IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 011 of 2019

In the matter between

1. LAKER KERENI OGENA }
2. LABEJA GEOFFREY PAUL } …… APPELLANTS

VERSUS

OTTO ZAIRE …… RESPONDENT

Heard: 6 May, 2019.
Delivered: 16 May, 2019.

Land Law *—Boundary disputes — the weight and order of priority given to boundary features in case of conflicting evidence, in the determination of a true boundary position — Acquiescence by acts or declarations of adjoining landowners or the possessory conduct of the parties may establish the dividing line —A consentable line that is neither created by "recognition and acquiescence," or by "dispute and compromise" is invalid —A boundary may be created by the fact of "part parcel adverse possession." .*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally for a declaration of ownership of land measuring approximately 200 acres situate at Ladere South village, Ladere Parish, Lokode sub-county, Agago District. He sought a declaration that the land belongs to him and the community, a permanent injunction restraining the appellants from further acts of trespass to land, general damages for trespass to land, an order of vacant possession, and the costs of the suit. His claim was that the land in dispute formed part of what was originally 600 acres. In the year 1976, following a dispute during the process of an

application for a lease by the first appellant's late husband a one Ogena Thomas over his land, it was divided into two parts by the Land Committee; 400 acres were given to the first appellant's late husband Ogena Thomas while the 200 acres now in dispute were retained by the respondent's father, the late Altimo Okello. Traditional trees; Anwanga and Kidit were planted to mark the boundary. In 1986, the appellants falsely claimed the part that was given to the respondent's father as theirs.

[2] In her written statement of defence, the first appellant averred that during 1989, her late husband Aquilino Ogena applied for a lease over the land in dispute. He was granted an initial term of five years whereupon he established thereon a mixed farm under the name and style of "Ladere Agricultural Mixed Farm." The respondent first trespassed onto the land in 1986. He was arrested and prosecuted for criminal trespass. Despite that prosecution the respondent continued with his trespass on the land in dispute. Upon the death of Aquilino Ogena, a grant of letters of administration were granted to his son, Labeja Geoffrey Paul, the second appellant. She therefore prayed that the suit be dismissed.

The respondent's evidence;

[3] The respondent Otto Zaire testified as P.W.1 and stated that the land in dispute originally belonged to his grandfather Lalam and it was then inherited by his late father Altimo Oklot, before he inherited it in turn. The appellants trespassed onto his land in by exceeding the boundary created in 1976 by the Kitgum District Commissioner. In 1964, a brother to the first appellant's late husband Aquilino Ogena requested the respondent's father to put up a small shop on part of the land. Later a dispute erupted between the two which prompted the Kitgum District Commissioner to demarcate the land between the two disputants on 15th July, 1976. The respondent's father Altimo Okello was assigned the Eastern side while Aquilino Ogena was assigned the Western side. The boundary between the

two run from an Anwanga tree up to the Patongo to Adilang road. Ten years later Aquilino Ogena caused the arrest of the respondent for criminal trespass. Upon their return from the IDP Camp at the end of the insurgency, instead of returning to their part of the land, the appellants occupied his side of the land, hence the suit.

[4] P.W.2 Oboke Alfonse testified that he was the sub-parish chief during 1976. He witnessed settlement of a dispute over the land between Altimo Okello and the brother of the late Aquilino Ogena. P.W.1 Otto Zaire was assigned the Eastern side while Aquilino Ogena was assigned the Western side. Multiple trees were planted to mark the boundary which included; Anwanga tree, Kidit tree and Lacaa tree. Each party used their respective land peacefully until after the insurgency when the appellants trespassed onto the respondent's part of the land. P.W.3 Akidi Gabrieta testified that the land in dispute was divided whereupon P.W.1 Otto Zaire was assigned the Eastern side while Aquilino Ogena was assigned the Western side.

[5] P.W.4. Ogena Bruno testified that matters over the land in dispute were settled in 1976 with the division of the land between the two disputants. The District Commissioner demarcated the boundary from a thorn tree "Lacer" to a Kidit tree. The boundary runs North to South. P.W.1 Otto Zaire was assigned the Eastern side while Aquilino Ogena was assigned the Western side. The appellants have exceeded that boundary. P.W.5 Otto Aldo testified that matters over the land in dispute were settled on 15th July, 1976 with the division of the land between the two disputants by the District Commissioner. A Kidit tree marked the boundary. P.W.1 Otto Zaire was assigned the Eastern side while Aquilino Ogena was assigned the Western side. That was the close of the respondent's case.

The appellants' evidence;

[6] In his defence, the second appellant Paul Geoffrey Labeja testified as D.W.1and stated that the land in dispute belonged to his late father Aquilino Ogena. The respondent trespassed onto the land. His late father Aquilino Ogena had on 6th March, 1980 applied for a lease over the land (exhibit D. Ex.2). He was on 12th January, 1989 given a lease offer (exhibit D. Ex.3). His father used the land for mixed commercial farming under the name and style of "Ladere Agricultural Mixed Farm." Because his father's work station was in Jinja at the time, the respondent took advantage and encroached onto approximately four acres of the land. His father reported a case of trespass but the respondent went into hiding. The respondent's land is to the North of the Patongo to Adilang road. There has never been a sub-division of the land although the District Commissioner once inspected the land.

[7] The second appellant Laker Kereni testified as D.W.2 and stated that her late husband Aquilino Ogena owned the land in dispute as a customary holding before he applied for a lease. Later the respondent's father mobilised a group of people who encroached onto the land and cleared approximately four acres of it. The respondent became hostile and threatened the appellants in an attempt of preventing them from using the land. She reported to the authorities and the respondent was arrested. D.W.3 Okot Balbina testified that the respondent's father and Aquilino Ogena had lived harmoniously with each in possession for their respective parcels of land that shared a common boundary. The district officials were never invited to decide anything in relation with the land. The boundary is a footpath that goes up to the river. D.W.4 Akulu Matide testified that the first appellant is her co-wife. She lived on the land peacefully until the respondent began encroachment. Before that, the respondent occupied land North of the road. Aquilino Ogena's land extends from the footpath that leads to the river.

The Court's visit to the *locus in quo*;

[8] The court then visited the *locus in quo* where it observed the Anwanga and Kidit trees. The land alleged to have been given to the first appellant's husband was bushy with no visible farming activities. The one in dispute had seasonal crops planted by the first appellant and appeared to have been under cultivation for a long time. The trial Magistrate prepared a sketch map of the area in dispute that reflected the area to be border by the Patongo to Adilang road to the South and the path leading to the Agago River to its East. Cutting across that area, dividing the land almost into two from North to South, is an imaginary line connecting an Anwanga tree to the North towards the direction of the river, and a Kidiit tree to the south approximately twenty feet off the Patongo to Adilang road. The area West of that line is unutilised and vacant, while that East of that line is occupied by the appellants' gardens.

The judgment of the court below;

[9] In his judgment, the trial Magistrate found that the appellant's land was to the West of the imaginary line marked by the Anwanga and Kidit trees yet the first appellant had trespassed beyond it onto the Eastern side. The location of the boundary was not challenged. Although the trespass began in 1976, the wrong committed by the appellant was in the nature of a continuing tort, hence the question of limitation did not arise. The lease offer was not proof of ownership. The first appellant alleged that the respondent trespassed onto the land in 1986 and was prosecuted for trespass but she did not sue him for recovery of the land. She slept on her rights for too long. The land belonged to the respondent's father before the respondent inherited it. Judgment was delivered in the respondent's favour, he was declared owner of the land and the appellants trespassers thereon, an order of vacant possession was granted. The respondent was awarded general damages of shs. 10,000,000/= a permanent injunction was

issued against the appellants and the costs of the suit were awarded to the respondent.

The grounds of appeal;

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

1. The learned trial magistrate erred in law and fact when he found that the land had been demarcated between the first appellant's husband, who is the second appellant's father, Thomas Oyena and the respondent's father, Alfred Okot whereas there was no evidence to support that finding.
2. The learned trial magistrate erred in law and fact in holding that the respondent's claim was not time barred whereas not thereby occasioning a miscarriage of justice.
3. The learned trial magistrate erred in law and fact in holding that there was no dispute over the division of the land in 1976 whereas the appellant adduced evidence of prosecution of a criminal case against the respondent.
4. The learned trial magistrate erred in law and fact when he held that the respondent is the owner of the land in dispute, whereas the appellants have been in possession and use of the land for over 40 years.
5. The learned trial magistrate erred in law and fact in awarding general damages of shs. 10,000,000/= whereas the same was not pleaded nor proved by the respondent.

Submissions of counsel for the appellants;

[11] Counsel for the appellants submitted that the alleged creation of a boundary by the District Commissioner was not supported by any documentary evidence. The respondent's witnesses did not attend proceedings at the *locus in quo* and therefore could not demonstrate the boundary, whose creation they alleged to

have witnessed. All four witnesses for the appellant denied there having been any division of the land as claimed by the respondent. At the *locus in quo*, the footpath that forms the boundary between the appellants' and the respondent's land was seen in corroboration of the testimony of D.W.1 Paul Geoffrey Labeja, D.W.3 Okot Balbina and D.W.4 Akulu Matide. The Anwang and Kidit trees have never been recognised by the parties as the boundary. The court's finding that the suit was not time barred was erroneous in so far as the respondent admitted that he had not been in possession of any part of the land in dispute since 1986. The court at the same time observed that the appellants had been in possession of the land for over 38 years. From 1986 when he was arrested and imprisoned over trespass to that land, the respondent did not file a suit until the year 2013, hence after 27 years. Although the process of acquisition of a lease title over the land was interrupted by insurgency, the appellants have been in possession and quiet enjoyment of the land for over forty years, until 2013 when the suit was filed against them. There was no basis for awarding the respondent general damages. He prayed that the appeal be allowed.

Submissions of counsel for the respondent;

[12] In response, counsel for the respondent submitted that all the respondent's witnesses attested to the sub-division of the land that took place in 1976. A Kidit tree and Anaga tree marked the boundary between the adjacent parcels of land allotted to the two parties. Although the witnesses were not present during the visit to the *locus in quo*, the court was able to verify their testimony by the features it observed threat. The late Aquilino Ogena's application for a lease was made in 1989, long after the location of the common boundary had been resolved and the documents presented by the appellants cannot be deemed to represent land that included that of the respondent. The appellants cannot claim to have enjoyed quiet possession of the land when they acknowledge having caused the respondent's prosecution for alleged criminal trespass over the same land. The land is owned under customary tenure yet the appellants' claim was

founded on an application for a lease. The trial court properly evaluated the evidence before it and came to the correct conclusion. The award of general damages is at the discretion of court. General damages need not be pleaded as they are presumed to arise from the very fact of trespass. The trial court properly exercised its discretion to award them and there is no basis for interfering with the award. He prayed that the appeal be dismissed.

The duties of this court;

[13] 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*).

[14] 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.

Dealing with conflicting evidence in the determination of a true boundary position;

[15] In grounds one and three, the trial Magistrate is faulted for having found that the land in dispute had been demarcated between the first appellant's husband, who

is the second appellant's father, Thomas Oyena and the respondent's father, Alfred Okot, and that the resultant boundary was not dispute yet there was evidence that the respondent and other persons had been arrested multiple times at the instance of the appellants over trespassing onto the land.

[16] When the description or location of a boundary is ambiguous, otherwise uncertain or in conflict with the occupations, Courts usually settle the position of the disputed boundary by granting priorities of weight where any two or more of the following boundary features present conflicting evidence in the determination of a true boundary position, in order of priority: (i) natural boundaries (e.g. rivers, cliffs); (ii) monumented lines (boundaries marked by survey or other defining marks, natural or artificial); (iii) old occupations, long undisputed (for example an old wall or fence); (iv) abuttals (a described "bound" of the property e.g. a natural or artificial feature such as a road); and (v) statements of length, bearing or direction (measurements in a described direction). The hierarchy is based primarily upon the variation in the level of certainty that exists with each form of evidence. Natural landmarks, being less liable to change and not capable of counterfeiting, carry the most conclusive evidence.

[17] This ranking order though is not rigidly adhered to; special circumstances may lead a court at times to give greater weight than normal to a feature of lower rank. The priorities are based on presumptions about the relative certainty of each type of evidence. There is an underlying fundamental principle which forms the foundation of the rules. When the reasons for adhering to the presumed priority ranking do not apply to the case at hand, the presumed ranking should fail and the best available evidence should prevail.

[18] Since the location of a boundary is primarily governed by the expressed intention of the originating party or parties, or where the intention cannot be ascertained from the behaviour of the parties, subject to any evidence to the contrary, Courts have consistently ruled in favour of long, acquiescent and undisturbed

occupation consistent with one or other of this features, as the most convincing evidence of a boundary between properties. Most weight should be given to those points on which the parties at the time were least likely to be mistaken.

[19] In the instant case, in the absence of maps, plans and diagrams, whether drawn to scale or not, capable of showing the true boundary of the disputed land, the trial court was left with the option of considering oral testimony on the boundaries by persons it considered trustworthy and knowledgeable about land matters in the area, visual identification during the *locus in quo visit* of customary forms of identifying or demarcating boundaries using natural features and trees or other prominent objects actually seen on the land, or evidence of human activities on the land such as the use of footpaths and the placing of boundary marks on the land that have existed thereon for a considerable period of time, particularly those that existed before the dispute flared up.

[20] It was the respondent's case that the boundary issue was resolved in 1976 by the then District Commissioner's identification and designation of the Anwang and Kidit trees, as the boundary marks. This fact was disputed by the appellants who instead stated that the true boundary is the Patongo to Adilang road on one side and the path leading to Agago River on the other. The three features were seen by the court when it visited the *locus in quo* and are reflected on the sketch map that the court prepared. It turns out that while the respondent relied on a level (i) boundary (natural boundaries in the form of trees), the appellants relied on a level (iv) boundary (abuttals in the form of a road and a footpath). Ranking of the boundary markers according to the recommended propriety alone would not solve the dispute since that ranking order is not rigidly adhered to. It is meant to be used as a guide but not as a straight jacket. They are only evidentiary principles, rather than substantive rules and special circumstances in this case required the trial court to give greater weight than normal to a feature of lower rank, as explained below.

[21] Considering that each of the parties disputed the other's identification of either feature as the true boundary, which of them is the true boundary could only be determined by evidence of their behaviour over the years. Proof of external and visible acts and conduct serves to indicate, more or less forcibly, the particular recognition of a feature as a boundary, since an owner of land and a person intruding on that land without his or her consent cannot be both in possession of the land at the same time.

[22] The question then revolved upon the determination of who between the parties has had exclusive physical control of the land in dispute. Acquiescence by acts or declarations of adjoining landowners would then establish the dividing line. When court has to make a determination based on the conduct of the parties, it is not even necessary that the parties specifically consent to the line so defined. It is sufficient that their actions consistently honoured the boundary. The fact (if true) that the parties' beliefs as to ownership that guided that conduct were based on inadvertence, ignorance, or mistake is irrelevant.

[23] For example in *Sledge v. Peach County, 624 S.E.2d 288(Ga.App.2005*, evidence showed that for over 30 years the owners of the Rauls property had farmed the 19 acre disputed property by planting and harvesting soybeans, wheat, vegetables, watermelons, and hay; had planted pine trees in the area; had had cattle grazing on the land; had built a small building on the property with power to the building; had stored an old truck on the property; and had had a lock on a gate on the road leading into the property at the fence line. The Sledge family did not cut timber past the fence line. Aerial photographs and testimony indicated the parties had treated the fence as the boundary line. The trial court found that the fence line was the proper boundary line.

[24] Similarly in *Watcham v. Attorney-General of the East Africa Protectorate,[1919] AC 533*, the Watchams held land along the bank of the Nairobi River. It had been conveyed to them by the Crown by a certificate under the East African Land

Regulations. The certificate gave the area transferred as "66 3/4 acres, or thereabouts," but included a description by reference to physical features on the ground which would have resulted in an area of 160 acres. There was evidence that the Watcham family had never occupied the more extensive area, part of which had been occupied without objection from them by someone else. It was held that the evidence was admissible as an aid to construction, to show that the description in the certificate must be "*falsa demonstratio"* (a wrong description of an item in a legal document will not necessarily void the gift if it can be determined from other facts).

[25] That case presents an interesting example of working with the hierarchy of guides to achieve the ends of justice. In that case area was finally chosen over all other elements of the hierarchy, including distance and bearing. This case is a strong indication that the hierarchy is a slave, not a master. From that judgment, their Lordships stated that it was clear from the facts that the statement of the boundaries contained in the certificate was no true guide to the ascertainment of the property intended to be conveyed. There was only one other guide, the area. The choice lay between them, one or the other had to be a *falsa demonstratio*. The area came first and was repeated after the boundaries. In their Lordships view, the description of the boundaries was the *falsa demonstratio* and the other description being complete and sufficient in itself, that of the boundaries was rejected. Similarly in matters of boundary disputes, it may therefore be possible to take into account the subsequent behaviour of the parties to interpret what was intended as the boundary, by determination of who between the two had over the years had a sufficient degree of exclusive physical control.

[26] The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly what must

be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

[27] When the court visited the *locus in quo*, it noted that, "the land alleged to have been given to the first appellant's husband was bushy with no visible farming activities," yet "the one in dispute had seasonal crops planted by the first appellant and appeared to have been under cultivation for a long time" (emphasis added). Had the land West of the imaginary line between the Anwanga and Kidit trees been occupied by the appellants, then that is where the court would have found evidence of the land having "been under cultivation for a long time," or other evidence of old occupations, but there was none. The implication is that the evidence at the *locus in quo* did not demonstrate that the parties had ever adjusted their activities on the land to reflect that the North to South imaginary line between the Anwanga tree to the Kidit tree was the recognised common boundary.

[28] The possessory conduct of the parties reflects the Patongo to Adilang road that runs East to West to have been the boundary. This is because evidence of old occupancy, by way of human activities of the parties, indicated that those of the appellants' were to the North of that road while those of the respondent were to the South of that road. Each of the parties exclusively possessed the land on the party’s side of that road rather than on the opposite sides of the imaginary line between the Anwanga and Kidit trees. This shows that the parties had for long harboured a perception of the Patongo to Adilang road being the boundary, and it explains why whenever the respondent's and other persons' activities crossed that boundary, the appellants would initiate criminal proceedings against them. The respondent is simply a persistent trespasser.

[29] The Court's role was to find and confirm where the boundary had been in the first place; not to attempt to create one by confirming a line that had been set by the

District Commissioner in circumstances, as will be explained when resolving grounds two and four, where he had no legal authority for so doing. The trial court therefore misdirected itself when it held that the Anwanga and Kidit trees formed the common boundary. Long standing occupation often affords very satisfactory evidence of the original boundary when no other evidence is attainable or credible. An error of law was committed where the trial court, for no rational reason, disregarded or rejected as wholly irrelevant, evidence which *prima facie* afforded some proof of the matter to be determined. Therefore grounds one and three succeed.

A consentable line that is neither created by "recognition and acquiescence," or by "dispute and compromise," is invalid.

[30] In grounds two and four, the trial Magistrate is faulted for holding that the respondent's claim was not time barred whereas the appellants had been in possession and use of the land for over 40 years. It was the respondent's evidence that the brother of Aquilino Ogena settled onto the land in 1964. Later a dispute erupted between his father and the brother of Aquilino Ogena which prompted the Kitgum District Commissioner to demarcate the land between the two disputants on 15th July, 1976. The appellants disputed the latter fact but contended it is the respondent who over the years has been trespassing on their part of the land. What is not in doubt is that the appellants were in occupation from the early 1960s except that their occupancy was interrupted by the insurgency.

[31] It is clear from the two versions that each of the parties has over the years accused the other of trespass. I am inclined to believe that there was an attempt to resolve that dispute by creation of a boundary between them by the District Commissioner. Since that boundary does not seem to have been created by consensus, its validity is undermined. The District Commissioner had no legal mandate to arbitrate or adjudicate boundary disputes. He could only mediate.

Adjoining owners can, through words or action, create a “consentable” (or “consentible”) boundary: An agreed upon boundary that literally supersedes any other boundary that existed hitherto.

[32] There are two ways to create a consentable line: by “recognition and acquiescence,” and by “dispute and compromise.” When adjoining owners of unregistered land treat a line as being the boundary between them, though that line may be different from the boundary described in their deeds, or any other officially recognised boundary that existed hitherto, and when those actions continue uninterrupted for twelve years or more, (whether by a single owner or a succession of owners), the parties are deemed to have established the line as the boundary, through recognition and acquiescence, regardless of the boundary described in their deeds or any other officially recognised boundary that existed hitherto. The boundary is binding even when it is not reflected in a writing.

[33] As regards “recognition and acquiescence,” it was the testimony of the respondent that ten years after that boundary was created, Aquilino Ogena caused his arrest for criminal trespass to the same land. There is no evidence therefore of any conduct of both parties that treated that line as forming the boundary between them, having continued uninterrupted for twelve years or more for it to acquire the status of the true boundary by “recognition and acquiescence.” The alternative mode then is by “dispute and compromise.” The law encourages the amicable and immediate resolution of bona-fide disputes as to the location of a boundary. Therefore, if a boundary is in dispute but the adjoiners nevertheless agree to recognise a consentable line, they need not wait twelve years before their agreement becomes effective; it can become effective immediately (see *Niles v. Fall Creek Hunting Club, 376 Pa. Super. 260, 545 A.2d 926 (1988*).

[34] The requirements for establishing a boundary by “dispute and compromise” are;- (i) a dispute as to the location of the boundary, (ii) the establishment of a line in

compromise, and (iii) consent by both parties to give up their respective claims inconsistent with the compromise. None of the respondent's witnesses led evidence to show that the exercise of 15th July, 1976 by the Kitgum District Commissioner demarcating the land between the two disputants met conditions (ii) and (iii) above. Indeed there was no evidence that the process was attended by Aquilino Ogena. The line so created therefore did not acquire the status of the true boundary by “dispute and compromise” either.

[35] Lastly, a boundary may be created by the fact of "part parcel adverse possession." The law imposes an obligation to act upon a party who, by the open and notorious acts of the other, has been dispossessed of the area in dispute. The claimant must prove actual, exclusive, visible, notorious, distinct, and hostile possession of the land continuously for more than twelve years (see sections 5 and 11 of *The Limitation Act*). Part parcel adverse possession can accomplish the same thing as a consentable line, effectively subdividing the land. For a successful part parcel adverse possession claim, there are a number of common law requirements, typically: exclusive, continuous and uninterrupted possession; possession must be adverse to the interests of the legal owner and without permission of the legal owner; open and notorious (using the land in a manner so as to place the legal owner on notice that a trespasser is in possession); and for a period of over twelve years.

[36] For example in the Canadian case of *Nicholson v. Halliday (2005), 193 O.A.C. 240 (CA)*, bush lots 22 and 23 on Manitoulin Island were supposed to measure 100 acres each. For over 50 years, the owners of each lot assumed that a snake rail fence marked the boundary between their lots. It turned out following a survey that if the fence did in fact mark the boundary, lot 22 measured 113 acres and lot 23 measured 87 acres. The boundary was not surveyed until 1992, when the lot 23 owner ordered a survey. That survey did not accept the fence as the boundary. A subsequent survey ordered by the lot 22 owner accepted the fence. The surveyors hired by both owners asked the Director of Titles to determine the

boundary. A designate of the Director of Titles determined that the snake rail fence constituted the boundary. The lot 23 surveyor appealed. The Ontario Divisional Court, allowed the appeal. The lot 22 surveyor appealed. The Ontario Court of Appeal allowed the appeal and restored the Director's decision regarding the fence as the true boundary, holding that;

> the Director correctly determined, on the balance of probabilities, that the fence was built, not as a fence of convenience, but to mark the boundary between the lots..... Lots were occupied relative to the lot-line as marked, if it was peaceably settled by adjacent lot owners.....This practice was recognised even though such a boundary may not be in accordance with survey measurements. There was evidence before the Director that the owners of Lots 22 and 23 had peacefully accepted the fence as the boundary for more than fifty years. Evidence of lengthy acquiescence or peaceful acceptance of a fence as a boundary has long been held to be relevant to the question of the fence's purpose. Long standing peaceful acceptance is a fact from which the Director was entitled to draw an inference in support of the proposition that, since the fence served the purpose of a boundary from at least 1937, it likely also served that purpose when it was built....(emphasis added).

[37] It is evident from the above decision that in order for part parcel adverse possession to occur, there must be a true boundary in respect of which there is evidence of acquiescence or peaceful acceptance. Occupation of land with an undefined or contested boundary by either party cannot be considered adverse. Possessory evidence is relevant to determine the boundary, however only when the boundary is defined can any issue arise regarding adverse possession. To demonstrate adverse possession, a neighbouring landowner must prove that his or her possession was not consensual and that his or her acts of possession were sufficiently strong, exclusive and coupled with the requisite intention. Actions that are non-exclusive, sporadic and unaccompanied by the necessary *animus possidendi*, will not suffice. For example in *Browne v. Fahy [1975] WJSC-HC.* the defendants' adverse possession claim failed because the court was satisfied that the plaintiffs had occasionally walked over the land which the

defendants had grazed cattle on for over 30 years (See also *Mulhern v. Brady[2001] IEHC 23* and *Feehan v. Leamy [2000] IEHC 118*).

[38] Before the trial court, there was no evidence adduced of acquiescence or peaceful acceptance of the imaginary line between the Anwanga and Kidit trees by ether party for the required period of over twelve years. Although *animus possidendi* can co-exist with a belief in ownership (see *Hughes v. Cork [1994] EG 25 (CS) CA (Civ Div*), and much as a good faith adverse possessor may obtain title by adverse possession, on the facts of this case with the appellants in occupation believing they were rightfully on the land in dispute, they could not logically be said to have had the intent to dispossess the respondent who was not in possession of any part of the land at all and had not proved title to it. For those reasons the entire argument that the appellants held any part of the land by adverse possession is misplaced. Therefore grounds two and four fail.

Without a counterclaim, a defendant is not entitled to an award of general damages;

[39] The fifth ground of appeal faults the trial Magistrate for awarding the respondent general damages. An appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd., S.C.C.A. No. 10 of 1993 (unreported)* and *Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises. S.C.C.A No. 16 of 2006*).

[40] Having found that the respondent failed to prove his claim that the imaginary line between the Anwanga and Kidit trees formed the true boundary between his and the appellants' land, his claim for trespass to land against the appellants is then unfounded. By necessary implication there was no basis for awarding him damages and the award must therefore be set aside. In the final result, the appeal is allowed.

Order :

[41] The judgment of the court below is set aside; all declarations, orders and awards that were made by the trial court are set aside. In their place judgment is entered for the appellants against the respondent dismissing the suit. The costs of the appeal and of the court below are awarded to the appellants.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellants : Mr. Louis Odong.

For the respondent : Mr. Ladwar Walter Okidi.