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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Appeal No. 0063 of 2022

(Arising from Katakwi Chief Magistrates Court Civil Suit No. 013 of 2020)

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1. Okure Moses

2. Omudu Robert

3. Aupal Simon

4. IP Enyakoit Alias Morulem

5. Dr. Morulem Charles Collins

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..... Appellants

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Versus

Acanit Constance Respondent

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(An appeal arising from the judgement and orders of the Chief Magistrates Court of Katakwi holden at Katakwi delivered on the 13th day of July 2022 by H/W Owino Paul Abdonson)

Before: Hon. Justice Dr henry Peter Adonyo

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Judgement on Appeal

1. Introduction:

This appeal arises from the judgement and orders of the Chief Magistrates Court of Katakwi holden at Katakwi delivered on the 13th day of July 2022 by H/W Owino Paul Abdonson.

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5 2. Background:

The respondent filed Civil Suit No. 0013 of 2020 in the Chief Magistrates Court of Katakwi against the appellants as well as Alinga Christine, Acan Hellen and Atim Susan daughter for trespass on 12 acres of land situate at Ariamareng East Village, Ongema Parish, Usuk Sub County, Katakwi District,
10 a declaration of ownership, recovery of the suit land, permanent injunction, general damages and costs of the suit.

Alinga Christine, Acan Hellen and Atim Susan applied to be added to the Civil Suit since they are beneficiaries of the late Imodoi's estate.

In her amended plaint the respondent claimed that the Olinga Christine
15 not Alinga Christine is a daughter to the late Imodoi Beredeta and is a beneficiary to the suit land is she leaves her matrimonial home. Acan Hellen and Atim Susan are granddaughters of Imodoi Beredeta.

She added that her claim is against the appellants and not Alinga, Acan or Atim who are her family members and are free to come back to the suit
20 land.

The respondent's claim against the 1st to 5th defendants now appellants was that at all material times she has been the care taker of the suit land. She assumed her role upon the death of Okure Filbert her maternal uncle and her biological mother Ajenga Marcelena sister to the late Okure.

25 That the late Okure before his death and while on his death bed handed over all his properties including the suit land to the respondent to administer for the benefit of the beneficiaries of the estate. That the said Okure Filbert during his lifetime and last hours of his life named Abiar as his 1st wife (childless and whereabouts unknown) and Among as his 2nd wife
30 was also childless. Immediately after the burial of the late Okure Filbert, on the 14/5/2016, members of Ikorinyanga clan under the leadership of the

5 said clan held a meeting and demarcated the late Okure Filbert's land. To the respondent's surprise, in February the appellants without any colour of right and from nowhere emerged and began laying claim on the suit land and are now cultivating the same.

10 The 1st appellant who claims to be the late Okure's biological son has also built three grass thatched houses on the suit land, yet he has never been seen in the family of the late Okure and was never mentioned by the late Okure as his son and his mother is not known to the family. That the 2nd appellant is a fraudulent self-imposed clan chairman who gave out the suit land to the 1st, 3rd, 4th and 5th appellants for cultivation.

15 The appellants in their written statement of defence admitted that both Abiar and Among were the wives of the late Okure Filbert and never had children, however, they add that Okure Filbert begot the 1st appellant with another woman Itikolit Ipemia and the 1st appellant constructed on the suit land as a beneficiary thereof.

20 That the 1st appellant from his childhood was staying at his late father Okure's home at Ariamareng Village, Ongema Parish, Usuk sub-county Katakwi District where he studied at Usuk Boys Primary School from P.1 to P.5 then went to Acowa Primary School for P.6 to P.7.

25 That it was when the 1st appellant went to join senior one that he left and went to his mother to continue with studies since the late Okure did not have the financial ability to pay his school fees and to this extent he is known by the family and the clan of Ikorinyanga as the late Okure's biological child.

30 That the knowledge of his mother by the Ikorinyanga clan is immaterial since it does not remove the fact that he is a biological child of the late Okure Filbert.

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5 The 1st appellant contended that the suit land belongs to the estate of the late Imodoi Beredeta a widow to the late Morulem Epipaniya. That the late Imodoi Beredeta had five children namely Okure Filbert (deceased), Ajenga Marcelena (deceased), Ogulo Rose (deceased), Atim Mary (deceased) and Alinga Christine and it is therefore not true that the suit land only belonged
10 to the late Okure Filbert and Ajenga Marcelena.

That the respondent is only a beneficiary to the estate of her late grandmother Imodoi through her mother Ajenga Marcelena. That the 1st appellant being one of the beneficiaries, in January 2020 approached the elders of Ikorinyanga clan and expressed his interest to build a home on
15 part of the suit land and since his need was urgent the clan permitted him to build a home on the suit land and to keep the suit land in trust for other beneficiaries which the respondent happens to be. The 1st appellant denied that the late Okure handed over the suit land to the respondent especially since he was not the only beneficiary to Imodoi's estate,
20 furthermore that the allegation that he handed over the suit land to the respondent on his death bed is more absurd.

The 2nd appellant claimed to be a paternal cousin to the respondent and as the chairperson of Ikorinyanga clan responsible for land matters who effects the recommendations by the clan members and denied allocating
25 land to any of the appellants.

The 3rd and 5th appellants also claiming to be paternal cousins to the respondent, stated that they have cultivated the suit land with authorisation of the 1st appellant. That they were looking for land to rent for cultivation but the 1st appellant requested them to utilize two gardens
30 in a way of helping to clear the bushes. That they are not claiming ownership of the suit land in anyway.

5 The 4th appellant stated that apart from knowing the location of the suit land and the former owner thereof as a clansman he has not done any cultivation or even attempted to cultivate the suit land.

The 1st appellant and the 6th to 8th defendants (Alinga, Acan and Atim) further counter claimed for a declaration that the suit land belongs to the
10 estate of the late Imodoi Beredeta and that they are beneficiaries of the same just like the respondent.

The trial Magistrate having heard and evaluated the evidence adduced in the trial court entered judgement in favour of the respondent with the following orders;

- 15 a) The plaintiff is declared to be an owner of part of the suit land, a share that belonged to her late mother Ajenga Marcelena and the share of Okure Filbert her late uncle.
- b) Alinga Christine, Acan Hellen and Atim Susan 6th, 7th and 8th defendants are declared beneficiaries to the estate of the late Imodoi Beredeta.
- 20 c) Okure Moses, Omudu Robert, Aupal Simon, IP Inyakoit Alias Morulem and Dr. Morulem Charles Collins 1st, 2nd, 3rd, 4th and 5th defendants respectively are declared trespassers to the suit land.
- d) The Counter claim is hereby dismissed for lack of merit.
- e) Costs of the suit is awarded to the plaintiff.

25 The appellants being dissatisfied in part with the judgement and orders of the Learned Trial Magistrate appealed on the following grounds;

- a. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby occasioning miscarriage of justice that;
30 i. The Appellants are trespassers on the suit land.

5 ii. The 1st Appellant is not a biological son of the late Okure
 Filbert and therefore not a beneficiary.

 b. That the learned trial Magistrate erred in law when he misdirected
 himself on the law on burden of proof thereby arriving at a wrong
 conclusion that the 1st Appellant Okure Moses is not a biological of
10 the late Okure Filbert.

3. Duty of the 1st appellate court:

This court is the first appellate court in respect of the dispute between the
parties.

An appellate court is a higher court that reviews the decision of a lower
15 court. It does so by hearing an appeal from a lower court. The primary
 function of an appellate court is to review and correct errors made by a
 trial court. In addition, an appellate court may deal with the development
 and application of law. In carrying out its duty, the appellate court can do
 one of the following:

- 20 a) Review decisions made by lower trial court;
 b) Affirm the decision of the trial court, in which case the verdict at trial
 stands;
 c) Reverse the decision to the trial court, in which case a new trial may
 be ordered;
25 d) Modify an order or a decree;
 e) Remand the case back to the lower court for further proceedings;
 f) Dismiss the case.

This Honourable Court is the first appellate court in respect of the dispute
between the parties herein and is obligated to re-hear the case which was
30 before the lower trial court by subjecting the evidence presented to the
 trial court to a fresh and exhaustive scrutiny and to re-appraise the same

5 before coming to its own conclusion as was held in *Father Nanensio Begumisa and Three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236.*

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

"...the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it"

15 In rehearing afresh, a case which was before a lower trial court, this appellate court is required to make due allowance for the fact that it has neither seen nor heard the witnesses and where it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. *See: Lovinsa Nakya vs. Nsibambi*
20 *[1980] HCB 81.*

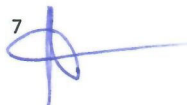
In considering this appeal, the above legal provisions are taken into account.

4. Representation:

The 1st to 4th appellants were represented by M/s Asire & Co. Advocates
25 while the respondent was represented by Baobab Advocates.

Counsel for the appellants in his submissions stated that the 5th appellant withdrew his instructions. The 5th appellant was therefore unrepresented and no submissions were filed in his regard.

30 This matter proceeded by way of written submissions which will be considered in the determination of this appeal.

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5 5. Determination:

a. Preliminary objection:

Counsel for the respondent raised a preliminary objection on a point of law that this appeal was filed out of time contrary to section 79 (1) (a) of the Civil Procedure Act. It was their submission that the judgement is dated
10 13th July 2022 but was read in open court on 07th October 2022 and the appellants ought to have filed the appeal by 7th November 2022 but the same was filed on 08th December 2022 out of time.

Section 79 of the Civil Procedure Act provides for limitation of appeals thus;

(1) Except as otherwise specifically provided in any other law, every appeal
15 **shall be entered—**

(a) within thirty days of the date of the decree or order of the court; or

(b) within seven days of the date of the order of a registrar,

as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this
20 **section has elapsed.**

(2) In computing the period of limitation prescribed by this section, the time taken by the court or the registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.

25 In the instant matter though the judgement is dated 13th July 2022, the record (written proceedings) indicates it was read in open court on the 7th October 2022, the notice of appeal was filed on the 20th October 2022, there is no request for a certified record of proceedings and judgement, however the record of proceedings on record was certified on the 09th of
30 November 2022, judgement certified on 15th December 2022 and the Decree extracted on 09th December 2022.

5 Section 79(2) provides that the time taken in preparing the proceedings and decree upon which the appeal is founded shall be excluded, given that the decree and proceedings were certified on the 09th November 2022 and the memorandum of appeal filed in this court on 08th December 2022 I find that the appeal was filed within time.

10 This objection is accordingly overruled.

a. Ground 1:

The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby occasioning miscarriage of justice that;

15 a) *The Appellants are trespassers on the suit land.*

b) *The 1st Appellant is not a biological son of the late Okure Filbert and therefore not a beneficiary.*

Regarding trespass, counsel for the 1st to 4th appellants submitted that the 1st appellant is a biological son of Okure Filbert and therefore a beneficiary
20 to his estate. To this extent a beneficiary cannot be a trespasser because a beneficiary has in equity, a proprietary interest in the estate property.

That the 2nd appellant only attended the meeting in which the 1st appellant was given a portion of the suit land to construct a home and signed as the chairperson in charge of lands. That even if the action of trespass was to
25 be sustained it would be against the chairperson of the said meeting that is one Aleka William not the 2nd appellant.

That the 3rd appellant being a cousin to the respondent cultivated the suit land on the mistaken belief that he was helping to clear the land. Counsel added that the trial magistrate in his judgement found the 3rd appellant a
30 trespasser because he together with the other appellants held a meeting in which the 1st Appellant was placed on the suit land, however perusal of

5 the attendance list attached as DEX1 the 3rd appellant was not among the attendees. Counsel submitted that the 3rd and 4th appellant did not participate in placing the 1st Appellant on the suit land and therefore are not trespassers.

In relation to the 1st appellant being Okure Filbert's son, counsel for the 1st to 4th appellants submitted that the 1st appellant in the lower court told
10 court that his father is the late Okure Filbert, he grew up at his home in Usuk and studied at Usuk Boys Primary School as well as Usuk SS. That the 1st appellant presented school report cards, school fees payment slips and examination clearance cards.

15 Counsel further submitted that apart from contesting the 1st appellant's name "Musa" as against "Moses" did not furnish any evidence to the contrary that the 1st appellant did not study in any of those schools.

Counsel further added that the description of the late Okure Filbert by the 1st appellant was not disputed by the respondent. That the 1st appellant
20 went ahead to name Atim Suzan, Asion Carolyne and Okwi Emmanuel as the children who grew up with him in the same home of his late father Okure Filbert and the respondent never challenged this.

Counsel highlighted the various testimonies he submitted proved that the 1st appellant was the son of the late Okure Filbert.

25 Relying on *Odongo & Anor v Ojera (Civil Appeal No. 53 of 2017) [2019] UGHCLD 1* submitted that in the instant case the paternity of the 1st appellant was proved by the following;

- i. The clan name Okure
- ii. The 1st appellant studying in Usuk Boys Primary school as well as Usuk
30 Senior Secondary School which fact was corroborated by his witnesses.

- 5 iii. The inconsistent fact of the 1st defendant's mother having cohabited with Okure together with the fact that the 1st appellant grew up and stayed in Okure's home.
- iv. Late Okure Filbert in Ariamareng village.
- v. The introduction of the 1st defendant to clan members during clan
10 meetings by the late Okure Filbert as his son.

Counsel for the respondent in reply submitted that there are competing testimonies on record about the paternity of the 1st Appellant, Okure Moses. The plaintiff's now respondent's case through PW1-PW6 who all stated that they had not known the 1st defendant in general and in
15 particular did not know that he is a son to Okure Filbert.

Counsel submitted that the appellants' evidence on his paternity had a lot of loop holes that the learned trial Magistrate identified in his analysis of the evidence before him as a whole. Some of the loop-holes identified by the learned trial Magistrate include but not limited to:

- 20 i. Non-declaration of the 1st appellant at the time of death/burial of the late Okure Filbert as the son of the deceased;
- ii. Non-involvement of the respondent and other beneficiaries to the estate in a family meeting that re-introduced the 1st appellant as a son to the deceased Okure Filbert and the eventual handover of the
25 suit land to the 1st appellant
- iii. Using the LC1 Chairperson of another jurisdiction to preside over the unlawful hand over of the suit land located in another village to the 1st appellant in the absence of the respondent who had been clothed with possession and control over the suit land by the clan meeting
30 minutes of 14/05/2016.

5 iv. The presence of clan members in the two controversial clan meetings under which the suit land was in two different occasions handed over to both the respondent and the 1st appellant.

v. The absence of evidence that the deceased himself had ever introduced the 1st appellant before anyone as his son.

10 Counsel further disagreed and contended that the appellants ought to have done more than show court he schooled in Usuk and his mother lived in Okure's home, documentary evidence like the Birth Certificate, Baptism Cards, and School Report Cards in certain circumstances come into aid in this respect. Unfortunately, in this case the Report Cards exhibited as
15 DEXH1& DEXH2 had a lot of loop holes that were cited and poked into by the learned trial Magistrate at paragraph 2 of page 4 of his judgment and at the end of the day the two exhibits did not carry any evidential value worth considering. That the 1st appellant ought to have done DNA test to prove paternity in this case, however, this was not done.

20 Counsel additionally submitted that in the premises the appellants having asserted that the 1st defendant was a biological son to the late Okure Filbert, the burden of proof squarely lay on them on the principle of "he who alleges must prove". The evidence provided by the appellants in this regard has to be weighed against the respondent's evidence that the 1st
25 appellant had not been known to her before the dispute in question sprung up.

i. Appellants as trespassers on the suit land.

Regarding the appellants being trespassers, Counsel for the respondent submitted that the respondent proved in the lower court that the 1st-5th
30 appellants convened an irregular clan meeting (in the absence of the respondent who had lawfully been put in possession and control of the suit

5 land for herself and for the benefit of other rightful beneficiaries identified in a clan meeting held on 14th May 2016 held immediately after the death of Okure Filbert) to give away the estate of the late Okure Filbert to the 1st appellant.

Counsel added that the record of the testimony of the respondent is reflected in the record of proceedings and in her testimony she named
10 each of the activities done by the appellants all of which amount to unauthorized entries upon the suit land and yet the clan meeting and minutes of 14th May 2016 had placed the suit land in the possession and control of the respondent.

15 The respondent in her testimony was categorical and was assertive that each of the appellants entered the suit land without her consent and authority.

In her testimony, she ably apportioned roles played by each of the appellants in interfering with her possession and control of the suit land
20 without her consent or authority.

In the premises, I would find that the learned trial magistrate was correct to find and declare the appellants' trespassers on the suit land as he based his finding on the evidence on record and I find no justification in departing from his findings at all.

25 ii. The paternity of the 1st appellant, Okure Moses:

PW1 Acanit Constance a niece to the late Okure Filbert denied knowing Okure Moses as a family member especially as a son to the late Okure. She testified that she took care of the late Okure during his lifetime and illness till he died and she did not see Okure Moses, she does not know where he
30 came from or who his mother is. PW2 Odeke Cosmas stated that he is a brother to the late Okure Filbert (same father different mothers) and

5 Okure did not have children, he is not aware of Okure Moses as a son to his late brother. He stated in cross-examination that a name can attach one to a clan and Okure is a name of the Ikorinyanga clan.

PW3 Arukori Wilbrod stated that the 1st respondent is his sister, he stated that Okure did not have any children and none was mentioned and Okure
10 Moses is not known to him as a son of the late Okure Filbert, he added that he came from Acowa village six miles from Ariamareng in Amuria District. He also admitted that the name Okure is for their clan. PW4 Inyakoit Hellen testified that the late Okure Filbert did not have a child called Okure Moses. PW2, PW3 and PW4 all stated that the late Okure's 2nd wife produced a
15 child but unfortunately both the child and the woman died after the delivery.

PW5 Okwii Emmanuel stated that Okure Moses is not the son of Okure Filbert and he has never come out. PW6 Ajenga Dinah also stated that she did not know the 1st appellant and only saw him in court.

20 DW1 Okure Moses on the other hand testified that he stayed in the home of his father Okure Filbert while schooling at Usuk Boys Primary School and he stayed with Atim Susan, Asio Caroline and Ojoki Emmanuel. He was staying with his father alone while his mother was in Acowa. He tendered in copies of his report card, clearance slip and payment slip with the claim
25 that he got them from his father's house since no body was staying home. He further stated that he did not attend his father's burial because he was in Kampala staying alone and did not know that he died and only found out from his cousin Ocen Emmanuel when he called home. That after this he travelled home in December 2016 and found out it was true that his father
30 had died, he then went to Aleka William the clan chairperson, Omudu John Robert his cousin and his paternal uncle for the next step, he wanted to be

5 shown where to build his house and they told him they would hold a meeting. This meeting was held in 2019 in Ogwel's home and he was shown where to build his house, this meeting was called by Aleka William, Omudu John Robert, Ogwel his paternal uncle, Ongole and Oporu and there was no one staying at home at that time. During cross-examination
10 he stated that his mother did not stay with Okure because they were not married. He used to talk to his father after five to eight months and he does not know where his father died from. He added that the clan meeting was held in January 2020 and he does not know why the meeting was held at Ogwel's home and not Okure's. He could not give answers as to why the
15 meeting was held with authorities of Ariamareng West and not east or why other siblings were not involved in the clan meeting of 2020.

DW3 Stephano Ogwel testified that Okure Moses is his nephew, son of Okure Filbert. He stated that Okure Filbert brought Okure Moses to stay with him, Moses' mother Ikareut continued to stay with them as well and
20 after the death of Okure Filbert they had a meeting to show Okure Moses the boundary of his father's land and minutes were written. DW4 Aupal Simon Peter stated that he knows Okure Moses as a son to their late uncle Okure Filbert. DW6 Atim Susan stated that she grew up at Imodoi's home with Okure Moses in 1997 and Itikolit is his mother. DW8 Enyakoit Robert
25 stated that the suit land belongs to Okure Moses who is the biological son to Okure Filbert. DW9 Ipemia Itikolit the mother to Okure Moses testified that his father is Okure Filbert who was her brother in law, her husband being Okuru Silver.

That during the insurgency she ran to Okure Filbert's home to take refuge
30 and during this time she produced Okure Moses, she stayed with Okure

5 Filbert for 10 years and she left and built a house in Acowa leaving Okure with his father.

DW10 Arukori Honeret Vincent the overall clan chairman of Ikariwok Ikorinyanga testified that Okure Moses is the son of the late Okure Filbert and in the early 1990's he found Itikolit carrying him as a baby at
10 Ariamareng East.

DW11 Aleka William stated that Okure Moses was born in 1991 by Okure Filbert, Okure Moses schooled at Usuk Boys P/S in 1994 and was staying in Filbert's home. During cross-examination he stated that no child of Okure Filbert was brought but the Okure Moses was announced and Okure
15 Moses was present at the burial of Okure Filbert.

DW12 Okwi George William stated he grew up with Okure in Ariamareng East and he first saw Okure in 1993 at Okure's home, he further studied with him in Usuk Boys P/S in 1994, he was in P.1 with him. That Okure Moses stayed as the only child at his father's home with his mother who
20 was concubined by Okure Filbert. During cross-examination he stated that Okure Moses was in P.1 in 1994 when he was 3 years old but for him he finalised P.7 in 2010 when he was 21 years.

The 1st appellant tendered in evidence his progress report for Usuk Boys P/S for the year 1999 as DEX1. This report indicates his name as Okure
25 Musa in Primary 2 aged 8 years. It has a provision for parent/ guardian but it is not filled. DEX2 (a) and (b) are clearance receipt and examination card for S. 1B terms 1 and 2 at Usuk SSS which he attended in 2008.

The trial magistrate in his judgement considered the manner in which Okure was brought onto the suit land plus the testimonies relating to his
30 paternity and stated that there was doubt as to whether Okure Moses is a biological child to Okure Filbert and as such a beneficiary to his estate.

5 The 1st appellant Okure Moses raises a claim that he is a biological child of the late Okure Filbert, this claim is disputed by the respondent and her witnesses.

A parent and child relationship is a legal relationship existing between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations. The parent and child relationship between a child and the natural father may be established by various methods, including a prior paternity adjudication, a birth certificate, or scientific testing.

In *Odongo & Anor v Ojera (Civil Appeal No. 53 of 2017) [2019] UGHCLD 1* Justice Stephen Mubiru discussed the doctrine on presumption of paternity thus;

"At common law, a man is presumed to be the father of a child if:

(a) he and the mother of the child are married to each other and the child is born during the marriage;

20 *(b) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation;*

25 *(c) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce or after a decree of separation; or*

30 *(d) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the*

5 *marriage is, or could be declared, invalid, he voluntarily asserted his paternity of the child, and there is no other presumptive father of the child, and:*

(i) the assertion is in a record filed with the Registrar of Births and Deaths;


10 *(ii) he agreed to be and is named as the child's father on the child's birth certificate; or*

(iii) he promised in a record to support the child as his own."

In the instant case there is no evidence the Itikolit mother of the 1st appellant was married to the late Okure or that during the pendency of their relationship she conceived the 1st appellant.

Itikolit did testify that the late Okure was her brother in law and during the insurgency she took refuge and that's when she produced Okure Moses. There is no indication on when exactly she came to the late Okure's home and whether she was pregnant before or after she came to the home. Her claim that she thereafter stayed with him for 10 years is also not helpful in determination of Okure Moses' paternity.

The 1st appellant himself does not state that he was born in the late Okure's home, in the WSD he stated that he was staying with his father in his childhood where he studied and he maintained this in his testimony. And he actually stated in cross-examination that his mother did not stay with the late Okure because they were not married. DW3 on the other hand stated that it was the late Okure who brought the 1st appellant to his home which contradicts Itikolit's testimony that she produced the child when she was in the late Okure's home. DW10 stated that the 1st appellant was the son of Okure and he found Itikolit carrying him in the early 1990s. These testimonies are not sufficient to prove the presumption of paternity, that



5 a boy was in the same village as the late Okure and bears a similar surname
is not sufficient.

In *Odongo & Anor v Ojera (supra)* Justice Stephen Mubiru further found that

10 *“These presumptions may be rebutted by genetic testing with results
that identify another man as the father or that exclude the presumed
father, where such a test would be in the best interests of the child to
disestablish the parent-child relationship.*

15 *It can also be rebutted with evidence to show that the presumed
father and the mother of the child neither cohabited nor engaged in
sexual intercourse with each other during the probable time of
conception. Therefore, in order to prove a parent-child relationship,
there should be evidence of a biological relationship such as an
acceptable birth certificate if the birth was registered not too long
after the child’s birth, cogent evidence explaining the circumstances
of birth or infant hood such as medical records, school records, and
20 religious records (such as certificate of baptism issued by a church)
showing the names of the parents and the child, or a DNA test.”*

In the court below, the 1st appellant did not adduce any evidence to prove
the circumstances of his birth, in fact the circumstances of his birth are not
clear. No documentation whether relating to his birth, infant hood, medical
25 records or any document pertaining to his existence bears the name of the
late Okure Filbert. There is also no clear evidence that Okure ever publicly
acknowledged the 1st appellant as his biological son at any public or clan
gathering and all the appellants’ witnesses save for DW11 Aleka did not
make any mention of any public admission that Okure was his son. DW11
30 claimed that Okure Moses was announced and was actually present at the
burial of his father, this evidence was contrary to that of the 1st appellant

5 himself who stated that he did not attend the late Okure's burial and neither did his mother.

In fact, neither Okure Moses nor his mother knew of the illness or subsequent death of the late Okure and from this it can be inferred that they were not known as his child or concubine. If indeed the elders in clan
10 knew that the late Okure fathered a son, they would have immediately informed him of his father's sickness and death but this is not the case.

The 1st appellant wants this Court to believe that by his schooling at Usuk Boys Primary School, his mother having lived in Okure Filbert's home, evidence of the 1st appellant's school mates and home-mates at the home
15 of Okure Filbert, the appellants had proved on a balance of probability that indeed the 1st appellant was a biological son to the late Okure Filbert which is not the case.

Furthermore, the 1st appellant stated that when he found out that the late Okure had passed on he came in December 2016 and he immediately went
20 to the elders on the way forward because he wanted to be shown where to build his house. The late Okure passed away in May 2016 and the appellant could only afford to come in December to find out where to build his house.

There is no evidence to show that any of the common law presumptions
25 of parentage would apply to his situation.

It is worth noting that given that one of the late Okure's sisters was still alive as well as his half-brothers and other close relatives, the 1st appellant had the choice to undertake a DNA test which would have settled his claim, however this was not done.

5 The standard of proof in civil matters is on a balance of probabilities. If the evidence is such that the tribunal can say ***"we think it more probable than not, the burden is discharged, but if the probabilities are equal it is not"***.
(see *Miller v. Minister of Pensions [1947] 2 All ER 372*).

When left in doubt, the party with the burden of showing that something
10 took place will not have satisfied the court that it did. That being the case, i find that the 1st appellant's evidence on paternity leaves a lot of doubt as to its truthfulness, there is no sufficient evidence on record that the late Okure Filbert fathered the 1st appellant and as such he failed to prove that he was a beneficiary to his estate.

15 The trial court was therefore right in finding that he is not a biological son and therefore not a beneficiary.

iii. The appellants as trespassers on the suit land:

Trespass to land was defined in *Justine E.M.N Lutaaya vs Sterling Civil Engineering Co. SCCA No.11 of 2002* where it was held that trespass to land
20 occurs: ***"when a person makes an unauthorized entry upon land, thereby interfering, or portends to interfere, with another person's lawful possession of that land."***

The 1st appellant after a meeting held on 06-01-2020 per DEX1 was placed on the suit land where he proceeded to construct his houses. In these
25 minutes under Minute III he is named as the owner of the land and the one to give others portions. It is further stated under Minute V that the Nurse Acanit Constance is no longer the owner of the land except Okure Moses. This corroborated the respondent's claim that the after the death of the late Okure Moses the clan sat on the 14th May 2016 and made her the
30 caretaker of the suit land. Meaning by giving the land to Moses the

5 attendees of the meeting instigated the appellants trespass on the suit land.

Given that the 1st appellant did not prove that he was the late Okure's son, his presence on the suit land amounted to trespass.

The 3rd and 5th appellants claimed they were permitted to grow crops on
10 the land by the 1st appellant and the 2nd appellant respectively. Given that the 1st and 2nd appellant had no authority to grant them use of the land, it is right that the lower court found them to be trespassers.

The 2nd appellant per the testimony of PW2 Cosmas and PW4 Inyakoit also cultivated the suit land and such he was rightfully found as a trespasser.

15 However, regarding the 4th appellant IP Enyakoit Alias Morulem he stated in his evidence that he has never entered the suit land in anyway, the respondent however stated that he had planted ground-nuts between March and April 2020. PW4 Inyakoit was not sure whether the 4th appellant had done anything on the land. I find that his cultivation on the suit land is
20 not clear and as such should not have been found as a trespasser on the same.

Ground 1(a) of the appeal partly succeeds with regard to only the 4th appellant. Ground 1(b) fails.

b. Ground 2:

25 ***That the learned trial Magistrate erred in law when he misdirected himself on the law on burden of proof thereby arriving at a wrong conclusion that the 1st Appellant Okure Moses is not a biological of the late Okure Filbert.***

Counsel for the appellant submitted that section 101 of the Evidence Act provides that the burden of proof lies on a person who wishes to prove a
30 particular fact. That the plaintiff alleged that the 1st appellant is not a



5 biological son of the late Okure Filbert and therefore not a beneficiary to his estate but she did not adduce any evidence to support her claim.

Counsel for the respondent in reply submitted that in resolving this ground they are guided by *JK Patel vs Spear Motors Ltd SCCA No. 04 of 1991* where it was held by the supreme court that the burden of proof rests before
10 evidence is given on the party asserting the affirmative, it then shifts on the party against whom the judgement would be given if no further evidence to the contrary is adduced. Counsel further relied on *Sebuliba vs Co-operative Bank Ltd [1982] HCB 129* where it was held that the burden of proof lies upon the person who asserts or alleges, and that a party can be
15 called upon to disprove or rebut what has been proved by the other side.

Counsel submitted that in the instant appeal the appellants in the court below asserted that the 1st appellant was the biological son of the late Okure Filbert, the respondent and her witnesses adduced evidence to the effect that the 1st appellant was not known as the son of the late Okure.
20 That in this circumstance the plaintiff is said to have shifted the evidential burden to the defendants that the 1st appellant s not the biological son to the late Okure Filbert and her contention is believed to be true unless the appellants adduced evidence to rebut the presumption.

I agree with counsel for the respondent that the trial magistrate was faced
25 with two contentions and he analysed the versions for and against the 1st appellant being the biological son to the late Okure Filbert.

The trial magistrate did not shift the burden of proof to the appellants as submitted by counsel for the appellants.

The legal burden of proof is a burden fixed by law and is a fixed burden of
30 proof and in civil cases, the standard is on a balance of probabilities. The evidential burden on the other hand is the burden of adducing evidence to

5 prove a fact in ones favour. While the evidential burden keeps shifting, the legal burden never shifts. (see *Kamo Enterprises Limited vs Krystalline Salt Limited (Civil Appeal No. 8 of 2018) [2021] UGSC 47*)

Section 103 of the Evidence Act provides that the burden of proof as to any particular fact lies on that person who wishes court to believe in its
10 existence, unless it is provided by law that the proof of that fact shall lie on a particular person.

In *JK Patel vs Spear Motors Ltd SCCA No. 04 of 1991* as submitted above it was held by the supreme court that the burden of proof rests before evidence is given on the party asserting the affirmative. It then shifts on
15 the party against whom the judgement would be given if no further evidence is adduced.

When a party adduces evidence sufficient to raise a presumption that what he or she asserts is true, she is said to shift the burden that her allegation is presumed to be true unless the opposing party adduces evidence to
20 rebut the same.

In this instance the respondent pleaded that she was the niece of the late Okure Filbert and prior to his death he stated that he did not have children. She maintained this throughout her testimony where she stated that she took care of the late Okure during his lifetime and illness till he died and
25 she did not see Okure Moses, she does not know where he came from or who his mother is.

PW2 Odeke Cosmas a brother to the late Okure Filbert (same father different mothers) also stated that Okure did not have children and he is not aware of Okure Moses as a son to his late brother. PW3 Arukori
30 Wilbrod, PW4 Inyakoit Hellen, PW5 Okwii Emmanuel and PW6 Ajenga

5 Dinah all stated that Okure Moses is not the son of Okure Filbert and they did not know him.

This evidence was enough to raise the presumption that the respondent's claim was true, and the evidential burden shifted to the appellants to prove the paternity of the 1st appellant.

10 The 1st appellant pleaded that he was the son of the late Okure Filbert and Itikolit Ipemia, that he stayed with in his childhood and studied from there. While he adduced evidence that he studied in a Usuk P/S school and Usuk SSS at a certain point in his lifetime he did not prove that this was because his father was the Late Okure, his mother and the rest of his witnesses
15 were not able to give sufficient evidence surrounding the circumstances of his birth and as such he did not sufficiently prove his allegation of paternity as pleaded.

Each party had to prove their allegations as pleaded and the trial magistrate having considered the evidence adduced on both sides found
20 that the 1st appellant had not proved his paternity.

The contentions were weighed on a balance of probabilities, evidence adduced by both sides analysed and the finding was that the 1st appellant's evidence left doubt as to whether he was the biological son of the late Okure Filbert.

25 The respondent had the onus of discharging her legal burden of proof on the balance of probability which was done, however the 1st appellant did not satisfy his evidential burden on paternity.

I thus find that the trial magistrate did not shift the burden of proof to the appellants and consequently this ground fails.

5 6. Conclusion and orders:

In the final result this appeal is allowed only in respect to the finding of the lower trial court that the 4th appellant was a trespasser on the suit land otherwise and the following orders issued.

- 10 a. The judgement and orders of the lower court are upheld save for the finding that the 4th appellant trespassed on the suit land.
- b. The rest of the grounds of appeal lack merit and are dismissed.
- c. The respondent is granted 80% costs in this court and in the lower trial court.

I do so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

4th October, 2023

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