



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 053 of 2018

In the matter between

ODIYA ANTHONY

APPELLANT

And

1. LUKWIYA SAMSON
2. KARAMA CHRIS
3. SPC OLOYA RICHARD
4. OKELLO JOHN BROWN

RESPONDENTS

Heard: 11 September, 2019.

Delivered: 26 November, 2019.

Land law—Proof of customary ownership — Possession or use of land does not, in itself, convey any rights in the land under custom occupancy should be proved to have been in accordance with customary rules accepted as binding and authoritative — Possession or use of land does not, in itself, convey any rights in the land under custom. That occupancy should be proved to have been in accordance with customary rules accepted as binding and authoritative — Under the doctrine of prior appropriation, as among appropriators of formerly unoccupied and unclaimed land, the principle of "first in time, first in right" controls such that possessory rights are determined by priority of beneficial use — The claimant must demonstrate an intent to possess the land, actual or constructive possession, and application of the land to beneficial use.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The appellant sued the respondents jointly and severally seeking recovery of approximately 122 acres of land situated at Pamin Olango village, Latoro or Wii Anaka Parish, Purongo sub-county, Nwoya County in Amuru District, a declaration that the land in dispute belongs to the estate of the late Donasiano Odiya, general damages for trespass to land, an order of vacant possession, a permanent injunction restraining the respondents from further acts of trespass onto the land, and the costs of the suit.
- [2] The appellant's claim was that his father the late Donasiano Odiya settled on the land in dispute in 1961 as the then Parish Chief of Pawat Omero. In 1964, the respondents' father too settled on adjacent land to the West, separated from the one occupied by the appellant's father by Anaka River. In 1978, the late Donasiano Odiya applied for a lease over the land he occupied but died in 1979 before completion of that process and was buried on that land. The family of the deceased continued to occupy the land nevertheless but were surprised when during the year 2004 the respondents began claiming the land to be theirs. They gave out part of the land for construction of a school and another part to a priest, without the appellant's consent. The respondents have since claimed to be in possession of a title deed to the land and have demanded that the appellant vacates the land, hence the suit.
- [3] In their written statement of defence, the respondents denied the appellant's claim. They averred that the land in dispute belonged to their late father Peter Oola Labara who occupied it from the year 1959 until his death during the year 2003. In 1969 he applied for a lease in respect of 5,000 acres but was only offered 3,500 acres. During his lifetime, the late Peter Oola Labara also gave out part of the land for construction of a school and a church but the appellant never challenged him. The appellant filed the suit only as an afterthought following the death of their late father Peter Oola Labara. It is the late Peter Oola Labara that gave a small portion of land measuring approximately 100 x 100 meters out of

the land in dispute, to the late Donasiano Odiya for purposes of establishing a homestead. Any documents used for claiming more land than that are fraudulent. They therefore counterclaimed for a declaration that they are the rightful customary owners of the land in dispute, cancellation of all documents relied upon by the appellant to claim land beyond the 100 x 100 meters strip that was given to the late Donasiano Odiya, a permanent injunction against further acts of trespass, general damages for trespass to land, an order of eviction and vacant possession, and the costs of the suit and of the counterclaim.

The appellant's evidence in the court below:

- [4] The appellant, Odiya Anthony, testified as P.W.1 and stated that his late father Donasiano Odiya occupied the land in 1961. He applied for a lease in 1978. It is in the year 2004 that the respondents encroached onto the land, gave away parts of it, stopped him from accessing and interfered with his user. P.W.2. Labol Rufina, widow of the late Donasiano Odiya, testified that the late Donasiano Odiya had lived on the land in dispute since 1961. It was infested with tsetse flies at the time and uninhabited. The late Peter Oola Labara came much later to settle in the area as their neighbour.
- [5] P.W.3 Ocaya Carlos, a son of the late Donasiano Odiya testified that his late father settled on the land in dispute in 1962. To the East of that land lived the family of Peter Oola Labara. The respondents have since prevented them from utilising their land. P.W.4 Okot Maurensio testified that it is during 1962 that the respondents' father Peter Oola Labara settled on land to the West of the one in dispute. The common boundary was River Anaka. The late Donasiano Odiya in 1978 applied for a lease and received an offer. There were no objections raised during the inspection that led to the grant of that offer There was no dispute over the land until after the death of Donasiano Odiya.

[6] The court then invoked its powers under Order 16 rule 7 of *The Civil Procedure Rules*, and section 100 of *The Magistrates Courts Act*, empowering it at any stage of the trial, to summon or call any person as a witness, if that person's evidence appears to it essential to the just decision. It is on that account that C.W.1 Aber Suzan Mildred, the District Land Officer, testified that according to the records in her custody, the late Donasiano Odiya on 14th August, 1978 applied for 122 acres of land and the land he applied for was inspected on 20th August, 1984. The application was on 19th March, 1985 forwarded to the Uganda Land Commission and no further step was taken. With regard to Peter Oola Labara he had during the year 1964 made three different applications for land at various locations in Wii Anaka, one of which was in respect of 5000 acres which he later on 20th August, 1968 withdrew due to financial constraints. He had also applied for 5000 acres but received approval for only 3,500 acres. If it is the same land in respect of which the late Donasiano Odiya submitted an application on 14th August, 1978, then it belongs to him since Peter Oola Labara had by that time withdrawn his application. His other two applications regarding land for a petrol station and another measuring 1000 x 1000 yards were approved.

The respondents' evidence in the court below:

[7] In his defence as D.W.1, the 1st respondent Lukwiya Samson testified that the land in dispute belonged to his late father Peter Oola Labara. Before his death in June, 2004 he had applied for a lease over the land. It is him that gave the appellant's father only two acres of that land. During the year 1999, their late father as well gave ten acres of land to Wii Anaka Primary School, and multiple other individuals. It is the appellant who sold part of the land to Father Lutalo. D.W.2 Okello John Brown, the 4th respondent and a younger brother to the late Peter Oola Labara, testified that the deceased settled on the land in dispute during the year 1958. The late Donasiano Odiya came as a parish Chief much later. Peter Oola Labara gave Donasiano Odiya, the appellant's father, only two acres of that land as he did to multiple other persons. Peter Oola Labara applied

for s lease over his land, it was duly inspected in the presence of Donasiano Odiya. There was no dispute.

- [8] D.W.3 Oloya Richard, a nephew of the late Peter Oola Labara testified that he came to know the appellant only during the year 2006 after he had sold part of the land to Father Lutalo. The late Peter Oola Labara had constructed a house on the land whose ruins are still visible thereat. D.W.4 Okello Emmanuel testified that he has lived in the neighbourhood since the year 1959 and knows the land in dispute to belong to the late Peter Oola Labara who settled thereon in 1958. The late Donasiano Odiya came as a parish Chief much later and Peter Oola Labara gave him only about seven acres of that land. D.W.5 Okello Emmanuel testified that the late Donasiano Odiya came to the area as a parish Chief in 1963. He requested Peter Oola Labara for land and he gave him only about five acres of that land.

Proceedings at the *locus in quo*:

- [9] The court then visited the *locus in quo* on 24th March, 2018 where the appellant showed the court the location of the grave of the late Donasiano Odiya on the land in dispute. There were homesteads, mango trees of the late Donasiano Odiya on the land in dispute. On their part, the respondents contended that these were located within the area that was given to the late Donasiano Odiya by Peter Oola Labara. The court observed that the respondents occupy land West of the road to Pakwach. The court prepared a sketch map illustrating its observations.

Judgment of the court below:

- [10] In his judgment, the trial Magistrate found that the evidence established that the late Peter Oola Labara settled in the area earlier than Donasiano Odiya. The observations at the *locus in quo* that showed the respondents were in physical possession of land West of the road to Pakwach contradicted the testimony of

C.W.1 Aber Suzan Mildred who had suggested that the land belonged to Donasiano Odiya after Peter Oola Labara withdrew his application. The letter dated 20th August, 1968 referred to as the late Peter Oola Labara's notification of the withdrawal of his application, has no probative value. It is contradicted by one dated 22nd January, 1985 seeking an extension of the lease offer and the instruction to survey dated 14th May, 1985. The land in dispute was therefore offered to the late Peter Oola Labara. The appellant has not proved on the balance of probability that he owns the land in dispute. The late Donasiano Odiya was never offered any land. The appellant did not prove that he was in actual or constructive possession of the land in dispute. He therefore failed to prove the claim for trespass. The suit was accordingly dismissed with costs to the respondents. An order of eviction was issued against the appellant.

The grounds of appeal:

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

1. The learned trial Magistrate erred in law and fact when he failed or neglected to properly evaluate the evidence before him to the effect that the appellant's father had been in possession of the suit land since 1961, and hence came to the wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he failed to enter judgement on admission in favour of the appellant describing that portion of the suit land the respondents admit belongs to the appellant, hence occasioning a miscarriage of justice to the appellant.
3. The learned trial Magistrate erred in law and fact when he failed to consider grave inconsistencies and contradictions in the defence evidence regarding the gift and size of the suit land, hence came to a wrong conclusion.
4. The learned trial Magistrate erred in law and fact when he ignored the evidence adduced at the *locus in quo* and thereby failed to declare the

appellant the lawful owner of the suit land on the Eastern side of Anaka River, hence came to a wrong conclusion.

Arguments of Counsel for the appellant:

[12] In their submissions, counsel for the appellant argued with regard to the 1st and 4th grounds of appeal, that evidence established that while the late Donasiano Odiya settled on land East of the Anaka River, the late Peter Oola Labara settled West of it. The respondent's evidence about the size of land allegedly given by the late Peter Oola Labara to the late Donasiano Odiya was contradictory. None of the could describe the boundaries of that land. Both parties relied on documents showing and incomplete process of application for a lease over the land in dispute. The claims by both parties seek to enforce on possessory rights. The appellant's evidence showed his parents had been in continuous possession of the land since 1961 until 2004 when the respondents trespassed onto part of it. Donasiano Odiya settled on land East of the Anaka River while the late Peter Oola Labara settled on land West of it. During the visit to the *locus in quo* it was established that apart from the portions the respondents gave to Wii Anaka Primary School, the Catholic Parish, and that rented out to an Indian for sorghum and cotton growing, the appellant occupied the rest of the land East of the Anaka River. The 4th respondent testified that the Indian had used the land for three years. The court should have delineated that part of the land the respondents acknowledged belonged to the appellant, the part starting from the valley and proceeding Southward, and entered judgment on admission in respect thereof. There were material contradictions in the respondents' evidence regarding the size of land allegedly given to by Donasiano Odiya by Peter Oola Labara. These contradictions were not properly evaluated. They prayed that the appeal is allowed.

Arguments of Counsel for the respondent:

[13] In response, counsel for the respondent submitted that the trial court was right to ignore inconsistencies in the respondents' case because the burden of proof lay on the appellant. The testimony of the respondents regarding their late father's occupation of the land from 1958 was corroborated by documentary evidence and observations made at the *locus in quo* where his petrol station, shops and gardens on the land. The trial court could not enter judgment on admissions since that was not the entire claim by the appellant. The appellant's claim was for 122 acres. Variations regarding the size of land given to the appellant's father, as to whether it was two or seven acres, was not material since the appellant's claim was for 122 acres. They were estimates by lay people regarding the land actually occupied by the appellant out of the land he claimed to be his. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[14] 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, S.C. C A No. 17 of 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*).

[15] 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 four

- [16] Grounds one and four will be considered concurrently. The two grounds fault the trial Magistrate with regard to his findings as to ownership based on a long period of possession. In law, ownership connotes a complete and total right over a property, i.e. all rights, powers and privileges which an individual may have or exercise over a piece of land. To amount to ownership the right claimed must be infinite and absolute. Ownership is a creation of law. It is the law that determines what land may or may not be owned by an individual or groups in society.
- [17] Ownership of land is acquired by either; purchase, inheritance, gift, transmission by operation of law, prescription or adverse possession. According to section 110 of *The Evidence Act*, when the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner. The implication of this presumption is that in the event of two competing claims of title to land and in the absence of satisfactory proof of ownership by either party or claimant; title will be awarded to the party in possession.
- [18] The appellant in his evidence and the respondents in their counterclaim each claimed to be customary owner of the land in dispute. The appellant claimed 122 acres while the respondents claimed 3,500 acres. None of the parties led evidence, either by himself or of persons who would be likely to know of the existence of customs that guided their respective acquisition of customary interest in land each of them claimed. Proof of mere occupancy and user of

unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure (see *Bwetegeine Kiiza and Another v. Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009*; *Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009*; *Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of 2010*; and *Abner, et al., v. Jibke, et al., 1 MILR 3 (Aug 6, 1984)*). Possession or use of land does not, in itself, convey any rights in the land under custom. That occupancy should be proved to have been in accordance with customary rules accepted as binding and authoritative. Since none of the parties adduced such evidence, their rival claims of ownership based on custom failed. That being the case, they could only seek a determination as to who had a superior right of possession of the land in dispute.

[19] Possession is the actual physical control over a piece of land. It is constituted by the fact that somebody is in physical control of the land with intention to control it. Possession is a question of fact to be decided on the merits of each particular case. It may be established by evidence of physical residence on the land. It may also be established by a show of some visible or external sign which indicates control over the piece of land in question. For example, in *Wuta Ofei v. Danquah [1961] 3 All ER 596*, it was held that the demarcation of the land with pegs at its four corners by the claimant was sufficient act of possession even though it was an uncultivated land. Cultivation of a piece of land, erection of a building or fence thereon, demarcation of land with pegs or beacons are all evidence of possession. A person can also be in possession through a third party such as a servant, agent or tenant.

[20] The rival claims of each of the parties are traced to their respective ancestors at a time when the land was vacant and unclaimed by any person. The court therefore had to invoke the doctrine of prior appropriation. By that doctrine, as among appropriators of formerly unoccupied and unclaimed land, the principle of "first in time, first in right" controls by prioritising possessory rights according to the time of their original acquisition. Under that doctrine, possessory rights are

determined by priority of beneficial use. The amount of land being put to a beneficial use is the measure of land that the appropriator is entitled to use in the future, as long as it does not interfere with another prior appropriation. Thus, an appropriator gains the exclusive possessory right to use the land that has been appropriated, over any subsequent appropriators and to the exclusion of subsequent appropriators. The date of the appropriation determines the user's priority to use the land, with the earliest user having a superior right.

[21] There are four essential elements of the doctrine of prior appropriation: intent, actual or constructive possession, effective beneficial use, and priority. The claimant must demonstrate an intent to possess the land, actual or constructive possession, and application of the land to beneficial use. Actual possession, also sometimes called possession in fact, is used to describe immediate physical contact while constructive possession, also sometimes called "possession in law," exists where a person has knowledge of the boundaries of the land plus the ability to control the land even if the person has no physical contact with it. A beneficial use is that which results in appreciable gain or benefit to the user. The quantity of land associated with a possessory right is determined by the pattern of use. It is against that criteria that the trial court ought to have analysed the rival claims.

i. Intent to occupy or possess the land;

[22] There must be evidence sufficient to establish an intention to possess the land itself; evidence of expression of a deliberate intention to exclude all others (*animus possidendi*). It involves the intention, in one's own name and on one's own behalf, to exclude the world at large so far as is reasonably practicable and so far as the processes of the law will allow. Not only must one show that he or she had the requisite intention to possess, but made show that such intention was clear to the world by some action or words or similar overt act. Just as it is with adverse possession, an intention to control the land, the possessor actually

believing himself or herself to be the true owner, is quite sufficient (see *Ocean Estates v. Pinder* [1969] 2 AC 19 and *Bligh v. Martin* [1968] 1 WLR 804). The intention to possess may be, and frequently is, deduced from the objective acts of physical possession.

[23] In this case intent is demonstrated by the respective applications for a lease. According to the Court witness, C.W.1 Aber Suzan Mildred, the late Donasiano Odiya on 14th August, 1978 applied for 122 acres of land and the land was inspected on 20th August, 1984. On 19th March, 1985 the application was forwarded to the Uganda Land Commission and no further step was taken. With regard to Peter Oola Labara the Court witness, C.W.1 Aber Suzan Mildred, testified that he had during the year 1964 made three different applications for land at various locations in Wii Anaka, one of which was in respect of 5000 acres which he later on 20th August, 1968 withdrew due to financial constraints. He had also applied for 5000 acres but received approval for only 3,500 acres. I therefore find that both parties adduced sufficient evidence to prove the required intention.

ii Actual or constructive possession.

[24] Although capacity for use (dominion) does not necessarily create private property ownership rights, possessory rights are created by; (i) a physical relation to the land of a kind that gives a certain degree of physical control over the land, and (ii) intent to exercise that control so as to exclude others from any present occupation. The capacity to exclude must be of a character which is protected by law or equity if someone tries to remove or interfere with that ability to exclude. Contested rights of right of occupancy based on rival claims of possession may be determined by evidence of acts of appropriation which sever the land from the public domain. An appropriative right is generally based upon physical control and beneficial use of the land. There is no hierarchy among persons claiming

only possessory rights of land other than priority date. Possessory rights are defined and perfected based on how, when, and where the land is used.

- [25] Mere possession by a finder is sufficient to provide grounds for an action against one who deprives him or her of the object with no better right than his or her own. Therefore, actual physical possession of a piece of land confers on the possessor the primary right to exclude intruders from the land. The right to exclude intruders confers on the person in possession a cause of action in trespass against intruders. Trespass to land is actionable at the suit of the person in possession of the land. "Mere possession is sufficient, against a person invading that possession without himself having any title whatever as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser" (see *Bristow v. Cormican (1878)*, 3 App. Cas. 641).
- [26] Factual possession signifies an appropriate degree of exclusive physical control. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. What must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so. In the case of vacant and unenclosed land which is not being cultivated, the slightest amount of possession would be sufficient (see *Justine E.M.N. Lutaya v. Stirling Civil Engineering Company Ltd S.C. Civil Appeal No.11 of 2002*).
- [27] Factual possession of land signifies an appropriate degree of exclusive physical control. For vast lands, possession requires knowledge of its boundaries and the ability to exercise control over them (see *Powell v. McFarlane (1977)* 38 P&CR

452). Where part of the land claimed is not under actual physical possession, there must be unequivocal evidence before court that the claimant deals with the occupied and un-occupied portions of the land, co-extensive with the boundaries, in the same way that a rightful owner would deal with it. Constructive possession of the unoccupied part of the land may be proved by evidence of appropriation and separation from adjoining land of the same character. Open, notorious, continuous, exclusive possession or occupation of any part thereof would in such circumstances constructively apply to all of it. In such cases, occupancy of a part may be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by the claimant.

[28] When the court visited the *locus in quo*, it found evidence of possession by the appellant evinced by that the location of the grave of the late Donasiano Odiya on the land in dispute. There were homesteads, mango trees of the late Donasiano Odiya on the land in dispute. The respondents contended that these were located within the undisputed area that was given to the late Donasiano Odiya by Peter Oola Labara. The court observed that the respondents as well occupied land West of the road to Pakwach, contrary to what the appellant had claimed. I therefore find that both parties adduced sufficient evidence of prove each had exclusive possession of parts of the land in dispute, West of Packwach road.

iii Effective beneficial use;

[29] The only land in respect of which possessory rights may be enforced is that which the possessor puts to beneficial use in a reasonable time with reasonable diligence. Beneficial land uses are compatible land uses which provide benefits or services to the holder as well as to the broader community. There must be evidence of actual use for some purpose that is socially accepted as beneficial. As a general rule, when land is not used for agricultural purposes, its use is beneficial when it adds some value to the land or an enterprise on that land. The

added value does not always have to be economical, but can be recreational or ecological in nature.

- [30] Importantly, use is not necessarily limited to physical use, it can also include conservation or fallowing. When part of the land is designated for the sole purpose of conservation until the possessory rights holder finds need of it, that part of the land cannot be assigned to occupied by or assigned to another claimant, even if he or she would be able to immediately put it to beneficial use, without formal assent of the possessor and compensation for losses.
- [31] For the avoidance of speculative hoarding of land, a possessory right to former public land can only be maintained and protected for land placed under beneficial use only. Possessory rights are not accompanied by a right to hoard. Beneficial use may be the only quantifiable determinant of the measure and limit of the possessory rights. Beneficial use means a use of land which is of benefit to the appropriator and to society as well. It must be for a purpose consistent with the best interests of the public, i.e. in a manner which promotes the peace, health, safety and welfare of the public. It encompasses considerations of social and economic value and efficiency of use.
- [32] Possessory rights do not last forever, especially if the land is not being put to a beneficial use by the holder of the right. Possessory rights may be terminated by notice, forfeiture or abandonment. Continued enjoyment of possessory rights over land is conditional on the ability and intention to possess. Abandonment is an intentional relinquishment of a known right. Under section 37 (2) (b) of *The and Act*, where a tenant by occupancy leaves the whole of the land unattended to by himself or herself or a member of his or her family or his or her authorised agent for three years or more, he or she is taken to have abandoned his or her occupancy.

- [33] While abandonment requires an intent by the possessor to abandon (and non-use raises a presumption of intent to abandon), forfeiture follows failure to use the land for an unreasonable period of time, regardless of the owner's intent. Intent to abandon, actual or inferred, is not an element of forfeiture. Forfeiture is the involuntary or forced loss of the possessory right, caused by the failure of the appropriator or owner of that right to do or perform some act required for its maintenance. Forfeiture in cases of this nature requires proof only of non-use, lapse of time and incapacity to exclude.
- [34] For continued enjoyment of possessory rights based on the doctrine of "prior appropriation," the fact of use is not itself sufficient: the land that is subject to the right must be put to "effective and beneficial use." By analogy drawn from section 37 (2) (b) of *The and Act*, three or more successive years of non-use (effective and beneficial use) of land will constitute a forfeiture of claims of purely a possessory nature. When the beneficial use has ceased for three or more successive years, the possessory right to the land (or a portion thereof) must be declared forfeited.
- [35] Losing the capacity to put the land to effective and beneficial use over an unreasonable period of time when coupled with loss of the capacity to exclude constitutes a conclusive proof of forfeiture of the possessory right because the capacity to exclude forms the basis from which the right to protection by law or equity springs, while beneficial use is the basis, measure and limit of a possessory right under the prior appropriation doctrine. If the land is not being put to effective beneficial use, the possessory right will expire. Forfeiture results without regard to and irrespective the possessor's intent. When an appropriator ceases to use all or a part of a possessory right arising from appropriation for an unreasonable period of time, and this is coupled with the loss of capacity to exclude, the appropriator is deemed to have forfeited the right for the part not used. The possessory right is, to that extent, considered forfeited and must immediately expire.

- [36] When possessory rights are forfeited the land which was the subject of use under such rights reverts to the public by virtue of the Constitutional doctrine of public trust embedded in article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act*, which constitutes former public land into a category of a collective asset or common property or common heritage of the citizens. It then becomes again the subject of appropriation in the manner provided by law, subject to existing priorities.
- [37] Not putting land to a beneficial use means the appropriator forfeits or no longer has a right to the land that is not being used. If the possessory right is not being used, the land is then defined as "unappropriated" and becomes available for new appropriators. Because a forfeited possessory right has reverted to the state and the state system of granting freehold or leases is the exclusive means for acquiring ownership rights from the state, an individual cannot acquire another individual's possessory right through adverse possession.
- [38] Save in cases where there is evidence of legal and extraordinary economic obstacles to exercise of the right, or other evidence that justifies the non-use, a sustained period of non-use will constitute a forfeiture of the land. Continued and unexplained non-use for an unreasonable period of time raises a rebuttable presumption of forfeiture. The presumption is imposed because of the difficulty of obtaining direct evidence of the owner's intent; the long period of non-use suggests an intent to abandon. To rebut the presumption, there must be more than statements of desires and hopes; there must be fact or conditions excusing the non-use. In the instant case, with the exception of the continued use of the part under effective control of the appellant.
- [39] In the instant case, the appellants claim was that the late Donasiano Odiya occupied the land from 1961 until his death in 1979. His family continued to occupy the land but were surprised when during the year 2004 the respondents

began claiming it as theirs and gave out part of it as a donation for construction of a school and another part to a priest, without the appellant's consent. The respondent's version on the other hand is that during his lifetime, the late Peter Oola Labara gave a small portion of land measuring approximately 100 x 100 meters out of the land in dispute, to the late Donasiano Odiya for purposes of establishing a homestead. He gave out another part of the land as a donation for construction of a school and a church, and he was never challenged by the appellant. The appellant filed the suit only as an afterthought following the death of Peter Oola Labara.

[40] From the two versions, it is clear that the Peter Oola Labara's activities complained of by the appellant occurred six years prior to his filing of the suit to challenge them. The implication is that six years before the filing of the suit, the appellant had lost the capacity to put those parts of the land that were given away by Peter Oola Labara. The appellant's capacity to put that part of the land to effective and beneficial was thus impaired. He also lost the capacity to exclude. The only question then left is whether by reason of those events he forfeited the possessory right by loss of the basis upon which the right to protection by law or equity springs, most especially since beneficial use is the basis, measure and limit of the possessory right under the prior appropriation doctrine.

iv Priority.

[41] The ultimate determination of who has the priority right comes from the date of appropriation. A person may seek to enforce a possessory only if the land is free from the claims of others with earlier appropriations. Priority of appropriation ensures that those with the oldest appropriations will be guaranteed their possessory rights while more recent right holders will lose out.

[42] According to the documents produced in evidence by C.W.1 Aber Suzan Mildred, Peter Oola Labara was the first to make applications for land in this area, which

applications he made during the year 1964. He made three different applications for land at various locations in Wii Anaka, one of which was in respect of 5,000 acres. Her claim that he later on 20th August, 1968 withdrew that application due to financial constraints was refuted by the fact that by a letter dated 22nd January, 1985 Peter Oola Labara sought an extension of the lease offer and the instruction to survey dated 14th May, 1985 in respect thereof. On the other hand the late Donasiano Odiya made his application eleven years later on 14th August, 1978 when he applied for 122 acres of land, which land was then inspected on 20th August, 1984. The timing of that application made eleven years after that of Peter Oola Labara lends credence to the respondents' version that Peter Oola Labara's appropriation was first in time and that it him who gave part of it, measuring 100 x 100 meters, to the late Donasiano Odiya.

- [43] Indeed when the court vested the *locus in quo*, it found that contrary to the appellant's claim, the respondents were in possession of land West of the road to Pakwach. It is on the same side of that road that the land donated for construction of a school and to the priest for construction of a Church, are located. It is trite that "possession is good against all the world except the person who can show a good title" (see *Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5*). Possession raises the presumption of ownership in favour of the person in possession. Possession may thus only be terminated by a person with better title to the land.
- [44] To be entitled to evict the respondents from the land, the appellant had to prove a better title to the land. The appellant did not succeed in proving a better title. For that reason the respondents as the persons in possession had to keep the property, even if a third party could have a better claim than either of them (see *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*). Where questions of the right to possession of land arise in litigation, the court is concerned only with the relative strengths of the possessory rights proved by the rival claimants. The plaintiff must succeed by the strength of his or her own right and not by the weakness of

the defendant's. The appellant did not prove a better possessory right and therefore the trial court came to the right conclusion. Accordingly, the two grounds of appeal fail.

Grounds two and three

[45] Grounds 2 and 3 as well will be considered concurrently. The two grounds fault the trial Magistrate with regard to the manner in which he dealt with contradictions relating to the size of land occupied by the appellant as a gift *inter vivos* and entitlement to a judgment in respect thereof. Having found that the appellant did not prove that he was in actual or constructive possession of the land in dispute, and hence his claim for trespass, the court dismissed the suit with costs to the respondents and issued an order of eviction against the appellant. It is contended by counsel for the appellant that the court should have delineated that part of the land the respondents acknowledged belonged to the appellant, the part starting from the valley and proceeding Southward, and entered judgment on admission in respect thereof.

[46] As regards contradictions in the size of the land acknowledged by the respondents as having been given to the late Donasiano Odiya, 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. The question of quantity is mere matter of description, if the boundaries are ascertained (see *Howe v. Bass*, 2 Mass. 380 (1807)). In their defence, the respondents acknowledged that the late Peter Oola Labara gave a small portion of land measuring approximately 100 x 100 meters out of the land in dispute, to the late Donasiano Odiya for purposes of establishing a homestead. When the court visited the *locus in quo*, it indeed found located within that area as illustrated in the sketch map, the grave of the late Donasiano Odiya, his homestead and mango trees. In their written statement of defence, the respondents counterclaimed for a declaration that they are the rightful customary owners of

the land in dispute, cancellation of all documents relied upon by the appellant to claim land beyond the 100 x 100 meters strip that was given to the late Donasiano Odiya, and a permanent injunction against further acts of trespass. It was therefore erroneous of the trial Magistrate to have ordered an eviction of the appellant, when his occupation of the specific area is un-contested. These two grounds of appeal therefore succeed in part. The order of eviction is set side.

Order:

[47] In the final result, the judgment of the court below is set side and instead the appellant's suit is demised with costs to the respondents. Judgment is entered in favour of the respondents against the appellant on the counterclaim in the following terms;

- a) A declaration that, save for the 100 x 100 meters of land given by the late Peter Oola Labara, to the late Donasiano Odiya for purposes of establishing a homestead, the appellants are in lawful possession of the rest of the land in dispute, West of the road to Pakwach.
- b) A permanent injunction issues restraining the appellant, his agents and persons claiming under them from committing further acts of trespass onto land outside the 100 x 100 meters of land given by the late Peter Oola Labara, to the late Donasiano Odiya for purposes of establishing a homestead.
- c) Since the appeal has succeeded in part, each party is to bear their own costs, both of the counterclaim and of the appeal.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : M/s Masaba, Owakukikoru-Muhumuza and Co. Advocates

For the respondent : M/s ALP Advocates.