

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0023 OF 2009

(Arising from Adjumani Grade One Magistrates Court Civil Suit No. 0003 of 2009)

1. WAYI ATILIO }
2. TABAN ISAAC } **APPELLANTS**

VERSUS

ELVIRA OJALI **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent sued the appellants jointly and severally for recovery of land by way of an order of vacant possession, general damages for trespass to land, and costs in respect of a piece of land located in Lajopi Cesia village in Adjumani District. Her claim was that in 1983, she was given the land in dispute, as a gift *inter vivos*, by the father of the first appellant, the late Mario Draga in March 1983 and she took possession immediately. During 2008, without any claim of right, the two appellants entered onto the land and refused to vacate despite her demands that they do so. The first appellant claimed to be a customary tenant of the land and to have sold it to the second appellant.

In his written statement of defence, the first appellant denied the respondent's claim against him and contended that he is the customary owner of the disputed land and he rightly sold it to the second appellant. He contended further that his father had given the land in dispute to the respondent on 17th March 1983 on temporary terms during the political turbulence of the 1980s when she took refuge in Adjumani Catholic Mission. He sold the land to the second appellant after due notice to the respondent whereupon the second appellant proceeded to fence it off. In his written statement of defence, the second appellant stated that he bought the land in dispute from the first appellant, who was hitherto the customary owner thereof. He proceeded to construct a grass-thatched house and pit latrine thereon.

In her testimony, the respondent stated that following the death of her husband on 5th February 1983, the first appellant's father, Mario Draga offered her the land so that her children could stay in school. She consulted a one Lulua to confirm that the land belonged to Draga and after obtaining the confirmation, accepted the gift of land and proceeded to construct a hut thereon, leaving the Cotton Ginnery Staff Quarters where she and her husband had lived before his death. At that time, the first appellant was living in exile in Sudan. She lived on the land peacefully from 17th March 1983 until November 2008 when the first appellant found her harvesting sim sim in the garden and told her to leave the land because he had sold it to someone else and offered her shs. 100,000/= as a token of appreciation for her having preserved the land for that long and for the teak trees he cut. She reported the developments to the L.C.I. On 6th January 2009, the second defendant took possession of the area from which she had harvested sim sim. She reported to the L.C.II who surprisingly authorised the second appellant to go ahead with constructing a house on the land. The second appellant constructed three houses on the land and fenced it. The respondent's tenants on the land, who were occupying three of the huts she had constructed on the land, were forced to vacate as a result of which she lost income in the form of monthly rent. Some of the 20 teak trees she had planted on the land were uprooted to create space for the second appellant's constructions. Her latrine and one rental hut was enclosed in the area sold to the second appellant and this forced her tenants to leave for lack of toilet facilities.

The respondent called three witnesses to support her case. P.W2 Mary Lulua testified that the land in dispute was given as a gift to the respondent in March 1983 by this witnesses' grandfather the late Mario Draga to enable her raise her children. She was present when this occurred and it was not given to her on temporary terms. The deceased showed to both of them the demarcations. The respondent built on the land and was in possession until the purported sale of part of this land by the first appellant to the second appellant. Mario Draga died in 1984. At the time of this transaction, the first appellant lived in exile in Sudan. P.W3 Maritiliano Eberu testified that she was called by both the respondent and P.W.1 after the second appellant had taken over the land and he saw that the second appellant had fenced part of it off, enclosing one of the respondent's hut and a toilet in the fenced area. P.W4 Tarapkwe Faustine, a sister to the respondent, testified that following the death of the respondent's husband, the late Mario Draga invited them to witness a transaction by which he gave part of his land to the respondent. He

showed them the boundaries of the land donated and the respondent proceeded to construct houses on it and to occupy the land until October 2008 when they heard rumours that the first appellant had sold part of it to the second appellant. In November 2008 the second appellant started clearing the land and constructing houses on it despite their protests to the L.C.I and L.C.II to stop him. The respondent then closed her case.

In his defence, the first appellant testified that in 1979 he fled to Sudan, into exile. He returned to Uganda to attend his father's funeral upon learning that his father had died. He found that the respondent had constructed huts on part of his father's land. On inquiry from his sisters, he learnt that it was his father who had given her the land free of charge. He returned to Sudan and later came back to Uganda in 1987 and lived peacefully with the respondent on the land. In 2005, he fell sick and because he wanted to raise money for his treatment, he sold off part of it. At the time of sale, the respondent had left the land to her tenants and had been living in Minia for about two years. The respondent complained to the L.C.I who referred the dispute to the L.C.II which decided in his favour. He could not die while his father's land was available so he encouraged the second respondent to proceed with the construction since he had already used the money paid for his treatment.

The second appellant testified that September 2008 he asked friends to find him land available for purchase. The land now in dispute was identified and he negotiated with the first appellant who needed money for his treatment. He wanted to fence off the land immediately after the sale but the first appellant stopped him saying he needed to discuss with the respondent first. His construction and fencing of the land was subsequently stopped by the L.I and the L.C.II but the latter eventually decided in his favour and he was allowed to continue with the construction and fencing. In the area he fenced there were some teak trees, a hut and latrine. Two witnesses testified in support of the defence. D.W.3 Serena Tarapkwe testified that following the death of the respondent's husband in 1983, the late Mario Draga, her father, told her that he was to give part of the land to the respondent on temporary terms, until the return of the first appellant from exile. When her brother, the first appellant, returned from exile in 1986, she updated him of that development. At the time the first appellant sold off part of it, the respondent had for the previous four years or so not been living on the land but had instead let out her houses thereon to

tenants and her brother, the first appellant needed money for treatment. The part sold off included a hut and a latrine belonging to the respondent. The rest of the land on which are her houses was left to her. D.W.4 Acia Jackline, wife of the second appellant, testified that they bought the land from the first appellant. Before the purchase, they inspected the land and found there was a house and teak trees. When the second respondent inquired who the owner was, the first appellant told him they belonged to a woman who had been given the land by his father but because he needed money for treatment and the woman had transferred to another place, he had decided to sell them. He promised to talk to the woman in the event of any future problems. Upon that assurance, they paid the agreed purchase price. At the time of payment, there was sim sim growing on the land and they had to wait for it to be harvested but the L.Cs later stopped them when they began to construct and fence off the land. The L.C.II later decided in their favour and they continued with their construction. The appellants then closed their case.

The court proceeded to visit the *lous in quo* where the respondent pointed out the area of her land that had been sold off by the first appellant to the second appellant. She pointed out the latrine, hut and tree stumps as her property enclosed by the second appellant. She pointed out the new structures which the second appellant had constructed on the disputed area. The first appellant as well showed court the disputed land and contended no trees had been cut down and if any had been cut then this was by the respondent's daughter. The second appellant showed court the structures which he had found on the land at the time of purchase including a hut and a latrine. He denied having cut down any trees. The court prepared a sketch plan.

In its judgment, the trial court found that the respondent had adduced sufficient evidence to prove the fact that she acquired the land in dispute by way of a gift from the first appellant's father in 1983. She was in possession thereof until the second respondent fenced off part of it, enclosing one of the huts, a latrine and some trees belonging to her. The L.C.II had no jurisdiction to adjudicate over the dispute, except as mediators. At the time of purchase, the second appellant had notice of the respondent's interest in the land and was therefore not a bona fide purchaser for value. The court found that he was guilty of fraud and acted in connivance with the first appellant to deprive the respondent of her land. The court therefore ordered that the second appellant hands over to the respondent vacant possession of the land, a permanent

injunction against both appellants and their agents against further acts of trespass onto the land, awarded the respondent general damages of shs. 2,000,000/= and the costs of the suit.

Being dissatisfied with the decision the appellant seeks a declaration that the first appellant is the customary owner of the disputed land, that the second appellant is a bona fide purchaser for value of that land and the costs of the appeal and trial court, on the following grounds, namely;

1. The learned trial magistrate erred in fact and law when he failed to properly evaluate the evidence on record on ownership of disputed (sic) land thereby coming to a wrong conclusion that the disputed land belongs to the plaintiff / respondent.
2. The learned trial magistrate erred in fact and law misdirected (sic) himself when he failed to properly evaluate evidence on record and found that 2nd appellant was not a bona fide purchaser for value of disputed (sic) land.

When the appeal came up for hearing, the appellants and their counsel were absent yet there was a return of service filed in court in proof of service of a hearing notice on counsel for the appellants. Counsel for the respondent was therefore granted leave to proceed ex-parte. Submitting in opposition of the appeal, counsel for the respondent, Mr. Henry Odama, argued that the appeal had been filed out time and ought to be struck out. The judgment was delivered on 14th July 2009 yet the memorandum of appeal was filed on 5th October 2010. In the alternative, he argued that the trial court had come to the correct conclusion after a proper evaluation of the evidence. The evidence showed that the land in dispute had been given to the respondent by the first appellant's father. The first appellant knew this as a fact yet he went ahead to sell off part of her land to the second appellant. At the time of purchase, the second appellant had notice of the respondent's interest in the land.

According to section 79 (1) (a) of *The Civil Procedure Act*, except as otherwise specifically provided in any other law, every appeal should be entered within thirty days of the date of the decree or order of the court. It is trite law that an appeal filed out of time without the leave of court is incompetent and will be struck out as incompetent (see *Maria Onyango Ochola and others v J Hannington Wasswa [1996] HCB 43* and *Hajj Mohammed Nyanzi v Ali Ssegane [1992 – 1993] HCB 218*). On the face of it, the instant appeal was filed out of time since it was filed nearly three months after the date of the judgment sought to be appealed yet nor prior leave

of court was sought to file it out of time. However, this being a land dispute, I am inclined instead to invoke the power of this court under s 79 (1) (b) of *The Civil Procedure Act* for good cause, to admit the appeal though the period of limitation prescribed elapsed although it has not been proved that the appeal was filed within thirty days of the record being availed to the appellant. A decision on the merits would suit the parties better since it promotes adherence to the need to administer substantive justice between them without undue regard to technicalities.

This being a first appeal, the court reminds itself of the duty of a first appellate court was appropriately stated in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge'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 the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).

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.

Being the plaintiff in the court below, the respondent carried the burden of proving the case against both appellants on the balance of probabilities. It is stated in the first ground of the memorandum of appeal that the trial court failed to properly evaluate the evidence on record regarding ownership of the disputed land thereby coming to a wrong conclusion that the disputed land belongs to the plaintiff / respondent.

It is trite law that there is no set form of evaluation of evidence and the manner of evaluation of evidence in each case varies according to the peculiar facts and circumstances of the case (see *Mujuni Apollo v Uganda S.C. Criminal Appeal No.46 of 2000*). Therefore, while evaluating the evidence before it, a trial court may adopt any reasonable course to arrive at an objective finding in accordance with its judicial conscience bearing in mind that it can only make a finding in favour of the plaintiff, in those cases where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, only if a reasonable man might hold that the more probable conclusion is that for which the plaintiff contends. The court should be careful not to base its findings on surmises and conjecture since where the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then the plaintiff will have failed to prove his case (see *Lancaster v Blackwell Colliery Co. Ltd 1918 WC Rep 345*).

In the instant case, it was common ground that the respondent acquired the land in dispute from the first appellant's father as a gift *inter vivos* on or around 17th March 1983. A gift is a voluntary transfer of personal or real property without consideration. It involves the owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money. It has been legally defined as "the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee" (see *Black's Law Dictionary*, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187).

When a gift is made, the owner of property (Donor) may give such property to a person (Donee) with or without conditions. A Donor may gift a property with a specific condition that he reserves to himself or herself the right to revoke, but may also gift a property wherein it is expressly stated that it is absolute and irrevocable. A Donee by accepting the gift binds himself or herself to all the conditions in the grant. A customary proprietary interest in property may be created by gift in which case a writing is not essential to the validity of a gift either of moveable or immovable property. At common law, the essential requisites of a valid gift are; capacity of donor, intention of donor to make gift, absence of consideration, completed delivery to or for

donee, and acceptance of gift by donee. The donor of the gift must have had a present intent to make a gift of the property to the donee and a transfer of the gift must be delivered to the donee and the donee must accept the gift in order for the property transfer to take place.

These requirements are illustrated by the case of *Re Cole [1964] 1 Ch 175*, where Mr Cole bought, furnished and equipped a large house in London as the family home, costing him £20,000 overall. Later that year, his wife came to London to move into their new home. He said to her “look, it's all yours”. Subsequently, Mr Cole went bankrupt and the contents of the home were claimed. However, Mrs Cole claimed that they had been gifted to her. The court held that a gift of chattels cannot be perfected by showing them to a donee and stating words of gift. In order to establish a gift there are three requirements for perfecting a gift, namely; 1) Intention 2) Delivery and 3) Acceptance. In this case Mr Cole had, by words, shown intention to make a gift to Mrs Cole. He had not however, delivered anything to her, and she had not accepted anything. It is incumbent on the Donee to accept the gift for it to become operative.

The evidence before the trial court contained in the testimonies of the respondent, P.W.2, P.W.3, P.W.4, the first appellant and DW.3 amply supports the trial court’s finding that the respondent acquired a customary proprietary interest in the land in dispute by way of a gift on or around 17th March 1983 from the late Mario Draga, father of the first appellant. There is nothing to suggest that the late Mario Draga lacked capacity to grant the gift, he had a clear intention to give it to the respondent evidenced by his dissuading the respondent from migrating back to Marindi Pachara, away from the area upon the death of her husband and by demarcating its boundaries, it was clearly made for no consideration or familial considerations, it was delivered and the respondent accepted it by taking possession and constructing huts thereon. She established her dwelling on the land, cultivated part of it and subsequently collected rent from some of the houses she constructed thereon, for more than two decades before the appellants’ entry thereon. All this is evidence that the gift was perfected and a transfer of proprietary interest therein from the late Mario Draga to the respondent in the property, did take place.

Whether the gift passed an absolute estate or limited estate depends upon the terms of the grant. That too, depends upon the expressions used in the terms of the grant at the time it was made. No

sooner does the donor relinquish his right in the property followed by delivery of possession and acceptance by the donee than a gift is completed. The only point of contention that remained for the court's determination is whether or not it was given as a temporary, conditional gift as contended by the appellants, or as an outright, unconditional gift, free of any restrictions, as contended by the respondent. When a question of fact arises during a trial, the onus lies on a party who has to prove a positive assertion and not a negative assertion of the issue. In *Jovelyn Bamgahare v. Attorney General S.C. C.A. No 28 of 1993*, it was decided that he who asserts must affirm. Therefore the burden of proof of this issue lay upon the appellants, being the parties asserting the affirmative of this issue, and not upon the respondent, who denied, since from the nature of things he or she who denies a fact can hardly produce any proof. The appellants had the onus of proving, on the balance of probabilities, that in giving the land to the respondent as a gift *inter vivos*, the late Mario Draga did so conditionally and on a temporary basis.

Oral words coupled with delivery, and gift by deed are the only modes available at common law for an *inter vivos* grant of a gift. The evidence before the trial court showed that the gift was never evidenced in writing. The transaction was entirely oral coupled with delivery. Whether or not it was on temporary basis could be determined by evaluation of the cogency of evidence adduced by both parties. On the one hand, there was the evidence of the respondent herself. At page 5 of the record of proceedings, while under cross-examination by the first appellant she stated that; “.....Your father gave me the land without any condition and there are witnesses. It was out of good faith and nobody was to chase me away. He even insisted (sic) to me whenever I voiced my concern and fear. He confirmed no one shall take the land away from me.” At the same page, still under cross-examination by the first appellant, P.W.2 stated; “the land was permanently given he didn't say it was temporary because you were in Sudan and will come back. That time the land was given free.” At the same page, in his evidence, P.W.3 stated; “.....the L.C.II Court ruled badly (sic) that the land was for Wayi D1 because it was on temporary basis. Yet in actual sense it was given freely in 1983, by Draga himself.” While under cross-examination by the first appellant at page 6 of the record of proceedings, this witness continued to say; “When you were in exile and your father was dying, he didn't say anything about chasing people away from the land he gave them.”

On the other hand, the first appellant testified at page 7 of the record of proceedings but during his evidence in chief did not allude to any conditions having been attached by his father to the grant of gift of this land to the respondent. He only stated that; “.. I could not die yet the land of my father was there...I have been envied, because I sold the land to Taban so I don’t know why they want to chase me away from my land.” In her testimony at page 8 of the record of proceedings, D.W.3 testified that; “In 1983, the husband of Elvira died, and she came to my father to give her a piece of land because due to the war she could not go away with the children. So my father said that the children were not there, Wayi was in Sudan, and so he told me that the land was then to be given temporarily till Wayi should come so when Wayi came I told him of that...”

The court had before it on the one hand with the testimony of the respondent and her witnesses who were present at the time of the transaction and on the other the testimony of the first appellant, who was in exile at the time of the transaction, and that of his sister, whose was not present at the time of the transaction but whose testimony is rather based on what she was told by her father at an unspecified time before the transaction. The evidence by the respondent and her witnesses was consistent and remained unshaken by the first appellant’s cross-examination. Comparing and balancing probabilities as to their respective value of the two versions, I am of the view that a reasonable man might hold that the more probable conclusion is that for which the respondent contends. The appellants failed to discharge the onus cast upon them to prove that in giving the land to the respondent as a gift *inter vivos*, the late Mario Draga did so conditionally and on a temporary basis.

Ancillary to this aspect of the appeal, this court considers it worthwhile to determine whether in the absence of proof of a restricted grant made to the respondent by his late father Mario Draga, the first appellant inherited from his late father, any power of revocation of this grant of gift which would justify his sale of part of the land to the second appellant. Considering this issue from a public policy perspective, a donee in whose favour a gift of unregistered land, as opposed to a chattel, is made would be put in jeopardy and in a state of uncertainty if the law is to infer into the transaction a donor’s power at any time to unilaterally revoke the gift. The donee would be unfairly placed as he or she cannot improve the land or use it as collateral to obtain financing

for building or for commercial purposes or even dispose of it, thus impacting on his or her as well as the country's economic development and welfare. This would create a situation where lending institutions who accept evidence of ownership by the donee and take such land as collateral in granting loans being placed in a disadvantaged position since upon unilateral revocation by the donor, they would lose the security on which the loan was granted. There is also the possibility that the donee, in connivance with the donor and for the purpose of defrauding the lending institutions, can unilaterally revoke the gift without recourse to Court. If the court is to readily infer such a power of revocation of gifts of unregistered land there is a danger that what would otherwise be valuable collateral available to the public to obtain funds for development or in times of financial need, will have been lost to them as ownership of such property would then have been placed in the category of "unacceptable and uncertain title."

At common law, a donor of property who does not provide for a reservation of rights in the grant, absolutely and irrevocably divests himself or herself of title, dominion, and control of the gifted property. This is illustrated in the decision of Carl J. in *Herzog Foundation, Inc. v. University of Bridgeport*, 243 Conn. 1, 699 A.2d 995 (1997) where he stated as follows;

"...As a matter of common law, when a settlor of a trust or a donor of property to a charity fails specifically to provide for a reservation of rights in the trust or gift instrument, neither the donor nor his heirs have any standing in court in a proceeding to compel the proper execution of the trust, except as relators. . . . There is no such thing as a resulting trust with respect to a charity. . . . Where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him have any standing in a court of equity as to its disposition and control." There is clear donor intent to "absolutely and irrevocably divest himself of title, dominion, and control" of the gifted property; there is an irrevocable, complete transfer of the gift to the charity (donor can no longer exercise dominion and control).

Under Roman-Dutch Law, if a donor of an irrevocable gift wishes to revoke it, he must file action in a Court of Law to have the Deed of Gift revoked on the grounds recognised by Roman-Dutch Law, which are; (a) if the donee failed to give effect to a direction as to its application (donatio sub modo), or (b) on the ground of the donee's ingratitude or (c) if at the time of the gift the donor was childless but afterwards became the father of a legitimate child by birth or legitimisation. A donor is entitled to revoke a donation on account of ingratitude; (i) if the donee

lays *manus impias* (impious hands) on the donor, (ii) if he does him an atrocious injury, (iii) if he wilfully causes him great loss of property, (iv) if he makes an attempt on his life, (v) if he does not fulfil the conditions attached to the gift, (vi) other equally grave causes.

For example the Supreme Court of Sri Lanka in the case of *Podinona Ranaweera Menike v. Rohini Senanayake (1992) 2 SLR 181*, a case dealing mostly with deeds of gift granted to the sons in law as dowry at the time of the daughters getting married according to our Sri Lankan culture, the issue was whether such deeds can be revoked or not and on what grounds such deeds can be revoked. The court made a summary of causes to revoke a donation on account of ingratitude. It categorised them as follows: 1. If the donee lays impious hands on the donor, 2. If he does him an atrocious injury, 3. If he wilfully causes him great loss of property, 4. If he makes an attempt on his life, 5. If he does not fulfil the conditions attached to the gift, and 6. If he does other equally grave causes. Justice Amarasinghe then held that, “the donee-daughter by assaulting her donor-parents was guilty of the foul offence of ingratitude. [But even then] revocation is not however automatic. It requires a decision of the court.”

Whether or not the customary law of the parties to this case recognises any power of revocation of gifts of land by a donor was not canvassed in the court below. But even if grounds similar to those available in Roman-Dutch Law for the revocation of gifts can be found under the relevant customary law of the parties, a customary practice that recognises or encourages unilateral revocations of gifts of land without recourse to court would be repugnant to natural justice, equity and good conscience. I find the Roman-Dutch Law principle against unilateral revocation of gifts without recourse to court to be a persuasive approach in dealing with revocations of gifts of unregistered land. When a donor has given up all rights in a gift of unregistered land, the donor (or the descendants of that donor) as a matter of public policy, do not have any right to unilaterally revoke the grant, without recourse to court.

Lastly regarding this ground of appeal, the respondent can rely on equity, more especially on the common law doctrine of proprietary estoppels, for laying her claim. This doctrine has been used to found a claim for a person who is unable to rely on the normal rules concerning the creation or transfer (and sometimes enforcement) of an interest in land. In *Crabb v Arun District Council*

[1976] 1 Ch.183, Lord Denning explained the basis for the claim as follows: “the basis of this proprietary estoppel, as indeed of promissory estoppel, is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law.” It will prevent a person from insisting on his strict legal rights, whether arising under a contract, or on his title deeds, or by statute, when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. It is illustrated in *Ramsden v. Dvson (1866) L.R. 1 H.L. 129*, thus;

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake to which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

This doctrine will operate where the claimant is under a unilateral misapprehension that he has acquired or will acquire rights in land where that misapprehension was encouraged by representations made by the legal owner or where the legal owner did not correct the claimant’s misapprehension. It is an equitable remedy, which will operate to prevent the legal owner of property from asserting their strict legal rights in respect of that property when it would be inequitable to allow him to do so. As is shown in *Crabb v Arun District Council* that one aspect of modern proprietary estoppel is that it can be used as a cause of action, rather than just a defence contrary to the well known mantra that estoppel may be used as a shield, but not a sword.

That doctrine is founded on acquiescence, which requires proof of passive encouragement. Megarry and Wade’s *The Law of Real Property (8th Edition)* at pages 710 to 711, para 16-001 summarises the requirements in relation to proprietary estoppel as follows:

A representation or assurance (by acquiescence or encouragement) made to the Claimant that the claimant has acquired or will acquire rights in respect of the property. The claimant must act to his detriment in consequence of his (reasonable) reliance upon the representation. There must also be some unconscionable action by the owner in denying the Claimant the right or benefit which he expected to receive.

Acquiescence can only be raised against a party who knows of his rights. As Lord Diplock put it in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 884 thus:

The party estopped by acquiescence, must at the time of his active or passive encouragement, know of the existence of his legal right and of the other party's mistaken belief in his own inconsistent legal right. It is not enough that he should know of the facts which give rise to his legal right. He must also know that he is entitled to the legal right to which these facts give rise.

In *Willmott v Barber* (1880) 15 Ch D 96, the House of Lords described five elements which were required to be shown if a person's legal rights were to be overborne by a proprietary estoppel. It explained the required probanda as follows;

It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.... the principle requires a very much broader approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment..... The inquiry which I have to make therefore, as it seems to me, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared ...

In the subsequent decision of Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 the court favoured a broader approach directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that he knowingly, or unknowingly allowed or encouraged another to mistakenly assume legal rights, rather than inquiring whether the circumstances could be fitted within the confines of the strict probanda of *Willmott v Barber*. In the latter case, knowledge of the true position of the party alleged to be estopped is merely one of the factors to be considered in the inquiry, and may be most pertinent in considering the requirement of unconscionability. Such knowledge might be determinative in a case of pure acquiescence, in which no active encouragement was offered at all, but might be less relevant in a case where there was some active encouragement coupled with acquiescence and inactivity.

The broader approach was approved by the House of Lords in *Thorner v Major* [2009] UKHL 18 where the court approved the analysis of an estoppel as being based on three main elements of representation / assurance, reliance and detriment, and held that cases of pure acquiescence were to be analysed as cases in which the landowner's conduct in standing-by in silence served as the required element of representation / assurance. Thus, there was no additional requirement that the estopped party was to have known of the other party's mistaken belief.

If the legal owner stands by and allows the claimant to, for example, build on his land or improve his property in the mistaken belief that the claimant had acquired or would acquire rights in respect of that land or property then an estoppel will operate so as to prevent the legal owner insisting upon his strict legal rights. It applies where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act. The essential elements of proprietary estoppel are further summarized in McGee, *Snell's Equity*, 13 ed. (2000) at pp. 727-28, as follows: an equity arises where: (a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property; (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.

It will be observed from the above summary that to rely on such equity, two things are required, first; that the person expending the money supposes himself or herself to be building on his or her own land; and, secondly, that the real owner knows that the land belongs to him and not to the person expending the money in the belief that he is the owner.

In the instant case, the first appellant became aware of the respondent's activities on the land as way back as 1984 or 1986 when he returned from exile to attend the funeral of his late father Mario Draga. He became aware of the respondent's presence on the land under an arrangement by which the late Mario Draga induced, encouraged or allowed her to believe that she had or would enjoy proprietary right or benefit over that part of Mario Draga's property. In reliance upon this belief, the respondent acted to her detriment in developing the land to the knowledge of both Mario Draga and the first appellant. When the first appellant in the year 2008 (more than twenty years later) sought to take unconscionable advantage of the respondent by denying her the right or benefit over part of that land which she expected to enjoy, it would be unconscionable in the circumstances of this case for the first appellant to be permitted to deny that he knowingly, or unknowingly allowed or encouraged the respondent to mistakenly assume legal rights over the land now in dispute, which by his own account was meant to be a temporary occupation. For all the above mentioned reasons, the first ground of appeal fails.

The second ground of appeal assails the finding of the trial court to the effect that the second appellant was not a bona fide purchaser for value of the land in dispute. The plea of bona fide purchaser for value without notice is available to a purchaser who, at the time of the purchase, obtains a legal estate without notice of a prior or existing equitable claim or interest and the onus of proof usually lies with the party making the plea of bona fide purchaser. Notice includes actual or constructive notice of such facts as would have been discovered if all usual and proper inquiries were made of the vendor's title, interests and encumbrances affecting the land. Within the system of land registration, one is not required to search the root of title to ensure that there is a good root. The standard of due diligence imposed on a purchaser of unregistered land is much higher than that expected of a purchaser of registered land. The reason is illustrated by the decision in *Williams and Glyn's Bank Ltd v Boland*, [1981] AC 487 where Lord Wilberforce when commenting on the Torrens system of land registration said:-

The system of land registration...is designed to simplify and to cheapen conveyancing. It is intended to replace the often complicated and voluminous title deeds of property by a single land certificate, on the strength of which land can be dealt with. In place of the lengthy and often technical investigation of title to which a purchaser was committed, all he has to do is consult the register.....Above all, the system is designed to free the purchaser from the hazards of notice – real or constructive – which, in the case of unregistered land, involve him in inquiries, often quite elaborate, failing which he might be bound by equities.

Therefore, a purchaser of unregistered land who does not undertake the otherwise expected “lengthy and often technical investigation of title” which will often ordinarily involve him in quite elaborate inquiries, is bound by equities relating to that land of which he had actual or constructive notice. According to Cheshire and Burns in their book *Modern Law of Real Property, 16th Edition page 60*; constructive notice is generally taken to include two different things: (a) the notice which is implied when a purchaser omits to investigate the vendor’s title properly or to make reasonable inquiries as to the deeds or facts which come to his knowledge; (b) the notice which is imputed to a purchaser by reason of the fact that his solicitor or other legal agent has actual or implied notice of some fact. This is generally called imputed notice. In *Hunt v Luck (1901) 1 Ch 45* the court considered the nature of constructive notice. Farwell J said: “Constructive notice is the knowledge which the courts impute to a person upon presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him on further enquiry or from wilfully abstaining from inquiry to avoid notice.” In *Uganda Posts and Telecommunications v A.K.P.M. Lutaaya, S.C. Civil Appeal No. 36 of 1995*, for example, it was held that a person who conducts a perfunctory search of title to land before purchase, takes it subject to existing equitable interests in the land. In that case, the respondent had limited his due diligence before the purchase, to a mere search of the register. He had not carried out a physical inspection of the land and the court found that had he done so, he would have discovered that the respondent had an earth satellite station constructed and operational on the land. He therefore took the land subject to the respondent’s possessory interests.

In the instant case, before purchase of the land the second appellant undertook inquiries, which according to his wife D.W.4 Acia Jackline, revealed that there was a house and teak trees on the

land which did not belong to the first appellant. When she inquired who the owner was, the first appellant told her they belonged to a woman who had been given the land by the first appellant's father but because the first appellant needed money for treatment and the woman had transferred to another place, he had decided to sell them. The first appellant promised to talk to the woman in the event of any future problems. Upon that assurance, the second appellant and his wife paid the agreed purchase price. At the time of payment, there was sim sim growing on the land and they had to wait for it to be harvested but the L.Cs later stopped them when they began to construct and fence off the land. The L.C.II later decided in their favour and they continued with their construction. The second appellant himself testified that he wanted to fence off the land immediately after the sale but the first appellant stopped him saying he needed to discuss with the respondent first. His construction and fencing of the land was subsequently stopped by the L.I and the L.C.II but the latter eventually decided in his favour and he was allowed to continue with the construction and fencing. In the area he fenced there were some teak trees, a hut and latrine which belonged to the respondent.

Through this inspection, the second appellant discovered that the piece of land he was about to purchase had developments on it which did not belong to the first appellant but rather the respondent. Due diligence in the circumstances demanded that the second appellant seeks audience with the respondent. He chose instead to rely on undertakings and assurances made to him by the first appellant. Had he taken that further step, he would have readily discovered the existence of the respondent's adverse claim to the land. Constructive knowledge of this fact cannot be rebutted by the second respondent's abstaining from making the necessary inquiry. The conduct of the second appellant was not that of a bona fide purchaser and the trial court came to the correct conclusion, this ground of appeal too fails.

In the final result, I have not found any merit in the appeal and it is hereby dismissed. The costs of this appeal and of the court below are awarded to the respondent.

Dated at Arua this 10th day of January 2017.

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Stephen Mubiru
Judge