

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0024 OF 2011
(Arising from Arua Grade One Magistrates Court Civil Suit No. 0013 of 2006)

OBITRE JACKSON **APPELLANT**

VERSUS

ABDU MATUA CHARLES **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the appellant sued the respondent for recovery of a piece of land held under customary tenure at Tivu village, Tilevu Parish, Vura sub-county, measuring 60 metres by 160 metres, seeking an order of vacant possession and costs. The appellant's case was that the land in dispute originally belonged to his late grandfather, a one Drayi who was born on that land and upon his death, it was inherited by the appellant's father, Elikude Mark who too was born on that land during the year 1909. He disputed the respondent's claim over the same piece of land on grounds that the respondent originates from Congo, later migrated to Tivu village where his grandfather was advised to leave the land whereupon he settled in Ezuku. The respondent's grandfather in 1996 has unlawfully returned to Vura and settled on the appellant's land without his consent. The appellant claimed shs. 46,000,000/= in special damages for the value of coffee on the land which he lost, an order of vacant possession and costs.

In his written statement of defence, the respondent denied the appellant's claim and instead contended that he is the rightful customary owner of the disputed land having inherited it from his father Herod Seti and Grandfather Eliku Daniel. He averred that he is a Ugandan and his father was buried on that land. The appellant was in 2003 convicted of the offence of criminal trespass over the same land and fine shs. 150,000/= by the Chief Magistrate's Court of Arua.

In his testimony, the appellant stated that he was using the land in dispute jointly with his father until his death in 1981 whereupon he inherited it and continued using it. The appellant sought and obtained a lease offer over that land. During the year 2000, the respondent trespassed on the land by planting an avocado tree and laying a foundation for a building without his consent. In that process, the respondent destroyed the appellant's coffee trees valued at shs. 46,000,000/= Sometime before his death, the appellant's father had permitted the Public Works Department of the Ministry of Works to temporarily occupy the land. P.W.2 Adule Simon testified that the land in dispute belongs to the appellant having inherited it from his late father in Lunkinda who died in 1981. The appellant had planted 1000 coffee trees on the land starting in the year 1999. In 2002, the respondent encroached on the land by planting avocado trees and bananas in the coffee plantation. Because of the ensuing dispute, the L.C.III stopped the appellant from weeding the coffee trees as a result of which they withered away. The Public Works Department of the Ministry of Works temporarily occupied the land but vacated it in 1995. The appellant closed his case.

In his defence, the respondent testified that the appellant is his neighbour and the land in dispute measures approximately about one and a half acres. The land previously belonged to his grandfather and he inherited it from his father upon his death in the year 2001. His great grandfather Obiti had in the year 1910 allowed the Public Works Department of the Ministry of Works to occupy the land and the department had vacated the land in the year 2001 whereupon the respondent entered into possession and began digging a foundation for the construction of a building but was stopped by the L.Cs. The respondent filed a case of criminal trespass against the appellant, the latter was convicted and fined by the Grade II Court at Odumi. D.W.2 Tikodri Abele testified that the land originally belonged to the respondent's grandfather, Obiti Asara. In 1935, the then Local Government established a camp on the land until the year 2000 when the appellant attempted to enter onto the land and he was arrested. The land is the property of government. D.W.3 John Onyua testified that the disputed land measures approximately two acres which belonged to the respondent's late grandfather Obiti. In 1935, the land was given to government to establish a camp and to-date it belongs to the sub-county. The respondent closed his case.

The court then visited the *locus in quo* on 7th December 2010 where it received evidence from the L.C.I Chairman Mr. Atia Mark who stated that the two parties were involved in a dispute over land belonging to the Ministry of Works. It because of this, that both were stopped from using the land. Another witness, Mr. Okonzi Edward testified that the land originally belonged to Obiti, upon whose death the land remained under Government. The County headquarters were built on the land and the Ministry of Works too had built on the land. It is after the Ministry of works left that both parties began utilising the land. Another witness, Ms. Drakuru Lydia stated that the land originally belonged to her father in law, Amaniyo and when they migrated to Bunyoro, it was taken over by Government. A one Mr. Richard Olema stated that since his childhood, the land was under occupation of the Public Works Department of the Ministry of Works. The land was given to Government by Obiti. The land does not belong to any of the parties but to the Ministry of Works.

In his judgment, the learned trial magistrate found that on basis of the evidence before court and that obtained from the *locus in quo* visit, the land in dispute belonged to the Ministry of Works until 2001 when the appellant attempted to obtain a lease over the land. The lease offer was for an initial term of six years which expired in 2006. During that time, the respondent had carried on activities on the land in violation of the offer made to the appellant. Although there was no evidence of a grant of the lease to the appellant, he was entitled to compensation for the damage occasioned by the respondent. He awarded shs. 5,000,000/= as damages to the appellant and the costs of the suit. He declined to make any declaration about the ownership of the land.

Being dissatisfied with the decision the appellants appeal on the following grounds, namely;

1. The learned Grade One magistrate erred in law and fact by deciding the suit against the appellant against the weight of evidence on record.
2. The magistrate erred in fact and law by not deciding in favour of the appellant simply because the appellant's lease offer had by then expired.
3. The learned magistrate erred in law and fact in deciding that the land belonged to Arua District Local Government.

4. The magistrate erred in law and fact by deciding against the appellant because he failed to disclose on the court record as to what expired at the locus in quo regarding the crops planted by the appellant.

In his written submissions, counsel for the appellant Mr. O. Oyarmoi argued with regard to ground one, that there was ample evidence that the disputed land belonged to the appellant, he having inherited it from his father who in turn inherited it from Obiti, his father. The defence evidence that Obiti gave the land to the Ministry of Works was hearsay. The weight of the evidence was in favour of the appellant and his witnesses who knew the history of ownership of the land very well as compared to the respondents' who said it belonged to government and not the respondent. In respect of ground two, he argued that since the appellant's claim was not based on the lease offer, the trial magistrate erred in taking that evidence into account. With regard to the fourth ground, he submitted that the trial magistrate erred in not recording any proceedings at the locus in quo yet went ahead to rely on his observations thereat to decide against the appellant. He cited *Fernandes v Noroniha* [1969] EA 506. He prayed that the appeal be allowed with costs. In his oral submissions, the respondent who appeared in person but unrepresented submitted that the land belongs to government and for that reason the appeal ought to be dismissed with costs.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the court below to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga*, SCCA 17of 2000; [2004] KALR 236 thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court

as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

I find it convenient to deal first with the fourth ground of appeal which faults the trial magistrate for failing to comply with the procedural requirements of a hearing at the *locus in quo*. Order 18 rule 14 of *The Civil Procedure Rules* empowers courts, at any stage of a suit, to inspect any property or thing concerning which any question may arise. Although this provision is invoked mainly for purposes of receiving immovable items as exhibits, it includes inspection of the *locus in quo*. The purpose of and manner in which proceedings at the locus in quo should be conducted has been the subject of numerous decisions among which are; *Fernandes v Noroniha* [1969] EA 506, *De Souza v Uganda* [1967] EA 784, *Yeseri Waibi v Edisa Byandala* [1982] HCB 28 and *Nsibambi v Nankya* [1980] HCB 81, in all of which cases the principle has been restated over and over again that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. This was more particularly explained in *David Acar and three others v Alfred Acar Aliro* [1982] HCB 60, where it was observed that:-

When the court deems it necessary to visit the *locus-in-quo* then both parties, their witnesses must be told to be there. When they are at the *locus-in-quo*, it isnot a public meeting where public opinion is sought as it was in this case. It is a court sitting at the *locus-in-quo*. In fact the purpose of the *locus-in-quo* is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he / she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings.

The procedures to be followed upon the trial court's visit to a *locus in quo* have further been outlined in *Practice Direction No. 1 of 2007*, para 3, as follows; -

- a. Ensure that all the parties, their witnesses, and advocates (if any) are present.
- b. Allow the parties and their witnesses to adduce evidence at the locus in quo.
- c. Allow cross-examination by either party, or his/her counsel.
- d. Record all the proceedings at the locus in quo.
- e. Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

The determination of whether or not a court should inspect the locus in quo is an exercise of discretion of the magistrate which depends on the circumstances of each case. That decision essentially rests on the need for enabling the magistrate to understand better the evidence adduced before him or her during the testimony of witnesses in court. It may also be for purposes of enabling the magistrate to make up his or her mind on disputed points raised as to something to be seen there. Since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. Considering that the visit is essentially for purposes of enabling trial magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony.

Upon examination of the record of appeal, it is evident that during the visit to the *locus in quo*, the trial magistrate prepared a sketch map which indicates the features the court found on the land. These included an excavated foundation for construction of a building, banana plants, trees and a footpath. He also recorded some features on the adjacent pieces of land including a road, a house, another foundation and eucalyptus trees. I do not find any basis for counsel's contention that there were coffee trees on the land. This is contrary to the features indicated on the sketch map. I do not see any reason why the trial magistrate would omit the coffee trees from the sketch map if they existed at all. I am inclined to believe that they were not indicated on the sketch map only because they did not exist on the land. This is corroborated by the testimony of P.W.2 Adule Simon who testified that because of the dispute which broke out between the parties in the

year 2002, the L.C.III stopped the appellant from weeding the coffee trees as a result of which they withered away. The court visited the *locus in quo* on 7th December 2010, eight years after the appellant had been stopped from weeding the coffee trees, and it is not surprising that the court did not find any evidence of these trees so as to indicate them on the sketch map. This argument therefore is, with due respect, misconceived.

However, I have noted that while at the *locus in quo*, the trial magistrate recorded evidence from three persons who had not testified in court. These were; the L.C.I Chairman Mr. Atia Mark, Mr. Okonzi Edward and Ms. Drakuru Lydia. There is no indication on record that allowance was made for the parties to cross-examine any of these witnesses yet the parties were entitled to have nothing stated against them in the judgment which was not stated on oath in their presence and which they had opportunity of testing by cross-examination and of rebutting. He erroneously imported this testimony into his judgment. The practice of visiting the *locus in quo* is intended to check on the evidence given by witnesses and not to fill gaps by calling upon persons who never testified in court to participate in the proceedings (see *Nsibambi v Nankya [1980] HCB 81*).

When there is such a glaring procedural defect of a serious nature by the trial court, the High Court is empowered to direct a retrial if it forms the opinion that the defect resulted in a failure of justice, but from the nature of this power, it should be exercised with great care and caution. It should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. It is possible that the witnesses who appeared and testified during the first trial may not be available when the second trial is conducted and the parties may become handicapped in producing them during the second trial. In such situations, the parties would be prejudiced and greatly handicapped in establishing their respective cases such that the trial would be reduced to a mere formality entailing agony and hardship to the parties and waste of time, money, energy and other resources. Viewed in this light, the direction that the retrial should be conducted can be given only if it is justified by the facts and circumstances of the case.

However, where the time lag between the date of the incident and the date on which the appeal comes up for hearing is short, and there occurred an incurably fundamental defect in the

proceedings which affected the outcome of the suit, the proper course would be to direct retrial of the case since in that case witnesses normally would be available and it would not cause undue strain on their memory.

In *James Nsibambi v Lovinsa Nankya* [1980] HCB 81, it was held that a failure to observe the principles governing the recording of proceedings at the *locus in quo*, and yet relying on such evidence acquired and the observations made thereat in the judgment, is a fatal error which occasioned a miscarriage of justice. In that case the error was found to be a sufficient ground to merit a retrial as there was failure of justice (see also *Badiru Kabalega v. Sepiriano Mugangu* [1992] 11 KALR 110).

Nevertheless where, by the nature of the dispute to be adjudicated, the appellate court finds that the visit to the *locus in quo* was a useless exercise and that the case could have been decided without visiting the *locus in quo* such that without reliance on its findings at the locus, the trial court would have properly come to the same decisions on a proper evaluation and scrutiny of the evidence which was already available on record, a re-trial will not be directed. The erroneous proceedings at the locus in quo will be disregarded. For example in the case, *Basaliza v. Mujwisa Chris*, H.C. Civil Appeal No. 16 of 2003, the court observed;

There was no dispute over boundaries. The visit to the locus was in the circumstances a useless exercise. This case could have been decided without visiting the locus. Without basing himself on his findings at the locus, the learned Chief Magistrate would have properly come to the same decisions on a proper evaluation and security of the evidence which was already available to him on record.

In that case, a re-trial was not ordered. In the instant case, I am of the view that the defect has not occasioned a miscarriage of justice since the case can still be decided on basis of the available evidence without having to rely on comments and observations of the trial court made as a result of the impugned visit to the *locus in quo*.

The essence of the dispute between the parties in the instant appeal is conflicting claims to ownership of the disputed land with each party tracing the history of its ownership to their

respective ancestors. When the trial court visited the *locus in quo*, it was not for purposes of solving a subsisting boundary dispute but rather for the court to observe features such as trees and a foundation for the construction of a building, which had been mentioned by the parties and their witnesses as landmarks in the history of ownership of the land. The visit was therefore intended to enable the trial magistrate understand better the evidence adduced before him during the testimony of witnesses in court and not for purposes of enabling him make up his or her mind on disputed points raised as to something to be seen there. The visit was therefore not meant to aid the determination of the question of ownership of the land based on existing features to be seen at the *locus in quo*, a decision which could be made based only on the evidence adduced in court. Scrutiny of the judgment of the trial court does reveal though some reliance on evidence gathered at the *locus in quo* in the determination of the issue of ownership of the disputed land. This error though should not be considered in isolation but rather within the context of the trial as a whole. Having considered the evidence as a whole and for other reasons to be explained later in this judgment, I do not find that the trial court's erroneous conduct of proceedings at the *locus in quo* caused a miscarriage of justice and for that reason ground four of the appeal fails.

Grounds 1, 2 and 3 of the appeal assail the trial court's evaluation of the evidence as having led it to wrongly find that the land belongs to government and not either party. Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed (See *Peters v Sunday Post Ltd [1958] E.A. 429*).

At the trial, the burden of proof lay with the appellant. To decide in favour of the appellant, the court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the respondent such that the choice between his version and that of the appellant would be a matter of mere conjecture, but rather of

a quality which a reasonable man, after comparing it with that adduced by the respondent, might hold that the more probable conclusion was that for which the appellant contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

The appellant's version as pleaded in his plaint was that originally belonged to his late grandfather, a one Drayi who was born on that land and upon his death, it was inherited by the appellant's father, Elikude Mark who too was born on that land during the year 1909. In his testimony, the appellant stated that he was using the land in dispute jointly with his father until his death in 1981 whereupon he inherited it and continued using it. He sought and obtained a lease offer over that land. During the year 2000, the respondent trespassed on the land by planting an avocado tree and laying a foundation for a building without his consent. In that process, the respondent destroyed the appellant's coffee trees. Sometime before his death, the appellant's father had permitted the Public Works Department of the Ministry of Works to temporarily occupy the land. Although P.W.2 Adule Simon testified that the land in dispute belongs to the appellant having inherited it from his late father in Lunkinda who died in 1981 and planted 1000 coffee trees on the land starting in the year 1999, he also said that the Public Works Department of the Ministry of Works temporarily occupied the land but vacated it in 1995.

On his part, the respondent testified that the land previously belonged to his grandfather and he inherited it from his father upon his death in the year 2001. His great grandfather Obiti had in the year 1910 allowed the Public Works Department of the Ministry of Works to occupy the land and the department had vacated the land in the year 2001 whereupon the respondent entered into possession and began digging a foundation for the construction of a building but was stopped by the L.Cs. The respondent filed a case of criminal trespass against the appellant, the latter was convicted and fined by the Grade II Court at Odumi. D.W.2 Tikodri Abele testified that the land originally belonged to the respondent's grandfather, Obiti Asara but in 1935, the then Local Government established a camp on the land until the year 2000 when the appellant attempted to enter onto the land and he was arrested. To him, the land is the property of government. D.W.3 John Onyua testified that it previously belonged to the respondent's late grandfather Obiti who in 1935, gave it to the government to establish a camp and to-date it belongs to the sub-county.

Comparing the two versions, I find that although the appellant attributed the historical ownership of the land in dispute to his grandfather Drayi and through inheritance he himself subsequently acquired it in 1981 upon the death of his father, Elikude Mark, the respondent on his part ascribed the historical ownership of the land to his great grandfather Obiti Asara and through inheritance he himself subsequently acquired it the year 2001 when the Public Works Department of the Ministry of Works vacated the land which they had occupied since 1935.

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

Customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules. Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and

occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply. Review of judicial practice in this area presents three modes of proof of customary ownership.

In the first category, are customary rules that over the years, in the legislative history of land legislation in Uganda, have attained documentation by way of codification. These include persons holding under the *Ankole Landlord and Tenant Law of 1937*, the *Toro Landlord and Tenant Law of 1937* or Kibanja holdings by virtue of the *Busuulu and Envujjo Law 1928* the latter of which under s. 8 (1) provided that except a wife or a child of the holder of a kibanja, or a person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof, no person had the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner. Under s. 29 (1) (a) of the *Land Act*, such former customary tenants on land now have the status of lawful tenants. In such cases, there is no need to prove the nature and scope of the applicable customary rules and their binding and authoritative character but rather the production of evidence to show that the specific land in question is one to which such rules apply and that the acquisition was in accordance with those rules, for example by production of Busuulu Tickets, as was done in *John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*, and in *Kiwalabye v Kifamba H.C. Civil Suit No. 458 of 2012*. For such interests, production of an agreement purporting to sell and transfer a Kibanja holding is not sufficient proof of acquisition of a lawful holding. There is an additional need to prove consent of the mailo owner, e.g. introduction to the registered owner and payment of a “Kanzu” (see *Muluta Joseph v Katama Sylvano S.C. Civil Appeal No. 11 of 1999*).

In the second category, are instances where because of the more or less homogeneous nature of the community in a specific area, the customary practices regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of the specific parcel of land in that area have attained notoriety that court would be justified in taking judicial notice of such practices under section 56 (3) of the *Evidence Act*. In

such situations, a court would take judicial notice as a fact, the existence of such practices which are not subject to reasonable dispute because they are generally known within the trial court's territorial jurisdiction. Such judicial notice has been taken in matters of distribution of land as part of an estate of a deceased person such as in the case of *Geoffrey Mugambi and two others v David K. M'mugambi and three others*, C.A. No. 153 of 1989 (K) (unreported), where the parties did not adduce evidence to prove the relevant Meru customary law of land distribution. But the Court of Appeal of Kenya held that as the custom was not only notorious but was also documented, the trial Judge was perfectly entitled to take judicial notice of it and it was not therefore necessary to call evidence to prove it. The Court held thus;

“Inheritance under Meru law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son generally gets a slightly larger share. In a polygamous household, the distribution of land is by reference to the house of each wife equally, irrespective of the number of sons in the house.” This is the Meru customary law which the Judge applied in an attempt to distribute the deceased's land among his sons. There was no evidence to suggest either that the deceased had divided his land among the houses of his wives or among his sons. The respondents' claim was made in their capacity as the sons of the deceased and not on the basis of membership of the various houses of the deceased's wives. There is no doubt that the Judge understood the custom and applied it correctly in this case. The respondents had shown that no provision had been made for them by the deceased. This ground of appeal therefore must fail.

In the last category, are cases where the customary rules are neither notorious nor documented. In such cases, the customary law must be established for the Court's guidance by the party intending to rely on it. As a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of persons who would be likely to know of its existence, if it existed, or by way of expert opinion adduced by the parties since under s. 46 of the *Evidence Act*, which permits the court to receive such evidence when the court has to form an opinion as to the existence of any general custom or right, such opinions as to the existence of that custom or right, are relevant. In *Ernest Kinyanjui Kimani v Muira Gikanga* [1965] EA 735 at 789, the court stated:

As a matter of necessity, the customary law must be accurately and definitely established. ...The onus to do so is on the party who puts forward the customary

law. ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.

In the instant case, the customary law under which the appellant acquired the land is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the appellant to adduce evidence of the customary law. It was not enough for him to claim to have inherited the land. He had the onus of adducing evidence of the customary procedures, practices and rules by virtue of which he is recognised as such. Having failed to do so, the trial magistrate was justified in his finding that the appellant had failed to prove his case.

On the other hand, although the parties were at variance as to the historical origins of their claimed customary ownership of the land, it was common ground between them that the most recent occupant of the land was the Public Works Department of the Ministry of works. Both parties attempted to take possession of the land upon the departure of that department which, according to the respondent's evidence had occupied the land since 1935. Although the appellant did not disclose the period for which the land was under the occupancy of that department, I am inclined to believe the respondent's evidence that it was from 1935 to 2001, a period of 66 years.

Considering that none of the parties ancestors were in direct physical occupation of the disputed land for that long, whatever claims of customary ownership the parties' ancestors may have had in the disputed land were extinguished by either abandonment of the land to the department or by the doctrine of adverse possession. Uninterrupted and uncontested possession for a specified period, hostile to the rights and interests of true owner, is considered to be one of the legally recognized modes of acquisition of ownership (see *Perry v Clissold* [1907] AC 73, at 79). In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of *The Limitation Act*. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*). As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in

adverse possession for over twelve years, but also the possessor is vested with title. From 1935, the Public Works Department of the Ministry of works was in open, continuous, uninterrupted and uncontested possession of the disputed land for 71 years by 2006 when the suit was filed. By that time, the appellant had not only lost the right to bring an action for recovery of the land, if he had any in the first place, but also Government was vested with title thereto.

On the other hand, it is trite law that all rights and interests in unregistered land may be lost by abandonment. For example, and by way of analogy, under section 37 (1) (a) of *The Land Act, Cap 227*, when a tenant by occupancy voluntarily abandons his or her occupancy, the right of occupancy lapses. Under that section, abandonment occurs where he or she leaves the whole of the land unattended to by himself or herself or a member of his or her family or his or her authorised agent for three years or more. Although in respect of tenancies by occupancy abandonment is deemed to have occurred after the lapse of three years of leaving the whole of the land unattended to by occupant or a member of occupant's family or his or her authorised agent, there is no similar temporal delimitation in respect of land held under customary tenure.

At common law, abandonment as a mechanism of termination of interests in unregistered land generally requires proof of intent to abandon; non-use of the land alone is not sufficient evidence of intent to abandon. The legal definition requires a two-part assessment; one objective, the other subjective. The objective part is the intentional relinquishment of possession without vesting ownership in another. The relinquishment may be manifested by absence over 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. A person against whom abandonment is alleged may testify as to intent but cannot evade the effect of his or her conduct. The court ascertains the owner's intent by considering all of the facts and circumstances. The passage of time in and of itself cannot constitute abandonment. For example, the non-use of an easement for 22 years was insufficient on its own, to raise the issue of intent to abandon in the case of *Strauch v Coastal State Crude Gathering Co.*, 424 S.W. 2d 677.

This doctrine enables extinguishment of dormant interests in land on the basis of non-use coupled with intent to abandon. A summary of the doctrine of abandonment was presented in the case of *Anson v Arnett*, 250 S.W. 2d 450, thus; -

To abandon is to give up, desert, or to relinquish voluntarily and absolutely. The question of abandonment is one of fact to be determined in each case from all the evidence in the record. An essential element of abandonment is the intention to abandon, and such intention must be shown by clear and satisfactory evidence. Abandonment may be shown by circumstances, but they must disclose some definite act showing intention to abandon. The non-use of a right is not sufficient in itself to show abandonment, but if the failure to use is long, continued and unexplained, it gives rise to an inference of intention to abandon.

In the instant case, the evidence before court indicated that none of the members of the family of either party had used the land for the last 71 years before the suit was filed in the year 2006. For all that period, their ancestors had left the whole of the land unattended to by themselves or members of their families with only the Public Works Department of the Ministry of Works undertaking activities thereon. Although mere non-use of land is insufficient to prove abandonment, however evidence of long and unexplained non-use is admissible as to intent. Where the failure to use the land is long, continued and unexplained, it gives rise to an inference of an intention to abandon. For all intents and purposes therefore, if ever there had been any customary rights of ownership enjoyed by any of the parties ancestors in the land now in dispute, those rights were extinguished by abandonment. None of the parties therefore could in law acquire the land by inheritance since there were no longer any proprietary interests in the land which survived their ancestors. In short, the appellant had no *locus standi* in claiming the land as a customary owner.

The alternative was his claim as a person to whom an offer for a lease had been granted by the District Land Board. Upon the promulgation of *The Constitution of the Republic of Uganda, 1995*, the role of the Uganda Land Commission was redefined and restricted by article 239 of the constitution and section 53 of *The Land Act Cap 227*, to holding and managing land in Uganda “vested in or acquired by the Government of Uganda” in accordance with the provisions of the Constitution. Since there was no evidence that the Public Works Department of the Ministry Works acquired a registered interest in the land, according to article 241 (1) (a) of *The*

Constitution of the Republic of Uganda, 1995 and section 59 (1) of *The Land Act*, the power to hold and allocate land in the district “which is not owned by any person or authority,” was vested in the District Land Boards, in this case, Arua District Land Board.

The appellant adduced evidence before the trial court of a lease offer he obtained from Arua District Land Board on 21st May 2001 under its minute D.L.B 19/2001 (2) of 08/08/2001 (exhibit P.E.1). According to clause 4 of the letter, the offer was “conditional on terms and conditions of the lease being accepted within one month of the date of this letter.” According to clause 4 thereof, acceptance was to be in writing accompanied by evidence of payment of the specified fees including; the premium, fees for survey and mark-stones, preparation of lease, assurance of title, registration fee, land agency fee and ground rent. The appellant did not adduce evidence of having formally accepted the offer. Therefore, by the time he filed the suit on 26th April 2006, the offer had long expired, nearly five years before. When he began activities on the land including planting of coffee trees, etc. he was practically a trespasser on the land.

The question which was before the trial court was whether the appellant adduced before it evidence which showed a greater probability capable of satisfying a reasonable man that the land in dispute belonged to him. The trial court came to the conclusion that he had failed to discharge that burden. Having subjected the evidence to a fresh and exhaustive scrutiny, I have come to a similar conclusion and consequently, grounds 1, 2 and 3 of the appeal fail.

Before taking leave of the matter, having found that the appellant had no *locus standi* in filing the suit and more especially since he had failed to prove his claim of customary ownership, I do not find any basis for upholding the award of shs. 5,000,000/= as damages. That award is hereby set aside. In the final result, I find no merit in the appeal and it is accordingly dismissed with costs to the respondent of both the appeal and the trial.

Dated at Arua this 23rd day of February 2017.

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Stephen Mubiru
Judge