



**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable  
Civil Appeal No. 089 of 2019

In the matter between

1. ONYUTA WILLY
2. AKUMU TABICA
3. AKETO MARY

**APPELLANTS**

And

1. AKENA LOT LAMEX
2. OJWIYA WILSON
3. OPIRA JAMES
4. OLUR BATILIMAYO
5. LAYET JOYCE

**RESPONDENTS**

**Heard: 20 March, 2020**

**Delivered: 22 May, 2020.**

***Land Law** — gift inter vivos — inter vivos to be valid; (i) the individual making the transfer actually must intend to make a gift; it must be demonstrated that the donor's objective was to make a gift when he or she transferred the property; (ii) the donee must have accepted the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour. In general, such acceptance is presumed once the third condition is met; i.e. (iii) the delivery of the property that is the subject-matter of the transfer by the donor to the donee. — This delivery confirms the donor's intent to make the gift. There will be no gift if the donor is not competent to give and / or the donee competent to receive. The moment in time when a gift takes effect is dependent on the nature of the gift; the statutory provisions governing the type of gift and the steps taken by the donor to effectuate the gift—Ownership — Land is both a physical entity and a legal concept, there cannot be delivery of possession of land until the boundaries of the parcel of land are demarcated, appropriating it from the rest of the adjacent land. Property rights cannot be secured without a specification of the physical*

*boundaries, however imprecise. Where there is no determined boundary, there is no parcel and, hence, no enforceable property rights. Customary tenure— Article 237 (3) (a) of The Constitution of the Republic of Uganda 1995, and section 2 of the Land Act — customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and "traditional institutional ownership," use, management and occupation of land, 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 in accordance with those rules.— The main attribute of land held under customary tenure is that it is not documented*

**Evidence** — section 79 of The Evidence Act — *The appellate court is to presume that the evidence recorded was the evidence actually given, except to the extent the document is shown not to be an accurate transcription of the record. There is a rebuttable presumption that the written proceedings is the official and authentic history of the case and the judgment, intended to remain a perpetual and unimpeachable memorial of the proceedings and judgment.*

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## JUDGMENT

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**STEPHEN MUBIRU, J.**

Introduction:

- [1] The appellants jointly and severally sued the respondents jointly and severally seeking recovery of approximately two acres forming part of land measuring approximately 40 acres situated at Palubayi, Ajayi Pupwonya North village, Pupwonya Parish, Atiak sub-county, Kilak County in Amuru District, a declaration that he is the rightful owner of the land in dispute, special and general damages for trespass to land, an order of vacant possession, a permanent injunction restraining the respondents from further acts of trespass onto the land, and the costs of the suit.
- [2] The appellants' claim was that they inherited that land from their late father, Obadiah Olaka who in turn acquired it from his own father, the late Oniba Puyumoi passed down from the late Lubayi Oceng. The appellants together with their families occupied the land undisturbed until the year 2007 when the respondents, who own land adjacent to that of the appellants', trespassed onto it

by excavation of marrum, cutting down trees, building grass-thatched houses thereon and claiming it as their own. It is the appellants' father Obadiah Olaka, who gave the respondents land to the West of the one now in dispute. During or around the year 2007, the appellants entered into a five-year lease agreement with ATC Uganda Limited, permitting that company to erect a telecommunications mast on the appellants' land. Before expiry of the said agreement, the 1<sup>st</sup> respondent erroneously entered into a similar agreement with the same company during or around the year 2011, thereby depriving the appellants of income of shs. 5,500,000/= per annum from the erection of the telecommunications mast onto their land, hence the suit.

[3] In their joint written statement of defence, the respondents refuted the appellant's claim. They contended instead that they inherited the land occupy from their forefathers. Their land is separated from that of the appellants by a footpath. The specific part where the telecommunications masts is located was previously occupied and utilised by the parents of the 3<sup>rd</sup> respondent, Okee James and Okot Ngula. It is the appellants who trespassed onto that land when they purported to enter into a lease agreement with ATC Uganda Limited for the installation of a the telecommunications mast. They therefore counterclaimed against the appellants for orders that the approximately half an acre on which the ATC Uganda Limited telecommunications mast is located belongs to them, and award of specific damages of shs. 4,000,000/= per annum from 2007 until 2015 hence a total of shs. 32,000,000/= general damages for trespass to land, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the counterclaim.

[4] In their reply to the written statement of defence, the appellants averred that the land rented out to ATC Uganda Limited for installation of their telecommunications mast, forms part of the estate of the late Obadiah Olaka. The 3<sup>rd</sup> respondent's mother, Okot Ngula, was a sister to one of Obadiah Olaka's wives, Ladu Meyi. It is Obadiah Olaka who gave a small portion of land to Okot

Ngula, which is separate and distinct from the one where the ATC Uganda Limited telecommunications mast is located. None of the respondent's forefathers has ever been in possession of the land where the ATC Uganda Limited telecommunications mast is located. The common boundary between the appellants and the respondent's land is the Juba road; the respondents occupy land to the West of that road given to their forefathers by Obadiah Olaka while the appellants occupy land to the East of that road. They prayed that the counterclaim be dismissed.

The appellants' evidence in the court below:

- [5] P.W.1 Onyuta Willy, the 1<sup>st</sup> appellant testified that the land in dispute was originally owned by his great grandfather Lubayi Oceng. When he died, it was inherited by his grandfather Oniba Puyumoi. It was then inherited by his father Obadiah Olaka and thereafter by himself. It is on that basis that on 14<sup>th</sup> September, 2007 on behalf of the family of the late Obadiah Olaka, he leased a small portion of it to ATC Uganda Limited for the installation of a the telecommunications mast (exhibit P. Ex.1). Later during the year 2015 the 1<sup>st</sup> respondent challenged that transaction claiming that the land belonged to them, he entered into a separate agreement with the company and began collecting rent. The rest of the respondents began to establish gardens and houses on the land, yet the land that was given to their fathers is to the West, across the road to Juba. The elder sons of the late Obadiah Olaka donated approximately 41 acres for the construction of Atiak Technical School but the 1<sup>st</sup> respondent frustrated the project after the construction of the buildings, claiming that the land belongs to him. He left the land he used to occupy West of the Juba Road and established a home on the land East of that road. The land given to Okee James and Okot Ngula by Obadiah Olaka in 1965 is separated from the land in dispute by a line of *mivule* trees planted in 1970.

[6] P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant testified that the other appellants are her siblings. She lived on the land in dispute until she was displaced by the LRA war. Before the insurgency, the 1<sup>st</sup> respondent lived on his father's land, Lot Tokwara, West of the Gulu-Juba road. It is after the insurgency that he constructed three huts on the appellants' land East of that road. Okee James and Okot Ngula were given about two acres of land along the road to Palabek by Obadiah Olaka in 1953 but had their gardens on land to the West of the Gulu-Juba road. It is separated from the land in dispute by a boundary marked by bamboo trees, Shea nut trees, and mango trees. It is also bounded by the footpath leading to the Shea nut trees. The 2<sup>nd</sup> and 4<sup>th</sup> respondents' deceased fathers were buried on land East of the road to Juba. Obadiah Olaka gave parts of the land East of the road to Juba to three persons; Okee James, Nathan Luwa and Kosiya who in turn permitted several other persons to occupy the land that was given to them. They planted trees demarcating the boundaries of the land they were given. It is her brothers; Oyugi Davis, Vinansio Kamlega and Obola Peter who gave approximately 50-60 acres of Obadiah Olaka's land to Atiak Technical School. Before that gift, the appellants had been using that part of the land for farming. The 3<sup>rd</sup> respondent Opira James exceeded the two acres that were given to his father, Okee James and now occupies about five acres. The 4<sup>th</sup> respondent Olur Batilimayo too exceeded the boundaries. It is after the L.R.A war that the 1<sup>st</sup> respondent Akena Lot Lamex crossed over from the land given to his father West of the Juba Road onto the land East of that road. The 4<sup>th</sup> respondent's father Nathan Luwa was buried on land given to him by Obadiah Olaka.

[7] P.W.3. Ocola Oniba, the former Chairman of the Board of Governors of Atiak Technical School testified that it is the sons of the late Obadiah Olaka who in 1984 gave the school approximately 41 acres of land, short of the road to Palabek. Part of it is now the land in dispute. The appellants had been using that land for farming. There was a garden of cotton at the time. They were shown the boundaries of the land and were told demarcation would be undertaken later. The 1<sup>st</sup> respondent's father, the late Lot, never resided on any part of that land.

Development of the land was interrupted by the 1985 coup. It re-started in 1994 with the construction of two classrooms and a borehole. The operation of the school was interrupted again in 1995 and the school re-located to Gulu. It is the 1<sup>st</sup> respondent who frustrated the technical school's occupation of the land claiming that it belonged to him and that dispute caused the Board to permanently vacate the land. The school is no longer interested in the land.

[8] P.W.4. Opobo Isaac Obur testified that the appellants belong to the Palubayi Clan while the respondents belong to the Pamoo Clan. The sons of the late Obadiah Olaka who in 1984 gave the school approximately 41 acres of land. In 2006 the 1<sup>st</sup> and 3<sup>rd</sup> respondents began giving the school a hard time. The school later during the year 2015 vacated the land due to threats from the 1<sup>st</sup> respondent and re-located to Parwacha Parish and that is when the respondents began trespassing upon the vacant land. It is Obadiah Olaka who gave about one acre of land to the wife of Okee James after she caused her arrest and was nearly reaped thereafter but it is distinct from the one in dispute. It is bordered by the road to Palabek. There is a path from Palabek-Atiak road along the Shea nut tree that formed the boundary between Okee's and Obadiah's land. He continued to cultivate on his land West of the Gulu-Juba road. It is in 2004 that the telecommunications mast was erected with mutual recognition that it was the late Obadiah Olaka's land by all neighbours. Later the 1<sup>st</sup> respondent began claiming that land as his as well. The L.C. Courts resolved the dispute in favour of the 1<sup>st</sup> appellant.

[9] P.W.5. Nyeko Pastore testified that the land given to Atiak Technical School originally belonged to the late Obadiah Olaka and his wives used to have gardens thereon. The land on which the mast was installed too belonged to the late Obadiah Olaka. The land that was given to Okee James, father of the 3<sup>rd</sup> respondent Opira James, is separate and distinct from it. The wives of Okee James used to reside there but had gardens across, West of the Gulu-Juba road. The path from Palabek-Atiak road to the Shea nut trees does not serve as a

boundary. The Shea nut trees constitute the boundary between his land and that of the late Okee James. The land given to Okee James never touched the Atiak-Palbek Road. Both Atiak Technical School and Okee James' land are located on land that formerly belonged to Obadiah Olaka. It is after the insurgency that the respondents began to encroach on the land now in dispute.

- [10] P.W.6. Akumu Tabica, the 2<sup>nd</sup> appellant, testified that the other appellants are her siblings. The 1<sup>st</sup> respondent's father, Lot Tokwara, was their neighbour across the road, to the West of their land. It is her father Obadiah Olaka who gave two acres of land to Okee James, on the Eastern side of the Gulu-Juba Road, after differences between him and his father erupted on the land given to his father, West of that road. It is on that land that he was buried when he eventually died. It is her bothers Omony, Vinansio Kamlega and Obola Peter who gave approximately 50 acres of Obadiah Olaka's land to Atiak Technical School. It is part of that land that is now in dispute. The path from Palabek-Atiak road to the Shea nut trees does not serve as a boundary between land belonging to Okee James and that which belongs to Obadiah Olaka. Lii pa Arwota Stream is the boundary. The rest of the respondents were given various portions of land whose boundaries they have since exceeded and encroached onto the appellants' land, including that which had been given to Atiak Technical School.

The respondents' evidence in the court below:

- [11] Testifying in his defence as D.W.1, Akena Lot Lamex, the 1<sup>st</sup> respondent stated that he was born and lived on land East of the Gulu-Juba road where the ATC Uganda Limited telecommunications mast is located. The area where the mast is located used to be cultivated by his cousin Okee James husband of Okot Ngula. He executed an agreement with ATC Uganda Limited on 13<sup>th</sup> April, 2015 for extension of the lease (exhibit P. Ex.4). He and his father lived on land West of the Gulu-Juba road. He built on the land in dispute in 1995 and when his mother died in 1990 he buried her on that land. The mast is about 250 meters from his

house, on land that belonged to the late Okee James and Okot Ngula where the latter used to farm. There is no clearly boundary between his garden and that of the appellants. In 2010 he contested gift of land by the sons of Obadiah Olaka to Atiak Technical School since the land belonged to the Pamoo Clan. It was meant to be a temporary allocation during the insurgency at the end of which it was to be re-located to Gorodon village, Okidi Parish in Atiak sub-county, its original location. Later Atiak Technical School surrendered the land back to the Pamoo Clan but during the year 2007 the 1<sup>st</sup> appellant misled ATC Uganda Limited into installing their telecommunications mast on that land. This was followed by litigation before the L.C Courts.

[12] D.W.2 Ojwiya Wilson, the 2<sup>nd</sup> respondent testified that the late Okee James was his paternal uncle. It is on land that belonged to the late Okee James that the mast was constructed during 2007 at the instigation of the 1<sup>st</sup> appellant claiming that the land belonged to his father the late Obadiah Olaka. The late Okee James lived on that land with his two wives, one of whom was the mother of the 3<sup>rd</sup> respondent. It is the 1<sup>st</sup> appellant who during 2007 allowed MTN to construct a mast on that land. The path and the Shea nut trees constitute the boundary between the 3<sup>rd</sup> respondent and the appellants. That path leads to the home of Okee James. It is to the East of the MTN mast. The appellants have no activity West of that path. He came to learn of the installation of the mast during the year 2007. He learnt of the donation of land to Atiak Technical School in 1975. The L.C.II decided in favour of the 1<sup>st</sup> appellant but the L.C.III on appeal decided in favour of the 1<sup>st</sup> respondent.

[13] D.W.3 Opira James, the 3<sup>rd</sup> respondent testified that he was born and raised on the land in dispute. It originally belonged to Ojany. On his death it was inherited by Abwona Lamex and then Otigo Lakin and then his father James Okot Okee. He inherited approximately twenty acres from his late father Okee James. It is part of the land that belongs to the Pamoo Clan occupied by four other families, that of; Olur Batimayo, Lot Tokwaro, Komakech s/o Olwo and Okumu Charles

P'Lagund. It is to the West of the Shea nut tree. The appellants reside to the extreme East of that tree. The 1<sup>st</sup> respondent's father had two homes, one to the East of the road to Juba and the other to the East of that road. The 1<sup>st</sup> respondent negotiated and executed the agreement with ATC Uganda Limited on behalf of their family. The mast is located on land that belonged to his father Okee James to which went up to Lii pa Arwota Stream. He has no land to the West of Juba road. Part of the land in dispute was during 1994 allocated to Atiak Technical School. In 2009 Pamoo Clan asked the school to vacate the land. It is in 2007 that the 1<sup>st</sup> appellant had encroached on that land by permitting the construction of a telecommunications mast thereon. The L.C.II decided in favour of the 1<sup>st</sup> appellant but the L.C.III on appeal decided in favour of the 1<sup>st</sup> respondent.

[14] D.W.4 Layet Joyce, the 5<sup>th</sup> respondent testified that the Pamoo Clan has land on both sides of the Gulu-Juba road and the Palabek-Atiak road. The land upon which the telecommunications mast is located belongs to her late brother James Okee, the 3<sup>rd</sup> respondent's father. Before 1961, he lived West of the road to Juba. It is upon marrying the 3<sup>rd</sup> respondent's mother Okot Ngula that he moved to occupy land to the East of that road. His home was near the current location of that mast and was surrounded by a fence of gum trees. The actual location of the mast used to be his garden. James Okot Okee's land went up to Lii pa Arwota Stream. Before the insurgency the 1<sup>st</sup> appellant used to live on his father's land West of the road to Juba but after the insurgency he occupied land East of that road, where he built two houses. When the 1<sup>st</sup> appellant permitted the construction of a mast on Okee's land, the L.C.II decided in favour of the 1<sup>st</sup> appellant but the L.C.III on appeal decided in favour of the 1<sup>st</sup> respondent. The Chief Magistrate ordered a re-trial.

[15] D.W.5 Acen Juliet Dego testified that she and her husband in 1975 initially lived at the home of James Okee of the Pamoo Clan and it is James Okee who during 1977 gave her the land that she is occupying. That land was East of the home of

James Okee. They constructed two huts, planted a *mvule* tree and a mango trees on the land. They lived on that land until 1986. It was separated by a footpath from land that belonged to Obadiah Olaka. When she last visited the land in 2018 she saw that a mast had been built on land that belonged to the late James Okee. D.W.6 Angom Tokwaro testified that she the daughter of the late Lot Tokwaro and sister of the late James Okee. She lives on land West of the road to Juba but her mother and several of her siblings though were buried at the home of James Okee, on land near the mast. Her daughter in law, Alanyo, has a garden of cassava closest to the mast. The appellants are neighbours to that land. The land near Lii pa Arwota Stream was communally used.

- [16] D.W.7 Alanyo Sabina testified that she a daughter in law of the late Okee James. She lived with the family from 1982. She had in 2006 planted a garden of cassava near the current location of the mast. The 1<sup>st</sup> respondent in 2007 forcefully caused the construction of the mast on part of the land she used to till and collected revenue there from. The mast was built on land that belongs to her father in law, Okee James. From the year 1982 she used to grow crops on the land upon which the mast was subsequently constructed. The path from Ajayi to the main road formed the boundary of the land. The land near Lii Pa Arwota Stream belongs to the community.

Proceedings at the *locus in quo*:

- [17] The court visited the *locus in quo* on 29<sup>th</sup> May, 2019 and on 1<sup>st</sup> July, 2019. where it observed that the 1<sup>st</sup> respondent's home is approximately 500 meters from the mast. The mast is near Palbek Road, West of the Shea nut tree and a path. Land around the mast is cultivated by Amony Calvin, daughter-in-law of D.W.6 Angom Tokwaro. The Shea nut tree and a path demarcate the boundary of the land and it leads to the home of James Okee. The home of James Okee (now occupied by the 3<sup>rd</sup> respondent James Opira) is surrounded by a hedge of gum trees, in between uncontested land of the appellants near Lii pa Arwota. Next to that

home to the East is the contested land that was donated to Atiak Technical School with two incomplete classroom blocks and a borehole. Although the rest of the land is occupied by relatives of both the appellants and the respondents, the home of James Okee is the nearest to the mast. The 1<sup>st</sup> respondent has two homesteads on land that had been donated to Atiak Technical School. At one there were contested graves and at the other graves of relatives of the appellants. There is evidence of a long period of occupancy by rest of the respondents near the road. The land they occupy is clearly demarcated. The contested area is less than five acres, has no clear shape to it and it is not possible to determine the extent of the claimed trespass. The court prepared a sketch of the land in dispute illustrating the key features observed on the land in dispute.

Judgment of the court below:

[18] In his judgment delivered on 30<sup>th</sup> August, 2019, the trial Magistrate found that the land in dispute forms part of that which the family of Obadiah Olaka donated to Atiak Technical School. The 1<sup>st</sup> respondents' father was given parts of the land East of Gulu-Juba road but the respondents have since exceeded the boundaries of that land and now claim in excess of what was given to them by the appellants' father. They went as far as taking over land that the appellants' family had donated to Atiak Technical School. Obadiah Olaka gave the land on which the mast was subsequently built to Okee James therefore neither the 1<sup>st</sup> appellant nor the 1<sup>st</sup> respondent had the capacity to deal with that land since it is not clan land. It is therefore only the estate of Okee James and Atiak Technical School, donees of the land that is now in dispute, that had the capacity to sue in trespass. At the *locus in quo*, the appellants were unable to demonstrate any evidence of their occupation of the land nor its boundaries. The mast lies on land that was given to Okee James but adjacent to that which was given to Atiak Technical School. The appellants have no cause of action against the respondents. Both the 1<sup>st</sup> and the 2<sup>nd</sup> respondents had no *locus standi* to

counterclaim in respect of that land. It is not true that Okee James was given twenty acres of land. The two acres of land in dispute on which the mast is located belong to the 3<sup>rd</sup> respondent as beneficiary of the estate of the late James Okee. He was not awarded any special or general damages because he did not prove any but the costs both of the suit and the failed counterclaim by the rest of the respondents, were awarded to him.

The grounds of appeal:

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

1. The trial Magistrate erred in law and fact when he held that the appellants had failed to prove their ownership of the land.
2. The trial Magistrate erred in law and fact when he held that the land upon which the MTN booster stands belongs to the 3<sup>rd</sup> respondent.
3. The learned trial Magistrate erred in law and fact when he held that the appellants are estopped from laying claim against the respondents in respect of land earlier allocated by their relatives to Atiak Technical School.
4. The trial Magistrate erred in law and fact when he relied on his own findings at the *locus in quo* that were not a true reflection of what transpired during the visit to the *locus in quo*.

Arguments of Counsel for the appellants:

[20] In their submissions, counsel for the appellants submitted that although the family of the appellant had in 1984 given part of their land to Atiak Technical School, the school had subsequently vacated the land under threats from the 1<sup>st</sup> respondent. The two acres they gave to the mother of the 3<sup>rd</sup> respondent were meant for settlement only while she continued to farm on land to the West of Gulu-Juba road. The portion upon which the mast was erected forms part of the

land that was given to Atiak Technical School which is distinct from the land given to Okee James. When the 1<sup>st</sup> appellant transacted with ATC Uganda Limited during the year 2007 for the erection of that mast on their land, he was never challenged by either the 1<sup>st</sup> nor the 3<sup>rd</sup> respondent until much later when the 1<sup>st</sup> respondent sued before the Local Council. Their conduct ought to have been considered as acquiescence. The 3<sup>rd</sup> respondent did not as well challenge the subsequent transaction between the 1<sup>st</sup> respondent and ATC Uganda Limited. During the course of the trial, the 1<sup>st</sup> respondent proposed to the appellants that the proceeds of the contract be shared. This is a recognition of the appellant's interest in the land. The school lost interest in the land donated to it since it acquired land elsewhere.

- [21] They argued further that when the school abandoned the land, the land reverted to the family of Obadiah Olaka. The 1<sup>st</sup> respondent's entry was not authorised by the appellants and he having trespassed onto the land in 2007, the suit filed in 2015 is not time barred. At the locus in quo, it was evident that the home of the late Okee James was fenced yet the area on which the mast was installed lies outside that fence. The 1<sup>st</sup> respondent had following the insurgency, established a garden and constructed a house on the area where the appellants' deceased relatives' graves are located. This evidence was ignored by the trial Magistrate. The 1<sup>st</sup> respondent has wrongfully collected over shs. 32,000,000= whose refund the court ought to have ordered. The trial Magistrate failed to declare the common boundary between the two acre piece of land given to Okee James and what was left of the late Obadiah Olaka's land. The appeal should accordingly be allowed.

Arguments of Counsel for the respondents:

- [22] Counsel for the respondents in response argued that the appeal is incompetent in so far as it was filed a month before a decree was extracted, yet appeals lie from decrees. It was the appellants' case that the sons of Obadiah Olaka had

given part of the land in dispute to Atiak Technical School in 1984 and Obadiah Olaka had himself given the other part to Okee James. It was common ground between the parties that the 3<sup>rd</sup> respondent Opira James is a son of the late Okee James. This gift of land to both could not be revoked. It is on that account that the 3<sup>rd</sup> respondent Opira James inherited that which was given to his deceased father. None of the appellants were in possession of the land at the time of the alleged wrongful entry since it was the property of the persons to whom it had been given as a gift *inter vivos*. None of the appellants could sustain a claim of trespass to land. The land given to Okee James was bounded by the path to the Shea nut tree on one side and the Atiak- Palabek road on the other.

[23] These boundaries were verified during the visit to the *locus in quo*. The telecommunications mast is located on land enclosed by those boundaries. It was on that land that the graves of the deceased relatives of the 3<sup>rd</sup> respondent Opira James are located. The land occupied by the appellants was on the other side of the path to the Shea nut tree. This was confirmed by evidence to be the common boundary between the two adjacent properties. During the two visits to the *locus in quo*, the court took notes of its observations which form part of the court record. All the material observations made correspond to the oral evidence of both parties given in court. None of the findings made are a creature of the court. The appellants cannot introduce observations that were not made by court, are not reflected on the trial record and whose accuracy was never tested during the trial. The appeal should therefore be dismissed.

#### Rejoinder:

[24] In rejoinder, counsel for the appellants submitted that extraction of a decree is no longer a mandatory step to be taken before the filing of an appeal. When Atiak Technical School vacated the land given to it by the appellants. The respondents illegally occupied it. The claim that Atiak Technical School surrendered the land back to them was not supported by any evidence. The Shea nut tree mentioned

by the appellants as the true boundary marker was visible during the visit to the *locus in quo*. The respondents attempted to segment the land that was otherwise one block, into three different parcels. The respondents were never in possession of any part of the land in dispute until the year 2007 when they committed the act of trespass now in dispute.

Duties of a first appellate court:

[25] 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 17 of 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*).

[26] In exercise of its appellate jurisdiction, this 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 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 and three. Courts' finding as to ownership.

[27] In grounds one and three, the appellants criticise the trial court's findings as to the ownership of the land formerly occupied by Atiak Technical School. Upon re-

evaluation of the evidence, it is evident that the appellants and their witnesses were consistent in assertion of the fact that it was their family that donated land to Atiak Technical School. P.W.1 Onyuta Willy, the 1<sup>st</sup> appellant testified that the elder sons of the late Obadiah Olaka donated approximately 41 acres for the construction of Atiak Technical School. P.W.6. Akumu Tabica, the 2<sup>nd</sup> appellant, testified that it is her brothers Omony, Vinansio Kamlega and Obola Peter who gave approximately 50 acres of Obadiah Olaka's land to Atiak Technical School. P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant testified that it is her brothers; Oyugi Davis, Vinansio Kamlega and Obola Peter who gave approximately 50 - 60 acres of Obadiah Olaka's land to Atiak Technical School.

[28] Before that gift, the appellants had been using that part of the land for farming. P.W.3. Ocola Oniba, the former Chairman of the Board of Governors of Atiak Technical School testified that it is the sons of the late Obadiah Olaka who in 1984 gave the school approximately 41 acres of land, short of the road to Palabek. P.W.4. Opobo Isaac Obur testified that it is the sons of the late Obadiah Olaka who in 1984 gave the school approximately 41 acres of land. P.W.5. Nyeko Pastore testified that the land given to Atiak Technical School originally belonged to the late Obadiah Olaka and his wives used to have gardens thereon. None of these witnesses was discredited by cross-examination.

[29] In contrast, the respondent's version was that the land belonged to the Pamwo clan, only that the appellants' brothers wrongfully donated it to Atiak Technical School. D.W.1 Akena Lot Lamex, the 1<sup>st</sup> respondent testified that during the year 2010 he contested gift of land by the sons of Obadiah Olaka to Atiak Technical School since the land belonged to the Pamoo Clan. It was meant to be a temporary allocation during the insurgency at the end of which it was to be re-located to Gorodon village, Okidi Parish in Atiak sub-county, its original location. D.W.2 Ojwiya Wilson, the 2<sup>nd</sup> respondent testified that he learnt of the donation of land to Atiak Technical School in 1975. D.W.3 Opira James, the 3<sup>rd</sup> respondent testified that Part of the land was during 1994 allocated to Atiak Technical

School. In 2009 the Pamoo Clan asked the school to vacate the land. The rest of the respondents' witnesses did not offer evidence regarding this contested fact.

[30] When the two versions are analysed, the conclusion that the appellants' version is more persuasive is inevitable. Whereas the appellants' version was that the family of Obadiah Olaka had used the land for farming before the donation, apart from the assertion that the land belonged to the Pamwo Clan, none of the respondents and their witnesses adduced evidence regarding the clan's user of that land before the donation. Pamwo Clan had never occupied nor used the land before. Therefore in agreement with the trial Magistrate, I find that the land donated to Atiak Technical School formed part of the estate of the late Obadiah Olaka.

[31] It was the appellants' evidence that the land was donated as a gift for the construction of Atiak Technical School. A gift is the voluntary and gratuitous transfer of property. The donor must not draw any personal benefit, either directly or indirectly, in consideration for the transfer. The gesture must be entirely gratuitous and a reflection of liberal intent on the part of the donor in regard to the donee. The donor's intent in transferring title to the donee must be immediate, unequivocal and irrevocable.

[32] Three conditions must be met for a gift *inter vivos* to be valid; (i) the individual making the transfer actually must intend to make a gift; it must be demonstrated that the donor's objective was to make a gift when he or she transferred the property; (ii) the donee must have accepted the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour. In general, such acceptance is presumed once the third condition is met; i.e. (iii) the delivery of the property that is the subject-matter of the transfer by the donor to the donee. This delivery confirms the donor's intent to make the gift. There will be no gift if the donor is not competent to give and / or the donee competent to receive. The moment in time when a gift takes effect is dependent

on the nature of the gift; the statutory provisions governing the type of gift and the steps taken by the donor to effectuate the gift.

- [33] Equity will not perfect an imperfect gift. In legal terms, this means that equity will not regard the beneficial interest as having been transferred to the intended donee before legal title does so (see *Halsbury's Law of England*, 3<sup>rd</sup> Edition, Vol. 18 at page 396, 397 para 755; *Richards v. Delbridge* [1874] LR 18 Eq 11; *Milroy v. Lord* (1862) 45 ER 1184; *In re Griffin* [1899] 1 Ch 408; *Macedo v. Stroud* [1922] 2 AC 330; *In re Fry* [1946] Ch 312; *Re Rose, Midland Bank Trustee Co Ltd v. Rose* [1949] Ch 78 and *In re Rose, Rose v. IRC* [1952] Ch 499), except where it would be unconscionable for the donor to revoke the gift they purported to make (see *Pennington and another v. Waine and others* [2002] 1 WLR 2075 and *Gliselle Zeital and another v. David Norman Kaye and others*, [2010] EWCA Civ 159). Courts will otherwise refuse to intervene to perfect a gift that is not complete.
- [34] The gift is complete when the donee has done all under his or her control, everything necessary to transfer title in the property, completely without any further assistance from the donor. This occurs when no further act on the part of the donor is needed to vest the legal title in the beneficiary and the donor has no power to prevent it (see *In Re Rose, Midland Bank Executor and Trustee Co. Ltd. v. Rose* [1949] Ch. 78). A gift is complete in law when the donor had done all in his or her power irrevocably to transfer ownership in the subject matter of the gift of the donee (see *Snell's Equity*, 29<sup>th</sup> Edition, p 122 para (3)).
- [35] For this to occur, either the subject matter has to be delivered to the donee or some indicia of title thereto. Title of the donor acting unilaterally must be transferred or otherwise dealt with or affected in a way which results in a change in the legal or equitable estate in a specified parcel land. There must be an actual alienation in order to amount to a severance. If statements of intention were held to effect a severance, uncertainty might follow. The donee can have neither a

legal nor an equitable estate in the land until an act of severance from that retained by the donor. There cannot be a perfected gift of land when the physical dimension of land demarcation, which in practice often means the measurement and delineation of boundaries by one or more of the parties that have an interest in the land, has not been undertaken.

[36] In the instant case, there was inconsistency in the appellants' evidence regarding the size of the land that was donated to Atiak Technical School. P.W.1 Onyuta Willy, the 1<sup>st</sup> appellant testified that the elder sons of the late Obadiah Olaka donated approximately 41 acres for the construction of Atiak Technical School. P.W.6. Akumu Tabica, the 2<sup>nd</sup> appellant, testified that it was approximately 50 acres. P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant too testified that it was approximately 50 - 60 acres. P.W.3. Ocola Oniba, the former Chairman of the Board of Governors of Atiak Technical School testified that it was approximately 41 acres of land. Lastly P.W.4. Opobo Isaac Obur testified that it was approximately 41 acres of land. There is not only a lack of precision as to the acreage of land donated but there was also no evidence led regarding the location of its boundaries. The spatial extent of the land was never established in evidence, not even a rudimentary means of describing the land was offered, yet a description of the spatial limits of the land is essential for the enforcement of property rights.

[37] Land is both a physical entity and a legal concept. As a legal entity it is a bundle of property rights the ownership of which may be legally recognised. As a physical entity it is the physical extent comprising one unit of ownership. For practical purposes therefore a gift of land should be regarded as a gift of a closed polygon on the surface of the Earth constituting one parcel, in unique ownership and with homogeneous real property rights. That being the case, there cannot be delivery of possession of land until the boundaries of the parcel of land are demarcated, appropriating it from the rest of the adjacent land. Property rights cannot be secured without a specification of the physical boundaries, however

imprecise. Where there is no determined boundary, there is no parcel and, hence, no enforceable property rights.

[38] Monumentation must be undertaken by placing markers to demarcate boundaries between parcels, yet there was no evidence to show that the gift was followed by such an exercise. Monumentation involves identification and planting of durable boundary markers of a parcel partitioned off a bigger estate. P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant too testified that marks had been fixed but were removed later by unknown persons. She did not describe what those marks were and their previous location. P.W.3. Ocola Oniba, the former Chairman of the Board of Governors of Atiak Technical School testified that it was demarcated by cotton then growing on the land. He said they were shown the boundaries of the land and were told demarcation would be undertaken later. During the court's visit to the *locus in quo*, there was no attempt made to undertake a process of re-establishment of what court found to be unclear boundary lines and there was no reference to any markers delineating the land that was given to Atiak Technical School. In the absence of an express act of severance, a unilateral declaration of intention to give as a gift will not suffice to sever the intended parcel of land from an existing estate. Until demarcation of the boundaries of the approximately 41 or 50 acres donated, Atiak Technical School remained nominees for the gift as the gift remained imperfect. It was open to family of the late Obadiah Olaka to countermand the gift.

[39] The law is that when a gift of land has become effective it cannot be recalled or revoked thereafter, even though the person donee has not yet been registered as the proprietor (see *Registered Trustees Anglican Church of Kenya Mbeere Diocese v. David Waweru Njoroge* [2007] eKLR). However an incomplete gift can be revoked at any time. No question of conscience enters into the matter for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete (see *Re McArdle* [1951] Ch 669, at 677).

- [40] That aside, under both Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and section 2 of the *Land Act*, customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and "traditional institutional ownership," use, management and occupation of land, 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 in accordance with those rules. One of the incidents of customary ownership recognised by section 2 of the *Land Act*, is ownership of "a person, a family or a traditional institution."
- [41] Under the general rules of interpretation the word "person" when used in a statute means either a natural person or a juridical person, where "juridical person" includes any corporate legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately owned or owned by government, including any corporation, trust or company having its own existence and being responsible for its own actions, separately and distinctly from those of its members or organisers. However in this context it means a natural person because legal personhood is a creation of law, whose role is to identify the subjects of certain rights and obligations, and grant legitimacy to actions realised pursuant to those rights and obligation. Furthermore, in essence corporate property belongs not to individuals but to a purpose.
- [42] This is further the case because a legal entity is a legal construct there is no evidence to show that other than traditional cultural institutions, under custom personhood is associated with other collective entities or corporations as juridical persons. Custom recognises traditional institutions representing the collective community interest embodying traditional lifestyles of owning, developing, the control and use the lands and territories, uniting the members of the community to act in concert in such matters as if they were one. These are institutions

created in accordance with laws, norms and practices of the local or traditional communities, the belief systems and forms of tribal governance, when the cultural element and the legal relationship coincide. Traditional institutions exist mainly for promotion and upholding of cultural values of their communities and, in particular, promoting sound family values, taking measures to preserve the culture, traditions, history and heritage of their communities, administer communal land and to resolve disputes amongst the people in their communities in accordance with customary law. They reflect not only substantive legal principles, but also the cultural context from which they evolved.

- [43] On the other hand the non-traditional legal entities are created when the economic element and the legal element of the legal relationship coincide, thereby creating the foundation of the collective interest. Although both types of entities are meant to make up for the shortcomings of natural persons in adapting to environmental, social, cultural and economic pressures and demands, and share a point of convergence between economic and legal elements, the former are notable for consisting of multiple individuals united by common cultural rather than predominantly economic interests, as the latter tend to be.
- [44] Unless they are incorporated in accordance with the prevailing culture, customs, traditions and practices of the communities concerned, and are embodied in the traditional lifestyle of the community, non-traditional corporate entities cannot own land customarily, since they are neither created by nor envisaged under customary law. Section 3 (1) of the *Land Act, cap 227* does not envisage public bodies / statutory institutions, private or public limited liability companies or similar corporate entities owning land under customary tenure, but rather individuals (persons), households (family), communities (communal ownership) and traditional institutions (formed under customary law).
- [45] Atiak Technical School did not come into existence in accordance with laws, norms and practices of the local or traditional communities. It therefore is not a

traditional institution, and not having been incorporated in accordance with the prevailing culture, customs, traditions and practices of the concerned communities, thus not being embodied in the traditional lifestyle of the community, could only perfect the gift of otherwise customary land by conversion into one of the two tenures where title is acquired by registration, i.e. leasehold or freehold. Written consent of the family of the late Obadiah Olaka would be required. For that reason, since that step had not been taken yet, the donors had done all in their power irrevocably to transfer ownership in the subject matter of the gift of the Atiak Technical School. The gift had not been perfected.

[46] It was further argued that Atiak Technical School abandoned the land after all. An essential element of abandonment is the intention to abandon, and such intention must be shown by clear and satisfactory evidence. Abandonment may be shown by circumstances, but they must disclose some definite act showing intention to abandon. The non-use of a right is not sufficient in itself to show abandonment, but if the failure to use is long, continued and unexplained, it gives rise to an inference of intention to abandon. The passage of time in and of itself cannot constitute abandonment.

[47] It was the evidence of P.W.3. Ocola Oniba, the former Chairman of the Board of Governors of Atiak Technical School that when the operation of the school was interrupted again in 1995, it re-located to Gulu. The dispute caused the Board to permanently vacate the land and the school is no longer interested in the land. The school therefore abandoned the land. For all those reasons, Atiak Technical School was a mere licensee on the land. The trial Magistrate therefore came to a wrong conclusion when he held that Atiak Technical School acquired property rights in the land that was donated to it and therefore should have sued in trespass. That land for all intents and purposes forms part of the estate of the late Obadiah Olak.

[48] Evidence was led to show that it is only after the insurgency that the 1<sup>st</sup> respondent had left his father's land West of the Gulu Pakwach Road to occupy part of this land East of the Gulu Pakwach Road that extends to Lii pa Arwota Stream. P.W.1 Onyuta Willy, the 1<sup>st</sup> appellant testified that the 1<sup>st</sup> respondent left the land he used to occupy West of the Juba Road and established a home on the land East of that road. In corroboration of that testimony, P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant too testified that before the insurgency, the 1<sup>st</sup> respondent lived on his father's land, Lot Tokwara, West of the Gulu-Juba road. It is after the insurgency that he constructed three huts on the appellants' land East of that road. It is after the L.R.A war that the 1<sup>st</sup> respondent Akena Lot Lamex crossed over from the land given to his father West of the Juba Road onto the land East of that road. He now occupies land close to the graveyard of the appellants' deceased relatives. He even stopped P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant from accessing that part of the land. This evidence was not discredited by cross-examination. The 1<sup>st</sup> respondent founded his defence on the claim that the land belongs to the Pamoo Clan which facts was never established. The trial Magistrate therefore misdirected himself when he failed to make the finding that the 1<sup>st</sup> respondent is a trespasser on the appellants' land.

[49] It was further claimed that the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents had exceeded the boundaries of the land that was given to their respective predecessors in title, Nathan Luwa and Kosiya by the roadside, extending further into that land. P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant testified that although the 2<sup>nd</sup> and 4<sup>th</sup> respondents' deceased fathers were buried on land East of the road to Juba, on land Obadiah Olaka gave to three persons; Okee James, Nathan Luwa and Kosiya, the three appellants had exceeded the boundaries. It was her evidence that Nathan Luwa and Kosiya planted trees demarcating the boundaries of the land they were given. This though was not proved at the *locus in quo*. No evidence was led at of the exact location of the boundaries and neither was a demonstration of the extent of their encroachment made. As a result the claim of trespass made against the three respondents; the 2<sup>nd</sup> Ojwiya Wilson, the 4<sup>th</sup> Olur Batilimayo and

the 5<sup>th</sup> Layet Joyce was rightly dismissed. The two grounds of appeal accordingly succeed only in part.

Grounds two and four ;errors in conducting the proceedings at the *locus in quo*: .

[50] By grounds two and four, the trial court is criticised regarding its conduct of proceedings at the *locus in quo* and findings of fact regarding ownership of the land on which the telecommunications mast was installed. There were two versions explaining the status of the land on which the mast is located. According to the appellants, it is located on land the sons of Obadia Olaka had given to Atiak Technical School. P.W.1 Onyuta Willy, the 1<sup>st</sup> appellant, testified that it is after the insurgency that the respondents began to establish gardens and houses on land East the road to Juba, yet the land that was given to their fathers is to the West, across the road to Juba. The 1<sup>st</sup> appellant left the land he used to occupy West of the Juba Road and established a home on the land East of that road. The land given to Okee James and Okot Ngula by Obadiah Olaka in 1965 is separated from the land in dispute by a line of mivule trees planted in 1970. P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant too testified that before the insurgency, the 1<sup>st</sup> respondent lived on his father's land, Lot Tokwara, West of the Gulu-Juba road. It is after the insurgency that he constructed three huts on the appellants' land East of that road. Okee James and Okot Ngula were given about two acres of land along the road to Palabek by Obadiah Olaka in 1953 but had their gardens on land to the West of the Gulu-Juba road.

[51] It is separated from the land in dispute by a boundary marked by bamboo trees, Shea nut trees, and mango trees. It is also bounded by the footpath leading to the Shea nut trees. Obadiah Olaka gave parts of the land East of the road to Juba to three persons; Okee James, Nathan Luwa and Kosiya who in turn permitted several other persons to occupy the land that was given to them. They planted trees demarcating the boundaries of the land they were given. The 3<sup>rd</sup> respondent Opira James exceeded the two acres that were given to his father,

Okee James and now occupies about five acres. The 4<sup>th</sup> respondent Olur Batilimayo too exceeded the boundaries. It is after the L.R.A war that the 1<sup>st</sup> respondent Akena Lot Lamex crossed over from the land given to his father West of the Juba Road onto the land East of that road. The 4<sup>th</sup> respondent's father Nathan Luwa was buried on land given to him by Obadiah Olaka.

[55] P.W.4. Opobo Isaac Obur testified that it is Obadiah Olaka who gave about one acre of land to Okee James but it is distinct from the one in dispute. It is bordered by the road to Palabek. There is a path from Palabek-Atiak road along the Shea nut trees that formed a boundary. He continued to cultivate on his land West of the Gulu-Juba road. P.W.5. Nyeko Pastore testified that the land on which the mast was installed too belonged to the late Obadiah Olaka. The land that was given to Okee James, father of the 3<sup>rd</sup> respondent Opira James, is separate and distinct from it. The wives of Okee James used to reside there but had gardens across, West of the Gulu-Juba road. The path from Palabek-Atiak road to the Shea nut trees does not serve as a boundary. The Shea nut trees constitute the boundary between his land and that of the late Obadiah Olaka. The land given to Okee James never touched the Atiak- Palbek Road. P.W.6. Akumu Tabica, the 2<sup>nd</sup> appellant, testified that It is her father Obadiah Olaka who gave two acres of land to Okee James, on the Eastern side of the Gulu-Juba Road, after differences between him and his father erupted on the land given to his father, West of that road. It is on that land that he was buried when he eventually died. The path from Palabek-Atiak road to the Shea nut trees does not serve as a boundary between land belonging to Okee James and that which belongs to Obadiah Olaka.

[56] According to the respondents, their version is that the mast it is located on land that Obadia Olaka gave to Okee James. D.W.1 Akena Lot Lamex, the 1<sup>st</sup> respondent testified that the area where the mast is located used to be cultivated by his cousin Okee James, husband of Okot Ngula. The mast is about 250 meters from his house, on land that belonged to the late Okee James and Okot

Ngula. Later Atiak Technical School surrendered the land back to the Pamoo Clan but during the year 2007 the 1<sup>st</sup> appellant misled ATC Uganda Limited into installing their telecommunications mast on that land. D.W.2 Ojwiya Wilson, the 2<sup>nd</sup> respondent testified that the late Okee James lived on that land with his two wives, one of whom was the mother of the 3<sup>rd</sup> respondent. It is the 1<sup>st</sup> appellant who during 2007 allowed MTN to construct a mast on that land. The path and the Shea nut trees constitute the boundary between the 3<sup>rd</sup> respondent and the appellants. That path leads to the home of Okee James. It is to the East of the MTN mast. The appellants have no activity West of that path.

- [57] D.W.3 Opira James, the 3<sup>rd</sup> respondent testified that he was born and raised on the land in dispute. It originally belonged to Ojany. On his death it was inherited by Abwona Lamex and then Otigo Lakin and then his father James Okot Okee. He inherited approximately twenty acres from his late father Okee James. It is to the West of the Shea nut tree. The appellants reside to the extreme East of that tree. The mast is located on land that belonged to his father Okee James. D.W.4 Layet Joyce, the 5<sup>th</sup> respondent testified that the land upon which the telecommunications mast is located belongs to her late brother James Okee, the 3<sup>rd</sup> respondent's father. Before 1961, he lived West of the road to Juba. It is upon marrying the 3<sup>rd</sup> respondent's mother Okot Ngula that he moved to occupy land to the East of that road. His home was near the current location of that mast and was surrounded by a fence of gum trees. The actual location of the mast used to be his garden. James Okot Okee's land went up to Lii pa Arwota Stream. D.W.5 Acen Juliet Deگو testified that it is James Okee who during 1977 gave her the land that she is occupying. That land was East of the home of James Okee. They constructed two huts, planted a *mvule* tree and a mango trees on the land. They lived on that land until 1986. It was separated by a footpath from land that belonged to Obadiah Olaka. When she last visited the land in 2018 she saw that a mast had been built on land that belonged to the late James Okee.

- [58] D.W.6 Angom Tokwaro testified that her mother and several of her siblings though were buried at the home of James Okee, on land near the mast. Her daughter in law, Alanyo, has a garden of cassava closest to the mast. D.W.7 Alanyo Sabina testified that she had in 2006 planted a garden of cassava near the current location of the mast. The 1<sup>st</sup> respondent in 2007 forcefully caused the construction of the mast on part of the land she used to till and collected revenue there from. The mast was built on land that belongs to her father in law, Okee James. From the year 1982 she used to grow crops on the land upon which the mast was subsequently constructed. The path from Ajayi to the main road formed the boundary of the land.
- [59] When the two versions are analysed, it is common ground that during or around 1953 up to the early to mid-1960s Obadiah Olaka gave part of his land East of the Gulu-Juba road to Okee James. There is disagreement on three points; the size of that land, whether it comprised land for farming and the location of the common boundary between that land and what was left of Obadiah Olaka's land. These controversies had to be resolved by taking into account the probity of the oral testimony supporting either version of the three aspects alongside observations of court at the *locus in quo*.
- [60] At the *locus in quo*, the court observed that land around the mast is cultivated by Amony Calvin, daughter-in-law of D.W.6 Angom Tokwaro. Shea nut trees and a path demarcate the boundary of the land and that path leads to the home of James Okee. Next to that home is the contested land that was donated to Atiak Technical School with two incomplete classroom blocks and a borehole. Although the rest of the land is occupied by relatives of both the appellants and the respondents, the home of James Okee is the nearest to the mast. It was argued by counsel for the appellant that while at the *locus in quo* the trial Magistrate failed to record and take into account the observation that following the insurgency, the 1<sup>st</sup> respondent had established a garden and constructed a house on the area where the appellants' deceased relatives' graves are located.

That he relied on his own findings at the *locus in quo* that were not a true reflection of what transpired during the visit to the *locus in quo* and as a result, failed to declare the common boundary between the two acre piece of land given to Okee James and what was left of the late Obadiah Olaka's land.

- [61] In the first place, according to section 79 of *The Evidence Act*, whenever a document is produced before any court, purporting to be a record of any evidence given in a judicial proceeding, and purporting to be signed by any magistrate, the court "may presume" that the document is genuine and that "the evidence recorded was the evidence actually given," and shall not be precluded from admitting any such document merely by reason of the absence of any formality required by law.
- [62] The expression "may presume....that the evidence recorded was the evidence actually given" denotes that there is therefore a rebuttable presumption that the written proceedings is the official and authentic history of the case and the judgment, intended to remain a perpetual and unimpeachable memorial of the proceedings and judgment. The appellate court is to presume that the evidence recorded was the evidence actually given, except to the extent the document is shown not to be an accurate transcription of the record. The presumption is rebutted when a party adduces evidence sufficient to raise a doubt about the presumption. Mere allegations cannot destroy or discredit the authenticity of the record of proceedings.
- [63] Whenever any difference arises about whether the record truly discloses what occurred in the trial court, the difference must be submitted to and settled by that court and the record conformed accordingly. If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded. In cases where the transcript of a hearing or trial is unavailable, or one such as this where it is contended that parts of the material evidence were

omitted from the record, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the respondent, who may serve objections or proposed amendments. The statement and any objections or proposed amendments must then be submitted to the trial court for settlement and approval. As settled and approved, the statement will then be included in the record on appeal. The appellants did not undertake that process and as a result have failed to discharge that burden. The record of proceedings and observations made by the trial court will therefore will be taken as is.

[64] Firstly, regarding the size of the land, whereas D.W.3 Opira James, the 3<sup>rd</sup> respondent claimed he inherited 20 acres, P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant testified that he was given about two acres of land along the road to Palabek. P.W.4. Opobo Isaac Obur testified that it was about one acre. P.W.6. Akumu Tabica, the 2<sup>nd</sup> appellant, testified that it was two acres. In his judgment, the trial Magistrate it was not true that Okee James was given twenty acres of land but two acres of land. I find that on basis of the oral testimony and description of the land as illustrated on the sketch map, the trial court came to the correct finding as to the size of land that was given to the late James Okee as being approximately two acres. This conforms with the rule of construction that generally holds monuments superior to measurements.

[65] Secondly, regarding the question whether it comprised land for farming, P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant testified that the land was used only as a residence but James Okee had his gardens on land to the West of the Gulu-Juba road. P.W.5. Nyeko Pastore testified that the wives of Okee James used to reside on the land now in dispute but had gardens across, West of the Gulu-Juba road. This was refuted by the respondents who contended that Okee James used to use part of the land for cultivation. To that effect D.W.1 Akena Lot Lamex, the 1<sup>st</sup> respondent testified that the area where the mast is located used to be cultivated by his cousin Okee James husband of Okot Ngula. D.W.4 Layet Joyce, the 5<sup>th</sup>

respondent testified that whereas the home of James Okee was near the current location of that mast and was surrounded by a fence of gum trees. The actual location of the mast used to be his garden. D.W.7 Alanyo Sabina testified that from the year 1982 she used to grow crops on the land upon which the mast was subsequently constructed. Considering that Okee James was given that piece of land after an acrimonious fall out with his father, Lot Tokwara, to an extent that his wife was almost raped, it is most unlikely that she continued to farm on the land West of the Gulu-Juba road. The respondent's evidence on this point is more plausible. It is also corroborated by the fact that at the *locus in quo*, the court observed that land around the mast is cultivated by Amony Calvin, daughter in law of D.W.6 Angom Tokwara. I therefore in agreement with the trial Magistrate find as a fact that the land given to James Okee comprised land for farming.

- [66] Thirdly, regarding the true location of the common boundary, an original property unit of land may become fragmented over time in one of two ways: multiplicity of parcels and multiplicity of landowners. Multiplicity of parcels arises where there is one owner of a series of separate parcels. Multiplicity of owners occurs where several people are the proprietors of one parcel with the ownership either being in the form of shares or as a joint or communal tenancy. Communal or family land may involve share ownership with an original volume of space being divided into a series of parcels, one relating to the common parts and the remaining parts being in the private ownership of the individual members. The common parts may be owned jointly by the members each having certain usufructuary rights and obligations depending on the internal rules of the community. If a member dies, a new owner will take over his or her entitlement under systems of inheritance in which rights to the land may be divided between the beneficiaries in accordance with certain laws, rules and customs. A unit of ownership may be shared among different people (multiplicity of owners) or divided into different adjacent or non-adjacent parcels.

- [67] The main attribute of land held under customary tenure is that it is not documented. It is acknowledged though that different communities have, over time, identified and utilised different types of boundary markers. Nevertheless, each parcel must be delimited by a boundary. From a legal perspective, a boundary is an invisible line on the surface that differentiates one set of real property rights from another. Whereas the physical demarcation of boundaries includes any activity for identifying a parcel of land and delineating its boundaries, performed by any of the parties related to the parcel, legal demarcation consists of reaching a social consensus on physical demarcation, such that it will be enforced *in rem*.
- [68] In order for demarcation to produce effects on third parties, such party-led physical demarcation must be accepted by all other interested parties, which in this case mainly means the neighbours of the particular parcel. After some degree of physical demarcation, legal demarcation involves two additional steps. First, it requires checking for possible contradictions with all relevant evidence, which might be obtained by consulting neighbours' parcel boundary markers or opinions, or by examining possessory indications in the field. Full legal demarcation requires eliminating all contradictions and overlaps, either by reaching private agreements with neighbours or by pursuing some type of litigation and adjudication procedure. Social consensus allows legal demarcation to produce stronger, *in rem*, effects. It is only after the adjoining land has been legally demarcated that boundaries are "conclusive," meaning they have legal force *in rem*: that is, they have effects against third parties.
- [69] Boundaries are traditionally delineated by reference to natural geographical features; by their abutments or relation to natural or artificial elements such as roads or adjacent lands; by statements of length, bearing and distance. Parties can demarcate land with a variable degree of precision, from mere verbal identification to detailed and precise drawing and location of boundaries. Neighbours can agree on the boundaries whatever the method used to define

them and whatever precision the method provides. When boundaries are less precisely defined, the visible land parcel / spatial unit may then be defined by the informal mechanisms of adverse possession and acquisitive prescription, which allow an implicit definition of boundaries to take place *ex post*, instead of by a formal and explicit settlement procedure taking place *ex ante*. Its location may then be deduced in relation to identifiable physical features. Courts ordinarily adhere to a hierarchy with natural boundaries at the top, followed by monumented lines, old undisputed occupation, abuttals and statements of length, bearing or direction. A parcel of land is considered to be an area with some identifiable attributes that differentiate it from adjoining plots on the basis of, for example, different land use.

[70] In the instant case, P.W.1 Onyuta Willy, the 1<sup>st</sup> appellant, testified that it is a line of *mivule* trees planted in 1970. P.W.2. Aketo Mary, the 3<sup>rd</sup> appellant it was constituted by bamboo trees, Shea nut trees, and mango trees. It is also bounded by the footpath leading to the Shea nut trees. P.W.4. Opobo Isaac Obur testified that It is bordered by the road to Palabek. There is a path from Palabek-Atiak road along the Shea nut trees that formed a boundary. P.W.5. Nyeko Pastore was inconsistent. He in one breath testified that the land given to Okee James never touched the Atiak- Palbek Road and the path from Palabek-Atiak road to the Shea nut trees does not serve as a boundary and later admitted the Shea nut trees constitute the boundary between his land and that of the late Obadiah Olaka. P.W.6. Akumu Tabica, the 2<sup>nd</sup> appellant, simply refuted the claim that the path from Palabek-Atiak road to the Shea nut trees serves as a boundary between land belonging to Okee James and that which belongs to Obadiah Olaka and stated instead Lii pa Arwota Stream is the boundary.

[71] According to D.W.1 Akena Lot Lamex, the 1<sup>st</sup> respondent there is no clearly boundary between his garden and that of the appellants'. D.W.2 Ojwiya Wilson, the 2<sup>nd</sup> respondent testified that the path and the Shea nut trees constitute the boundary between the 3<sup>rd</sup> respondent and the appellants. That path leads to the

home of Okee James. It is to the East of the MTN mast. The appellants have no activity West of that path. D.W.3 Opira James, the 3<sup>rd</sup> respondent testified that the mast is to the West of the Shea nut tree. The appellants reside to the extreme East of that tree. The mast is located on land that belonged to his father Okee James. D.W.5 Acen Juliet Dego testified that it was separated by a footpath from land that belonged to Obadiah Olaka. D.W.6 Angom Tokware testified that the path from Ajayi to the main road formed the boundary of the land. D.W.7 Alanyo Sabina testified that the path from Ajayi to the main road formed the boundary of the land.

[72] A boundary is either the physical objects marking the limits of a parcel of land or an imaginary line or surface marking the division between two legal estates. It is apparent from the sketch map prepared during the visit to the *locus in quo* that the mast is located outside Okee James' homestead surrounded by a fence of gum trees. The actual physical location of a boundary line is normally demarcated in one of two ways: by point features such as monuments the straight line between which marks the divide between two properties, or by linear features such as walls, hedges and fences.

[73] Fences serve many functions.; they can be constructed for security reasons. Fences are regarded in law as items of defence and guards against intrusion rather than boundary markers. The fence makes plain the limits of the occupied space intended to be kept separated and subject solely to the control of the occupying party. Land owners are not required to fence off or enclose their entire land. Fencing or other enclosure that is obviously designed to create a more private area, or to exclude intruders, or to contain livestock will not necessarily constitute a boundary marker with adjoining land. Hence, the line of the legal boundary may not necessarily be the same as that which is marked physically on the ground by a fence. It is not uncommon for fences to sit inside or outside a boundary line.

[74] A dividing fence separates the land of different owners whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary. Although fences are very often used to mark the boundaries of a property, this is not an intention that is readily inferred. The first step to determine the legal significance and practical value of the fence is to gather information on the fence. In doing that the court should determine if there is any evidence portraying the fence in a manner that is suggestive of an intent to fix the boundary along the fence. Information may be obtained from the testimony of neighbours, long-time residents, and other knowledgeable people. Privity to events leading to the creation of the fence and conformance with the location of other visible monuments could be instructive. Alternatively, the intention that a fence was meant to serve as the location on a property boundary will be deduced from the behaviour of the adjoining neighbours in limiting their activities to either side of the fence. A boundary may be fixed by recognition and reputation. Therefore the most important piece of information to obtain during the visit to the *locus in quo* is the relative location of the fence with respect to other evidence. In some cases, there may never have been better evidence other than the fact the people living along or near the fence have always supposed and accepted the fence as the boundary marker.

[75] Recognition and reputation of a fence as a boundary or a "dividing fence" is based in part on equity and in part on logical assumptions. Equity by way of laches, estoppel, and other equitable principles, would keep settled what has been settled. With the same results, a logical analysis could be constructed to show that the recognition and reputation of a fence as a boundary marker must have been based on some authority since obscured or some intent expressed and accepted long ago. Parties may show where the boundary lies in relation to identifiable physical features. If activities beyond the fence are shown to have continued for a long time without question or conflict, the opposing party asserting the fence to be the boundary marker has the burden of coming forward

with evidence proving by a preponderance of evidence that the fence marks the boundary or that in all likelihood it coincides with the boundary.

- [76] The testimony of the appellants was inconsistent in this regard. P.W.1 Onyuta Willy, claimed it was a line of *mivule* trees planted in 1970 yet he did not demonstrate this at the *locus in quo*. P.W.2. Aketo Mary, stated it was constituted by bamboo trees, mango trees and Shea nut trees, but only the latter was seen at the *locus in quo*. P.W.4. Opobo Isaac Obur acknowledged that the path from Palabek-Atiak road along the Shea nut trees formed the boundary. P.W.5. Nyeko Pastore was inconsistent, denying this fact initially and later admitting it. P.W.6. Akumu Tabica too refuted the claim and stated that Lii pa Arwota Stream is the boundary.
- [77] On the other hand, D.W.2 Ojwiya Wilson, D.W.3 Opira James, D.W.5 Acen Juliet Dego and D.W.6 Angom Tokwaro were all consistent that path leading to the home of Okee James and the Shea nut tree formed the common boundary. D.W.7 Alanyo Sabina testified that during the year 2006 she had planted a garden of cassava near the current location of the mast. This evidence was not refuted by the appellants. The visible presence on land of a crop grown for human consumption that is under cultivation, in the process of being harvested, or marketable if harvested at the time of entry is a sure indication of possession. Further it was the testimony of D.W.2 Ojwiya Wilson, the 2<sup>nd</sup> respondent that the appellants have no activity West of that path. The sketch map drawn by the court illustrated that the path leading to the home of Okee James is to the East of the MTN mast, which mast is to the West of the Shea nut trees.
- [78] On the other hand, where the fence intended to be the boundary is in a different location than the possession boundary, the question of what is the (ownership) boundary becomes a question of law. In that regard, adverse possession of land beyond the location of the fence intended to be the boundary, when maintained

for the time period prescribed by *The Limitation Act*, creates title under the doctrine of adverse possession.

[79] Possession is the actual physical control over a piece of land. It is constituted by the fact that somebody is in physical control of the land with intention to control it. Possession is a question of fact to be decided on the merits of each particular case. It may be established by evidence of physical residence on the land. It may also be established by a show of some visible or external sign which indicates control over the piece of land in question. Cultivation of a piece of land, erection of a building or fence thereon, demarcation of land with pegs or beacons are all evidence of possession. A person can also be in possession through a third party such as a servant, agent or tenant.

[80] A person asserting title by adverse possession must prove the following six elements; (i) the land was held adverse or hostile to the owner's title; (ii) possession has been actual; (iii) it has been open and notorious (i.e., visible and known); (iv) possession has been exclusive or the use by others has been controlled by the possessor; (v) possession has been continuous for the period of more than twelve years; and (vi) possession has been under claim-of-title or colour-of-title. It was the evidence of both D.W.6 Angom Tokwaro and D.W.7 Alanyo Sabina that since the mid-1960s in the case of the former and 1982 in the case of the latter, used the land on which the mast is located for farming undeterred by the appellants. At the time the court visited the *locus in quo*, it was still in their possession. They respectively had enjoyed open, continuous, uninterrupted and uncontested possession of the disputed land for over 40 years and 25 years respectively by 2007 when the suit was filed.

[81] In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of “extinctive prescription” reflected in sections 5 and 16 of *The Limitation Act*. Where a claim of adverse possession succeeds, it has the

effect of terminating the title of the original owner of the land (see for example *Rwajuma v Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*). As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the possessor is vested with title.

[82] In his judgment, the trial Magistrate noted that at the *locus in quo*, the appellants were unable to demonstrate any evidence of their occupation of the land nor its boundaries. The mast lay on land that was given to Okee James but adjacent to that which was given to Atiak Technical School. Under section 56 (2) and (3) of *The Evidence Act*, courts are empowered to take judicial notice of practices that have attained such notoriety that court would be justified in taking judicial notice of (see *Geoffrey Mugambi and two others v. David K. M'mugambi and three others, C.A. No. 153 of 1989 (K)*). In Acholi traditional custom, death of a propertied member of the family results not in inheritance but rather in a rearrangement of duties and of rights of participation in the produce of the land or rights of usage of the land itself. The land is re-allotted according to the rules of customary intestacy law. The rules of Acholi customary intestacy law settles the estate upon the eldest son (typically where the deceased is male) or to the eldest daughter (typically where the deceased is female) or sole surviving child, in such a way that it devolves to him or her undivided but subject to provisions of user for the widow, the daughters, younger sons, and other close dependant relatives.

[83] It is a practice which is seen by the communities themselves as having a binding quality. It is of immemorial antiquity, certain and reasonable, obligatory, not repugnant to statute law, though it may derogate from the common law concept of inheritance. It is a practice so vital and an intrinsic part of the customary socio-economic system of the Acholi that it is treated as if it were law. It is a valid custom that this court can take judicial notice of. In that regard, upon the death of his father, the land in dispute devolved to the 3<sup>rd</sup> respondent under the Acholi customary intestacy law. Therefore the trial Magistrate came to the correct

conclusion when he found that that the mast is located on land belonging to the 3<sup>rd</sup> respondent as beneficiary of the estate of the late James Okee.

[84] The appellants' suit was for trespass to land. Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19<sup>th</sup> edition (London: Sweet & Maxwell, (1987) 46). It is a possessory action where if remedies are to be awarded, the plaintiff must prove a possessory interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised. The defendant should not have had any right to enter into plaintiff's land.

[85] In his judgment, the trial Magistrate found that the appellants were unable to demonstrate any evidence of their occupation of the land, the subject matter of the suit, nor its boundaries. He found that the mast lay on land that was given to Okee James but adjacent to that which was given to Atiak Technical School. There is no evidence that any of the respondents exceeded the common boundary marked by the path leading to the home of Okee James and the Shea nut tree. There is no merit in these grounds two grounds. The 1<sup>st</sup> appellant had no basis for transacting with ATC Uganda Limited allowing its construction of a telecommunications mast on land his father Obadiah Olaka gave to Okee James way back around 1953 to the mid-1960s. For that reason the 3<sup>rd</sup> respondent was entitled to judgment against the 1<sup>st</sup> appellant on the counterclaim for recovery of shs. 4,000,000/= the 1<sup>st</sup> appellant received per annum from 2007 until 2015 hence a total of shs. 32,000,000/= which ought to have been revenue for the beneficiaries of the estate of the late Okee James.

Order:

[86] In the final result, the appeal succeeds only in part. For that reason the judgment of the court below is set aside and in its place judgment is entered for the appellants against the respondents jointly and severally in the following terms;

- a) The claim for trespass against the 2<sup>nd</sup> Ojwiya Wilson, the 4<sup>th</sup> Olur Batilimayo and the 5<sup>th</sup> Layet Joyce is dismissed.
- b) A declaration is made that the land previously given by the sons of Obadiah Olaka as a gift to Atiak Technical School forms part of the estate of the late Obadiah Olaka.
- c) The common boundary between land comprising the estate of the late Obadiah Olaka and that comprising the estate of the late Okee James is the path leading to the home of Okee James and the Shea nut tree.
- d) An order of eviction hereby issues against the 1<sup>st</sup> appellant from land he is occupying East of the Gulu-Juba Road, near the graves of the appellants' deceased relatives.
- e) A permanent injunction issues restraining the respondents, their agents and persons claiming under them from undertaking any activities on land East of that common boundary.
- f) Judgment is entered on the counterclaim in favour of the 3<sup>rd</sup> respondent against the 1<sup>st</sup> appellant by which the land on which the ATC Uganda Limited telecommunications mast is located is declared to form part of the estate of the late Okee James. The 3<sup>rd</sup> respondent is awarded special damages of shs. 4,000,000/= per annum from 2007 until 2015 hence a total of shs. 32,000,000/= as against the 1<sup>st</sup> appellant.
- g) A permanent injunction issues restraining the appellants, their agents and persons claiming under them from undertaking any activities on land decreed to the 3<sup>rd</sup> respondent.
- h) The counterclaim by the rest of the respondents is dismissed.
- i) Each party is to bear their own costs of the trial and of the appeal.

Delivered electronically this 22<sup>nd</sup> day of May, 2020

.....Stephen Mubiru.....

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellants : M/s Kunihira and Co. Advocates

For the respondents: M/s Mayende and Associated Advocates