

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0003 OF 2005
(Arising from Nebbi Chief Magistrates Court Civil Suit No. 0024 of 2013)

1. AFARD NEBBI }
2. EZROM OKER } APPELLANTS

VERSUS

ALEX MANANO AJOBA RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

By a plaint dated 26th June 2003 and filed in court on the same day, the respondent sued the appellants for recovery of land measuring approximately 30 by 40 metres located at Boma Ground village, Central Ward Nebbi Town Council next to the then Local Administration Police Block, general damages for trespass to land, special damages and costs. He also sought orders of vacant possession of the land. Briefly his case was that he had during the 1950s obtained the land *inter vivos* under customary tenure from his now deceased parents, Ajoba Raphael and Angeyo Anna. He planted a tree on the plot of land for provision of a shade and conducted trade, among other activities, on this land. He was therefore surprised to learn on or about 25th April 2003 that the second appellant had sold that plot of land to the other two appellants. The first and second appellants proceeded to construct a building on the land against his protests, hence the suit.

In their joint written statement of defence dated 7th July 2003 and filed in court on 9th July 2003, the appellants denied the respondent's claim. The second appellant contended that he had been allocated the land by the government during 1971 and had occupied and utilized it undisturbed since then until the suit by the respondent in 2003. By the time it was allocated to him, it was

vacant and did not belong to anyone. The second appellant indicated he would raise a preliminary objection at the trial since the plaint did not disclose a cause of action against him. The first appellant raised the defence of bona fide purchaser for value without notice.

At the trial which began on 25th March 2004, the respondent testified that the land in dispute had been given to him by his father in 1950 and he immediately began cultivating the land while occupying part of it. He constructed the house in 1969. He was surprised when he returned home on 25th April 2003 to find construction material; bricks and stones, deposited on his plot of land. He reported to the L.C.I of the area but the following day he found construction had began and he was informed the second appellant had sold the land to the first appellant. All attempts by the area L.C.I to broker a settlement failed. Under cross-examination, he said the land belonged to him because he had inherited it from his father and up to the time of the trial, he was still cultivating part of it. From 1979 to 1999, he left the land to fallow and the houses he had constructed thereon collapsed in 1986.

He called four witnesses in support of his case. P.W. 2, the respondent's clans-mate, testified that the land originally belonged to their grandfather, Pithu Palwo, who gave it to the respondent's father who in turn gave it to the respondent. The plaintiff planted a mango tree on the land and constructed a house on it. The second appellant trespassed on the land by building a house thereon without the consent of the respondent. P.W.3 another clan member of the respondent, testified that the land belonged to the respondent's father Raphael and upon his death it was inherited by the respondent. Around 1974, the respondent stopped using the part now in dispute and it remained vacant until the second appellant gave it to the first appellant who began to construct on it. P.W.4 who was the L.C.I Chairman at the time the dispute sprouted testified that the respondent had in the past used the land for cultivation of crops like cotton. During 1969, the respondent had established a bar named "Natonzi" on the disputed land. Later when the appellants began activities on the land, he tried to stop the construction that was going on but the appellants were adamant. P.W.5 the Chairman Nebbi Town Council Land Committee, testified that during his routine inspection of physical development within the Town Council he came to know about the dispute over this land. His attempt to mediate the dispute failed. The respondent then closed his case on 13th May 2004.

The appellants opened their case on 15th June 2004 with the testimony of D.W.I, the Program Assistant of the first appellant. He testified that second appellant sold the disputed land to the first appellant on 18th May 2003. Because of the dispute that erupted over the land after they began construction on the land, they sought the intervention of the Town Council which permitted them to continue with the construction. At the time they bought the land, the second appellant had a garden and some trees on the land. Before purchasing the land, the organization neither made inquiries from the neighbours nor the area L.C.I about the ownership of the land. D.W.2, a brother in law to the second appellant and one of the residents in the area testified that the land in dispute belonged to his family but that it was given to the second appellant in whose possession it was henceforth for over thirty years before he sold it to the first appellant. Under cross-examination he stated that the land was given to the second appellant by the local chiefs. D.W.3, the second appellant testified that he was given the land in dispute by the County Chief of Nebbi during 1971 when he was posted to Nebbi and had nowhere to stay. The land had no structures on it and was covered in bush. He was encouraged by P.W.3 to build on the land belonged it belonged to them. He occupied the land without any problem and at one time when he attempted to sell it the respondent was one of the witnesses to the agreement of sale except that the transaction fell through after the purchaser was informed the area was reserved for offices. He had been in possession of the land until his decision to sell it to the first appellant. D.W.4 an employee of the Town Council who has lived in Nebbi since 1971, testified that he used to see the second appellant's wife growing crops on the disputed land. D.W.5 a retired civil servant who used to work in West Nile but based in Nebbi testified that the second appellant had in the past allowed public officers to carry out agricultural outreach activities on part of the disputed land. The appellants closed their case on 25th June 2004 and the court proceeded to visit the locus on 2nd July 2014 after which the suit was adjourned for written final submissions and judgment.

In his judgment, the trial magistrate found that the second appellant had not produced any evidence of allocation of the disputed land to him as he claimed in his testimony. When the court visited the locus in quo and was shown the boundaries, it discovered that what remained of the land was being cultivated by the respondent. The court found that trespass to the land began with

the first appellant's construction of a building on the land and therefore the action was not barred by limitation. On the balance of probabilities, the respondent had proved ownership of the land. The trial court found that the first appellant was not a bonafide purchaser for value of this land since its officers had not made any inquiries from the neighbours about the status of ownership of this land before they bought it. It found that the respondent had not established any claim as against the second appellant and therefore dismissed the suit as against him with costs. It ordered the first appellant to compensate the respondent for the value of the land and awarded the respondent the costs of the suit.

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

1. The learned trial magistrate erred in law and fact when he failed to adequately evaluate the evidence adduced hence reaching a wrong decision.
2. The learned trial magistrate failed to appraise the doctrine of limitation.
3. The trial magistrate erred in law when he awarded exorbitant costs to the plaintiff.

Submitting in support of the appeal, counsel for the appellant M/s Mwesigye, Mugisha and Company Advocates argued that the trial magistrate failed to consider contradictions and inconsistencies in the respondent's evidence regarding how he acquired the land and the activities he carried out thereon. He also misdirected himself regarding the second appellant's exhibit of the agreement the respondent had signed as a witness which showed the second appellant was owner of the disputed land. He had totally ignored evidence of P.W.2 to the effect that the second appellant had been in undisturbed possession of the land for over thirty years. In the alternative, if the second appellant's entry onto the land was unlawful, having occurred in 1971, the trial magistrate erred when he did not decide that the respondent's action was barred by limitation. Lastly, counsel argued that the costs awarded to the respondent were exorbitant as a result of the trial magistrate's failure to exercise his discretion judiciously.

In reply, counsel for the respondent M/s Donge and Company Advocates argued that the trial court had properly evaluated the evidence and had come to the correct conclusion. He argued that the appellant had claimed to have been allocated the land in dispute yet he had not produced any documentary evidence of such an allocation. On the other hand the respondent claimed to be

the customary owner of the land. Not only did he produce witnesses who testified to this but also the court had established that at the time of the trial he was still in occupation of part of the disputed land. The first appellant could not claim to have been a bonafide purchaser of the land when the inquiries he made before such purchase were perfunctory. He argued further that the appellant could not raise the question of limitation on appeal since he had not raised it during the trial. In the alternative, that the acts of trespass began on 25th April 2003 when construction material was deposited on his land and therefore when he filed his suit on 26th June 2003, his action was not time barred. Lastly, that the trial court did not err when it awarded costs to the respondent since costs follow the event

The nature of the duty of a first appellate court was appropriately stated in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he 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 the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, 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.

The first ground of appeal questions the manner in which the trial court went about evaluation of the evidence before it. It is trite law that there is no set form of evaluation of evidence and the manner of evaluation of evidence in each case varies according to the peculiar facts and circumstances of the case (see *Mujuni Apollo v Uganda S.C. Criminal Appeal No.46 of 2000*). Therefore, while evaluating the evidence before it, a trial court may adopt any reasonable course to arrive at an objective finding in accordance with its judicial conscience bearing in mind that it can only make a finding in favour of the plaintiff, in those cases where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, only if a reasonable man might hold that the more probable conclusion is that for which the plaintiff contends. The court should be careful not to base its findings on surmises and conjecture since where the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then the plaintiff will have failed to prove his case (see *Lancaster v Blackwell Colliery Co. Ltd 1918 WC Rep 345*).

If the conclusion arrived at by the trial court is only backed by assertions rather than by acceptable reasoning based on the proper evaluation of evidence and suffers from the infirmity of excluding, ignoring and overlooking material aspects of the evidence, which if considered in the proper perspective would have led to a conclusion contrary to the one taken by court, then the trial court would have failed in its duty to make a proper evaluation of the evidence. The appellate court will interfere with findings of fact if it is established that they were based on no evidence, or on a misapprehension of the evidence, or that the trial court demonstrably acted on the wrong principles in reaching those findings (See *Peters v Sunday Post Ltd [1958] E.A. 429*).

In this regard, counsel for the appellant argued that the trial magistrate failed to consider contradictions and inconsistencies in the respondent's evidence regarding how he acquired the land and the activities he carried out thereon. He also misdirected himself regarding the second appellant's exhibit of the agreement the respondent had signed as a witness which showed the second appellant was owner of the disputed land. He also totally ignored evidence of P.W.2 to

the effect that the second appellant had been in undisturbed possession of the land for over thirty years. It is for that reason that this court will embark on a re-appraisal of the evidence.

The respondent's claim before the trial court was based on customary ownership of the land in dispute acquired by way of inheritance in 1950. This was supported by the testimony of both PW.2 and P.W.3 who explained that the land originally belonged to the respondent's grandfather Pithu Palwo upon whose death it passed to the respondent's parents Ajoba Raphael and Angeyo who when they died, the respondent inherited it. These witnesses together with P.W.4 testified that the respondent had proceeded to cultivate various crops on the land, planted some trees, at constructed houses thereon and at one time conducted the business of a bar on the land. This part of the respondent and his witnesses' testimony was not discredited during the appellants' cross-examination.

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 land 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.

Although proof of customary ownership of land ordinarily requires establishing the nature and scope of the applicable customary rules and their binding and authoritative character and acquisition in accordance with those rules, of a part of land to which such rules apply, in a case such as this where the parties did not dispute the fact that the disputed land was one in respect of which parcels could be recognised as subdivisions belonging to a person or a family and hence

that it was held under customary tenure, ownership could be sufficiently proved with evidence of user (see *Marko Matovu and two others v Mohammed Sseviiri and two others, S.C. Civil Appeal No. 7 of 1978*).

I observe that the trial court was not presented with evidence suggesting a conflicting version in the history of ownership of this land between 1950 and 1971. Re-considering and balancing probabilities as to the value of this evidence viz-a-viz the appellants' combined cross-examination, I find that a reasonable man might hold that the more probable conclusion is that for which the respondent contended. The conclusion that the respondent had acquired the land in dispute through customary inheritance was not based on surmises and conjecture but rather on evidence. I am not persuaded that in coming to this conclusion the trial court was laboring under any misapprehension of the evidence, or that it demonstrably acted on the wrong principles in reaching that finding. I am therefore satisfied that the respondent proved on the balance of probabilities that between 1950 and 1971, he owned the disputed land under customary tenure.

What appears to be contested is the status of ownership of this land from 1971 onwards. The respondent having succeeded in proving his customary ownership of the land in dispute between 1950 and 1971, it is contended that he had abandoned the land and that it was vacant when during or around 1971 it was allocated to the second appellant. In his testimony, the respondent stated that from 1979 to 1999, he left the land to fallow and the houses he had constructed thereon collapsed in 1986. According to P.W.3, around 1974, the respondent stopped using the part now in dispute and it remained vacant until the second appellant gave it to the first appellant who began to construct on it. The question then is whether this lack of activity on the land that occurred around 1974 amounted to abandonment such as would have terminated the respondent's customary ownership of the land.

It is trite law that all rights and interests in unregistered land may be lost by abandonment. For example, and by way of analogy, under section 37 (1) (a) of *The Land Act, Cap 227*, when a tenant by occupancy voluntarily abandons his or her occupancy, the right of occupancy lapses. Under that section, abandonment occurs where he or she 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 three

years or more. Although in respect of tenancies by occupancy abandonment is deemed to have occurred after the lapse of three years of leaving the whole of the land unattended to by occupant or a member of occupant's family or his or her authorised agent, there is no similar temporal delimitation in respect of land held under customary tenure.

At common law, abandonment as a mechanism of termination of interests in unregistered land 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. A person against whom abandonment is alleged may testify as to intent but cannot evade the effect of his or her conduct. The court ascertains the owner's intent by considering all of the facts and circumstances. The passage of time in and of itself cannot constitute abandonment. For example, the non-use of an easement for 22 years was insufficient on its own, to raise the issue of intent to abandon in the case of *Strauch v Coastal State Crude Gathering Co.*, 424 S.W. 2d 677.

This doctrine enables extinguishment of dormant interests in land on the basis of non-use coupled with intent to abandon. A summary of the doctrine of abandonment was presented in the case of *Anson v Arnett*, 250 S.W. 2d 450, thus; -

To abandon is to give up, desert, or to relinquish voluntarily and absolutely. The question of abandonment is one of fact to be determined in each case from all the evidence in the record. An essential element of abandonment is the intention to abandon, and such intention must be shown by clear and satisfactory evidence. Abandonment may be shown by circumstances, but they must disclose some definite act showing intention to abandon. The non-use of a right is not sufficient in itself to show abandonment, but if the failure to use is long, continued and unexplained, it gives rise to an inference of intention to abandon.

In the instant case, the respondent's evidence was that he had used the land in dispute partly for cultivation and partly for construction of houses and for the business of a bar. In 1974, he let the part now under dispute to fallow as a result of which there was no apparent activity thereon until 1986 and beyond, when even the houses he had constructed thereon collapsed. Land that is the subject of cultivation may of course naturally be left to fallow as one of the renowned practices of conservation agriculture. In this case though, the question is whether the long period on non-use that stretched from 1974 until 2003, a period of 29 years, when the first appellant began construction on the land can be reasonably explained as a deliberate act of fallowing or rather as evidence of intent to abandon the land instead. In his testimony while under cross-examination at page 3 of the record of proceedings, the second appellant explained that between 1979 and 1999, he had left the land to fallow. He however did not explain what activities, if any, he was carrying out on the land from 1979 to 2003 when the first appellant began construction on the land.

Although mere non-use of land is insufficient to prove abandonment, however evidence of long and unexplained non-use is admissible as to intent. Where the failure to use the land is long, continued and unexplained, it gives rise to an inference of an intention to abandon, but in my view, this is an inference that should not be readily made based only on the preponderance of the evidence applicable in civil suits but rather on clear and satisfactory evidence such as would be required in the proof of fraud in civil suits. This is because the doctrine involves a deprivation of interests in land and as such it would be appropriate to require evidence that meets a heightened standard of proof above a mere preponderance of evidence, though not as high as that required in criminal cases.

That agricultural land was left to fallow for 20 years (from 1979 – 1999) and thereafter followed by an unexplained period of non-use (1999 – 2003) is in my view an unsatisfactory explanation of the long period of non-use. The evidence adduced by the respondent in this case therefore did not satisfactorily explain his long no-use of the land. However, despite that shortcoming, the inference of abandonment cannot be readily made considering that there was evidence established by the visit to the *locus in quo* that respondent did not leave the whole of the land unattended but continued to occupy part of it until the date of the court's visit. This conduct, of remaining in occupation of part of the land, is inconsistent with any inference of intentional

relinquishment of possession without vesting ownership in another, with no intent to return and repossess the land or exercise his or her property rights in respect thereto, as would be required to support an inference of abandonment. In absence of a statutory delimitation of a period of non-use such as the one which applies in respect of tenancies by occupancy, or any under the common law, I am unable based on the facts of this case, to infer that the respondent's non-use of the land in dispute for a period of 29 years, on its own is conclusive evidence of intent to abandon the land. I have not found a specific and definite act on the part of the respondent showing intention to abandon the disputed land. For that reason, I find that the respondent remained a customary owner of the land in dispute despite the long duration of his non-use of this part of his land.

That being the case, the only ways in which the second appellant could have lawfully acquired ownership of the disputed land was by purchase for consideration from the respondent, or by way of gift from the respondent, or inheritance. He could also have acquired ownership by adverse possession. The latter is the mode of acquisition which he advanced as the basis of his defence during the trial. Acquisition of land under the doctrine of adverse possession is recognized in all common law jurisdictions. The concept and elements of adverse possession are almost the same except that there is no clear pattern as regards the length of limitation periods, which vary from 10 years to 30 years.

In the eye of law, an owner of land is deemed to be in possession of the land so long as there is no intrusion. Non-use of the land by the owner, even for a long time, will not affect his or her ownership. But the position will be altered when another person takes possession of the land and asserts rights over it and the original owner omits or neglects to take legal action against such person for years. The process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner. Uninterrupted and uncontested possession for a specified period, hostile to the rights and interests of true owner, is considered to be one of the legally recognized modes of acquisition of ownership. The Privy Council in *Perry v Clissold* [1907] AC 73, at 79 stated as follows; -

It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly

good title against the entire world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title.

In the instant appeal, it is contended by the appellants that during 1971 or thereabouts, the second appellant entered into adverse possession of the disputed land and therefore any rights and interests the respondent may have had therein, were terminated by the lapse of more than 12 years, without the respondent having taken any step to assert his title by process of law within the period prescribed by *The Limitation Act, Cap 70*.

The rationale for the doctrine of adverse possession rests broadly on the considerations that title to land should not be in doubt for long. Society will benefit from someone making use of land which the owner leaves idle and further that that persons who come to regard the occupant as owner may be protected (see William B Stoebuck, “*The Law of Adverse Possession in Washington*”, (1960) 35 Wash. L. Rev. 53). The maxim that law and equity do not help those who sleep over their rights is invoked in support of prescription of title by adverse possession. In other words, the original title holder who neglected to enforce his rights over the land cannot be permitted to re-enter the land after a long passage of time. A situation of *de facto* possession lasting for a long period creates certain expectations and it would be unjust to disappoint those who trust on them.

The other justification is that the doctrine tends to promote a more efficient allocation of land, as propounded by R. Posner in his *Economic Analysis of Law*, 6th edn, New York: Aspen Publishers, 2003 at p 83. Posner argues that if the squatter values the land more highly than the abandoning owner, (who presumably values it at zero), the resulting allocation is more efficient. This view is supported by R. Cooter and T. Ulen in their book, *Law and Economics*, New York: Harper Collins, 1988 at p156. However, other commentators have argued that leaving land idle is not necessarily inefficient, since it “may serve the beneficial purpose of holding it until its best use becomes clear” (see J.E. Stake, *The Uneasy Case for Adverse Possession*, (2001) 89 Georgetown LJ 2419, 2436). It is also argued that adverse possession may encourage over-

exploitation of wild lands. It has also been criticized as irrational, illogical and wholly disproportionate (see for example *A Pye (Oxford) Ltd v United Kingdom* [2002] 3 All ER 865, [2002] 3 WLR 221, [2003] 1 AC 419 and *State of Haryana v Mukesh Kumar & Others* [2012] AIR SCW 276). It has further been criticized on account of not providing compensation to the owner for the loss of title, for not drawing a distinction between honest and dishonest encroachers, allowing those who grab land by force or otherwise without semblance of *bona fides* and without colour of right to get title and for not protecting those owners of land who may not be physically available to evince an intention towards disrupting hostile possession.

Despite the criticism which is directed at policy issues which are a matter for the legislature, the doctrine of adverse possession is part of the law to be applied by courts and happens to be more relevant, handy, practical and forceful in respect of unregistered land than with registered land. Under customary tenure, a multitude of people, especially those in rural areas belonging to agriculturist families take possession of land by virtue of inheritance, purchase or otherwise without having title deeds. They live in their ancestral houses or enjoy possessory rights over parcels of land from times immemorial, *bona fide* believing that they or their ancestors are the true owners of the land. Lack of a legal regime under which titles are registered, with only the possibility of issuance of certificates of customary ownership, and the shoddy manner in which land records are maintained by the families, makes it difficult for those entering into land deals in respect of such land to know, even through reasonable diligence, the true owner of land and the history of ownership. The means of knowing whether the land in question is land managed by the District Land Boards or whether someone else has superior title over the land are not readily available, at least the ordinary people would find it difficult not know or find such information. Even legitimate owners who may have only the element of possession as the foundation for assuming or defending their rights may suffer in absence of the doctrine of adverse possession. That possession is “nine points of law” therefore applies with greater force to land held under customary tenure.

Whereas the uncertainty inherent in establishing current ownership and the history of ownership of land is eliminated by a system of registration so that the rationale for the doctrine of adverse possession is thereby weakened in respect of registered land, in order to resolve problems arising

from informal conveyancing practices rife in dealings in land owned under customary tenure, the doctrine assumes immense importance. It is not uncommon for owners under customary tenure to sell their land without conveyancing formalities. Some parcels of land have been bought and sold off over decades, without a consistent paper trail. The doctrine provides a convenient method for recognising the claim of the person in long-standing and unchallenged possession, to restore the marketability of the land. Policy indicates that it is better to recognise a long-standing possessory claim, even by a bad faith adverse possessor, than to leave the land effectively *res nullius*.

Adverse possession in respect of registered land is based on the concept of “acquisitive prescription.” In the case of registered land, under sections 78 – 91 of *The Registration of Titles Act*, a person claiming title by adverse possession may cause an entry on the register where the registered proprietor makes no objection to the application or cannot be contacted. Although section 16 of *The Limitation Act* provides that at the expiration of the period prescribed by the Act for any person to bring an action to recover land, the title of that person to the land is extinguished, in the case of registered land the owner’s title is extinguished, not by the operation of a limitation Act, but only by alteration of the register following an application by the adverse possessor for registration in accordance with *The Registration of Titles Act*. The Registrar must attempt to notify the registered owner, who is entitled to object to the application and effectively to veto it. The right to object may be exercised by lodging a caveat. The effect is that registration of title acquired by adverse possession is confined to cases where the registered owner has died, has sold the land without conveyancing formalities or has abandoned the land and has no interest in contesting the claim. However, for public policy reasons, the possessor has to claim his or her ownership, it cannot be granted automatically. The adverse possessor acquires ownership upon registration of the fact of adverse possession of the land on the register, and not before. Acquisitive prescription results in rectification of the register by allowing the registration of claims based on long-standing possession. In respect of registered land, limitation bars only the remedy but does not extinguish the title, until registration.

On the other hand, in respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the

concept of “extinctive prescription” reflected in section 16 of *The Limitation Act*. As opposed to “acquisitive prescription,” where title is not acquired until the adverse possessor is registered, “extinctive prescription” extinguishes all sorts of rights and actions and the adverse possessor of land becomes owner of the land when the right of action to terminate the adverse possession expires. The adverse possessor acquires ownership *ex lege*, i.e. registration of the fact of adverse possession of the land is not required for the adverse possessor to acquire ownership through adverse possession. Once the statutory period has expired, the ownership of the person dispossessed will be extinguished and his or her cause of action lost. In the case of unregistered land, limitation does not merely extinguish ownership of the owner but confers a positive ownership on the adverse possessor.

According to the subjective theory, acquisition by adverse possession presupposes a lack of activity of the owner not making use of his or her right. This lack of activity or omission amounts to an abandonment or neglect of his or her rights or to lack of diligence, whereas the person possessing adversely deserves protection for his or her diligence. According to the objective theory, “acquisitive prescription” or adverse possession aims at protecting interests of the society as a whole. The society’s interest in the certainty of legal situations is put at risk when stale claims are brought. Furthermore, a *de facto* situation lasting for a long period creates an appearance and certain expectations and it would be unjust to disappoint those who trust and act on the basis of such expectations.

The effect of limitation in the context of adverse possession was explained in the case of *Jandu vs. Kirpal and another* [1975] EA 225 at 323, as follows;

By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner.

Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land. For example in *Rwajuma v Jingo Mukasa*, H.C. Civil Suit No. 508 of

2012, the plaintiff bought an unregistered interest in land on 15th June 1996. She and her deceased husband took possession and constructed a homestead, planted a banana plantation, grew crops on the land and also grazed livestock thereon. Unknown to them, the land had previously belonged to a one Yowana Mukasa who had acquired it on 11th August 1960. Later on 13th April 2012, letters of administration to the estate of Yowana Mukasa were granted to the defendant who sought to evict the plaintiff from the land claiming she was a trespasser. The court found that with the passage of time, there had evolved a set of competing rights in favor of the plaintiff who had, for a long period of time, cared for the suit land, developed it, as against the defendant who had abandoned it. Therefore, invoking the provisions of Section 5 of *The Limitation Act* the court held that as a rule, limitation not only cut off the defendant's right to bring an action for the recovery of the suit land that has been in adverse possession of the plaintiff for over twelve years, but also under Section 16, of *The Limitation Act*, the plaintiff as the possessor was vested with title.

The notion of possession is of pivotal importance under the doctrine of adverse possession. It is satisfied if two elements are present; first the *corpus*, which is the factual exercise of the rights derived from the ownership, i.e. the objective physical possession such as an owner would have which means that the possessor should have material control and use of the land and secondly, the *animus domini*, the subjective intent of the possessor to exercise material mastery over the land on his own behalf, rather than on behalf of another person. Ownership is not to be acquired through adverse possession, if the conditions of adverse possession exist only for a section of the land where it so happens that parcel of land in question is indivisible.

Permissive possession or possession without a clear intention to exercise exclusive rights over the property is not considered as adverse possession. The essential requisites to establish adverse possession are that the possession of the adverse possessor must be neither by force nor by stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that the possession is adverse to owner. Adverse Possession requires at a minimum five basic conditions being met, to perfect the title of the adverse possessor. Possession must be unequivocal. It is equivocal when the acts of the possessor do not show his intention to behave like the real owner; when he cannot prove the *animus domini*. Adverse possession is

interrupted, if a) the owner summons the possessor in writing to surrender the land or files a suit thereto; b) the owner retains some control of the land. The possession must be held openly. Possession is clandestine if the material acts of possession are hidden from people who would have interest in knowing them. Possession must be peaceful. It can never begin by a violent act or if it started with acts of violence, the prescription starts only the day where the violence stopped. The limitation period only begins to run from the date on which forcible occupation ceased. Possession must be continuous. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner. Therefore, if the possessor cannot prove that he had the material control of the land on a regular basis, or at least with the same regularity that a real owner would have, then possession is regarded as discontinuous. Where the land is of a type ordinarily occupied only during certain times, the adverse possessor may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Exclusive use of the property; the adverse possessor holds the land to the exclusion of the true owner. In order for possession of land to ripen into ownership, it must be adverse, actual, open, notorious, exclusive, and continuous for the prescribed statutory period.

The adverse possessor must have engaged in activities capable of giving notice to the true owner such as residence, cultivation, fencing, and other improvements. Although for purposes of adverse possession, the possession need not have been acquired in good faith, in the instant case the second appellant genuinely believed that he had acquired ownership from the County Chief of Nebbi who gave him the land 1971. What was required in establishing his claim as an adverse possessor are not the circumstances in which he came to take physical possession of the land but rather that he had enjoyed adverse, actual, open, notorious, exclusive, and continuous possession of the land for the prescribed statutory period.

In this regard, the trial court found the second appellant's evidence of his activities on the land to have been unsatisfactory. The trial court found that the second appellant's evidence only established that his wife had grown crops on the land (see para. two at page 4 of the judgment). In coming to this conclusion, the trial court's analysis of the evidence suffers from an infirmity

of excluding, ignoring and overlooking material aspects of the evidence, which if considered in their proper perspective would have led to a different conclusion. In that sense, the trial court failed in its duty to make a proper evaluation of the evidence. The decision was therefore based on a misapprehension of the evidence and for that reason will be subjected to a fresh and exhaustive scrutiny.

Contrary to that finding, before the trial court was the evidence of the second appellant himself who testified that he occupied the land without any problem and at one time when he attempted to sell it the respondent was one of the witnesses to the agreement of sale except that the transaction fell through after the purchaser was informed the area was reserved for offices. He also stated that he had been in possession of the land until his decision to sell it to the first appellant. The testimony of D.W.1 was to the effect that at the time they bought the land, the second appellant had a garden and some trees on the land. The testimony of D.W.2 was to the effect that the second appellant was in possession for over thirty years before he sold it to the first appellant. The testimony of D.W.4 was to the effect that he used to see the second appellant's wife growing crops on the disputed land and that of D.W.5 was that the second appellant had in the past allowed public officers to carry out agricultural outreach activities on part of the disputed land. If believed, this evidence was capable of establishing that the second appellant had enjoyed adverse, actual, open, notorious, exclusive, and continuous possession of the land.

To counteract this evidence, the second appellant's version was that he had left the land to fallow for 20 years (from 1979 – 1999) followed by an unexplained period of non-use (1999 – 2003). The houses he had built on the land had collapsed by 1986. He had seen the second appellant who had since 1975 settled on land adjacent to the disputed land, which is separated from the disputed land by a road. This was however contradicted by PW.2 who under cross-examination at page 5 of the record of proceedings testified that the second appellant had constructed on the disputed land although he did not know under what authority. P.W.3 at page 5 of the record of proceedings stated that at the time the dispute arose, the land "in dispute was not being put to use" and that the respondent had stopped using it in 1974. This was however contradicted by PW.4 who testified at page 6 of the record of proceedings that at the time of the dispute the

respondent was using the land as a garden and was growing cotton thereon. Considering this evidence as a whole, I am inclined to find that the respondent had for nearly thirty years not utilized this land in any way. The evidence of P.W.4 to the contrary on this point, is not capable of belief.

When the trial magistrate visited the *locus in quo*, he did not record any of the observations he made. This is evident at page 13 of the record of proceedings. Nevertheless, at page 3 of his judgment, he found as follows; “when the court visited the locus the boundaries were shown and in fact the rest (of the) piece of land is to-date being utilised by the plaintiff as a garden...” This finding would confirm that at the time the court visited the *locus in quo*, there was no activity on the disputed land but rather on land the court considered to be “the rest (of the) piece of land.” The trial court’s finding that the land in dispute belonged to the respondent was based on inference from the fact that he was cultivating “the rest of the disputed land” rather than direct evidence of actual activities he was carrying on over the disputed land itself. The court did not explain how it was able to determine that what it considered to be “the rest of the disputed land” was at any time before part of the land it went to inspect as being the subject of the suit.

Faced with the two versions, it has to be determined whether the second appellant succeeded in establishing a claim of adverse possession over the disputed land considering that at the time the trial court visited the *locus in quo* there was no activity on the disputed land. The trial court had and this court has to choose between a version of possession not supported by anything visible on the ground (as advanced by the second appellant) against that of possession based on evidence of cultivation of “the rest of the disputed land” (as advanced by the respondent).

In the absence of evidence of physical occupation by any of the parties, the respondent and the second appellant, at the time of the court’s visit to the *locus in quo*, the determination of this point boils down to considering the history of conduct of each of the parties towards and in respect of this plot of land in the past, prior to that visit. On the one hand, the respondent had by admission not undertaken any activity on this land in the last nearly thirty years. On the other, the third respondent and his witnesses claimed that the respondent had undertaken various activities thereon from 1971 onwards including physical possession, cultivation, allowing public

officers to carry out agricultural outreach activities thereon and finally his attempt in 1994 to sell it to a one John Onegwa, to which transaction the respondent was one of the witnesses, except that the transaction fell through after the purchaser was informed the area was reserved for offices.

To establish adverse possession, one needs only to prove continuous possession which is not necessarily constant. Proof of possession is satisfied by evidence of control of the land on a regular basis, or at least with the same regularity that a real owner would have. If the possession is continuous, uninterrupted, peaceful, public and unequivocal, all that the law requires is that it must be open and hostile enough to be capable of being known by other parties interested in the land. In other words, the possession to become adverse to the owner must be so overt and open that the owner could, with exercise of reasonable diligence, have been aware of what was happening. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner. In the instant case, the respondent's participation as one of the witnesses to the 1994 attempt by the second appellant to sell the disputed land to a one John Onegwa, removes all doubt that the second appellant's possession of the disputed land was overt and open that the respondent could, with exercise of reasonable diligence, have been aware of what was happening on and in respect of the disputed land. The document indicates that what was on the land at the time were "trees of edible trees." This agreement was tendered as evidence relating to a transaction in respect of the disputed land. The respondent was unable to refute this through cross-examination or otherwise. The trial magistrate therefore erred in speculating that it possibly related to a different piece of land. That possibility is not supported by the evidence on record.

The finding by the trial magistrate that this agreement did not relate to the disputed plot but possibly related to another plot (see the last paragraph at page 3 and the first paragraph at page 4 of the judgment) is not supported by the evidence on record. At this point, the trial magistrate introduced surmises and conjecture in his analysis of the evidence. The evidence before him indicated that although this agreement had not been pleaded and put to the respondent during his case but was introduced for the first time during the defence case, the respondent did not object to its introduction in evidence (see page 11 of the record of proceedings). It was introduced in

evidence by the second appellant as a document relating to a previous transaction in respect of the disputed land and not any other plot of land. The third respondent was never cross-examined on it nor did the respondent make any suggestion that it related to a different plot of land, as suggested by the trial magistrate.

This being a case where the known facts are not equally consistent, comparing and balancing probabilities as to the respective value of the two versions, a reasonable man might hold that the more probable conclusion is that for which the second appellant contended. The evidence adduced by the second appellant proved that he had exercised adverse, actual, open, notorious, exclusive, and continuous possession of the disputed land, from 1971 until the year 2003 when he sold it to the first appellant as opposed to the respondent's to the effect that he had left the land to fallow for 20 years (from 1979 – 1999) followed by an unexplained period of non-use (1999 – 2003). In the circumstances, the second appellant succeeded in asserting his adverse possession of the disputed land and in refuting the respondent's claim to the land. Therefore the trial magistrate erred in his finding to the contrary. For that reason, ground one of the appeal succeeds.

With regard to the second ground of appeal, counsel for the appellant argued that if the second appellant's entry onto the land was unlawful, having occurred in 1971, the trial magistrate erred when he did not decide that the respondent's action was barred by limitation. In reply, counsel for the respondent argued that the appellant could not raise the question of limitation on appeal since he had not raised it during the trial. In the alternative, that the acts of trespass began on 25th April 2003 when construction material was deposited on his land and therefore when he filed his suit on 26th June 2003, his action was not time barred.

The second appellant's claim to the disputed land having been founded on adverse possession, discussion of limitation during the trial was inevitable. It is not a point being raised for the first time on appeal as contended by counsel for the respondent but rather it was inherent in the consideration of the impact of the second appellant's adverse possession on the respondent's ownership of the land. Indeed at page 4, paragraph 3 of the judgment of the trial court, the trial

court found that the cause of action had accrued on 25th April 2003 when construction material was deposited on the respondent's land. However, this finding is flawed for two reasons.

Firstly, the trial magistrate did not take into account the effect of the duration of the second appellant's adverse possession on the respondent's ownership of the land. Extinctive prescription operated to extinguish all sorts of rights and actions of the respondent and the second appellant as adverse possessor of the disputed land became owner when the right of action to terminate the adverse possession expired. The second appellant acquired ownership *ex lege*, once the statutory period had expired. The respondent's ownership was extinguished and his or her cause of action lost upon the lapse of the limitation period without him having taken any action in court to recover possession. Being unregistered land, limitation did not merely extinguish ownership of the respondent but also conferred ownership on the second appellant. Section 16 of *The Limitation Act* provides that at the expiration of the period prescribed by the Act for any person to bring an action to recover land, the title of that person to the land is extinguished. It lays down a rule of substantive law by declaring that after the lapse of the period, the title ceases to exist and not merely the remedy. It means that since the respondent who had a right to possession had allowed his right to be extinguished by his inaction, he could not recover the land from the second appellant as a person in adverse possession and as a necessary corollary thereto, the second appellant was enabled to hold on to his possession as against the respondent not in possession. When the title to the land of the respondent was extinguished, ownership of the land passed on to the second appellant and his adverse possessory right got transformed into ownership by operation of the law. He was henceforth clothed with the capacity to sell it, as he did to the first appellant.

Secondly, the trial magistrate misconstrued the commencement date for the period of limitation in an action relating to adverse possession. Section 5 of *The Limitation Act*, which provides for limitation of actions for the recovery of land, states as follows;

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.

This limitation is applicable to all suits for possession of land based on title or ownership i.e., proprietary title as distinct from possessory rights. Furthermore, Section 11 (1) of the same Act provides that;

No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as “adverse possession”), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue until adverse possession is taken of the land. (Emphasis added).

According to section 6 of the same Act, “the right of action shall be deemed to have accrued on the date of the dispossession.” A cause of action accrues when the act of adverse possession occurs. In *F.X Miramago v Attorney General [1979] HCB 24*, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff. If by reason of disability, fraud or mistake the operative facts were not discovered immediately, then section 21 (1) (c) of *The Limitation Act* confers an extension of six years from the date the facts are discovered. In this case, there was evidence that in 1994, the respondent appended his signature as a witness to the agreement Exhibit D.E. “D” dated 22nd April 1994 by which the second appellant first attempted to sell the disputed land. By that fact, the respondent obtained actual notice of the second appellant’s claim to the disputed land. If the respondent had hitherto been laboring under any disability, fraud or mistake, which he did not plead any way, his cause of action would have been revived by that discovery. It would have resulted in an extension of the limitation period for another six years which too ran out in the year 2000 such that when he filed his suit in April 2003, he was still out of time.

In order to benefit from that extension, the respondent needed to have pleaded that he did not and could not have discovered the relevant facts with reasonable diligence within the statutory period, because of disability, fraud or mistake. To assert a claim of disability, the respondent needed to have been ignorant of the facts and lacked the ability to have discovered the facts

earlier, he needed to have pleaded this ignorance, the lack of discovery, and how and when the facts were eventually discovered after the 12 year limitation period had expired. This is because Order 7 rule 6 of *The Civil Procedure Rules* requires that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff should show the grounds upon which the exemption from that law is claimed. This requirement was considered by the Court of Appeal in *Uganda Railways Corporation v Ekwaru D.O and 5104 others, C.A. Civil Appeal No.185 of 2007 [2008] HCB 61*, where it was held that if a suit is brought after the expiration of the period of limitation, and no grounds of exemption are shown in the plaintiff, the plaintiff must be rejected.

In any event, even in the event of disability, causes of action for recovery of land are capped at 30 years by section 21 (1) (c) of *The Limitation Act*, which provides that no action to recover land is to be brought by virtue of that section by any person after the expiration of thirty years from the date on which the right of action accrued to that person or some person through whom he or she claims. Upon re-evaluation of all the evidence adduced before the trial court and having considered it in the light of all provisions relating to limitation of actions for recovery of land, the trial court's finding that the cause of action accrued on 25th April 2003, when construction material was deposited on the respondent's land, is in total disregard of the second appellant's evidence that he had since 1971 occupied the land, his wife had grown crops on it and he had on diverse occasions allowed public officers to carry out agricultural outreach activities on it. By 2003 when the respondent filed the suit, the second appellant had been in adverse possession for a total of 32 years. The cause of action having accrued in 1971 when the second appellant entered into adverse possession of the land, the suit commenced in 2003 was barred by limitation. For those reasons ground two of the appeal succeeds.

The last ground of appeal criticizes the trial magistrate for having awarded exorbitant costs to the responding. Submitting in support of this ground, counsel for the appellant argued that the costs awarded to the respondent were exorbitant as a result of the trial magistrate's failure to exercise his discretion judiciously. In reply, counsel for the respondent argued that the trial court did not err when it awarded costs to the respondent since costs follow the event. This ground of appeal is misconceived to the extent that it insinuates that in awarding costs, the trial court determined the

quantum, hence the reference to such costs as being “exorbitant.” Under section 27 of *The Civil Procedure Act*, costs follow the event. Therefore, the trial magistrate having decided in favour of the respondent, was empowered to make the order he made. However, that order will be set aside only because on appeal, the court has come to a conclusion different from that of the trial magistrate. This ground of appeal succeeds for reasons other than those advanced by the appellants.

Before taking leave of this appeal, it is necessary to make some observations about its unfortunate procedural history. The impugned judgment was delivered on 23rd July 2004. The appellants requested for a certified copy of the record of proceedings from the trial court on 6th August 2004. A certified copy of the record of appeal was availed to the appellants on 16th December 2014. The appeal was filed in the Gulu High Court circuit on 14th January 2005. Subsequently there was an order for the transfer of the appeal from Gulu High Court Circuit to Arua High Court Circuit. What happened thereafter cannot be easily ascertained from the record. What is evident though is that counsel for both parties descended into a series of communications containing accusations and counter accusations of underhand actions committed in collusion with some registry staff of the Magistrates Court at Nebbi, intended to delay the appeal. By July 2012, seven years after filing of the appeal, counsel for the respondent was yet to be served with copies of the memorandum of appeal and the record of appeal. It is disturbing that it is only on 4th October 2016 that the appeal was finally heard. The delay from the year 2012 until then is totally unexplained.

Without attributing blame to any of the parties, it is unfortunate that as a result, the appeal has traversed the term of at least three High Court Circuit Judges before its final disposal, more than eleven years after it was filed. It is cases like this which not only undermine the effectiveness and credibility of the administration of justice but also erode public confidence in the administration of justice. Article 126 (2) (b) of *The Constitution of the Republic of Uganda, 1995* enjoins courts to administer justice without delay. This provision is a guarantee which relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered. All stages must be undertaken “without delay,” both in first instance and on appeal, whatever the outcome of proceedings turns out to be. To make this effective, the parties only

need to assert their right but it is the duty and responsibility of counsel, as officers of court, and the court staff to perform their roles in a timely fashion. For this delay, counsel and the judicial system appear to have failed the parties, a fact that is highly regretted and a recurrence of which ought to be avoided at all costs.

That aside, the appellants having succeeded on two of the grounds of appeal which constitute the gravamen of the controversy between the parties, for which reason the appeal is allowed. Consequently, the judgment and decree of the court below is set aside and instead an order made dismissing the suit. The costs of this appeal and those of the trial are awarded to the appellants. I so order.

Dated at Arua this 10th day of November 2016.

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Stephen Mubiru
Judge