

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0022 OF 2014

(Arising from Adjumani Grade One Magistrates Court Civil Suit No. 0011 of 2013)

OYUA ENOCH **APPELLANT**

VERSUS

1. OKOT WILLIAM	}	
2. AKOMI KASINIRO	}	
3. NYADRU ISAAC	}	
4. AYIGA FLAMINO	}	
5. AYIA MADEKENA	}	
6. AMOLU VENSON	} RESPONDENTS
7. IDDA PATRICK	}	
8. INGWINA EMMANUEL	}	
9. EDEA ELIVIRA	}	
10. KAREO BERTTY	}	

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the appellant sued the respondents for trespass to land, seeking an order of vacant possession, general damages, a permanent injunction and costs in respect of fifty acres land situate at Kureku West village, Sube Parish, Ofua Sub-county in Adjumani District. His case was that the disputed land was the property of his late father, Oriang Sumuni and he used it for farming right from 1953 until his death. The appellant inherited it after the death of his father but was during the year 1980 displaced by civil war whereupon the respondents took advantage of his absence to encroach on the land. In the year 2006, he unsuccessfully attempted to end the encroachment.

In their joint amended written statement of defence, the respondents denied the appellant's claim. They instead claimed the land as their clan land and counterclaimed against the appellant for trespass. They traced their ancestral ownership to their grandparents; Alli, Oliny, Languyeni and

Akileo who occupied the land from 1942. The appellant came onto the land from Acholi around 1954 – 1958 when he came to live with the respondent's Aunt. He was never given any part of the land.

In his testimony, the appellant that the respondents are his neighbours but in the year 1990, they began encroaching on his land and refused to vacate. He inherited the land in 1951 from his late father, Oriang Sumuni. Due to civil war, he was forced to vacate the land in 1980 and it is during that turbulent period that the respondents encroached on it and harvested the cassava he had planted thereon. P.W.2 Eberuma Saverio testified that he is one of the appellant's neighbours. The Pagoro clan to which the appellant belongs had land at Kureku village which they cultivated until the 1979 civil war. When he returned from exile in 1986, he found the respondents cultivating the land whereas they all are from the Paigo clan. P.W.3 Waigo John testified that he is a neighbour to the appellant and has been so since 1952. He knew the appellant's father as Oriang Okumu who died in 1957 and was buried on that land. The appellant was born on that land and has lived on it since the 1950s. P.W.4 Okello William, a cousin to the appellant testified that he is a neighbour to the appellant. The appellant inherited the land from his late father Oriang who died sometime time after 1982. The respondents encroached on the appellant's land in 1982 while the appellant was an internally displaced person living in Acholi. When the appellant returned from exile in 1985, he found the respondents had settled on part of his land and they refused to vacate. P.W.5 John Paito Lapila a clan member with the appellant testified that he is a neighbour to the appellant. In 2004, he obtained permission from the appellant to bury his dead brother on the land in dispute. Before that, the land had belonged to the late Oriang who settled thereon during the 1950s. The respondents encroached on the land in 1981. The appellant then closed his case.

In his defence, the second respondent who testified as D.W.1 stated that the appellant lives about a kilometre away and they do not share a common boundary, with several families living in between them. The land in dispute belongs to the Paigo Clan whose ancestors settled thereon during the 1940s. The appellant's brother, Lakoko was the husband of this appellant's Aunt Lalio Lacholi. During 1958, the appellant came to live on the land given to that couple by the elders of the Paigo Clan. Both were buried on that land when they died in 1982 and 1983 respectively.

The appellant in more recent times began encroaching beyond the land that belonged to his late brother onto that of the respondents. The land belonging to the Pagoro Clan is across the stream. D.W.2 Ayiga Flamino testified that the appellant lives about 300 metres from him and they do not share any common boundary. All their ancestors were buried on the land in dispute. The appellant settled on land that had previously been given to his late brother and wife. The appellant later attempted to expand the boundary of that land, hence the dispute with the respondents. D.W.3 Nyadru Isaac testified that he lives about one hundred meters from the appellant. They had utilised the land in dispute as a family until sometime in 2013 when the appellant filed a suit against them. D.W.4 Okot William testified that the land in dispute belonged to their forefathers. His uncles, the rest of the respondents, brought him from Acholi after the 1980 civil war and he has since then lived peacefully on the land until sometime in 2013 when the appellant filed a suit against them. The appellant belongs to the Pagoro Clan from Acholi yet the respondents belong to the Paigo Clan from Madi. D.W.5 Edea Elvira testified that she lives about one hundred meters from the appellant, there are families which live in between them and they don't share any common boundary. Her husband died in 1991 and she lived peacefully on her late husband's land until sometime in 2012 when the appellant together with other people entered onto her land and destroyed her garden. A criminal case was opened up against him and he in turn filed a civil suit. D.W.6 Edea Elvira testified that she was a co-wife to D.W.5 before the death of their husband in 1991. There was no problem between the appellant and their husband during his lifetime. It is only during 2013 that the appellant filed a suit against them claiming her son had trespassed on his land yet she had been cultivating that land since she was married and even when their husband died he was buried on that very land. The land customarily belongs to the Paigo Clan. D.W.7 Ingwima Emmanuel testified that the land in dispute is customarily belongs to them having inherited it from their forefathers. He has since his childhood lived on this land. The land given to the appellant's late brother lies across the stream, River Ofua. That is where he and his wife were buried when they died. It is only during 2013 that the appellant filed a suit against them claiming her son had trespassed on his land yet the land does not belong to him. D.W.8 Tiondi Faustin testified that the land in dispute belongs to their family. The appellant came to live with his brother Lakoko who was married to their late Aunt Lacholi. Their grandfather gave them a four acre piece of land to live on. It is on that land that they were buried when they died. The appellant has never grown any crops on the disputed

land. D.W.9 Awuleria Chuliba testified that the appellant was brought from Acholi around 1958 by the late Lakoko who had married their Aunt Lacholi. She had returned to Kureku when her husband was arrested on suspicion of murder. Later when he was released from prison, he brought the appellant with him and they started living together on land given to them by the grandfathers of the respondents. Problems started when the appellant began exceeding the boundary of the land given to his late brother and began claiming land belonging to the respondents. The respondents then closed their case.

The court then on its own motion summoned one witness, one of the surviving sons of the late Lakoko and Lacholi. C.T.W.1 Eruaga Erikanjelo testified that their family is from the Pagoro Clan of Acholi. The respondents are his uncles from the Paigo Clan of Madi. The respondents trespassed on the land after 1980 but the appellant could not confront them then because of the insecurity that prevailed then. In cross-examination, he stated that the land cultivated by him and the rest of his extended family lies across River Ofua. Thereafter, the court visited the *locus in quo* on 17th April 2014 and prepared sketch map of the land in dispute.

In his judgment, the learned trial magistrate found that there were contradictions as to the date of encroachment alleged by the appellant. In his plaint he had pleaded that it occurred in 1980 while in his testimony he stated it occurred in 1990. P.W.4 on his part had stated that the encroachment occurred in 1982. This witness said the appellant's father died after 1982 while the appellant testified that his father died in 1957 and he thereupon inherited the land. The appellant was as well inconsistent regarding the identity of his father. During the examination in chief he had claimed that his father was Oriang but later while under cross-examination said his father was Okenyi Towil and that Oriang was his paternal uncle. On the other hand, the respondents were consistent in their evidence explaining that the land belonged to their forefathers and was handed down to them through inheritance. At the locus, they were able to show court the grave of one of their ancestors, right in the middle of the disputed land as opposed to the appellant who showed court what appeared to be an anthill. The appellant also appeared uncertain about the physical location of the land. The respondents as well explained how the appellant came onto the land when he followed his late brother Lakoko who had married their Aunt Lacholi. If the respondents encroached on the land in 1982, then the appellant's action was barred by limitation.

The magistrate nevertheless believed the respondents' version and concluded that the appellant had failed to prove his claim. He therefore dismissed the case with an award of "general damages" to the respondents of shs. 10,000,000/= "for antagonising almost the entire family members of the late Ali Guluma." He as well awarded the respondents the costs of the suit, granted them vacant possession of the land and issued a permanent injunction against them.

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

1. The magistrate erred in law and fact by deciding in favour of the respondents basing it on his / her observations at the *locus in quo* which were not disclosed on the record of proceedings in the case.
2. The magistrate erred in law and fact by deciding in favour of the respondents simply because of the application of the principle of limitation of period (sic) and because the appellant failed to plead disability caused by the Kony War that prevented him from suing the respondents in time.
3. The magistrate erred in law and fact by deciding in favour of the respondents simply because the appellant's testimony contradicted his pleadings and because that (sic) the appellant testified that his grandfather (sic) was Oriang instead of Okwenyi.
4. The learned magistrate erred in law and fact by deciding in favour of the respondents despite glaring evidence for the appellant on the record of proceedings.
5. The magistrate's decision for the respondents was against the weight of evidence on record for the appellant.

In his written submissions, counsel for the appellant Mr. O. Oyarmoi argued 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 in favour of the respondents. He cited *Fernandes v Noroniha [1969] EA 506*. He further argued that the trial magistrate misdirected himself on the nature of the appellant's claim which was trespass to land and being a continuing tort, the law of limitation did not apply to it. He cited *Eriyasafu v. Wilberforce Kuluse (1994) III KALR 10*. In respect of the third ground of appeal, he submitted that the contradiction between the appellant's pleadings and his testimony was ably explained by senility since he was 85 years old at the time he testified. With regard to ground four, he submitted that there was ample evidence that the

disputed land belonged to the Pagoro Clan and he had inherited it from his father in 1957 only for the respondents to encroach on it during the 1980s. Lastly, that 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 did not. He prayed that the appeal be allowed.

In his oral submissions, counsel for the respondents Mr. Samuel Ondoma argued that the appellant failed to prove his customary ownership of the land and therefore the trial court came to the correct conclusion. The land is situated within a predominantly Madi area and there is no evidence that the appellant acquired the land in accordance with that culture. The appellant was inconsistent on a number of material facts and therefore the court was justified not attaching a lot of weight to his evidence. The respondents' evidence on the other hand clearly established that the land belonged to the Paigo Clan of Madi. There is no evidence that the appellant's ancestors acquired it from them whether by purchase or inheritance. The appellant's claim on the other hand was time barred since he was aware of what he claimed to be the respondents' adverse possession as way back as 1982 but never commenced any action against them. The trial magistrate properly conducted the proceedings at the locus in quo and came to the right conclusion. 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 17 of 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.

The first ground of appeal 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 hardly recorded any of the testimonies he received, the demonstrations made / features pointed out by the witnesses and observations he made, apart from what appears on the sketch map in comments such as “anthill alleged by the claimant to be the old homestead of Oriang,” “cassava plantation (sic) scattered in different portions,” and “Ledu tree confirmed by the plaintiff”. He also permitted persons who had not testified in court, to make statements about the case which he recorded. This is evident in his judgment at page 36 para 5 of the record of proceedings where he commented, “...near an old mango tree, locally known as Ledu tree was properly identified by all the community present at locus who all agreed that Ali Guluma used to live on that particular spot.....”.

There is no indication on record that allowance was made for the parties to cross-examine any of the witnesses that gave adverse evidence during those proceedings yet they 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. The Magistrate did not place on record his observations at the *locus in quo*, but expressed them for the first time in his judgment when he found that the appellant and his witnesses were contradictory and inconsistent in their evidence in comparison to the respondents and their witnesses who were consistent on how the appellant acquired the suit land. He imported in his judgment matters of inference and opinion, without distinguishing whether or not they had been coloured by his observations at the *locus in quo*.

Considering the propensity of the magistrate upon such a visit perceiving something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party, the magistrate needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record. This should be done not only for maintenance of the court's impartiality but also in order to enable the parties test or rebut the accuracy of the court's observations by making appropriate, timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse opinion formed against such a party, keep it entirely off the record, only to spring it upon the party for the first time in his judgment. Furthermore, in case of an appeal, where the trial Court limits its judgment strictly to the material placed before it by the parties in court, then its judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court. This will not be possible where the lower court's judgment is based on personal observations made out of court and off the court record, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.

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 graves, trees, a river and gardens 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 one of the appeal fails.

Grounds 3, 4 and 5 of the appeal assail the trial court's evaluation of the evidence as having led it to wrongly enter judgment for the respondents. 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 respondents 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 respondents, 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 he inherited the land from his father, a one Oriang Sumuni in 1953 following his death and that the respondents trespassed on it after the 1980 war. In his testimony, he stated that his father was Okenyi Towil and that Oriang was his paternal uncle. The trespass he was complaining of occurred in 1990. P.W.4 on his part had stated that the encroachment occurred in 1982. This witness said the appellant's father died after 1982 while the appellant testified that his father died in 1957 and he thereupon inherited the land. The appellant and his witnesses were not only inconsistent regarding the identity of his father but also as to the date of encroachment complained of, yet this were material contradictions of a grave nature that went unexplained. Counsel for the appellant has on appeal introduced the explanation of possible senility since the youngest of the appellant's witnesses was 60 years and the appellant being the oldest at 85 years. However, this is a double edged argument as it also has the tendency of casting the reliability of their entire evidence in further doubt. I have not found any evidence on record to explain these material contradictions yet the law is that grave inconsistencies unless satisfactorily explained may result in the evidence being rejected (see *Uganda v. Abdallah Nassur [1982] HCB*).

On the other hand, the respondents' version was consistent in naming the ancestors through whom they derive their occupancy of the land. Their evidence clearly established that the land belonged to the Paigo Clan of Madi to which they belonged rather than the Pagoro Clan from Acholi, to which the appellant belongs. They were able to explain how the appellant came to live on part of their land through his late brother Lakoko who had in 1958 migrated from Acholi to live with his wife, their Aunt Lacholi who had returned earlier from Acholi following the incarceration of her husband. There is evidence that the appellant's brother and Aunt were given a piece of land by the respondent's grandfather to live on and the appellant lived together with them on that land.

Comparing the two versions, I find that of the respondents consistent and unshaken by cross-examination while that of the appellant is wrought with unexplained contradictions and inconsistencies on material aspects. Matters are not helped further by the inability of the appellant to explain under what customs he inherited land that had been given to his late brother Lakoko and sister in law Lacholi, to constitute him as customary owner of that land.

Customary tenure is recognized by Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and s. 2 of the *Land Act*, Cap 227 as one of the four tenure systems of Uganda. It is defined by s. 1 (l) together with s. 3 of the *Land Act* as system of land tenure regulated by 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 respondent 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. Consequently, grounds 3, 4 and 5 of the appeal fail.

Lastly, in respect of ground 2, counsel for the appellant contends the trial court erred in applying the law of limitation to a claim in trespass to land which is essentially a continuous tort. It is clear from the evidence taken as a whole that even when considered from the perspective most favourable to the appellant, which is that the respondents have been in possession of the land only as recently as since 1990, the appellant would be precluded from claiming ownership thereof 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 1990, the respondents have been in open, continuous, uninterrupted and uncontested possession of the disputed land for 23 years by 2013 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 the respondents were vested with title thereto.

Counsel for the appellant contends this was an action in trespass rather than an action for recovery of land. I respectfully disagree. One of the pre-requisites of an action for trespass is that the plaintiff must be a person in possession at the time of intrusion. An action for the tort of trespass to land is therefore for enforcement of possessory rights rather than proprietary rights. In his own testimony, the appellant testified that the respondents entered onto the land during the time he had fled the area due to insurgency and he was an internally displaced person in Acholi. Therefore he was not a person in possession of the time of the intrusion complained of. The nature of rights the appellant sought to enforce in the action were of a proprietary nature, hence recovery of land, of which he contended he had been unlawfully deprived by the respondents. It does not matter that he named the action trespass to land instead of recovery of land. The court will consider the essence of the action rather than the nomenclature adopted by the parties. The essence of his claim was recovery of land and not the tort of trespass to land. Being an action for recovery of land, section 5 of *The Limitation Act*, provides that;

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.

This limitation is applicable to all suits for possession of land based on title or ownership i.e., proprietary title as distinct from possessory rights. Furthermore, Section 11 (1) of the same Act provides that;

No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession"), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue until adverse possession is taken of the land. (Emphasis added).

According to section 6 of the same Act, “the right of action shall be deemed to have accrued on the date of the dispossession.” A cause of action accrues when the act of adverse possession occurs. In *F.X. Miramago v. Attorney General [1979] HCB 24*, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff. If by reason of disability, fraud or mistake the operative facts were not discovered immediately, then section 21 (1) (c) of *The Limitation Act* confers an extension of six years from the date the facts are discovered. This disability though must be pleaded as required by Order 18 rule 13 of *The Civil Procedure Rules*, which was not done in the instant case. It is trite law that a plaint that does not plead such disability where the cause of action is barred by limitation, is bad in law. Statutes of limitation are in their nature strict and inflexible enactments. Their over-riding purpose is *interest reipublicae ut sit finis litium*, i.e. litigation shall be automatically stifled after fixed length of time, irrespective of the merits of the particular case. “...the statute of limitations is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights,” (see *Hilton v. Sutton Steam Laundry [1946] 1 KB 61 at 81*). The trial magistrate therefore was right in finding the appellant’s action to be time barred. Consequently, ground two of the appeal fails as well.

Before taking leave of the matter, in absence of a counterclaim properly placed before court and in respect of which the appellant was given ample notice of and opportunity to defend, there was no basis for awarding the respondents any relief other than dismissing the suit. For that reason, the orders of the trial court awarding the respondents “general damages” of shs. 10,000,000/= “for antagonising almost the entire family members of the late Ali Guluma,” the order of vacant possession and the permanent injunction are hereby set aside. In the final result, I find no merit in the appeal and it is accordingly dismissed with costs to the respondents of both the appeal and the trial.

Dated at Arua this 23rd day of February 2017.

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Stephen Mubiru
Judge