THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL APPEAL No. 0005 OF 2015

(Arising from Paidha Grade One Magistrate's Court Civil Suit No. 0010 of 2013)

OUMA EMILIO ANGEYO ……. APPELLANT

VERSUS

1. ONENCAN LUIJI }
2. WATHUM UNUT } ……. RESPONDENTS

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondents jointly and severally sued the appellant seeking a declaration that they are the rightful owners of land under customary tenure, an order of eviction, an award of general and exemplary damages for trespass to land and the costs of the suit. The plaintiffs' claim was that they inherited the land in dispute from their father in 1959. The land in dispute, measures approximately thirty acres, and is located at Ombavu village, Juloka Parish, Warr sub-county in Zombo District. Their case was that some time during the year 2011 without any claim of right, the appellant stopped them from cultivating and otherwise utilising the land. In his defence, the appellant denied the claim and contended instead that the land in dispute originally belonged to his late grandfather, Agulukongo and in 1957 the appellant inherited it from his father Goffido Ouma.

At the hearing, the first respondent, Onencan Luiji testified as P.W.1 and stated that he resides and grows crops on the land in dispute. His brother, the second respondent Wathum Unut does not reside on the land but grows crops on it. The appellant, Ouma Emilio Angeyo, does not reside on the land or carry on any activity thereon. The land originally belonged to their grandfather, Nziri. This witness was born on that land in 1945. During the year 2006, the appellant sold off one of the Banyan trees but he had not stop him because he considered that not to be a sale of the land. When a dispute over the land erupted between the respondents and the

appellants, it was decided in favour of the respondents by the Alur Traditional Chiefs. The appellant was dissatisfied with that decision, hence the suit. The second respondent, Wathum Unut testified as P.W.2. He stated that the land in dispute originally belonged to their grandfather Agiye, who was a brother to Nziri. The land was left to the respondents' late father who occupied it until the 1940s when he died. They were born on that land and he personally planted eucalyptus trees, avocado trees, cassava and bananas on the land in 1989. The appellant's claim to the land is based on the fact that one of his brothers was buried thereon by a man called Toyi. P.W.3 Eriya Okwendu testified that the land originally belonged to the family of Toyi. The appellant's grandfather Agulukongo was a cousin to the grandfather of the respondents and he migrated from Moro to live with his cousin on the land in dispute and when he died he was buried thereon. He refuted the appellant's claims of his father and himself having lived on the land or undertaken activities thereon. P.W.4. Benson Ponga testified that during his childhood, it was the respondents' grandfather who was tilling the land in dispute. It is they who gave a one Toyi the portion of the land on which he lives. That was the close of the appellant's case.

In his defence, the appellant testified as D.W.1 and stated that that the land in dispute originally belonged to his late grandfather Agulukongo who left it to the appellant's late father, Jothelejo Ouma who when he died was buried elsewhere because he desired to preserve the land in dispute for cultivation. He had a house on the land and a well. The appellant began utilising the land during his father's lifetime in the early 1960s. He planted the eucalyptus trees on the land. Two of his brothers are buried on the land. The respondents began utilising the land during the 1980s after hiring it from his paternal uncle. During 1984, the appellant asked the respondents to leave the land but they asked for more time. They planted bananas and eucalyptus trees promising to leave them behind for the appellant when they eventually vacated the land. D.W.2 Syvio Mike testified that the land in dispute originally belonged to their late grandfather Agulukongo who left it to Ouma Emilio. The appellant's family had a well on the land. Two of the appellant's children are buried on that land. Upon Ouma's death, his brother Abelo hired it out to the respondents. The second appellant Wathum Unut forcefully planted eucalyptus trees on the land. D.W.3 Ogwok Cypriano testified that the land in dispute originally belonged to Agulukongo who left it to Ouma Alfredo who in turn left it to his son, the appellant. A brother of the appellant and his sister were buried on that land upon their demise. Apart from the Banyan trees, the rest of the

crops on the land were forcefully planted by the respondents. That was the close of the respondents' case.

The court then visited the *locus in quo* on 18th May 2015 where it established that there were bananas on the land in dispute planted by the first respondent's mother and eucalyptus trees planted by the second respondent. The first respondent as well showed court avocado trees, mango trees and bananas he too had planted on the land. he also showed court Bongo trees that were planted by Toyi. On his part, the second respondent showed to court the eucalyptus trees he planted during the year 1994. The appellant in turn showed the court some banana trees that belonged to him and admitted that the respondents had been utilising the land since 1985. He also stated that although he had never occupied the land, his uncle had told him about it. The respondents had rented the land from his late father in 1975 but he had tried to evict them in vain at the time he died in 1986. The court then received testimony from three other people who had not testified in court whom it referred to as "independent witnesses." The first one, Elia Okwendo stated that he had never seen the appellant's father cultivate the land. The second one, Cypriano Gwok stated that the land belonged to Gofredo Ouma and was later cultivated by the respondents' father. The respondents hired the land from Abelu but attempts to evict them had been futile. The third one Valentino Ocamringa stated that the land belonged to the respondents whose grandfather had lived on it and cultivated it. He was surprised that the appellant was evicting the respondents. All crops on the land were planted by the respondents.

In his judgment, the learned trial magistrate found that although the appellant's children or brothers were buried on the land with the permission of Toyi, this did not entitle him to lay claim to the land since when his father died he was buried elsewhere. He was satisfied on the balance of probabilities that the respondents had proved that they had lived on the land for over thirty years. They had crops on the land including eucalyptus trees, avocado trees, bananas and mango trees while the appellant had none. He declared the respondents the lawful owners of the land, the appellant as a trespasser thereon. He entered judgment in favour of the respondents, with costs and also injuncted the appellant against further acts of trespass.

Being dissatisfied with the decision the appellant raised four grounds of appeal, namely;-

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence adduced by the appellant hence wrongly entering judgment for the respondents.
2. The learned trial magistrate erred in law and fact in concluding that the appellant had no crops on the suit land.
3. The learned trial magistrate erred in law and fact in concluding that the appellant's late father had never lived on the suit land.
4. The learned trial magistrate erred in law and fact by deciding for the respondent in view of glaring contradictions in the evidence of the respondents and their witnesses.

In his written submissions, counsel for the appellant, Komakech Dennis Atiine combined all the grounds and argued that the trial magistrate failed to properly appraise the evidence of D.W.2. to the effect that the land originally belonged to the appellant's grandfather Agulukongo who left it to the appellant's father Jothelejo Ouma who used to cultivate on it although he was buried elsewhere upon his death. The appellant had began utilising the land in the early 1960s, had planted eucalyptus trees on it and had buried the bodies of two of his deceased children there. D.W.3. corroborated that testimony adding that it is the appellant's father who had let out the land to the respondents. Although they too had planted eucalyptus and avocado trees on the land, they did so forcefully. The first respondent admitted that in 2006, the appellant had sold off one of the Banyan trees and he had not stopped him because he considered that not to be a sale of the land. The second respondent had under cross-examination admitted that the appellant's children were buried on the land in dispute. At the *locus in quo*, the appellant showed court the bananas he had planted on the suit land. He prayed that the appeal be allowed with costs to the appellant.

In reply, counsel for the first respondent, Mr. Onyafio Ezadri Michael argued the four grounds separately. In respect of the first ground he submitted that the trial magistrate did not err in law and in fact. He relied solely on the evidence of the appellant and his four witnesses. The evidence established that the appellant was not living on the suit land whereas the respondents had been on the land as way back as 1984. This corroborated the fact that the respondents had been on the land resident and using it. Issue one was therefore correctly answered in the affirmative. Upon court visiting locus, it saw respondents' houses near there but those of the

appellant were too far away. The second respondent told court at locus that he had planted there eucalyptus trees. This shows that the respondents have been in constant uninterrupted occupation and ownership of the land. Regarding the second ground, the entire evidence at locus by the respondents and their witnesses coupled with the observations of court was conclusive that the appellant did not have any existing crop on the suit land thereby corroborating the fact that from 1984 the appellant had not utilised the land. He is estopped after such a long period from claiming ownership of the land. This ground too should be answered in the negative.

With regard to the third ground, he submitted that the respondents in their evidence in chief during the trial told court that the appellant had never resided on that land and that their home was far from that of the appellant and they gave the borders of the suit land and their neighbours who did not include the father of the appellant nor the appellant himself. Under cross-examination P.W.1 told court that he actually had been living on this land uninterrupted from the time he took possession and that he was born on the land and that in 2006 he sold one of the existing Banyan tree to a Muganda. P.W.2 regarding the existence of the father on the land was emphatic and was able to tell the court that the land originally belonged to their grandfather. They lived on the land since the 1940s. The fact is that appellant's father was not on the land. At the locus, the appellant did not point to the location or site where his father allegedly resided not even where his grandfather resided. The facts left no doubt in the mind of the trial magistrate in deciding for the respondents.

Regarding ground four, in the entire record of proceedings both in court and at locus there never existed any contradictions. The testimonies of the respondents and their witnesses corroborated each other showing a clear path that not only had the dispute been resolved by the then trial court at Paidha but also the traditional courts that had given the land to the respondents. The respondents confirmed the same together with their witnesses and the appellant confirmed in his testimony and under cross-examination that it is the respondents on the suit land but not himself. He therefore prayed that the court finds in the negative on this ground and passes judgment in favour of the respondent and also invited the court to be guided by the decisions in *Bran Dehya v Khemis Karala H.C.C.A 12 of 2015* decided on 15th June 2017, that of *Osman Yusuf v. Dramadri Geoffrey and Others* and that of *Zubeda Abdulrahman v Oyee Leonard and Others*. All those

authorities refer to non-occupation of the suit land by the appellant for a period of time and the uninterrupted use and possession of the suit land by the respondents. They have similar facts to the instant case. He finally prayed that the appeal be dismissed with costs to the respondents and the costs in the lower court be provided for.

This being a first appeal, this court is under an obligation 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. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

> It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although 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.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, 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 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.

Although not specifically raised by either counsel, the court notes that while at the *locus in quo*, the trial magistrate recorded evidence from three persons it described as "independent witnesses" None of the three had testified in court and apparently none of them was subjected to an oath. the purpose of and manner in which proceedings at the locus in quo should be conducted has been the subject of numerous decisions among which are; *Fernandes v. Noroniha [1969] EA 506, De*

Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28 and *Nsibambi v. Nankya [1980] HCB 81*, in all of which cases the principle has been restated over and over again that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. Considering that the visit is essentially for purposes of enabling trial magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. In the instant case, the record of appeal, reveals that during the visit to the *locus in quo,* the trial magistrate failed to observe these principles.

Where a trial court fails to observe the principles governing the recording of proceedings at the *locus in quo,* and yet relies on such evidence acquired and the observations made thereat in the judgment, it has in some situations been found to be a fatal error which occasioned a miscarriage of justice and a sufficient ground to merit a retrial (see for example *Badiru Kabalega v. Sepiriano Mugangu [1992] 11 KALR 110* and *James Nsibambi v. Lovinsa Nankya [1980] HCB 81*). However, if despite the defect in procedure the dispute to be adjudicated is of a nature where the appellate court finds that the visit to the *locus in quo* was a useless exercise and that the case could have been decided without visiting the *locus in quo* such that without reliance on its findings at the *locus in quo,* the trial court would have properly come to the same decision on a proper evaluation and scrutiny of the evidence which was already available on record, a retrial will not be directed. The erroneous proceedings at the *locus in quo* will be disregarded (see for example the case of *Basaliza v. Mujwisa Chris, H.C. Civil Appeal No. 16 of 2003*). Since the trial magistrate did not advert to any of that irregularly admitted evidence in his judgment and there is no evidence to show or suggest that it influenced his decision in any way, that procedural error will be disregarded as inconsequential in the instant case.

The multiple grounds raised by the appellant are all essentially concerned with the manner in which the trial magistrate evaluated the evidence before him and for that reason will be considered concurrently. In order to decide in favour of the respondents, the trial court had to be satisfied that they had furnished evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by them, might hold that the more probable conclusion is that for which the respondents contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*). The burden of proof was on the respondents to prove on the balance of probabilities that they had a better claim to the land than the one made by the appellant.

The appellant's testimony that the land originally belonged to grandfather Agulukongo who left it to the appellant's father Jothelejo Ouma who used to cultivate on it was corroborated by evidence D.W.2 Syvio Mike, that of D.W.3 Ogwok Cypriano and the appellant's demonstration to court at the *locus in quo* of eucalyptus trees on the land. None of this testimony was fundamentally shaken or destroyed by the respondents' cross-examination. I therefore find as a fact that the appellant, his father and grandfather before him, utilised the land by way of cultivation of crops.

However, the appellant admitted that the respondents, having initially been permitted to utilise the land after hiring it from his paternal uncle during the 1980s, he in 1984 asked them to vacate the land. From that moment the respondents became trespassers and in adverse possession of the land. They forcefully planted bananas and eucalyptus trees. He does not seem to have taken any action against them thereafter until the year 2013 when he filed the suit from which this appeal arises. This was after a period of 29 years of continuous adverse possession. Not having been in physical possession of the land for that long, the appellant could not maintain an action in trespass to land but rather one for recovery of land. Trespass is unjustified entry onto land in another’s possession, i.e. entering onto the land without permission, or refusing to leave when permission has been withdrawn (see *Davis v. Lisle [1936] 2 KB 434, [1936] 2 All ER 213*). When pleaded as part of an action for recovery of land, it is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership rather than possession.

It is trite law that uninterrupted and uncontested possession of land for a specified period, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see *Perry v. Clissold [1907] AC 73, at 79*). In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of *The Limitation Act.* Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v. Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*). As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto.

In the instant case, the appellant sat on his rights for nearly 29 years and his claim for recovery of the land from the respondents was extinguished by prescription. The trial magistrate therefore came to the correct conclusion. In the final result, I do not find merit in the appeal. it is dismissed with costs both of this court and of the court below, to the respondents.

Dated at Arua this 26th day of October 2017.

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Stephen Mubiru
Judge
26th October, 2017