opined that, Nyeko Johnson (DW5) visited the suit land, and is estopped form denying. With respect, the trial court did not consider the defence version alongside the Respondent's. It should have considered the evidence in totality and not in isolation. The Chairman was categorical that he knew of a piece of land the Respondent owned in the Northern side of the suit land, and thought the recommendation was being sought in respect thereof. This view appears to be supported by Arach Judith (PW3) who confirmed in para.3 of her witness statement that, the Respondent purchased the land (not in dispute) from the father of PW3, a one Bazilio Ocitti, in the year 1993. I have also perused the recommendation letter. Nowhere does the Chairman purport to vouch for land ownership by the Respondent. He was not specific about any piece of land where the water connection was to be. So the bluster by the learned Chief Magistrate in his rendition, was unwarranted.

The trial court proceeded further to rely on the eucalyptus trees alleged to have been planted by the Respondent along the original boundary separating the suit land from the 1st Appellant's family remainder land. It then held that, it proved her ownership. The court, with respect, did not fully evaluate the whole evidence. DW6 had testified that, her late brother Odong Santo, had planted those trees. The court appears to have found difficulty in whom to believe, and did not resolve the competing claims. The court proceeded to rely on the claim that, because the LC Chairman wrote to the Respondent to remove her property from the suit land, which included trees, then it proved the ownership. I have perused the letter. The letter is dated 21st November, 2013. It was written by the LC 1 Vice Chairman Okeny Bosco. He directed the Respondent to remove temporary structure from the land plus some trees. This chairman never testified to explain the context of his letter. Mr. Donge capitalized on these, to argue, thus swaying the trial court, that, the Chairman meant the eucalyptus trees that were planted in a straight line. Learned Counsel added, the trial court saw at least one old tree stump of those trees. With respect, if the LC 1 Vice Chairman was deemed a relevant witness, he should have been called for the Respondent to expound on the letter. Although Nyeko Johnson (DW5) was labelled a liar, he did not write the referenced letter of 21st November, 2021. He instead wrote the letter dated 3rd March, 2011, recommending for the water connection. His letter merely affirms the Respondent was a resident in the author's area of jurisdiction. He did not vouch for land ownership, at least the suit land. I note that Mr. Nyeko claims in cross examination that, he is also the author of the letter of 21st November, 2021. This is far from it. Be that as it may, the Respondent as the person suing had a duty to prove her case on the balance of probability. She, in my opinion, failed

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to prove a prima facie case requiring the Appellants to adduce evidence to rebut. At any rate, her claims were rebutted.

In light of my analysis, I think it was wrong for the learned Chief Magistrate to hold that the suit land was purchased by the Respondent. It was also an error for the trial court to find that the features highlighted, which were in my opinion, extraneous, coupled with the alleged taking of possession of the suit land, conclusively proved the Respondent's alleged ownership because of purportedly long (permanent) usage. In so holding, the court ignored material contradictions in the Respondent's case. It also did not evaluate the whole evidence before it, side by side.

For the reasons given, grounds 1, 2, 3 and 6 of the appeal succeed.

The determination of these grounds should suffice to dispose of the appeal. However, for completeness, I shall very briefly address grounds 4 relating to the alleged fraud and ground 5 regarding the award of general damages.

Ground 4 springs from the holding that the Appellants were all fraudulent in their transactions. The alleged fraud is because the 1st Appellant sold the suit land to the 4th Appellant who after a period (05 years) sold to the 2nd Appellant who extended his school bounds there and constructed a monument of Pope John Paul II. The law on fraud is well settled. Fraud must be specifically pleaded, particularized and strictly proved, with the burden of proof being higher than on the balance of probability applicable to ordinary civil cases although not beyond reasonable doubt. Something more than a mere balance of probability is thus required. See: ***Kampala Bottlers Ltd Vs. Damanico (U) Ltd, SCCA No. 22/1992***; ***Fam International Ltd & another Vs. Muhammed Hamid, Civil Appeal No. 16/ 1993 (1994 UGSC 12)***; ***David Sejjaka Nalima Vs, Rebecca Musoke, Civil Appeal No. 12 of 1985 (COA).***

Hllaodi

In the amended plaint, the alleged fraud was pleaded thus: selling and buying the disputed land knowing it did not belong to them (Appellants/ Defendants) but the Plaintiff (now Respondent); Selling and buying off land without the Plaintiff's consent and without giving her a hearing; fencing off the disputed land while knowing that it belongs to the plaintiff; selling the land by the 1st Defendant (1st Appellant) to the 5th Defendant (now 4th) and later by the 5th (now 4th) Defendant to the 2nd Defendant in order to deprive the Plaintiff of her land.

In his Judgment the learned Chief Magistrate held that, since there was already a plaint filed (I think court meant that filed in the initial Civil Suit No. 65 of 2014 which was withdrawn) thus putting the 4th Appellant on notice at the time he purchased the land from the 1st Appellant, there was fraud on the part of the 4th Appellant. Court also held that, the Respondent was in possession, and when coupled with the features on the sit land, the 4th Appellant was further put on notice. Regarding the 2nd Appellant, court opined that, since he was a neighbor, he must have known about the Respondent's existence. The trial Court then asserted that, there was collusion between the Appellants and they colluded simply because the Respondent had no sale agreement. Court added, the 1st Appellant returned from captivity to repossess what his mother had already sold to the Respondent. It added, there was greed and dishonesty on the part of the 1st Appellant who wanted to sell the same land twice.

With respect, although the findings of the learned Chief Magistrate were expressed in different words, in my view, the trial court was largely influenced by the finding it had already made to the effect that the Respondent had bought the suit land from the mother of the first Appellant. The trial court based on that holding to make attractive reasoning in favour of a finding of fraud. I have already held that the holding regarding the Respondent's purported ownership, is unsupported on the law and evidence, and yet she had the legal burden of proving her case. See sections 101, 102 and 103 of the Evidence Act and the case of ***Sebuliba Vs. Co-operative Bank Ltd [1982] HCB 129.*** **In *Halsbury's***

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Laws of England, Civil Procedure, Vol. 12 (2020), at paragraph 698, it is stated that, in respect of a particular allegation, the burden of proof lies on a party for whom the substantiation of that particular allegation is an essential component of his case. Thus the evidential burden (burden of adducing evidence) only shifts to the opposite party once the allegations have been established by the person alleging or claiming. To shift the onus from the Plaintiff to the Defendant, the evidence must be sufficient *prima facie* to establish the case of the person on whom the onus of proof lies. See: ***Sarkar's Law of Evidence, Vol. 2, 14th Ed. 1993 Reprint, 1997, pp. 1338-1340***.

Second, the grounds of fraud as pleaded by the Respondent were not proved to the required standard and the trial court appears to have relied on other conclusions to find there was fraud, quite apart from what was pleaded. This was erroneous. Of course fraud is such a grotesque monster that must be hounded wherever it appears. It unravels everything as aptly stated by Lord Denning LJ, in ***Lazarus Estates Vs. Beasley (1956) 1 QB 702 at 712***. That said, evidence must be adduced to prove it and fraud cannot be assumed or deduced from attractive reasoning. It is thus not for the court to merely draw inferences of fraud without proof. In this matter, the trial court also ignored the Appellants' explanations, without basis. It was clear some due diligence was conducted before the respective purchases. Some of the Appellants said they consulted the LCI Chairperson of the area, among other persons, before they could buy. The purchasers and sellers were, therefore, not aware of the Respondent's alleged purchase, before the suit land was sold. I, therefore, hold that the trial court erred in its holding that fraud was committed by the Appellants against the Respondent. The ground of appeal is, therefore, upheld.

Ground 4 relates to the award of general damages.

Given my findings on the rest of the grounds, I find that the award of general damages, in principle, cannot stand, because, the Respondent did not purchase the suit land. She was ordered to appear to remove her temporary chicken house, as well as the tap water. It appears she obliged. There is nothing to prove that she was entitled to keep using the suit land. It was a temporary offer to her by the mother of the 1st Appellant. As a licensee she could not stay forever and the death of the licensor revoked the gratuitous license. According to DW6, their mother died in 2006, at least according to paragraph 19 of her witness statement. This determined the temporary license. Had I found otherwise, I would have still found no basis for awarding the whooping shs. 20,000,000 to the Respondent, on the facts. The amount was inordinately high to represent an entirely erroneous estimate of damages in the circumstances. See: ***Matiya Byabalema & others Vs. Uganda Transport Company (1975) Ltd, SCCA No. 10/1993***. I would have interfered with the award and would have instead awarded shs. 5,000,000.

In conclusion, I allow the appeal in its entirety and proceed to set aside the Judgment and decree of the learned Chief Magistrate. Accordingly, the order of declaration that the Respondent- Lucy Larubi is the owner of the suit land (½ acre of land at Laliya Dwol Village, Laliya Parish, Bungatira Sub-county, Gulu District) is hereby set aside. Furthermore, the order giving vacant possession and ordering the eviction, and demolition of unauthorized developments on the suit land, are also set aside. The awards of general damages of shs. 20,000,000, and costs of the trial court, are equally set aside. Consequently, in the exercise of powers of this court under section 80 (2) of the Civil Procedure Act Cap 71, I dismiss Civil Suit No. 057 of 2020 lodged by the Respondent (Plaintiff then) against the Appellants, with an order that each party bears its own costs in the trial court. Similarly, each party shall bear its own costs in this appeal, given the need to promote their reconciliation.

It is so ordered.

Delivered, dated and signed this.....18th.....day of.....April.....2024

George Okello

JUDGE

Judgment read in open court.

10:53am

18/4/2024

Attendance

Mr. Walter Okidi Ladwar, holding brief for Mr. Donge S.D Opar, Counsel for the Respondent.

Ms. Kunihira Roselyne, Counsel for the Appellants.

Mr. Ochan Stephen, Court Clerk.

George Okello 18/4/2024

JUDGE