

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0001 OF 2012

(Arising from Nebbi Grade One Magistrates Court at Paidha Civil Suit No. 0007 of 2010)

OBIMA AMA **APPELLANT**

VERSUS

**1. YUNES d/o STANLEY UDO }
2. ELI d/o STANLEY UDO } **RESPONDENTS**
3. AMIA d/o STANLEY UDO }**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

By a plaint dated 12th April 2010, the appellant sued the respondents jointly for recovery of land measuring approximately six acres at Aguny village, Otheko Parish, Paidha Sub-county, in Zombo District, a permanent injunction, and costs. Briefly his case was that he had on 4th March 1976 bought the disputed piece of land from a one Sibiriano Opara at the price of shs. 5,500/=.

He constructed a house on it and otherwise began utilizing the land by cultivating crops such as coffee, bananas, pineapples and mangos. During April 2010, the respondents began claiming the land as their own before the traditional chief “Dipu Paidha Umua’s Court.” The appellant then filed the suit seeking a declaration that he was the rightful owner of the land.

In their joint written statement of defence dated 5th May 2010 and filed in court on the same day, the respondents denied the appellant’s claim. They claimed that the land had belonged to their grandfather, Jaconga Aleta, it had been inherited from him by their father Stanley Aleta and they in turn had inherited it from their father in 1981. They relied on the decision of the “Dipu Paidha Umua’s Court” which had been delivered in their favour.

At the trial which began on 26th June 2010, the appellant testified that he bought the land in dispute on 4th March 1976 from Sibiriano Opara at the price of shs. 5,500/=. He constructed a house on it and otherwise began utilizing the land by cultivating crops such as coffee, bananas, pineapples and mangos and had done so for over thirty years when during April 2010, the respondents began claiming the land as their own before the traditional chief “Dipu Paidha Umua’s Court.”.

He called two witnesses in support of his case. P.W. 2, Julius Oyanya, testified that he shares a common boundary with the land in dispute and had known the disputed land to belong to the appellant, whom he had known for over forty years. He had seen the appellant utilise the land for over thirty years. He had at one point in time left the land but continued to cultivate it. P.W. 3, Ronald Okulu, testified that he had known the appellant since childhood as the son of his brother. He knew the appellant had bought the land from Opara, but was not present during the transaction and did not know the year during which he bought it. He used to see the appellant cultivate the land but did not know if there was a coffee plantation on the land at the time the appellant had bought it. He had last seen the appellant utilise the land in 1962. The land had at one time belonged to the respondents’ grandfather Stanley Areta. The appellant closed his case after the testimony of this witness after the court had rejected his application to call witnesses he had not listed in his pleadings.

The respondents opened their case on 2nd December 2010 with the testimony of D.W.I, Yunisi Areta. She testified that their father Stanley Areta had inherited the land in dispute during 1960. Upon the death of their father, she and the other two sisters inherited it. It was entrusted to Yindi Shebu and Timo Awekonimungu as caretakers. The appellant had trespassed on the land when he purported to buy the coffee thereon. She knew Opara Sibiriano as a squatter on the land which he had occupied for five or six years and had no right to sell the coffee plants to the appellant. D.W.2, Elly Falyera testified that the land in dispute belongs to the three respondents having inherited it from their deceased father. They established a banana plantation on the land in 1993. The appellant began trespassing on it in 2010. The matter was reported to the traditional chief whereupon the appellant undertook to vacate the land. D.W.3, Amia Jeros, testified that the three

of them had inherited the land in dispute. The appellant had illegally trespassed onto the land. D.W.4 Ijudi Shebo, testified that he shares a boundary with the disputed land and knew that the respondents had inherited the land in dispute from their deceased father in 1981. Opara had occupied part of the land for some time and had planted coffee on the land until 1972 when he was evicted from the land for practicing witchcraft. He disputed the claim that the appellant had purchased the land. He had seen the respondents utilise the land since 1981. The respondents then closed their case on 15th February 2011 and the court proceeded to visit the *locus in quo* on 24th March 2011 after which the suit was adjourned for judgment.

In his judgment delivered on 19th January 2012, the trial magistrate found that the agreement relied upon by the appellant as evidence of his purchase had some unexplained crossings and appeared to have been forged. When the court visited the *locus in quo* he had found that the land was unutilised for a considerable period of time contrary to the appellant's claim that he had utilised it for over thirty years. He found that the appellant was simply attempting to defraud the respondents of land they had inherited from their late father. He therefore entered judgment in their favour with costs.

Being dissatisfied with the decision the appellant appeals on the following grounds, namely;

1. The learned trial magistrate erred in law and fact when he rejected the plaintiff's / appellant's application to call witnesses not listed in his pleadings.
2. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thus came to a wrong conclusion that the suit land belonged to the defendants / respondents.
3. The learned trial magistrate erred in law and fact when he found that the agreement dated 4th March 1976 was a forged agreement without any evidence to support that finding.
4. The learned trial magistrate erred in law and fact when he based his decision on his findings at the *locus in quo* whose proceedings do not form part of the court record.

Submitting in support of the appeal, counsel for the appellant Ms. Bandaru Daisy Patience argued that the trial magistrate's reasoning in dismissing the appellant's prayer for leave to call witnesses not listed in his pleadings was erroneous to the extent that he regarded that

requirement under Order 6 rule 2 of *The Civil Procedure Rules* as mandatory. Section 22 (b) of *The Civil Procedure Act* empowers court to call and examine witnesses at any time and stage of proceedings. The court should have invoked that power to allow the appellant's motion, considering that the litigants were unrepresented. This rejection occasioned a miscarriage of justice.

In relation to the second ground, she argued that the appellant presented evidence of purchase of the land in dispute and of over thirty years' undisturbed user which the trial magistrate had failed to properly appraise. In contrast, the first respondent had not disclosed the year during which her father had died and she claimed to have inherited the land. The respondents had never been in physical occupation of the land yet they acknowledged that the appellant's predecessor in title, Opera Sibiriano, had been in occupation. They knew about the sale which took place in 1976 and had not taken any action against the appellant. The respondents did not prove the alleged fraudulent sale by Opera Sibiriano to the appellant.

In respect of the third ground, she submitted that the trial magistrate's finding that the agreement was forged was not supported by the evidence on record. The respondents did not object when the agreement was tendered in evidence and neither did they cross-examine the appellant on its contents. The respondents never alleged fraud in their pleadings and did not prove fraud to the required standard. She cited *R.G.Patel v Lalji Makanji [1957] EA 314* in support of her submissions. Lastly, she argued that the proceedings of court at the locus in quo did not form part of the court record and for that reason the trial magistrate erred in relying on the findings he made thereat as the basis of his decision. She relied on the decision in *Fernades v Noronha [1969] EA 506*. She prayed that the judgment and decree be set aside, the court grants a permanent injunction against the respondents and awards the appellant the costs of appeal and of the trial.

In reply, counsel for the respondent Mr. Bundu Richard argued that the trial court had properly rejected the appellant's prayer to call witnesses who had not been listed in his pleadings. If dissatisfied with the decision, the appellant should have appealed it under Order 44 rule 2 (2) of *The Civil Procedure Rules* but he had instead chosen to close his case and therefore should not

now be heard to raise the complaint on appeal. In any case, section 33 of *The Evidence Act*, provides that no particular number of witnesses is required to prove a case. In respect of the second ground he submitted that the respondents' testimony was consistent as to the fact that they had inherited the land from their father in 1981, which they then entrusted to caretakers Yindi Shebu and Timo Awekonimungu. Opera Sibiriano was only a squatter on the land for only five to six years before he died. The trial magistrate had therefore properly evaluated the evidence and come to the right conclusion. Regarding ground three, he argued that the agreement did not make any reference to the land in dispute and had unexplained alterations which made it impossible to determine the purchase price. Although not pleaded, the evidence before court established fraud in the appellant's transaction with Opera Sibiriano to the required standard. Lastly, he submitted that although not constituting part of the record of appeal, the record of proceedings at the locus in quo were available on the court record of the trial court at Paidha. He prayed that the appeal be dismissed with costs.

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 demeanour 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 faults the trial magistrate for having rejected the appellant's prayer for leave to call two additional witnesses who had not been listed in his pleadings. In his list of witnesses filed together with the plaint, the appellant named four witnesses who were; Ucama Paul, Ankwangkane Leonard, Melki Ulul and Julious Oyanya. At the scheduling conference, he reduced the list to three witnesses, excluding Ucama Paul. During the hearing of the suit, of the witnesses he named and listed, he called only Julious Oyanya. He did not explain why he abandoned the other two. He instead called another witness, Ronald Okulu, who had not been listed nor mentioned during the scheduling conference. He instead sought leave to call an additional two witnesses without disclosing who they were and the nature of their intended testimony. The court rejected his prayer and he then closed his case.

Order 5 rule 2 of *The Civil Procedure Rules* requires every summons to file a defence to be accompanied by a copy of the plaint, a brief summary of the evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on; except that an additional list of authorities may be provided later with the leave of court. These amendments to *The Civil Procedure Rules* were introduced on 24th July 1998 (see *The Civil Procedure (Amendment) Rules, 1998; S.I. 26 of 1998*) as part of measures taken to curb the practice of withholding essential information, such as the identity of witnesses, until the moment before trial. This encouraged "trial by ambush," which unfairly disadvantaged defendants because they were not afforded adequate time to prepare an effective defence and cross examination. It also was intended to enable defendants understand the strength of the case against them and engage in meaningful settlement negotiations before a case goes to trial. This would also serve the purpose of reducing frivolous suits and instead promote meaningful settlement negotiations before court resources are expended. Ultimately, the reforms would reduce the financial and administrative burdens on the courts, allowing more expedient justice for those with legitimate claims. Total

non-compliance with this requirement has resulted in the pleadings being struck out (see *Haji Subair Magomu v. Uganda Posts and Telecommunications Corporation*, H. C. Civil Suit No. 2044 of 1997 and *Waira v. Okalang and another*, H.C. Civil Misc. Application No. 62 of 2010). For those reasons I find that the trial magistrate came to the right conclusion when he held that it is a mandatory requirement of contemporary pleading.

That notwithstanding, non-compliance with this mandatory requirement is not always fatal as each default will be decided on its operative facts (see for example *DFCU Leasing Company Limited v. Nasolo Faridah*, H. C. Misc. Civil Application No. 74 of 2007). Furthermore, although the rule appears to expressly confer upon court discretion only to allow an additional list of authorities to be provided later, this in my view does not detract from the general principle that the rules of procedure are “intended to serve as the hand-maidens of justice, not to defeat it.” (See *Iron and Steelwares Limited v. C.W. Martyr and Company* (1956) 23 E.A.C.A. 175 at 177). In a deserving case, the court may rightfully exercise its discretion, upon such conditions as it may deem fit intended to guard against trial by ambush, to allow a litigant to amend the brief summary of the evidence to be adduced as well as the list of witnesses, by adding to or removing names from the list.

This is a discretion that should be exercised judiciously rather than capriciously. If a court is to exercise its discretion to allow witnesses to be called whose names were not listed, in violation of the provision, there must be some explanation or reason put forward by the party in default upon which this discretion may be exercised. The applicant ought to explain why it was not possible for him or her at the time of filing the suit, to name and list the additional witnesses intended to be called at that later stage. The court should further be guided on the relevance of the testimony of the intended additional witnesses to the specific issues to be decided by court. The court should be invited to exercise its discretion directed by sound judgment and not blindly in light of the potential injustice that may be caused to the other party by calling witnesses of whom no advance notice was provided at the time of service of the pleadings. This bizarre conduct of the appellant of apparent indecision regarding the witnesses he planned to rely on was totally unexplained. In the instant case, the appellant not having furnished the court with the

necessary explanation upon which such sound judgment could be exercised, the trial court was justified in rejecting the application. The first ground of appeal therefore fails.

Grounds two and three are correlated and will be more conveniently considered together. The second 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, only 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, and it forms the opinion that 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*).

To decide in favour of the applicant, the court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by

the respondents such that the choice between his version and that of the respondents would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondents, might hold that the more probable conclusion was that for which the appellant contended.

In the instant case, the point of convergence between the totality of the appellant's evidence and that of the respondent was in respect of two sets of facts; first, that for an unspecified period of time in its history of ownership, the land in dispute belonged to the respondents' grandfather Jaconga Aleta. This was disclosed in the testimony of P.W.3 under cross-examination by the third respondent at page 8, the testimony of the first respondent at page 14, that of the second appellant at page 17 and that of D.W.4 at page 18 of the record of proceedings (this though was disputed by the appellant at page 5 and P.W.2 at page 6 of the record of proceedings). D.W.4 testified that Jaconga Areta's ownership had commenced in 1914 (see page 18 of the record of proceedings), whereupon according to the first appellant, Stanley Areta inherited it in 1960 (see page 14 of the record of proceedings). The appellant's version that the land at one time belonged to a one Okaki who inherited it from his father a one Jayero before Opera Sibiriano bought, was based on inadmissible hearsay evidence (see the testimony of the appellant at page 5 and P.W.3 at page 8 of the record of proceedings) and therefore was not proved. The fact that Stanley Areta died in 1981 as claimed by the respondents was not contested by the appellant. Therefore, considering the evidence as a whole, I am inclined to believe and after re-evaluating the evidence and therefore find that it was established as a fact that by 1976 when the appellant claimed to have acquired the land by purchase, Stanley Areta's owned the land in dispute and his ownership still subsisted.

The second aspect of convergence between the totality of the appellant's evidence and that of the respondent was in respect of the fact that in an unspecified year during his lifetime, Stanley Areta permitted a one Opera Sibiriano to occupy the disputed land as a "squatter." This is contained in the testimony of the first appellant at page 15 and that of D.W.4 at page 18 of the record of proceedings. According to the first respondent, Opera Sibiriano occupied the land for about five to six years (see page 15 of the record of proceedings) and during that time he had

constructed a grass thatched house on the land (see the testimony of D.W.4 at page 18) and planted a coffee plantation (see the testimony of P.W.2 at page 6, and D.W.4 at page 18 of the record of proceedings). Opera Sibiriano was during 1972 banished from the village and forced to leave the land on suspicion of witchcraft (see the testimony of D.W.4 at page 19 of the record of proceedings). The appellant then claimed to have bought the land from Sibiriano on 4th March 1976. The question then is whether the circumstances in which Opera Sibiriano's entered onto the disputed land and his activities thereon vested in him any proprietary rights in the land capable of being assigned to the appellant.

It is common ground between the parties that at all material time, the land in dispute was held under customary tenure. It was the testimony of the first respondent that it is Stanley Areta who permitted Opera Sibiriano to occupy the disputed land as a "squatter" with rights to remain thereon "until he would wish to move away." Within this context, being classified as a squatter would mean that Opera Sibiriano's occupancy was never intended to be permanent but rather in the form of a licence for an indeterminate duration. In those circumstances, he could not have acquired an interest in the land other than by gift or purchase or other mode of *inter vivos* assignment of customary ownership, recognised within the area where the land is situated. In the absence of evidence of any such assignment, that permission constituted Opera Sibiriano as merely Stanley Areta's licensee on the customary holding rather than an owner of any proprietary customary interest in the land.

However, by permitting him to grow coffee on the holding, Stanley Areta elevated Opera Sibiriano's licence to a *profit a prendre*. A *profit a prendre* is defined by *Halsbury's Laws of England*, 4th Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117, as follows;

240. Meaning of *profit a prendre*.

A *profit a prendre* is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. The term *profit a prendre* is used in contradistinction to the term *profit a prendre*, which

signified a benefit which had to be rendered by the possessor of land after it had come into his possession. A profit a prendre is servitude.

241. *Profit a prendre* as an interest in land.

A *profit a prendre* is an interest in land, and for this reason any disposition it must be in writing. A *profit a prendre* which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce.

242. What may be taken as a *profit a prendre*.

The subject matter of a *profit a prendre*, namely, the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as *profits a prendre* to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore. The right to take animals *ferae naturae* while they are upon the soil belongs to the owner of the soil, who may grant to others as a *profit a prendre* a right to come and take them by a grant of hunting, shooting, fowling and so forth.

A *profit a prendre* is a servitude for it burdens the land, or rather a person's ownership of land, by creating a right exercised by a person in the land of another, accompanied with participation in the profits of the land thereof by that person other than the owner. It is an incorporeal right regarded as an appurtenance to the land, clothing the one in whom it is vested with an interest in the land. Being a benefit arising out of the land, it is also regarded as immovable property because it is an incident of the land and cannot be severed from it. In *Santabhai v. State of Bombay*, AIR 1958 SC 532 (536), it was held that trees, except standing timber, are regarded as immovable property because they are attached to or rooted in the earth. A *profit a prendre* is an assignable interest in land. For example in *Fairbrother v. Adams*, Vt. Sup., Ct 378 A, 2d 102 (1977), the Fairbrothers conveyed to the Adams a parcel of land of approximately three acres. The warranty deed contained the following expression; "There is also conveyed here with hunting and fishing rights on the other lands of the Fairbrother farm." This raised questions as to whether the deed conveyed exclusive hunting and fishing rights; the scope of those rights; whether those rights were personal only or were alienable and assignable; and if so, what parts of the entire Fairbrother farm was subject to them. The Fairbrothers, as plaintiffs, claimed that language in the deed pursuant to which they conveyed to the Adams, "the hunting and fishing rights on the other lands of the Fairbrother farm" created purely personal, non-exclusive rights. The issue for determination was whether a deed that granted "the hunting and fishing rights on other lands" created an exclusive, assignable *profit a prendre* in those other lands. It was held that a deed that granted "the hunting and fishing rights on other lands" created an exclusive, assignable *profit a prendre* in those other lands. The court decided that "the rights here are also alienable and assignable, not merely personal. Because *profits a prendre* may be granted separately from the freehold of the land, they imply inheritance and assignability unless expressly reserved. Here, the deed was clear and unambiguous."

In the instant case, Opera Sibiriano's coffee plantation was a benefit that arose out of the land, since the coffee trees were attached to the land. This right which took the form of a grant of benefits arising out of land, extended not only to taking coffee from the land but also a right of ingress and egress from the land and of further benefits including the right to occupy the land. A *profit a prendre* is not revocable like a license which is generally terminable at any time upon reasonable notice. Therefore, when Opera Sibiriano was during 1972 banished from the village

and forced to leave the land on suspicion of witchcraft, in the absence of evidence of voluntary abandonment, his *profit a prendre* was not revoked and he retained the capacity as he did on 4th March 1976, to transfer by sale this *profit a prendre* to the appellant. The *profit a prendre* could be assigned separately from the customary proprietary interest in the disputed land, which at the time was vested in Stanley Areta.

The trial magistrate had to determine the nature of the transaction that took place between the appellant and Opera Sibiriano on 4th March 1976. He came to the conclusion that the agreement of purchase presented by the appellant and exhibited in court as exhibit P.1 had “some crossed figures which tend to show that the sale agreement is a forged one” (see page 3 of the judgment). With due respect, this finding is not supported by the evidence on record. This agreement was included in the appellant’s list of authorities at the time of filing the suit. At the scheduling conference, the appellant mentioned it as a document he would rely on during the hearing of the suit (see page 3 of the record of proceedings). When the agreement was offered in evidence, none of the respondents contested it (see page 4 of the record of proceedings). During cross-examination of the appellant, it is only the first appellant who insinuated that his father was illiterate and could not have signed the agreement (this is deduced from the appellant’s answers at page 5 of the record of proceedings). The rest of the appellants did not challenge any aspect of the authenticity of this agreement.

The insinuation that the agreement was a forgery was in a way an allegation of fraud. Although not pleaded, the trial court could not ignore it as it had been brought to its attention during cross-examination of the appellant. However the trial court erred when it failed to apply the appropriate standard in the determination of whether or not the exhibit was a forgery.

Firstly, on the face of it, this was an agreement signed on 4th March 1976 that was being tendered in court on 26th June 2010, more than thirty four years after it was made. According to section 90 of *The Evidence Act*;

When any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of that document, which purports to be in the handwriting of any particular person, is in that person’s handwriting and, in

the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Had the trial court addressed this provision, it would have realised that this was technically an ancient document coming from proper custody, since it was in the custody of the appellant, who was one of the parties and signatory to the agreement as purchaser. Invoking that provision, the trial magistrate would have presumed the genuineness of execution, signatures and handwritings and every other part of the document and handwritings of the persons, who are purportedly indicated to be executors and witnesses of the document. Ancient documents are admissible in evidence upon proof that they have been produced from proper custody but their value as evidence, when admitted, must depend in each case upon the corroboration derivable from external circumstances.

In the Indian High Court decision of *Sandha Singh (Deceased) v. Amrik Singh and others*, AIR 2006 P H 9, (2006) 142 PLR 20, one of the issues was whether in a suit instituted on 21.5.1982, the mortgage deed dated 21.1.1947 was executed by the predecessor in interest of the defendant / respondent in favour of the predecessor in interest of the plaintiff / appellant raising a presumption in favour of the plaintiff / appellant Under Section 90 of the *Indian Evidence Act, 1872* (similar to section 90 of the *Uganda Evidence Act*). Noting the word "may" in the aforesaid section which means that the court may or may not presume correctness of such a document, the court held that;

An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof; it is then presumed to have constituted part of the actual transfer of the property mentioned. Though absence of proof of possession under an ancient document does not affect the admissibility of the document, it undoubtedly affects the weight to be attached to it. A document without possession to support it and without proof of any act done in connection with it, would generally have almost no weight in this country as a ground of inference.

In the instant case, the appellant adduced evidence that from 4th March 1976, he cultivated the disputed land for the next thirty years (see page 4 of the record of proceedings) which was corroborated by P.W.2 at page 6 of the record of proceedings. This was evidence “of ancient or modern corresponding enjoyment” which served as explanatory proof of exhibit P.1. In those circumstances, after the appellant furnished evidence of the agreement signed on 4th March 1976, a reasonable trial court would be compelled to take only one course of raising a presumption in his favour and it was then for the respondents to rebut that presumption by adducing cogent evidence of forgery or fraud. When the presumption under section 90 of *The Evidence Act* is invoked, mere denial or allegations of fraud would not be adequate to rebut that presumption. After all, allegations of fraud must be proved strictly and to a standard higher than a balance of probability but not as high as beyond reasonable doubt (see *Kampala Bottlers Limited v. Damanico (U) Limited*, S. C. Civil appeal No. 22 of 1992 and *Ratilal Gordhanbhai Patel v. Lalji Makanji [1957] EA 314*). The respondents did not discharge the onus and consequently a finding of forgery or fraud based only on “some crossed figures” which were apparent on the face of the sale agreement, without more, fell far short of the required standard and cannot be sustained.

From the foregoing re-evaluation of the evidence, it is apparent that the trial court failed in its duty to subject the evidence before it to a proper evaluation by overlooking material aspects of the evidence. Had the court considered all the evidence in its proper perspective, it would have come to a different conclusion and for that reason grounds two and three of the appeal succeed.

The last ground of appeal challenges the manner in which the court came to its decision when it relied on observations made at the locus in quo, which did not constitute part of the record of proceedings. Order 18 rule 14 of *The Civil Procedure Rules* empowers courts, at any stage of a suit, to inspect any property or thing concerning which any question may arise. Although this provision is invoked mainly for purposes of receiving immovable items as exhibits, it includes inspection of the *locus in quo*. The purpose of and manner in which proceedings at the locus in quo should be conducted has been the subject of numerous decisions among which are; *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*, in all of which cases the principle has been restated over and over again that 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. This was more particularly explained in *David Acar and three others v Alfred Acar Aliro [1982] HCB 60*, where it was observed that:-

When the court deems it necessary to visit the *locus-in-quo* then both parties, their witnesses must be told to be there. When they are at the *locus-in-quo*, it isnot a public meeting where public opinion is sought as it was in this case. It is a court sitting at the *locus-in-quo*. In fact the purpose of the *locus-in-quo* is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he / she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings.

The procedures to be followed upon the trial court's visit to a *locus in quo* have further been outlined in *Practice Direction No. 1 of 2007*, para 3, as follows; -

- a. Ensure that all the parties, their witnesses, and advocates (if any) are present.
- b. Allow the parties and their witnesses to adduce evidence at the locus in quo.
- c. Allow cross-examination by either party, or his/her counsel.
- d. Record all the proceedings at the locus in quo.
- e. Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

The determination of whether or not a court should inspect the locus in quo is an exercise of discretion of the magistrate which depends on the circumstances of each case. That decision essentially rests on the need for enabling the magistrate to understand better the evidence adduced before him or her during the testimony of witnesses in court. It may also be for purposes of enabling the magistrate to make up his or her mind on disputed points raised as to something to be seen there.

I have decided before and still hold the view that since the adjudication and final decision of suits should be made on basis of evidence taken in Court, visits to a *locus in quo* 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. Considering that the visit is essentially for purposes of enabling magistrates understand the evidence better, a magistrate should be careful not to act on what he or she sees and infers at the *locus in quo* as to matters in issue which are capable of proof by evidence in Court. The visit is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony.

Considering the susceptibility of the magistrate upon such a visit perceiving something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony or making personal observations prejudicial to the case presented by either party, the magistrate needs to acquaint the parties with the opinion so formed by drawing it to their attention and placing it on record. This should be done not only for maintenance of the court's impartiality but also in order to enable the parties test or rebut the accuracy of the court's observations by making appropriate, timely responses to such observations. It would be a very objectionable practice for the court to withhold from a party affected by an adverse opinion formed against such a party, keep it entirely off the record, only to spring it upon the party for the first time in his judgment. Furthermore, in case of an appeal, where the trial Court limits its judgment strictly to the material placed before it by the parties in court, then its judgment can be tested by the appellate court by reference to the same materials which are also before the appellate court. This will not possible where the lower court's judgment is based on personal observations made out of court and off the court record, the accuracy of which could not be tested during the trial and cannot be tested by the appellate court.

Upon examination of the original trial record, it is evident that the only evidence of what transpired at the *locus in quo* is a drawing of a sketch map of the disputed land indicating features such as the boundaries, roads and natural streams within its vicinity and names of the owners of the neighbouring plots of land. The key to the map indicates that the area in dispute is the one shaded with diagonal parallel lines. Within the shaded area are words written diagonally; "unutilised land." Although a more detailed narrative of proceedings and observations made at

the *locus in quo* would have been more desirable, I find the record sufficient to support the trial court's finding at page 3 of the judgment that:-

When also court visited the locus in quo of this matter, court found that the disputed land seem (sic) to have not been utilized for a long period of time. This observation does not correspond to the plaintiff's evidence that he has been utilising the suit land for over 30 years."

For that reason I am unable to agree with the submission of counsel for the appellant that the impugned finding was made on basis of observations made off-record which only emerged in the judgment. The original trial record taken at the *locus in quo* does not support that submission. The trial court's observation at the *locus in quo* is further supported by the testimony of P.W.2 who at page 6 of the record of proceedings testified that the appellant had settled on the suit land for over twenty years but had "later migrated." The additional statement that the appellant had continued to cultivate the land after that migration is inconsistent with what the trial court observed at the *locus in quo*. Ordinarily, an inconsistency developed on cross-examination or otherwise of a witness affects the credibility of his testimony in chief, and the weight thereof but for that reason, only that aspect of his testimony is rejected as untruthful.

It is trite law that all rights and interests in unregistered land may be lost by abandonment. Abandonment occurs where the owner of the unregistered interest 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).

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. 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.

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, though 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. However in the instant case, when the court visited the *locus in quo*, it discovered that the disputed land seemed "to have not been utilized for a long period of time." The appellant had hitherto enjoyed only a *profit a prendre* in the disputed land, with no customary proprietary interest therein. It is not clear for how long he abandoned the land but it was long enough for the coffee plantation to have ceased to exist on the land since the court did not find any traces of that plantation thereon upon its visit to the *locus in quo*.

The principle that enjoyment of a only a *profit a prendre* can be terminated by abandonment is specifically illustrated in the case of *Mathews Slate Co. of New York v. Advance Industrial Supply Co.*, 172 N.Y.S. 830, 832, 185 App. Div. 74. In that case, the owner of a certain tract of land had alienated a portion thereof to the predecessors in title of the plaintiff, the deed of conveyance containing the following reservation:

They also reserve to said Ensign, and he is to have, himself and his heirs and assigns, all the waste or rubbish stone which may be got at any time in working any part of the quarries on said premises, and the right to remove the same at pleasure.

A few years later the grantor conveyed the remainder of the farm to a certain grantee through whom the defendant claimed title. There was evidence that the successors in title of the latter conveyance occasionally gathered waste slate from the premises of the first grant. After the grantor's death his heirs made a conveyance of whatever interest they had in the reservation, which, through successive conveyances, also came to the defendant. There was evidence of non-user accompanied by other circumstances showing an intention to abandon by the grantor and his heirs. The court held, two judges dissenting, that the interest reserved was a *profit a prendre* and not an easement and that therefore there was an abandonment by the grantor and his heirs.

Similarly in the instant case, when the appellant allowed the coffee plantation, which was the basis of his *profit a prendre*, to cease to exist on the disputed land, his interest therein automatically terminated by abandonment. Consequently, ground four of the appeal fails. In the final result, I find that the appellant failed to adduce evidence capable of proving his claim of being the "legal and rightful owner of the suit land" and that the trial magistrate came to the right final conclusion despite the flawed reasons behind his decision.

Although the appellant has succeeded on two of his grounds of appeal, he has been unsuccessful in respect of the other two grounds of appeal and in arguments constituting the gravamen of the appeal, for which reason the appeal is dismissed.

The costs of this appeal and those of the trial are awarded to the respondents. I so order.

Dated at Arua this 1st day of December 2016.

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Stephen Mubiru

Judge