

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0019 OF 2016
(Arising from Paidha Grade One Magistrate's Court Civil Suit No. 0006 of 2008)

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|----|--------------------------|---|-------------------------|
| 1. | SIMEA UMIKA | } | |
| 2. | OKWAI ROBERT | } | |
| 3. | BOLI UTHUMA | } | |
| 4. | OKECHA S/O MESAKA | } | APPELLANTS |
| 10 | 5. NEREO ORYEMA | } | |
| | 6. NDIRI ANGAO | } | |
| | 7. PETER CANIKARE | } | |
| | 8. CHOMBE HUSSEIN | } | |

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VERSUS

MABER GROUP FARM LIMITED **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

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JUDGMENT

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In the court below, respondent sued the appellants jointly and severally for recovery of land measuring approximately 400 acres located in Zombo District, a declaration that the respondent is the lawful owner of the land in dispute, trespass to land, an order of vacant possession, a permanent injunction, general damages for trespass to land and the costs of the suit. The respondent claimed to have acquired the land in dispute by inheritance. It originally belonged to the late Lonja, then transmitted to Yakim Usum Lonja who permitted the respondent company to utilise the land for farming activities. The respondent subsequently during April, 2007 began the process of acquisition of a leasehold certificate of title in respect of the land. The land was inspected by the Area Land Committee and surveyed.

In their joint written statements of defence, the appellants refuted the respondent's claim. They contended that the land in dispute belongs to the Ajere community of over 2000 people comprising the following clans; Oyeoy, Konga, Areju, Pakiya, Plaei and morya, given them by the Chief in 1964. They have been living and grazing on the land since their childhood. They have since then been using it communally as grazing land and that therefore the respondent's suit is misconceived.

P.W.1 Ocamana Naftali, the Director of the respondent company testified that he had sued the appellant's for encroachment on the company's land that took place in 2007. He had planted Cyprus, Eucalyptus and Pine trees on the land but the appellants set fire to over three hundred acres of those trees. He acquired the land by inheritance from his father. The land had in the past been used for grazing but during 1962 - 1963 when the bank to which it had been pledged threatened to foreclose, the livestock keepers his grandfather had invited to graze their livestock on the land vacated the land and it is his father who redeemed it. The livestock keepers did not return to the land. The witness then raised money to uplift the standards of farming on the land. He incorporated the respondent as an avenue for managing the land. He then applied for a lease over the land from the Uganda Land Commission and the Area Land Committee duly conducted its inspection on 27th April, 2017. The District Land Board met on 18th June, 1987 and recommended the respondent for grant of a lease over the land. In 2006, the appellants began disrupting the respondent's activities on the land by setting his saplings on fire. Various clans of the Ajere have now taken over and occupied the land.

P.W.2 Ovoya Phillip testified that in 1964 P.W.1 had obtained a loan for fencing the land in dispute, which belonged to his late grandfather. When he failed to repay the loan, he collaborated with an Indian coffee trader and repaid the loan. He then incorporated the respondent company which took over management of the land and planted trees which were subsequently burnt down by the appellants. P.W.3 Oboko Salim testified that he was one of the employees of the respondent company, working as an Askari on the disputed land. The Chief gave the disputed land to Yakim, father of P.W.1. In 1964, Yakim obtained a loan to start modern farming on the land in dispute but defaulted on the loan. Thereupon the people who were herding their cattle

with him on the land drove their livestock away. He then collaborated with P.W.1 in transactions of sale of coffee from which they raised money and paid off the loan. When he planted trees on the farm, the appellants and other people would uproot them.

5 In defence, D.W.1 Okwai Robert testified that the land in dispute was given to the Ajere by Rwot Jalonga who fenced off about 500 acres and used it communally as grazing land by the Pakia, Konga, Oyweyo, Palei, Jupagatha and Palei Jupugot clans. In 2005, the respondent placed radio announcement stopping activities on the land yet many people still used it for grazing, grasshopper catching and fetching firewood. P.W.1 then resorted to violence to eject people from
10 the land. This witness sought the intervention of the L.C.1 and L.C.II but P.W.1 continued with his violent methods. The elders had planted Bongo trees and eucalyptus trees on the land.

D.W.2 Bolly Otuma testified that the land in dispute is communal and the people of Ajere fenced it off for communal grazing. In 1964, the Rwot and the District Council gave the land officially
15 to the people for use as grazing land. When the respondent attempted to plant trees on the land, he was prevented and the matter was reported to the L.C.II and to the Alur Kingdom leadership, who decided in favour of the community. D.W.3 Kalimente testified that by Rwot Jalonga gave the land to the Konga, Palei, Moya, and Oryero clans. They secured a bank loan to develop the land as communal grazing land.

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The court thereafter visited the *locus in quo* when the respondent showed court the Cyprus trees that mark the boundaries of the land in dispute. The gardens seen on the land that were said to belong to the appellants. He stated further that his father had planted the Bongo trees on the land and had invited many people thereafter to join him in grazing on his land. The appellants showed
25 court the area in dispute which is mainly on Moria hill and that the Adyera community graze around it. They explained that when some of the livestock began to die, some of the herders left the land. They stated that the land belongs to the clans of Pakia, Konga, and Palei. The fence was put in place by the community after borrowing funds for that purpose.

30 In his judgment, the trial magistrate found that the parties appeared to agree that the land in dispute was a livestock farm for which the respondent's father was the Chairman. The

respondent's father obtained a loan and he failed to service it. Members of the farm got scared that their cattle would be attached when the bank foreclosed and thus took their cattle off the farm leaving the respondent to struggle alone to discharge the loan. The appellants later returned and began to cultivate part of the land, hence the conflict with the respondent. The respondent
5 has since then commenced a process of acquiring a lease title over the land. On basis of that fact and the fact that his father was Chairman of the previous farm, the trial magistrate declared the respondent owner of the land. The trial magistrate recommended that if any of the appellants wished to participate in activities on the land, they should reimburse the costs incurred by the respondent in sums of not less than shs. 2,000,000/= each or alternately agree with the
10 respondent as willing buyers and sellers. The magistrate thus declared the respondent the lawful owner of the land, the appellants as trespassers on the land and advised the appellants to share the farm with the respondent through mutual agreement and to contribute to the respondent's expenses. He awarded the respondent the costs of the suit.

15 Being dissatisfied with the decision, the appellants, who are self-represented on appeal, appealed on the following grounds (presented with considerable editing and paraphrasing);

1. The learned trial Magistrate erred in law and fact when he ignored the letter of the Alur Paramount King which showed clearly that the suit land was customary land given to the appellants as grazing land in 1964.
- 20 2. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence, hence arriving at a wrong decision.
3. The learned trial Magistrate misdirected himself on the question of legal ownership when he relied on steps taken to lease the suit land by the respondent to support his finding that the respondent has a legal title.
- 25 4. The learned trial Magistrate erred in law and fact when he directed that each of the appellants contributes shs. 2,000,000/= as expenses of the respondent or in the alternative agree with the respondent on the basis of willing buyer willing seller.
5. The learned trial Magistrate erred in law and fact when he disregarded the appellants' evidence of customary ownership.

6. The learned trial Magistrate erred in law and fact when he declared the appellants as trespassers and advised them to share the farm with the respondent through mutual agreement and contribute to the respondent's expenses, if any.

5 Submitting on his behalf and on behalf of the rest of the appellants, the third appellant argued that the land in dispute is customarily owned and it was commissioned by the paramount King of Alur Kingdom in 1964 for grazing animals. Up to now the appellants own and are in possession of the land. There is a fence round the hill was planted by our elders using barbed wire and Bangu trees. At the *locus in quo*, the appellants showed this to the court. The court even saw the
10 appellants' animals grazing there. It also saw the crops which the community had planted on the slope and the eucalyptus given to the community in 2015 by Nebbi District Forest Department to plant for environmental protection. The court did not take those into consideration.

He submitted further that in 2009 there was a decision by a Grade one magistrate which was
15 ignored in the decision appealed. By that decision, the respondent was supposed to pay 5,600,000/= and he was summoned five times and he did not go to the court. The Alur Kingdom decided in the appellants' favour in 2015 but this was not considered. Instead the respondent went back to Paidha and he was given a letter indicating violation of community rights on 21st November, 2011 and he told the appellants to graze their animals and cultivate on their land. Up
20 to now the community is using the land. He prayed that the appeal be allowed.

Although the hearing proceeded ex-parte against the respondent upon its failure to turn up in court on the day fixed for hearing of the appeal, which had been fixed in the presence of its Director Mr. Ucama-Gui Naphtali, he later filed his written response to the appeal. His argument
25 in that response is that the suit was correctly decided in favour of the respondent because the respondent proved that the land in dispute is customary land. The Paramount Chief has no authority to give away land that belongs to an individual to another community. The appellants did not submit before court any documentary proof of their claim to the land. On the other hand, he proved that the land had belonged to his grandfather, it was inherited by his father and later
30 himself. The appellants are attempting to take it forcefully by destruction of the respondents' trees planted on the land. He prayed that the appeal be dismissed.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *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.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

The six grounds of appeal will more conveniently be considered concurrently since they all relate to the manner in which the trial magistrate went about his evaluation of the evidence. One fact that emerged from the evidence adduced before the trial court that is common to all parties to this dispute is that the land in dispute is held under customary tenure. Each of the parties claims to have customary interest in the land as proprietor; on the one hand the respondent as a private owner and on the other the appellants as communal owners. The respondent's version is that the land originally belonged to the grandfather of one of its directors and by inheritance came into the hands of its director and subsequently the company. The appellants on the other hand claim that it was vacant land which in 1964 was given to the Ajere community by the then paramount

King of Alur Kingdom, Rwot Jalonga and it has since then been occupied by the Konga, Palei, Moya, and Oryero clans as their communal grazing land.

The burden of proof in the court below lay on the respondent, he being the plaintiff. The respondent had to prove acquisition of the land in dispute as a customary owner on the balance of probabilities. To decide in the respondent's favour, the court had to be satisfied that the respondent had furnished evidence whose level of probity was such that a reasonable man might hold that the more probable conclusion is that for which the respondent contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd* 1918 WC Rep 345 and *Sebuliba v. Cooperative Bank Ltd* [1982] HCB 130). The burden of proof was on the respondent to prove on the balance of probabilities it has a better claim to the land than the one made by the appellants.

Customary tenure is recognized by Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and s. 2 of *The Land Act, Cap 227* as one of the four tenure systems of Uganda. It is defined by s. 1 (l) together with s. 3 of the *Land Act* as system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which include; (a) applicable to a specific area of land and a specific description or class of persons; (b) governed by rules generally accepted as binding and authoritative by the class of persons to which it applies; (c) applicable to any persons acquiring land in that area in accordance with those rules; (d) characterised by local customary regulation; (e) applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land; (f) providing for communal ownership and use of land; (g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and (h) which is owned in perpetuity.

Customary tenure is therefore characterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in

accordance with those rules. Consequently, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who
5 acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules.

The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules
10 apply. The respondent claimed that it acquired the land through the inheritance of one of its directors. Being a corporate entity with separate legal existence (see *Salomon v. Salomon & Co Ltd (1897) AC 22*), it is distinct from its members, from its shareholders, directors, promoters etc. Acquisition of land by inheritance by any of its members, shareholders, directors, promoters etc is not acquisition by the company. There is absolutely no evidence on record as to which
15 customary rules the respondent complied with in acquisition of the disputed land.

The only evidence adduced by the three plaintiff's witnesses was to the effect that one of its directors had acquired the land in dispute by inheritance and allowed the company to undertake farming activities on the land. To take by inheritance is defined as "to take as heir on death of
20 ancestor; to take by descent from ancestor; to take or receive, as right or title, by law from ancestor at his demise" (see *Black's Law Dictionary, 8th edition, 2004*). Inheritance therefore denotes devolution of property under the law of descent and distribution.

The process of devolution is regulated by the relevant customary law of descent and distribution.
25 Inheritance primarily and narrowly deals with the transmission of property, or of rights to such property, which by necessary implication excludes taking by deed, grant or purchase. Whether testate or intestate, inheritance entails a process guided by rules that govern the devolution and administration of a deceased person's estate. The purpose of inheritance is that the property of the deceased intestate should be left to the use and benefit of his or her closest relatives or those
30 who were dependent upon him or her during his or her lifetime. By virtue of the procedural requirements embedded in the concept of inheritance, it follows that an individual who claims

property of a deceased person only by dint of social affiliation does not necessarily claim by inheritance unless and until it is proved that the devolution was in accordance with the relevant law of descent and distribution under custom or enactment.

5 Having traced the root of her title to a person who is said to have acquired it by inheritance, the burden was on the respondent to prove that it's director had acquired the land in dispute following rules that govern the devolution and administration of a deceased person's estate under a specific customary law, by adducing evidence clarifying or defining what those rules are within the customary context. It comprises established patterns of behaviour that can be objectively
10 verified within a particular social setting or community which is seen by the community itself as having a binding quality. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law" (see *Osborne's Concise Law Dictionary*, Ninth Edition (Sweet and Maxwell, 2001). "Customs that are accepted as legal requirements or obligatory rules of conduct; practices and
15 beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws" (see *Black's Law Dictionary*, 8th edition, 2004).

Although section 56 (3) of the *Evidence Act* permits a court to take judicial notice as a fact, the existence of practices which are not subject to reasonable dispute because they are generally
20 known within the trial court's territorial jurisdiction. Such judicial notice can be taken within the context of this appeal to the extent that land held under customary tenure may be acquired by customary inheritance, usually by close relatives of the deceased owner of such land. That is as far as judicial notice may go. Under section 46 of *The Evidence Act*, when the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of
25 such custom or right of persons who would be likely to know of its existence if it existed, are relevant. Considering that the customary rules, formalities and rituals involved in general inheritance of property and specifically to inheritance of land may vary from community to community, a person asserting that he or she inherited land in accordance with the applicable customary rules must prove it as a fact by evidence in the event that such rules are not
30 documented.

Where customary Law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinions adduced by the parties (*Ernest Kinyanjui Kimani v. Maira Gikanga [1965] EA 735*). The ascertainment of customary law requires that the court determines whether the alleged rule is indeed a law as defined by the community, as the source of living customary law is the community itself. It must then proceed to determine whether the specific customary rule satisfies the legal test to constitute enforceable customary law for as the gatekeepers of customary law, courts must ensure that the customary law relied on is not incompatible with the provisions of the constitution, any written law and is not repugnant to natural justice, equity and good conscience.

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. Descent and kinship mould inheritance practices. The inheritance practices determine the settling of the estate and how the estate should devolve. They determine the person with responsibility for distributing the estate, the persons entitled to a share and the proportions to which they are entitled. The trajectory of inheritance in any society is usually associated with the cultural interpretation of kin and is thus not a term that can be applied universally to any situation of property transmission without reference to structuring effects of kinship relationships. Inheritance is conditioned by how, culturally, people define to whom they consider themselves to be related and in what way.

The customary law under which the respondent acquired the land is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the respondent to adduce evidence of the customary law. It was not enough for it to claim the land to have been inherited by one of its directors. It had the onus of adducing evidence of the customary procedures, practices and rules by virtue of which it is recognised as the lawful prospector of the land. The fact that the respondent went ahead to commence the process of acquisition of a title deed over the land was not evidence of customary ownership. Apart from the respondent's averment, through its witnesses, that one of its directors inherited

the land, the customary rules and practices that guided its acquisition of the land were never proved. Having failed to do so, the trial magistrate was not justified in his finding that the respondent had proved its case.

5 To the contrary, the evidence of both P.W.1 Ocama Naftali, the Director of the respondent company and P.W.3 Oboko Salim, who worked as an Askari on the disputed is to the effect that the grandfather of P.W.1 had in the past invited people to graze their livestock on the land and that only vacated the land after there were threats of foreclosure. Although according to P.W.1 these livestock keepers did not return to the land, this evidence tends to corroborate the
10 appellants' version that this was communal grazing land. It is a curious coincidence that the year 1964 reckoned by P.W.3 when this happened happens to be the year reckoned by the appellants as the year in which the then paramount King of Alur Kingdom, Rwot Jalonga conferred the land upon the Konga, Palei, Moya, and Oryero clans as their communal grazing land. I therefore find the trial magistrate's conclusion on basis of the available evidence that it is more probable that
15 P.W.1 justifies his claim by the fact only that the rest of the community left him to bear the burden of repaying the loan alone and returned only to enjoy the fruits of his sacrifice. That though on its own is incapable of creating a customary interest in the land, capable of being passed to the respondent.

20 Although it is trite law that all rights and interests in unregistered land may be lost by abandonment, it generally requires proof of intent to abandon; non-use of the land alone is not sufficient evidence of intent to abandon. The legal definition requires a two-part assessment; one objective, the other subjective. The objective part is the intentional relinquishment of possession without vesting ownership in another. The relinquishment may be manifested by absence over
25 time. The subjective test requires that the owner must have no intent to return and repossess the property or exercise his or her property rights. The court ascertains the owner's intent by considering all of the facts and circumstances.

An essential element of abandonment is the intention to abandon, and such intention must be
30 shown by clear and satisfactory evidence. Abandonment may be shown by circumstances, but they must disclose some definite act showing intention to abandon. The non-use of a right is not

sufficient in itself to show abandonment, but if the failure to use is long, continued and unexplained, it gives rise to an inference of intention to abandon. The passage of time in and of itself cannot constitute abandonment. For example, the non-use of an easement for 22 years was insufficient on its own, to raise the issue of intent to abandon in the case of *Strauch v. Coastal State Crude Gathering Co.*, 424 S.W. 2d 677.

In the instant case, the evidence before court indicated that at some point in time, the community vacated the land for fear of attachment of their cattle in foreclosure proceedings. There is no evidence as to the period they remained off the land. For all intents and purposes therefore, if ever there had been any customary rights of ownership enjoyed by the parties in the land now in dispute, those rights were not extinguished by abandonment. The level of probity of the evidence in this case was such that a reasonable man might hold that the more probable conclusion is that for which the appellant's contended, that this was communal rather than private grazing land. There was evidence of communal grazing over the land that emerged from the testimony of the respondent's witnesses which supported the appellants' version and thus tipped the balance of probabilities in their favour.

On the other hand, apart from asserting that P.W.1, the respondent's director inherited the land in dispute from his late father who in turn inherited it from his own father, the respondent did not adduce any evidence regarding the custom under which that inheritance occurred, the rules and practices of inheritance which determine the settling of estates of intestate deceased persons under that custom or how the estates should devolve, compliance with those established rules and practices of inheritance in his specific instance, and that those rules and practices are not incompatible with the provisions of the constitution, any written law and are not repugnant to natural justice, equity and good conscience. The respondent's entire claim depended on proof of its claimed root of title in customary inheritance which it failed to establish. The trial court therefore failed to properly direct itself on the evidence and came to the wrong conclusion.

In the circumstances, I find merit in the appeal. Consequently the appeal is allowed, the judgment of the court below is set aside and instead one is entered in favour of the appellants

against the respondent dismissing the suit. All orders and recommendations of the court below are hereby set aside. The costs of the appeal and of the court below are awarded to the appellants.

Dated at Arua this 15th day of March, 2018

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Stephen Mubiru

Judge,

15th March, 2018.