IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 074 of 2019

In the matter between

1. CAESAR WOKORACH OLAKA

2. MRS. KEROBINA OKIDI ALUM **APPELLANTS**

And

1. JAMES OKECH PAGAI

2. CAESAR OLOBO **RESPONDENTS**

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

Land Law *— Ownership — A temporary right of occupancy is essentially limited or transient in nature. It amounts to no more than a bare licence to occupy land on a temporary, and sometimes, short term basis and generally confers no legal state in the grantee of such a right, in and over the land in question. A temporary occupant is not entitled to occupy the land to the exclusion of others and does not have the rights of a tenant. — Although the duration of a temporary right of occupancy need not be for any fixed duration, a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership continuously for about sixteen years, cannot be said to hold such land under temporary rights of occupancy. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before — Factual possession of land signifies an appropriate degree of exclusive physical control. Possession of land requires knowledge of its boundaries and the ability to exercise control over them. — Limitation —* The *Limitation Act—The owner of the land must have actual knowledge of the adverse possession. Non-use of the land by the owner, even for a long time, won't affect his or her title, but the position will be altered when another person takes possession of the land and asserts rights over it and the person having title omits or neglects to take legal action against such person for more than twelve years.*

Evidence Law *— Section 56 (2) and (3) of The Evidence Act —, courts are empowered to take judicial notice of practices that have attained such notoriety that court would be justified in taking judicial notice of. The essential basis for taking judicial notice is that the fact involved is of a class that is so notorious or "generally known" as to give rise to the presumption that all reasonably intelligent persons are aware of it.*

Civil Procedure — *Damages* ***—*** *Trespass in all its forms is actionable per se, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. But without proof of actual loss or damage, courts usually award nominal damages.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellants jointly and severally sued the respondents jointly and severally seeking recovery of approximately 121 acres of land situated at Lapina Bar Dyang village, Puco Parish, Ogom sub-county in Pader District, general damages for trespass to land, exemplary damages, an order of vacant possession, a permanent injunction and the costs of the suit. The appellant's claim was that their father had for a long time owned the land in dispute. Upon his death, they inherited that land. The 1st respondent owns land adjacent to it. Sometime before the filing of the suit, the two respondents crossed the common boundary and trespassed onto the appellants' land, they cut down trees, burnt charcoal and opened up gardens thereon.

[2] In their joint written statement of defence, the respondents denied the appellants' claim. They instead counterclaimed for a declaration that they are the rightful owners of the land in dispute, general damages for trespass to land, a permanent injunction and costs. Their claim is that it is during the year 1960 that the 1st respondent's acquired the land in dispute, measuring approximately 300 acres, as unclaimed vacant land. The only neighbour to the West was Acona Stefano. During 1961, the 1st appellant's father Olaka Lucibo and his wife Lupira Maliza (sister to the 1st respondent) requested him for temporary occupancy of part of

the land pending the performance of some rituals and their eventual their return to their home at Lutyek, in Pader Town Council. They vacated the land later that year leaving behind two of their children who as well vacated the land during or around 1977. It is only during the year 2011 that the 1st appellant forcefully occupied part of the land and constructed a house and pit latrine thereon. The appellants now occupy six acres of the land but wrongfully claim the rest of the over 122 acres.

[3] In their reply to the counterclaim, the appellants contended that the land in dispute used to be a hunting ground controlled by their grandfather Lulyel until around 1957 when it was converted into farmland, free for any interested person. It is on that basis that the 1st appellant's father Olaka Lucibo migrated onto that land from Olam with his wife Lupira Maliza. The 1st respondent occupies the Western part of the land and it shares a common boundary with the land in dispute, marked by a cattle track to River Agago. The appellants own approximately 121 acres of the land save that the respondents have since the year 2011 unlawfully interfered with their activities thereon.

The appellant's evidence in the court below:

[4] P.W.1 Caesar Wokorach Olaka, the 1st appellant, testified that the 2nd appellant is his sister-in-law and they are joint owners of land in dispute, which measures approximately 122 acres. It belonged to their late grandfather Lulyel as a hunting ground but in 1957 it was converted to farmland after the wild animals were dissipated. The dispute only erupted during the year 2007 upon the widespread people's return from the IDP Camps. His mother, Lupira Maliza is a sister to the 1st respondent James Okech Pagai. Together they migrated with his father Olaka Lucibo onto the land in 1961. His father Olaka Lucibo lived on the land and was buried thereon when he died. They vacated the land with his mother Lupira Maliza in 1988 due to cattle rustling and insurgency. The 1st respondent's land is

to the East of the one in dispute. The common boundary that side is a cattle track to River Agago.

[5] P.W.2 Kerobina Okidi Alum, the 2nd appellant, testified that the 1st appellant is her brother in law and together they own the land in dispute measuring approximately 122 acres. It was previously a hunting ground controlled by the late Lulyel. In 1957 he permitted whoever was interested to occupy any part of it. It is on that basis that her father in law Olaka Lucibo occupied the area now in dispute. The 1st respondent followed later in 1961 to occupy land to the East of that occupied by Olaka Lucibo. The common boundary was a cattle track to River Agago. They lived on the land from 1958 and only vacated it temporarily in 1988 due to insurgency. Upon return during the year 2011 the respondent's began trespassing onto their land.

[6] P.W.3 Okot John, a neighbour to the East of the land in dispute, testified that Lupira Maliza was his aunt. The 1st appellant's father occupied the land by the time the witness migrated to live in its neighbourhood during the year 1959. The land was unclaimed and vacant when Olaka Lucibo settled thereon in 1958. The 1st respondent's land is to the East of the one in dispute. The dispute over the land began in the year 2007 when the 1st respondent sold of the portion traversed by the cattle track and began claiming that belonging to the appellants. P.W.4 Obote Masimilino, testified that he is a neighbour to the West of the land in dispute. He settled in the neighbourhood of that land in 1966 together with his father Alipayo Odyamo. The appellants' father acquired the land in dispute during the year 1958. The 1st respondent's land is to the East of the one in dispute. The land in dispute belongs to the 1st appellant. It is during the year 2009 after the insurgency that the 1st respondent began trespassing onto the land now in dispute.

[7] P.W.5 Otim Biasali, a neighbour to the North of the land in dispute testified that Olaka Lucibo had settled on the land in dispute by 1958. Its boundary to the East

was cattle track from Dago Dwong to River Agago. The 1st respondent followed later to occupy land to the East of that occupied by Olaka Lucibo. It is during the year 2005 that the 1st respondent crossed the common boundary and began cultivation on the appellants' side of the land. The appellants returned to the land in the year 2011. P.W.6 Odongo Aldo Olaro, the L.C.1 Chairman testified that in dispute testified that Olaka Lucibo had settled on the land in dispute by 1958. Its boundary to the East was cattle track from Dago Dwong to River Agago. The 1st respondent followed later to occupy land to the East of that occupied by Olaka Lucibo. The 1st respondent later during the year 2008 crossed the common boundary an encroached onto the appellants' land. This was after he had sold the part comprising the cattle track to a one Opiyo. He attempted unsuccessfully to mediate the dispute in the year 2010 an thereafter.

The respondent's evidence in the court below:

[8] In his defence as D.W.1, James Okech Pagai, the 1st respondent testified that he acquired the approximately 300 acre piece of land from his father Lulyeri in 1960. He also gave the 1st appellant's father, Olaka Lucibo, to the West of the land. The common boundary is marked by Shea nut trees and other species of trees bearing distinguishing marks affixed in 1960. He also planted a palm (*Tugu*) tree along the boundary. It is him who permitted his sister, Lapura Maliza, wife of the 1st appellant's father Olaka Lucibo, temporary stay on approximately three acres on the Western part of the land. When Lapura Maliza returned to her home, she left behind her husband and two of her daughters. Upon his death, Olaka Lucibo was buried on that land. The two daughters vacated the land in 1977 and returned to their mother's home. The land reverted to him. It is during the year 2011 that the 1st appellant forcefully occupied approximately six acres of the land and constructed a house thereon. It is on that basis that he claims the rest of the 121.9 acres.

[9] D.W.2 Caesar Olobo, the 2nd respondent, testified that it is his step-father, the 1st respondent, who gave him the land he is occupying during the year 2012. His step father told him that Lapura Maliza had occupied the land temporarily during the year 1961 but had returned to her marital home in Olam village later that year, and subsequently to Lutyek. She was followed by the children she had left behind following the death of her husband, Olaka Lucibo, during the year 1977. It is during the year 2011 that the 1st appellant left Lutyek and forcefully occupied approximately six acres of the land and constructed a house thereon.

[10] D.W.3 Otto John, a neighbour to the North of the land in dispute testified that it belongs to the 1st respondent. It is the 1st respondent who gave a portion of it to his sister Lapura Maliza and her husband Olaka Lucibo. The latter died later and was buried on that land while the former returned with her children to her marital home in Lutyek. The 1st respondent has thus occupied the land uninterrupted from 1977 until the return of the 1st appellant in the year 2011 claiming ownership of the land. This land is separated by a footpath from that occupied by the 1st Respondent.

[11] D.W.4 Oyoo Martin testified that he is a neighbour of the 1st appellant at Lutyek, where they both reside and at one time he saw Olaka Lucibo living there. It is the 1st respondent who temporarily gave a portion of the land in dispute to his sister Lapura Maliza and her husband Olaka Lucibo. The latter died later and was buried on that land while the former returned with her children to her marital home in Lutyek. The common boundary during the period of their occupancy was marked by trees bearing distinguishing marks. The appellants have never owned land in the location under dispute. It is during the year 2011 that the 1st appellant left Lutyek, returned to the land in dispute and began claiming it as his own. D.W.5 Ayero Hellen testified that she is a neighbour to the West of the land in dispute. She has lived at Lapina Bardyang village since 1978 but has never seen the appellants occupy any part of the land in dispute. It is only during the year

2011 that the 1st appellant began claiming it as his own, yet he had been living in Olam since 1983. The 1st appellant's land is at Lutyek.

Proceedings at the *locus in quo*:

[12] The court visited the *locus in quo* on 19th June 2019 where it observed that there was no evidence of occupancy by the 2nd appellant. There was a house recently constructed by the 1st appellant. The boundaries mentioned by the respondents in their testimony were shown to the court. The court observed the Shea trees had old markings. The court prepared a sketch map indicating the location of debris of the appellants' former homestead, more or less in the middle upper-third aspect of the land in dispute. The boundary demonstrated by both parties is consistent on the Northern side; is separated by a few metres on both the Eastern and Southern side;- that demonstrated by the respondents being of a wider perimeter that that of the appellants; to the West is where the widest disparity is;- whereas that of the appellants excludes land occupied by neighbours Lugune Jibiria, P.W.4 Obote Masimilino and P.W.6 Odongo Aldo Olaro where the only neighbours beyond it is Okello S/o Acona Stefano, the one demonstrated by the respondents includes the three neighbours. The location of the graves, the appellants' house and the cattle track to River Agago were not indicated.

Judgment of the court below:

[13] In his judgment delivered on 22nd August, 2019, the trial Magistrate found that the mere presence of graves of one's relatives is not proof of customary inheritance of the land on which the graves are located. For some reason Olaka Lucibo left his land in Lutyek and lived for a short time with his in-laws on the land in dispute. When he died he was buried thereon. The 2nd appellant left the land due to insurgency in 1988. The appellants claimed the trespass began in the year 2007 yet they filed the suit in 2017. The suit was barred by limitation since time

began to run in 1988 when the appellants vacated the land. The respondents occupied the land originally given to Lapura Maliza. They have had adverse possession since then. The appellants lost any claim they may have had to the land by abandonment. During the visit to the *locus in quo*, the appellants could not demonstrate the boundaries of the land they claimed to be theirs. On the other hand, the respondents' evidence fit the observations made by court during that visit. The evidence has established that the land belongs to the respondents. Therefore, the respondents are not trespassers on the land. The suit was dismissed with costs. Judgment was entered in favour of the respondents on the counterclaim. The respondents were declared rightful owners of the 300 acres of land in depute, they were awarded general damages for trespass to land in the sum of shs. 8,000,000/= with interest thereon at 8% per annum. An permanent injunction order restraining the appellant from further acts of trespass was issued and the costs of the counterclaim were awarded to the respondents.

The grounds of appeal:

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

1. The learned trial Magistrate erred in law and fact when he failed to find that the appellants are the lawful customary owners of the suit land thereby arriving at wrong decision.
2. The learned trial Magistrate erred in law and fact when he ignored the visible evidence of possession of the suit land by the appellants and their relatives thereby arriving at a wrong decision.
3. The learned trial Magistrate erred in law and fact when he failed to determine the boundary between the parties thereby occasioning a miscarriage of justice.
4. The learned trial Magistrate erred in law and fact when he held that the appellants' suit was barred by limitation whereas not, thereby arriving at a wrong decision.

5. The learned trial Magistrate erred in law and fact when he ignored the evidence of disability on record and held that the respondents were adverse possessors of the suit land thereby occasioning a miscarriage of justice.
6. The learned trial Magistrate erred in law and fact when he awarded the respondents general damages of shs. 8,000,000/= without any evidence on record thereby occasioning a miscarriage of justice.
7. The learned trial Magistrate erred in law and fact when he failed to properly conduct proceedings at the *locus in quo* and imported his own facts as evidence of features observed thereat whereas not thereby arriving at a wrong decision.

Arguments of Counsel for the appellants:

[15] In their submissions, counsel for the appellants argued that although the respondents claimed that Lapura Maliza's two children later followed her to Olam village after she abandoned the land, the appellants pleaded and proved that she never left the land until she was displaced initially briefly by Karimojong cattle rustlers in 1980 and later by the Kony insurgency in 1988. Her said two children were buried on the land in dispute upon their demise. The respondents in their counterclaim pleaded that the appellant's trespass began in 2011. The appellants on their part pleaded that the respondent's trespass began in 2009. Therefore the suit filed in 2017 from either perspective was not time barred. The respondent's trespass only began in 2019 after the insurgency. The insurgency ended in the year 2006 yet the trial Magistrate erroneously found that it had ended in 2004 thereby failing to take it into account as a disability for tolling the limitation clock. On the land the appellants had graves of their relatives, re-occupied the land in 2011, re-established gardens, constructed a permanent house and a pit latrine thereon, without any objection from the respondents. The appellants therefore are in possession of the land and not the respondents. The appellants never abandoned the land but were forced off the land by insurgency and returned as

soon as it was safe for them to do so. The evidence established that before the insurgency, both parties had lived as neighbours. The dispute began only after the insurgency over a common boundary, yet the trial court failed to make a proper finding as to its true location. There was no evidence to support the claim that the land in dispute was given to Olaka Lucibo temporarily.

[16] Counsel argued further that the location of the graves, the appellants' house and the cattle track to River Agago were not indicated on the sketch map drawn at the *locus in quo*, yet they were material to the decision and visible to the court. Contradictions in the respondents' evidence regarding the identity of the neighbours to the West of the land, hearsay evidence of the 2nd respondent, and failure to explain the absence of the palm (*Tugu*) tree claimed to have been planted by the 1st respondent to mark the boundary. That distinctive marks existed on the Shea trees 59 years after they were etched is unbelievable. The trees too could not be the common boundary since they are located beyond land occupied by multiple neighbours to the land in dispute, including P.W.4 Obote Masimilino and P.W.6 Odongo Aldo Olaro. The proceedings at the *locus in quo* were not recorded. The court should have taken judicial notice of customary inheritance practices in favour of the appellants. The award of general damages was erroneous and the quantum unjustified. Instead it is the respondents who have trespassed onto the land since the year 2009 by cutting down trees and burning charcoal. The appellants should be compensated by an award of general damages of shs. 1,000,000/= per acre for each year of trespass, hence shs. 121,000,000/= for the ten years' trespass. The appeal ought to be allowed.

Arguments of Counsel for the respondents:

[17] In response, counsel for the respondents submitted that the appellants abandoned the land that had been given to their parents way back in 1977, only to return during the year 2011. Their claim was barred by limitation and the appellants' rights accordingly terminated by the respondents' adverse

possession. By the time the appellants sought to forcefully re-occupy the land after 53 years, it is the respondents who were found in possession. During the visit to the *locus in quo*, the appellants attempted to demonstrate the location of the boundary to their land but this was visibly within the respondents' land. The proceedings thereat were undertaken in accordance with the established procedure and should not now be challenged on appeal. The fact that the appellants' trespass was wilful justified the award of damages and the quantum. The appeal should be dismissed.

Duties of a first appellate court:

[18] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[19] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate’s findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Grounds one and two; Courts' findings on ownership and possessions:

[20] In the first and second grounds of appeal, the trial court is criticised as having made wrong findings on ownership and possession by the respondents. The appellants' version was that the land in dispute used to be a hunting ground controlled by their grandfather Lulyel until around 1957 when it was converted into farmland, free for occupation by any interested person. It is on that basis that the 1st appellant's father Olaka Lucibo migrated onto that land from Olam village Lutyek, in Pader Town Council, with his wife Lupira Maliza. The 1st respondent occupies the Western part of the land and it shares a common boundary with the land in dispute, marked by a cattle track to River Agago.

[21] On the other hand, the respondents' version was that it was during the year 1960 that the 1st respondent acquired the land in dispute, measuring approximately 300 acres, as unclaimed, vacant land. The only neighbour to the West was Acona Stefano. During 1961, the 1st appellant's father Olaka Lucibo and his wife Lupira Maliza (sister to the 1st respondent) requested him for temporary occupancy of part of the land pending the performance of some rituals and their eventual return to their home at Lutyek, in Pader Town Council. They vacated the land later that year leaving behind two of their children who as well vacated the land during or around 1977.

[22] Common to the two versions is that the 1st appellant's parents migrated from Olam village Lutyek, in Pader Town Council and occupied the land in dispute sometime during or around 1960. Whereas the appellants contend it was a permanent occupancy and they never left until 1988 due to insurgency, the respondents contend it was only temporary and they had all vacated by 1977. It was the testimony of P.W.1 Caesar Wokorach Olaka the 1st appellant, that they vacated the land with his mother Lupira Maliza in 1988 due to cattle rustling and insurgency. P.W.2 Kerobina Okidi Alum the 2nd appellant testified that they lived on the land from 1958 and only vacated it temporarily in 1988 due to insurgency.

[23] On the other hand, D.W.1 James Okech Pagai, the 1st respondent testified that when the two daughters vacated the land in 1977 and returned to their mother's home, the land reverted to him. The testimony of D.W.2 Caesar Olobo is hearsay on this point. D.W.3 Otto John, a neighbour to the North testified that when Olaka Lucibo died, he was buried on that land in dispute while the former returned with her children to her marital home in Lutyek. The 1st respondent has thus occupied the land uninterrupted from 1977. D.W.5 Ayero Hellen testified that she has lived at Lapina Bardyang village since 1978 but has never seen the appellants occupy any part of the land in dispute.

[24] Although in his notes taken during the visit to the *locus in quo* the trial Magistrate never recorded the presence of multiple graves of the appellants' deceased relatives on the land, he adverted to that fact in his judgment. P.W.1 Caesar Wokorach Olaka the 1st appellant testified they were graves of his father, Olaka Lucibo, uncle Alberto Opiyo and other relatives. This was corroborated by P.W.2 Kerobina Okidi Alum the 2nd appellant. P.W.5 Otim Biasali, a neighbour to the North testified that he attended those burials. Alberto Opiyo was buried in 1975 while Olaka Lucibo was buried in 1977. In his defence, D.W.1 James Okech Pagai, the 1st respondent admitted in his witness statement that Alberto Opiyo was buried there in 1961 but under cross-examination said it was in 1970 and two of his grandchildren too were buried on the land, although under protest.

[25] A temporary right of occupancy is essentially limited or transient in nature. It amounts to no more than a bare licence to occupy land on a temporary, and some times, short term basis and generally confers no legal state in the grantee of such a right, in and over the land in question. A temporary occupant is a licensee and not a tenant. A temporary occupant is not entitled to occupy the land to the exclusion of others and does not have the rights of a tenant. Although the duration of a temporary right of occupancy need not be for any fixed duration, a person in possession of land in the assumed character of owner and exercising

peaceably the ordinary rights of ownership continuously for about sixteen years, cannot be said to hold such land under temporary rights of occupancy.

[26] A gift *inter vivios* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift. The number of graves of the appellants' deceased relatives on the land, when such deaths did not occur within a short period of time, combined with the long period of occupancy is more consistent with the appellants' version than the respondents' claim of temporary occupancy. The nature of the appellants' possession in the instant case is more consistent with ownership than a license.

[27] Although it is trite law that all rights and interests in unregistered land may be lost by abandonment, the fact of abandonment is constituted by the intentional relinquishment of possession without vesting ownership in another, without intent to return and repossess the property or exercise proprietary rights therein. Both P.W.1 Caesar Wokorach Olaka the 1st appellant and P.W.2 Kerobina Okidi Alum the 2nd appellant testified that the late Olaka Lucibo lived on the land with his family from 1958 until his death in 1977 while his wife Lupira Maliza and the rest of the family continued to live thereon until the insurgency forced them off in 1988. This is refuted by the 1st respondent who contends that they had all vacated by 1977 and did not return for the next 34 years. The respondent's version was disproved by the presence of visible debris of the appellants' former house on the land which is more consistent with recent than ancient possession.

[28] Therefore, when the appellants vacated the land as a result of the insurgency, that did not terminate their ownership. Involuntary abandonment of a holding does not terminate one’s interest therein, where such interest existed before (see *John Busuulwa v. John Kityo and others C.A. Civil Appeal No. 112 of 2003*). The temporary abandonment of the land by the appellants in the instant case not

having been voluntary, their rights as owners were revived when they returned to the land in 2007 after the insurgency.

[29] The appellants claimed the land under the Acholi law of customary inheritance. Although the onus of proving customary inheritance begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition of the property of the deceased in accordance with those rules, under section 56 (2) and (3) of *The Evidence Act,* courts are empowered to take judicial notice of practices that have attained such notoriety that court would be justified in taking judicial notice of (see *Geoffrey Mugambi and two others v. David K. M'mugambi and three others, C.A. No. 153 of 1989 (K)*. A court can use this doctrine to admit as proved such facts that are common knowledge to a judicial professional or to an average, well-informed citizen. Under these provisions, the courts take cognisance or notice of matters which are so notorious or clearly established that formal evidence of their existence is unnecessary, and matters of common knowledge and everyday life.

[30] The essential basis for taking judicial notice is that the fact involved is of a class that is so notorious or "generally known" as to give rise to the presumption that all reasonably intelligent persons are aware of it. A court may take judicial notice, i.e. accept a statement as true without formal proof where the statement; (a) would be considered as common knowledge without dispute among reasonable people, or (b) is capable of being shown to be true by reference to a readily accessible source of indisputable accuracy. A fact is notorious in the sense of being of a class so generally known as to give rise to the presumption that all persons are aware of it (see *Holland v. Jones (1971) 23 CLR 149 at 153* and D Byrne, J d Heydon, *Cross on Evidence*, 3rd Aust. Ed., 1986 at 112). The reference to "all persons" need not literally mean "everybody"; in an appropriate case it can mean all persons in a particular area or locality, or all persons of a particular background, calling or profession (see *Cross on Evidence*, 3rd Aust.

Ed., 1986 at 101). When a court takes judicial notice of something, then there is no need to call evidence in that regard (see *R v. Simpson [1983] 3 All ER 789; [1983] 1 WLR 1494; (1984) 78 Cr App R 115; [1984] Crim LR 39*).

[31] It is a fact so generally known as to give rise to the presumption that all reasonably intelligent persons are aware of it that in Acholi traditional custom, death of a propertied member of the family results not in inheritance but rather in a rearrangement of duties and of rights of participation in the produce of the land or rights of usage of the land itself. The land is re-allotted according to the rules of customary intestacy law. What follows is not inheritance but re-allotment in accordance with settled rules generally fixed for all. In each generation, the rules of customary intestacy law settles the estate upon the eldest son (typically where the deceased is male) or to the eldest daughter (typically where the deceased is female) or sole surviving child, in such a way that it devolves to him or her undivided but subject to provisions of user for the widow, the daughters, younger sons, and other close relatives.

[32] This is an established pattern of behaviour that can be objectively verified within the Acholi customary social setting or communities that it applies indiscriminately to men and women. It is a practice which is seen by the communities themselves as having a binding quality. It is of immemorial antiquity, certain and reasonable, obligatory, not repugnant to statute law, though it may derogate from the common law concept of inheritance. It is a practice so vital and an intrinsic part of the customary socio- economic system of the Acholi that it is treated as if it were law. It is a valid custom that this court can take judicial notice of. In that regard, upon the death of her mother, the land in dispute devolved to the respondent under the Acholi customary intestacy law. The appellants are biological son and daughter-in-law respectively of the late Olaka Lucibo and his wife Lupira Maliza, the previous owners of the land. They had the right to re-possess the land under the Acholi law of intestacy. The court therefore misdirected itself when it decided otherwise. For the foregoing reasons the two grounds of appeal succeed.

Grounds four and Five ;Failure to take into account the law of limitation and disability:

[33] In grounds four and five of appeal, the trial court is faulted for its failure to take into account the law of limitation and disability. In suits for recovery of land time begins to run from the date of adverse possession (see section 16 of *The Limitation Act*). In their plaint, the appellant's claimed that the respondent's trespass began in the year 2009, while on the other hand in their counterclaim, the respondents claimed to have been in adverse possession from the year 1977 when the last of the Olaka Lucibo's children followed their mother Lupira Maliza back to Olam village, Lutyek, in Pader Town Council.

[34] Factual possession of land signifies an appropriate degree of exclusive physical control. Possession of land requires knowledge of its boundaries and the ability to exercise control over them. In respect of claims over adjacent unoccupied land, there should be evidence that the claimant deals with the cleared and un-cleared portions of the land, co-extensive with the boundaries, in the same way that a rightful owner would deal with it Once there is evidence of open, notorious, continuous, exclusive possession or occupation of any part thereof as would 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. The possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under *The Limitation Act*. The owner of the land must have actual knowledge of the adverse possession. Non-use of the land by the owner, even for a long time, won't affect his or her title, but the position will be altered when another person takes possession of the land and asserts rights over it and the person having title omits or neglects to take legal action against such person for more than twelve years.

[35] Adverse possession capable of vitiating a title is one that is peaceful, actual, hostile, open, notorious, continuous, uninterrupted and exclusive in respect of the

entire land in issue, for more than twelve years (see *Kintu Nambalu v. Efulaimu Kamira [1975] HCB 222* and *Buckinghamshire County Council v. Moran [1990] Ch. 623*). There was no evidence of what activities the respondents undertook on the land formerly occupied by the appellants to constitute factual possession. Indeed the respondent's version was disproved by the presence of visible debris of the appellants' former house on the land which was consistent with their more recent possession as they claimed, as opposed to the ancient possession as claimed by the respondents. User of the land by the respondents of about 42 years (from 1977 to June, 2019 when the court visited the *locus in quo*), interrupted only by the period of insurgency, combined with the natural elements would have decimated such debris to non-existence.

[36] The fact that such debris of the appellants' former homestead was found on the land proved that the respondents never at any time following the departure of the appellants at the break-out of insurgency, did they exercise open, notorious, continuous, and exclusive possession or occupation of any part thereof. Their wrongful activities commenced only at the end of the insurgency in the year 2009 as claimed by the appellants. The suit was filed 8 years later, hence it was not barred by limitation. For the foregoing reasons the two grounds of appeal succeed.

Ground three and seven; errors in conducting proceedings at the *locus in quo.*

[37] In grounds three and seven of the appeal, the trial court is criticised for the manner in which it conducted proceedings at the *locus in quo* proceedings and its findings as to the location of common boundary between the adjoining parcels of land. Being a procedure undertaken pursuant to Order 18 rule 14 of *The Civil Procedure Rules,* proceedings at the *locus in quo* are an extension of what transpires in court. They are undertaken for purposes of inspection of a property or thing concerning which a question arises during the trial. For the inspection of immovable property, objects that cannot be brought conveniently to the court, or

the scene of a particular occurrence, the court may hold a view at the *locus in quo*. According to section 138 (1) (b) of *The Magistrates Courts Act* and Order 18 rule 5 of *The Civil Procedure Rules*, evidence of a witness in a trial should ordinarily be taken down in the form of a narrative, and this by implication includes proceedings at the *locus in quo*.

[38] Therefore, at the *locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court (see *Karamat v. R [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; [1956] 40 Cr App R 13*). Evidentiary statements made under examination should be noted in the record to the extent they can be assumed to be of significance in the case. The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a *locus in quo*. The record in the instant case does not disclose if any witnesses were sworn and if any questions were asked by any of the parties at the *locus in quo* concerning what the court ultimately observed. As matters stand, the observations made in the sketchy notes and the illustrations made on the sketch map are hanging, not backed by evidence recorded from witnesses.

[39] Nevertheless, a sketch map drawn at the *locus in quo* is not substantive but only demonstrative evidence. Being only demonstrative evidence, it is neither testimony nor substantive evidence. The Court is not free to draw independent conclusions from it as a demonstrative aid but is only free to utilise it to better understand or remember the evidence of a witness from which the actual conclusions of fact will be drawn. It can never take the place of real or oral evidence. Preparing an inaccurate one therefore is not fatal if the oral evidence is clear. In the instant case the oral evidence is very clear. The omission was therefore not fatal.

[40] In any case, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice.

[41] Common to the two versions in this case is that the 1st appellant's parents migrated from Olam village Lutyek, in Pader Town Council and occupied the land in dispute sometime during or around 1960. The only other question that had to be determined then is the location of the common boundary between the land occupied by the two parties. The appellants' version was constituted by the testimony of P.W.1 Caesar Wokorach Olaka, the 1st appellant, who stated that that the 1st respondent's land is to the East of the one in dispute. The common boundary that side is a cattle track to River Agago. P.W.2 Kerobina Okidi Alum, the 2nd appellant, testified that the 1st respondent has since 1961 occupied land to the East of that occupied by Olaka Lucibo. P.W.3 Okot John, a neighbour to the East of the land in dispute, testified that the 1st respondent's land is to the East of the one in dispute. P.W.4 Obote Masimilino, testified that he is a neighbour to the West of the land and that the 1st respondent's land is to the East of the one in dispute. P.W.5 Otim Biasali, a neighbour to the North of the land in dispute testified that the common boundary between the parties is to the East and was cattle track from Dago Dwong to River Agago. The 1st respondent occupied land to the East of that occupied by Olaka Lucibo. P.W.6 Odongo Aldo Olaro, the L.C.1 Chairman testified that Its boundary to the East was a cattle track from Dago Dwong to River Agago. The 1st respondent occupyies land to the East of that occupied by Olaka Lucibo.

[42] On the other hand, the respondents' version was constituted by the testimony of D.W.1 James Okech Pagai, the 1st respondent who stated that it is him who gave the 1st appellant's father, Olaka Lucibo, land to the West of that he was occupying. The common boundary was marked by Shea nut trees and other species of trees bearing distinguishing marks affixed in 1960. He also planted a palm (*Tugu*) tree along the boundary. D.W.3 Otto John, a neighbour to the North of the land in dispute testified that the land occupied by the appellants was separated by a footpath from that occupied by the 1st respondent. D.W.4 Oyoo Martin testified that he is a neighbour of the 1st appellant at Lutyek the common boundary between the appellants and the respondents during the period of their occupancy was marked by trees bearing distinguishing marks.

[43] Analysis of the evidence reveals that in both versions, it is common ground that the land occupied by the appellants was to the West of that occupied by the respondents. The appellants were consistent that the common boundary between the two parcels of land was a cattle track to River Agago. In the respondent's version, two types of boundaries were referred to; according to both D.W.1 James Okech Pagai and D.W.4 Oyoo Martin, by Shea nut trees and other species of trees bearing distinguishing marks while according to D.W.3 Otto John it was a footpath.

[44] The sketch map shows that the Shea nut trees and other species of trees bearing distinguishing marks referred to by both D.W.1 James Okech Pagai and D.W.4 Oyoo Martin is West of the location of debris of the appellants' former house and therefore separates the land in dispute from Okello S/o Acona Stefano. This therefore is not the boundary between the respondents and the appellants which should be to the East of the location of debris of the appellants' former house. The implication therefore is that the true boundary is that mentioned and demonstrated by the appellants, the cattle track to River Agago. Although not indicated as such on the sketch map, it is to the East of the location of debris of the appellants' former house. The court therefore misdirected itself

when it decided otherwise. For the foregoing reasons the two grounds of appeal succeed.

Ground 6; the award and quantum of general damages:

[45] Ground six of appeal concerns the award and quantum of general damages. Trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be "at large", that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.

[46] *Halsbury'sLaws of England*, 4th edition, vol. 45, at para 1403, explains five different levels of damages in an action of trespass to land, thus; (a) If the plaintiff proves the trespass he is entitled to recover *nominal damages*, even if he has not suffered any actual loss; (b) if the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss; (c) where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use; (d) where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded; and (e) if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

[47] In *Halsbury's Laws of England*, 4th Ed., Vol. 45 (2), (London: Butterworth's, 1999, at paragraph 526), the law on damages for trespass to land is addressed thus:

"a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use ..... Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

[48] The defendant's conduct is thus key to the amount of damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was wilful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well. In the instant case no evidence was led regarding the total acreage of the appellant's land wrongfully occupied by the respondents. Considering that this was wilful trespass and guided by the degree of destruction, I will award substantial damages of shs. 15,000,000/= per annum which translates into shs. 165,000,000/= for the last eleven years, to be paid jointly and severally by the respondents.

Order:

[49] In the final result, the appeal succeeds on all grounds and is accordingly allowed. The judgment of the court below is set aside. Instead the counterclaim is dismissed and judgment is entered for the appellants against the respondents jointly and severally in the following terms;

a) The appellants are declared the rightful customary owners of the land in dispute.
b) The common boundary between their land and that of the respondents is the location of the cattle track from Dago Dwong to River Agago.

c) A permanent injunction hereby issues restraining the respondents, their agents, employees and persons claiming under them, from further acts of trespass onto the appellants' land, West of the location of the cattle track from Dago Dwong to River Agago.
d) General damages of shs. 165,000,000/= for trespass to land.
e) Interest on the above sum at the rate of 8% per annum, from the date of this judgment until payment in full.
f) The costs here and below.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

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