

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0042 OF 2018

(Arising from Gulu Chief Magistrate's Court Civil Suit No. 026 of 2014)

5 1. NEKOMIA OBINA }
2. BWANGAMOI TOM }
3. ONEKA JOHN }
4. OKULLU CHARLES } APPELLANTS
5. ONYANGO AMOS }
10 6. OTIM SAM }
7. BWONGAMOI GEORGE KOMAKECH }

VERSUS

15 1. OKUMU VINCENT }
2. ILARIO OKWERA }
3. AJOK EDISA }
4. ADYEBO COSMAS }
5. KILAMA JUSTINE }
20 6. ONYACH JAMES } RESPONDENTS
7. OBONYO VINANSIO }
8. LAGORO }
9. MUZEE KOAMKECH }
10. OKELLO TITUS }
25 11. ANGELLA APACO }
12. OJULI }
13. MEGO AKELLO }

Before: Hon Justice Stephen Mubiru.

30 **JUDGMENT**

The appellants jointly and severally sued the respondents jointly and severally for recovery of approximately 400 acres of land under customary tenure, a declaration that they are the rightful owners of that land, situated at Uum village, Lapinant East Parish, Koro sub-county, Omoro
35 County, Gulu District, a permanent injunction, damages for trespass to land, interest and costs. It was the appellants' case that the land in dispute, located on the Eastern side of Moroto Road, was first occupied as vacant land by their great-grandfather, Wana Otwoma in 1936. The appellants

were born, raised on and occupied that land until the L.R.A. insurgency. The respondents were their neighbours on the Eastern side of Larwodo Stream, which formed the natural boundary between their land and that of the respondents.

5 At the closure of the IDP Camps in 2008, the respondents led by the first respondent, trespassed onto their land forcefully, which they have refused to vacate to-date. The appellant sued the respondents and both the L.C.II and L.C.III Courts decided in the appellants' favour, the latter decision having been delivered on 17th July, 2009. The respondents appealed to the Chief Magistrate but the appeal was never disposed off.

10

In their joint written statement of defence, the respondents refuted the appellants' claim. They contended that the suit was *res judicata*, the same subject matter having arisen and decided in Gulu Chief Magistrate's Court Civil Appeal No. 113 of 2009 between the same parties. In the alternative they contended that all the respondents are customary tenants on the land and have not committed any acts of trespass. The appellants vacated the land in 1980 and settled elsewhere, only to return in the year 2007 after the insurgency. Out of goodwill, the respondents allowed them to re-occupy their former homesteads. The L.C.II decided that the parties should live in harmony. The appellants appealed to the L.III which decided in favour of the appellants. The Chief Magistrate's Court reversed that order and restored the one of the L.C.II.

20

The second appellant, Bwangamoi Tom, testified as P.W.1 and stated that the first appellant is his paternal uncle while the rest of the appellants are his brothers. The respondents are their neighbours on the other side of Larwodo stream. He and his brothers own the 400 acres but they use the land collectively as relatives by way of rotational cultivation. The respondents have trespassed on about three quarters of the land in dispute by tilling and constructing houses. The trespass began around the year 2007 upon the disbanding of IDP Camps. their grandfather Wana Otwoma lived on that land until his death in the 1980s whereupon it was inherited by their father, Gaudensio Okot.

30 The respondent's grandfather, and their father Augustino Okot, were buried on the other side of Larwodo stream, which is the natural boundary between theirs and the respondent's land. There

are graves of the appellants' deceased relatives, a fish pond, a cattle crush, mango trees and a kraal as evidence that he land belongs to them. The respondents' father Augustino Okot and his three wives; Ajok, Lakot and Auma all lived on the other side of Larwodo stream. The 7th respondent is a brother to Augustino Okot. The first appellant, his family and the rest of the appellants were forced to leave the land by the breakout of insurgency in 1987 during the Lakwena War. They returned in 1990 and upon the death of their mother Adong, she was buried on the land. The respondents still lived across the stream by that time. The first appellant's son, the 5th appellant Onyango Amos, tried to establish a home on the land upon return from the IDP Camp but found the respondents in occupation and they refused to vacate the land. The 3rd appellant lived on the land before but took refuge in Arua and is yet to return to the land. The 2nd appellant upon return from the IDP Camp, now occupies a portion of the land on the Western side of the road to Moroto. Other relatives who were displaced to Lalogi have been prevented by the respondents from returning to the land.

15 P.W.2 Aber Everlyn, testified that the land in dispute, measuring approximately over 200 acres, was originally owned by Wana Otwoma and it is now owned by the 5th appellant, Onyango Amos as his father, the 1st appellant is weak. The first appellant is a son of the late Wana Otwoma. The rest of the appellants, apart from the 4th, are grandsons of Wana Otwoma. For the 45 years she has lived on the village, the land in dispute has been occupied by the lineal descendants of Wana Otwoma. It is in 2007, while the appellants had taken refuge at Lalogi IDP Camp, that the respondents, all descendants of Augustino Okot, settled on the land and began cultivating crops thereon. They have since sold off parts of it. The boundary between the appellants and the respondents' land is Larwodo stream. The appellants vacated the land in 1987 due to rebel activity.

25

P.W.3 Omona Bazilio testified that the 1st appellant inherited the land in dispute from his late father, Wana Otwoma. The first respondent is now occupying the land, having taken possession during the time people went into the IDP Camps. He is felling trees for timber and tilling the land. The rest of the respondents are engaged in similar activities, whereas their land lies to the East of Wana Otwoma's land, across Larwodo Stream. The first appellant fled from the land after his daughter, Adong, was shot dead at the onset of the insurgency and only returned after the

30

war. He left his children and some of his wives on the land. The respondents are the children of Augustino Okot and Ononyo, none of whom is related to the appellants. The appellants then closed their case.

5 In his defence, D.W.1 Vinancio Obonyo, the 7th appellant testified that all the appellants are related, and so are all the respondents. He inherited the land in dispute from his father, Ogura Akuru who in turn acquired it from a one Mona Adimiliki in 1911. He was born n the land in dispute and his father was buried thereon when he died. Wana Otwoma too used to live on the same land. The 1st, 3rd and 4th appellants left the land in 1981 after 1st appellant's daughter Adong
10 was shot dead at a disco hall, not due to insurgency. He left his children behind. He retained control over the land they had vacated but the 5th appellant requested them to return and they permitted him. None of the other appellants have returned to the land. The 7th appellant has since planted bananas, mango and pine trees and his sons occupy parts of the land. Together they occupy approximately 100 acres. The boundary to the East of the land is Larwodo Stream. His
15 father, his wife as well as the appellant's grandfather, grandmother and 1st appellant's daughter Adong, were all buried on the land in dispute. There was no boundary between the land occupied by his father and that occupied by the appellants' father. The appellants are free to return and occupy the land alongside them.

20 D.W.2 Julius Okoya, the 1st respondent's brother; the respondents are all his relatives. The land in dispute measures approximately 100 acres. His father, Augustino Okot lived and died on the land. He was buried on the land and his grave is visible. The appellants' land lies on the Western side, across the road to Moroto. It is true the appellants lived on the land at one time but moved to Lalogi following the death of Adong, the 1st appellant's daughter in 1981. Only the 5th appellant,
25 Onyango Amos now lives on the land where he occupies about eight acres, having returned in 2007. He does not own any land beyond Larwodo stream. The appellants' grandfather, Wana Otwoma, was buried on the land. All the 1st appellant's children were born on that land. The boundary between the respondents' and the appellants' land is tree stump of an Opok tree. The appellants occupied about 8 - acres of land across the road. Wana Otwoma's land is occupied by
30 the appellants. When he returned from the camp, he occupied his original home. He simply repaired his old house.

D.W.3 Onywar Pangaleo testified that he knows the respondents as persons to whom his grandfather gave land. The respondents and the appellants all lived in one place, each on their own side. The 1st appellant left the land for Lalogi because of insecurity following the murder of his daughter, Adong. His son, the 5th appellant, Onyango Amos returned later in 2007 from the
5 IDP Camp in Apecu and occupies about 9 - 10 acres. Wana Otwoma was buried on the land currently occupied by the 5th appellant, Onyango Amos, across the road to Moroto. The respondents occupy approximately 100 acres and have gardens and banana plantations on that land. There are Lucoro trees planted along the boundary between the respondents and the appellants land but is the respondents land that extends up to Larwodo stream. The appellants
10 grandfather, Wana Otwoma was buried on the appellants' side of the land.

The court then visited the *locus in quo* where it found an old kraal on the land being cultivated by the 9th respondent. The court was shown the location of Wana Otwoma's grave on the land in dispute. The 5th respondent, Onyango Amos, was found to be cultivating around that grave.
15 Adong's grave was also seen on the land in dispute. There were signs of an old homestead near the place where Akuru was alleged to have been buried and it was the 12th respondent cultivating around that area. The 8th appellant had an approximately twelve-year-old pine tree forest and banana plantation on the land near Wana Otwoma's grave.

In his judgment, the trial magistrate held that apart from the second appellant, the rest of the appellants did not adduce any evidence to prove their respective cases. On the other hand , there was evidence to show that the respondents have been in occupation of the land over a long period of time. They do not claim the entire 400 acres but only the portions each of them currently occupies. At the *locus in quo* visit, he found all the respondents resident on the land yet
25 none of the appellants was, apart from the 5th who has a homestead on the land. The 10th respondent bought land from a one Opio Pilimo, son of one of the respondents. The 11th respondent cultivates land he purchased from the 12th respondent. Evidence was found to show that Wana Otwoma lived and was buried on the land in dispute. The 5th respondent, a grandson of Nekomia Obina, occupies the upper part of the land in dispute. There is evidence of long
30 occupancy by the respondents which the appellants have not rebutted. Each of the parties occupy distinct parts of the land in dispute, hence the respondents had proved that they are customary

tenants on the land they occupy. The appellants failed to prove parts they occupy, dates of entry of the respondents on their land, and hence failed to prove trespass. The 10th and 11th respondents are bona fide purchasers of the land. Each party was to retain the land it occupies and the suit was dismissed with costs to the respondents.

5

The appellants were dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record and by rejecting the plaintiffs' witnesses' testimony which would have helped court reach a just conclusion.
2. The learned trial magistrate erred in law and fact when he held that two of the respondents are bona fide purchasers for value without notice.
3. The learned trial magistrate erred in law and fact when he failed to evaluate the appellants' evidence as to ownership of the suit land and reaching a wrong conclusion by dismissing the suit with costs to the respondents.
4. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence thus reaching a wrong decision that each party is to remain as per his finding at the *locus in quo*, thus maintaining the *status quo*.

All the appellants appeared *pro se*. Submitting on their behalf, the 5th appellant, Kilama Justine, argued that at the trial, the court directed that one party was to testify on each side. Only the second appellant, now deceased, testified on the side of the appellants. He brought in two other witnesses to support the case. When a new Chief Magistrate took over the trial, toward the end, he was not aware of the earlier directive. On 12th June, 2018 when a decision was delivered, he based his judgment on the fact that only the second appellant had testified, ignoring the fact that he had done so on his behalf and on behalf of the rest who did not give evidence. He found the second appellant had not satisfied court on the issue of trespass. P.W.2 gave a true account which was dismissed because of her marital status. That was wrong.

As regards ground 2, the finding of bona-fide purchase is challenged. The 13 respondents were sued over trespass. Respondents 10 and 11 came onto the disputed land by way of purchase from

other respondents. None of the two turned up to testify. There was no evidence of bona fide purchase in the trial. They were referred to as daughter and son of 12th and 7th respondent. It was only during the locus visit that the two respondents turned up and admitted being on the disputed land by virtue of purchasing from the other respondents. The decision is not supported by the
5 evidence.

As regards ground three, he submitted that they led evidence at the trial that they are the customary owners of the suit land by inheritance from their late grandfather who acquired it when it was vacant in 1934 and we had lived peacefully on it until the 1979 war and then left for
10 the IDP Camp and later the respondents came on return from the IDP Camp. They chose to stay near the roadside. They told court that they had visible features as proof of ownership on the part occupied by the respondents, such as graves of the late grandfather Wana Odwola. This grave was during the *locus in quo* found within where the respondents are residing. There was another grave of Adong who was shot during the insurgency and was buried on the disputed land
15 occupied by the respondent. They showed court the old cattle kraal, the fish pond and the Lucoro tree forming the kraal and it was not disputed by the respondents.

The decision was therefore against the weight of that evidence when he held that each party should stay where they are as per the locus findings. During the locus visit the respondent had
20 admitted that the suit land belonged to the appellants' late grandfather. During the locus visit they showed to the trial magistrate the boundary that existed between the appellants and the respondents, which was a stream called Larodo, this was not disputed during locus. They proved their case by the existence of these features. In the judgment, the trial magistrate made it very clear that respondent 11 had sold part of the disputed land to respondent No. 12 Ojuli alias Julius
25 Okoya and that the appellants' cattle ground was being used for cultivating by respondent No. 9 the court clearly stated that the 10th respondent purchased the suit land from one of the sons of the respondents. The judgment contradicts the proceeding. He prayed that the appeal be allowed.

In response, counsel for the respondents Mr. Patrick Abore submitted that the trial court was
30 right to have rejected the evidence of P.W.2 Aber Everlyn because this witness was not sure of the year the respondent came onto the suit land. When the trial magistrate disregarded her

evidence it was on the basis that she did not know the date even when she was married. The respondent who testified as D.W.1 Obonyo stated he was born on the land in 1938 and has lived there ever since. This was not discredited by the appellant and P.W.1. Aber did not refute it. Her evidence could not articulate when the appellants came onto the land and when they left it. The trial magistrate was right not to believe her.

Regarding ground 2 on bonafide purchase without notice, the respondents proved that they had been on the land since 1938 although there was no evidence adduced that they were buyers. With regard to ground 3, D.W.1 clearly explained to court the relationship between him and the rest of the respondents. He could testify on their behalf. He was born in 1938 and lived there to-date. This was not challenged in any way by the appellants. It was from birth until the filing of the suit. The appellants adduced evidence that they left the land in 1981. They only returned in 2007 and it was only appellant No. 4 residing on the land. The rest have never returned to the land since 1981. They have never been on the land since 1981. In her testimony, P.W.1 Aber stated that from 1987 the land was vacant. The appellants were not on the land. They had no possession of the land. War was not pleaded as a fact that prevented them from taking possession of the land. The respondents proved to court that they are the owners and have been on the land since birth until the filing of the suit, over 36 years. The decision should be upheld. The appeal be dismissed with costs.

20

It is the duty of this court as a first appellate court 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 (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). 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 or she has clearly failed on some point to take account

30

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.

5 The first ground of appeal assails the decision of the court below for dismissing the appellants' case on account of the fact that only one of them testified. Section 133 of *The Evidence Act* provides that subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact. It follows therefore that a party
10 needs to call all witnesses necessary to unfold the narrative of events unless there is a good reason not to do so. It is not necessary to call witnesses whose evidence is; irrelevant, repetitious, not credible or reliable. For ascertaining the truth, the court does not consider the number of witnesses but the quality of their evidence. Decisions are not made based on the plurality of witness but on the weight, quality and value of the evidence. When the testimony of one witness is reliable, trustworthy and cogent, it cannot be rejected on the grounds of the some minor
15 omissions considering the circumstances of the case, especially the fact the examination of the evidence takes place years after the occurrence of the incident.

The parties have a duty to call all credible and relevant witnesses but they are solely responsible for deciding how to present their respective cases and choosing which witnesses to call.
20 Although the trial court may but is not obliged to question the parties in order to discover the reasons which lead them to decline to call a particular person, the court is not called upon to adjudicate the sufficiency of those reasons. The court cannot direct a party to call a particular witness. Save in the most exceptional circumstances, the trial court should not itself call a person to give evidence. The parties are responsible for the running of the case and the court will often
25 not have sufficient information to determine whether a witness ought to be called. The court will not know what evidence the witness may give or whether the witness is reliable. The court risks derailing the trial with collateral issues if it calls a witness or decides, without evidence, to draw an adverse inference from a decision by a party not to call a particular witness. A decision of a party not to call a particular person as a witness will only constitute a ground for setting aside the
30 decision if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

Therefore, where parties appear jointly in a suit in respect of which they share a common legal interest, based on the same facts of which the parties have similar personal knowledge, there is a danger of time consuming, verbose testimony if not outright repetition of facts already canvassed by other witnesses. To require each of the parties to testify in such circumstances would be a
5 decision in utter disregard of economy of time. Moreover, testimony that is unnecessarily repetitive of the other evidence (duplicative) has little or no probative value (see *Whitehorn v. R (1983) 152 CLR 657*). Evidence proving a fact need not be that of all parties, one of them or even a witness called by any of them, if credible, may by direct evidence prove any fact in issue. If the witness's evidence is likely to be unimportant, cumulative or inferior to what has already been
10 adduced, or where the un-led evidence would simply have supported the unchallenged evidence of another witness such a witness need not testify.

In the instant case, P.W.1 testified that he and his brothers own the 400 acres but they use the land collectively as relatives by way of rotational cultivation. They thus claimed the same
15 interest, under the same title, based on the same factual knowledge. Testimony of one would suffice. The trial court was therefore wrong to have drawn an adverse inference against the rest of the appellants who did not testify. This ground of appeal consequently succeeds.

Grounds 3 and 4 will be considered concurrently in so far as they relate to the manner in which
20 the trial court went about the task of evaluation of evidence relating to ownership of the land in dispute. When considering findings of fact by a trial court, an appellate court will be reluctant to reject findings of specific facts, particularly where the findings are based on the credibility, manner or demeanour of a witness. However, an appellate court will far more readily consider itself to be in just as good a position as the court below to draw its own inferences from findings
25 of specific facts where such findings are not based on demeanour of the witness. Assessment of evidence is an evaluation of the logical consistency of the evidence itself. When a finding of fact depends on a matter such as the logical consistency of the evidence rather than the manner of the witness, an appellate court may be more readily willing to reject a finding of a specific fact (see *Benmax v. Austin Motor Co. Ltd [1955] AC 370* and *Faryna v. Chorny [1952] 2 D.L.R. 354*).

It appears to me that the trial court came to the conclusion it did not based on the credibility of the witnesses before it but more on basis of the available corroborative evidence observed during its visit to the *locus in quo*. The veracity of witnesses may be tested by reference to contemporaneous evidence that does not depend much upon human recollection, such as
5 objective facts proved independently of their testimony.

The dispute between the parties was as to the location of a common boundary between their respective tracts of land. A court faced with contradictory or inconsistent evidence as to the location of a boundary between two adjacent pieces of land will look to extrinsic evidence when
10 seeking to determine the true position of a boundary. Regulation 21 (1) of *The Land Regulations, 2004* provides the following sources as a guide;- a statement on the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land matters in the parish or the urban area; (ii) simple or customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects; (iii) human
15 activities on the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land; (iv) maps, plans and diagrams, whether drawn to scale or not, which show by reference to any of the matters referred to in sub-paragraph (ii) or (iii) the boundaries of the land. In short, there are any number of factors which a court may consider when determining the true boundary between two properties, and the court is entitled to give
20 what weight it feels appropriate to each element in order to reach a decision on all the evidence.

In his book, *Law Relating to Land Boundaries and Surveying*, published by the Association of Consulting Surveyors Queensland, (1980) at page 155, Brown Allan suggest the following hierarchy of giving weight to evidence of cadastral boundaries to guide the reinstatement of
25 cadastral boundaries; (i) the greatest weight must always be given to lines actually marked on the ground; (ii) next most important are natural monuments mentioned in the deed; (iii) Adjoiners, “a well established line of adjacent survey,” often rank as natural monuments; (iv) artificial monuments rank next; (v) maps or plans actually referred to in the deed rank after artificial monuments; (vi) unmarked lines which are well recognised rank next to maps and plans in
30 importance (vii) bearings and distances will over-ride other calls only, in most cases, where there is no trustworthy evidence of such other calls; (viii) as between bearing and distance, neither is

given overall preference, if they are inconsistent with each other the circumstances dictate which is preferred; (ix) Area, will in general be the least valued evidence, but may in some cases be the key to the problem; and (x) finally, but most important of all, any one of these rules may be of more (or less) weight in one case than another. The rules set out are for cases of conflict, they are
5 general rules, to be used as a guide but not as a straightjacket (see also *Donaldson v. Hemmant* (1901) 11 QJ 35 at p41;) *Fulwood v. Graham*, 1 Rich. 491 (1844) and *Walsh v. Hill* 38 Cal. 481 (1869). The hierarchy is merely an indication and it should yield to the particulars of a case.

The location of a boundary is primarily governed by the expressed intention of the originating party or parties or, where the intention is uncertain by the behaviour of the parties. Therefore one
10 of the keys to ascertaining the intention of the parties is resolving how it was expressed in the actions of the parties. The visit to the *locus in quo* was meant to determine if the physical evidence of boundaries is in accord with the oral testimony of the boundaries. Evidence of occupation that is contemporary with the boundary creation may resolve the boundary position.
15 A long occupation authorised by the original owner, and acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which was conveyed to the occupant. In such cases the occupier is not to be driven to rely on a mere possessory title; but has a right to assert that the land he or she holds is the very land granted (see *Equitable Building and Investment Co. v. Ross* (1886) NZLR 5SC 229 often referred
20 to as the *Lambton Quay Case*). Boundary positions publically agreed to and observed by neighbours over long periods of time by neighbours, will be binding even when found later to be inaccurate (see *South Australia v. Victoria* (1914) AC 283).

The respondents' case was presented as follows; - Vinancio Obonyo, the 7th appellant who
25 testified as D.W.1, stated that the boundary to the East of the land is Larwodo Stream. There was no boundary between the land occupied by his father and that occupied by the appellants' father. The 1st respondent's brother D.W.2 Julius Okoya, on his part testified that the appellants' land lies on the Western side, across the road to Moroto. It is true the appellants lived on the land at one time but moved to Lalogi following the death of Adong, the 1st appellant's daughter in 1981.
30 Only the 5th appellant, Onyango Amos now lives on the land where he occupies about eight acres, having returned in 2007. He does not own any land beyond Larwodo stream. The

appellants' grandfather, Wana Otwoma, was buried on the land. All the 1st appellant's children were born on that land. The boundary between the respondents' and the appellants' land is tree stump of an Opok tree. Wana Otwoma's land is occupied by the appellants. D.W.3 Onywar Pangaleo testified that the respondents and the appellants all lived in one place, each on their own side. The 1st appellant left the land for Lalogi because of insecurity following the murder of his daughter, Adong. His son, the 5th appellant, Onyango Amos returned later in 2007 and occupies about 9 - 10 acres. Wana Otwoma was buried on the land currently occupied by the 5th appellant, Onyango Amos, across the road to Moroto. The respondents occupy approximately 100 acres and have gardens and banana plantations on that land. There are Lucoro trees planted along the boundary between the respondents and the appellants land but is the respondents land that extends up to Larwodo stream. The appellants grandfather, Wana Otwoma was buried on the appellants' side of the land.

In summary, the respondents acknowledged that the appellants occupied the land until 1981, but gave contradictory evidence relating to the location of the common boundary; - D.W.1 Vinancio Obonyo, stated that there was no boundary; D.W.2 Julius Okoya, stated the appellants' land lies on the Western side, across the road to Moroto. A tree stump of an Opok tree marks the boundary while according to D.W.3 Onywar Pangaleo, all parties lived in one place, each on their own side. Lucoro trees were planted along the boundary.

On the other hand, the appellants' case was presented as follows; - the 2nd appellant P.W.1 Bwangamoi Tom testified that the respondents are their neighbours on the other side of Larwodo stream. The respondent's grandfather, and their father Augustino Okot, were buried on the other side of Larwodo stream, which is the natural boundary between theirs and the respondent's land. There are graves of the appellants' deceased relatives, a fish pond, a cattle crush, mango trees and a kraal as evidence that the land belongs to them. P.W.2 Aber Everlyn stated on her part that for the 45 years she has lived on the village, the land in dispute has been occupied by the lineal descendants of Wana Otwoma. The boundary between the appellants and the respondents' land is Larwodo stream. Lastly, P.W.3 Omona Bazilio testified that the respondent's land lies to the East of Wana Otwoma's land, across Larwodo Stream.

In summary, the appellants asserted that they occupied the land until 1987 when they were forced to vacate by the state of insecurity in the area. All of them were consistent as regard the location of the common boundary as being the Larwodo stream. At the *locus in quo*, none of the features mentioned by the respondents as marking the boundary were shown to court. To the
5 contrary, the Court found an Old kraal on the land being cultivated by the 9th respondent. It was shown the location of Wana Otswana's grave on the land in dispute. The 5th respondent, Onyango Amos, was cultivating around that grave. Adong's grave was on the land in dispute. There were signs of an old homestead near the place where Akuru was alleged to have been buried (refuted by the appellants) and it was the 12th respondent cultivating around that area. The appellants'
10 version was therefore corroborated by features found on the land during the *locus in quo* inspection. In the absence of survey marks there can be no better indication of the land to which ownership relates than long and unchallenged occupation. Streams may be some of the most satisfactory of monuments because they are durable and their course not easily shifted (see *Horne v. Struben* [1902] AC 454).

15

There was controversy as to when the appellants had vacated the land. Whereas the respondents' evidence was to the effect that the appellants had vacated the land in 1981 following the murder of Adong, the appellants version was that they occupied the land until 1987 when they were forced to vacate by the state of general insecurity in the area. Whatever the case may have been,
20 it was not disputed that it was some form of insecurity that forced the appellants off the land. Although it is trite law that all rights and interests in unregistered land may be lost by abandonment, it generally requires proof of intent to abandon; non-use of the land alone is not sufficient evidence of intent to abandon. The legal definition requires a two-part assessment; one objective, the other subjective. The objective part is the intentional relinquishment of possession
25 without vesting ownership in another. The relinquishment may be manifested by absence over time. The subjective test requires that the owner must have no intent to return and repossess the property or exercise his or her property rights. The court ascertains the owner's intent by considering all of the facts and circumstances. The passage of time in and of itself cannot constitute abandonment. For example, the non-use of an easement for 22 years was insufficient
30 on its own, to raise the issue of intent to abandon in the case of *Strauch v. Coastal State Crude Gathering Co.*, 424 S.W. 2d 677.

Involuntary abandonment of a customary holding does not terminate one's interest therein, where such interest existed before. For example in *John Busuulwa v. John Kityo and others C.A. Civil Appeal No. 112 of 2003*, court found that the respondents had vacated their land simply because they had been forced by the NRA / NRM war to abandon their *bibanja* on the land. That
5 temporary absence because of the insecurity brought about by the NRA bush war in the area, did not constitute abandonment. In the instant case, whether the respondents occupied the land in 1981 or 1987 after the appellants had vacated the land, that did not constitute adverse possession of the nature that would have vitiated the appellants' title since the type that vitiates title must be; open and notorious, exclusive, hostile, longer than the statutory period of limitation, continuous
10 and uninterrupted.

The court below found further that some of the respondents were bonafide purchasers of their current holdings. A person is considered a purchaser in good faith if he or she buys the property without notice that some other person has a right to or interest in such property and pays its fair
15 price before he or she has notice of the adverse claims and interest of another person in the same property. It connotes an honest intention to abstain from taking undue advantage of another. Good faith consists in the buyer's belief that the person from whom the buyer purchased the land was the owner and could convey title. Good faith, while it is always to be presumed in the absence of proof to the contrary, requires a well founded belief that the person from whom title
20 was received was himself or herself the owner of the land, with the right to convey it. There is good faith where there is an honest intention to abstain from taking any unconscientious advantage of another. Otherwise stated, good faith is the opposite of fraud and it refers to the state of mind which is manifested by the acts of the individual concerned.

25 According to Cheshire and Burns in their book *Modern Law of Real Property, 16th Edition page 60*; constructive notice is generally taken to include two different things: (a) the notice which is implied when a purchaser omits to investigate the vendor's title properly or to make reasonable inquires as to the deeds or facts which come to his knowledge; (b) the notice which is imputed to a purchaser by reason of the fact that his solicitor or other legal agent has actual or implied notice
30 of some fact. This is generally called imputed notice. In *Hunt v. Luck (1901) 1 Ch 45* the court considered the nature of constructive notice. Farwell J said: "Constructive notice is the

knowledge which the courts impute to a person upon presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him on further enquiry or from wilfully abstaining from inquiry to avoid notice."

5

A purchaser of unregistered land who does not undertake the otherwise expected 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 (see *Williams and Glyn's Bank Ltd v Boland*, [1981] AC 487). When a purchaser has actual knowledge of facts and
10 circumstances that would impel a reasonably cautious person to make such inquiry or when the purchaser has knowledge of a defect or the lack of title in the vendor or of sufficient facts to induce a reasonably prudent person to inquire into the status of the title of the property in litigation, his or her mere refusal to believe that such defect exists, or his or her wilful closing of his or her eyes to the possibility of the existence of a defect in the vendor's title will not make the
15 purchaser an innocent purchaser for value if it later develops that the title was in fact defective, and it appears that he or she would have had such notice of the defect had he or she acted with that measure of precaution which may reasonably be required of a prudent person in a like situation.

20 Constructive notice applies if a purchaser knows facts which made "it imperative to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper" (see *Macmillan v. Bishopsgate Investment Trust (No. 3)* [1995] 1 WLR 978). When it is proved that such a purchaser acquired knowledge of circumstances which would put an honest and reasonable man on inquiry (see *Baden v. Societe Generale pour Favoriser le
25 Developpement du Commerce et de l'Industrie en France SA*, [1993] 1 WLR 509), and yet he did not undertake the necessary inquiries, such a purchaser cannot claim to have bought in good faith. The ascertainment of good faith, or lack of it, and the determination of whether due diligence and prudence were exercised or not, are questions of fact which require evidence. The burden of proof to establish the status of a purchaser in good faith lies upon the one who asserts
30 it. This *onus probandi* cannot be discharged by mere invocation of the legal presumption of good faith.

In the instant case, the 10th respondent bought land from a one Opio Pilimo, son of one of the respondents. The 11th respondent cultivates land he purchased from the 12th respondent. Through inspection before purchase, the 10th and 11th respondents would have discovered that the land, part of which they were about to purchase, had graves of the appellants' deceased relatives, a fish pond, a cattle crush, mango trees and a kraal, developments which did not belong to the sellers but rather the appellants. The two respondents did not adduce any evidence sufficient to meet the standard of proof required. In sum, they were negligent in not taking the necessary steps to determine the status of the land despite the presence of circumstances which would have impelled a reasonably cautious man to do so. Both cannot therefore be considered as buyers in good faith as they never exercised due diligence required under the circumstances. Both had constructive notice of the appellants' claim to the land and to find that they were bona fide purchasers was a misdirection on the part of the court below.

It turns out therefore that had the trial court properly directed itself, it would have found that the balance of probabilities favoured the appellants. They adduced evidence of such a quality that a tribunal properly directing itself on the law would say "we think it more probable than not" the burden is discharged (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). The appellants proved that the respondents were trespassers onto the land in dispute. Concerning the appellants' claim for general damages for trespass to land, these are intended to compensate the claimant for being kept out of his land on whatever basis they are assessed.

Trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be "at large", that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. *Halsbury's Laws of England*, 4th edition, vol. 45, at para 1403, explains five different levels of damages in an action of trespass to land, thus; (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss; (b) if the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will

compensate him for his loss; (c) where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use; (d) where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the
5 object of making a gain by his unlawful conduct, exemplary damages may be awarded; and (e) if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

In *Halsbury's Laws of England*, 4th Ed., Vol. 45 (2), (London: Butterworth's, 1999, at paragraph
10 526), the law on damages for trespass to land is addressed thus: "a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should
15 reasonably be paid for that use....Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

20 The defendant's conduct is thus key to the amount of damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was willful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well. Considering that this was wilful trespass and guided by the acreage of approximately 100 acres occupied since 2007, for each acre I will award nominal
25 damages of shs. 100,000/= per annum which translates into shs. 10,000,000/= per annum and for the last eleven years, shs. 110,000,000/= which is awarded as general damages to be paid jointly and severally by the respondents.

From his plaint and testimony in court, the basis for the appellants' claim for general damages, in
30 addition to mesne profits, is premised on the loss of use and enjoyment of their land. The reality is that the appellants' rights were invaded and they have been deprived of the use and enjoyment

of their property. Nevertheless, I am not satisfied that this is a case which warrants an additional award of damages for loss of use and enjoyment.

In the final result, the appeal is allowed. The judgment of the court below is set aside. Instead the
5 judgment is entered for the appellants against the respondents jointly and severally in the following terms;

- a) A declaration that the land in dispute belongs to the appellants and Larwodo stream is the natural boundary between their land and that of the respondents.
- b) An order of vacant possession against the respondents for occupation on the appellant's
10 land on that side of the said stream.
- c) A permanent injunction restraining the respondents, their agents, employees and persons claiming under them, from further acts of trespass on the appellants' land, on the side beyond Larwodo Stream.
- d) General damages of shs. 110,000,000/=
- 15 e) Interest on the above sum at the rate of 8% per annum, from the date of this judgment until payment in full.
- f) The costs here and below.

20 Dated at Gulu this 6th day of December, 2018

.....
Stephen Mubiru
Judge,
6th December, 2018.