



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 031 of 2007

In the matter between

AUMA LUCY

APPELLANT

And

1. KIDEGA MOSES

2. AUMA JOYCE

RESPONDENTS

Heard: 20 March, 2020

Delivered: 22 May, 2020.

Land Law — Communal Land Tenure — Customary land ownership recognises communal "ownership" and "use" of land and ownership of land is defined in terms of user rights. — Section 22 (1) of The Land Act —recognises that even for land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, "where the customary law of the area makes provision for it." Individuals or households may as well cause their portions of the land to be demarcated and transferred to them, of such land which in accordance with customary law, is made available for the occupation and use of that individual or household — Family communal ownership confers onto the family and not the individual members, rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land. It is a group interest that inheres in present and future generations. — "Common property" gives rise to usufructuary rights only and a legal right to manage but not own or possess, in which case the litigant sues as a steward in protection of group interests, while "collective property" gives rise to rights to private use subject to community interests, of land allocated by the community and "private property" gives right to individual or household use and management as the member may please, to the exclusion of others — Therefore, for an individual to maintain a suit in respect of communal land, the rights sought to be enforced must be

exclusive as against the community at large, such rights being independent of the rest of the members of the community and exercisable by such individual as of right.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The appellant sued the respondents jointly and severally seeking recovery of approximately four acres of land situated at Kati-kati village, Lacor Parish, Lwala-Kwar sub-county, Kilak County in Gulu District, revocation of the sale of that land by the 1st respondent to the 2nd respondent, a declaration that she is the rightful owner of the land in dispute, general damages for trespass to land, and the costs of the suit.
- [2] The appellant's claim was that she is the owner of the land in dispute under customary tenure. The land originally formed part of a bigger parcel of land that belonged to her grandfather Modesto Ouna. It is her said grandfather who gave her that part of his land. Without any claim of right, and without her knowledge or consent, the 1st respondent sold the land to the 2nd respondent who has since wrongfully taken possession of it to her detriment. At the time he purchased the land, the 2nd respondent was aware that it was still the subject of litigation before the L.C.I Court and therefore purchased it fraudulently.
- [3] In their joint written statement of defence, the respondents refuted the appellant's claim. They averred instead that the 1st respondent was a bona fide occupant of the land in dispute to which the appellant has no rightful claim. The appellant having lost the suit she filed before the L.C.I Court, the current proceedings were *res judicata* and should be terminated. The transaction of sale was in good faith and the 2nd respondent has since caused the survey of the land, and survey mark-stones are already in place. The appellant though has since then without

any claim of right prevented the 2nd respondent's planned development of the land. They prayed that the suit should be dismissed.

The appellant's evidence in the court below:

- [4] P.W.1 Auma Lucy, the appellant, testified that the 1st respondent is a relative of her late father, Okumu Peter s/o Modesto Ouna. There was no legal representative appointed following the death of her father. She was raised by her mother at Layibi but in 1991 he moved to the home of her father at Lacor on the land in dispute. She got married in 1994 but later left the marriage and returned home in 1998 only to find the 1st respondent had taken possession of her father's land. The land in dispute was shown to her as one of the assets of her late father. When she attempted to construct a house on the land, she was prevented by the 1st respondent. She complained to the clan leadership but the 1st respondent declined to attend mediation meetings until she discovered that he had sold off the land to the 2nd respondent, hence the suit.
- [5] P.W.2 Sarafino Okojo testified that he came to know the appellant as a granddaughter of Modesto Ouna, daughter of Peter Okumu. The land in dispute belonged to Modesto Ouna. The 1st respondent's family migrated onto the land during 1958 and have lived thereon since then. The appellant's father too lived on the same land. The 1st respondent prevented the appellant from occupying any part of the land and that caused the dispute.

The respondents' evidence in the court below:

- [6] In his defence, D.W.1 Kidega Moses, the 1st respondent testified that he moved to that village with his father in 1948. His father's uncle, Modesto Ouna gave his father eleven acres part of which is the land in dispute. He was born on that land in 1958, was raised on it and lived on it until he sold it off four acres during the year 2003. This was after the family had met and agreed to sell off that part of

the land and the transaction was witnessed by the local civic leaders. It is his mother as head of the family who in effect sold the land. The proceeds were used to repair the graveyard and it was accompanied by a big feast at which the appellant never showed up. Both his parents are buried on that land. The appellant only showed up later that year to sue him before the L.C.1 Court which decided in his favour. Modesto Ouna had one son, Okumu Peter, who separated from his wife in 1974. The 1st respondent's father, Ochieng Erukana, looked after Modesto Ouna in his old age because he was a widower. Okumu Peter had a son who died during childhood and four adult daughters, all of whom are married.

- [7] D.W.2 Auma Joyce, the 2nd respondent, testified that that she came to know the 1st respondent when she purchased the land in dispute from him during the year 2003. She negotiated with the 1st respondent's mother and eventually purchased four acres from her at the price of shs. 5,000,000/= The transaction involved all family members and was witnessed by the local authorities at the instance of the 2nd respondent. Shortly after she had the land inspected by the Area Land Committee, received a lease offer and caused a survey of the land, the 1st respondent's mother died. Thereafter she heard of the dispute between the appellant and the 1st respondent over the land.

Proceedings at the *locus in quo*:

- [8] The trial court did not visit the *locus in quo* but instead on its own motion, summoned a number of witnesses, as follows; ID.W.1 Abdon Pido testified that he knew the late Okumu Peter from way back in 1952. He was not survived by a widow and he never knew of any child of his. The 1st respondent's father is Ochieng Erukana. He never saw the appellant nor her mother until she commenced proceedings for recovery of the land in dispute. The land in dispute belonged to the late Ochieng Erukana and all along it was him utilising the land.

- [9] D.W.2 Onek Paul testified that Ochieng Erukana used to be his neighbour. The 1st respondent is a son of Ochieng Erukana who grew up on that village. It was only of recent that he came to know the appellant. For a long time Ochieng Erukana was in possession of the land in dispute. He and his wife were buried on that land. It is Modesto Ouna who gave him the land but he did not know for what reason. Okumu Peter was Modesto Ouna's son. ID.W.3 Okwera Charles testified that he was the L.C.1 Chairman and came to know the appellant during the year 2004 when she filed a suit in respect of the land now in dispute. He grew up on that village and knew it belonged to the 1st respondent's father who has always had a house on that land. The land is about eleven acres in all. He had never seen the appellant on that land at all and did not know her father.
- [10] ID.W.4 Okot Emmanuel testified that the 1st respondent is a son of his elder brother, Ochieng Erukana. The appellant is the daughter of his uncle, Okumu Peter, son of Modesto Ouna. During 1958 Ochieng Erukana's family migrated from Pabbo and has lived on the land in dispute since then. Ochieng Erukana raised him on that land which was being used communally. They were free to dig anywhere on the land, including the area purchased by the 2nd respondent that is now in dispute. The land belonged to their uncle, Modesto Ouna, and it is him who allowed them to settle on that land. It is part of that land that the 1st respondent sold to the 2nd respondent. When he obtained a job in 1967 he moved to Kampala with his family from where he returned in 1995, by which time Ochieng Erukana was dead. It is the 1st respondent who showed him where to settle his family on the land. He could not tell the spot where the appellant's house used to be or where her mother was buried. The appellant is now claiming the land they are occupying.
- [11] ID.W.5 Hellen Okot testified that she is the wife of ID.W.4 Okot Emmanuel whom she married in 1962. By that time the appellant's father Peter Okumu and the 1st respondent's father Erukana Ochieng both lived on that land. Peter Okumu was her paternal uncle. The appellant's mother was married to Peter Okumu but they

later separated and she went away with the appellant, who was born on that land. The appellant returned many years later as an adult. She heard Peter Okumu died as a rebel in the bush.

Judgment of the court below:

- [12] In his judgment delivered on 27th August, 2007, the trial Magistrate found that the 1st respondent and two independent witnesses, Abdon Pido and Onek Paul, denied knowledge of the appellant being the daughter of Okumu Peter and granddaughter of Modesto Ouna. However, other witnesses, P.W.2 Sarafino Okojo and ID.W.4 Okot Emmanuel, testified that they knew her to be the daughter of Okumu Peter and granddaughter of Modesto Ouna, though she was raised by her mother after she separated from her father while the appellant was still an infant. She never obtained a grant of letters of administration to the estate of the late Okumu Peter she claimed to be her father. That omission though should not be a bar to her claim. The appellant is indeed the daughter of Okumu Peter. The fact that she was raised by her mother after separation from her father could explain why some witnesses did not know her.
- [13] The trial Magistrate further found that the appellant alleged the transaction of sale was fraudulent because the 2nd respondent was aware of proceedings pending before the L.C.1 Court relating to that land, at the time of purchase. This was not evidence of dishonesty. There was no act performed by the 2nd respondent that was intended to mislead anyone. The sale occurred after the family had met and agreed to sell off that part of the land and the transaction was witnessed by the local civic leaders. Four of the five independent witnesses testified that the family of the 1st respondent has lived on the land in dispute since 1948 and that the 1st respondent was born on that land. This was land held under customary tenure. It appears because the appellant left the land during her infancy she was unable to locate the exact spot of her father's former homestead on the land and its demarcations. The land on which the 1st respondent and his

relatives live was given to them by Modesto Ouna, who never attempted to evict them during his lifetime. There is no legal basis upon which the appellant may seek to have them declared trespassers not seek recovery of the land from them after they having lived on the land since 1948. The only recourse available for the appellant is to obtain a grant of letters of administration to the estate of her late father, identify his assets and take control of them. Accordingly, the suit was dismissed with costs to the respondents.

The grounds of appeal:

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

1. The learned trial Magistrate erred in law and in fact in failing to evaluate the evidence of the respondent's side by side with that of the appellant and ignored some of the appellant's witnesses, thereby coming to a wrong conclusion and occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact in holding that the appellant failed to show the exact location and demarcation of the land she claimed which influenced his decision yet the area in dispute was properly shown by the evidence on record.
3. The learned trial Magistrate erred in law and fact in holding that fraud was not proved, which evidence was contrary to the evidence adduced.

Arguments of Counsel for the appellant:

[15] Counsel for the appellant, argued that although in his judgment the trial Magistrate observed that the court called five witnesses in all, he only evaluated that of ID.W.4 Okot Emmanuel and ignored that of the rest. That witness stated that he knew the land to have belonged to Modesto Ouna, and it is him who allowed them to settle on the land. P.W.2 Sarafino Okojo too testified that the appellant's father Okumu Peter resided on that land. ID.W.6 Hellen Okot testified

that indeed the appellant was born on that land. Had the trial Magistrate considered that evidence he would have found that the land belongs to the appellant by inheritance. The appellant's claim was the 1st respondent had fraudulently sold off four acres of that land to the 2nd respondent. This was sufficient identification of the land she claimed and it was erroneous of the trial Magistrate to have found that she did not know the exact location of the land that belonged to her father. Had he visited the *locus in quo*, he would have decided the case in favour of the appellant. The court's finding that she did not prove that the sale was fraudulent is not supported by the evidence on record. The appeal should therefore be allowed.

Arguments of Counsel for the respondents:

[16] In response, counsel for the respondents, submitted that the appeal was filed out of time. The judgment was delivered on 27th August, 2007 yet the appeal was filed in 2010 and the date of filing was altered and backdated to 2007. That notwithstanding, the first ground is too general and ought to be struck out. As regards the second and third grounds, evidence established that Modesto Ouna gave the land in dispute to the 1st respondent's father, Erukana Ochieng in 1948. He and his wife were buried on that land. By 1948 the appellant was not born yet. By 1974, the appellant's mother had separated from her husband. When she returned home in 1998 to live with the 1st respondent's brother, Robert, she was a mere licensee on the land. The suit should have been dismissed for being time barred. The 2nd respondent undertook due diligence before purchase of the land. The family of the seller and the local civic authorities were involved in the transaction. The trial court rightly found that there was no fraud involved in the transaction. The 2nd respondent has since the date of judgment in the year 2007 taken possession of the land. The appeal should therefore be dismissed.

Duties of a first appellate court:

- [17] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga* SCCA 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).
- [18] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Timeliness of the Appeal.

- [19] Regarding the argument that the appeal is incompetent for having been filed out of time, the record indicates that the notice of appeal was filed on 5th September, 2007 the record of proceedings was sent for by this court on 2nd March, 2010 and certified by the trial court on 26th April, 2010. The memorandum of appeal was filed on 4th June, 2010. According to section 79 (1) (a) of *The Civil Procedure Act*, every appeal has to be lodged within 30 days of the date of the decree or order of the court. However according to section 79 (2) thereof, in computing time for

the filing of an appeal, the time taken by court in making a copy of the decree or order appealed against or the proceedings upon which it is founded, is excluded.

[20] The record was certified on 26th April, 2010 but it is not indicated as to when it was availed to the appellant. The memorandum of appeal though was filed 39 days later, on 4th June, 2010. Time for lodgement of appeal does not begin to run against the intending appellant until the party receives a copy of the proceedings against which he intends to appeal (see *Godfrey Tuwangye Kazzora v. Georgina Katarikwenda [1992-1993] HCB 145*). In absence of evidence as to the specific date the record was made available to the appellant, I am inclined to give the appellant the benefit of the doubt and find that there is no evidence to show that it was filed out of time.

[21] It is further observed that the court summoned a total of five witnesses *proprio motu*. The court is given wide discretionary powers under both Order 18 rule 13 of *The Civil Procedure Rules* and section 100 of *The Magistrates Courts Act* to call witnesses. Such powers must be exercised judicially and reasonably and not in a way likely to prejudice either party. Once the court decides that certain evidence is essential for the just determination of the case, then it may recall a witness or witnesses to give that evidence whatever its effect is likely to be, provided that the parties are allowed to exercise their right to cross-examine any such person, and the court should adjourn the case for such a time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness. This provision is not a license to a court to summon witnesses at its own, motion who have not been summoned by either party. A judicial officer should not *proprio motu* summon witnesses not called by either party, certainly not simply for purposes of filling up a gap or lacuna in either party's case or for corroboration of the evidence, for in doing so it descends into the arena, but only because the just decision of the case requires it.

[22] That aside, there is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord, when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to narrate important relevant facts. Whereas the court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed, that jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safeguards. In the instant case, I find that the just decision of the case required the summoning of the five "independent" witnesses and that no miscarriage of justice occurred as a consequence of that ground.

All ground of appeal considered concurrently.

[23] The rest of the grounds of appeal are considered concurrently. It is common ground that the land in dispute is held under customary tenure. Customary land ownership recognises communal "ownership" and "use" of land (see section 3 (1) (f) of *The Land Act*). In communal land systems, ownership of land is defined in terms of user rights. A person does not really own land: but rights in land. Communal Land Ownership has been defined as "a system whereby land is collectively owned by an extended family, clan or community of ancestrally related people, with the control or administration vested in a leader or his appointee who may give out portions of the land to the community or non-community members to be used on an individual basis, on a more or less nucleated family basis, on a co-operative basis or through some other such recognised arrangement, for variable lengths of time" (see Edwin A. Gyasi, *The Adaptability of African Communal Land Tenure to Economic Opportunity: The Example of Land Acquisition for Oil Palm Farming in Ghana*, Africa: Journal of the International African Institute, Vol. 64, No. 3 (1994), pp. 391-405). It has also been defined as "situations where groups, communities, or one or more villages have well defined, exclusive rights to jointly own and / or manage particular areas

of natural resources such as land, forest and water.” (see Kirsten Ewers Andersen, *Communal Tenure and the Governance of Common Property Resources in Asia: Lessons from Experiences in Selected Countries*, (2011: 3).

- [24] Section 3 of *The Land Act* recognises that customary land may be recognised as belonging to a person, a family, or a traditional institution. Communal and private ownership are both forms of holding exclusive rights to land under customary tenure. In Communal ownership, rights in land are conferred on the basis of accepted group membership, and there is a degree of group control of occupation, use, and allocation or supervision of land. There is equal legal and equitable protection for communal and private ownership property interests and rights. Communally owned land includes parcels set aside for the exclusive use of a family, individual or sub-community group or other relevant social identities, under usufruct rights. Family communal ownership arises in situations where descendants of a common ancestor, usually in an extended family setup, have well defined, exclusive rights to jointly own and/or manage a particular parcel of land. Family communal ownership of land confers on each member of the family a right to use the land or a portion of it, but these rights cannot be bestowed to an outsider.
- [25] These rights can be placed in three broad categories; - (i) user rights; such as the right to access the land, draw benefits from the land or exploit it for economic benefit; (ii) control or decision-making rights, such as the rights to manage the land (plant a crop, decide what tree to cut, where to graze) or exclude (prevent others from accessing the land); and (iii) powers of alienation, such as the right to rent out, sell, or transfer the rights to others. Communal management involves collective monitoring of the land for exclusion of outsiders. Access to the land, withdrawal of benefits from the land, management of the land, exclusion by way of determining who has access and withdrawal rights, and alienation of the land is done collectively in accordance with informal customary norms or customary law.

- [26] Evidence of family communal ownership of land is to be found in; (i) a system of governance that enforces exclusive use and occupation by the family, the exclusivity being related to the rights exercised by the family and not to individualised rights. The family must have had exclusive occupation of the land from time immemorial; (ii) an established uniform system or set of customary norms that regulate possession and use of the land which, although they may be highly flexible, are certain, considered as binding and are frequently followed by members of the family. All major decisions pertaining to the land must be made by the family; (iii) beneficial occupation and use of the subject land i.e. personal and usufructuary rights (inclusivity), forming part of their inclusive communal activities; (iv) and the usufructuary rights in issue are not irreconcilable with the nature of the family's attachment to the land. It is for the latter reason that land held as family communal customary land may not be alienated without the consent of the specific family.
- [27] It was the testimony of ID.W.4 Okot Emmanuel that the late Ochieng Erukana raised him on the land now in dispute, and it was being used communally. They were free to dig anywhere on the land, including the area purchased by the 2nd respondent that is now in dispute. The land belonged to their uncle, Modesto Ouna, and it is him who allowed them to settle on that land. I therefore find that the land in dispute was for the exclusive private use of members of the two extended families; that of Modesto Ouna and that of Erukana Ochieng. No part of the land was earmarked for exclusive, individual, private use of any member of the two families. When the 1st appellant and his late mother chose to sell off a part of it, they had to involve the rest of the family. When ID.W.4 Okot Emmanuel returned with his family from Kampala, he was shown a portion of the land where to settle. I therefore find that this land comprised discrete usufruct family parcels, but access to which, whose use, management, and transfer had to be in accordance with family or community sustained norms.

- [28] Communal customary tenure is in essence a bundle of rights, which may vary from community to community. Most communities in which permanent user rights are granted allow for land inheritance. In some communities, sales of communal land are more or less still banned since ownership of land does not confer any personal individual right of ownership (see for example *Tufele Liamatua v. Mose American Samoa, Pacific Law Materials 1988*), while in others such transactions are strictly regulated by members of the family, the clan or the chiefs, where an "owner" may sell a land, if his next of kin agree or approve (see for example the Pacific Islands case of *Tereia Timi v. Meme Tong Kiribati Land Appeals No. 1 of 1996*).
- [29] Yet in others, communal control is all but practically gone. Many customary norms prevent members of the community selling community property, although each member may hold an exclusive right to land, including the right to bequeath it to heirs. In some customary regimes, sale of family parcels within the domain has long been permitted, subject to permission of the traditional authority. Communal rights in land are neither universal nor static. In some communities sales of land are widespread in, but elsewhere remain repugnant; in some communities rights have become highly individualised, while in others they remain under the control of groups.
- [30] Therefore the definition of private rights in family communal land is subject to family decision-making using informal customary norms or customary law specific to the wider community to which the family belongs. Subject to and in accordance with those norms, there may be allocation of part of the family communal land to a member of the family for their exclusive use and occupation for such period as the family may determine. Such allocation cannot be superior to the family collective title in any way, since family oversight aims at keeping the land within the family.

- [31] However, the impact of social transformation, especially the increasing commodification of land and boundaries of usufructuaries becoming more exclusively defined, a family may seek to convert part or all of its land into fully fledged private properties rather than usufructs, provided this is done in accordance with the informal customary norms or customary law. There is an increasing prevalence of land being acquired through a variety of market transactions, including purchase. However, because access to land is distinct from control of land, no sale may be approved to an individual or family for a private parcel within the communal land area until members have assured themselves that it does not encroach upon the existing individual or family usufructuary rights. This is because equity internally generally characterises customary communal tenure regimes.
- [32] In order to convert family communal title into private fee simple estates, the communal interest in the former must be modified in such a way as to ensure a good title in the latter. A prerequisite for such conversion is that the decision to modify or surrender family communal title must be made by the collective decision of the family as a whole in accordance with their customary law (see *Chippewas of Sarnia Band v. Canada (AG)*, 195 D.L.R. (4th) 135 and Jack Woodward, *Converting the communal aboriginal interest into private property*, in Lippert (ed) *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (2000) 93-102).
- [33] Section 22 (1) of *The Land Act* recognises that even for land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, "where the customary law of the area makes provision for it." Individuals or households may as well cause their portions of the land to be demarcated and transferred to them, of such land which in accordance with customary law, is made available for the occupation and use of that individual or household, (see section 22 (3) (b) of *The Land Act*). This presents the reality of limited private ownership rights existing even within communal customary

ownership. Individual and family interests to specific parts of the community property are acknowledged and nested under collective tenure as derivative rights. While permitting the alienation of private parcels from the community area or its authority, this provision at the same time leaves the definition of private rights in community lands to community decision-making or customary law.

[34] The transaction between the 1st respondent and 2nd respondent involved a shift from communal to private individual tenure or individualisation of control of four acres out of the eleven acres of land and its alienation from customary family authority, amounting to effective privatisation of the land. There was ample evidence of a collective decision by the family and the wider community to which it belongs, to cede the hitherto family communal title over four acres of that land, to the 2nd respondent's private ownership. I am persuaded by the jurisprudence from Nigeria to the effect that a sale, transfer, grant or gift of land under customary law is constituted by the handing over of the land so transferred in the presence of witnesses. The presence of witnesses is not only merely of evidential value, it is also a necessary part of the transaction. The presence of witnesses gives the transaction not only solemnity but also validity (See *Kamalu v. Ojoh* (2000) 11 NWLR (Pt.679) P.505 at p. 517 Paras D-E; *Cole v. Folami* (1956) 1. F.S.C 66 at p. 68; *Ajayi v. Olanrewaju* (1969) 1 All NLR 382 at p. 387; and *Orun-nengimo v. Egebe* (2008) 9 S.C.L.R (ph.7) pg. 82 at p. 102).

[35] It was contended by the appellant that this transaction was fraudulent and therefore the 2nd respondent did not obtain good title. Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practice to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disenabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and*

Telecommunications v. A. K. P. M. Lutaaya S.C. Civil Appeal No. 36 of 1995). It must be brought home to the person whose title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others*, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd.*, S.C. Civil Appeal No. 22 of 1992). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited* [1987] HCB 130 and *M. Kibalya v. Kibalya* [1994-95] HCB 80).

[36] It was the appellant's contention that the 2nd respondent's purchase was intended to deprive her of an interest in the land, since the 2nd respondent was aware of on-going, pending litigation between appellant and the 1st respondent at the material time. Unfortunately, this claim is misconceived. The appellant's rights in the land are usufructuary in nature. The appellant had only a usufruct restricted to the right to use, possess, and derive income from the land, but without the right to alienate. A usufructuary enjoys exclusive rights over land allotted to her, but subject to the overriding interests of the family. For the duration of the usufruct the rest of the members of the family could not interfere with her peaceful possession and use of the land subject to usufruct, for as long as that use was consistent with the group nature of the ownership and the enjoyment of the land by future generations. In the suit, the appellant did not seek protection from interference with her exclusive enjoyment of the usufructuary but sought instead to recovery of the land which in a way depends on existence of the right to exclusive possession as an owner.

[37] Although the usufructuary's right to use and to the fruits of the land (where fruits includes natural produce derived periodically from the land without diminution of its substance; products of industry such as those obtained by cultivation; and civil fruits such as rents and other kinds of revenue derived from the land), is as extensive as that of an owner, the extent of the right of use is determined by the

nature of the land and the prevailing circumstances. The usufructuary's right to enforcement of exclusive possessory rights accrues from the moment that the usufruct crystallises to a specific part of the common property. In this case the appellant's usufructuary rights were ambulatory and had never crystallised so as to attach to any specific part of this land. She had no right to exclusive possession of any part of the land.

[38] "Common property" gives rise to usufructuary rights only and a legal right to manage but not own or possess, in which case the litigant sues as a steward in protection of group interests, while "collective property" gives rise to rights to private use subject to community interests, of land allocated by the community and "private property" gives right to individual or household use and management as the member may please, to the exclusion of others. With regard to "collective property", one would be enforcing only those user rights that are based on the extent of exclusive possession of the land allocated to him or her by the community which may or may not have ripened into private property rights, since in some communities such land may not be freely alienated.

[39] Therefore, for an individual to maintain a suit in respect of communal land, the rights sought to be enforced must be exclusive as against the community at large, such rights being independent of the rest of the members of the community and exercisable by such individual as of right. Otherwise, where the rights sought to be enforced are exclusive only in the limited sense that they depend for their enjoyment upon similar rights in others, such rights are subordinate to those of the community. In the latter case, since the question is one of a common or general interest of many persons, the options available are; (i) to sue as a communal land ownership committee, incorporated under section 18 (3) of *The Land Act* (community as a legal person); or (ii) sue in a representative capacity in accordance with Order 1 rule 8 and Order 7 rule 4 of *The Civil Procedure Rules*; or (iii) initiate public interest litigation under article 50 of *The Constitution of the Republic of Uganda, 1995*, all designed for members of a community or the

public, in appropriate cases, to come forward to protect the rights of a person or persons belonging to a determinate class who, by reason of being numerous, poverty stricken, helplessness, disability, socially or economically disadvantaged persons, are unable to approach the court for relief. The appellant therefore had no basis for seeking revocation of the sale.

[40] However on the other hand, the usufructuary of a corporeal object is entitled to all its profits, i.e., natural and civil fruits as well as all other advantages of use. The usufructuary's right to fruits commences on the day of creation of the usufruct whose apportionment follows the informal customary norms or customary law specific to the family or the wider community to which it belongs. In the instant case no evidence was led as what her entitlement was, if at all such exists under their customary law, to the proceeds of the sale. The appeal against the 2nd respondent is therefore dismissed with no order as to costs.

[41] As regards the 1st respondent's decision to deny the appellant enjoyment of rights of access and user of what remained of the land, there is no evidence to show that the remaining seven or so acres underwent that transformation as well. When land is owned communally by a family, in order for exclusive possession to confer or constitute proof of ownership of a parcel, there ought to be evidence of enjoyment by the individual member of the family, of three principal rights: *usus*, the right to utilise the land for one's own purposes; *fructus*, the right to gather and use the fruits of the land; and *abusus*, the right to alienate, i.e. to sell, lease, grant as a gift, or mortgage. In contrast, individual members or smaller units of the community enjoy only the first two of these rights since theirs are usufructuary rights. Ownership is incomplete without having a right to alienate the property in issue. For all intents and purposes, the seven or so acres remain communal family property. While a collective property may be partitioned, it still is a common property as the claims of individual family members are endorsed by the family's own internal rules binding on all members of the family.

- [42] Land rights under family communal customary tenure are derived from accepted membership of the family. Extended family communal ownership of land is held in quasi-absolute ownership for life. When an allotment of land is made, it is worked by a man, his wife and his unmarried sons and daughters. Ordinarily, sons who marry and start families of their own and daughters who return from failed marriages, apply to the head of the family charged with the administration of the hereditary family land, for allotment of part of the land.
- [43] Access to land is through the right of avail which is a general right held by the family as a whole, but in which every member automatically participates. In this sense, under customary tenure of the communal type, land is "owned" by the family and the individual members enjoy only rights of user, otherwise known as usufructuary rights, based on accepted membership to the particular family. They are inclusive rather than exclusive in character, being shared and relative. They include both strong individual and family rights to residential and arable land. Rights accruing from family membership are capable of entitlement and enjoyment, hence enforceable. However, the rights conferred are purely of usufruct. A possessor of a usufruct has a right to be respected in his or her possession and should he or she be disturbed therein, to be protected in or restored to the said possession. The usufruct holder has the right to exclusive possession of a part of the land but not as owner.
- [44] Family communal ownership confers onto the family and not the individual members, rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land. It is a group interest that inheres in present and future generations.
- [45] In family communal ownership systems, the "owner" of a piece of land forming part of family communal land only has an interest or estate in the land, since

such land is collectively owned. The family is assumed to hold the complete bundle of rights, including alienation rights. Members of the family only have varying levels of usufruct rights. Usufruct is the right of enjoying a thing the ownership of which is vested in another. All members of the family have a right to use the land, the right not to be excluded from it, and a right to exclude all non-members from it. These are necessary conditions to exclude outsiders and to secure the rights of family members so that these rights cannot be taken away or changed unilaterally.

- [46] A usufruct can terminate if the members of the family agree but may also be terminated unilaterally by the usufructuary by way of an express renunciation. The usufruct may be terminated by the family as owner if the usufructuary commits waste, alienates any part of it without authority, or abuses his enjoyment in any other manner. The appellant did not commit any of these act. By denying the appellant access to the land, the 1st respondent treated the land as individual, private property, which it is not.
- [47] For any person to have *locus standi*, such person must have “sufficient interest” in respect of the subject matter of a suit, which is constituted by having; an adequate interest, not merely a technical one in the subject matter of the suit; the interest must not be too far removed (or remote); the interest must be actual, not abstract or academic; and the interest must be current, not hypothetical. The requirement of sufficient interest is an important safe-guard to prevent having "busy-bodies" in litigation, with misguided or trivial complaints. If the requirement did not exist, the courts would be flooded and persons harassed by irresponsible suits. Courts deny *locus standi* to anyone who appears to be a mere busybody or mischief maker. As a member of the one of the two families owning the land communally, the appellant did not require a grant of letters of administration in order to assert her rights.

Order:

[48] In the final result, the appeal succeeds and is accordingly allowed. The judgment of the court below is set aside. Instead judgment is entered for the appellant against the 1st respondent in the following terms;

- a) It is declared that the land in dispute is owned communally by members of the family of the late Peter Okumu S/o Modesto Ouna and the late Ochieng Erukana.
- b) A permanent injunction hereby issues restraining the 1st respondent, his agents, employees and persons claiming under him, from preventing the appellant from occupying her equitable usufructuary share of the land in accordance with their customary law, constructing a house on thereon and otherwise having quiet enjoyment of her usufruct in the land.
- c) The costs here and below are awarded to the appellant.

Delivered electronically this 22nd day of May, 2020

.....Stephen Mubiru.....
Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : M/s Donge and Co. Advocates.

For the respondents: M/s Odongo and Co. Advocates.