

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0051 OF 2015
(Arising from Pader Grade One Magistrate's Court Civil Suit No. 018 of 2011)

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OGABA JOHN **APPELLANT**

VERSUS

10 **KILAMA BOSCO** **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The appellant sued the respondent for a declaration that he is the owner of land under customary tenure, measuring approximately two acres, situated at Rachoko Central "A" village, Rachoko Parish, Awer sub-county, Pader District, an order of eviction, permanent injunction, general damages for trespass to land, interest and costs. His case was that he found the land vacant in
20 1986 and settled thereon. He and the respondent each utilised their respective neighbouring land until they were displaced by the L.R.A. insurgency. Upon their return after the insurgency, the respondent began trespassing onto the appellant's land.

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In his written statement of defence, the respondent contended that he is not a proper party to the suit since his father was still alive. He stated in the alternative that he is a customary owner of the land having acquired it from his father Otto Goldmore who opened it as vacant land in 1987. The appellant has since trespassed on four acres of it. He prayed that the suit be dismissed.

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P.W.1 Ogaba John, the appellant, testified that he acquired the suit land through "prescription" in 1986. Cultivated the land from then until November, 2002 when he went into Pabbo IDP Camp due to insurgency. In the year 2008 he returned and reconstructed his homestead on the land.

The respondent encroached on the Northern part of the land during the year 2011. He constructed two huts thereon and planted a banana plantation and seasonal crops. P.W.2 Olum John, the Hoe Chief, testified that in 1986, the appellant migrated from Ohocho Kabila village and settled on the land in dispute, which was vacant by then. The land had fallen vacant as a result of its
5 occupants, a Langi community, had vacated it following the fall of the Obote II government in 1985. The respondent and his father too came and occupied another part of the same land. During the insurgency, the appellant took refuge at Lira Palwo IDP Camp. In May 2011 the respondent encroached further onto the land by building two huts and growing crops.

10 P.W.3 Omara Gadenio testified that the appellant occupied the land in dispute until a one Akello Margaret settled on part of it. The dispute was resolved by the L.C.II Court letting the latter take the Northern part while the former retained the Southern part. The appellant appealed the decision to the L.C.III. In the year 2011, the respondent encroached on the land and constructed two huts thereon and also established gardens. The respondent is a trespasser on the
15 land. The appellant then closed his case.

In his defence, D.W.1 Kilama Bosco, the respondent, testified that the land in dispute measures approximately six acres. His father acquired approximately twenty acres of land by "prescription" in 1987. In 1996, the appellant's mother requested for a portion of the land from
20 the respondent's grandmother. She was allowed temporary occupancy of about eight acres near Ludel Stream. The appellant occupied that land with his mother until the year 2000 when they vacated and returned to their original home in Anyaya village, Agago District. In the year 2002, the insurgency forced the appellant into Lira Palwo Trading Centre while the respondent was forced into Rackoko IDP Camp. On return from the camp, the appellant occupied ten acres near
25 the road but also continued to cultivate the eight acres that were given to his mother. The appellant refused to vacate the ten acres and return to the eight. He instead constructed a house thereon which he occupies to-date. The appellant should have sued the respondent's father since the land in dispute belongs to him. It is his father who in the year 2009 gave him the land he is now occupying with his family since the year 2010 and now the appellant desires to dispossess
30 him of that land.

D.W.2 Otto Goldmore, the respondent's father, testified that in 1996 he gave approximately four acres of his land to the appellant. He lived thereon for four years. When a one Akello trespassed on those four acres the appellant sued her. After the four years, the appellant returned to his place of origin in Obolokome village, Agago District. The appellant later forcefully returned and occupied the part near the main road where he constructed some dwelling houses. He was ordered to return to the place that was given to him but he refused. In 2009 he gave the respondent the portion of land he is now occupying with his family.

D.W.3 Okello Augustine, a cousin to both parties, testified that the land in dispute measures approximately four acres and it belongs to the respondent. In 1987, the respondent's father, D.W.2 Otto Goldmore acquired approximately twenty acres by "prescription." The land was originally occupied by some Langi people who vacated it in 1982. The respondent's father and three of his brothers then took possession of varying acreage of the land. It is out of the land his father occupied that the respondent was given four acres. The respondent has occupied the four acres since the year 2010. He has built two grass-thatched huts and established gardens thereon, including trees for timber. The respondent then closed his case.

The court then visited the *locus in quo* where it estimated the acreage of the area in dispute to be 2 to 4 acres. The court as well recorded evidence from; (i) Delphino Opoka who stated that the respondent's father was the first to settle in that area. The appellant came later; (ii) Oola Peter who stated that the land belongs to the respondent's father as he is the one who settled there first; (iii) Lapoti Simon who stated that the conflict began when the respondent constructed his houses on the land in 2011. The respondent was not on the land in 1997; (iv) Ogalo Ponsiano who stated that the respondent's father gave the appellant's mother some land. The land belongs to the respondent since it was his father's; (v) Odong Patrick who stated that the land belongs to the respondent since it originally belonged to his father. It is him who gave a portion to the appellant as well; and (vi) Akello Margaret who stated that the respondent's father was the first to settle on the land and left and on return came with the appellant whom he gave a portion of the land. Each occupied their respective pieces of land until the insurgency which displaced them into IDP Camps. When a dispute erupted between her and the appellant, a boundary was created between her land and that of the appellant. The court then prepared a sketch map of the land in dispute

indicating that the area in dispute contains two huts, two gardens, Teak trees and a banana plantation, all belonging to the respondent.

In his judgment, the trial magistrate found that it had been established that the land was occupied by a community of Langi prior to 1987. Upon the overthrow of the Obote II Government in 5 1985, the Langi community fled vacating the land and leaving it vacant. The two parties then took advantage and occupied different parts of the land. Since they are related and lived side by side, the land is to be divided into two equal parts, the boundary being perpendicular to the Kitgum-Lira main road. The appellant taking the northern side with banana plants while the respondent is to take the Southern side where the cassava and millet gardens are. Each party was 10 to bear his own costs.

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

1. The trial Magistrate erred in law and in fact when he failed to evaluate the evidence on 15 record, especially that of the appellant and his witnesses, which was (sic) all consistent thereby arriving at an erroneous decision.
2. The trial Magistrate erred in law and fact when he ordered the suit land to be divided yet the appellant settled on the suit land from 1986 uninterrupted and without a dispute with anybody.

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Mr. Owor Buga David, Counsel for the appellant argued that the appellant led evidence to the effect that he acquired vacant land in 1986. He opened the land and continued to cultivate it. This was corroborated by P.W.2 the Chief of the area who confirmed that the appellant migrated from Koch Abila and settled on the land which was vacant. It was formerly occupied by the Langi 25 people who left in 1985 upon the overthrow of the Obote Government. He stated that by 2000 the appellant was already settled on the suit land. The defence evidence was that the respondent was given the land by his grandmother whereas D.W.2 stated that in 1996 he gave the respondent land to the Western part of the suit land, about four acres. He settled there without any problem. This is contradictory. In his written statement of defence, the respondent stated that he was a 30 wrong party to the suit since the father was still alive. The respondent is disowning the land. The judgment of the court resulted in division of the land against the evidence of the respondent.

D/.W.1 page 8 para 3 he said he had never attended the meeting during which the land was given and he did not know the terms involved in the gift. In his earlier testimony he had said that the land had been given to the appellant temporarily by the grandmother.

5 P.W.2 was the person responsible in matters concerning land and that should have been considered as expert evidence. D.W.1 said he built a house near the suit land and continued to cultivate eight acres given to his mother by the grandmother, this proves occupation, utilisation and control by the appellant. The respondent was not on the land but was neighbouring it. The evidence of the appellant is corroborated by the sketch map during the locus visit. The sketch
10 map shows that the respondent is not on the land. The land was not occupied and the respondent who only intended to move there. There are no reasons for the division of the land into two parts. D.W.3 stated that the respondent's land was neighbouring the suit land to the North West. This confirms what is shown on the sketch map. The respondent's father has never occupied the suit land. He prayed that the appeal be allowed. The decision be set aside and the costs be awarded
15 to the appellant.

In response, counsel for the respondent Ms. Alice Latigo submitted that it is not disputed that the land in question was left vacant by the Langi community and that gave the parties opportunity to acquire it. The land that belonged to the appellant was on the North Western side. The
20 respondent was in effective possession of the part now in dispute. The appellant came to settle near the land in 2010. She prayed that the appeal should not be dismissed. The court should come up with the right decision.

Having perused the pleadings and the record of appeal, listened to the submissions of both
25 counsel and addressed my mind to the principles of the law applicable to the facts of this case, I found merit in the appeal and consequently delivered an *ex tempore* judgment setting aside the decision of the court below in so far as it directed division of the land between the parties. Although the appeal was technically allowed, the judgment was in essence in favour of the respondent for reasons different from those advanced by the appellant for which reason the costs
30 of the appeal and of the court below were awarded to the respondent. I undertook to explain the reasons in more detail in this judgment.

5 Firstly, 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*). 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.

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The trial magistrate is criticised for having failed to evaluate the evidence, choosing instead to deliver a judgment directing the sub-division of the land in dispute. In our legal system, there cannot be a "draw" in litigation, court must make a finding in favour of one of the parties, against the other. If a judicial officer finds it more likely than not that something did take place, then it is treated as having taken place. If he or she finds it more likely than not that it did not take place, then it is treated as not having taken place. A judicial officer is not allowed to sit on the fence. He or she has to find for one side or the other. Generally speaking in most cases a judicial officer is able to make up his or her mind where the truth lies without expressly needing to rely upon the burden of proof. However, in the occasional difficult case, sometimes the burden of proof will come to his or her rescue. "If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). When left in doubt, the party with the burden of showing that something took place will not have satisfied the court that it did. That being the case, the trial court erred when it instead created a new boundary, in respect of which no evidence at all had been led at all.

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That aside, while at the *locus in quo*, the court erroneously proceeded to record evidence from six persons who had not testified in court, namely; (i) Delphino Opoka, (ii) Oola Peter, (iii) Lapoti Simon, (iv) Ogalo Ponsiano, (v) Odong Patrick and (vi) Akello Margaret. 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 witnesses.

Both parties claimed to be customary owners of the land in dispute. 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 (I) 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. Similarly, section 54 of *Public Lands Act* of 1969 (then in force in 1973) 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." Therefore, a person seeking to establish customary ownership of land had the onus of proving that he or she belonged 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. None of the parties adduced such evidence at the trial.

Although evidence of user of unregistered land may be sufficient to establish customary ownership of such land (see *Marko Matovu and two others v. Mohammed Sseviiri and two others*, S.C. Civil Appeal No. 7 of 1978), and possession can sometimes be used as an indicator of ownership or even to create ownership, proof of customary tenure at the least requires
5 evidence of a practice that has attained such notoriety that court would be justified in taking judicial notice of it under section 56 (3) of *The Evidence Act* (see *Geoffrey Mugambi and two others v. David K. M'mugambi and three others*, C.A. No. 153 of 1989 (K) (unreported),
Otherwise, the specific applicable customary rule should be proved by evidence of persons who would be likely to know of its existence, if it exists, or by way of expert opinion adduced by the
10 parties since under s. 43 of the *Evidence Act*, the court may receive such evidence when the court has to form an opinion as to the existence of any general custom or right, such opinions as to the existence of that custom or right, are relevant (see *Ernest Kinyanjui Kimani v. Muira Gikanga* [1965] EA 735 at 789).

15 Consequently, 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 in accordance with those rules. The onus of proving
20 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.

Proof of mere occupancy and user of unregistered land, however long that occupancy and user
25 may be, without more, is not proof of customary tenure. That occupancy should be proved to have been in accordance with a customary rules accepted as binding and authoritative in respect of that land, in such circumstances (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.,*
30 *1 MILR 3 (Aug 6, 1984)*). Possession or use of land does not, in itself, convey any rights in the land under custom.

A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law” (see *Osborne’s Concise Law Dictionary*, Ninth Edition (Sweet and Maxwell, 2001). “Customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and
5 intrinsic a part of a social and economic system that they are treated as if they were laws” (see *Black’s Law Dictionary*, 8th edition, 2004). The ascertainment of customary law requires that the court determines whether the alleged rule is indeed a law as defined by the community, as the source of living customary law is the community itself. It must then proceed to determine whether the specific customary rule satisfies the legal test to constitute enforceable customary
10 law for as the gatekeepers of customary law, courts must ensure that the customary law relied on is not incompatible with the provisions of the constitution, any written law and is not repugnant to natural justice, equity and good conscience.

None of the parties adduced evidence of the specific applicable customary rule by the testimony
15 of persons who would be likely to know of its existence, if it exists, or by way of expert opinion. In absence of proof of occupation under any established customary practices, the dispute between the parties boiled down, not to ownership but rather, to conflicting claims of possessory rights over the land 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
20 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
25 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.

It is common ground between the parties that until sometime in 1985, the land in dispute was
30 occupied by a Langi community who vacated and have never returned. The parties' subsequent possession of parts of that land from 1986 was interrupted by the insurgency that broke out one

or two years later causing them too to vacate the land as they fled into IDP Camps such that none of them had the minimum period of continuous possession that would have created such rights. Their claim to have acquired the land by "prescription" is therefore a misnomer. Possession, to constitute the foundation of a prescriptive right, must be adverse; if not, such possessory acts, no matter how long, do not start the running of the period of prescription. Prescription is the process of acquiring rights in land as a result of the passage of time. Where a person has possessed land openly, peaceably and without judicial interruption, that person may either by acquisitive prescription, in that he or she is allowed after a specified period of time, or extinctive prescription, i.e., barring actions for recovery of that land, acquire title. At common law, one needed only to prove at least twenty years' possession for acquisitive prescription while by virtue of section 5 *The Limitation Act*, extinctive prescription in Uganda requires a minimum of twelve years' open, notorious, continuous and uninterrupted possession. A person who has the right to sue loses his right of action because of the passage of the limitation period. It is a presumption of abandonment by the potential claimant.

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Ownership 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, title 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 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 the instant case no such evidence was led, implying that there is nothing to suggest that the Langi community vacated the land with an intention ever to return to it. Considering that the said community has

never returned, for over thirty years now, they may be deemed to have abandoned the land. Abandoned land becomes, in theory, a *res nullius*, a thing owned by no one, hence becoming available for appropriation by its first new possessor. A person exercising such possession therefore, for all practical purposes, is the owner of the land since it is trite that "possession is
5 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). Possession may thus only be terminated by any person with better title to the land. The respondents did not prove a better title for which reason the trial court came to the wrong conclusion when it decided in their favour.

10 The evidence before the trial court, and as illustrated in the sketch map drawn at the *locus in quo*, was to the effect that it is the respondent who has effective control and possession of the entire land in dispute. On it he has a banana plantation, two huts, a garden of millet and a garden of cassava. He also had teak trees planted on the land. In essence it is the respondent exercising
15 dominion over the entire four or so acres in dispute. Being in effective control and possession of the land, the respondent's possession could only be terminated by a person with better title to the land. The appellant did not prove a better title for which reason the trial court came to the wrong conclusion when it decided to subdivide the land.

It is for the foregoing reasons that the appeal was allowed and the decision of the court below
20 was set aside. Instead judgment was entered dismissing the suit. Although the appeal was technically allowed, it was for reasons different from those advanced by the appellant, hence the decision was substantially in favour of the respondent. It is for that reason that the costs of the appeal and of the court below were awarded to the respondent.

25 Dated at Gulu this 25th day of October, 2018

Stephen Mubiru
Judge,

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