THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0038 OF 2015

(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 0031 of 2009)

1. OKETA P'ALAL }
2. TOKWINTY P'YUSUR } …….…… APPELLANTS
3. OCAN P'BANYA ANAR }
4. ODONG GEORGE P'OGABA }

VERSUS

LAKONY DAVID LIVINGSTONE ……..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The respondent sued the appellants jointly and severally for a declaration that he is the owner of land measuring approximately 6,000 acres, situated at Koch Akili village, Kulu Alenga Kal "B" Parish, Koch Goma sub-county, Nwoya County in Amuru District, an order of eviction, permanent injunction, general damages for trespass to land, interest and costs. His case was that he is the customary owner of the land in dispute, his family having settled thereon in 1968 while it was virgin, vacant land.

On 14th May, 1982 he applied for a lease over the land. A survey was done on or about 6th September, 1983 and on 18th September, 1984 he obtained a lease offer in respect of that land from the Uganda Land Commission. During the insurgency, he vacated the land leaving his parents thereon. His father died in 1992 and was buried on the land. Without his permission, the appellants during or around the year 2008, wrongfully entered onto part of this land, constructed dwelling houses thereon, engaged in lumbering activities and became aggressive toward the respondent.

In their joint written statement of defence, the appellants refuted the respondent's claim and contended that they occupy land they inherited from their respective grandfathers "long ago." they instead claimed damages for psychological torture and a permanent injunction but did not present their claim as a counterclaim.

P.W.1 Lakony David Livingstone, the respondent, testified that he and his father, Okot Yokoyadi, migrated from the land of his grandfather in Onyona village, Ongako sub-county and began living on the land in dispute, then vacant land, during the year 1967. They undertook mixed farming on the land and caused its survey between 1982 - 1984, following an application for a lease made on 14th May, 1982. On 25th September, 1982 he received a notice of inspection from the District Land Board. The inspection was done and a report issued on 6th September, 1983. Instructions to survey were issued but the survey was not done because of the breakout of insurgency. He received a lease offer dated 18th September, 1984 which has since lapsed. His request in March, 2011 for renewal of the lease offer was rejected because of the dispute between him and the appellants. He fled to Gulu Town during the insurgency. When his father died in 1989, he was buried on that land. The appellants entered onto the land between the year 2009 to 2010 and currently occupy approximately 200 acres of the land he had been offered.

P.W.2 Ojok James Odur, a neighbour, testified that the respondent occupied the land in dispute in 1967. The first appellant has a home in Agonga Parish, the second in Obul village, the third with his father in Kal "B" Parish. It is during the insurgency that the appellants and many other people came to live on the land now in dispute. They later fled into an IDP Camp. He too fled to Gulu Town during the insurgency. He attended the inspection in 1982. The appellants did not live on the land at the time and did not grow ant tobacco on it. It was the respondent who was engaged in mixed farming on this land at that time. By the time of the insurgency in 1987, the second appellant's father had constructed a tobacco barn on the land in dispute. When they left the camp, the appellants initially returned to their respective homes located 15 - 17 kms away from the land in dispute but eventually returned to it and now occupy parts where they are engaged in farming activities.

P.W.3 Okot Nicholas testified that the respondent settled on the land in dispute during the year 1967. The first appellant has a home in Agonga Parish, the second in Obul village, the third is a teacher at Lila primary School. It was vacant land in 1967 and it is in 1982 that the District Land Board inspected it. The appellant used to grow seasonal crops on the land before the insurgency. No one grew tobacco in the area at the time.

In his defence, the third appellant, Ochan P'Banya, indicated he had no interest in the land in dispute and the suit was withdrawn against him. D.W.1 Tokwiny P'Yusur, the second appellant, testified that he was born on the land in dispute in 1942. Neither the respondent nor his father has ever lived on the land nor carried out any activities thereon. His father, Yusur Opio, and his elder brother used to grow tobacco on the land and during the 1970s he established a barn for that purpose. In 1989, he fled to Masindi but returned to the land in 2007. He first lived in a camp at Koch Goma.

D.W.2 Apuda Otim testified that he inherited the land from his father Odong Apada and he is the one who gave land to the father of the respondent and that of the second appellant. The land he gave to the respondent's father is to one side of a tributary to Lenga Stream known as Ladoro (Lenga side). The respondent now claims the part that was given to the second appellant's father on the opposite side of the stream (Ladoro side). The second appellant's father used the land mainly for tobacco growing and established a barn thereon. Because of insurgency, the respondent" father was buried on the second appellant's land. D.W.3 Oketta P'Alal, the first appellant, testified that he acquired approximately 800 acres from his late father, Alal. There are remnants of his activities on this land before the insurgency. During the insurgency, he took refuge in a camp in 1986 and later migrated to Masindi in 1997. The land in dispute is in Ladora while the respondent lived in Laminomony from where he would come to draw water from Kal Lenga. Neither his father no himself witnesses the inspection of this land.

D.W.4 Buladina Anyao, a neighbour stated that the first appellant own approximately fifty acres of the land in dispute. The first appellant's father had settled on the land in the 1970s following her father's earlier settlement. The land acquired by her father is now registered in "Kiguka Farm Limited."A mango tree marks the location of the old homestead of Oketta P'Alal. It is her father

and a one Odong Atori who opened the road from Pakwera to Kiguka. The respondent's father was buried on that land because of insurgency.

D.W.5 Odong David Kabende, brother to the first appellant, testified that the land, measuring about 600 - 800 acres belongs to the first appellant. It was first occupied by his father in 1970 when he migrated from their ancestral home in Agonga. The respondent is not a neighbour. His land in Koch Akili, about 3 - km from the land in dispute. Lastly, D.W.6 Odong George P'Ogaba, the fourth appellant, stated that they inherited the land in dispute from their grandfather Ongom Belle in 1970. The land is surrounded by streams. The respondent's land is situated in Lamin Omony "A" in Akili, about 5 - 6 kms away. He was not present at the inspection of the respondent's land but his father was.

The court then visited the *locus in quo* but the appellants and their counsel were absent during that visit. Among the features observed by court were the former homestead and grave of Okot Yokayadi, the respondent's father. The court prepared a sketch map and also recorded evidence from; (i) Ouma Otto Justo, who stated that it was public land and he applied for a lease in 1973. The second appellant must have settled on the land after the war. (ii) Ojok Kul, who stated that the appellants were not on the land at the time the road to the land was opened. Only the respondent's father lived on the land. (iii) Lapyem David; did not much about the land. (iv) Odong Jolly Joe, who stated that he attended the burial of the respondent's father. The second appellant lived on the other side of Kiguka Stream, and (v) Mwaka Martin, who stated that two graves exist on the land, one for the respondent' father.

In his judgment, the trial magistrate found that the respondent applied for and was granted ownership of the land. The independent witnesses at the *locus in quo* supported the respondent's case. The defence evidence was contradictory. The demeanour of the defence witnesses was shaky. Some of them did not reside in the area at the time the respondent applied for a lease. The respondent's claim was supported by documentary evidence and physical features on the land. The respondent's evidence is more persuasive and therefore the land belongs to the respondent. None of the appellants lived on the land at the time the respondent was given a lease offer in 1984. The appellants have since the year 2010 constructed temporary shelters on the land and

felled trees for charcoal, and these actions constitute trespass. The respondent was accordingly declared the rightful owner of the land, a permanent injunction issued against the appellants, the respondent was awarded general damages of shs. 7,000,000/= for trespass to land, mesne profits of shs 2,000,000/= interest on the two monetary awards at the rate of 20% per annum from the date of filing the suit until payment in full, an order of eviction and costs of the suit.

Being dissatisfied with the decision, the appellants appealed to this court on the following grounds;

1. The learned trial Magistrate erred in law and fact when failed to properly evaluate the evidence on court record in regard to the legal effect of an expired lease held by the respondent viz-a-viz the rights of land ownership by the individual appellants and thus came to the wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he conducted *locus in quo* in the company and hospitality of the respondent and in absence of the appellants or their lawyers and as such was not able to verify the claims of both parties on the suit land hence leading to a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact when he took additional evidence from witnesses in support of the respondent's claim at the conduct of the *locus in quo* in the absence of the appellants thus re-penning hearing of the plaintiff's case to the exclusion of the defendants, hence a miscarriage of justice.
4. The learned trial Magistrate was biased in favour of the respondent throughout the trial and in his judgment.

In his submissions, M/s Ogik and Co. Advocates, counsel for the appellant argued that a lease offer is not conclusive evidence of ownership. It expired after five years' failure to process a title. the respondent was not in possession of the land at the time of the application but only planned to establish a mixed farm thereon. The first visit to the *locus in quo* of 20th February, 2015 aborted as none of the parties turned up. No proper evidence of service for the subsequent date of 28th February, 2015 by an authorised process server. The appellants were denied an opportunity to show court features on the land that corroborate their testimony in court. Evidence was received at the *locus in quo* of people who did not testify in court The manner in which the proceedings

were conducted indicated bias on the part of the trial magistrate. He completely ignored evidence of the appellants relating to their presence and activities on the land prior to the respondent's application for a lease. He also awarded interest on damages from the time of filing the suit. He prayed that the judgment of the court below be set aside and instead the appellants be declared the rightful owners of the land in dispute.

In his submissions, Counsel for the respondent, Mr. Patrick Doii, argued that he owned the land under customary tenure before he applied for its conversion into a leasehold. Expiry of the lease offer did not terminate his customary tenure. Although they were served, the appellants opted not to turn up during the proceedings at the *locus in quo*. Evidence taken from the people in attendance at the *locus in quo* who were not witnesses of the parties, is irrelevant and can be disregarded without affecting the outcome of the suit. The record of trial does not disclose any bias on the part of the trial magistrate and hence the appeal should be dismissed with costs.

As a first appellate court, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (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 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.

The respondent's claim to the approximately 6,000 acres of land was premised on the fact that he was given a lease offer in 1984 by The Uganda Land Commission. *The Public Lands Act, 1969*

had renamed what was formally Crown land and vested in The Uganda Land Commission. Under section 25 of the Act, The Uganda Land Commission was empowered to make a grant in freehold or leasehold of public land. Subsequently, under section 1 of *The Land Reform Decree of 1975*, all land in Uganda was declared public land to be administered by the Uganda Land Commission in accordance with *The Public Lands Act* of 1969, subject to such modification as were necessary to bring the Act into conformity with the Decree. Therefore at the time the respondent was granted the lease offer, the land in issue was technically public land.

The evidence presented by the respondent at the trial shows that he applied for a lease on 14th May, 1982 (exhibit P.E 1). On 25th September, 1982 he received a notice of inspection from the District Land Board. The inspection was done and a report issued on 6th September, 1983 (exhibit P.E 3) and on about 18th September, 1984 he obtained a lease offer in respect of that land (exhibit P.E 5) for a five year initial term to be extended to 49 years upon payment of the requisite fees**.** Although according to clauses 4 and 5 of the offer, it was conditional on "the terms and conditions of the lease being accepted in writing within one month of the date of the letter," accompanied by the prescribed fees and rent, the respondent paid the fees and rent seven months later on 18th April, 1985 by receipt No. Y033853 as per the revenue stamp on exhibit P. E. 5. In his testimony, he stated that he was unable to continue with a survey because of insurgency that broke out soon thereafter.

The question then arises as to whether by virtue of that documentation the respondent acquired a lease over the land in dispute. Section 3 (5) of *The Land Act* defines a lease, *inter alia*, as form of tenure created by contract, usually but not necessarily in return for a rent, under which one person, namely the landlord or lessor, grants or is deemed to have granted another person, namely the tenant or lessee, exclusive possession of land usually but not necessarily for a period defined, directly or indirectly, by reference to a specific date of commencement and a specific date of ending. It therefore goes without saying that the lease agreement must contain an adequate description of the land leased. A description or designation is sufficient if, by the resort to any fact extrinsic to the writing but referred to therein, the land can be identified with certainty. An agreement containing an inadequate legal description of the land conveyed is not effective as a lease. A contract for the conveyance of land must contain a description of the land

sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.

In the instant case, the offer (exhibit P. E.5) did not contain a description of the land nor did it reference an instrument which did contain such a description, though a description need not be in the agreement at the time it is executed but can be furnished at a later time if the agreement so provides. In clause 8 thereof, the offer was made subject "to land being available and free from disputes at the time of survey." The schedule of fees specified in clause 2 (g) included a fee of shs. 125,000/= for survey and mark-stones. It was clearly anticipated that the limits of the land offered would be delineated by survey, which unfortunately never occurred. It is essential to the integrity of the system of land registration and the stability of real estate titles, the systematic and organised transfer of land, that the boundaries of the land leased are sufficiently described before a lease may come into existence. In this case, the offer although accepted by the respondent could not result into a valid lease until the survey was done.

Besides that, section 3 (5) (c) of *The Land Act* stipulates as one of the key elements of a valid lease the requirement that exclusive possession of that specified parcel of land is usually but not necessarily for a period defined, directly or indirectly, by reference to a specific date of commencement and a specific date of ending. In clause 1 (a) of the lease offer (exhibit P. E.5), it was stipulated that the five year initial term would begin to run, "from 1st date after survey." The commencement of the lease was therefore pegged onto an event that never took place; the survey of the land.

Even assuming that a valid lease was created, according to Regulation 10 of *The Public Lands Rules S.I 201-1* (revoked in March 2001 by rule 98 of *The Land Regulations, S.1. 16 of 2001*), being the law in force at the time, an offeree of a lease on public land was a mere tenant at sufferance and he or she could only acquire interest at registration. It provided that:

> Any occupation or use by a grantee or lessee of land which the controlling authority has agreed to alienate shall until registration of the grant or lease be on sufferance only and at the sole risk of such grantee or lessee.

The implication of Rule 10 of *The Public Lands Rules* therefore was that an offerree of a lease by a Controlling Authority did not acquire an interest in the land so offered until actual registration of that lease. It is generally recognised that interests in land, whether legal or equitable, are valid and enforceable against the whole world (*in rem*) since they are of a proprietary nature capable of binding third parties who acquire the land. At common law, a tenancy at sufferance may be terminated at any time and recovery of possession effected and is not a right *in rem*. It is not a proprietary interest capable of binding third parties who acquire the land. It is not an interest in land.

Continuing with that argument further, it is trite that when a lease expires, the land automatically reverts to the lessor (see *Dr. Adeodanta Kekitiinwa and three others v. Edward Maudo Wakida, C.A. Civil Appeal No 3 of 2007; [1999] KALR 632*). Therefore upon expiry of the five year initial term, if indeed it began to run in 1984 as argued by the respondent, the land reverted to the Uganda Land Commission in 1989, and upon the promulgation of *The Constitution of the Republic of Uganda, 1995*, which by article 286 thereof revoked the powers and mandate of the Uganda Land Commission and transferred the land in issue to the Arua District Land Board. A leseee who remains in occupation after a lease term has expired, but before the lessor demands the lessee to vacate the property, is a tenant at sufferance (see See *Remon v. City of London Real Property Co. Ltd., [1921] 1 KB 49, 58*) and *Halsburys Laws of England (4th Edition) Vol. 18 para. 16*). A tenancy at sufferance arises by implication of law not by contract. A tenant at sufferance acquires no interest in the land he or she occupies. In conclusion therefore, it was erroneous for the trial magistrate to have relied on the lease offer (exhibit P. E.5) as having conferred upon the respondent any interests in the land in dispute. Ground one accordingly succeeds.

The rest of the grounds will be more conveniently considered together in so far as they assail the decision of the court below for conduct of proceedings ex-parte at the *locus in quo*, receipt of evidence from "independent witnesses," and bias by the trial magistrate. But I will deal with the issue of the *ex-parte* proceedings first.

According to Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the notice of hearing was duly served, it may proceed *ex parte*. It is a cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces itself on the matters in controversy between the parties. It is for that reason that an ex-parte judgment will be set aside if there is no proper service (see *Okello v. Mudukanya [1993] I K.A.L.R. 110*). An affidavit of service must be on record before ex-parte proceedings are allowed (see *Kitumba v. Kiryabwire [1981] H.C.B. 71*).

Effective service of court process requires the person serving to provide the recipient a copy of the process and immediately thereafter to return to the issuing court the original process duly endorsed with what he or she has done concerning it. Such service is proved by an affidavit of the person effecting service in which he or she identifies himself or herself, states that he or she is authorized under the law to serve process or documents therein, and that the process or document in question has been served as required by the law, and sets forth the manner and the date of such service. The procedures of service are so exacting to the extent that the requirement that a duplicate be delivered or tendered is mandatory and if not complied with, the service is bad (see *Erukana Kavuma v. Metha [1960] E.A. 305*). It is for that reason that courts have time and again emphasized the need to file an affidavit of service after effecting service (see *Tindarwesire v. Kabale Municipal Council [1980] H.C.B. 33; Edison Kanyabwera v. Pastori Tumwebaze SCCA No. 2 of 2004 (unreported*); *Kanji Naran v. Velji Ramji (1954) 21 E.A.C.A. 20*).

The record of appeal indicates the defence was closed on 4th February, 2015 under the provisions of Order 17 rule 4 of *The Civil Procedure Rules,* in the absence of the appellants and their counsel, and the suit was fixed for visiting the *locus in quo* on 23rd February, 2015. That date having been fixed *ex-parte*, it was incumbent upon the respondent and his counsel to take out hearing notices and serve then upon the appellants, notifying them of the date so fixed. The record shows that this was not done. As a result, on 23rd February, 2015 the court proceeded *ex-parte* without first being satisfied that notice of that hearing was duly served as required by Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*.

While at the *locus in quo,* the court erroneously proceeded to record evidence from five persons who had not testified in court, namely; (i) Ouma Otto Justo, (ii) Ojok Kul, (iii) Lapyem David, (iv) Odong Jolly Joe, and (v) Mwaka Martin. Visiting the *locus in quo* is meant to enable court to check on the evidence given by the witnesses, and not to fill gaps in their evidence for them, lest Court runs the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*).

That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. I have therefore decided to disregard the evidence of the five "independent witnesses," since I am of the opinion that there was sufficient evidence on basis of which a proper decision could be reached, independently of the evidence of those that witness.

It is argued by counsel for the appellants, supposedly by reason of the foregoing two errors, that the trial magistrate was not impartial and hence was biased against the appellants. Impartiality implies freedom from bias, prejudice, and interest. All litigants are entitled to objective impartiality from the judiciary. It is for that reason that Principle 2.4 of the *Uganda Code of Judicial Conduct, 2003* requires a judicial officer to “refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned.,”

The phrase “might reasonably be questioned” embodies a shade of doubt or a lesser degree of possibility, which suggests an objective standard requiring disqualification even if there is no actual bias. It reflects an emphasis on objective standards requiring disqualification even when the judicial officer lacks actual bias. Under this provision, a mere appearance of impropriety to an objective observer is enough to trigger disqualification because justice must satisfy the appearance of justice. The test to be used in matters of perceived or apparent bias was explained in *R. v. Gough [1993] A.C. 646 at 670* as being whether there is in the view of the court “a real

danger" that the judicial officer was biased. A judicial officer is "impartial" when he or she is free of bias or prejudice in favour of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before him or her.

Impartiality can be described as a state of mind in which the trial magistrate is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a trial magistrate is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias.

Consideration by an appellate court of alleged judicial bias in the court below proceeds from a point of considerable deference to the trial court on ground that judicial officers "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances" (see *United States v. Morgan, 313 U.S. 409 (1941), at p. 421*). There is a strong presumption of judicial impartiality that is not easily displaced. There has to be a proper and appropriate factual foundation for any reasonable apprehension of bias. In the instant case what is being advanced are mere procedural errors by the trial magistrate. Of themselves they do not show that the trial magistrate failed the test of impartiality. They do not demonstrate that he failed to proceed with an open-minded, dispassionate, careful, and deliberate investigation and consideration of the complicated reality of the case before him but instead relied on stereotypical undue assumptions, generalisations or predeterminations. A reasonable person who is fully informed of and understands all facts and circumstances surrounding this case and seeing the outcome of the case, may not reasonably question the trial magistrate's impartiality in the matter. This aspect of the argument fails.

The last aspect of these grounds questions the determination by the trial court that the respondent owns the land occupied by each of the appellants. It is argued that the trial court came to that conclusion without a proper evaluation of the evidence before it. In paragraph 4 (a) of the plaint, the respondent's claim was presented in a somewhat nixed up manner. He claimed that "at all material time the plaintiff has been the lawful owner of a customary piece of land.....having acquired the same through lease in respect of 6,000 acres of the sad land on the 18th day of

September, 1984..." Then in paragraph 4 (b) of the plaint, that "the plaintiff and his family members settled on this piece of land on (sic) or about 1968 as vacant land." In his testimony, the respondent stated that he and his father, Okot Yokoyadi, migrated from the land of his grandfather in Onyona village, Ongako sub-county and began living on the land in dispute, then vacant land, during the year 1967 whereupon they undertook mixed farming on the land.

The inspection report, (exhibit P.E 3), shows that by 9th November, 1982 the respondent had the following on the land; "35 head of cattle, 67 goats, 38 sheep grazing on the land, 15 acres of rice, 30 acres of groundnuts, 20 acres of sim-sim, 15 acres of cassava and 10 acres of millet." The respondent undertook developments on what was for all practical purposes public land, and that of itself did not create a customary interest in that land. Section.54 of *The Public Lands Act* of 1969 (by then repealed) had defined customary tenure as “a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons.”

Customary tenure is recognized by Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and s. 2 of the *Land Act*, Cap 227 as one of the four tenure systems of Uganda. It is defined by s. 1 (*l*) together with s. 3 of the *Land Act* as system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which include; (a) applicable to a specific area of land and a specific description or class of persons; (b) governed by rules generally accepted as binding and authoritative by the class of persons to which it applies; (c) applicable to any persons acquiring land in that area in accordance with those rules; (d) characterised by local customary regulation; (e) applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land; (f) providing for communal ownership and use of land; (g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and (h) which is owned in perpetuity.

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. Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply.

In the instant case, the customary law under which the respondent claimed to have acquired the land is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the respondent to adduce evidence of the customary law by virtue of which he would gain interest in vacant land only by the fact of occupancy. Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure (see *Bwetegeine Kiiza and Another v. Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009; Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009; Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of 2010;* and *Abner, et al., v. Jibke, et al., 1 MILR 3 (Aug 6, 1984*). Possession or use of land does not, in itself, convey any rights in the land under custom. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative.

In absence of proof of occupation under any established customary practices, the dispute between the parties boils down, not to ownership but rather, to conflicting claims of possessory rights over a sizeable tract of land of former public land, which each claims as private property. Private Property is that in respect of which a person has a legal basis to say to the world, "keep off, unless you have my permission, which I can grant or withhold.” Although capacity for use (dominion) does not necessarily create private property ownership rights, possessory rights are created by; (i) a physical relation to the land of a kind that gives a certain degree of physical

control over the land, and (ii) intent to exercise that control so as to exclude others from any present occupation. The capacity to exclude must be of a character which is protected by law or equity if someone tries to remove or interfere with that ability to exclude.

A possessory right in land is the right and intent of someone to occupy or control a parcel of land but does not include ownership of the land. Factual possession of land signifies an appropriate degree of exclusive physical control. For vast lands, possession requires knowledge of its boundaries and the ability to exercise control over them (see *Powell v. McFarlane (1977) 38 P&CR 452*). There should be evidence that the claimant deals with the cleared and un-cleared portions of the land, co-extensive with the boundaries, in the same way that a rightful owner would deal with it. Once there is evidence of open, notorious, continuous, exclusive possession or occupation of any part thereof as would constructively apply to all of it, in such cases occupancy of a part may be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by the claimant. A person exercising such possession therefore, for all practical purposes, is the "owner" of the land since it is trite that "possession is good against all the world except the person who can show a good title" (see *Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5*). The respondent never adduced evidence of this nature at the trial.

Possessory rights may be terminated by notice, forfeiture or abandonment. Abandonment is constituted by the act of vacating property with the intention of not returning. Abandonment occurs where an occupier of land leaves the whole of the land unattended to by himself or herself or a member of his or her family or his or her authorised agent for a considerable period of time (which under section 37 of *The land Act* is three years or more in respect of tenancies by occupancy). The legal definition requires a two-part assessment; one objective, the other subjective. The objective part is the intentional relinquishment of possession without vesting possession in another. Land will be deemed abandoned when the possessor intentionally and voluntarily relinquishes all right and interest in it. The relinquishment may be manifested by absence over time. The subjective test requires that the possessor must have no intent to return and repossess the property or exercise his or her possessory rights. While abandoned property becomes, in theory, a *res nullius*, a thing owned by no one, hence becoming available for appropriation by its first new possessor, the voluntariness of abandonment is crucial. Evidence

that the possessor was forced, tricked or induced by fraud to abandon the land will defeat a claim by a subsequent possessor that it was abandoned. In this case the fact that the respondent was forced by insurgency to vacate the land implies that he did not abandon and therefore could regain possession at the end of the insurgency. However, while the law protects exclusivity and other property interests, it also generally limits the scope of those interests in its exercise of the duty to protect public interests. Transactions in respect of former public land need certainty. To grant protection to possessory rights beyond the terms of the offer, would create a great deal of uncertainty. Loss of a continued right to possession upon efluction of the time stipulated in the offer should be regarded as a forfeiture of the possessory rights. One cannot claim as private property that which he or she has lost dominion over by effluction of time. Continued enjoyment of possessory rights over the land in dispute was conditional on the respondent's ability and intention to possess. Losing the capacity of either was a forfeiture of possessory rights because the capacity to exclude was not of a character which is protected by law or equity.

On the record of appeal, there is no evidence that after the insurgency, the respondent dealt with all the 6,000 acres in the same way that a rightful owner would deal with it. There was no evidence of open, notorious, continuous, exclusive possession or occupation of any part thereof by the respondent as would constructively apply to all of it, or as could be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by him. He in the circumstances could only lay claim to parts where there is no actual adverse possession of land not actually occupied by him, but co-extensive with the boundaries of the land he actually has physical dominion over. By virtue of the appellant's adverse possession, he certainly did not have dominion over the entire 6,000 acres of this former public land, after the insurgency. Being in effective control and possession of the various tracts of former public land that they occupy, the appellants' possession could only be terminated by a person with better title to the land. The respondent did not prove a better title for which reason the trial court came to the wrong conclusion when it decided in his favour. In the final result, the appeal is allowed. The judgment of the court below is set aside. Instead the suit is dismissed. The costs here and below are awarded to the appellants.

Dated at Gulu this 25th day of October, 2018

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Stephen Mubiru

Judge,

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