



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 035 of 2019

In the matter between

TEDDY AKOT

APPELLANT

And

OKWONGA BRIDGET

RESPONDENT

Heard: 20 March, 2020

Delivered: 22 May, 2020.

Civil Procedure — *Summoning of witnesses — Order 16 rule 7 of The Civil Procedure Rules, and section 100 of The Magistrates Courts Act — The two provisions give the court discretionary power in summoning any person as a witness, though not summoned as a witness by any of the parties, if the evidence of such a witness appears to the court essential to the just decision of the case. The power though has to be exercised with care and judiciously, so that justice seems to have been done to both parties — The determinative factor when invoking that power is whether it is essential to the just decision of the case. It will not be an improper exercise of the powers of the Court to summon a witness under either provision merely because the evidence supports the case for one party and not the other. The limit of the inquiry on appeal is whether the court was right in thinking that the witness so summoned was necessary for a just decision of the case — Fraud — Order 6 rule 3 The Civil Procedure Rules — where a party relies on fraud as part of the cause of action, the particulars of that fraud with dates should be stated in the pleadings 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.*

Land Law — *Section 64 (2) of The Registration of Titles Act — Overriding interests in land — though not registered at the Land Registry, they still bind a party who acquires land that is subject to such interests - The interest of an adverse possessor will override*

the title if it would have been obvious on a reasonably careful inspection of the land at the time of creation of the title or where the registered proprietor had actual knowledge of the occupier's interest at the time of creation of the title.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant seeking recovery of two un-surveyed plots of land situated at Kirombe-Customs Ward, Layibi Division in Gulu District, general damages for trespass to land, *mesne profits*, an order of vacant possession and the costs of the suit. The respondent's claim was that she and her late husband Mathew Okwonga during the year 1980 purchased the two plots comprising the land in dispute from a one Michael, a Rwandese national, at the price of shs. 300,000/= and Okot Paul respectively. Following the death of her husband, she was granted letters of administration to his estate. Her husband and five of her children were buried on that land. The appellant is a daughter of the respondent, resident at the adjacent plot of land. Following the death of her father, the appellant has on several occasions threatened and attempted to exhume the bodies of her deceased siblings and father from the land, in a bid to force the respondent off the land, hence the suit.

[2] In her written statement of defence, the appellant denied the respondent's claim. She denied being the daughter of the respondent. She contended that she is the rightful owner of the land having purchased the two plots from a one Inyasio Jopatoo in 1995. She later during the year 1998 caused a survey of the land and in the year 2005, obtained a lease title deed to the land for the full term of 99 years. She built multiple houses on the land without an adverse claim being raised. Sometime during the year 2010, when the respondent's daughter had marital problems, she permitted her to take temporary refuge in one of the houses. It is for that reason that from time to time the respondent leaves the places where she ordinarily resides in Jinja and Pabbo Trading Centre

respectively, to visit her daughter on the land in dispute. There are no longer any graves on the land in dispute since they all were exhumed and re-buried in the village. She prayed that the suit be dismissed. She counterclaimed for a declaration that the appellant owns the land in dispute, comprised in plot 2 Ocan Ben Road, Kirombe Parish, Layibi Division, Gulu Municipality in Gulu District, on basis of a title deed issued to her in the year 2005.

The appellant's evidence in the court below:

- [3] In her defence as D.W.1, Akot Teddy, the appellant, testified that the respondent is her step-mother. Her biological mother was Terezina but she could not remember the second name since she died when the appellant was still a baby. The appellant bought the land in dispute measuring 44 meters by 29 meters during the year 1997 from a one Inyasio Jopatoo at the price of shs. 184,000/= The land was surveyed in 1988. By consent of two neighbours Okot Valente and Atim Edelina both of whom she duly compensated, an additional area was included in the survey. In January, 2000 she secured permission from the Town Clerk to begin developing the land. She then submitted a building plan for approval and once approved she began the construction of a house on the land. She secured an occupation permit on 8th March, 2005.
- [4] She later applied for a lease on 19th June, 2013. A notice was published and upon expiry of the period of notice, the Area Land Committed inspected the land. She was later issued with a freehold title. During the year 2015 a one Akena Nixon made a false claim to the land and he lost the ensuing suit to the appellant. During the insurgency, a one Mathew Okwonga took refuge on the land and lived there for only two months. When he died he was buried on the land instead of his home in Pabbo because of insurgency. Multiple other burials of relatives of Mathew Okwonga occurred on the land for similar reasons. In 2015, brother of the late Mathew Okwonga decided to have the bodies exhumed and re-buried at Pabbo.

- [5] D.W.2 Ochola Ferdinand Onyiba testified that when the appellant purchased the plot of land in dispute from Inyasio Jopatoo, he advised her to process a title. When the survey was done, it included parts of lane belonging to two of her neighbours and she compensated them for that. The late Mathew Okwonga, was the appellant's father and the respondent is her mother. When Mathew Okwonga died he could not be buried at his home in Pabbo due to the insurgency at the time but later his body was exhumed and re-buried there after the insurgency. At one time Akena Nixon sued the appellant but the decision was made in favour of the appellant.
- [6] D.W.3 Omyel Justine, brother of the late Mathew Okwonga testified that during the year 1999 the appellant told him she had bought the land now in dispute. His brother Mathew Okwonga did not own the land in dispute. His late brother had two wives; the respondent and a one Terezina Akollo. Mathew Okwonga was very sick when he brought him from Jinja to the home of the appellant because he could not be returned to his home in Pabbo by reason of the insurgency. He was brought together with his wife, the respondent. When he died two months later, he was buried on the land in dispute. Later upon the restoration of peace, they secured a court order by which six bodies, including that of Mathew Okwonga, were exhumed from that land and were re-buried at Pabbo. The respondent is the appellant's step-mother.
- [7] D.W.4 Sam Luywe Palamony, former Chairman of the Parish Development Committee testified that he was part of the team that inspected the appellant's plot on 30th July, 1998. She presented an agreement showing she had purchased the land from a one Inyasio Jopatoo in 1997. As a result of opening new roads in the area, parts of land belonging to her neighbours Okot Valente and Atim Edelina remained on her side of the roads. She compensate both of them and annexed the two portions to hers. At one time Akena Nixon sued the appellant claiming that land but he lost the suit to the appellant.

[8] D.W.5 Otim Peter, L.C.1 Chairman of the area testified that he got to know the appellant to be owner of the plot in dispute when the land was inspected by the Area Land Committee in his presence and when she had a case in court with Akena Nixon. He is aware that the appellant bought the plot from Inyasio Jopatoo. He also witnessed the agreements between the appellant and her two neighbours Okot Valente and Atim Edelina both of whom she duly compensated upon the creation of two public roads in the years 2005 and 2007 respectively that dissected their respective plots, to her advantage. It is the appellant who contracted him to roof the permanent houses on the plot. Later remains of the respondent's relatives were exhumed from the land. He never saw Mathew Okwonga on that land.

The respondent's evidence in the court below:

[9] P.W.1 Okwonga Bridget, the respondent, testified that the appellant is her second born biological daughter. During the year 1988, she and her late husband Mathew Okwonga purchased two plots; one from a one Michael, a Munyoro, and the other from Okot Paul respectively. At the time of the purchase, she and her husband lived in Jinja where her husband was employed. They handed over the purchase price to their son-in-law Akena Jackson, who paid it on their behalf. Later when a dispute erupted between the respondent and Akena Jackson, the appellant volunteered to appear on her behalf during the litigation and the respondent handed her the agreement to use as evidence in the suit. The appellant never returned the agreement to the respondent after her successful completion of that suit. The respondent had lived on the land for over 30 years from 1988 but when she constructed a uniport on the land, the appellant evicted her and she now lives with one of her other children at Pabbo. She had buried her late husband and her five deceased children on the land but the appellant exhumed all the bodies and re-buried them elsewhere. The appellant has since constructed a permanent house on the land and denied her and the rest of her siblings, access to the land. The appellant subsequently bought an adjacent plot

along Olailong Road from a one Inyasio Jopatoo over which the respondent has no claim.

- [10] P.W.2 Salume Adok, an immediate neighbour to the land in dispute, testified that she and the respondent have been neighbours since the year 1988. The respondent's husband, Mathew Okwonga, bought the land in dispute from a Munyoro named Nsubuga. When Mathew Okwonga died, he was buried on that land. Multiple other children of the respondent were buried on the land. The appellant is the respondent's biological daughter and now lives on the land in dispute. The appellant bought an adjacent plot of land from an Alur by the name Inyasio Jopatoo. She saw the appellant for the very first time during the burial of his father. She saw the late Mathew Okwonga and his family settle on the land. By that time the appellant was a girl. She saw the appellant build a house on her father's land because part of the land the appellant bought was subsequently turned into a public road. According to Acholi culture, a daughter cannot take charge of her deceased father's property during the lifetime of the widow.
- [11] P.W.3 Atim Hellen testified that she is the daughter of the respondent and the late Mathew Okwonga. The appellant is her biological sister. The land in dispute belonged to their late father Mathew Okwonga and he was buried thereon but the appellant exhumed the body and those of the rest of the relatives and re-buried them at an unknown place. The late Mathew Okwonga bought the land from Michael and Okot Paul, sons of Nsubuga in 1988. She has lived on the land since then as a daughter of Mathew Okwonga. The appellant as well lived on the land during her childhood as her mother's second born child and it is not true that she purchased the land. The plot the appellant owns is the one she purchased from Inyasio Jopatoo but part of it became part of a newly created public road. When during the year 2005 their mother P.W.1 Okwonga Bridget was involved in a boundary dispute with their neighbour Akena Nixon, it is the appellant who represented the family in the ensuing litigation and that is how she took possession of their father's purchase agreement which she has never returned.

The appellant completed the construction their father had begun and enclosed the plot with a perimeter wall fence. She exhumed the remains of her deceased father and siblings amidst protest from the rest of the family members.

Proceedings at the *locus in quo*:

- [12] The court then visited the *locus in quo* on 23rd January, 2018 where the respondent pointed out developments on the land which she claimed to have belonged to her late husband, including; an avocado tree she planted, mango trees, a house her husband built, a grass thatched house, a uniport and the burial sites of the bodies that were exhumed. The location of the pit latrine she said was on the plot the appellant bought from Inyasio Jopatoo. The appellant claimed the same land as hers and showed court her developments thereon including; the main house, an old house she built in 1997, the perimeter wall fence, the parts she annexed by purchase from Okot Valente and Atim Edelina.
- [13] The court then recorded additional evidence from "court witnesses" as follows; (i) Okot Valente who testified that the land in dispute originally belonged to a one Inyasio Jopatoo. It was vacant until the appellant constructed thereon a house in 1997. The appellant's father never lived on the land. He only saw him dead at the time of his burial on the land. She began living on the land in 1988 and later was joined by her siblings and step-mother. He ceded a small portion of his land to the appellant following the survey of her plot that enclosed that small portion; (ii) Akena Nixon who testified that the land in disputed belongs to the respondent. He used to see her deceased husband who was of advanced age and used to sit under a mango tree. He and the appellant were involved in litigation over a common boundary. The appellant claimed to have bought the land in 1988 but by then she was only 12 years old. He knew the appellant as a daughter of the respondent and her husband who lived at their home; and (iii) Atim Edelina who confirmed that the appellant used to occupy the old house and annexed a part

she bought from her following the bisection of her plot by a newly created road. The court did not prepare a sketch map of the land in dispute.

Judgment of the court below:

[14] In his judgement, delivered on 29th March, 2019 the trial Magistrate found that the stark resemblance between the respondent and the appellant corroborates the fact that the former is the biological mother of the latter. The respondent claimed to have bought two plots together with her late husband Mathew Okwonga from a one Michael and Okot Paul respectively while the appellant claimed to have bought it from Inyasio Jopatoo and thereafter annexed portions purchased from Okot Valente and Atim Edelina. On basis of the testimony of P.W.2 Salume Adok and P.W.3 Atim Hellen, the court found that the appellant purchased a plot from Inyasio Jopatoo that was adjacent to that of her father Mathew Okwonga but when she constructed the perimeter wall fence, she enclosed both plots creating the false impression that both belonged to her, whereas not. During the visit to the *locus in quo*, the common boundary between the two properties was clearly the mango tree. The appellant constructed a house, now old, on the part that belonged to Inyasio Jopatoo and two fairly modern houses of the part that belonged to her father, near the one occupied by the respondent. The testimony of the respondent established her ownership of that part of the land by inheritance from her deceased husband. The appellant never challenged the evidence showing that she was given the agreement as the respondent's attorney in a previous litigation yet she never produced it in evidence. During that litigation in 2007, the appellant had claimed to be 31 years old implying that she was only 12 years old when she bought the land in 1988, which is incredible.

[15] The trial court found further that it was unbelievable that the appellant would have permitted the respondent, a person she claimed not to be related to her at all, to bury her five deceased children and husband on the appellant's land. The

appellant in a scheme to defraud her mother, did not annex the portions purchased from Okot Valente and Atim Edelina to the land she purchased from Inyasio Jopatoo. Those portions became part of the late Mathew Okwonga's land. The appellant cannot benefit from her fraudulent scheme. Acquisition of the title deed thereafter was illegitimate since it included land that did not belong to the appellant. The respondent was unaware of the existence of the title the appellant acquired fraudulently until the trial. The respondent should proceed to apply for an order for cancelation of that title. The respondent still occupies the old building her late husband constructed on the land. The respondent permitted the appellant to construct two other buildings on the land since she is her daughter. She is therefore occupying part of the land in dispute as a licensee. The respondent was therefore declared the rightful owner of the land in dispute and the appellant a licensee thereon. The costs of the suit were awarded to the respondent.

The grounds of appeal:

[16] 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 fact when he held that the appellant had acted fraudulently in acquiring the certificate of title to the land.
2. The learned trial Magistrate erred in law and fact in holding that the respondent is the lawful owner of the suit land in total disregard of the appellant's evidence.
3. The learned trial Magistrate erred in law and fact when he relied on the evidence obtained at the *locus in quo*, from witnesses who never testified in court, thereby descending into the arena and soliciting evidence that supports the respondent's case, hence occasioning a miscarriage of justice to the appellant.

Arguments of Counsel for the appellant:

[17] In their submissions, counsel for the appellant, submitted that the land in dispute is comprised in FRV HQT 740 Folio 23, Ocan Ben Road, Plot 2 Kirombe, Gulu Municipality. It was erroneous of the trial Magistrate to have recorded evidence from two additional witnesses during proceedings at the *locus in quo*. By doing that he descended into the arena. The appellant led evidence explaining the circumstances in which she purchased the land and subsequently obtained a title deed. Possession of a title deed is conclusive evidence of ownership and the title deed was never impeached. Neither did the respondent plead fraud nor did she prove it. The court was wrong to grant relief not sought in the pleadings. Apart from the respondent, the rest of the witnesses relied on hearsay as proof of the purchase by the late Mathew Okwonga. The respondent herself did not adduce any documentary evidence of that purchase and the claim that she gave the agreement of purchase to the appellant was unsubstantiated. The respondent was a bare licensee on the land and this explains why she never objected as the appellant constructed permanent houses on the land, processed a title deed thereto and enclosed it with a perimeter wall fence. The respondent adduced no proof of ownership under any of the known tenure systems. The judgment of the court below should therefore be set aside.

Arguments of Counsel for the respondents:

[18] Counsel for the respondent did not file any submissions in response.

Duties of a first appellate court:

[19] 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*).

- [20] 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.

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

- [21] By the third ground of appeal, the trial Magistrate is criticised for having recorded evidence from "court witnesses" at the *locus in quo*. The purpose of visiting the *locus in quo* is to check on the evidence by the witnesses and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506*, *De Souza v. Uganda [1967] EA 784*, *Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*). But on the other hand under Order 16 rule 7 of *The Civil Procedure Rules*, provides that any person present in court may be required by the court to give evidence.

- [22] Similarly, under section 100 of *The Magistrates Courts Act*, a magistrate's court may, at any stage of any trial, summon or call any person as a witness, if that person's evidence appears to it essential to the just decision of the case only that the parties or their advocates have the right to cross-examine any such person,

if, in its opinion, either party may be prejudiced by the calling of any such person as a witness. The two provisions give the court discretionary power in summoning any person as a witness, though not summoned as a witness by any of the parties, if the evidence of such a witness appears to the court essential to the just decision of the case. The power though has to be exercised with care and judiciously, so that justice seems to have been done to both parties. It is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

[23] It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. The ends of justice would be defeated if judgments should be rendered on the basis of inchoate, inconclusive and a speculative presentation of facts. The object underlying Order 16 rule 7 of *The Civil Procedure Rules*, and section 100 of *The Magistrates Courts Act* therefore is that there may not be a failure of justice on account of mistake of either party omitting to bring valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor when invoking that power is whether it is essential to the just decision of the case. It will not be an improper exercise of the powers of the Court to summon a witness under either provision merely because the evidence supports the case for one party and not the other.

[24] It is, however, to be borne in mind that whereas the two provisions confer a very wide power on the Court on summoning witnesses, which power may be exercised at any stage of the trial, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind. It may not be invoked where the aim is only to fill gaps or loopholes in either party's case. What is required in relation to such evidence is the Court to be satisfied or it should "appear to the Court" that the evidence is essential for the just decision of the case. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the

Presiding Judicial officer. The paramount consideration is just decision and for that purpose the essentiality of a person to be called as a witness has to be ascertained, against the backdrop aim of obtaining proper proof of such facts which lead to a just and correct decision of the case.

[25] Where the court exercises the power under Order 16 rule 7 of *The Civil Procedure Rules*, or section 100 of *The Magistrates Courts Act*, the limit of the inquiry on appeal is whether the court was right in thinking that the witness so summoned was necessary for a just decision of the case. If the court acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction. Since a witness summoned by the Court cannot be termed a witness of any particular party, the Court should give the right of cross- examination to both parties.

[26] Calling a witness for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as filling in a lacuna in the other part's case unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the other party resulting in miscarriage of justice. Having reviewed the testimony of Okot Valente, Akena and Atim Edelina whose evidence was taken at the *locus in quo*, I find that it was not merely intended only to fill gaps or loopholes in either party's case, but it was essential and necessary for a just decision of the case. This ground of appeal accordingly fails.

Grounds one and two; Fraudulent acquisition of title by the appellant:

[27] In grounds one and two of the appeal, the trial court is faulted for its finding of fraudulent acquisition of title by the appellant and declaration of ownership of the land in favour of the respondent. By virtue of section 59 and 176 of *The Registration of Titles Act*, a certificate of title is conclusive proof of ownership

(see *Kampala Bottlers v. Damanico (U) Ltd*, S. C. Civil Appeal No. 22 of 1992 and *H. R. Patel v. B.K. Patel* [1992 - 1993] HCB 137). It can only be impeached on grounds of illegality or fraud, attributable to the transferee (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. 22of 1992).

[28] Registered proprietors are given indefeasible title that can only be disputed under those specified circumstances. Upon registration, a registered holder immediately acquires protection of registration, subject to statutory fraud which they themselves may have committed (see *Frazer v. Walker* [1967] 1 AC 569; [1967] 1 All ER 649). The title of a registered proprietor is not impeached unless he or she somehow engaged in fraud leading to the acquisition of the title. The appellant had the onus of proving fraud against the respondents. From the evidence on record they did not.

[29] According to Order 6 rule 3 of *The Civil Procedure Rules*, where a party relies on fraud as part of the cause of action, the particulars of that fraud with dates should be stated in the pleadings. Consequently where impeachment of title is sought by reason of fraud perpetrated in the course of its acquisition, the particulars of fraud must be specified in the pleadings and the allegation of fraud must relate to the way in which the proprietor gained registration (see *Lubega v. Barclays Bank* [1990-1994] EA 294; *B.E.A. Timber Co. v. Inder Singh Gill* [1959] E.A. 465 at 469; *Okello v. Uganda National Examinations Board* [1986-89] EA 436; [1993] II KALR 133 at 135 and *Kampala Bottlers v. Damanico (U) Ltd*, S. C. Civil Appeal No. 22 of 1992). The acts alleged to be fraudulent must be set out and then it should be stated that these acts were done fraudulently.

[30] 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). A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*, which essentially relate to error, fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker* [1967] AC 569).

[31] In the instant case, neither was fraud pleaded nor was it proved. If the respondent wished to recover title to the land, she should have established either that she had a proprietary priority over the current registered proprietor or else achieve rectification of the register. Both remedies required specific pleading of facts entitling her to such relief, which she did not. Failing these, she was left with the possibility of an indemnity or in the alternative a declaration that the title was subject to her interest.

[32] There is a category of interests, otherwise known as overriding interests, which though not registered at the Land Registry, still bind a party who acquires land that is subject to such interests. An overriding interest is any interest in land which "overrides" registration, i.e. it is still valid and enforceable against land even though it is not registered against the land's title. Although the mirror principle means that the register is intended to reflect accurately all the facts material to a given title, overriding interests are the one important exception to the mirror principle. These interests are reflected in section 64 (2) of *The Registration of Titles Act*, and include certain rights of occupation, public rights of way, easements acquired by enjoyment, etc. Under that section, land included in any certificate of title is deemed to be subject to rights subsisting under any adverse possession of the land, existing at the time of registration. The prescribed burdens affect the land even when they are not registered. They

override the interest of the registered owner and are automatically binding of the registered estate. In essence, the registered proprietor's estate is not paramount where any part of the proprietor's parcel was adversely occupied at the time of registration.

- [33] To have overriding status, the interest must be a proprietary interest (see *National Provincial Bank v. Ainsworth* [1965] AC 1175). Personal rights such as a licence do not confer overriding status (see *Strand Securities v. Caswell* [1965] Ch 958). There is no requirement though that the occupation must be inconsistent with the title of the registered proprietor (see *Bird v. Syme-Thomson* [1991] 1 WLR 440; *Hodgson v. Marks* [1971] Ch 892; [1970] 3 WLR 956; *Kingsnorth Finance Co Ltd v. Tizard* [1986] 1 WLR 783 and *Williams & Glyn's Bank v. Boland* [1981] AC 487). The concept of overriding interests is intended to encourage a practice of careful enquiry as to the fact of occupation, and if necessary, as to the rights of occupiers.
- [34] The law requires that intending transferees make inquiries as to any and all occupants of a property, even where such occupancy is not inconsistent with the title being sold. If there is actual occupation, and the occupation has rights, the purchaser takes subject to them. Actual occupation of part of the land comprised in a registered disposition protects a right or interest in relation to that part of that land (see *Ferrishurst Ltd v. Wallcite Ltd* [1999] 1 All ER 977; [1999] Ch 355).
- [35] The interest of an adverse possessor will override the title if it would have been obvious on a reasonably careful inspection of the land at the time of creation of the title or where the registered proprietor had actual knowledge of the occupier's interest at the time of creation of the title. Actual possession means apparent or patent possession, such as would put a person inspecting the land on notice that there was some person in occupation (see *Williams & Glyn's Bank Ltd v. Boland* [1981] A.C. 487 and *Malory Enterprises Ltd v. Cheshire Homes Ltd* [2002] Ch. 216). What is required is physical presence on the land.

[36] Actual occupation requires some degree of permanence and continuity. However, the degree of physical presence required will depend on the nature of the land. A person claiming actual occupation may successfully show such occupation, even if it is intermittent, so long as they are able to point to some physical evidence or "symbol" of their continued residence at the property, as well as evidence of their intention to return to the property (see *Lloyds Bank v. Rosset* [1989] Ch 350; *Epps v. Esso Petroleum* [1973] 1 WLR 1071; *Chhokar v. Chhokar* [1984] F.L.R. 313 and *Kling v. Keston Properties Ltd* (1985) P. & C.R. 212). What is required is some evidence of previous occupation and an intent to return to the property; physical evidence in or around the property would be required to satisfy this requirement. Occupation by a representative may be sufficient (see *Abbey National Building Society v. Cann* [1991] 1 AC 56; *Lloyds Bank v. Rosset* [1989] Ch 350 and *Strand Securities v. Caswell* [1965] Ch 958).

[37] In *Strand Securities v. Caswell* [1965] Ch 958, Denning MR held that, "fundamentally," the purpose of protecting overriding interests by actual occupation is "to protect the person [...] from having his rights lost in the welter of registration." Perhaps the most important of overriding interests is that of someone that is in actual occupation. Consequently, section 64 (2) of *The Registration of Titles Act* protects those with an interest in the land (NB. the mere fact of occupation is not itself protected if the occupier has no separate property interest in the land). Provided the occupier does have such an interest, there need be no causal connection between that interest and the occupation that might thereby protect it (e.g. an unprotected option over the land owned by someone who, quite separately, say as a family member, happens to be in actual occupation of the land, is still capable of being an interest that overrides). It is the fact of occupation that matters. The focal point of actual occupation is objective and factual perspective. Actual occupation is a matter of fact, not a matter of law. A person should be regarded as being in actual occupation of land only if he or she is physically present on the land and his or her occupation is apparent on a reasonable inspection of the land. If there is actual occupation, and the occupier

has rights, the purchaser takes subject to them. If not, he does not. Hence, a prospective transferee of land has to carefully inspect the land and be aware of the occupants on the land even though they might not have the equitable interest as appose to legal title (see *Hodgson v. Marks* [1971] Ch 892).

[38] The effect of an overriding interest is that it binding on the registered proprietor and any buyer or lender, whether or not they knew about the interest, unless enquiries had been made of the person claiming an interest and s/he failed to disclose it when s/he could reasonably have been expected to do so, or unless that person's occupation was not obvious on reasonably careful inspection and was not known to the registered proprietor or buyer. Overriding interests bind the registered proprietor even though they have been neither substantively registered nor protected by means of an entry on the register. The rights of a person in actual occupation will override only to the extent that they coincide with that occupation. As a result, the person who claims the overriding interests is authorised to exercise the right against the land even though they are unregistered interests which disregard the registered title.

[39] In the instant case the fact that the respondent buried her husband and multiple deceased children of hers, including her own mother, on the land in dispute is inconsistent with here being a mere licensee. It is more consistent with her having a proprietary interest in the land. At the time the appellant processed her tile she had actual notice of the respondent's adverse possession. She therefore acquired title subject to that interest. Where an overriding interest exists it terminates through unity of both tenements or release that is duly executed and evidenced in writing. She could not obtain the orders she sought. Once an overriding interest is established, it means that a non-owning cohabitant may be able to retain the right to occupy against the registered proprietor. The trial court therefore came to the correct conclusion in dismissing the suit. The respondent's overriding interest only extends to the part of the land in actual occupation.

Order:

[40] In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the suit and of the appeal are awarded to the respondent.

Delivered electronically this 22nd day of May, 2020

.....Stephen Mubiru.....

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

For the respondent :