IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 34 of 2018

In the matter between

ODUR DAVID **APPELLANT**

And

1. OCAYA ALPHONSE }
2. ONEK MARY } RESPONDENTS
3. LOUM MARTIN }
4. OCAYA GEOFFREY }

Heard: 12 February 2019

Delivered: 28 February 2019

Summary: dispute over customary ownership of land.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents for recovery of land measuring approximately ten acres forming part of one square mile of land located in Amalac village, Patuda Parish, Ongako sub-county, Aswa County, Gulu District, general damages for trespass to land, an order of vacant possession, a permanent injunction, interest and costs. His claim was that the land originally belonged to his grandfather Odong alias Dokgang. The appellant's father Sarafino Odur used it for grazing. Sometime in 2007 the respondents left their land situate in Kweyo village, Ami-Lobo sub-parish, Patuda Parish, Ongako sub-

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county, crossed river Amalac that forms the natural boundary between the appellant's land and their land, to trespass onto the land in dispute. They have since established homesteads and gardens on the land.

[2] In their joint written statement of defence, the defendants denied the claim in toto. They instead contended that the land in dispute measures approximately fifty six acres and belongs to them customarily. The first to the third respondents inherited the land from their grandfather, who is the great grandfather of the fourth respondent, Labella Lukwiya who in turn acquired the land as a gift *inter vivos* for grazing his cattle from his friend, Adwe during the year 1911. He occupied and utilised the land until his death in 1973. Adwe died during the year 1954. The boundary between the land in dispute and that belonging to the appellant is marked by a Lucoro tree and barbed wire fencing. It is bordered by a swamp on the Western side. All their activities on the land are lawful as they are the customary owners of the land. Although they did not present a counterclaim, they made a number of payers including dismissal of the suit, an award of general damages, interest, cots and a permanent injunction against the appellant.

The appellant's evidence in the court below:

[3] The appellant Odur David testified as P.W.1, and stated that he had lived on the land in dispute since his birth. The first respondent's father Okeny was Sarafino Odur's a herdsman and the latter allowed the first respondent's grandfather Labella Lukwiya to graze cattle on that land. At the fall of Idi Amin's government in 1979, all the cattle was looted as a result of which both Labella Lukwiya and Okeny Yovani returned to their ancestral land in Kweyo village. The respondents returned after the disbanding of the IDP camps to re-occupy the land and have since established gardens and dwellings on the land. P.W.2 Okumu Victor, a neighbour testified that the appellant's grandfather Sarafino Odur allowed five people including the first respondent's grandfather Labella Lukwiya, to graze cattle on his land now in dispute. When he died, his son Okeny Yovani continued

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grazing cattle on the land until the herd was decimated by soldiers and he returned to his ancestral home. A fence had been planted along the river to stop the cattle from straying into people's fields. The dispute began when the respondents returned to the land after the insurgency and began cultivating crops on it.

[4] P.W.3 Owiny Emmanuel testified that the natural boundary between the appellant's and the respondents' land is Amalac Stream. There was a fence along the stream but it collapsed. The first respondent has since crossed over onto the appellant's land and cut down trees. The first respondent's grandfather Labella Lukwiya had been permitted to graze his cattle on the land which he did for two to three years before he died. On his death, his son, Okeny Yovani who is the first respondent's father continued to graze cattle on the land until he sold all of them and returned to the other side of the stream where his father Labella Lukwiya used to live.

[5] P.W.4 Opira Samuel, a neighbour across Amalac Stream, testified that the land in dispute belongs to the appellant. Amalac Stream is the natural boundary between the appellant and the respondents. The respondent's land is on the other side of the stream and it is the land that belonged to their grandfather Labella Lukwiya. The first respondent's grandfather Labella Lukwiya had been permitted to graze his cattle on the land which he did for two to three years before he died. On his death, his son, Okeny Yovani who is the first respondent's father continued to graze cattle on the land. When the cattle died, the first respondent began to grow crops on the land. The appellant's father Okeny Yovani although still alive is not claiming the land because he knows his father had only been allowed temporary user for grazing.

<u>The respondents' evidence in the court below</u>:

[6] The first respondent Ocaya Alphonse testified as D.W.1 and stated that the second and third respondents are his brothers while the fourth is his son. His

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grandfather Labella Lukwiya told him that his friend Adwe permitted him to take cattle onto his land around 1911. Labella Lukwiya lived o the land until 1972 when he died. They planted Lucoro tree saplings to fence off the land and they have grown into trees. Their father was living on that land at the time of the first respondent's birth in 1956. Their grandmother died in 1984 and was buried on that land. The dispute began when the respondents lost all their cattle and the appellant in the year 2006 asked them to vacate the land. It has subsisted to-date.

[7] D.W.2 Oneka Mark, the second respondent, testified that he was born on the land in dispute in 1973 and grew up thereon. During the insurgency they never left the land permanently as they would graze their cattle until 3.00 pm an return to the detach. Problems began in 2006 when government directed people to return to their land and the appellant returned from Karuma with a large family and demanded that the respondents should vacate yet before the war each family occupied its respective area of the same land separated by a common boundary. Labella Lukwiya had two wives; one on the land in dispute and the other on the opposite side of Amalac Stream. When he died, he was buried across the stream at the home of his second wife. D.W.3 Ocaya Geoffrey, the fourth respondent testified that he has lived on the land since he was born. The appellant is their neighbour and there was no boundary dispute between them until the year 2006.

[8] D.W.4 Okeny Joseph Gaetano stated that the land belonged to the late Labella Lukwiya and now his grandsons, the respondents, live on it. Adwe lived on the West wile Labella Lukwiya lived on the East. Labella Lukwiya had two wives and when he fell ill he was taken to his senior wife across the stream. His second wife Lapobo remained on the land in dispute and when she died he was buried on that land. The appellant has never undertaken any activity on the land. D.W.5 Alobo Alisantorina testified that Adwe invited the first respondent's grandfather

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Labella Lukwiya to live on the land. His second wife Lapobo remained on the land in dispute and when she died he was buried on that land.

Proceedings at the *locus in quo*:

[9] The trial court visited the *locus in quo* where it estimated the land in dispute to be approximately ten acres. The respondents were in actual physical possession of the land and had gardens on it. The respondents had four homesteads on the land and had planted about two acres of pine trees thereon estimated to be three to four years old. There were graves of the respondents' deceased relatives on the land. There was debris of a collapsed old homestead on the land. The appellant and his family occupied the adjacent land, with a road to Ongako Lagoo separating that land from the one in dispute occupied by the respondents. On the other side the land extends up to the swamp.

Judgment of the court below:

[10] In his judgment, the trial magistrate found that the respondents occupied the land as descendants of persons who had been permitted to occupy the land. The permission by the previous owners to occupy and graze cattle on the land was first granted to Labella and on his death, Yovani Okeny the respondents' father took over. Evidence at the *locus in quo* revealed that it is the respondents in actual physical possession of the land. they had established homesteads, had graves of deceased relatives on the land, gardens and pine trees. Their grandmother was buried on this land. The land has for ages been in procession of the respondents and their forefathers without any attempt to evict them. The appellant is simply trying to reclaim land that once belonged to his forefathers. He found that the land belonged to the respondents as customary owners and therefore they were not trespassers thereon. He dismissed the suit and issued a permanent injunction restraining the appellant from further acts of interference with their possession.

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The grounds of appeal:

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

1. The learned trial Magistrate erred in law and fact and misdirected himself when he failed to properly evaluate the evidence on record as a whole and came to the wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he wrongly held that there was no trespass committed by the respondents thereby occasioning a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact when he failed to consider the weight of the evidence of the appellant vis-à-vis the contradictory witnesses of the respondent and holding that the respondents are the owners of the suit land whereas not, thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[12] In his submissions, counsel for the appellant argued the second ground first and submitted that P.W.1 stated that they returned from the camp in the year 2007 and began to cultivate and build on the land. He said the respondents are neighbours on the opposite side. He stated that the grandfather of the respondents requested for grazing land from his father. He stated that the defendant left the land in 1979 after the overthrow of Idi Amin, and this was confirmed by P.W.2, 3 and 4. It was an agreed fact that all parties are on the land. The appellant testified that the respondents left the disputed land and returned to the land opposite the Amalac Stream and that they came back in 2007 when people returned from the camps. He then reported to the L.CII and that is when a fresh trial was ordered. At the *locus in quo*, the respondents were found in actual possession. The court found that the appellant had no connection of the suit land. It found two acres of pine about 3 - 4 years old. This was within

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the time the case was ongoing before the Chief Magistrate. That there were graves belonging to the respondents. The respondent mentioned only one grave of Lapobo. There are contradictions as to when Lapobo died; D.W.1 1972, DW2 stated1974 and DW4 1954. Had the magistrate carefully considered it, there would be evidence of trespass. They were not on the land between 1980 - 2006. Had the trial magistrate looked at the evidence, there would have been a case of trespass found. Occupation continued as litigation went on. P.W.1 left the land to avoid violence. Trees were planted during that period.

[13] With regard to ground three he submitted that the trial Magistrate failed to give due weight to the contradictions. P.W.1 said they did not have a home in Amara ranch. D.W2. said they had land there at Amara Lach. DW1 said their grandfather got land from Adwe. D.W.4 told court that the land was vacant when Labella the grandfather of the respondents acquired it. D.W2 stated that both parties were using the land while P.W.4 denied usage of any land by the appellant. Their claim is not clear and so is it about the occupation. Had the trial magistrate considered the contradictions, he would have made a finding that they were trespassers.

[14] With regard to the last ground, he submitted that the court found many graves and an old homestead but did not make a finding as to who owned the graves. Some of the findings are not supported by evidence. The evidence of P.W.2 was not appreciated. Both parties were not considered. P.W.2 said that Adwe was already deceased at the time of the alleged grant. He said he was his uncle. Five people requested for land and then the respondents came in 2007. Had the entire evidence been evaluated, a different conclusion would have been reached. He is the son of the person who is purported to have given land to the appellant's grandfather. The respondents contend it is Adwe who gave them the land. D.W.2 gave evidence of usage by both parties. It does not show that the appellant never utilised the land as alleged by DW6. Cultivation was referred to when DW6 stated that the appellant is using the entire land. DW6 is the father of the respondents

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and he did not reside on the disputed land. The land is occupied by DW2, 3 and 4 who are children of DW6. DW3 is son to DW2, and DW3 are brothers of DWI, DW6 is grandfather to DW2, DW3 and father to DW1. He thus prayed that the court be pleased to allow the appeal and set aside the judgment of the lower court.

Arguments of Counsel for the respondent:

[15] In response, counsel for the respondent submitted that trespass occurs with entry onto land in possession of another person. It is possessory action and remedies can only be granted after proof of a possessory interest. From the appellant's evidence, the grandfather of the respondents was given land on a temporary basis for grazing which would confer a license. That is not true. It was a gift *inter vivos* not for grazing but for settlement. The appellant's grandfather died and left his son Apoli who lived on the land and did not chase away the respondent's grandfather. D.W.2 was born on the land and he grew up until now. There was no intention to revert as it was never done immediately on death. He claimed there were other families given a license but this was disputed by DW6 who testified that they never shared any grazing rights. The appellant only cane in 2007 on returning from Karuma after the LRA war. He was never in possession. He began laying claim in 2007 and by the time the land was in the hands of the respondents. It is difficult to infer that it was temporary. The grandfather said that a second wife Lapobo lived there, died and was buried on the suit land. The grave was seen at the locus. This shows a long period of occupation. Contradictions in the year of death of Lapobo is due to lapse of time. Witnesses could not have accurate memory. It does not go to the root of the mater, His death and burial was not challenged. The appeal should be dismissed.

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Duties of a first appellate court:

[13] This being a first appeal, it is the duty of this court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Oral evidence when corroborated by physical evidence carries more weight:

[14] It was the appellant's case that his grandfather Sarafino Odur Odong alias Dokgang gave temporary grazing rights on this land to five people including the first respondent's grandfather Labella Lukwiya who vacated the land sometime in 1979 at the fall of Idi Amin's government. This was because all his cattle were looted as a result of which both Labella Lukwiya and Okeny Yovani returned to their ancestral land in Kweyo village. The respondents returned to reoccupy the land only after the disbanding of the IDP camps in 2007 and have since established gardens and dwellings on the land.

[15] It was the respondents' case that their grandfather Labella Lukwiya acquired the land as a gift *inter vivos* for grazing his cattle from his friend, Adwe during the

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year 1911. He occupied and utilised the land until his death in 1973. When he died, his son Okeny Yovani, the respondent's father, continued grazing cattle on the land at the time of the first respondent's birth in 1956. Their grandmother died in 1984 and was buried on that land. During the insurgency they never left the land permanently as they would graze their cattle until 3.00 pm an return to the detach. The appellant is their neighbour and there was no boundary dispute between them until the year 2006. The appellant has never undertaken any activity on the land.

[16] It emerges from the two versions that it is not disputed that sometime in the early to mid 1900s, the respondents' grandfather Labella Lukwiya was granted grazing rights over this land and that upon his death, his son Okeny Yovani, the respondent's father, continued grazing cattle on the land for some time. What is in dispute is; (i) whether those rights were granted by the appellant's grandfather Sarafino Odur Odong alias Dokgang or a one Adwe; (ii) whether the rights were temporary or permanent; (iii) whether those rights included establishing dwellings and gardens. The trial court found that on account of the fact that their grandmother was buried on this land, and that their forefathers had been in procession without any attempt to evict them, the appellant was simply trying to reclaim land that once belonged to his forefathers.

[17] Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed (See *Peters v. Sunday Post Ltd [1958] E.A. 429*).

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[18] Evaluation of evidence entails assessing the credibility and probative value of evidence before weighing it in order to arrive at a decision. In order to distil the truth from the evidence presented, the court must consider the body of evidence as a whole, as well as evaluate the persuasiveness of each individual piece of evidence. For all types of evidence, whether oral or documentary, direct or circumstantial, reliability must be assessed in order for the court to decide how much weight it should be attached to it.

[19] In principle, no amount of corroboration would render incredible evidence credible. So the court has first to inquire as to whether the evidence that it has before it is credible before it even goes on to look for fortifying evidence, strengthening or confirming evidence. Evidence is reliable only if it has been shown to be correct. Correctness may be assessed upon considerations such as; whether the witness has a personal interest in the issue; if there is a basis for bias; if one party had a better opportunity to know the facts, and which version is more reasonable and probable. Evidence is credible when it is inherently believable or has been received from a competent source such as when it is based on direct personal knowledge or experience of the witness. Such evidence will ordinarily be accepted at face value unless called into question by other evidence on record or by lesson drawn from sound common experiences or legal principles. Evidence that is incredible carries no weight or probative value for example where a witness materially relies on a recounted narration of unsupported historical occurrences. Such evidence may be discounted.

[20] In the ordinary affairs of life when one is in doubt as to whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in (see *DPP v. Kilbourne [1973] 1 ALL ER 440; [1973] AC 720*). Secondly, the

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corroborating evidence must also be credible and independent. It should not be mere repetition of the evidence on record.

[21] The trial court did not make any finding as to whether the respondent's grandfather Labella Lukwiya acquired the grazing rights from the appellant's grandfather Sarafino Odur Odong alias Dokgang as contended by the appellant or a one Adwe as contended by the respondents. The appellant and his witnesses were consistent in testifying to the fact that Amalac Stream formed the natural boundary between the appellant and the respondents' land. In cross-examination, none of these witnesses was impeached regarding this fact. It is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue (see *Habre International Co. Ltd v. Kasam and others [1999] 1 EA 115; Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008* and *James Sawoabiri and another v. Uganda, S.C. Criminal Appeal No. 5 of 1990*). The appellant's version on this point is not inherently incredible and was not shown to be possibly untrue.

[22] Moreover the evidence showed that the respondent's grandfather was buried on the other side of the Amalac Stream. This was corroborated by the second respondent D.W.2 Oneka Mark and D.W.4 Okeny Joseph Gaetano who testified that Labella Lukwiya had two wives; one on the land in dispute and the other on the opposite side of Amalac Stream. When he died, he was buried across the stream at the home of his second wife. On the other hand, the respondent's version that their grandfather acquired the land from Adwe is devoid of corroborative evidence. The appellant's version fits in with other statements or circumstances relating to it and thus I am more inclined to believe it. I therefore find that it is the appellant's grandfather Sarafino Odur Odong alias Dokgang who gave the respondent's grandfather Labella Lukwiya grazing rights on the l and in dispute. It was not a one Adwe as contended by the respondents.

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[23] In determining whether the rights were temporary or permanent, the trial court appears to have been persuaded by the fact that the land in dispute has for ages been in procession of the respondents and their forefathers without any attempt to evict them. the trial court in essence found that the evidence was more consistent with a gift *inter vivos* than with a grant of temporary rights of user. A gift *inter vivos* involves an owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land from one person to another, made gratuitously, and not upon any consideration of blood or money. It has been legally defined as "the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the done" (see *Black's Law Dictionary*, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187).

[24] A gift *inter vivios* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and may be established by evidence of exclusive occupation and unrestricted user thereof by the donee during the lifetime of the donor (*Ovoya Poli v. Wakunga Charles, H. C. Civil Appeal No. 0013 of 2014*). Customary law requires no writing for the transfer of land, whether by way of sale or by way of gift. For a gift *inter vivos* to be perfected, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift. None of the witnesses were present at the time of the grant.

[25] The evidence before the trial court showed that the grant was never evidenced in writing. The transaction was entirely oral coupled with delivery. Whether or not it was on temporary basis could only be determined by evaluation of the cogency of evidence adduced by both parties. More weight is usually attached to evidence that can be independently and objectively verified. Because of the difficulty in determining the accuracy or clarity of the individual's memory, evidence that

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rests solely on the word of a witness will be accorded a lesser weight in the face of that which can be independently and objectively verified. However, even verifiable evidence must be scrutinised for accuracy. At the *locus in quo*, the court found graves of the respondents' deceased relatives on the land. There was debris of a collapsed old homestead on the land. This corroborated the testimony of the first respondent D.W.1, D.W.4 Okeny Joseph Gaetano and D.W.5 Alobo Alisantorina that Labella Lukwiya's second wife Lapobo remained on the land in dispute and when she died he was buried on that land.

[26] The witnesses contradicted one another on the actual date of Lapobo's demise. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

[27] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. “essential” to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case. In the instant case since the fact of her death and burial on the land was not in dispute, the date of Lapobo's demise was not essential to the determination of the case. It was a minor contradiction that could be explained by

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lapse of memory due to passage of time. Since it did not point to deliberate untruthfulness, the trial court was justified in disregarding it.

[28] The presence of Lapobo's grave on the land and the debris of a collapsed old homestead thereon renders the nature of the grant in the instant case to be more consistent with a gift than a license limited to temporary grazing rights. The observations at the *locus in quo* by the trial court were more consistent with the respondents' version than the appellant's claim of temporary occupancy. The gift can be deduced from the presence of those features on the land. At common law, a donor of property who does not provide for a reservation of rights in the grant, absolutely and irrevocably divests himself or herself of title, dominion, and control of the gifted property. I find therefore that the appellant's grandfather Sarafino Odur Odong alias Dokgang gave the first respondent's grandfather Labella Lukwiya the land in dispute, not on temporary basis for grazing purposes, but as a gift *inter vivos*. Upon the death of Labella Lukwiya, the land passed to his Okeny Yovani, the respondents' father. The respondents therefore are not trespassers on the land. The evidence as a whole shows a significant imbalance that tilts the scale in favour of the respondents and therefore the trial court came to the correct conclusion.

Order :

[23] In the final result, there is no merit in the appeal and it is hereby dismissed. The costs of the appeal and of the trial court are awarded to the respondents.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : Mr. Akena Fred.

For the respondent : Mr. Michael Okot.

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