

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0005 OF 2017
(Arising from Pader Grade One Magistrate's Court Civil Suit No. 0012 of 2013)**

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OYOO FRANCIS APPELLANT

VERSUS

10 **OLANYA MARTIN RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

15 The appellant sued the respondent for recovery of land, a declaration that he is the owner of land measuring approximately 350 hectares situated in Omunyu Ward, Golo Parish, Latanya sub-county in Pader District, an order of vacant possession, a permanent injunction, an award of general damages for trespass to land and costs. His case was that the land in dispute originally belonged to his late grandfather until his death in 1989. It was inherited by his father Otto
20 Bonifasio who as well died during the insurgency. The appellant in turn inherited it during the year 2005. Before his death, the late Otto Bonifasio had permitted the respondent's father to occupy part of the land. When he was later asked to leave, he refused to vacate hence the suit.

In his defence, the respondent refuted the appellant's claim and prayed that the suit be dismissed.

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P.W.1, Oyoo Francis stated that his land measures approximately 300 acres. He inherited it during the year 2008, with the permission of the clan leaders. In 1985, his grandfather had granted the respondent temporary refuge after falling out with his brother. The respondent vacated in the temporary occupancy in 1987 at the behest of the appellant's late father. In 2010 the
30 respondent returned to the area that he had been given in 1985, began cultivating it and even exceeded the area of the original grant, hence the suit.

P.W.2, Romeo Ojok stated that the appellant's late grandfather, Palwar, acquired the land in dispute in 1935. On his death, it was inherited by his son, Venansio Otto. When the latter died during the insurgency, the appellant inherited the land. In 1991, the late Palwar gave the respondent four acres of that land. During the insurgency, the respondent vacated the land but returned in 2005 and began cultivating the land again.

P.W.3 Abwola Valentino Oloum stated that in 1985, the respondent had requested the appellant's grandfather for some land, and he was given a part of the land. The appellant's father Venansio Otto having been absent at the time of that transaction, since he was serving in the army, on his return he attempted to evict the respondent. The respondent vacated the land in 1986 due to insurgency. At the end of the insurgency, the respondent returned to the land during the year 2010. The respondent buried relatives on the land; brothers and their wives, and seven children of the respondent. P.W.4, Remica Arech stated that In 1985, the appellant's grandfather allowed the respondent. temporary use of part of the land in dispute. The respondent used the land for about two years and vacated in 1986. The respondent returned after death of the appellant's grandfather and father. Over 20 relatives of the respondent were buried on the land during insurgency. The appellant then closed his case.

In his defence as D.W.1 the respondent, Olanya Martin, testified that he settled on the land in dispute during the year 1978 while it was virgin, vacant land. The dispute with the appellant only began in the year 2010. He had 15 graves of his relatives on the land and although he shares a common boundary with the appellant, he has never encroached onto the appellant's land. D.W.2 Okello Moses testified that the respondent shared a common boundary with appellant's father and grandfather, before him. There was no dispute over the land then. The dispute began after return from camp. The respondent closed his case at that point.

Before the court visited the *locus in quo*, it recorded evidence of one "independent witness," a one Kibwota James, who testified that the respondents occupancy of the land was never disputed by the appellant's father and grandfather, before him. At the *locus in quo*, the court recorded prepared a sketch map of the area and recorded

In his judgment, the trial magistrate found that the appellant had failed to prove the case on the balance of probabilities. The appellant was not in possession and could not maintain an action in trespass, yet the respondent's testimony was corroborated by the features observed at the *locus in*
5 *quo*. The respondent was therefore the owner and not a trespasser on the land in dispute. The court declared the respondent to be the owner of the land in dispute, issued a permanent injunction against the appellant and awarded the costs of the suit to the respondent.

Being dissatisfied with the decision, the appellant appealed to this court on one ground as
10 follows;

1. The trial Magistrate erred in law and fact when he decided that the plaintiff was not the lawful owner of the suit land.
2. The trial Magistrate erred in law and fact when he found that the defendant was not a trespasser to the suit land.
- 15 3. The trial Magistrate failed to conduct locus in quo according to the prescribed principles thereby leading to a miscarriage of justice.
4. The trial Magistrate failed to evaluate the evidence thereby coming to a wrong decision.

In his submissions, counsel for the appellant Mr. Ocorobiya Lloyd argued that it was not
20 controverted that the respondent was given temporary occupancy right of the land in dispute by the appellant's grandfather in 1985 and he vacated the land in 1986. The respondent wrongfully returned to the land in 2005. The trial court should have found that the land belonged to the appellant and the respondent is a trespasser thereon. The trial magistrate failed to conduct proceedings at the *locus in quo* for the purpose for which such proceedings are designed. He
25 prayed that the appeal be allowed. The respondent was unrepresented at the hearing of the appeal and did not file written submissions.

In reply, counsel for the respondent, Mr. Owor Edward Buga, argued that the evidence of D.W.1 the respondent was to the effect that he found vacant land and took possession. The land was not
30 controlled by anyone. The plaintiff then said that the respondent was given the land but that was disputed. According to the respondent he stated that he acquired 100 acres. The sketch map

indicates that the suit land was occupied by the respondent. It shows the burial ground. It also indicates the gardens. Nowhere is the appellant indicated on the suit land. He is on the Eastern side. The suit land is bordered by the trees which is a clear indication that it belongs to the respondent and not the appellant. According to P.W.4 he said the grandfather told them he gave
5 the land to the respondent. The period was not stated. P.W.1 stated that the defendant came to the land in 1988. The magistrate stated that in 1988 there was insurgency and there was no one in possession. The respondent had left the land due to insurgency. He did not go there as a refugee. The trial magistrate found there was peaceful co-existence of the grandfather of the appellant and the father of the respondent. The map indicates the respondent is to the West and they had a
10 common boundary. There was a settlement indicated on the map and there were gardens. He prayed therefore 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
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.

It is trite that there is no particular format required in the evaluation of evidence. The task may
20 be carried out in different ways depending on the circumstances of each case since judgment writing is a matter of style by individual judicial officers. A Judgment will be valid once it is the court's final determination of the rights and obligations of the parties based on the evidence adduced and gives reasons or grounds for the decision (see *British American Tobacco (U) Ltd v. Mwijakubi and four others, S.C. Civil Appeal No. 1 of 2012; Bahemuka Patrick and another v. Uganda S.C. Criminal Appeal No. 1 of 1999 and Tumwine Enoch v. Uganda S.C. Criminal Appeal No. 11 of 2004*).

The question as to whether the appellant discharged the burden of proof on a balance of
30 probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and / or inherent probabilities of

the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. The enquiry is two-fold: there has to be a finding on credibility of the witnesses; and there has to be balancing of the probabilities.

5 The party who bears the burden must produce evidence to satisfy it, or his or her case is lost. The probabilities must be high enough to warrant a definite inference that the allegations are true. In a civil suit, when the evidence establishes conflicting versions of equal degrees of probability, where the probabilities are equal so that the choice between them is a mere matter of conjecture, the burden of proof is not discharged (see *Richard Evans and Co. Ltd v. Astley*, [19U] A.C. 674
10 at 687). The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied (see *Bradshaw v. McEwans Pty Ltd*, (1959) 101 C.L.R. 298 at 305). The law does not authorise court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others.

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In the first place, the appellant's claim hinged on the claim that the respondent was only granted temporary use rights of the land in dispute in 1985, while on the other hand the respondent claimed to have been in occupation as a customary tenant since 1978. The number of graves of the respondent's deceased relatives on the land was more consistent with the respondent's version
20 than the appellant's claim of one year's occupancy.

With regard to the claimed temporary user rights, deciding whether or not the respondent obtained the land as a gift from the appellant's grandfather depended on the credibility of all witnesses who testify in that regard since none of them witnessed the grant. Questions of
25 credibility relate to whether the witnesses should be believed and how much weight should be given to their testimony. Decisions on the credibility of a witness may depend on the demeanour of that witness, the internal consistence of the testimony, its overall consistence with the rest of the evidence of proved facts, motive for the testimony, its accuracy, existence or otherwise of exaggerations, speculations and so on, with the court at all time in that process drawing on its
30 own common sense, good judgment and experience of life in deciding whether the testimony is reasonable or unreasonable, probable or improbable.

An appellate court will be reluctant to reject findings of specific facts, particularly where the findings are based on the credibility, manner or demeanour of a witness. However, an appellate court will far more readily consider itself to be in just as good a position as the court below to draw its own inferences from findings of specific facts where such findings are not based on demeanour of the witness. Assessment of evidence is an evaluation of the logical consistency of the evidence itself. When a finding of fact depends on a matter such as the logical consistency of the evidence rather than the manner of the witness, an appellate court may be more readily willing to reject a finding of a specific fact (see *Benmax v. Austin Motor Co. Ltd* [1955] AC 370 and *Faryna v. Chorny* [1952] 2 D.L.R. 354). It appears to me that the trial court came to the conclusion it did based on the credibility of the witnesses before it and the available corroborative evidence observed during its visit to the *locus in quo*. The veracity of witnesses may be tested by reference to contemporaneous evidence that does not depend much upon human recollection, such as objective facts proved independently of their testimony.

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The nature of the grant in the instant case is more consistent with a gift than a license. An *inter vivos* gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift (See *Standard Trust Co. v Hill*, [1922] 2 W.W.R. 1003, 1004 (*Alta. Sup. Ct. App. D*). It involves an owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land from one person to another, made gratuitously, and not upon any consideration of blood or money. It has been legally defined as “the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee” (see *Black's Law Dictionary*, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187). A gift *inter vivos* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift.

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Common sense, good judgment and experience of life suggests that it is improbable that he not having witnessed the alleged transaction, the appellant was in position to know the terms upon which the land was given to the respondent. I have not found credible evidence to prove that the appellant's grandfather gave this land to the respondent for temporary use only. The appellant therefore failed to adduce evidence to prove this as a fact. The number of graves of the respondent's deceased relatives on the land, and other features seen by court when it visited the *locus in quo*, which could not have been established within one years, were more consistent with the respondent's version than the appellant's claim of temporary occupancy. The gift can be deduced from conduct.

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According to section 56 (1) (j) of *The Evidence Act*, a court may take judicial notice of the commencement, continuance and termination of hostilities between the Government and any other State or body of persons. In such cases, the court may resort for its aid to appropriate books or documents of reference. By virtue of that provision, this court takes judicial notice of the fact that from the middle of the year 2004 onwards, rebel activity dropped markedly in the entire Northern Region of Uganda, and in mid-September, 2005, a band of the active remnants of Lord's Resistance Army fighters, led by Vincent Otti, crossed into the Democratic Republic of Congo. Thereafter, a series of meetings were held in Juba starting in July, 2006 between the government of Uganda and the LRA (see Wikipedia, "*Lord's Resistance Army insurgency*" at https://en.wikipedia.org/wiki/Lord%27s_Resistance_Armey_insurgency, visited 18th September, 2018). The implication is that in 2006, northern Uganda was nearing the end of the brutal Lord's Resistance Army insurgency (see IRIN, "*How the LRA still haunts northern Uganda*," at <http://www.irinnews.org/analysis/2016/02/17/how-lra-still-haunts-northern-uganda>, visited 18th September, 2018). I find that on the facts of the case, the trial magistrate was justified in taking judicial of the LRA insurgency and its impact since P.W.3 Abwola Valentino Oloum stated as much in his testimony.

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That being the case, 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

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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. The court ascertains the owner's intent by considering all of the facts and circumstances. When the respondent
5 vacated the land as a result of the insurgency, that did not terminate his ownership of the land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before (see *John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*;). Similarly, 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
10 of intent to abandon in the case of *Strauch v. Coastal State Crude Gathering Co., 424 S.W. 2d 677*. The temporary abandonment of the land by the respondent in the instant case not having been voluntary, his rights as owner were revived when he returned after the insurgency.

Having re-evaluated the evidence, I find that the trial court properly directed itself, and it came to
15 the right conclusion. This appeal lacks merit and it is consequently dismissed with costs to the respondents.

Dated at Gulu this 11th day of October, 2018

20 Stephen Mubiru
Judge,