

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0002 OF 2015
(Arising from Nebbi Chief Magistrates Court Civil Suit No. 0022 of 2013)

1. KLELIA OBAYA }
2. PACURYEMA MARGARET } APPELLANTS

VERSUS

OVURU STEPHANO RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellants for general damages for trespass to land, an order of vacant possession, a permanent injunction and the costs of the suit. The respondent's claim was that in 1943, he inherited a customary land holding at Punyang East / Nyapolo village, Abok Parish, Alwi Sub-county, Jonam County in Nebbi District from his late father Obel s/o Yik. On 23rd January 2013, without any claim of right, the appellants began encroaching onto this land by tilling part of it falsely claiming it to be theirs, after Total Oil Company had discovered oil on that part of the land. The respondent protested to the local cultural leaders all of whom cautioned the appellants to stop trespassing onto the land. The appellants ignored the caution and continued their activities on the land.

In their joint written statement of defence, the appellants denied the respondent's allegations against them. They instead averred that the land in dispute was left to the first appellant by his late husband Obaya. They denied any knowledge of the said Obell or of the claim that he was the father of the respondent. They contended that the respondent came onto that part of the land in 2004 when he was allowed temporary user by the late John Longen, grandfather of the second appellant.

In his testimony, the respondent stated that the land in dispute measures about twenty acres. It belonged to his late father Obel Yik who died while the respondent was still a baby. His mother preserved it for him as she cultivated seasonal food crops on it. When he became of age, he migrated to Buganda as a labourer and returned to the land in dispute in 1978 and used it peacefully until around 2012 when Total Oil Company picked interest in the land. Upon inquiry from the community, the company officials were informed the land belonged to him. When the company proposed to compensate him for the land, the appellants objected claiming to be joint owners of the land. The company decided that the dispute be settled by court and it would then deal with the rightful owner as declared by court, hence the suit. The respondent called five witnesses.

P.W.2. Ayikanying Alex Tinkendu testified that he was at the material time the Traditional Chief of Alwi Chieftdom. He is related to all parties to the dispute. The elders had demarcated the boundaries of the land using sisal plants before the dispute sprouted. It was sparked by Total Oil Company's activities of prospecting for oil by which time it was the respondent growing cassava on the disputed land. Total Oil Company compensated the respondent for the cassava on the land before it commenced its activities of prospecting. Eventually the company expressed a desire to compensate the owner of the land. All persons neighbouring the land recognised the respondent as the owner of the land except the first appellant who claimed to own it. None of the appellants had ever claimed the land as their prior to Total Oil Company picking interest in it. The respondent had used the land undisturbed since his return from Kampala until Total Oil Company expressed a desire to compensate its owner.

P.W.3. Acayo Berna Okumu who is related to all parties to the dispute by marriage, testified that in 2009, a boundary dispute had emerged between the first appellant and the respondent which was resolved by the elders planting sisal plants to demarcate the boundary. The parties lived in peaceful co-existence thereafter until 2011 when Total Oil Company began prospecting for oil in the area. At a community meeting convened by the company, all people in attendance chorused that the land belonged to the respondent. The appellants' claim over the land is baseless.

P.W.4. Scholastica Omung, a cousin to the respondent and sister in law of the first appellant testified that the land in dispute belongs to the respondent. It originally belonged to the respondent's father Obel Yik who died when the respondent was still a baby.

P.W.5. Jinio Wacibra, a neighbour to the respondent testified that when Total Oil Company began prospecting for oil in the area, at a community meeting convened by the company, all people in attendance chorused that the land belonged to the respondent. Both appellants were present at the meeting but did not lay claim to the land. The respondent introduced the appellants to the company among his neighbours. The respondent was growing cassava on the land at the time. The respondent was compensated for his crops.

P.W.6. Opio Domic, a neighbour to the respondent testified that the dispute between the parties originates from the activities of Total Oil Company prospecting for oil in the area. At the time they expressed interest in installing equipment on the land the respondent was growing cassava and pumpkin on it. The company convened a community meeting at which all people in attendance chorused that the land belonged to the respondent. The representatives of the company requested the respondent to show them his neighbours to the land and among them he introduced both appellants. He was therefore surprised to see the appellants subsequently claiming the land as theirs. That was the close of the respondent's case.

In her defence, the first appellant testified that the land in dispute originally belonged to a one Atia Martin, a local chief and brother to her late husband, Antonio Obaya. When Atia died, his wife Akweyo inherited it and upon her death it was inherited by Antonio Obaya. Upon the death of her husband Antonio Obaya, she inherited it. A dispute arose between her and the respondent when the respondent began cultivating the land and stopped her children from grazing goats on the land. The respondent claimed the land belonged to his family. The dispute was resolved by the planting of sisal plants along the common boundary between them though she disagreed with its location. Later white men came and found oil at the boundary between her land and that of the second appellant.

The second appellant in her defence testified that the respondent had trespassed on her father's land in the year 2004. The land in dispute originally belonged to her grandfather a one Lei Ongene who later gave it to the respondent to construct a house. The appellants called four witnesses.

D.W.3. Michael Olega testified that he was one of the elders who attempted to resolve the dispute between the respondent and the appellants. After hearing all the parties, it was decided that the respondent was to leave the land to the family of Antonio Obaya and Lei Ongene to which the two appellants belong respectively. Sisal plants were planted as the boundary. When Total Oil Company asked for the respondent's witnesses at a community meeting, the first appellant was forced to sign as one of his witnesses.

D.W.4. Nereo Orema Atia testified that he was a clans-mate of the respondent, the Puyang Clan. He knew the respondent right from childhood when he came to the village at the age of about ten years to live with his mother. Later the respondent had migrated to and lived in Nakaseke until sometime after 1986 when he came to the home of Longene John and asked him for a piece of land for settlement. Longene gave the respondent about ten acres of land that had belonged to the late Acen, a sister of this witness's grandfather Lei. The respondent then trespassed on the neighbouring land that belonged to the late Antonio Obaya, husband of the first appellant. The dispute was resolved by the local chiefs in favour of the appellants. The respondent rejected the decision and decided to file a suit instead. He refuted the claim that the appellants had signed as his witnesses when Total Oil Company came to ascertain the owner of the land.

D.W.5. Komakech Robinson, a brother to the second appellant testified that he asked his grandfather Longene about the status of the respondent on the land and he told him the respondent had come following his mother. When he asked the respondent to leave the land, the respondent refused to. He reported the matter to the elders but the respondent was still not cooperative. The boundary was later demarcated by the L.C.I executive. The respondent referred the dispute to the Jonam County traditional chief who decided against the respondent, hence the suit. At the time Total Oil Company came to ascertain the owner of the land, this witness was in

Sudan. He confirmed though that the respondent had neither a dispute with Longene nor with the father of the witness, Mario Okello, during their lifetime.

D.W.6. Oloya Joseph Ongom, a member of the Alwi Security Committee at the material time testified that he attended the meeting convened by the elders to resolve the dispute between the parties. The meeting decided that the land belonged to the family of Longene and Obaya. The respondent rejected the decision because he had already filed a suit in the Nebbi Chief Magistrate's Court. The matter eventually was brought to the attention of the Jonam County Traditional Chief. That was the close of the defence case.

The court then visited the *locus in quo* where it received evidence from the elders who included Ocaki Pastore, Okumu Muhamud, Anyolotho Gilbert, Onyutha Cwalo, Celemia Odubu, who stated the land belongs to the respondent while Okapker Atia P'lei, Omuci Longene, Okumu Daniel and Okello Emma stated the land belonged to the appellants. The clan Chief of Alwi stated it belongs to the respondent and so did the L.C.I Chairman while the Secretary for Women stated it belonged to the two appellants. It also recorded evidence of the parties each of whom restated their respective claims to ownership of the disputed land.

In his judgment, the learned trial magistrate found that the respondent had adduced cogent evidence proving he had inherited the disputed land from his late father Obel Yik. He further observed that at the time Total Oil Company picked interest in the land and took steps to ascertain the owner of the land, it was the respondent who was growing crops on the land. It was him who was compensated for the crops. He disbelieved the testimony of the second appellant because of what she stated in her written statement of defence that she had never seen the respondent cultivating the disputed land since her marriage as a young girl. The evidence of the second appellant revealed that she had no claim over the disputed land more especially since her grandfather Lei Longene and father Lei Christiano had no claim over it against the respondent during their lifetime. He declared all decisions that had been made by the traditional chiefs null and void having been made after the suit was filed. He was of the view that the appellants were motivated by greed in laying claim to the land after Total Oil Company picked interest in it. He decided that the respondent had proved on the balance of probabilities that the land belonged to

him and entered judgment in his favour. However, during the visit to the *locus in quo*, he had found that none of the appellants had entered onto the land and for that reason rejected the respondent's prayer for an order of vacant possession. He instead issued a permanent injunction restraining the appellants from trespassing on the land. He awarded the respondent general damages of shs. 300,000/= for the inconvenience he suffered when the appellants claimed ownership of the disputed land. He awarded the respondent the costs of the suit.

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

1. The learned trial magistrate erred both in law and fact when he failed to properly evaluate the evidence on the court record thus wrongly entered judgment for the respondent.
2. The learned trial magistrate erred both in law and fact when he failed to properly conduct proceedings at the *locus in quo* as required by law.

Submitting in support of the appeal, counsel for the appellant Mr. Manzi Paul argued that while at the *locus in quo*, the trial magistrate allowed persons who were not witnesses who testified in court, to give evidence. In his judgment, he proceeded to rely on their evidence when he referred to the community which had "chorused that the suit belonged to the plaintiff." Citing *Emmanuel Basaliza v. Mujwisa Chris, H.C. Civil Appeal No. 16 of 2003*, he argued that defective proceedings at a *locus in quo* render a trial a nullity, requiring an appellate court to direct a re-trial. In response, counsel for the respondents, Mr. Richard Bundu argued that although the manner in which the proceedings at the *locus in quo* were conducted was erroneous, there was no miscarriage of justice occasioned. Citing *Kahwa Stephen and another v Kalema Hannington H.C. Civil Appeal No. 07 of 2011* he argued that a defective proceeding at the *locus in quo* should not necessarily result in a re-trial. The rest of the evidence proves the land is owned by the respondent.

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.

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

When the court deems it necessary to visit the *locus-in-quo* then both parties, their witnesses must be told to be there. When they are at the *locus-in-quo*, it isnot a public meeting where public opinion is sought as it was in this case. It

is a court sitting at the *locus-in-quo*. In fact the purpose of the *locus-in-quo* is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he / she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings.

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

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

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

Upon examination of the record of appeal, it is evident that during the visit to the *locus in quo*, the trial magistrate permitted persons who had not testified in court, to make statements about the case which he recorded. This is evident at pages 14 – 16 of the record of proceedings. He recorded the views of elders who included Ocaki Pastore, Okumu Muhamud, Anyolotho Gilbert, Onyutha Cwalo, Celemia Odubu, who stated the land belongs to the respondent while Okapker Atia P'lei, Omuci Longene, Okumu Daniel and Okello Emma stated the land belonged to the

appellants. The clan Chief of Alwi stated it belongs to the respondent and so did the L.C.I Chairman while the Secretary for Women stated it belonged to the two appellants. He admitted and recorded evidence of eleven persons who had not testified in 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).

However 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 cited by counsel for the appellant, *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 was conflicting claims to its ownership with each party tracing the history of its ownership to their respective ancestors. In the past, there had been a boundary dispute over the land but according to D.W.3. Michael Olega it had been resolved by the elders planting sisal plants as the boundary between the parties. P.W.2. Ayikanying Alex Tinkendu who at the material time was the Traditional Chief of Alwi Chiefdom, too testified that the elders had demarcated the boundaries of the land using sisal plants. P.W.3. Acayo Berna Okumu testified that in 2009, a boundary dispute had emerged between the first appellant and the respondent which was resolved by the elders planting sisal plants to demarcate the boundary. The first appellant too in his testimony admitted that the dispute which arose between her and the respondent when the respondent began cultivating the land and stopped her children from grazing goats on the land was resolved by the planting of sisal plants along the common boundary between them. Although she claimed to have disagreed with the location of that boundary, she did not take any step to have the decision vacated or reversed until the filing of the suit four year later after from which the current appeal springs. This was after Total Oil Company had discovered oil in the area of the disputed land.

I am therefore satisfied that at the time the trial court visited the *locus in quo*, there was no longer any subsisting boundary dispute whose resolution could be enhanced by such a visit. The visit was not to aid the determination of the question of ownership of the land based on existing boundaries to be seen at the *locus in quo*, a decision which could be made based only on the evidence adduced in court, but rather for a determination of the question as to whether or not there had been any encroachment by the appellants as alleged. Scrutiny of the judgment of the trial court does not reveal reliance on evidence gathered at the *locus in quo* in the determination of the issue of ownership of the disputed land but rather in support of the finding that none of the appellants had entered onto the land as a justification for the rejection of the respondent's prayer for an order of vacant possession. That did not prejudice the appellants in any way. I therefore find that no miscarriage of justice was occasioned by the trial court's erroneous conduct of proceedings at the *locus in quo* and for that reason ground one of the appeal fails.

The first ground of appeal assails the trial court's evaluation of the evidence thus wrongly entering judgment for the respondent. 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 respondent. To decide in favour of the respondent, the court had to be satisfied that the respondent had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the appellants such that the choice between his version and that of the appellants would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the appellants, might hold that the more probable conclusion was that for which the respondent

contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

The respondent's version was that he inherited the land in dispute from his late father Obel Yik who died while the respondent was still a baby. His mother preserved it for him as she cultivated seasonal food crops on it. When he became of age, he migrated to Buganda as a labourer and returned to the land in dispute in 1978 and used it peacefully until around 2012 when Total Oil Company picked interest in the land. His version was supported by the evidence of P.W.4. Scholastica Omung and that of P.W.2. Ayikanying Alex Tinkendu the Traditional Chief of Alwi Chiefdom at the material time who testified that the respondent had used the land undisturbed since his return from Kampala until Total Oil Company expressed a desire to compensate its owner, save for a boundary dispute (some time in 2009). The elders had demarcated the boundaries of the land using sisal plants. When Total Oil Company's began its activities of prospecting for oil in the area, it was the respondent growing cassava on the disputed land and it is him that Total Oil Company compensated for the cassava on the land. The dispute was only revived when the company eventually expressed a desire to compensate the owner of the land. None of the appellants had ever claimed the land as theirs prior to Total Oil Company picking interest in it. Demarcation of the boundary in 2009 and revival of the dispute only after Total Oil Company began prospecting for oil in the area and compensating the respondent for cassava and pumpkin he was growing on the land was further corroborated by P.W.3. Acayo Berna Okumu, P.W.5. Jinio Wacibra, and P.W.6. Opio Domic.

On the other hand, the appellants' version was that the land in dispute originally belonged to a one Atia Martin, a local chief and brother to the first appellant's late husband, Antonio Obaya. When Atia died, his wife Akweyo inherited it and upon her death it was inherited by Antonio Obaya. Upon the death of her husband Antonio Obaya, she inherited it. The dispute which subsequently arose between her and the respondent when the respondent began cultivating the land and stopped her children from grazing goats on the land was resolved by the planting of sisal plants along the common boundary between them though she disagreed with its location. Later white men came and found oil at the boundary between her land and that of the second appellant. On her part, the second appellant in her defence testified that the land in dispute originally belonged to her grandfather a one Lei Ongene who later gave it to the respondent to

construct a house. The respondent had trespassed on her father's land in the year 2004. This was supported by D.W.3. Michael Olega who testified that he was one of the elders who attempted to resolve the dispute between the respondent and the appellants. After hearing all the parties, it was decided that the respondent was to leave the land to the family of Antonio Obaya and Lei Ongene to which the two appellants belong respectively. Sisal plants were planted as the boundary. When Total Oil Company asked for the respondent's witnesses at a community meeting, the first appellant was forced to sign as one of his witnesses.

D.W.4. Nereo Orema Atia testified that it was sometime after 1986 when the respondent returned from Nakaseke and asked Longene John for a piece of land for settlement. Longene gave the respondent about ten acres of land that had belonged to the late Acen, a sister of this witness's grandfather Lei. The respondent then trespassed on the neighbouring land that belonged to the late Antonio Obaya, husband of the first appellant. The dispute was resolved by the local chiefs in favour of the appellants. Although confirming that the respondent had neither a dispute with Longene nor with the father of the witness, Mario Okello, during their lifetime, D.W.5. Komakech Robinson, a brother to the second appellant testified that when he asked his grandfather Longene about the status of the respondent on the land, he told him the respondent had come following his mother. When he asked the respondent to leave the land, the respondent refused to. He reported the matter to the elders but the respondent was still not cooperative. The boundary was later demarcated by the L.C.I executive. The respondent referred the dispute to the Jonam County traditional chief who decided against the respondent, hence the suit. D.W.6. Oloya Joseph Ongom, a member of the Alwi Security Committee at the material time testified that a meeting convened by the elders to resolve the dispute between the parties decided that the land belonged to the family of Longene and Obaya. The respondent rejected the decision because he had already filed a suit in the Nebbi Chief Magistrate's Court. The matter eventually was brought to the attention of the Jonam County Traditional Chief.

Comparing the two versions, I find that of the respondent consistent and unshaken by cross-examination. On the other hand, the appellants' version presents inconsistent explanations for the respondent's presence on the land. One explanation is that the land originally belonged to a one Lei Ongene / Longene John who gave the respondent about ten acres of it (see the testimony of

D.W.2 and D.W.4). The other explanation is that the land originally belonged to a one Atia Martin, a local chief and brother to the first appellant's late husband, then inherited by his wife Akweyo then Antonio Obaya, her husband and subsequently by herself. It therefore does not belong to the respondent (see the testimony of D.W.1). This contradiction was unexplained.

That aside, whereas D.W.4. Nereo Orema Atia refuted the claim that the appellants had signed as the respondent's witnesses when Total Oil Company came to ascertain the owner of the land, the evidence of D.W.3. Michael Olega was to the effect that when Total Oil Company asked for the respondent's witnesses at a community meeting, the first appellant was forced to sign as one of his witnesses. This contradiction too was unexplained.

Furthermore, whereas the respondent adduced evidence of occupation and cultivation of this land dating as far back as 1978 which is partially, admitted by the testimony of D.W.2 Pacuryema Margaret (the second appellant) and D.W.4. Nereo Orema Atia who testified that it was sometime after 1986 when the respondent returned from Nakaseke and asked Longene John for a piece of land for settlement which was then given to him, there is no evidence whatsoever that any of the appellants had utilised the land in a similar manner or at all during that time period. This renders the testimony to the effect that when Total Oil Company's began its activities of prospecting for oil in the area, it was the respondent growing cassava on the disputed land and it is him that Total Oil Company compensated for the cassava on the land, even more believable.

It is clear therefore from the evidence taken as a whole that even when considered from the perspective most favourable to the appellants, which is that the respondent has been in possession of the land only as recently as since 1986, the appellants 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 1986, the respondent had been in open, continuous, uninterrupted and uncontested possession of the disputed land for 23 years by 2009 when the boundary dispute arose. By that time, the appellants had not only lost the right to bring an action for the recovery of the suit, if they had any in the first place, but also the respondent was vested with title thereto.

In the final result, I find no merit in the appeal and it is accordingly dismissed with costs to the respondent of both the appeal and the trial.

Dated at Arua this 24th day of January 2017.

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Stephen Mubiru

Judge