

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0068 OF 2016
(Arising from Pader Grade One Magistrate's Court Civil Suit No. 027 of 2014)

5 **1. OYET BOSCO }**
 2. ANYWAR CHARLES } APPELLANTS

VERSUS

10 **ABWOLA VINCENT (suing through }**
 attorney TOO-OAYA FRANCIS) } RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The respondent sued the appellants jointly and severally for a declaration that he is the owner of land under customary tenure, measuring approximately 150 acres, situated at Parakaka Ward, Golo Parish, Latanya sub-county, Pader District, an order of vacant possession, a permanent injunction, general damages for trespass to land, interest and costs. His case was that he inherited
20 it from his late father, Too Francisco, in 1997. His late father was born on this land, lived and died on it and the respondent lived and utilised it peacefully thereafter until the dispute with the appellants that emerged during the year, 2011. In their joint written statement of defence, the appellants refuted the averments in the plaint and sought a declaration instead that he land belongs to them.

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Testifying as P.W.1 Too Ocaya Francis, a son of the respondent, stated the land in dispute belonged to his grandfather, Too Francisco. He let his sister Akello Terezina live with him on the land. In 1955, she was joined by her son Ongom Bernard, the father of the appellants. In 1985, both vacated the disputed land and returned to their place of origin in Owelle. In the year 2011,
30 they returned and claimed ownership of the land. P.W.2 Odoo Akwilino, a neighbour, testified that the respondent inherited the land from his father in 1960. In 1952, Paracico, the respondent's

father, invited his sister, the appellants' grandmother to live with him on the land. She in turn allowed the appellants' father in 1955 to live on the land. The first appellant was born on that land in 1974 while the second was born thereon in 1978. During the insurgency, the appellant migrated to Pader where both their parents died from. When the appellants returned to the land after the insurgency, the respondent stopped them from re-occupying the land.

P.W.3 Awor Arobolina testified that the appellants came to the land in dispute with their parents in 1970 and lived there until the insurgency. They returned after the insurgency and now occupy about 90 acres. P.W.4 Okwera Celestino testified that in 1955 when the appellant's grandmother Terezina Akello lost her husband in Pader, she was brought to the land in dispute by her brother Too Francis, the respondent's grandfather. She lived with him for about ten years and left for Parakaka with the appellants' father. They later returned to Pader where both died. The appellants then decided to return in 2011 resulting in the current conflict. The appellants though were born on the land in dispute. The would be last witness, P.W.5 Ayella Charles, was erroneously disqualified for having been in court throughout the testimony of the previous witnesses.

In his defence, the first appellant, Oyet Bosco, testified as D.W.1 and stated that born on the land in dispute in 1966 and has lived there since. His father settled thereon in 1945 on the invitation of the respondent's father. They lived together on the land until the insurgency. His father even inherited the respondent's mother. the land in dispute measures approximately 120 acres and neighbours that of the respondent's father. He only left the land during the insurgency in 1987 during which his father died in the year 2007 in an IDP Camp and was buried there. He returned to the land in 2008 after the insurgency. D.W.2 Anywar Charles, the second appellant, testified that the respondent's father was their grandmother's uncle. The land was vacant when their father occupied it around 1958 and they lived on it until the insurgency. They were born on that land. The dispute over it arose on their return from the IDP Camp, when the respondent demanded that they leave the land.

D.W.3 Labeja Vincent, testified that the land in dispute belongs to the first appellant. His mother settled on the land in 1945. It was her maternal home. The appellants' father inherited the respondent's mother. Each of the parties has a separate piece of land within the same area. It is

the appellants' grandfather who used to cultivate the land in dispute and the respondent's grandfather and father never undertook any activities on the disputed land. D.W.4 Oyo Andrew, a neighbour, testified that the land in dispute belongs to the appellants. The first respondent's father was born on that land in 1964. The clan attempted to stop the respondent from harassing
5 the appellants because the appellants' mother was living on the and even before the respondent was born. The respondent's land is separate from the one in dispute. D.W.5 Otim Richard, another neighbour, too testified that the land in dispute belongs to the appellants. It was vacant land when the first and second appellants' father, Ongom, occupied it in 1974. In 1945, the appellants' grandmother left her marital home and came to live on that land while the appellants'
10 father was still a child. The appellants have lived there all their lives. The respondent's land is separate from that of the appellants.

The court then visited the *locus in quo* where it recorded evidence from two persons who had not testified in court, as follows; - (i) Oyaja Bernard, L.C.III Councillor, Latanya West who stated
15 that the appellants were born on the land. The parents of the appellants and the respondent lived in harmony on the land. They only left the land during the insurgency. The respondent's father came onto the land in 1980; (ii) Odong Lino, who stated that the appellants' father Ongom Tony acquired the land in 1970 and the appellants were born on the land. They lived on the land until the insurgency. The dispute was sparked off by their return after the insurgency. The court then
20 prepared a sketch map of the land in dispute.

In his judgment, the trial magistrate found that the respondent had proved on the balance of probabilities that he is the owner of the land in dispute. The land belonged to the respondent's grandfather who invited the appellants' grandmother and therefore the appellants could not have
25 acquired it by inheritance. The respondent was declared owner of the land, a permanent injunction issued against the appellants, an order of vacant possession and costs of the suit.

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

- 30 1. The trial Magistrate erred in law and fact when he found that the plaintiff was the lawful owner of the suit land.

2. The trial Magistrate erred in law and fact when he decided that the appellants were trespassers on the land.
3. Had the trial magistrate properly addressed his mind to the evidence on record, he would have arrived at a different conclusion.

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In his written submissions, counsel for the appellants, Mr. Ocorobiya Lloyd, argued that the evidence before the trial court established that the appellants' grandmother and father settled on the land in 1955. They left the land only in 1985 as a result of the insurgency. Thirty years was too long a period of occupancy to be characterised as a license. Customary land can be acquired
10 by gift. The trial court should have found instead that the land in dispute was given to the appellants' grandmother as a gift *inter vivos*. The appellants are in occupation of the land which is distinct from that occupied by the respondent. He prayed that the appeal be allowed.

In response, counsel for the respondent, Mr. Owor Abuga David submitted that the appellants
15 initially claimed that their father obtained the land in dispute as vacant virgin land yet evidence at the trial established that the respondent's father, Too-Francisco, owned the land and permitted his sister Akello Terezina to reside on the land. She came with the appellants' father. It was not a gift of land. She lived on the land for about ten years and then left. The appellants could not inherit land which never belonged to their grandmother or father. Since the appellants occupy the
20 land without the consent of the respondent, they were rightly found to be trespassers.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *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
30 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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Both grounds of appeal are too general and offend the provisions of Order 43 rules (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree
10 appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the
15 appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621; Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). That on its own would have disposed of this appeal but I thought it necessary to consider the merits of appeal under the general duty of this court to subject the
20 evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.

In the first place, the court below committed a procedural error at the *locus in quo* when it recorded evidence from two persons who had not testified in court; - (i) Oyaja Bernard, L.C.III
25 Councillor, Latanya West and (ii) Odong Lino. Visits to a *locus in quo* are essentially for purposes of enabling trial magistrates understand the evidence better. They are intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only.
30 The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run 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
5 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. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the
10 court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for
15 any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have
20 decided to disregard the evidence of the two "independent witnesses," since I am of the opinion that there was sufficient evidence to support a decision, independently of the evidence of those two witnesses.

As regards the manner in which the trial court evaluated the evidence, an appellate court will be
25 reluctant to reject findings of specific facts, particularly where the findings are based on the credibility, manner or demeanour of a witness. However, an appellate court will far more readily consider itself to be in just as good a position as the court below to draw its own inferences from findings of specific facts where such findings are not based on demeanour of the witness. Assessment of evidence is an evaluation of the logical consistency of the evidence itself. When a
30 finding of fact depends on a matter such as the logical consistency of the evidence rather than the manner of the witness, an appellate court may be more readily willing to reject a finding of a

specific fact (see *Benmax v. Austin Motor Co. Ltd [1955] AC 370* and *Faryna v. Chorny [1952] 2 D.L.R. 354*).

It appears to me that the trial court came to the conclusion it did based on the logical consistency of the evidence rather than the manner of the witnesses. This court therefore is in just as good a
5 position as the court below to draw its own inferences from findings of specific facts since the findings were not based on demeanour of the witness. In agreement with the trial court, I find that the fact that the appellant's grandmother Akello Terezina returned from her marriage in Owelle later to be joined by her son, Ongom Bernard, the appellants' father who by then was a young boy, a more plausible version than the claim that their father occupied the land in dispute
10 as virgin vacant land. This is because it is was not disputed by the appellants that she was a sister to Too-Francisco and that at one time she was married and lived at Owelle.

That being the case, from that finding of a position common to both parties then the trial court had to determine what kind of relationship was created when the respondent's father, Too-
15 Francisco who owned the land, permitted his sister Akello Terezina to reside on the land sometime before the year 1955, when she was joined by her son Ongom Bernard, the father of the appellants. It is contended by the appellants that it was a gift *inter vivos* by brother to sister while the respondent contends that it was a permission to live on the land temporarily and that both Akello Terezina and her son Ongom Bernard vacated the land in 1985, and returned to their
20 place of origin in Owelle only for the appellants, who are sons of the latter, to return to the land in dispute during the year, 2011.

That the appellants never pleaded the grant of a gift to their grandmother as part of their defence was cured by the fact that it was the version presented by facts introduced by the respondent
25 during the hearing, both parties led evidence canvassing this set of facts. In any event, the framing of issues is not adjudicatory process nor it is a decisional process in itself. Framing of issues in the trial of the suit facilitates adjudication and decision in the case. Issues are framed to identify the crux areas of controversy and focus on them. The object is to shorten the arena of dispute, and to ascertain the real dispute between the parties. The issues can be framed or altered
30 at any stage thus framing of issues has to be a free exercise so long as the issues stem from the pleadings or evidence and bring out the points in controversy. It is in the interest of all the parties

that appropriate issues encompassing the entire controversy and focusing the material aspects thereof are framed and decided.

It is noteworthy that apart from the fact that it is Too-Francisco who sometime before the year 1955 invited and permitted his sister Akello Terezina to reside on the land, none of the parties adduced any direct evidence of the terms of that invitation and permission. The nature of rights conferred in the circumstances can only be determined from the conduct of the parties thereafter. It is trite that use of land by express or implied permission or license cannot ripen into ownership by prescription. But use under a claim of right will be adverse and may ripen into ownership by prescription.

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The evidence adduced before the trial court was to the effect that Akello Terezina had lost her husband when she left Owelle to settle on the land in dispute at the invitation of her brother, Too-Francisco. Given those circumstances, there was no realistic hope of Akello Terezina returning to the place of her marriage or reasonable prospects of re-marriage, and even if they existed, the period when she would re-marry was uncertain. The implication is that the period for which she was to reside on the land was indeterminate.

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During her stay on the land, there is no evidence of any restrictions imposed by Too-Francisco on her user of the land. The facts suggest that she had exclusive possession since she was able in turn to allow her son, Ongom Bernard to live on the land and to raise there from a family of his own. In his own testimony, P.W.1 Too Ocaya Francis, a son of the respondent, stated that the appellants' father settled on the land during the year 1955 and lived there on until 1985 when he voluntarily vacated and returned to Owelle (although the appellants dispute this and claim that it is insurgency which forced him off the land). Whatever the case may be, it is a fact that the respondent's father Ongom Bernard lived on the land for over thirty years. That period cannot be described as temporary occupancy, more so considering that fact that all the appellants were born on this land during that period. As a matter of common knowledge, a generation averages about 25 - 30 years from the birth of a parent to the birth of a child. Occupancy for an entire generation interval cannot be described as temporary occupancy.

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On the other hand, considering that the giving of gifts is a physical symbol of a personal relationship and an expression of social ties that bring individuals together, if the relationship between the donor and the donee at the time of giving is personal, then it is more likely to be a gift (see *Muyingo John Paul v. Abasi Lugemwa and two others, H.C. Civil Suit NO. 24 of 2013*).

5 A gift *inter vivos* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift (*Ovoya Poli v. Wakunga Charles, H. C. Civil Appeal No. 0013 of 2014*). Customary law requires no writing for the transfer of land, whether by way of sale or by way of
10 gift. For a gift *inter vivos* to be perfected, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift.

In this case, the facts before the trial court established that; the owner of the land Too-Francisco permitted his sister, the appellants' grandmother to live on the land for an indeterminate period of
15 time; the owner and grantee were brother and sister and the permission was granted in consideration of that personal relationship; she thereafter lived on the land of the next thirty years in turn allowing her son, Ongom Bernard to raise a family of his own on the land; there is no evidence to show that during their stay on the land, Too-Francisco ever imposed any restrictions on either Akello Terezina or Ongom Bernard in their user of the land, suggesting that
20 both had exclusive possession and user of their respective holdings. These circumstances are consistent with a gift of land as opposed to a license to use land. From the facts established by circumstantial evidence of the parties' conduct, it can be inferred that Too-Francisco had the capacity and intended to give the land as a gift *inter vivos* to his sister Akello Terezina, he delivered the gift and Akello Terezina, the appellants' grandmother, took possession thereby
25 perfecting the gift. The requirements of a gift *inter vivos* were fulfilled and the land became Akello Terezina to be subsequently succeeded to by Ongom Bernard and then the appellants.

Although the respondent claimed that the two Akello Terezina and Ongom Bernard vacated the land on their own volition in 1985, the appellants contend that both were forced off the land by
30 the breakout of insurgency. According to section 56 (1) (j) of *The Evidence Act*, a court may take judicial notice of the commencement, continuance and termination of hostilities between the

Government and any other State or body of persons. In such cases, the court may resort for its aid to appropriate books or documents of reference. By virtue of that provision, this court takes judicial notice of the fact that from the middle of the year 2004 onwards, rebel activity dropped markedly in the entire Northern Region of Uganda, and in mid-September, 2005, a band of the active remnants of Lord's Resistance Army fighters, led by Vincent Otti, crossed into the Democratic Republic of Congo. Thereafter, a series of meetings were held in Juba starting in July, 2006 between the government of Uganda and the LRA (see Wikipedia, "*Lord's Resistance Army insurgency*" at https://en.wikipedia.org/wiki/Lord%27s_Resistance_Army_insurgency, visited 18th September, 2018). The implication is that in 2006, northern Uganda was nearing the end of the brutal Lord's Resistance Army insurgency (see IRIN, "*How the LRA still haunts northern Uganda*," at <http://www.irinnews.org/analysis/2016/02/17/how-lra-still-haunts-northern-uganda>, visited 23rd October, 2018). I find this to be consistent with the appellants' version that they together with their grandmother and father were forced of the land by insurgency only to return during the year 2011, after the disbanding of the I.D.P Camps at the end of the Lord's Resistance Army insurgency.

Although it is trite law that all rights and interests in unregistered land may be lost by abandonment, it generally requires proof of intent to abandon; non-use of the land alone is not sufficient evidence of intent to abandon. The legal definition requires a two-part assessment; one objective, the other subjective. The objective part is the intentional relinquishment of possession without vesting ownership in another. The relinquishment may be manifested by absence over time. The subjective test requires that the owner must have no intent to return and repossess the property or exercise his or her property rights. The court ascertains the owner's intent by considering all of the facts and circumstances.

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When the appellants vacated the land as a result of the insurgency, that did not terminate their ownership of the land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before (see *John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*;). Similarly, the passage of time in and of itself cannot constitute abandonment. For example, the non-use of an easement for 22 years was insufficient on its own, to raise the issue of intent to abandon in the case of *Strauch v. Coastal State Crude Gathering*

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Co., 424 S.W. 2d 677. The temporary abandonment of the land by the appellants in the instant case not having been voluntary, their rights as owners were revived when they returned after the insurgency. When the court visited the *locus in quo* as illustrated by the sketch map drawn thereat, the entire land in dispute was occupied by the appellants while the respondent occupied the adjacent piece of land, just as they had before the insurgency.

In the final result, the appeal is allowed. The judgment of the court below is set aside. Instead the suit is dismissed with costs of this court and the court below, to the appellants against the respondent.

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Dated at Gulu this 25th day of October, 2018

Stephen Mubiru

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Judge,