

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0027 OF 2012
(Arising from Moyo Chief Magistrate’s Court Civil No. 0012 of 2008)

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MAGBWI ERIKULANO **APPELLANT**

VERSUS

10 **1. MTN (U) LIMITED** }.....**RESPONDENTS**
2. OBUKPWO RAY }

Before: Hon Justice Stephen Mubiru.

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JUDGMENT

In the court below, the appellant sued the respondents jointly and severally for trespass to land claiming a declaration that the first respondent is a trespasser on his land, an order of eviction, a permanent injunction, an award of general damages, *mesne profits*, interest and costs. His case was that he is the owner of land under customary tenure, situate at Ovuvu village, Liri Parish and Itoasi village, Arinyapi Parish, Dzaipi sub-county in Adjumani District. In January 2008, he was surprised to find a telecommunications mast constructed by the first respondent on his said land, without his permission, which they continue to occupy illegally.

25 The first respondent in its written statement of defence admitted having erected the mast complained of but only with the permission of the second respondent pursuant a lease agreement between it and the second respondent as owner of the land in dispute.

In his written statement of defence, the second respondent denied the appellant’s claim and contended instead that the disputed land does not belong to the appellant but rather to the second respondent who rightly leased it to the first respondent. The second respondent inherited the land from his late father Damiano Mundukolia and became the customary owner thereof. He was born on the land in dispute and his father is buried there.

In his testimony, the appellant stated that the first respondent built a mast on an area covering approximately 50 meters by 50 metres of about two acres of his land located on Oiji Hill which constitutes the boundary to Ovuvu village to the North and Otoasi village to the South, both in Arinyapi sub-county. He inherited the land from his late father Severino Okuga who in turn
5 inherited it from his own father Amoli. Before the construction of the mast, he was not utilising this part of the land because it is a rocky area. He complained to the area L.C. officials about the encroachment but when no assistance was forthcoming from them, he filed the suit. P.W.2 Ivoru Elpidio testified that the land in dispute is found on Onigo village Arinyapi Parish in Dzaipi sub-county. The land on which the mast was constructed is in Ovuvu village. P.W.3 Okudi Elizeo
10 testified that the land in dispute is located in Ovuvu village and he owns it and it is from this land that he performs his traditional rituals. In re-examination however he changed this version and stated instead that the land is owned by the appellant since 1987.

The second respondent testified that he leased part of his land to the first respondent for
15 construction of a mast. The leased area forms part of land measuring approximately a square mile situated in Otoasi village, which belonged to his late father Damiano Munkudolia. Ovuvu village is a neighbouring village found immediately after the hill on which the mast is built. The second respondent inherited the land from his said father after his death in 1979. He uses part of the land for cultivation but the part in the immediate neighbourhood of the mast is used for
20 grazing. D.W.2 Koma Alucio testified that he witnessed the negotiation between the two respondents and the eventual signing of a lease agreement. The land where the mast was built is on the last hill in Otoasi village bordering Ovuvu village. He attended the burial of the second respondent's late father Damiano Munkudolia which was on part of the land on which the mast was constructed. The borehole is also situated on this land. D.W.3 Bosco Sempijja the Legal
25 Officer of the first respondent testified that before entering in the lease agreement with the second respondent in respect of the 20 metres by 20 metres piece of land on which the mast is located, they made inquiries from the local residents and leaders and established that the land belonged to the second respondent, whereupon a thirty year lease was executed. That was the close of the respondents' case.

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The Court then visited the *locus in quo* on 1st October 2012. The court found that the disputed area is on top of a rocky steep hill known as Oji. The boundaries of the land in dispute were shown to court as stretching from a borehole in the valley all the way up to the banks of River Nile. There was no visible human activity within the vicinity of the Mast. The appellant's home
5 was about four kilometres away while the second respondent's was about two kilometres away in different directions from the mast. It was established that Oji Hill served as the natural common border between Otoasi and Ovuvu villages such that the disputed area lay astride the common boundary, although there were no visible markers.

10 In his judgment trial magistrate found that the MTN Mast was built across the boundary of two villages, with each of the parties, i.e. the appellant and the second respondent laying claim to the land on either side of the hill up to the where the mast was built. The trial magistrate having found that it was very difficult to ascertain the exact boundary given that none of the parties specifically showed him any particular accurate boundary point other than both agreeing that the
15 hill acted as a major boundary between Otoasi and Ovuvu villages, he decided that both parties i.e. the appellant and the second respondent should both share the proceeds accruing from the lease and hence directed a renegotiation of a tripartite lease within four weeks from the date of the judgment. Having concluded that this was a complex case, where all the parties were represented by counsel, he further ruled that all parties bear their own costs.

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

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1. The learned trial magistrate erred both in law and fact and misdirected himself when he declined to determine the issue of trespass between the parties.

2. The learned trial magistrate erred both in law and fact and misdirected himself when he held that a middleman's position should be reached that both the plaintiff and the second defendant are owners of the disputed land.

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3. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thus arrived at a wrong judgment.

4. The learned trial magistrate erred in law and fact and misdirected himself when he declined to award costs and mesne profits.

In his submissions, counsel for the appellant Mr. Kobwemi Peter argued the first and second grounds concurrently. In respect of the first ground he submitted that the magistrate did not decide the issue of trespass. The evidence of PW1 is that he acquired the land from his late father. At the *locus in quo*, in the judgment of the court at page 22, the trial magistrate found that
5 the first respondent had built a mast on the land but the mast is in-between two pieces of land, P.W.1 and D.W.1 showed the mast was in-between the boundary. This was evidence of trespass on the appellant's land. The land is on top of the hill. The trial magistrate ought to have determined the issue of trespass on the appellant's land. In regard to ground two, he assailed the trial court's direction that P.W.1 and PW2 enter into a fresh lease agreement with D.W.1. Having
10 established the extent of trespass, the option to enter in a new agreement would be left to him. The representative of D.W.1 was clear. They were ready to contract with the rightful owner. He directed the appellant and the second respondent instead to enter into a new contract. Regarding the third ground, there was failure to evaluate the evidence as already submitted. The fourth ground evidence of D.W.1. at page 16 – 17. The mast was erected in 2008 and continued
15 operating. It was functioning. The case is about damages in ground 4. The appeal be allowed, the judgment and decree be set aside with costs. He prayed that the appeal be allowed with costs.

The second appellant was not in court at the hearing of the appeal despite having been served and a return of service filed in court. Hearing of the appeal proceeded ex-parte against him.
20 Counsel for the first respondent, Mr. Louis Odong was not in court at the hearing of the appeal due to bereavement but filed written submissions in which he argued that the first respondent dealt with the second respondent in good faith and therefore in the event that the court rules he is not the rightful owner of the land, the first respondent should not be condemned in costs.

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

30 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.

Grounds one to three of the appeal will be combined. Firstly, the appellant and the second respondent each founded his claim on customary inheritance of the disputed land. According to section 14 (2) (b) (ii) of *The Judicature Act*, the jurisdiction of the High Court is to be exercised subject to any written law and insofar as the written law does not extend or apply, in conformity with any established and current custom or usage. Furthermore, section 15 (1) of the same Act confers on the High Court the right to observe or enforce the observance of, and not to deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with any written law. Similar provisions are found in section 10 of *The Magistrates Courts Act*.

By those provisions, customary law and common law are placed on equal footing, with both systems being subordinate to the Constitution and any statutory law. By effect, these provisions allow for legal pluralism, being the recognition within any society that more than one legal system exists to govern the society and to maintain the social order, but without the guarantee that each system will be treated equally. Customary laws and institutions are not completely

eliminated although their reach is greatly diminished as their application is relegated to instances where the formal, state-sanctioned laws permit.

Although, their role has been significantly diminished, customary laws and institutions continue to play a significant role in the lives of large segments of the population in Uganda, in matters that impact greatly on their day-to-day lives, such as inheritance to land. Significantly, for large segments of the rural population, customary laws and institutions are the only available means of acquisitions of land. Therefore although section 1 of *The Succession Act, Cap 162* stipulates that except as provided by the “Act, or by any other law for the time being in force,” the provisions in the Act shall constitute the law of Uganda applicable to all cases of intestate or testamentary succession. Although this law sought to provide a uniform testate and intestate succession law that is applicable throughout Uganda, it could never have been the intention of Parliament to abolish customary law of inheritance. This view is further supported by the fact that section 2 (1) of *The Succession Act (Exemption) Order*, Statutory Instrument 139-3 made under the provisions of section 334 of *The Succession Act*, provided that all Africans of Uganda were exempted from the operation of the Act. The phrase “or by any other law for the time being in force” should therefore be interpreted to include existing custom, which is not repugnant to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with *The Succession Act* (see also *The Administrator General v. George Mwesigwa Sharp C. A. Civil Appeal No. 6 of 1997*).

The fact that the Act recognises and makes provision for “customary heirs” as persons recognised by the rites and customs of the tribe or community of a deceased person as being the customary heir of that person and thus entitled to share in the property of the deceased as such, notwithstanding that in *Law Advocacy for Women in Uganda v. Attorney General, Constitutional Petitions Nos. 13 of 2005 and 5 of 2006*, it was held that section 27 of *The Succession Act* is inconsistent with and contravenes Articles 21 (1) (2) (3) 31, 33(6) of *The Constitution of the Republic of Uganda, 1995* and is thus null and void for being discriminatory in so far as it does not provide for equal treatment in the division of property of intestate of male and female, it creates room for a liberal and harmonious application of both the legislative and customary law regimes in matters of intestate succession to land by the enforcement of customary inheritance

practices which are not incompatible with the constitutional guarantee of equality. Customary law in this context influences the application and implementation of legal rules regarding rights to land of a deceased intestate.

5 On the other hand, Article 37 of *The Constitution of the Republic of Uganda, 1995*, guarantees to every citizen, the right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. Moreover, Article 247 of *The Constitution of the Republic of Uganda, 1995* requires courts to
10 construe existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution bearing in mind as well that Article 126 (1) thereof too requires such application to be in conformity with law and with the values, norms and aspirations of the people. Customary laws and protocols are central to the very identity of many local communities. These laws and protocols concern many aspects of their life. They can define rights and responsibilities on important aspects of their life, culture, use of
15 and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage, and many other matters.

Customary practices of inheritance impact directly on the right to culture (of course excluding rules which treat people unequally or which limit other rights in a way which is unreasonable and
20 goes against the spirit of the rest of the fundamental rights). In many traditional communities in a rural setting, a majority of the people identify with customary laws of inheritance and conduct their lives in conformity with them. When the determination of rights in land, which in the lifetime of the deceased were governed by local customary rules generally regulating transactions in such land, individual, household, communal and traditional institutional
25 ownership, use, management and occupation thereof, 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, and suddenly upon death the rights of successors to the land are instead considered in accordance with the strict application of provisions in legislative enactments, such strict
30 application of the legislative regime creates deficiencies in inheritance rights resulting from the non-recognition of those customary inheritance practices. The crucial consequence of such strict

application is that it creates tensions between the legal and customary transmission of rights in land, in respect of land governed by customary law.

5 In the rural traditional community setting, interwoven into all interactions between family and community members are the dual concepts of shame and respect. Shame and respect create the parameters for interactions and create the framework for customary law. One reason that customary law is more often used than written law in relation to family and community relations is that it embodies the notions of shame and respect. Where conflicts exist between customary law and written law, customary law generally prevails in the villages because written law often
10 fails to reflect the reality of the villagers' lives. Enactments which disregard the value and strength of these cultural norms are barely embraced. Without an understanding of these fundamental norms of behaviour, such enactments and the decisions based on them quickly become irrelevant. In the result, legal rules do not automatically change or override customary law. Rather, legal rules support change and the desire for change, but real change only occurs
15 when it is no longer shameful or disrespectful to behave in the manner mandated by the legal rule. The better option therefore is to make determinations of transmission of rights to land held customarily within a framework of interdependence between customary law and statutory law rather than exclusively on the basis of statutory law.

20 The struggle of maintaining customary law as a legal system while adhering to the expectations of statutory law and developments in the modern world reflects another battle: that between an idyllic world and the reality of traditional societies. For example in the instant case, section 191 of *The Succession Act* provides that no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first
25 been granted by a court of competent jurisdiction. These formal conscripts of ownership and inheritance stand in stark contrast to the patterns of descent-based succession and family property arrangements in the countryside characterised by local normative conventions. It may be appropriate for the court to adopt a narrow, restrictive interpretation that limits the application of this provision to disputes involving distribution of an estate of a deceased person among
30 persons claiming entitlement thereto, where the dispute is over who the beneficiaries are and their shares, rather than in resolving disputes involving third parties to the estate of the deceased

where a less restrictive definition is more appropriate if the ideal of justice administered in conformity with law and with the values, norms and aspirations of the people is to be realised.

5 The instant case is a clear example of this tension. The appellant and the second respondent each claimed ownership of the land in dispute through customary inheritance, where each claimed to have inherited the land decades before this dispute sprouted. To resolve their dispute by reference to the fact that none of them has ever taken out letters of administration as required by section 191 of *The Succession Act* and applying the narrow restrictive interpretation of that section leads inevitably to a decision based on technicality, which would in the circumstances of
10 this case be a failure on the part of the court to deliver and administer substantive justice in what for all intents and purposes would be undue regard to technicalities in the law of succession. It is better for the resolution of their dispute that the foundation of their rival claims to customary inheritance be resolved by harmonious application of the relevant customary law and statutory law principles rather than exclusively on the basis of statutory law.

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To take by inheritance is defined as “to take as heir on death of ancestor; to take by descent from ancestor; to take or receive, as right or title, by law from ancestor at his demise” (see *Black’s Law Dictionary, 8th edition, 2004*). Inheritance therefore denotes devolution of property under the law of descent and distribution. The process of devolution is regulated by the relevant law of
20 descent and distribution which may be either customary, statutory or both. Under both systems, inheritance primarily and narrowly deals with the transmission of property, or of rights to such property, which by necessary implication excludes taking by deed, grant or purchase. Whether testate or intestate, inheritance entails a process guided by rules that govern the devolution and administration of a deceased person’s estate.

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In determining who inherits it is obvious that kinship is important. At root, kinship is based on the acknowledgement of genealogically derived ties that emerge from bearing and engendering children. How people are related to the progenitor (the biological parent) enables them and the wider community to identify their interest in a family member’s estate, to stake a legitimate
30 claim to portions of it and to have their rights to such claims recognised. Descent and kinship are the primary determinants of intestate inheritance under both the statutory and customary legal

regimes. The common purpose of inheritance under both the customary and statutory legal regimes is that the property of the deceased intestate should be left to the use and benefit of his or her closest relatives or those who were dependent upon him or her during his or her lifetime. Determinations of descent and the manner of distribution are then guided by the relevant
5 customary or statutory law.

Because of the procedural requirements embedded in the concept of inheritance, it follows that an individual who claims property of a deceased person only by dint of social affiliation through successive generations does not necessarily claim by inheritance unless and until it is proved that
10 the devolution was in accordance with the relevant law of descent and distribution under custom or enactment. Being the plaintiff presenting a claim based on inheritance under custom, the burden was on the appellant to prove that he acquired the land in dispute following rules that govern the devolution and administration of a deceased person's estate under that specific customary law. This was to be done by adducing evidence to help clarify or define what these
15 rules are in order to give meaning to the claimed inheritance within the customary context.

Customary law, under which the appellant staked his claim, concerns the laws, practices and customs of indigenous peoples and local communities. It is, by definition, intrinsic to the life and custom of indigenous peoples and local communities. What has the status of "custom" and what
20 amounts to "customary law" as such will depend very much on how indigenous peoples and local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities. Defining or characterising "customary law" typically makes some reference to established patterns of behaviour that can be objectively verified within a particular social setting or community which is seen by the community itself as having a binding
25 quality. Such customs acquire the force of law when they become the undisputed rule by which certain entitlements (rights) or obligations are regulated between members of a community. According to one definition, "custom" is a "rule of conduct, obligatory on those within its scope, established by long usage. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common
30 law" (see *Osborne's Concise Law Dictionary*, Ninth Edition (Sweet and Maxwell, 2001). "Customs that are accepted as legal requirements or obligatory rules of conduct; practices and

beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws” (see *Black’s Law Dictionary*, 8th edition, 2004). Customary law is therefore “law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws” (see *Black’s Law Dictionary*, 8th edition, 2004). It is also defined by section 1 (1) (a) of *The Magistrates Courts Act* as “the rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by Parliament.” Customary law is therefore generally conceived as locally recognised principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.

Section 56 (3) of the *Evidence Act* permits a court to take judicial notice as a fact, the existence of practices which are not subject to reasonable dispute because they are generally known within the trial court’s territorial jurisdiction. Such judicial notice can be taken within the context of this appeal to the extent that land held under customary tenure may be acquired by customary inheritance, usually by close relatives of the deceased owner of such land. That is as far as judicial notice may go. Under section 46 of *The Evidence Act*, when the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or right of persons who would be likely to know of its existence if it existed, are relevant. Considering that the customary rules, formalities and rituals involved in general inheritance of property and specifically to inheritance of land may vary from community to community, a person asserting that he or she inherited land in accordance with the applicable customary rules must prove it as a fact by evidence in the event that such rules are not documented.

The former Court of Appeal for East Africa in the case of *Ernest Kinyanjui Kimani v. Muira Gikanga [1965] EA 735* held that where African Customary Law is neither notorious nor documented, it must be established for the court’s guidance by the party intending to rely on it and also that 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 expert opinions adduced by the parties. The ascertainment of customary law requires that the court determines whether the alleged rule is indeed a law as defined by the community, as the source of living

customary law is the community itself. It must then proceed to determine whether the specific customary rule satisfies the legal test to constitute enforceable customary law for as the gatekeepers of customary law, courts must ensure that the customary law relied on is not incompatible with the provisions of the constitution, any written law and is not repugnant to natural justice, equity and good conscience.

The onus of proving customary inheritance begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition of the property of the deceased in accordance with those rules. Descent and kinship mould inheritance practices. The inheritance practices determine the settling of the estate and how the estate should devolve. They determine the person with responsibility for distributing the estate, the persons entitled to a share and the proportions to which they are entitled. The trajectory of inheritance in any society is usually associated with the cultural interpretation of kin and is thus not a term that can be applied universally to any situation of property transmission without reference to structuring effects of kinship relationships. Inheritance is conditioned by how, culturally, people define to whom they consider themselves to be related and in what way.

In this case, apart from asserting that he inherited the land in dispute from his late father Severino Okuga who in turn inherited it from his own father Amoli, the appellant did not adduce any evidence regarding the custom under which that inheritance occurred, the rules and practices of inheritance which determine the settling of estates of intestate deceased persons under that custom or how the estates should devolve, compliance with those established rules and practices of inheritance in his specific instance, and that those rules and practices are not incompatible with the provisions of the constitution, any written law and are not repugnant to natural justice, equity and good conscience. His entire claim depended on proof of his claimed root of title in customary inheritance which he failed to establish. The trial court failed to properly direct itself as can be discerned from the following pertinent extract from its judgment;

When the court consulted the LCs from both villages of Otoasi and Ovuvu, all were in agreement that the MTN Mast was erected on the suit land in the middle of the boundary of the two villages of Otoasi and Ovuvu. Both parties, the claimant and the second defendant also confirmed to this fact. The MTN Mast is surrounded by a metal bar fence measuring 20 x 20 metres.....On a very close analysis and

5 observation of the suit land during the locus visit, it looked like a no man's land since no noticeable activities would be traced. However since land belongs to the people of Uganda under the Constitution, it is now apparent that there is no single inch of land in Uganda without any owner. I therefore come to the conclusion that since the MTN Mast was built in a boundary of two villages, of course each of the parties, i.e. the claimant and the second defendant laying claim to own the land on either villages up to the where the mast was built, means that a middleman's position should be reached by this court to absolve the tension between the claimant and the second defendant in respect of who owns the part [where] the mast was built.... I will therefore rule that both parties i.e. the claimant and the second defendant both share the proceeds accruing from the lease since it was clearly very difficult to ascertain the exact boundary given that none of the parties specifically showed any particular accurate boundary point other than both agreeing that the hill acted as a major boundary between Otoasi and Ovuvu villages.... since this was a complex case, where all the parties were represented by counsel, I will rule that both parties bear their own costs. I so order.

20 The trial magistrate erred in the expression that "there is no single inch of land in Uganda without any owner." This is contrary to the provisions of Article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (1) (a) of *The Land Act*, both of which confer upon District Land Boards, the authority "to hold and allocate land in the district which is not owned by any person or authority." Ownership of land therefore cannot be inferred by invoking the provisions of Article 237 (1) of *The Constitution of the Republic of Uganda, 1995* which only makes the declaration that land in Uganda belongs to the citizens of Uganda and is to vest in them in accordance with the land tenure systems provided for in the Constitution. It therefore is incumbent upon any person who claims to own any tract of land to prove ownership thereof under one of the tenure systems established by the Constitution.

30 By proceeding on basis of that fallacy, the trial magistrate failed to properly direct himself to the sufficiency of evidence establishing the appellant's claimed customary inheritance of the disputed land as the foundation of his title and instead delved into issues of borders between two neighbouring villages. Even when the trial court digressed into the determination of those borders, it misdirected itself when at the *locus in quo* it "consulted the LCs from both villages of Otoasi and Ovuvu, [and] all were in agreement that the MTN Mast was erected on the suit land in the middle of the boundary of the two villages of Otoasi and Ovuvu." The persons referred to

as “the LCs from both villages” are not identified, there is no indication that they had testified before in court and it is not stated that they testified on oath or were subjected to cross-examination. The trial magistrate should not have relied on that evidence at all. Even after finding that from the evidence available “it was clearly very difficult to ascertain the exact boundary given that none of the parties specifically showed any particular accurate boundary point other than both agreeing that the hill acted as a major boundary between Otoasi and Ovuvu villages,” the trial court did not hesitate to find that the “MTN Mast was erected on the suit land in the middle of the boundary of the two villages of Otoasi and Ovuvu.” This finding is premised on very shaky evidence more especially considering the oddity of a village border at the top of a hill in a country where such borders are ordinarily characterised by natural features such as valleys, swamps, streams, rivers, lake shores, foots of mountains and hills rather than peaks or crests of mountains and hills. His finding that the land in dispute “looked like a no man’s land” therefore is not supported by any credible evidence.

The real question in controversy between the appellant and the second respondent was the power to alienate the land in dispute. Having failed to establish customary inheritance as the source of that power, the appellant had the alternative of proving that he was in possession of the land at the time the first respondent constructed the mast, since the power to alienate cannot be conceived apart from possession. The appellant’s option of establishing constructive possession of the land was blown out of the window by his failure to prove title by customary inheritance. What was left for him was to prove that he had actual possession at the material time for how else will a man have control, management or administration of land? The power to alienate means the power of disposition. Disposing power in this context would mean actual possession.

Possession can sometimes be used as an indicator of ownership or even to create ownership, for example where *The Limitation Act* kicks in to aid an adverse possessor. A person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against the entire world but the rightful owner. The saying “possession is nine points of the law” is an old common law precept attributed to Lord Mansfield in 1774, which means that one who has physical control or possession over the property is clearly at an advantage or is in a better possession than a person who has no possession over the

property or alternatively, that possession constitutes nearly all of the legal claim to ownership. The saying is explained in *The Dictionary of English Law* (1959) as follows;

5 The adage ... means that the person in possession can only be ousted by one whose title is better than his; every claimant must succeed by the strength of his own title and not by the weakness of his antagonist's.

The basis of this legal maxim that comes down from the 17th century is the commonsense observation that if one has control of something, chances are better than average that it belongs to that person. It is a rebuttable presumption though: possession presumes ownership which is
10 recognised as such unless disproved by someone holding a more valid claim. The phrase started life as “possession is nine points of the law,” which referred to possession's satisfying nine out of eleven factors that constituted absolute ownership. However, “nine-tenths” entered popular usage to reflect the idea that custody is 90 percent of legal ownership. Possession is the kernel, the rest is husk. If someone is in possession and is sued for recovery of that possession, the plaintiff must
15 show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them. So possession is important, but is it nine-tenths of the law? Sometimes it is more, it is the whole thing.

20 For example in *Powell v. McFarlane* (1977) 38 P&CR 452, a squatter had occupied the land in dispute and defended a claim for possession. In discussing the conditions necessary to establish an intention to possess land adversely to the paper owner, Slade J. stated;

In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the
25 paper owner or to the persons who can establish a title as claiming through the paper owner. If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi').Factual possession signifies an appropriate degree of physical control. It must be a single [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot be both in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the
30 circumstances, in particular the nature of the land and the manner in which land of
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that nature is commonly used or enjoyed . . Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.....The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. An owner or other person with a right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner.....In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must, in my judgment, at least make his intention sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him.....What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.....Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession. (Emphasis added).

In *Hibbert v. McKiernan* [1948] 2 KB 142, the defendant collected lost balls on a golf course owned by a golf club. He then sold the balls to golfers coming on to the ground. He did not have permission to be on the golf course or to collect the balls. The golf club had warned him on previous occasions not to do this and had made efforts to prevent his activities with the erection of high fences and informing the police of his activities. The police patrolled the area and caught him in the act. He was convicted of theft and appealed contending that the balls were abandoned and as a finder of the balls he had a better right to the balls than the golf club as landowner, since the balls were on the surface of the ground rather than underneath. On appeal to the Court of

King's Bench, learned counsel argued that the club had not done enough to establish possessory rights that would count as ownership for these purposes. There was not enough control over the balls at the time they were taken. His conviction for theft was upheld. The court held that the golf club had exercised sufficient control demonstrating both an intention to control for possession and an intention to exclude others. As a trespasser, the defendant could not demonstrate a better right to the balls. Lord Goddard C.J., in the course of his judgment, stated:

Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property occupied by him, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken there from, not under a claim of right, but with a felonious intent.

Actual possession therefore is established by evidence showing sufficient control demonstrating both an intention to control and an intention to exclude others. Similarly, customary ownership of land may and indeed will be presumed from evidence of actual possession of a house, field, garden, farm or messuage on the land (see for example the case of *Marko Matovu and two others v. Mohammed Sseviiri and two others, S.C. Civil Appeal No. 7 of 1978* where it was held that growing of seasonal crops on land a person occupies or grazing cattle thereon may create customary rights over land they use). This coupled with proof that such occupancy and user was in accordance with known customary rules, accepted as binding and authoritative in respect of that land, settles the issue of ownership. The trial court in its judgment provided a vivid description of the land under dispute thus;

.....The visible observation on the surroundings apart from the mast reveals that no farming activities ever happened on this area probably because of its steepness. No human settlement looked traceable and the claimant's homestead looked about 4 kms by visual observation from the hilltop (suit land) to the West of the Mast towards Miniki Parish in Dzapi sub-county. The second defendant's homestead and the alleged borehole is about two kilometres down slope to the South East of the MTN Mast. The surrounding of the suit land had no visible artificial trees like mangoes as earlier on asserted by the second defendant in his testimony in defence, apart from the naturally growing threes and the full grown grass. No grave was traceable or shown by the second defendant as he had earlier on claimed that the grave was 200 metres from the suit land. On a very close analysis and observation of the suit land during the locus visit, it looked like a no man's land since no noticeable activities would be traced.....

For all intents and purposes, the first respondent's mast was constructed at the top of a hill in what otherwise appears to be a relatively vast wilderness. Whereas I am not aware of any legal limit as to the size of land that can be occupied under customary tenure, but neither could I find any authority for extending the application of the presumption stated in *Marko Matovu and two others v. Mohammed Sseviiri and two others*, to large tracts of wilderness lands. I do not think that it can on principle be held that customary ownership of such land may be based only on constructive possession by way of activities on a small portion thereof two or four kilometres away in the name of the whole. This is not to derogate from that fact that an owner of land may not have actual physical possession, but where he or she has knowledge of its boundaries and has the ability to exercise control over them, he will be taken to have constructive possession of it.

Where the land is of a nature that it cannot easily be placed under physical occupation at all times, the character and nature of the constructive possession, the extent of which is sought to be broadened and lengthened by construction so as to cover lands not in actual possession, must not, however, be equivocal. For example, owners of wilderness or wooded lands lying alongside or in rear of other cultivated fields forming part of the land are not bound to fence them or to hire men to protect them from trespassers. An owner of land is not bound to use it in any specific way. He or she may prefer to leave part of it vacant. In such cases, a trespasser does not by managing without discovery even for successive years to undertake activities on the land, necessarily acquire title to the land. Mere acts of user by trespassers will not establish a right (see for example *Sherren v. Pearson* 14 Can. S. C. R. 581 where the Supreme Court of Canada held that isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title).

However, it is actual possession which justifies the presumption that a person occupying, growing seasonal crops or grazing livestock thereon enjoys customary rights over the land they use. The presumption does not arise at all with respect to land of which there is no actual possession or occupation or beyond the bounds of such actual possession or occupation except where there is unequivocal evidence that the claimant deals with the cleared and un-cleared portions of the land, co-extensive with the boundaries, in the same way that a rightful owner would deal with it. In absence of such evidence, the court is hesitant to recognise possession of

any portion of the land and hence presume the existence of customary interests therein, until it is reduced to actual occupation.

To my mind, therefore, the question here is whether the trial court was furnished with evidence
5 to show that those through whom the appellant or the second respondent claimed ever entered
upon and occupied the disputed land or a part of it, dealing in the process with the cleared and
un-cleared portions of it in the same way that a rightful owner would deal with it. The case
pivoted on proof of actual or constructive possession of what for all intents and purposes appears
to be a tract of wild land atop a hill, unenclosed and not separated from adjoining land of the
10 same character, by entry upon and actual possession of only a portion kilometres away. The onus
of proof was upon the appellant to adduce evidence in respect to the vast wilderness land that he
and his ancestors had such open, notorious, continuous, exclusive possession or occupation of
any part thereof as would constructively apply to all of it, such as would operate to extinguish the
title of any true owner and vest in the appellant a statutory one. In such cases, occupancy may be
15 construed as possession of the entire land where there is no actual adverse possession of the parts
not actually occupied by the claimant.

In the case at hand, it is not and could not be contended for a moment that there was any actual,
visible, continuous and exclusive possession of any part of the disputed land by the appellant and
20 those through whom he claims. In his own testimony at page five of the record of appeal, he
stated that; “before the mast was built, no one was utilising the area because it is a rocky area.”
On his part, the second respondent testified at page eleven of the record of appeal as follows;
“the land where the suit portion falls is vast and I use part of the land for cultivation. ...the
particular area where I leased to MTN and its surrounding was used for grazing.” In cross-
25 examination, this part of the second respondent’s evidence was never tested. Counsel for the
appellant instead dwelt on issues unrelated to the user of this part of the land at the time the
second respondent leased it to the first respondent. It is trite that an omission or neglect to
challenge the evidence in chief on a material or essential point by cross examination would lead
to an inference that the evidence is accepted, subject to it being assailed as inherently incredible
30 or possibly untrue (see *James Sawoabiri and another v. Uganda, S. C. Criminal Appeal No. 5 of
1990* and *Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008*).

The evidence before the trial court on the one hand established that the appellant's continuous acts over a small portion of land situated four kilometres from the disputed area and he had not at any time exercised any form of control over the disputed area. There was no evidence of any form of occupation by the appellant or his predecessors, of the area in dispute. On the other hand, if the second respondent's evidence is accepted, his possession at best consisted of continuous acts over a small portion of land located two kilometres away coupled with isolated and intermittent activities of grazing animals on parts of the rest of the vast land, extending up to the area where the mast was constructed. Although his evidence was entirely wanting in that essential element of a continuous and exclusive occupation of the part of the land leased to the first respondent and now in dispute, for purposes of establishing actual possession, it was sufficient to establish constructive possession over it. When the two versions are compared therefore, the second respondent's case is more persuasive in establishing the power to alienate derived from constructive possession.

A person in constructive possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against the entire world but the rightful owner. Taking the evidence as a whole, by his constructive possession of this part of land in the wilderness, the second respondent must then be presumed to have claims over the disputed land as his property and will be so held against the entire world but the real owner or someone legally entitled under him to its possession. The onus in this case lay upon the appellant to prove that he was such real owner, and the main question for the court's decision was whether or not he had satisfied such onus. The appellant could only recover if and when he proved a legal title, either by customary inheritance or possession to the land in dispute. If he failed to prove such title he could not recover, however weak defendant's title may be to the land in dispute. Neither party pretended to have a good documentary title. Both claimed to have acquired title by inheritance. This is a case where constructive possession trumps lack of possession of any kind. Without proof of possession, the appellant could not maintain an action in trespass to land. For that reason grounds one to three of the appeal succeed, but for reasons other than those advanced by the appellant.

Regarding the last ground of appeal, indeed under Section 27 of *The Civil Procedure Act*, costs are awarded at the discretion of court. In sub-section (2) thereof, costs follow the event, unless for some reasons court directs otherwise (see *Jennifer Rwanyindo Aurelia and another v. School Outfitters (U) Ltd., C.A. Civil Appeal No.53 of 1999; National Pharmacy Ltd. v. Kampala City Council [1979] HCB 25*). It was also held in *Uganda Development Bank v. Muganga Constructions [1981] HCB 35*, that a successful party can only be denied costs if it proved that but for his or her conduct, the litigation could have been avoided, and that costs follow the event only where the party succeeds in the main suit.

10 Having come to the conclusion that the trial court misdirected itself in the manner it evaluated the evidence before it and therefore came to the wrong decision, its order regarding costs, which was founded on that erroneous decision, too has to be set aside. An appellate court is justified in interfering with orders as to costs made by a trial court where it forms the opinion that the trial court applied a wrong principle. The order of the trial court was premised on the principle that “a
15 middleman’s position should be reached by this court to absolve the tension between the claimant and the second defendant” and that “since this was a complex case.....I will rule that both parties bear their own costs.” In this regard, the trial court clearly applied the wrong principles justifying interference with that order and it is hereby set aside.

20 In the final result, I find the appeal has merit it is accordingly allowed. The Judgment, the decree and all orders made by the trial court are hereby set aside. In their place is entered an order dismissing the suit. However the costs of this appeal and those of the trial are awarded to the respondents since the result is only technically in favour of the appellant but is in substance against the appellant whose claim he failed to prove.

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Dated at Arua this 12th day of April 2017.

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Stephen Mubiru
Judge
12.04.2017