



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 039 of 2009

In the matter between

OPWONYA SAMUEL OBITA

PLAINTIFF

And

1. **ACHORA JOYCE** }
2. **OWEKA RICHARD alias OKAYOWIYE** }

DEFENDANTS

Heard: 21 February 2019

Delivered: 11 April 2019

Summary: A tenancy in common as the basis for a suit for trespass to land.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The plaintiff, as administrator of the estate of his father, the late Denis Okee Obita, sued the defendants jointly and severally for general and special damages for trespass to land, an order of vacant possession of land comprised in LRV 2040 Folio 24 Plot 52, Block 2 Koro, Gulu, a permanent injunction, interest and costs. His claim is that the deceased Okee Obita was a tenant in common with seven others in respect of land comprised in the above mentioned title, a lease that was duly extended to the full term. Having been ordinarily resident in Kampala at the time and therefore unable to effectively supervise the land following the death of his father in 2004, the plaintiff was surprised when in the year 2006 he found the first defendant in possession of part of the land, a portion

of which she later sold to the second defendant. The defendants in effect took advantage of lack of close supervision of the land to trespass onto it.

- [2] In their joint written statements of defence, the defendants refuted the plaintiff's claim. The first defendant contended that her late father Lakor William Alphonse owned land under customary tenure, that was adjacent to that of the late Okee Obita's, also under customary tenure. At the boundary were two anthills, the one on Okee Obita's side was popularly known as "bye pa Yusuf Obita" (anthill of Obita) while that on Lakor's side was popularly known as "bye pa Lakor" (anthill of Lakor). Upon the death of her father, she inherited the land and she is therefore a bona fide occupant of the land. The first defendant was unaware of the plaintiff's father's acquisition of title to the land. She counterclaimed for cancellation of the plaintiff's title on account of fraudulent acquisition, general damages for interference with her quiet enjoyment of the land and the costs of the counterclaim.

The plaintiff's evidence:

- [3] The plaintiff, Opwonya Samuel, testified as P.W.1 and stated that his father Okee Obita co-owned land comprised in LRV 2040 Folio 24 Plot 52, Block 2 Koro. It was initially customary land owned by his grandfather Yusuf Obita. Survey of the land was done in 1990 in his presence. The area encroached upon by the defendants measures approximately 100 meters x 50 meters. It is the witness and his family who were using that area for growing seasonal crops. Lakor William Alphonse was not their neighbour, he was only allocated a plot along the highway in 1994 -95. There were trees; mango, Tugu, Kano (Jambula) on that portion. In 2007, the witness stopped the second defendant from planting mark-stones around the disputed area. The grass thatched house on the land are recent, constructed in 2010 and 2011.

- [4] P.W.2 Ongaya Acellam Alfred, Enforcement Officer testified that he knew Yusufu Obita Okee as father of the plaintiff. He was a peasant farmer. Upon instructions of the Town Clerk, witnessed the survey that was done in 1990. The portion of land on which is a Tugu tree, a mango tree and Kano tree had no occupants at the time and was part of the land surveyed. P.W.3 Okot Zake, former sub-county Chief, testified that Lakor William Alphonse applied for and was allocated a 30 meters x 15 meters plot along the highway in 1991, neighbouring the land now in dispute.
- [5] P.W.4 Obita John Masaba testified that he was present during the survey of the land as a neighbour. The boundary of the customary land had been cleared and stakes planted before the actual survey was done. The defendants were not occupying the area in dispute at the time. Encroachment began in 2007. P.W.5 Ocitti Christopher, testified that in 1990 he participated in clearing the boundary of the customary communal land in preparation for the subsequent survey. The actual survey was done a week later. The family of P.W.1 was using that portion now in dispute for growing seasonal crops. He saw the first defendant on the land for the first time in 2015, occupying part of their land.

The defendants' evidence:

- [6] In her defence as D.W.1 Achora Joyce; her father purchased the area in dispute from a one Yusuf in 1977. He occupied it until his death in the year 2000. She inherited it as a sole beneficiary. She sold the land to the second defendant on 24th October, 2007 in the presence of the local authorities. Her late father was buried on the land in dispute.
- [7] D.W.2. Oweka Richard alias Okayowiye too testified in his defence and stated that he purchased the land in dispute from the first defendant on 24th October, 2007 and has been in possession since then. He is still in occupation of the land. He has four grass thatched houses on the land. His people live on the land. A s

on to his sister occupies the houses with his wife and family. He inquired from the neighbours about the ownership of the land. He asked the wife of Ayoli who is now separated from her husband. She is the only one he asked. He thought one neighbour would be enough. He was told the land originally belonged to Lakor William Alphonse and upon his death it was inherited by his daughter, the first defendant. When he attempted to cause a survey of the part he purchased, he was surprised to be stopped by the plaintiff.

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

- [8] The court then visited the *locus in quo* where it estimated the size of the land in dispute to be slightly over half an acre. It is located at the North Western Corner of the land comprised in LRV 2040 Folio 24 Plot 52, Block 2 Koro, shaped in more or less a triangular trapezium. It is bordered by a feeder road on the Northern side, Mao Road Reserve on the Western side, the plaintiff's family to the East and a swamp with a well to the South. There is no clear boundary line on the Eastern side and the first defendant explained that the path to the well which had been the boundary had been obliterated by the plaintiff when he levelled the area using grader and deposited murrum on top of it. Within that area is a Tugu (palm) tree, a mango tree, a kano (jambula) tree, six huts, a grave near one of the huts (it was identified as that of her mother by the first defendant which the plaintiff identified it as that of Lawino), an anthill (which the first defendant identified as "bye pa Lakor" (anthill of Lakor), a water well, a disused borehole and about five eucalyptus trees along the Western boundary. Most of the land was covered by swamp vegetation and bush. The disused borehole, located about 50 meters from the water well, had remnants of what clearly appeared as the figure 90 with the rest of the digits defaced by the elements. A deep pit had been dug about a foot from the grave the first defendant identified as her mother's.

The issues for determination;

[9] At the scheduling conference conducted by court on 14th October, 2010 the following issues were agreed upon to guide the court's decision;

1. Whether the suit is properly filed in this court.
2. Whether the plaintiff owns the land in dispute.
3. Whether the land in dispute was procured by the plaintiff through any acts of fraud.
4. Whether the first defendant is the lawful owner of the land in dispute.
5. Whether the second defendant was a bona fide purchaser for value without notice, of the land in dispute.
6. What are the remedies available to the parties?

Final submissions of counsel;

[10] Counsel for the plaintiff did not file her final submissions. In his final submissions, counsel for the defendants argued that whereas in his witness statement and the grant of letters of administration the plaintiff is described as administrator of the estate of the late Denis Okee Obita, the plaintiff presented a certificate of title registered in the names of; Mark Akera, Geoffrey Nyeko, Charles Opira, Julius Ocan, Odokonyeror William, Robert Ojara-Opio, Layoo Todwong, M. Labuc Okee Obita and Ojara Robert as tenants in common in equal shares. Denis Okee Obita is not named as one of the proprietors. The plaintiff never presented any express authorisation by the tenants common to file the suit against the defendants, hence the suit is incompetent.

[11] He submitted further that the first defendant's father acquired the land in dispute in 1977. The first defendant was born on that land and the graves of her parents are on the land. Neither she nor her father got to know about the procurement of the title deed by the plaintiff's father and the rest of the co-owners. By 1995, they had occupied that land for more than twelve years and they qualify to be bona

fide occupants. The plaintiff and the rest of his family obtained title fraudulently when they included land that belonged to the first defendant's father. They never disclosed the existence of that title deed at all during the previous proceedings before the L.C.III Court. They secured the title in order to defeat the defendants' existing unregistered interest in the land. The defendants are not trespassers on the land since they were on the land before the title deed was obtained. The second defendant is a bona fide purchaser for value of part of the land from the first defendant. The court should order cancellation of the title deed.

First issue; Whether the suit is properly filed in this court;

[12] The first issue in essence is a challenge as to the plaintiff's *locus standi*. It is argued that the plaintiff not being named as one of the registered proprietors of the land and considering that neither is the deceased whose estate he manages so named, he has no capacity to sue for recovery of any part of that land. The expression *locus standi* is defined as; having the capacity to sue in a court of law in order to enforce a legal right. Once the plaintiff has a right or vested interest to protect and enforce legally, and this has been disclosed in the plaint, the onus on him or her to establish *locus standi* to sue would have been discharged. In a claim of trespass, one need not necessarily be an owner of the land. What is required is that the plaintiff pleads and proves that he or she is in or was entitled to exclusive possession, and not title.

[13] The plaintiff pleaded that he is the son and administrator of the estate of his late father Okee Obita as co-owner of LRV 2040 Folio 24 Plot 52, Block 2 Omoro County, land at Koro, Gulu. It is a 49 year lease with effect from 1st July, 1981 over approximately 23.195 hectares. Entries on the title deed (annexure "B" to the plaint) show that it was registered to Mark Akera, George Nyeko, Charles Opira, Julius Ocan, Odokonyero William, Ojara Robert, Layoo Todwong, M. Labuc Okee Obita and Ojara Robert as tenants in common in equal shares, on 29th May, 1992.

[14] Tenants in common are the owners of the substance of the estate. Just as they may make such reasonable use of the common property as is necessary to enjoy the benefit and value of such ownership, they may take unilateral action for its protection. When property forming the subject matter of a suit in trespass is owned by several proprietors, until there is a sub-division, every one of them owns every part and every bit of the joint property along with others and thus it cannot be said that he or she is only a part owner or a fractional owner of the property. On account of the unity of possession, any of the co-owners may maintain a suit against a trespasser, in which case, unless they expressly object, the consent of other co-owners is assumed. Just as one co-tenant cannot prevent another from enjoying the benefit of owning the land by prohibiting the other co-owner from using it, so it is that one co-owner may not prevent another from maintaining a suit against a trespasser. The peculiar circumstances of a co-ownership of land warrant one co-tenant to proceed without the necessity of the other co-tenants concurring.

[15] In the instant case, the plaintiff is holder of a grant of letters of administration issued on 26th October, 2007 in respect of the estate of the late RO 5286 Denis Okee said to be his brother. The plaintiff contends that the name M. Labuc Okee Obita appearing on the title deed refers to one and the same person as RO 5286 Denis Okee. This is disputed by the defendants. The issue then is whether or not this is a misidentification or misnomer. Misidentification occurs when an entirely wrong person is named, different from the one intended. In contrast misnomer occurs when the identity of the person is certain but he or she is given an incorrect name.

[16] The misnomer principle is the process by which a court determines the attribution of a name. Generally, expressions of names should be construed objectively to ascertain whether a reasonable person, with all of the background knowledge that would reasonably have been available to the author, would attribute the name to the individual to whom it is sought to be attributed. The relevant question

is; to which individual would a reasonable person attribute the name? That attribution must generally be construed by reference to the known background facts. The test is whether or not a reasonable person reading the name, in all the circumstances of the case, and looking at it as a whole, may say to himself or herself, “of course it must mean so and so, but they have got his or her name wrong.”

[17] The misnomer doctrine applies to correct inconsequential deficiencies or technicalities in names. It has also been applied more broadly, for example, to complaints that what was named was a corporation instead of a partnership, a parent corporation instead of a subsidiary, a building instead of its corporate owner, and a corporation in liquidation instead of its successor (see *See Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1301-02 (2d Cir.) (parent-subsubsidiary), cert. denied, 498 U.S. 854 (1990); *Montalvo v. Tower Life Bldg*, 426 F.2d 1135, 1146-47 (5th Cir. 1970) (building-corporate owner); *Travellers Indem. Co. v. United States ex rel. Construction Specialties Co.*, 382 F.2d 103 (10th Cir. 1967) (parent-subsubsidiary); *Shoap v. Kiwi S.A.*, 149 F.R.D. 509 (M.D. Pa. 1993) (successor corporation); *Dunham v. Innerst*, 50 F.R.D. 372 (M.D. Pa. 1970) (corporation-partnership); *Adams v. Beland Realty Corp.*, 187 F. Supp. 680 (E.D.N.Y. 1960) (same). A classic misnomer is one in which the name contains a minor spelling error of the subject's name, or inclusion of a full middle name rather than merely a middle initial. If it is a case of misnomer, the name could be corrected by replacing the erroneous name for the correct name. In misnomer cases, the correct person is identified, even if under the incorrect name.

[18] For the doctrine of misnomer to apply, it is required that: (1) the author intended to name the subject to whom the name is now being attributed; and (2) a reasonable person would attribute the name to the person to whom it is now intended to be attributed. Misnomer arises when the author merely misnames the correct person as opposed to not being able to identify the correct person. Cases of a misnomer are such that the person whose name is written is known and is

the one whose name is intended to be written, only that it is written incorrectly or an entirely wrong name is written. Misidentification arises when two separate persons actually exist and an author mistakenly writes a name similar or identical to that of the correct person.

[19] The known background facts in the instant case are that; (i) M. Labuc Okee Obita is the named co-owner; (ii) the grant is to the estate of the late RO 5286 Denis Okee; (iii) the only common name to both formulations is Okee; (iv) in the plaint the plaintiff Denis Okee Obita was his brother; (v) in his testimony he stated Denis Okee Obita was his father; (vi) P.W.2 Ongaya Acellam Alfred testified during examination in chief that he knew the plaintiff's father as Okee Obita; (vii) D.W.1 Achora Joyce the plaintiff's father was Okee Obita (viii) P.W.2 Ongaya Acellam Alfred, testified during cross-examination that he knew the plaintiff's father as Yusufu Obita Okee and he was a peasant farmer; (ix) at the locus in quo the plaintiff claimed his late father was a soldier and indeed the prefix RO 5286 would suggest so; (x) the affidavit of clarification of name by which the plaintiff sought the name in the grant to be attributed to name on the title deed was rejected. The court finds unexplained discrepancies in; the number of names, the actual names, and the occupation of the deceased. Only the relationship between the plaintiff and the late Okee Obita has been sufficiently explained and reference to him in the plaint as a brother was a mistake. The anomalies cannot be explained as a mere typographical error as a result of which the plaintiff cannot attribute the name RO 5286 Denis Okee appearing in the grant of letters of administration to the name M. Labuc Okee Obita appearing on the title deed. He therefore cannot maintain the suit as one of the co-owners.

[20] However, it is trite law that trespass is a wrong committed against a person who is in exclusive possession of the land trespassed onto. The issue of trespass goes with the proof that, the plaintiff owned the land exclusively or was in possession of the same before the commencement of the suit or had the right to its possession. The issue to be determined on a claim for trespass to land is

whether the plaintiff has established his or her actual possession and whether the defendants trespassed on it. In law possession could either be physical or constructive. A person can be in physical possession when he or she is physically in occupation of the property in issue. Also, a person can be in constructive possession when he or she has a right to such exclusive possession. There is evidence of actual possession of the late Okee Obita, father of the plaintiff, although he is not named as such on the title as one of the proprietors. As a beneficiary of that estate the plaintiff may maintain a suit in trespass.

- [21] A person who has title over a piece of land though not in actual physical possession is deemed, in the eyes of the law, to be the person in possession. This is because the law attaches possession to the title and ascribed it to the person who has title. Such a possession is the legal possession, which is sometimes also called constructive. The plaintiff must in the plaint disclose sufficient interest or threat of injury and show a nexus between him or her and the right claimed to enable him or her invoke the judicial process.
- [22] Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). It is a possessory action where if remedies are to be awarded, the plaintiff must prove a possessory interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised. The defendant should not have had any right to enter into plaintiff's land.

[23] An action for the tort of trespass to land is therefore for enforcement of possessory rights rather than proprietary rights. Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry upon it. It is an invasion affecting an interest in the exclusive possession of his property. The cause of action for trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful interference. An action for trespass may technically be maintained only by one whose right to possession has been violated. The gist of an action for trespass is violation of possession, not challenge to title. To sustain an action for trespass, the plaintiff must either be in actual physical possession or has an immediate right to such exclusive possession.

[24] In paragraph 5 (a), (c), (d) (e) and (f) of the plaint, the plaintiff pleaded that his late father Okee Obita was in possession of the land as one of the co-owners. When he died in the year 2004, the part of the land he occupied remained unsupervised, a fact the defendants took advantage of to encroach onto it. It is in the year 2006 when the plaintiff returned to the land to establish a school that he discovered the defendants' encroachment on a part thereof. Being a beneficiary of the estate his late father Okee Obita and hence a person in constructive possession as one with a right to its exclusive possession, the plaintiff, both in his plaint and in his evidence, has demonstrated sufficient interest and threat of injury, with a clear nexus between him and the right claimed to enable him invoke the judicial process for an action in trespass to land. The plaintiff in essence pleaded possession, unlawful entry and damage. The first issue therefore is answered in the affirmative.

Second issue; Whether the plaintiff owns the land in dispute.

Third issue; Whether the land in dispute was procured by the plaintiff through any acts of fraud.

- [25] Tenancy in common may best be defined negatively. It is the co-tenancy in which none of the unities, other than the unity of possession, needs be present. There is no right of survivorship; the interest of a tenant in common passes to his or her heirs or devisees upon his or her death. A tenant in common has the ability to convey away his or her interest and such interest will pass by will or intestacy on the owner's death. Under section 192 of *The Succession Act*, Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death. The title of the administrator, though it cannot exist until the grant of administration, however, relates back to the time of the death of the person in respect of whose estate the administrator has been granted. Hence the administrator may recover against the wrongdoer who has unlawfully taken possession of any part of the estate in an action of trespass.
- [26] In the instant case, the plaintiff having failed to explain the anomalies between the name he claims to be that of his father as it appears on the title deed in contradistinction with that in the grant of letters of administration as a mere typographical error, as a result of which the court could not attribute the name RO 5286 Denis Okee appearing in the grant of letters of administration to the name M. Labuc Okee Obita appearing on the title deed, he has not established the claim of being the legal representative of one of the registered proprietors of the land. The only claim he has established is one of possession as a beneficiary of the estate of the late Denis Okee, a fact which the first defendant acknowledged in her testimony.
- [27] On the other hand, section 59 of *The Registration of Titles Act*, guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*, which essentially relate to error, fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other

statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker* [1967] AC 569).

- [28] Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practices to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disempowering and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya* S.C. Civil Appeal No. 36 of 1995).
- [29] In seeking cancellation or rectification of title on account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others*, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd.*, S.C. Civil Appeal No. 22 of 1992). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited* [1987] HCB 130 and *M. Kibalya v. Kibalya* [1994-95] HCB 80).
- [30] The defendants did not plead any particulars of fraud. They instead sought to rely on the argument that the title deed was never alluded to in earlier proceedings before an L.C.III Court. The proceedings and judgment of the L.C.III Court of Pece Division, dated 29th January, 2003 were exhibited (exhibits D. Ex.3A and D.

Ex.3B respectively). Firstly, it is trite that a party is bound by his or her pleadings and that only evidence relevant to the pleadings may be received (see *Mohan Musisi Kiwanuka v. Asha Chand*, S. C. Civil Appeal No. 14 of 2002; *Lukyamuzi v. House and Tennant Agencies Ltd* [1983] HCB 74 and *Dhamji Ramji v. Rambhai and Company (U) Ltd* [1970] EA 515). That particular element of alleged fraud was never pleaded.

[31] Secondly, the jurisdiction of Court can only be granted by law. If proceedings are conducted by a court without jurisdiction, they are a nullity (see *Desai v. Warsaw* [1967] EA 351; *Karoli Mubiru and 21 Others v. Edmond Kayiwa* [1979] HCB 212; and *Peter Mugoya v. James Gidudu and another* [1991] HCB 63). The law in force at the time was *The Executive Committees (Judicial Powers) Act*, Cap 8. According to section 7 (3) thereof, every suit had to be instituted in the court of the lowest grade competent to try and determine it. Section 28 (2) (b) created a right of appeal from the judgments and orders of a Parish Executive Committee Court to a Sub-county Executive Committee Court. L.C.III Courts had only appellate jurisdiction and had no powers of trial at first instance. The record of proceedings (exhibit D. Ex.3A) reveals that the L.C.III Court of Pece Division proceeded as a court of first instance. A court cannot exercise a jurisdiction that is not conferred upon it by law. Therefore, whatever a court purports to do without jurisdiction is a nullity *ab initio*. Those exhibits, being the product of a nullity, cannot be relied upon for the proof of any fact apart from that of the court having convened without jurisdiction.

[32] Moreover by seeking cancellation of LRV 2040 Folio 24 Plot 52, Block 2 Omoro County, land at Koro, Gulu, the counterclaim raised questions between the defendants and the plaintiff, together with other co-owners of the land, i.e. Mark Akera, George Nyeko, Charles Opira, Julius Ocan, Odokonyero William, Ojara Robert, Layoo Todwong, M. Labuc Okee Obita and Ojara Robert as tenants in common of that land in equal shares. By virtue of Order 8 rules 8 and 9 of *The Civil Procedure Rules*, the defendants were consequently required to deliver a

defence setting forth the names of all the above mentioned co-owners of the land as persons who, if the counterclaim were to be enforced by cross-action, would be defendants to the cross-action. A court cannot make an order cancelling title of parties who are not before the court (see *Caroline Turyatamba and four others v. Attorney General and another, Constitutional Petition No. 15 of 2006*).

[32] Not only were these co-owners not joined to the suit but also the alleged fraud is not attributable to any of them. It has not been brought home to any of them or to their agents. In conclusion therefore, the title deed has not been impeached by the evidence adduced by the defendants and in accordance with section 59 of *The Registration of Titles Act*, it is conclusive evidence of the named persons' co-ownership of the land.

Fourth issue; Whether the first defendant is the lawful owner of the land in dispute.

[33] The first defendant's claim of ownership is premised on the argument that her late father acquired the land in dispute in 1977 by purchase under customary tenure and she inherited it following his death. She was born on this land and she has been in possession at all material time. On the other hand, the plaintiff testified of a survey leading to the issuance of the title deed to LRV 2040 Folio 24 Plot 52, Block 2 Omoro County, land at Koro was done in 1990. The initial term began on 1st July, 1991 and was on 26th March, 1996 extended to full term. The title included the area in dispute which formed part of his family's farmland but was vacant at the time. Neither the first defendant nor her father had physical possession of that part of the land nor claimed any interest in it. It is subsequent to the survey that the first defendant's father encroached onto the land.

[34] Under section 64 of *The Registration of Titles Act*, the proprietor of land or of any estate or interest in land under the operation of the Act, except in the case of fraud, holds the land or estate or interest in land subject only to such

encumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other encumbrances, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the certificate of title or instrument evidencing the title of such proprietor.

[35] Be that as it may, under section 64 (2) of *The Registration of Titles Act*, land included in any certificate of title is deemed to be subject to rights subsisting under any adverse possession of the land. In essence, the registered proprietor's estate is not paramount where any part of the proprietor's parcel has been adversely occupied. This provision is intended to provide protection to vulnerable occupiers whose interests in the land may have been created informally and without full regard to the usual requirements. It requires purchasers to be prudent when inspecting property, as upon a reasonable inspection the purchaser ought to be made aware of potential unrecorded interests and the need for further inquiry. By this form of protection, an occupier may simply "stay there [at the property] and do nothing," because nobody can "buy the land over his head and thereby take away or diminish his rights" (see *Strand Securities v. Caswell* [1965] Ch. 958 per Lord Denning MR).

[36] The title to land is by virtue of section 64 (2) of *The Registration of Titles Act*, deemed to be subject to overriding interests subsisting under any adverse possession of the land. Overriding interests are interests that are not registered at the Land Registry, but which still bind a party who acquires land that is subject to such interest. For adverse possession existing at the time of acquisition of title to override the title, it must be actual i.e. "apparent" or "patent," such that the fact of occupation would put a person inspecting the land on notice that there was some person in occupation (see *Malory Enterprises Ltd v. Cheshire Homes Ltd* [2002] Ch. 216 per Arden LJ and *Hodgson v. Marks* [1971] Ch 892). A person claiming actual occupation may successfully show such occupation, even if it is

intermittent, so long as they are able to point to some physical evidence or symbol of their continued residence at the property, as well as evidence of their intention to return to the property.

[37] In the instant case, although the first defendant claims that her father was in possession of that part of the land now in dispute for over thirteen years by the time the survey took place in 1990, there is no explanation as to how he or the first defendant failed to notice the exercise of survey of the land that involved extensive clearance of the boundaries of the land a week before the actual survey and planting of mark-stones. The first defendant and her father could not have missed an exercise of that magnitude if indeed they were in physical possession at the time since the survey affected "their land." There is no evidence of objection or protest against the survey. The fact that the first defendant only became aware of the existence of a title deed to the land upon the filing of this suit is consistent with the plaintiff's version that she and her father before her, came onto the land as trespassers long after the survey had been done.

[38] This fact also corroborates the testimony of P.W.2 Ongaya Acellam Alfred, the Enforcement Officer who testified that he witnessed the survey that was done in 1990 and that the portion of land now in dispute on which is a Tugu tree, a mango tree and Kano tree are, had no occupants at the time and formed part of the land surveyed. It as well corroborates the testimony of P.W.4 Obita John Masaba who also stated that he was present during the survey of the land as a neighbour. The boundary of the customary land had been cleared and stakes planted before the actual survey was done. The defendants were not occupying the area in dispute at the time but that the encroachment began in 2007. P.W.5 Ocitti Christopher, too testified that in 1990 he participated in clearing the boundary of the customary communal land in preparation for the subsequent survey. The actual survey was done a week later. The family of P.W.1 was using

that portion now in dispute for growing seasonal crops. He saw the first defendant on the land for the first time in 2015, occupying part of their land.

[39] The plausibility of the plaintiff's version is enhanced by the testimony of P.W.3 Okot Zake, the former sub-county Chief, who testified that the first defendant's father, Lakor William Alphonse, applied for and was allocated a 30 metres by 15 metres plot along the highway in 1991, neighbouring the land now in dispute. At the *locus in quo*, this plot was seen as being distinct from the area now in dispute. The grave of the first defendant's father was conspicuous thereon. That plot is separated from the land now in dispute by a road reserve and a line of eucalyptus trees, negating the claim that it formed part of the 30 meters by 15 meters plot. The location of the two is consistent with an encroachment from the plot onto the area now in dispute.

[40] In addition, toward the middle lower section of the land in dispute exists a disused borehole. The two parties had varying explanations for its existence thereat. According to the plaintiff, it was constructed during the 1990s on his father's land and it was therefore popularly named after him. To the first defendant, that borehole was constructed during the 2000s, around 2003 - 2004, and the village calls the bore hole "Okee's water" only because the masonry work around it was done by the plaintiff's father, Okee Obita. The court having examined the masonry work round the borehole, was able to observe remnants of what clearly appeared as the figure 90 with the rest of the digits defaced by the elements. This physical evidence is more consistent with the plaintiff's than the first defendant's version. It is also more plausible that a structure like that would be named after the person on whose land it is located than simply the mason who did construction work around it. I therefore find as a fact that neither the first defendant nor her father occupied any part of the land in dispute before the survey that took place in 1990.

[41] The first defendant's claim of occupancy since the 1970s is uncorroborated by physical evidence on the land that came into existence before the 1990s. She did not in her evidence disclose when she constructed a hut on the land in dispute. By the court's visit, she could only point at the spot where it used to be. She also pointed out a grave of her mother whom she said she buried during May 1998. The plaintiff disputed this and stated it was the grave of a one Lawino, a formerly internally displaced person who used to reside on that land during the insurgency, and the hut beside it was hers not the first defendant's. The first defendant had within one foot of that grave dug a deep pit and used the soil excavated there from to make bricks. When asked whether this was not tantamount to desecrating the grave of her mother, if at all it was that of her mother, she explained that she dug that pit near the grave of her mother out of anger so that if the plaintiff came to beat her, she could fall onto the grave of her mother. Unconvincing as that explanation may be, I have chosen to give her the benefit of the doubt.

[42] The implication is that the grave of her mother as at the time of the court's visit to the *locus in quo* was the only evidence of her activities on the land, placing her thereon around May, 1998. Henceforth the first defendant's occupation would have been obvious on a reasonably careful inspection of the land only after that date. The question then arises as to whether she can on that basis claim to be an adverse possessor and cause rectification of the title based on the principle of part-parcel adverse possession that seems to have continued thereafter until the filing of this suit on 7th October, 2009, a period of eleven years.

[43] Part-parcel adverse possession involves the inadvertent trespass by one landholder over a portion of land belonging to an adjoining landholder where there is confusion with regard to the correct position of the boundary dividing the two land holdings. The distinction between whole and part-parcel adverse possession is that whole parcel adverse possession is always intentional and not inadvertent while part-parcel adverse possession is usually inadvertent although

deliberate adverse occupation of part of another's land holding. The occupational or possessory boundary then prevails over the legal boundary certified in the register and the boundaries would then be shifted by rectification. Part-parcel adverse possession would effectively transfer ownership of a small portion of an abutting parcel consequent to long term occupation, since that possession may prevail over the strict technical legal boundary. On the other hand, if part-parcel adverse possession is ineffective to transfer ownership of registered land, the technical legal boundary prevails over the occupational or possessory boundary despite the fact that it is not the boundary accepted by the parties involved as governing.

[44] Private proprietary interests in land, and the boundaries of those interests are inextricably linked. The extent of an owner's dominion is delineated by the boundary of that owner's land. The rights to exclude others, to alienate, and to subdivide are contingent on secure ownership and important features of private ownership of land which are directly related to the creation and maintenance of boundaries including their location. These three features necessarily involve the concept of a boundary wherein the rights of private ownership begin and end. Where there is evidence of a long period of occupation that is contemporary with the boundary creation, the presumption is that the land is occupied in accordance with the boundaries as originally plotted.

[45] The location of a boundary is primarily governed by the expressed intention of the originating party or parties, or where the intention is uncertain by the behaviour of the parties. The reason monuments control when the determination depends on the behaviour of the parties is because they are less liable to mistake. If there are conflicting calls, features which, from their nature, are less liable to mistake, must control those which are more liable to mistake. Survey marks aside, there can be no better indication of the land to which a grant relates than long and unchallenged occupation corroborated by other physical and documentary evidence.

[46] For example in *Turner v. Myerson (1917) 18 SR (NSW) 133 at 135*, where a suburban lot in a plan had been in undisputed occupation for some 30 years, the occupation yielding dimensions that accorded well with the certificate of title dimensions, then in the absence of original survey marks and monuments, there was a cogent presumption that fences and walls erected soon after the division which marked the occupation were erected on the true boundary lines. Harvey J. said;

I say unhesitatingly that occupation that has continued uninterrupted for 30 years requires the most positive and direct overwhelming evidence to upset the presumption that the land so occupied is in accordance with the boundaries as originally plotted...I do not think that the evidence comes anywhere near the certainty which is required to justify the upsetting of such a long continued possession.

[47] Similarly *Turner v. Hubner (1923) 24 S.R. 3*, was a case that was heard some 60 years after subdivision, meaning that the occupation (a house wall) had been erected within about 18 years of boundary creation but there were no reliable start points, for the side streets had been aligned since that subdivision. The party claiming encroachment had done so on the basis of laying subdivision data from the aligned side street position, but the position of the house wall was supported by evidence of other occupation. The court held that since the land had been uninterruptedly occupied for 42 years, the most positive evidence was required to rebut the presumption that the land occupied was in accordance with the boundaries as originally plotted.

[48] In the instant case, the line of eucalyptus trees on the Western side of LRV 2040 Folio 24 Plot 52, Block 2 Omoro County, land at Koro is contemporary with the boundary creation to that land which is more or less consistent with the boundary position shown by the deed plan. That boundary should be preferred to the first defendant's claims of a customary interest that is uncorroborated by physical evidence created before the 1990s. To upset the presumption that land contained in the title deed and as occupied by the plaintiff's family is in accordance with the boundaries as originally plotted required the most conclusive

evidence of error in the actual position of the boundary to justify an order of rectification. The first defendant has not proved part-parcel adverse possession consequent to long term occupation, for her possession to prevail over the strict technical legal boundary stipulated in the deed plan. The first defendant has not proved to be the lawful owner of the land in dispute. Her presence on the land is as a result of unauthorised encroachment, and hence, she is a trespasser on the land. Consequently this issue is answered in the negative.

Fifth issue; Whether the second defendant was a bona fide purchaser for value without notice of the land in dispute.

[49] The second defendant claims to be an innocent party who purchased the land without notice of the plaintiff's claim to the land. It is trite that the standard of due diligence imposed on a purchaser of unregistered land is much higher than that expected of a purchaser of registered land (see *Williams and Glyn's Bank Ltd v. Boland*, [1981] AC 487). In his own testimony, he stated that before purchase of part of the land from the first defendant, at the time he bought the land the first defendant was still living on the land. He made inquiries from only one of the neighbours, the wife of Ayoli who is now separated from her husband, about the ownership of the land. He thought that inquiring from only one neighbour would be enough. The L.C.1 Chairman was not present at the signing of the agreement of purchase but that he took it to him for his signature later, after the dispute between the plaintiff and the first defendant came up.

[50] The manner in which the second defendant went about ascertaining the first defendant's root of title was perfunctory and most unsatisfactory. He never inquired from the first defendant about the presence of the disused borehole on the land. Had he never asked for the proprietors of the neighbouring school to the East of that portion. Had he made those inquiries he would have discovered that there was already in existence, a title deed over the land. Constructive notice applies if a purchaser knows facts which made "it imperative to seek an

explanation, because in the absence of an explanation it was obvious that the transaction was probably improper" (see *Macmillan v. Bishopsgate Investment Trust (No. 3)* [1995] 1 WLR 978).

[51] The second defendant acquired knowledge of circumstances which would put an honest and reasonable man on inquiry (see *Baden v. Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA*, [1993] 1 WLR 509), and yet he did not undertake the necessary inquiries. Had he made the necessary inquiries, he would have discovered that the plaintiff had a claim over the land in dispute. By reason of the perfunctory inquiries, he cannot claim to be a bona fide purchaser for value without notice. This issue too is answered in the negative.

Sixth issue; What are the remedies available to the parties?

[52] Trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). In the instant case, the defendants entered into physical possession of the land long after it was registered to the current proprietors. The area in dispute was under occupation and use of the plaintiff's family. They did so without the consent of the plaintiff and have remained in possession since then to-date. Having found in resolving the foregoing issues that the defendants have no claim of right over the land whether in law or equity, this issue too is answered in the affirmative. The defendants are trespassers on the land and for that reason an order of vacant possession is warranted. The plaintiff not having proved any substantial damages, none are awarded.

Order :

[35] In the final result, the counterclaim is dismissed with costs to the plaintiff while judgment is entered for the plaintiff against the defendants jointly and severally in the following terms:-

- a) A declaration that the defendants are trespasser's on the land comprised in LRV 2040 Folio 24 Plot 52, Block 2 Koro.
- b) An order of vacant possession.
- c) a permanent injunction restraining the defendants, their relatives, agents, servants and assignees from trespassing on or in any other way interfering with the plaintiff's quiet possession and user of the land.
- d) The costs of the suit.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the plaintiff : Ms. Shamim Amola.

For the defendants : Mr. Oyet Moses.