THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL APPEAL No. 0004 OF 2017

(Arising from Adjumani Grade One Magistrate's Court Civil Suit No. 0010 of 2015)

IBAGA TARATIZIO ……..……..…..…… APPELLANT

VERSUS

TARAKPE FAUSTINA ……..…..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the appellant sued the respondent for recovery of land measuring approximately 44.5 metres x 36 metres, situate at Lajopi village, Cesia Parish, Adjumani Town Council in Adjumani District, a declaration that he is the rightful owner of that land, a permanent injunction and the costs of the suit. It was the appellant's case that on or about 10th October, 2011, the then customary owner of the land in dispute, a one Amanzuru Thomas, offered it for sale to the respondent. The respondent having failed to raise the stipulated purchase price of shs. 3,500,000/=, Amanzuru Thomas then offered it to the appellant who paid the stated purchase price on 8th November, 2011. Amanzuru Thomas then offered the respondent an alternative piece of land on which to settle with her family, but the respondent declined the offer. The respondent has since then refused to vacate the land hence the suit.

In her written statement of defence, the respondent refuted the respondent's claim and stated that the land in dispute originally belonged to a one Albino Rusi who in 1991 gave it to her as a gift *inter vivos*. She gave him shs. 3,000/= as a token of appreciation and has since then been living on this land. .

In his testimony as P.W.1, the appellant, stated that he bought the land in dispute from a one Amanzuru Thomas on 8th November, 2011, who needed funds for his treatment. At the time he purchased it, Amanzuru told him that he had allowed the respondent to stay on the land

temporarily and he had given her three chances to buy and own the land but the respondent failed to buy it. Being sickly and in need of funds to cater for his needs, Amanzuru then sold the land to the appellant on 8th November, 2011 at the price of shs. 3,500,000/= which he paid in the presence of the elders and local civic leaders. The respondent has since then refused to vacate the land. Amazuru Thomas died during 2012 before the trial commenced. Before buying the land, he inspected it and took measurements. He noticed that the respondent was in occupation but was assured that her occupation was only temporary and that she had failed to raise the money to pay for and own it. He never spoke to the respondent before buying the land.

P.W.2. Lulua Mary, a cousin to the late Amazuru Thomas testified that the deceased had before his death given land to the respondent for temporary use in 1992, but she did not know for what duration. He later offered the respondent the opportunity to buy the land from him but she had failed to raise the money. It is then that Amazuru sold the land to the appellant. The land belonged to Amazuru before he sold it. He had acquired it by way of inheritance from their deceased father. P.W.3. Ndiri Gabriel, another cousin to the late Amazuru Thomas testified that in 1992 the respondent had asked the late Amazuru for land and he had allowed her to occupy the land now in dispute on temporary terms. Following a disagreement with her husband in 2011, the respondent and her husband had each approached Amazuru requesting to buy the land from him. Amazuru offered to sell the land to her and she promised to raise the money within two weeks, but failed. It is then that Amazuru decided to sell the land to the appellant. Amazuru did so on his capacity as caretaker over the land on behalf of the family, but he sold it with the approval of the rest of the family members. Alubino Luci did not have a separate piece of land. The respondent had planted teak and mango trees on the land which by the time of hearing the suit had existed on the land for over twenty years.

P.W.4. Mesiku Teddy, the L.C.I Chairperson, testified that it is the late Amazuru Thomas who sold the land in dispute to the appellant. Before that, at a meeting convened on 10th October, 2011, the deceased had offered the respondent the first option to buy the land. The respondent promised to pay the price demanded for but failed to raise the money. After the two weeks elapsed is when he sold it to the appellant. The appellant was ready to compensate the respondent for her developments on the land but the respondent refused to vacate the land.

P.W.5. Ayiga Geoffrey, a cousin of the late Amazuru, testified that it is the deceased who gave the respondent land to settle on temporarily during 1992. Later he sold the same land to the appellant during the year 2011. It comprises part of their family land which has never been distributed. Alubino Luci had no separate portion of the land. That was the close of the respondent's case.

In her defence, the respondent who testified as D.W.1 stated that the land in dispute belongs to her. She requested for that land from the late Alubino Luci who willingly gave it to her during 1991. The grant was witnessed by some of her relatives and those of Alubino. It was swampy land and the respondent paid a token sum of shs. 3,000/= in appreciation of the grant. She took possession, constructed houses on it and planted trees, bananas and a hedge. Problems started only after the death of Alubino Luci during the year 2005. She later learnt from the L.C.1 Chairman that the appellant had bought the land who asked her to accept compensation from the appellant and leave the land. She questioned how the appellant had bought the land well knowing that it belongs to her and therefore rejected the proposal.

D.W.2 Simon Amazuru Madraru, one of the respondent's neighbours, testified that at the time he came to settle in the area in 1996 is when he came to learn from the late Alubino Luci, a brother of the late Amazuru Thomas, that it is him who gave the land in dispute to the respondent. He found the respondent in occupation and she continued to occupy the land in dispute peacefully until the appellant's purported purchase. D.W.3 Eberu Malitiriano, another of the respondent's neighbours, testified that the land in dispute previously belonged to the late Alubino Luci. It is him who gave it to the respondent in 1991. By then it was a swampy piece of land and he had asked Luci why he was giving her such inhabitable land. She has four houses and mango trees on the land. The respondent then closed her case.

The court then visited the *locus in quo* on 19th January, 2017. The witnesses proceeded to show court the various features on the land which they had mentioned in their testimony in court. The court did not draw a sketch map of the land. In his judgment, the trial magistrate found that it was common ground that the respondent was in possession of the land in dispute. He rejected the evidence suggesting that there had been a meeting at which Amazuru had offered the land to the

respondent because the purported minutes were not signed by either party. By the time the appellant bought the land, the respondent had lived on it for nearly twenty years, she was in possession and had houses and trees on it. The nature of her developments on the land were inconsistent with the claim that she was given the land only temporarily. He believed the respondent's testimony that it is Luci who gave her the land. He entered judgment in her favour and dismissed the suit with costs.

Being dissatisfied with the decision, the appellant appealed on the following grounds;

1. The learned trial magistrate erred in law and fact when he held that the respondent properly acquired the land from the late Alubino Luci.
2. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record hence arriving at a wrong conclusion that the respondent was the owner of the suit land.
3. The learned trial magistrate erred in law and fact when he improperly conducted proceedings at locus hence arriving at a wrong conclusion.

In the first place ground two of the appeal was struck out for offending the requirements of Order 43 rule 1 (1) of *The Civil Procedure rules* and counsel were not allowed to make any submissions on it. Under that rule, grounds of appeal are required to set forth, concisely the reasons of objection to the decree appealed from ,without any argument or narrative. A ground of appeal that is general in nature and does not identify any specific error committed by the court whose decision is appealed, or identify the specific matter of fact, law or mixed law and fact that was wrongly decided, so as to guide and require the appellate court to make a specific finding to that extent upon re-evaluating the evidence, is not sustainable for it does not call for any specific adjudication. Such a ground will be rejected and it is on that account that the second ground of appeal was struck out.

In respect of the first ground, counsel representing the appellant, Mr. Twontoo Oba submitted that the trial magistrate erred on the finding of the respondent's acquisition of the land in dispute, by purchase. The court should have found that it was customary land which was sold to the appellant by the rightful owner of the land, Amazuru Thomas, because according to the five

witnesses called by the appellant, the land was communally held by the family from the Lajopi Clan. Amazuru was appointed the family head after the death of their father. He was the eldest in the family and took charge as caretaker. There was no sub-division. He was authorised and empowered by the family. Three of the witnesses were blood brothers of the person who sold the land to the appellant. They confirmed that he had the powers, mandate and authority over the land. He was caretaker and he had their approval. The sister testified as P.W.2 Lulua Mary testified that the sale was reduced to writing in the presence of the L.C.1 and the appellant bought it at the price of shs. 3,500,000/= which the appellant paid. The trial magistrate instead erroneously found that the land had belonged to Albino Luci, the brother of the seller.

The evidence of the brothers P.W3 and PW4 confirmed that the alleged seller of the land to the respondent, Luci was a dependant and did not have land of his own. There was no evidence that the land belonged to Luci. In her own defence, the respondent admitted that she was given the land but it was not documented. She said she paid a token of shs. 3,000,000/= There was no witness to this giving. She admitted that she was aware the appellant bought the land. The respondent was in possession at the time of the suit. She was in the neighbourhood from 1995 - 1999 up to 2015 when the suit was filed. At one time the respondent indicated interest in buying the land. She was in occupation at the time. She forcefully planted crops and constructed a house. She was told to leave the land. Amazuru was constrained to sell the land because of illness.

Ground three is about conduct at the *locus in quo*, the parties demonstrated their testimony in court. They were not given opportunity to cross-examine. The court at its own motion recalled PW2 who testified that the rightful owner was Manzuru. It is the trial magistrate who grilled and intimidated the wittiness. Other witnesses were not allowed to do so at the locus. If the court had drawn the map it would indicate the original position she live in before moving to the land. The decision was in total disregard of the evidence before court. It should be set aside. The court should order that the suit land belonged to the appellant, a permanent injunction, an eviction order, the costs of the appeal and those of the lower court be awarded to the appellant.

In response, counsel for the respondent, Mr. Henry Odama submitted that the respondent adduced evidence that the suit land was given to her by Albino sometime in 1991. She has been in occupation since then to-date. Albino was the elder brother of Amazuru who sold the land to the appellant. The respondent had three witnesses. She was never offered the land by Amazuru. A document was produced as exhibit P.E.1. The respondent denied having participated in that meeting or receiving the offer. The land was given to the respondent as a gift. By the time the sale to the appellant took place she had been in occupation for over twenty years. The appellant was aware that there was an occupant. There is no evidence that it was Amazuru who had the authority. P.W.2 Lulua Mary confirmed at locus that the suit land had formerly belonged to Albino Luci who is the one who gave it to the respondent. The first ground must fail.

The last ground about proceedings at locus, they were properly conducted and the proceedings are at page 28- 29 of the record. The trial magistrate ensured attendance of all parties and allowed the parties and their witnesses to testify. The guidelines were followed. Lack of amp is not an error. The circumstances of the case did not warrant a map. The respondent never lived in the neighbourhood but on the land. In conclusion I pray that bye appeal be found to have no merits on all grounds and the same be dismissed with costs.

In reply, counsel for the appellant submitted that In the first place she lived in the neighbourhood. She had not been on the suit land. Luci had no authority to pass title. Amazuru gave her first option and he failed. There was due diligence to compensate her but she rejected the offer.

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;

> 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.

With regard to the secnd ground, I find that the evidence on record established that the respondent has bee in occupation of the land for over twenty years. Even if court were to believe the appellant's version that she acquired the land from Amazuru, I am in agreement with the finding of the trial magistrate that her user, in constructing multiple buildings and perennial trees is inconsistent with a temporary user of land. In any event, a period of twenty years' user does not fit the description of a temporary use.

On the other hand, the common law doctrine of proprietary estoppel favours' the respondent's 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 willfully 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 or she 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.

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 *Taylors 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 or her land or improve his or her 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 to be building on his or her own land; and, secondly, that the real owner knows that the land belongs to him or her and not to the person expending the money in the belief that he or she is the owner. In the instant case, the late Amazuru stood by as the respondent undertook all these acts. He could not turn around and sell off the land to another person. Equity would frown on such conduct.

In addition, the appellant does not satisfy the standard of due diligence imposed on a purchaser of unregistered land which is much higher that that expected of a purchaser of registered land. In the instant case, before purchase of the land the appellant did not inquire from the respondent herself as to her status on the land yet he was clearly aware of her possession. Had he done so, he

would have discovered she claimed as owner of the land. The appellant cannot take the benefit of the protection extended to bonafide purchasers of land without notice of adverse claims.

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. 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 (see *Hunt v. Luck (1901) 1 Ch 45*).

Lastly, it is trite law that uninterrupted and uncontested possession of land for a specified period, hostile to the rights and interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (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 adverse possessor is vested with title thereto. The respondent had been in possession, conducting herself as owner of the land, in open notorious use for nearly twenty years before the late Amazuru sold the land to the appellant. By reason of prescription, if he had any title in the land, it had been extinguished by that time and he had no capacity to sell the land to the appellant. the second ground of appeal therefore fails.

I have considered counsel for the appellant's arguments with regard to the third ground. I am not persuaded that in a dispute of this nature, the omission to draw up a sketch map would affect the result of the trial in any way. It was a dispute over who between the two brother, Amazuru and Alubino had authority to alienate the land and who between the appellant and the respondent and

a better claim to the land as a result of the claimed dispositions. The third ground of appeal fails as well. In the final result, I do not find merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the court below are awarded to the respondent.

Dated at Arua this 11th day of January, 2018 ……..

Stephen Mubiru
Judge,
11th January, 2018.