

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA SITTING AT GULU  
CIVIL APPEAL No. 0039 OF 2015  
(Arising from Amuru Grade One Magistrate's Court Civil Suit No. 050 of 2009)**

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**ODOKI MARIANO ..... APPELLANT**

**VERSUS**

1. **KOMAKECH WALTER }  
10 2. **ORINGA GEOFFREY } ..... RESPONDENTS  
3. **AKOT VENTORINA }  
4. **AKIDI HELLEN }********

**Before: Hon Justice Stephen Mubiru.**

15 **JUDGMENT**

The respondents jointly and severally sued the appellant jointly and severally with two other persons for recovery of approximately 200 acres of land under customary tenure situated at Koch Kal "B", Kiguka, Pakawera, Laminlangele. Kochgoam sub-county, in Amuru District, an order  
20 of vacant possession, a permanent injunction, general and special damages for trespass to land, and costs. Their claim was that they are the administrators of the estate of the late Odong Stanley Alung who before his death was the customary owner of the land in dispute. The appellants took advantage of the insurgency that engulfed the area, to unlawfully enter onto the land, destroy the natural vegetation thereon, grow crops and in the process lay his land to waste.

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In their joint written statement of defence, the appellant together with his co-defendants refuted the claim. The appellant contended that he purchased 200 acres of the land in dispute on 3<sup>rd</sup> July, 1984 at the price of shs. 2,000,000/= from the late Odong Stanley Alung. The land did not therefore constitute part of the estate of the deceased. Part of this land belonged to the late  
30 Keseroni Atori Alung father of Odong Alung and the latter was required to harvest his crops then growing on the land after the appellant had compensated him, after Keseroni Atori Alung gave

the appellant that part of the land as a gift *inter vivos*. The appellant raised a counterclaim seeking recovery of the expenses he incurred in the attempt to have the matter settled amicably. His co-defendants denied having any interest in the disputed land.

5 In his testimony as P.W.1, the first respondent stated that he only came to know the appellant in the year 2009 during the process of return from the IDP Camp. The land belonged to the late Odong Stanley Alung before his death in 1997. It measured approximately 10,000 acres at the time of his death but as a result of the encroachment of the appellant and other persons, its size had reduced to approximately 9000 acres. The land was not owned customarily and it was vacant. The deceased had during 1974, before his death, received a lease offer in respect of that  
10 land. The appellant and others had since the year 2009 prevented the respondents from accessing the land, caused their arrest on allegations of criminal trespass and cut down trees growing on the land. Before discovery of the encroachment in 2009, he had last visited the land in 1988. He disputed the purported sale of part of the land by his father to the appellant, since the land was not being held under customary tenure.

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The second respondent testified as P.W.2 and stated that the first respondent is his elder brother. He only came to know the appellant when the land dispute emerged between them as administrators of the estate of the late Odong Stanley Alung and himself. He was neither conversant with the size nor the boundaries of the land in dispute. The third respondent testified  
20 as P.W.3 and stated that she is one of the two widows of the late Odong Stanley Alung and co-administratrix of his estate. She too came to know the appellant when the land dispute emerged between them and him. The fourth respondent testified as P.W.4 and stated that she is the other of the two widows of the late Odong Stanley Alung who died in 1995, and co-administratrix of his estate. She too came to know the appellant when the land dispute emerged between them and  
25 him. This was not customary land but at the time she married the deceased in 1978, he was already using the land for farming but had his home at the Koch trading centre. The deceased did not sell an part of the land but surprisingly the appellant and others now occupy part of it and are very violent towards them.

30 P.W.5 Olok James Odur, the first respondent's paternal uncle, testified that the appellant has trespassed on the land in dispute without any lawful claim. The land in dispute measures

approximately 10,000 acres. The land in dispute is not customary land but rather the late Odong Stanley Alung acquired it from the Uganda Land Commission in March, 1973. The appellant and others trespassed on to the land in the year 2009 and still occupy part of it. Attempts to evict them were futile. He was not aware of any sale by the deceased of any part of that land. The  
5 lease offer was made in the name of Atori Kezironi, the father of the deceased because of fear of persecution from the then government in power. P.W.6 Josephine Abur, sister to P.W.5 testified that the land in dispute belonged to the late Odong Stanley Alung and not her father Atori Kezironi. She was only informed about the acquisition of that land since by that time she was already married.

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P.W.7 Lakony David Livingstone testified that the land in dispute measures approximately 10,000 acres and belongs to the late Odong Stanley Alung. He found vacant land in 1969 and settled thereon with the intention of establishing a farm. He applied for a lease from the Uganda Land Commission. He created a road from Koch Goma to the land, a distance of about 12 - 15  
15 kilometres, by clearing brush with earth moving equipment. Representatives of Gulu District Land Board then inspected the land around 1973. He then began growing crops on the land until around 1981 - 1983. He was not aware of any sale of any part of that land by the deceased. The land in dispute belonged to the late Odong Stanley Alung and not her father Atori Kezironi.

20 P.W.8 Uma Justine Otto, the first respondent's maternal aunt, testified that she and the deceased picked interest in commencement of farming in Pakawera. The deceased applied for 10,000 acres from the Uganda Land Commission while she applied for 3,000 acres. They obtained lease offers in 1973 to two tracts of land are separated by a stream called Lii. It was by then vacant land used for hunting. The deceased began using his part for farming. She is not aware of any sale by the  
25 deceased of any part of that land. The appellant has no land in that area.

In his testimony as D.W.1, the appellant stated that he occupies approximately 2,000 acres of the land in dispute. It is Atori Kezironi who in 1984 gave him that land. The late Odong Stanley Alung had a homestead, gardens and beehives on the land. He compensated him for his  
30 developments in the sum of shs. 2,000,000/= and took possession of the land. An agreement to that effect was executed on 3<sup>rd</sup> July,1984. He reared livestock and grew crops on the land until

1998 when he left due to insurgency but returned thereon in 2008. He had also built a church on the land in 1985. When the first respondent trespassed on the land, he sued him before the L.C.II Court which decided ex-parte in his favour. The first respondent never appealed the decision.

5 D.W2 Otim Richard, a brother of the first respondent, testified that it was in 1984 when the appellant came to the home of his grandfather Atori Kezironi where he began rearing livestock and growing crops on the land. He had also built a church but he did not know what arrangement existed between Atori Kezironi and the appellant since he was still a child at the time. The appellant lived on the land until 1988 when he fled due to insurgency. He returned in the year 2008 and is still resident on the land. D.W.3. Pilimena Aero testified that it is her who persuaded 10 the late Atori Kezironi to give the appellant the land he now occupies. He was asked to pay some money because Odong Stanley Alung had failed to account for some money at his place of work and his father Atori Kezironi needed to raise money to help him refund the missing funds and bail him out of jail. The appellant paid the money in 1984 and took possession of the developments on the land. He began rearing livestock and growing crops on the land. He also 15 built a church. It is insurgency that forced him off the land in 1988.

D.W.4 Abalo Anne, a neighbour, testified that the land in dispute originally belonged to Atori Kezironi but he gave it to the appellant. She and her husband as well acquired the land they occupied from Atori Kezironi. The appellant reared livestock, grew crops on the land and had 20 beehives on it. He also built a church. It is insurgency that forced him off the land in 1988.

D.W.5. Ochan Joseph, the appellant's brother, testified that he was present on 3<sup>rd</sup> July,1984 when the appellant paid shs. 2,000,000/= to Odong Stanley Alung as compensation for his developments on the land. The parties signed a typed agreement and it was duly witnessed. The appellant took possession of the land while Odong Stanley Alung relocated to a place across 25 Pakwera Stream. The court then visited the *locus in quo*.

In his judgment, the trial magistrate found that although the lease offer had been made in the names of Atori Kezironi, the offer was in fact made to Odong Stanley Alung and therefore the land in dispute forms part of the estate of the late Odong Stanley Alung. The purported grant of 30 part of that land by Atori Kezironi to the appellant was not witnessed by any member of Atori Kezironi's family and neither was the sale of the purported developments on the land witnessed

by any member of Odong Stanley Alung's family. The defence witnesses only knew bits and pieces of the claimed transaction of sale of developments on the land. The allegation that the sale was prompted by Odong Stanley Alung's failure to account for funds at his place of work was not supported by any credible evidence. At the visit to the *locus in quo*, the court did not find any  
5 remnants of the church which the appellant claimed to have constructed on the land. The court found that the appellant had not been given any part of the land in dispute. His presence on the land began at the end of the insurgency, without the consent of the respondents as administrators of the estate of the late Odong Stanley Alung and he is therefore a trespasser on the land. The trial court therefore declared the land in dispute to be part of the estate of the late Odong Stanley  
10 Alung, issued a permanent injunction against the appellant, an order of vacant possession, awarded general damages of shs. 5,000,000/= for trespass to land and the costs of the suit.

Being dissatisfied with the decision, the appellant appealed to this court on the following grounds;

- 15 1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record adduced by the appellant and thus came to a wrong decision prejudicial to the appellant.
2. The learned trial Magistrate erred in law and fact when by disregarding the evidence and facts adduced by the appellant and his witnesses in respect of their acquisition of the  
20 subject matter from the late Atori Kezironi Alung.
3. The learned trial Magistrate erred in law and fact when he failed to appreciate and understand the law and the effect of the expired lease offer vis-a-vis persons in ownership and possession of public land and thus came to the wrong decision prejudicial to the appellant.
- 25 4. The learned trial Magistrate erred in law and fact when he ignored evidence of possession adduced by the appellant during the locus visit and this came to a wrong decision prejudicial to the appellant.
5. In addition to ground 2 above, the learned trial Magistrate erred in law and fact by ignoring the evidence of features tendered before court by the appellants at the time of  
30 locus visit.

The parties proceeded by way of written submissions. In his submissions, counsel for the appellant presented a set of four "amended" grounds of appeal. Although Order 6 rule 19 of *The Civil Procedure Rules*, empowers court to at any stage of the proceedings, to allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, in the  
5 instant case counsel for the appellant did not seek leave to amend. To allow an amendment within the submissions would occasion an injustice in light of the fact that the respondent has not had opportunity to address court on the timeliness and fairness of the proposed amendment and in light of the strict time limits imposed on the parties for the filing of their written submissions. The justice of the case requires that the appeal be determined on basis of the memorandum of  
10 appeal that was filed on 28<sup>th</sup> October, 2015 whose grounds have been reproduced above.

In their submissions, M/s Odongo and Company Advocates, counsel for the appellant argued that whereas the respondents filed the suit claiming that they owned the land in dispute under customary tenure, at the trial they adduced evidence to show that it was part of former public  
15 land in respect of which the late Odong Stanley Alung had been given a lease offer. The application for rural land dated 3<sup>rd</sup> January, 1974 and the lease offer dated 25<sup>th</sup> February, 1975 tendered in evidence, do not bear the names of that deceased, but rather of his late father, Atori Kezironi Alung. The trial magistrate erred in admitting oral evidence that contradicts the express contents of the two documents. The respondent's evidence was contradictory as to the size and  
20 location of the land. Some aspects of it corroborated the defence raised by the appellant, that after the sale of the part now in dispute, the late Atori Kezironi Alung moved and settled beyond Pakwera Stream. The lease offer having been made to Atori Kezironi Alung, he had the capacity to sub-let to the appellant. The appellant's occupancy began in 1984, was interrupted by the period of insurgency starting in 1988, but was restored in 2008 to-date. None of the respondents  
25 are in occupation of the land in dispute. The court further erred when it failed to record proceedings at the *locus in quo*. The trial magistrate only referred to the absence of remnants of the church and not to any other observations made at the *locus in quo*. He prayed that the appeal be allowed.

30 In reply, counsel for the respondents, M/s Kunihira and Company Advocates submitted that the first ground of appeal ought to be struck out because it offends the provisions of Order 43 rule 1

(2) of *The Civil Procedure Rules*. Although in his defence the appellant had pleaded that he purchased the land in dispute from the late Atori Kezironi Alung, at the trial he testified that he obtained it as a gift *inter vivos* and only compensated Odong Stanley Alung for his development on the land. This was a departure from his pleadings. In addition, none of the family members of  
5 Odong Stanley Alung witnessed that document. The appellant's evidence was full of contradictions thereby justifying the decision of the trial court not to rely on it. On the other hand, the respondents' evidence was consistent and unshaken by cross-examination. Even if the lease offer had expired, the appellants had constructive possession of the land and enjoyed an equitable interest therein. They had possession of the land while the appellant did not. His  
10 trespass began in the year 2009 as decided by court after visiting the *locus in quo*. Counsel prayed that the appeal be dismissed with costs.

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  
15 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.

20 In agreement with the submissions of counsel for the respondents, the Court finds the first ground of appeal is too general and offends the provisions of Order 43 rule (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from  
25 without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get  
30 something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2*

of 1998; (1999) KALR 621; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). Accordingly the first ground of appeal is struck out.

5 Grounds four and five of the memorandum of appeal relate to the observations made by court when it visited the *locus in quo*. Unfortunately, that part is missing from the record of appeal and from the original trial record. The law on a missing record of proceedings has long been established. Where reconstruction of the missing part of the record is impossible by reason of neither of the parties being in possession of the missing record, but the court forms the opinion that all the available material on record is sufficient to take the proceedings to its logical end, the  
10 court may proceed with the partial record (see *Mrs. Sudhanshu Pratap Singh v. Sh. Praveen (Son)*, RCA No.32/14 & RCA No. 33/14, 21 May, 2015 and *Jacob Mutabazi v. The Seventh Day Adventist Church, C.A. Civil Appeal No. 088 of 2011*). I have formed the opinion that the available material on record is sufficient to take the proceedings to its logical end, and have therefore decided to proceed with the partial record.

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In grounds two and three, counsel for the appellant contends that the trial court misconstrued both the evidence relating to the appellant's acquisition of the land in dispute from the late Atori Kezironi Alung and the law relating to expired lease offers. Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions  
20 and arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the  
25 wrong principles in reaching those findings may be reversed (See *Peters v. Sunday Post Ltd [1958] E.A. 429*).

I have scrutinised the record and found that in paragraph 4 of the plaint, it was the respondent's case that the late Odong Stanley Alung was a customary owner of the land in dispute yet at the  
30 trial the first respondent as P.W.1 stated categorically that the land was not owned customarily and it was vacant. P.W.5 Olok James Odur, too testified that the land in dispute is not customary



land but rather the late Odong Stanley Alung acquired it from the Uganda Land Commission in March, 1973. P.W.7 Lakony David Livingstone testified that the late Odong Stanley Alung found vacant land in 1969 and settled thereon with the intention of establishing a farm. He then applied for a lease from the Uganda Land Commission. In agreement with the submissions of  
5 counsel for the appellant, I find this to have constituted a departure from the respondent's pleadings. They presented a materially different case at the trial from that pleaded in the plaint.

Counsel for the respondent contends the appellant engaged in similar behaviour but two wrongs do not make this right. In any event, the burden of proof lay on the respondents to prove their  
10 case and not the other way round. To decide in favour of the respondents, the court had to be satisfied that the respondents had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the appellant such that the choice between their version and that of the appellant would be a matter of mere conjecture, but rather of a quality which a reasonable person, after comparing it with that adduced by the appellant, might hold that  
15 the more probable conclusion was that for which the respondents contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

It turns out that the respondents' claim to the land is founded on an offer that was made to the late Atori Kezironi Alung dated 25<sup>th</sup> February, 1975 pursuant to an application for rural land  
20 dated 3<sup>rd</sup> January, 1974. The respondents adduced oral evidence to show that whereas both documents bear the name of Atori Kezironi Alung, the offeree in fact was Odong Stanley Alung. This offends section 92 of *The Evidence Act*, which states that when the terms of a contract, grant or other disposition of property, have been proved, no evidence of any oral agreement or statement may be admitted, as between the parties to any such instrument or their representatives  
25 in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. In effect the respondents were unable to adduce evidence of an application made by Odong Stanley Alung nor an offer made to him.

Besides that, condition 4 of the offer dated 25<sup>th</sup> February, 1975 made to the late Atori Kezironi  
30 Alung stipulated that it would lapse if not accepted within one month. There was no evidence adduced to prove such acceptance having been made. In *Routledge v. Grant [1828] 4 Bing 653*;

130 ER 920, the defendant contacted the claimant in writing, offering to purchase the lease of the claimant's home. The offer stated that it would remain open to the claimant for a period of six weeks. However, during this period, before the claimant had accepted, the defendant changed his mind about the purchase and wrote to the claimant once again purporting to withdraw the offer.

5 After receiving this second letter, still within six weeks from the first, the claimant accepted the defendant's offer. The issue was whether the defendant was contractually bound by his original letter to keep the offer open for six weeks, and by extension whether he was therefore bound by the claimant's acceptance within that period. The court held that the original letter did not bind the defendant to keep the offer open for a full six weeks, and as such it had been validly  
10 withdrawn by the defendant, and the claimant's purported acceptance was ineffective. In the words of Best CJ:

“... If a party make an offer and fix a period within which it is to be accepted or rejected by the person to whom it is made, though the latter may at any time within the stipulated period accept the offer, still the former may also at any time before it is  
15 accepted retract it; for to be valid, the contract must be mutual: both or neither of the parties must be bound by it...”

The underlying reason for this was that it is a fundamental principle of contract law that one party cannot be bound whilst the other is not. Although death of an offeree acceptance, does not  
20 necessarily terminate an offer unless it is one of a personal nature (see *Carter v. Hyde*. (1923) 33 C.L.R. 115), an offer lapses if acceptance is not communicated within the time prescribed in the offer (see *Ramsgate Victoria Hotel v. Montefiore* (1866) LR 1 Ex 109). There not having been any acceptance by 25<sup>th</sup> March, 1975, the offer had lapsed by the demise of both late Atori Kezironi Alung and to the late Odong Stanley Alung.

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I any event, the offer was never extended to Odong Stanley Alung. Even if that had been the case, according to Regulation 10 of *The Public Lands Rules S.I 201-1* (then in force and only revoked in March 2001 by rule 98 of *The Land Regulations, S.1. 16 of 2001*), an offeree of a lease on public land was a mere tenant at sufferance and he or she could only acquire interest at  
30 registration. It provided that:

Any occupation or use by a grantee or lessee of land which the controlling authority has agreed to alienate shall until registration of the grant or lease be on sufferance only and at the sole risk of such grantee or lessee.

5 A tenancy at sufferance arises by implication of law not by contract. Within the context of the rule, until registration of the lease, a person receiving an offer of a lease from a Controlling Authority was in a position akin to that of a tenant holding over demised premises at the end of a lease without the landlord's assent and whose occupancy therefore could be terminated at will. At common law a tenancy at sufferance may be terminated at any time and recovery of  
10 possession effected. The implication of Rule 10 of *The Public Lands Rules* therefore was that an offerree of a lease by a Controlling Authority did not acquire an interest in the land so offered until actual registration of that lease. A tenant at sufferance acquires no interest in the land he or she occupies.

15 If indeed on basis of that offer Odong Stanley Alung undertook developments on what was for all practical purposes public land, that of itself did not create a customary interest in that land. 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  
20 customary rules which are limited in their operation to a particular description or class of persons. Similarly, section 54 of *Public Lands Act* of 1969 (then in force in 1973) had defined customary tenure as "a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons." Therefore, a person seeking to establish customary ownership of land had the onus of proving that he or she belonged to a  
25 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 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. No such evidence was adduced at the trial.

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Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure. That occupancy should be proved to have been in accordance with a customary rules accepted as binding and authoritative in respect of that land, in such circumstances. In *Bwetegeine Kiiza and Another v. Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009*; where the respondent claimed ownership of the land in dispute on the basis that it had been given to him as a gift by the Bataka (local elders) of the area and also due to the fact that since he had from then onwards occupied and used it for a long time, on that basis he had acquired a customary interest in the land. The court decided;

We have carefully perused the record, and it is our finding that there was no evidence led or adduced to prove the custom that LCs and the Bataka (local elders) can allocate land in the form of a gift from which arises a customary interest in Bunyoro.....We also disagree with the finding that as a general rule when one occupies or develops land then *ipso facto*, a customary interest is created. The effect of that holding is that no matter how one comes to the land, as long as one develops it, a customary interest is acquired. Even trespassers would then acquire interest on property which they otherwise shouldn't. In any event this was not proven in evidence and, as a general proposition of customary law, would be unacceptable. It is clear from the authorities above that customary law must be accurately and definitely established and sweeping generalities will not do under this test.

Every inquiry into custom involves two factual determinations: first, is there a custom with respect to the subject matter of the inquiry; and, if so, second, what is it? It is axiomatic that a party relying on a rule of custom has the burden of proving its existence and substance at trial. The late Odong Stanley Alung could not have been a customary tenant since the respondents did not adduce evidence to that effect, but at best a tenant at sufferance, of the 10,000 acres of former public land that the respondents now claim. When custom is firmly established and widely known, the courts will take judicial notice of it, but when there is a dispute as to the existence of custom and a court is not satisfied as to its existence or applicability, custom becomes a mixed question of law and fact. In such case the party relying upon alleged custom must prove it by evidence satisfactory to the court. When a party fails to meet its evidentiary

burden at trial, it will not be permitted to remedy its failure by recasting a matter of custom as an issue of law, and then seek to re-litigate it as such on appeal.

For example in a similar case, *Lwanga v. Kabagambe*, C.A. Civil Application No. 125 of 2009,  
5 the applicant sought a certificate of importance for an intended third appeal to the Supreme Court against a finding that his claim over 3,000 acres of former public land was too big to be called a customary holding. His claim was based on a lease offer that was never accepted. The court found that if he were to be a customary tenant, he was at sufferance, and the land was available for leasing to the occupier or to anyone else. In *Musisi v. Edco and Another*, H.C. Civil Appeal  
10 No. 52 of 2010, by virtue of *The Land Reform Decree, 1975* and *The Public Lands Act, 1969*, the system of occupying public land under customary tenure was to continue, but only at sufferance and any such land could be granted by the Commission to any person including the holder of the tenure in accordance with the Decree. Similarly in the Marshall Islands case of *Abner, et al., v. Jibke, et al.*, 1 MILR 3 (Aug 6, 1984), the court held that possession or use of land does not, in  
15 itself, convey any rights in the land under custom.

Traditionally property rights were distinguished from personal rights. Property rights arose in relation to land, and personal rights in relation to every other “thing” not being land. The common law recognises a number of property interests, such as ownership, possession, use and  
20 rights of management or control. A tenancy at sufferance does not confer any such right and at best is a right *in personam*. Where a person has a proprietary right enforceable against the world at large this is sometimes called a real right or a right *in rem*. Even if an interest relates to “real” property, not all property rights are protected by a real or *in rem* remedies.

25 A finding of fact is clearly erroneous when review of the entire record produces a definite and firm conviction that the court below made a mistake. The learned trial magistrate therefore erred when he found that the respondents had proved ownership of an interest in the land in dispute, based only on evidence of a claimed long period of occupation and user without proof that such occupancy and user was in accordance with known customary rules accepted as binding and  
30 authoritative in respect of that land. A tenancy at sufferance is not an interest in land. An interest in land must be one capable of surviving the parties and must be recognisable to the

whole world (See *National Provincial Bank v. Anisworth* [1965] A.C.1175). A tenancy at sufferance not being an interest in land, no interest in the land in dispute could pass to the estate of the deceased.

5 What the dispute between the parties boils down to is conflicting claims of possession to a sizeable tract of land of former public land. Factual possession of land signifies an appropriate degree of exclusive physical control. For vast lands, possession requires knowledge of its boundaries and the ability to exercise control over them (see *Powell v. McFarlane* (1977) 38 P&CR 452). There should be evidence that the claimant deals with the cleared and un-cleared  
10 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 respondents never  
15 adduced evidence of this nature at the trial.

A possessory right in land is the right and intent of someone to occupy or control a parcel of land but does not include ownership of the land. Possessory rights may be terminated by notice, forfeiture or abandonment. Abandonment is constituted by the act of vacating property with the  
20 intention of not returning. It is trite law that all interests in unregistered land may be lost by abandonment. Abandonment occurs where the owner of the unregistered interest leaves the whole of the land unattended to by himself or herself or a member of his or her family or his or her authorised agent for a considerable period of time (which under section 37 of *The Land Act* is three years or more in respect of tenancies by occupancy). The legal definition requires a two-  
25 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 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.

30 The evidence before the trial court is to the effect that the appellant was in possession of the land from 1984 until 1988 when his possession was interrupted by insurgency. Immediately upon the

ceasure of hostilities around 1987 he returned and repossessed the land. The respondents on the other hand claimed that it was the late Odong Stanley Alung and the late Atori Kezironi Alung who were in possession immediately before the breakout of hostilities that displaced them to an IDP Camp during the insurgency. There is no evidence that after the insurgency, the respondents  
5 dealt with any part of the 10,000 acres in the same way that a rightful owner would deal with it. There was no evidence of open, notorious, continuous, exclusive possession or occupation of any part thereof by the respondents as would constructively apply to all of it, as could be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by them.

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To the contrary, possession of the 200 acres by the appellant was not disputed by the respondents, save for the claim that he was trespasser theorem. A person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against the entire world but the rightful owner. At common law, the principle  
15 is that the person entitled to exercise all the rights of ownership of land is the person seised of it. Seisin in theory means legitimate possession.

A person exercising such possession therefore, for all practical purposes, is the owner of the land since it is trite that "possession is good against all the world except the person who can show a  
20 good title" (see *Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5*). Possession may thus only be terminated by any person with better title to the land. The respondents did not prove a better title for which reason the trial court came to the wrong conclusion when it decided in their favour. Accordingly this appeal succeeds; the judgment of the court below is set aside. Instead the suit is dismissed and the costs of the appeal of the court below awarded to the  
25 appellant.

Dated at Gulu this 4<sup>th</sup> day of October, 2018

Stephen Mubiru

30 Judge,

