IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 028 of 2019

In the matter between

1. AYAT JOSEPHINE

2. OKOT SUNDAY

3. WATMON BUUNET OLUM

4. OLOYA WALTER **APPELLANTS**

And

1. OJOK ROBINSON

2. ACAYE PHILLIPS

3. OJWEE ANTHONY

4. OREMA DENIS **RESPONDENTS**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure— *Costs—. Section 27 (1) of The Civil Procedure Act — Power to award costs is discretionary. The question whether to make any order as to costs, and if so, what order, is a matter entrusted to the discretion of the trial court. The starting point for the exercise of discretion is that costs should follow the event. In that regard, costs are usually awarded to the person who is mostly successful in a suit, nevertheless; the court may make different orders for costs in relation to discrete issues and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue. — A successful party though may be denied costs where he or she has been guilty of some sort of misconduct relating to the litigation, or the circumstances leading up to the litigation. — Considering that costs orders are indemnities for costs incurred and not penalties against the unsuccessful party, a court may order each party to bear their own costs where in its view the legal merits are fairly*

evenly balanced. For obvious public policy reasons, the practice that each party bear his or her own costs, is as well the starting point in proceedings where the adversaries are close family members who will have to live with one another even after the litigation.

Evidence— *Admissions**—** The general rule is that proof by admission is not conclusive against the opposite party, but it is such strong evidence of the facts admitted that the burden of proving the contrary is upon the party making the admission. Its only effect is to shift the burden of producing evidence. An admission of facts is not conclusive as to the truth of the matters stated therein.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellants jointly and severally sued the respondents jointly and severally for recovery of approximately ten acres of land situated at Lacenotinga village, Lapainat West Parish, Koro sub-county, Omoro County in Gulu District, a declaration that they are the rightful owners of that land, general and punitive damages for trespass to land, an order of vacant possession, a permanent injunction and the costs of the suit. Their claim was that the 1st appellant's father, Nekolao Ojwe, acquired the land in dispute as vacant, unclaimed land during or around the year 1959. He raised al the appellants on the said land until the year 1997 when they were forced to vacate it due to insurgency. Upon cessation of hostilities, the appellants attempted to return to the land but were violently prevented by the respondents who accused the appellants' mother of having been a witch. Following a successful mediation of the dispute by the Hoe Chief (*Ker Kal Kwaro*) the appellants were permitted to re-occupy their land. The respondents still prevented the appellants from occupying the land. The respondents instead unlawfully cause a survey of the land, hence the suit.

[2] In their joint written statement of defence, the respondents refuted the appellants' claim and contended that the land in dispute originally belonged to their late grandfather, Orema. Upon his death it was inherited by their father, Isaiah

Ogwang. The respondent were born and raised on the land in dispute which still is in their possession. The appellants' father, Nekolao Ojwe, came to the land only in 1976 and requested the respondents' father permission to stay on the land for easier access to medical treatment. He was only given a hut for temporary occupation. When he eventually died during the year 1979, he was buried on the land while his widow and children returned to their original home at Larwodo. Subsequently, the respondent's father Isaiah Ogwang applied for and was granted a 49 year lease over his land. During or around the year 2014, the respondents jointly applied for a freehold title over the land, hence causing its survey. The respondents have never vacated the land an remained in occupation even during the insurgency. They prayed that the suit be dismissed with costs.

The appellant's evidence in the court below:

[3] P.W.1 Ayat Josephine, the appellant testified that the respondents are children of Isaya Ogwang. She is the only surviving child of her late father Nekolao Ojwe from whom she inherited the land in dispute. He father acquired the land in dispute from his maternal uncles. It measures approximately 10 acres and the neighbours to the land are; Opiro Daniel, Alijajali Oweka and Manasi Okot. She was born on that land in the year 1954 and left it during the year 1974 when she was married off. During the year 2013, the respondents stopped her from building a house on the land on grounds that she had been married off elsewhere. Her father was buried on the land in dispute during the year 1979. There are banana plants and debris of collapsed huts on the land which the family vacated in 1986 due to insurgency. The respondent's father's land is 150 metres away from the land in dispute, near Pece Stream and does not share a common boundary with the land in dispute. Their land is after that of Opiro Daniel with which the land in dispute shares a common boundary. The respondents have since let out most of the land to divers persons and also sold off two plots. It is not true that it is the respondent's father who gave her father the land in dispute during the year 1976 as they claim.

[4] P.W.2 Opiyo Evaristo testified that the appellants were born on the land in dispute. The land belonged to the 1st appellant's late father, Nekolao Ojwe. He had a banana plantation on then land and upon his death during the year 1979, he was buried on that land. The respondent's land is separate from the one in dispute but they have since taken possession of the land in dispute. The appellants were displaced by the war but when later they tried to return to their land, the respondents prevented them. The neighbours to the land are; Isaya Ogwang and the 2nd respondent Acaye Phillips.

[5] P.W.3 Lamunu Pauline testified that her father Oweka Alijari used to share a common boundary with the land in dispute, a footpath from Pece to Lapinyolo formed the common boundary. The land in dispute used to be occupied by the 1st appellant's father Nekolao Ojwe and the 1st appellant used to live with him. There was no land dispute between the appellants' and the respondents' fathers because each lived on their respective, separate parcels of land. The respondent's land shared a common boundary with the land in dispute, it was to the South of the land in dispute. Nekolao Ojwe had a banana plantation on the land.

[6] P.W.4 Lanek Jenaro testified that the 1st appellant's father the late Nekolao Ojwe migrated from Kwed Laki in Lapainant West and settled on the land in dispute during the 1950s. The respondent's father Isaya Ogwang too had his own land in the neighbourhood and each had his own homestead. The witness was a neighbour across Camna Stream to the East of the land in dispute. The land in dispute was occupied by the late Nekolao Ojwe. From Camna Stream was Oweka Alijari's land, then the land in dispute and thereafter Isaya Ogwang's land to the West of the land in dispute.

The respondent's evidence in the court below:

[7] D.W.1 Ojok Robinson, the 1st respondent, testified that the land in dispute measures approximately 10 acres. The neighbours to the land are; Oketa George to the South, Okello Francis S/o Manasi to the North and North East, D.W.2 Acaye Phillips to the East and Alobo Josca to the West. Their father Isaya Ogwang had a banana plantation on the land. The appellant's father came to live on the land in dispute during the year 1956. He was to live on the land for a brief period as he nursed his sick wife. He lived on the land until his death in the year 1979. Nekolao Ojwe was buried on the land in dispute but he grave is no longer visible due to the farming activities of their late father, Isaya Ogwang. During the year 1993, his father applied for and was granted a lease over the land which was extended to a full term of 49 years during the year 1993. A one Fatuma bought part of their father's land from his cousin Okello Jackson, not the land in dispute. The land in dispute measures approximately one acre. The banana plantation has approximately ten stems only and is located at the former homestead of the appellants' father. The dispute was sparked off in the year 2014 when the 1st appellant insisted she had to cement the grave of her late father and occupy the land since the grave could not be abandoned in the bush. All attempts at mediation failed.

[8] D.W.2 Acaye Phillips, the 2nd respondent, testified that it was around the year 1966 when the 1st appellant's late father Nekolao Ojwe requested his late father Isaya Ogwang for temporary stay on the land as he nursed his wife, Akwero Musa at Gulu Hospital. He was accommodated in a small hut to the East of the land but in 1978 he fell ill and died the following year. He had to be buried on the land because his body was decomposing quickly as a result of the strange disease that caused his death. Around the year 1984, the 1st appellant's mother returned to her late husband's brother's home in Larwodo village. The dispute over the land began during the year 2014. The appellants and the respondents vacated the area in the year 2003 during the insurgency. The respondents

returned in the year 2008. The appellants claim ten acres yet they are entitled to only one acre. When Nikolao Ojwee died in the year 1979 he was buried at the compound of Isaya Ogwang, the respondents' father who died in the year 2001.

[9] D.W.3, Ojwee Anthony, the 3rd respondent, testified that *Lucoro* trees demarcated the boundaries of his late father's land. The land that belonged to the late Nikolao Ojwee is enclosed within those boundaries. The appellants intend to grab one acre of the upper part, and leave the lower part only. The neighbours to the land are; Oketa George to the South, Okello Francis to the North and D.W.2 Acaye Phillips to the East and West. His late father's kraal is on the Southern part within the area the appellants are claiming. His family has always been in occupation of the land in dispute and he saw the appellants for the first time during the year 2014 when they began claiming the land.

[10] D.W.4 Orema Denis, the 4th respondent, testified that he is still a student but the land claimed by the appellants is occupied by the 2nd respondent, Acaye Phillips. His late father's kraal is on the Southern part within the area the appellants are claiming. His family has always been in occupation of the land in dispute and he saw the appellants for the first time during the year 2014 when they began claiming the land. The neighbours to the land are; Oketa George to the South, Okello Francis to the North and D.W.2 Acaye Phillips to the East and West. There are bananas on that land and nothing else. The respondents have never sold any part of that land. D.W.5 Ojara Otto testified that he is a neighbour to the late Isaya Ogwang. The land in dispute, measuring approximately four acres, was previously occupied by Nekolao Ojwe and his wife Akwero Musa, the 1st appellant's parents but it belonged to the late Isaya Ogwang who was buried next to Nekolao Ojwe. He heard that the appellants' claim is in respect of four acres. The neighbours to the land are; Joachim Opobo, Ongom Awany and Isaya Ogwang to the South, Okot Manasi to the North, Isaya Ogwang and Abur Roja to the East.

[11] D.W.6 Okullu Jackson testified that he is the son of Joakino Opobo, one of the neighbours to the West of the land in dispute. The land in dispute measures approximately one to three acres. The 1st appellant's father, Nekolao Ojwe, came to the land in 1966 as a friend to Isaya Ogwang, who permitted him to live there as he nursed his then sick wife Fatuma Musa. There was no dispute over land between Isaya Ogwang and Nekolao Ojwe during their lifetime. Nekolao Ojwe lived on the land in dispute as he was nursed by his wife during his sickness. He was buried on that land when he eventually died in 1979. In 1984, his widow Fatuma Musa vacated the land and went to live with her brother-in-law at Larwodo. Isaya Ogwang began the process of acquiring a lease had demarcated his land with *Lucoro* trees for he had two wives. There are banana trees along the boundary. The neighbours to the land are; Isaya Ogwang to the South, Abur Rose to the North, Nyeko Martin S/o the late Danielo Opiro, Joakino Opobo and Ongom Sarafino to the West, and Isaya Ogwang to the East.

Proceedings at the *locus in quo*:

[12] The court visited the *locus in quo* on 12th November, 2018 where it estimated the land in dispute to measure approximately two acres. The court observed that none of the respondents had attempted to till the land in dispute. The 1st appellant is not in possession and has no activity on the land either. There are no clear demarcations of the boundaries save gardens of neighbours. Although the respondents admitted that Nekolao Ojwe was buried on the land, they contested the pile of stones shown to court as the location of his grave. A sketch map was drawn illustrating the location of banana plants, the disputed grave a palm tree and gardens belonging to the 2nd respondent, Acaye Phillips surrounding three sides of the area in dispute, which is rectangular in shape.

Judgment of the court below:

[13] In his judgment delivered on 21st December, 2018, the trial Magistrate found that the parties are closely related by blood. The 1st appellant testified that she lived with her mother, Akwero Musa at Lalogi. She therefore was not in possession of the land in dispute, which has no clear demarcations separating it from the respondents' land. She testified that the land in dispute was given to her late father by his maternal uncles in 1960 yet she claims to have been born on that land in 1954. However it is not in dispute that her late father Nekolao Ojwe occupied the land until his death and that he was buried on that land. There is no evidence though to show that the 1st appellant inherited the land from her father. Nevertheless the land belonged to her father and now she is a beneficial owner of the land measuring approximately two acres. An order of eviction was issued against the 2nd respondent, Acaye Phillips who was found to be tilling a portion of the land. A permanent injunction was issued restraining all the respondents from undertaking any activities on the 1st appellant's land. The appellant's claim having been based on speculation as to which of the respondents had committed trespass onto the land, each party is to bear their own costs.

The grounds of appeal:

[14] The appellants were dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The trial Court erred in law and fact when it failed to properly evaluate the evidence on record, thereby arriving at a wrong conclusion that the 1st appellant is the lawful owner of only two acres of the suit land.
2. The trial Court erred in law and fact by not considering evidence confirmed at the *locus in quo*, thereby occasioning a miscarriage of justice.
3. The trial Court erred in law and fact when it ordered each of the parties to bear their own costs, thereby occasioning a miscarriage of justice.

Arguments of Counsel for the appellant:

[15] In their submissions, counsel for the appellant, submitted that one of the agreed facts at the scheduling conference was that the land in dispute measures approximately ten acres. The court having found as a fact that the appellants' father, the Nekolao Ojwe, lived on the land undisturbed since 1966 until his death and burial thereon, misdirected itself when it found that the appellants had not proved a beneficial interest in the land on ground that there was no evidence to show that they had inherited it. The court failed to pronounce itself with regard to the remaining eight acres. Despite having been given ample time within which t file their submissions in response.

Arguments of Counsel for the respondents:

[16] Ccounsel for the respondents did not file any.

Duties of a first appellate court:

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

[18] In exercise of its appellate jurisdiction, this 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.

[19] In exercise of its appellate jurisdiction, this 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.

Grounds one and two; courts' findings as to size of the suit land

[20] In grounds one and two, the trial court's finding regarding the size of the land in dispute is criticised on ground that it is contrary to what was pleased and established as an agreed fact at the scheduling conference. Before dealing with that issue, it is necessary to determine the nature of the appellants' rights claimed to exists in the land in dispute. The law is that where under the arrangement in question the occupier was granted a right to exclusive possession of the land, then a lease (if it is for a fixed term) or tenancy (if not a periodical one) arises, and not a mere licence (see *Street v. Mountford [1985] AC 809* and *Bruton v. London and Quadrant Housing Trust [1999] 3 All ER 481*). Temporary use of land will be associated with activities and material placed on the land that might be easily removed and relocated, while permanent use will be associated with activities and material placed on the land that might be deliberately designed to require great difficulty in removing after installation. In

addition, activities associated with temporary use are more likely to be of the type that requires more frequent inspection or adjustment in comparison to those associated with permanent use. 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 such exclusive occupation and user may suffice as evidence of the gift.

[21] The court may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction. The 1st appellant's mother never abandoned the land but was forced off the land by insurgency. The evidence established that before the insurgency, both parties had lived as neighbours. The dispute began only after the insurgency over the size of the land to which the appellant was entitled. The 1st appellant thus claimed as owner thorough inheritance, and not as licensee.

[22] According to Section 57 of *The Evidence Act* and Order 8 rule 3 of *The Civil procedure Rules*, any material fact in the plaint that is not denied specifically or by necessary implication in the written statement of defence, is taken to be admitted. No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, save that the court may in its discretion require any facts so admitted to be proved otherwise than by that admission. Consequently, the implication of admission of a fact during the scheduling conference is that such a fact will be regarded as proved, unless it is disproved. According to Section 2 (4) of *The Evidence Act* a fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

[23] As a general rule, any matter which can be decided by a court can also be settled by a compromise. Consequently facts that the parties admit to be true may reasonably be presumed to be so (see *Slatterie v. Pooley (1840) 151 ER 579*). The general scheme of Order 12 rule 1 of *The Civil Procedure Rules* that requires courts to conduct a scheduling conference before the commencement of a trial for the purpose of, *inter alia*, sorting out "points of agreement and disagreement," is to avoid a protracted trial during which every issue of fact is contested, and to permit the parties an opportunity to amicably come to a settlement that is lawful.

[24] However, admissions are in the nature of assertions, susceptible to being true or false. They can be proved to be wrong and for that reason they are not generally conclusive. They can be gratuitous (unnecessary and unwarranted) or erroneous. Admissions thus can be withdrawn or explained away during the trial. Admissions of facts made at the scheduling conference will rarely give rise to estoppel unless they relate to facts which the parties can with reasonable certainty, conclusively determine. When such facts are admitted as being true, the court will accept them as such so that they need not be proven at trial, meaning that no further evidence is enquired to prove the fact.

[25] The general rule is that proof by admission is not conclusive against the opposite party, but it is such strong evidence of the facts admitted that the burden of proving the contrary is upon the party making the admission. Its only effect is to shift the burden of producing evidence. An admission of facts is not conclusive as to the truth of the matters stated therein. It can be shown to be erroneous or untrue, so long as the party to whom it was made has not acted upon it to his or her detriment, when it might become conclusive by way of estoppel. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it was made. The court, on examination of the facts and circumstances of the case, has to exercise its judicial discretion when dealing with admitted facts, keeping in mind that ultimately it is its duty to make

findings of fact. If it should appear that there is no other evidence on record offered for proof of other issues that undermines the correctness of the admitted fact, it could as well be justified to make findings of fact on basis of such admission. But when the court finds that the admission was wrong or made under circumstances which render it unfit to be relied upon, it may disregard it. It is for that reason that the court retains the discretion to call upon the parties relying on an admission to prove the fact independently.

[26] It turns out that despite what transpired during the scheduling conference, there were discrepancies in the testimony regarding the size of the land. P.W.1 Ayat Josephine and D.W.1 Ojok Robinson said it was 10 acres; D.W.2 Acaye Phillips and D.W.3 Ojwee Anthony described it as one acre; D.W.6 Okullu Jackson described it as 1-3 acres while D.W.5 Ojara Otto described it as being 4 acres. The rest of the witnesses did not testify as to its size.

[27] Similarly as regards the description of its boundaries, there were discrepancies in naming who the immediate neighbours are. As regards whom the neighbour to the North is, Manasi Okot was named by P.W.1 Ayat Josephine and D.W.5 Ojara Otto; Okello Francis was named by D.W.1 Ojok Robinson, D.W.3 Ojwee Anthony and D.W.4 Orema Denis. As regards who the neighbour to the to the East is, Alijajali Oweka was named by P.W.1 Ayat Josephine and P.W.4 Lanek Jenaro; Acaye Phillips was named by by P.W.2 Opiyo Evaristo, D.W.1 Ojok Robinson, D.W.3 Ojwee Anthony, and D.W.4 Orema Denis; Isaya Ogwang and Abur Roja Joachim Opobo, Ongom Awany were named by D.W.5 Ojara Otto. As regards who the neighbour to the to the South is, Opiro Daniel was named by P.W.1 Ayat Josephine; Isaya Ogwang was named by P.W.2 Opiyo Evaristo, P.W.3 Lamunu Pauline and D.W.6 Okullu Jackson; Oketa George was named by D.W.3 Ojwee Anthony and D.W.4 Orema Denis; As regards who the neighbour to the to the West is, Isaya Ogwang was named by P.W.4 Lanek Jenaro; Alobo Josca was named by D.W.1 Ojok Robinson; Acaye Phillips was named by D.W.3

Ojwee Anthony and D.W.4 Orema Denis; Nyeko Martin, Joakino Opobo and Ongom Sarafino were named by D.W.6 Okullu Jackson.

[28] As illustrated above, the differing descriptions of the land in dispute by size and by its boundaries could only be resolved by its physical inspection during the visit to the *locus in quo*. There, it turned out that the admission of fact at the scheduling conference was made in respect of un-surveyed land whose boundaries were not demarcated by any visible monuments. The most contested boundaries turned out to be West and South of the land in dispute. It was established during that visit that the most immediate neighbour to the North of the land in dispute was Okot Manasi (as testified by P.W.1 Ayat Josephine and D.W.5 Ojara Otto), to the East was Acaye Phillips (as testified by P.W.2 Opiyo Evaristo, D.W.1 Ojok Robinson, D.W.3 Ojwee Anthony, and D.W.4 Orema Denis), to the South was Oketa George (as testified by D.W.3 Ojwee Anthony and D.W.4 Orema Denis), and to the West Acaye Phillips (as testified by Phillips by D.W.3 Ojwee Anthony and D.W.4 Orema Denis).

[29] By virtue of this findings or observations, the most reliable witnesses were D.W.3 Ojwee Anthony D.W.4 Orema Denis each of whom got three neighbours right and the estimate by the former was one acre. D.W.6 Okullu Jackson, son of Joakino Opobo, one of the neighbours to the West of the land in dispute, who estimated it to be approximately one to three acres big. He was also one of the least interested witnesses in the outcome of the suit. The description by both D.W.3 Ojwee Anthony D.W.4 Orema Denis reasonably conforms to the physical evidence found at the *locus in quo*.

[30] It is an established rule that where land is described by its admeasurements and at the same time by known and visible monuments, the latter prevail. Monuments are something tangible that the lay persons can see and understand. While anyone can comprehend and visualise that they own land at the top of the hill or to up to a stream, the size of an acre or hectare may vary in lay persons'

estimations. Because of these issues and the fact that no person will measure the same thing exactly the same way, monuments must govern over bearings, acreage and distances. No matter how “accurate” a measurement is, it has a lower value than a natural or artificial monument. When a party is estimating the size of land, he or she naturally estimates its quantity, and of course its value, by the features which enclose it, or by other fixed monuments which mark its boundaries, and he or she may be mistaken as to the size but not the monuments. The question of estimated acreage is mere matter of description, if the physical boundaries are ascertained. When the court visited the *locus in quo* it prepared a sketch map illustrating the dimensions of the land in dispute. The trial Court provided a description of the land decreed to the respondent by reference to the dimensions and neighbours of adjoining properties as seen on the ground, and illustrated in the sketch map it drew. These grounds of appeal accordingly fail.

Ground three; the trial court’s order that each party bears its own costs.

[31] In ground three, the trial court's decision that each party bears its costs is criticised. There are many factors to be considered when determining a just allocation of costs. The allocation is not simply a matter of determining who has "won" the case. Section 27 (1) of *The Civil Procedure Act* recognises this by framing the power to award costs as a discretion. The question whether to make any order as to costs, and if so, what order, is a matter entrusted to the discretion of the trial court. The starting point for the exercise of discretion is that costs should follow the event. In that regard, costs are usually awarded to the person who is mostly successful in a suit, nevertheless; the court may make different orders for costs in relation to discrete issues and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue. In that event, the court may make an order for costs against the party who has been generally successful in the litigation, and the court judge may deprive a party of costs on an issue on which he or she has

been successful if satisfied that the party has acted unreasonably in relation to that issue (see *Forster v. Farquhar (1893) 1 QB 564*). Parties who successfully defend proceedings are prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings. Similarly, the court may order that the costs are paid in full or in part if the parties have both won and lost aspects of the case.

[32] A successful party though may be denied costs where he or she has been guilty of some sort of misconduct relating to the litigation, or the circumstances leading up to the litigation (see *Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd*, *[1951] 1 All ER 873* and *Colgate-Palmolive Co v. Cussons Pty Ltd (1993) 46 FCR 225*). It is conduct that is reprehensible or worthy of reproof or rebuke, either in the circumstances giving rise to the cause of action, or in the proceeding, which makes the denial of such costs, desirable as a form of chastisement. Such conduct may include; a suit not brought bona fides, but rather as a vehicle to force or coerce the other party to bend to the plaintiff's will; prosecutes the matter solely for the purpose of increasing the costs recoverable; when the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; resistance to or lack of co-operation with the other party in providing information; raises points of law or fact or serves documents belatedly prompting otherwise avoidable adjournments; obtains relief which the unsuccessful party had already offered in settlement of the dispute; or by being frustratingly obstructive and predatory, such as not accepting a reasonable settlement offer put to them, where a reasonable settlement offer was made but was rejected on utterly unreasonable grounds; where the successful party has failed on more issues than he had succeeded, and so on. In such cases it serves as a penalty against well-resourced and unreasonable adversaries so as to encourage early settlement and discourage frivolous or vexatious litigation.

[33] Considering that costs orders are indemnities for costs incurred and not penalties against the unsuccessful party, a court may order each party to bear their own costs where in its view the legal merits are fairly evenly balanced. For obvious public policy reasons, the practice that each party bear his or her own costs, is as well the starting point in proceedings where the adversaries are close family members who will have to live with one another even after the litigation. The onus of persuading the court that it should depart from the usual rule rests on the successful litigant. The appellate Court should only interfere if it can be shown that the discretion as to costs miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters. An appellate court should not interfere with the trial Court's exercise of discretion merely because it takes the view that it would have exercised that discretion differently. It has not been shown that the discretion as to costs miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters in the instant case. This ground is without merit and it too fails.

Order :

[34] In the final result, the appeal has no merit and it is accordingly dismissed and each party is to bear their own costs of the appeal and of the court below.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Abore, Adonga and Ogen Co. Advocates

For the respondent : M/s Egaru and Co. Advocates.