

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0029 OF 2018

(Arising from Kitgum Grade One Magistrate's Court Civil Suit No. 0061 of 2016)

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LANYERO KETTY APPELLANT

VERSUS

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1. OKENE RICHARD }
2. HELLEN ABWOLA } RESPONDENTS

Before: Hon Justice Stephen Mubiru.

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JUDGMENT

The appellant sued the respondents jointly and severally for a declaration that she is the owner of an approximately 20 metres by 34 metres plot of land under customary tenure, situated at Camcam village, Atengo Parish, in Kitgum District. She sought a declaration that the sale of the land in dispute by the first respondent to the second respondent was illegal, an award of general and special damages for trespass to land, and the costs of the suit. Her claim was that during the year 1995, she got married to the first defendant and they thereafter lived together as husband and wife. During the year 1997, together with her as a spouse, the first respondent bought the land in dispute. She made a financial contribution to the purchase price, earned from her business. They settled on that land together whereon they established their matrimonial home. They begot five children together while living on that land. During the year 2012, following marital disagreement, the first respondent abandoned her on that land together with the five children and four grandchildren and went to cohabit with another woman. Unknown to her and without her consent, the first respondent sold the land to the second respondent, hence the suit.

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In their joint written statement of defence, the respondents contended that the first respondent purchased the land in dispute before she married the appellant. On her part, the second respondent contended that she purchased the land in dispute from the first appellant following the termination of the marriage between the appellant and the first respondent. This came after a

misunderstanding between the appellant and the first respondent. The appellant had during the year 2012 sold off all the household property in their matrimonial home, abandoned the first respondent on the land and left him in custody of all their five children. The first respondent then decided to sell off the land to the second respondent to enable him raise money for payment of school fees and provide sustenance for the children. The second respondent paid the agreed purchase price of shs. 4,000,000/= in instalments by way of direct payments of school fees and scholastic material to the appellant's children, which payments the children acknowledged in writing. The appellant later attempted to return to the home but her attempts at reconciliation with the first respondent were futile. She then forcefully re-entered and occupied the land under the pretext of looking after the children.

In her testimony as P.W.1, the appellant stated that she bought the land in dispute jointly with her husband, the first respondent, during the year 1997. She contributed shs. 50,000/= to the purchase price while the first respondent contributed shs. 100,000/= They established their matrimonial home on that land and she lived there henceforth. She was surprised to learn sometime during March, 2012 that the land she was occupying with her children had been sold off to the second respondent, the biological sister of the first respondent. The second respondent, subsequently caused her arrest and imprisonment over that land. She had separated from her husband sometime in 2012 when she discovered he had a concubine, but on her return later that year, she found some of her children had dropped out of school and others had begotten children. The sale took place during the period of her absence when she had returned to her parents' home following the marital misunderstanding with her husband.

P.W.2 Obote Vincent testified that he owned the land in dispute before he sold it off to the appellant and the first respondent jointly, during the year 1997. They paid shs. 150,000/= for the plot and the sale was witnessed by the L.C.1 Chairman of the area. The agreement of sale was written in the name of the first respondent "because he was the man" and "the man is owner more than the woman," but is the appellant who handed over the purchase price to him. P.W.3 Omara Charles, the son of both the appellant and the first respondent, testified that both parents contribute to his school fees and scholastic requirements. The land in dispute belongs to both his parents. He was born on that land. During the year 2015, their father, the first respondent, told

them he had sold the land to the second respondent in the year 2013. The children then wrote a formal letter to the L.C.1 protesting that sale. He later learnt that his mother had been imprisoned in relation to a dispute over that land with the second respondent. P.W.4 Oketayot Andrew, living in the neighbourhood, testified that the land in dispute belongs to the family of the appellant and the first respondent. They lived on the land with their children. The appellant was
5 sometime in 2016 arrested and imprisoned over alleged trespass to that land.

D.W.1 Opio Mathew, the L.C.1 Vice Chairperson, testified that the second respondent purchased the land in dispute from the first respondent on 13th March, 2016 and he witnessed the agreement
10 of sale. By that time, the appellant and the first respondent had separated after the latter had threatened to kill the former. She left the first respondent with the children in their matrimonial home located on that land and returned to her parents' home. The agreement of 13th March, 2016 was based on evidence produced by the second respondent showing that she had been paying school fees for the first respondent and appellant's children. She topped it up with a payment of
15 about shs. 200,000/= as the purchase price for the land. The appellant was not present at the sale.

In his defence as D.W.2, the first respondent testified that he purchased the land in dispute from P.W.2 Obote Vincent during the year 1997 at the price of shs. 150,000/= His wife, the appellant, was a mere witness to the transaction. They lived on the land thereafter from 1997 until the year
20 2009 when they returned to their original home in Dura with the entire family following the end of insurgency in that area. They had five children who at the time had proceeded to secondary schools and it was becoming increasingly difficult for him to raise school fees. The second appellant assisted him in meeting the school fees and it was agreed that if he failed to pay her back, the sum was about shs. 4,000,000/= in total, she would take the land now in dispute. He
25 then in presence of the L.Cs handed over the land to the person who helped him pay school fees for his children on 13th March, 2016. The appellant refused to vacate the land and instead constructed grass thatched houses thereon. She was arrested and prosecuted for criminal trespass.

The second appellant testified as D.W.3 and stated that she purchased the land in dispute from
30 her brother, the first appellant on 13th March, 2016. This was after the first appellant had approached her during December, 2012 and informed her that his wife, the appellant, had

deserted the home and taken away all his belongings with her to the home of her parents. He was finding it difficult to maintain his children in school. She took the first appellant's children under her care. The first appellant negotiated with her, he sold the land now in dispute to her on the understanding that she would in return meet the school fees payments of his children. She met
5 the school fees until the year 2014 when the appellant returned and began constructing grass thatched houses on the land. She caused the appellant's arrest and prosecution for criminal trespass. She conceded that at the time of purchase, she was aware that the appellant and her children lived on that land.

10 D.W.3 Ayat Catherine Omach, a sister to both the first and second respondents, testified that the land in dispute belonged to the first respondent. The appellant lived on the land for some time but in 2012 she deserted it and took all household property belonging to the first respondent. Being a primary school teacher with a salary of only shs. 180,000/= it became difficult of the first respondent to meet the school fees and other requirements of his children, hence the sale to
15 the second respondent. The price was not in direct cash payment but rather by way of meeting school fees and other school requirements. This arrangement was disrupted by the appellant when she suddenly returned sometime during the year 2014 and took possession of the land. The sale took place during the time the appellant had returned to her parents' home.

20 In his judgment, the trial magistrate found that since the agreement of purchase from P.W.2 Obote Vincent had been executed by the first respondent alone in his name, he was the rightful owner of the land in dispute. There was no evidence to support the appellant's claim that she had contributed to the purchase price. The land could not be characterised as family land since they did not derive their sustenance from it but rather used it for dwelling only and had gardens in
25 Dure village, from where they had been displaced by the insurgency, leading to the acquisition of the land in dispute. Although documentation relating to the sale indicated that the buyer was Olal Christine, oral testimony clarified that the sale was in fact to the second respondent and therefore she owned the land. The court therefore entered judgment in her favour and ordered the appellant to; demolish her illegal structures on the land and restore it as nearly as possible to its former
30 condition; vacate the land, pay general damages of shs. 1,000,000/= to the first respondent and shs. 2,000,000/= to the second respondent for inconvenience, and costs.

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

1. The trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision.
- 5 2. The trial Magistrate erred in law and fact when he failed to conduct locus thereby occasioning a miscarriage of justice.

When the appeal came for hearing, on its own motion court found that the first ground of appeal was too general and offended the provisions of Order 43 r (1) and (2) of *The Civil Procedure*
10 *Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial,
15 including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2*
20 *of 1998; (1999) KALR 621; Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). Accordingly the first ground of appeal presented in this appeal was struck out.

In his submissions on the second ground, counsel for the appellant Mr. Conrad Obol Oloya, retained on *pro bono* basis by The legal Aid Project of the Uganda Law Society branch in Gulu,
25 argued that in the judgment the magistrate said he did not need to visit locus since it was a question of ownership and not a boundary dispute. Even though it was a question of ownership, determination of legal rights required visiting the locus. The appellant and her witnesses' testimony was uncontroverted. There were settlements on the land and the appellant with two children and five dependants lived on the land. That was material at the time and the trial court
30 ought to have visited locus to acquaint itself with those facts. If court had visited locus it would have ascertained that it was family land where the appellant and her dependants sustained their

life. This occasioned a failure of justice. I pray that the court find the omission to have been grave. He argued further that it is the cardinal principle of the law for a first appellate court to re-evaluate the evidence. It has powers to alter and vary decision of a lower court where it appears that justice of the case was not met with that decision. He invoked section 98 of *The Civil*
5 *Procedure Act* and the unlimited jurisdiction of the court under *The Judicature Act*. He prayed that court finds merit in the appeal and it be allowed with costs of the appeal.

In reply, the first appellant appearing *pro se* argued that he sold his land in accordance with the law. It was proper though for the court to visit the land. Similarly, the second respondent too
10 appearing *pro se* submitted that at the trial it was the appellant who said that there was no need to visit the *locus in quo*. She is a sister of the first appellant and by the time he sold the land to her he and the appellant had separated. She was ready to visit the land but the appellant said she did not have the money to facilitate the court's visit to the *locus in quo*. She thus submitted that the judgment should be upheld. The appellant cannot complain to the High Court when it was her
15 decision for the trial court not to visit the *locus in quo*.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric*
20 *Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

The second ground of appeal assails the decision of the trial court based on its failure to visit the
25 *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
30 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. 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.

5 The visit is essentially for purposes of enabling trial magistrates understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. In the instant case, two issues were framed for the determination of court; - (a) which of the parties own the land; and (b) what remedies are available. The crux of the controversy therefore was whether or not the sale of the land in dispute by the first to the
10 second respondent was valid. This could be decided by relying on oral testimony of witnesses who knew the history of ownership of the land and the circumstance surrounding the transaction between the respondents. Since the dispute did not involve establishment of the nature of developments on the land or the boundaries of the land, its determination did not necessitate a visit to the *locus in quo*. The court could have made its decision without recourse to evidence
15 from the *locus in quo*. Indeed at the scheduling conference, the court recorded that "both agree that there is no need to visit locus." I have not found any evidence on record to support counsel for the appellant's submission and that of the respondents that the appellant was prevented by indigence from facilitating the court to visit the *locus in quo*. This ground of appeal fails.

20 Be that as it may, the court retains the onus of subjecting the entire evidence on record to a fresh and exhaustive scrutiny and re-appraisal. As a first appellate court, this court generally may reverse the decision of the trial court and render its own judgment if the evidence on record does not support the trial court's finding on an issue, or a finding on an issue erroneously determined, such as on a question of law. In particular this court is not bound necessarily to follow the trial
25 magistrate'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 demeanour of a witness is inconsistent with the evidence in the case generally.

30 In the court below, the appellant challenged the validity of sale of the land by her husband, the first respondent, to his sister, the second respondent. Whenever court is dealing with a

transaction that was not at arm's length, in the context that these may be transactions that might not be fully and fairly negotiated, it has to proceed with caution. "Arm's length" refers to a legal transaction in which buyers and sellers of real property, products or services have no relationship to one another either by blood, marriage, or business dealings. These relationships give rise to an increased likelihood of collusion, and these increase the risk that parties may manipulate aspects of the transaction such as the price or conceal important facts about the transaction. Where these relationships exist there is a greater likelihood that one party leveraged power over the other, either controlling or influencing their actions, or that the parties acted together, to manipulate the transaction to the detriment of or to defraud an interested third party.

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Of course there is nothing unlawful about persons related to one another either by blood, marriage, or business dealings selling property to each other but if the related parties colluded to manipulate aspects of the transaction for the purpose of defrauding an interested third party, then the law will step in to void the contract.

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A valid and enforceable contract must be supported by consideration, defined as either a benefit conferred by the promisee on the promisor in return for the promisor's promise, or a detriment incurred by the promisee in return for the promisor's promise (see *Currie v. Misa (1875) LR 10 Ex 153; (1875-76) LR 1 App Cas 554*). For a contract to be valid, consideration must be included at the time the contract is made. Past consideration is not good consideration (see *Dunlop Pneumatic Tyre Co Ltd v. Selfridge Ltd [1915] AC 847*). Past consideration is a promise or an act that was made or performed prior to a contract. Past consideration generally does not count as consideration in a contract. Where it operates, the rule has the effect of preventing an otherwise valid contract from being formed.

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Past consideration usually occurs when someone has a moral obligation to perform a duty for someone else. This obligation, however, is almost never legally required. It is for this reason that past consideration can also be called moral consideration (see *Eastwood v. Kenyon (1840) 113 ER 482*). Although the second respondent was not legally required to help the first respondent with school fees for his children, she felt morally obligated, and her fulfilment of this moral duty resulted in being offered the land in dispute as restitution. A promise is said to be given for moral

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or past consideration when the promisor's motivation for making the promise is a past benefit he received that gave rise to a moral, but not legal, obligation to make compensation.

5 Three cumulative elements must be satisfied before the exception against the past consideration rule can operate, where an act is done before the giving of the promise sought to be enforced:- (a) the act must have been done at the promisor's request; (b) the parties must have understood that the act was to be remunerated; and (c) such remuneration must have been legally enforceable if it had been promised in advance (see *Pao On v. Lau Yiu Long* [1980] AC 614). In the instant case, the agreement by which the second respondent claims to have bought the land in
10 dispute from the first respondent (exhibit D.E.1.) is dated 13th March, 2016 indicating the purchase price to have been shs. 4,000,000/= However, the second respondent and D.W.1 Opio Mathew, the L.C.1 Vice Chairperson, testified to the effect that the price was based on evidence produced by the second respondent showing that she had been paying school fees for the first respondent and appellant's children. The discernible dates of payment indicated in the records
15 produced in court are; 15th April, 2013; 2nd July, 2013; 2nd term 2013; 20th May, 2013; 8th September, 2013; 27th December, 2013; 27th January, 2014; and 30th June, 2014. None of these dates is contemporaneous with the date appearing on the agreement of purchase and the agreement does not state that any payment was made on the day it was executed, or promised to be paid thereafter. Although the act was done at the first respondent's request, and possibly with
20 the parties' understanding that it was to be remunerated, it was not legally enforceable by the adopted mode. For all intents and purposes, the agreement made two to three years later was not supported by any valid consideration, it was based on past consideration and thus is unenforceable.

25 Besides that, under section 92 of *The Evidence Act*, when the terms of a contract, grant or other disposition of property, have been proved, no evidence of any oral agreement or statement may be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. This parol evidence rule applies to all written contracts. Parol evidence is evidence outside of the written
30 contract. It is evidence comprising of what parties did or said before, during or even after the conclusion of the contract. The parol evidence rule has two components: the integration rule and

the interpretation rule. In terms of the integration rule, the written agreement is the “exclusive memorial” of the agreement between the parties. The written agreement contains all the express terms of the contract and as such the contents of the document may not be contradicted, altered, added to or varied by parol evidence (see *Jacob v. Batavia and General Plantations Trust*, 4 (1924) 1 Ch. 287). A court may not admit evidence as to what the parties intended it to mean if that has the effect of changing the terms of which they clearly agreed.

In the instant case, the agreement (exhibit D.E.1.) dated 13th March, 2016 names the buyer as Miss Olal Christine Jane. She signed the agreement as well in that capacity. The second respondent signed it as a witness. In her testimony, the second respondent explained that whereas Miss Olal Christine Jane is named as the buyer, she, the second respondent, was the intended buyer and Miss Olal Christine Jane signed in her name and on her behalf. That testimony sought to contradict and alter the clear expression contained in the written agreement as to who the parties to the transaction were. It ought not to have been relied upon, let alone admitted by the court in order to substitute the second respondent as the buyer. Had the trial court properly directed itself, it would have found that since the second respondent was not named as a party to the agreement, she did not have the capacity to enforce it or to take benefit under it.

That notwithstanding, the basis of the appellant's claim is that of co-ownership. This was refuted by the first appellant who stated that he purchased the land before marrying the appellant. However under cross-examination, he admitted that the appellant was present at the execution of the contract with P.W.2 Obote Vincent in 1997. This unexplained inconsistency in his evidence pointed to deliberate untruthfulness. I am therefore inclined to believe the appellant that she contributed to the purchase price and that she therefore is a co-owner of the land together with the first respondent

When there is no evidence of an intention to the contrary when purchasing a property together, the presumption is that the co-owners will hold as tenants in common. However in this case, taking into account the relatively small size of the land purchased and the fact that it thereafter constituted the matrimonial home, despite the varying contributions, the appellant and the first respondent as co-owners acquired the same title at the same time, same deed and with equal

interests. Because of the unity of time, of possession and title, this is a joint ownership. In situations where specific conditions in the agreement of purchase give co-owners exclusive rights to certain parts or portions of the property, a co-owner can sell his or her portion to whom he or she chooses. Otherwise, every joint or co-owner has a proprietary right of the entire
5 property. They legally share ownership without dividing the property into physical portions for their exclusive use. Hence, any sale has to be done with the consent of all co-owners involved. An owner in a joint tenancy can't sell the ownership interests of the other owners holding title in the property. A joint tenants needs to sever the joint tenancy before he or she is in a position to sell his or her share of the property, or for one party to buy the other party out. Co-ownership is
10 governed by fairness, reasonableness, practicality and equity and the courts will apply these principles should there be any disputes. A co-owner is entitled to three essentials of ownership: the right to possession, the right to use and the right to dispose off his or her share of the property if it is clearly stated, in the agreement of purchase. Every co-owner of a property has an equal right to live in the property. Therefore, if a co-owner is deprived of his or her property, he or she
15 has a right to be put back in possession.

In any case, even when considered from a perspective most favourable to the first respondent, that he was sole buyer of the land, he admitted that they proceeded to establish their home on this land. Under section 38A (4) (a) of the Land Act. "family land" includes land on which is situated
20 the "ordinary residence" of a family. It is trite that any definition must provide sufficient structure to facilitate uniform interpretation, but be flexible enough to adapt to the unique facts of each case. Determinations of "ordinary residence" should thus take into account "all the circumstances of any particular case" (see *C v. S*, [1990] 2 All E.R. at 965) Section 2 of *The Mortgage Act*, Act 8 of 2009 defines matrimonial home as a building or part of a building in
25 which a husband and wife or, as the case may be, wives, and their children, if any, ordinarily reside together. The "ordinary residence" of a family therefore may include the "matrimonial home" as well as the "habitual home," places where both spouses take steps to set up a regular household together with a shared, settled, mutual intent that the stay lasts indefinitely, the period need not be long. As the saying goes, home is where the heart is. It is quite possible to participate
30 in all the activities of daily life in a new place while still retaining awareness that one has another

life to go back to. In such instances one may be acclimatised in the sense of being well-adjusted in one's present environment, yet not regard that environment as one's ordinary residence.

5 A person is deemed to be ordinarily resident at such a place where in the settled routine of his or her life, he or she regularly, normally or customarily lives. It is contrasted with special or occasional, casual residence or deviatory residence. It is determined by the degree to which a person in mind and fact settles into or maintains or centralises his or her ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. The court looks primarily to whether the spouse has acclimated to his or her surroundings and
10 formed a settled intent to remain. A person can be absent for significant periods and still be ordinarily resident so long as he or she maintains some tie or connection with the place. A person absenting himself or herself temporarily from his or her place of ordinary residence cannot by reason thereof cease to be ordinarily resident thereat.

15 For example *In Re A and others*[1996] 1 All E.R. 32, the father, a United States serviceman, went to England in January 1988. He married his English wife in England in June 1989. They lived together in England until January 1993. The father was then posted to Iceland. Prior to relocating the family took a short vacation of approximately two months in Michigan. In December 1994, while still in Iceland, the parents separated. In January 1995 the father filed a
20 divorce suit in the Michigan Circuit Court. The family had lived together at a U.S. military base in Iceland for two years. The court found that, while the stay was not expected to last indefinitely, "they had no home base of their own elsewhere." The children were thus habitually resident in Iceland. Court therefore made an order against the mother, prohibiting the removal of the children to the United Kingdom.

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When a person has no clearly established ordinary residence elsewhere, he or she may become ordinarily resident even in a place where he or she intended to live only for a limited time. One need not have this settled intention at the moment of departure; it could coalesce during the course of a stay at the new place intended to be temporary. Nor need the intention be expressly
30 declared, if it is manifest from one's actions; indeed, one's actions may belie any declaration that no abandonment was intended. However in the instant case, by taking residence at her parents'

home following the marital turbulence or disagreement, would seem clearly to be not only temporary in time and exceptional in circumstances, but also accompanied by a sense of transitoriness with intent to return to her matrimonial home at a later stage, as indeed she did. It was not for the settled purpose of living with her parents with an intent to settle there as her ordinary residence. She had no home base of her own elsewhere, but on the land in dispute.

All that is required for a residence to be one's ordinary residence is the individual's purpose of living where he or she does. There must be a sufficient degree of continuity to enable it properly to be described as settled. An appreciable period of time and a settled intention was necessary to enable court deem the appellant to have become ordinarily resident at her parent's home. It was necessary to show that her living with her parents had a sufficient degree of continuity to be properly described as settled. Where there is no such intent, however, a prior ordinary residence should be deemed supplanted only where the objective facts point unequivocally to this conclusion. When a person already has a well-established ordinary residence, simple presence in another home is not usually enough to shift it there. Rather, the circumstances surrounding it must enable the court to infer an intent to abandon the previous ordinary residence. A settled intention to abandon one's prior ordinary residence is a crucial part of acquiring a new one since the first step toward acquiring a new ordinary residence is forming a settled intention to abandon the one left behind.

In *C v. S (minor: abduction: illegitimate child)*, [1990] 2 All E.R. at 965, Lord Brandon discussed the distinction between abandoning a prior ordinary residence and acquiring a new one. There is a significant difference between a person ceasing to be ordinarily resident at place "A," and his or her subsequently becoming ordinarily resident at place "B." A person may cease to be ordinarily resident at place "A" in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence at place "B" instead. Such a person cannot, however, become ordinarily resident at place "B" in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so.

A person can only have one ordinary residence at a time, the exception being the rare situation where someone consistently splits time more or less evenly between two locations, so as to retain

alternating ordinary residences in each (See, e.g., *Johnson v. Johnson*, 493 S.E.2d 668, 669 (Va. Ct. App. 1997). Otherwise, one is not ordinarily resident; one is away for a temporary absence of long or short duration. There is no evidence in the instant case that the appellant left the home on the land in dispute with a settled intention not to return, or at least an intention to relocate and stay with her parents indefinitely. Terminating of ordinary residence takes a departure with intent to relocate permanently, which is lacking in this case.

On the other hand, when circumstances are such as to hinder acclimatisation to a new environment, even a lengthy period spent in this manner may not suffice. It would be an abuse of ordinary language to say that the appellant, forced out of her ordinary residence by marital turbulence, had become ordinarily resident in her parent's home where she had taken temporary refuge. Ordinary residence is not lost by a spouse forced to leave it against his or her desires in order to escape verbal, emotional, or physical abuse. Coercion of the appellant by means of verbal, emotional or physical abuse removed any element of choice and settled purpose to relocate. The concept of ordinary residence must entail some element of voluntariness and purposeful design. The significance of the adverb "ordinarily" is that it recalls two necessary features, namely; residence adopted voluntarily and for settled purposes (see *Shah*, [1983] 1 All E.R. at 234). The appellant's stay with her parents therefore can be characterised only as a temporary absence of long duration from the place of her ordinary residence, on the land in dispute.

That being the case, where spouses have an "ordinary residence," no unilateral action by one of them can change its status, save by the agreement or acquiescence over time of the other spouse. There is no evidence that the couple had a shared intent to abandon the family's ordinary residence on this land. From the facts of this case, the court cannot reasonably infer a mutual abandonment of the land in dispute as the ordinary residence of the family. Although following the departure of the appellant the first respondent ceded custody of his children to the second respondent, the appellant by conduct did not acquiesce in the first respondent's decision to terminate the land in dispute serving as the ordinary residence of the family. She returned to the land in dispute later that year (the first respondent claimed it was after two years) although her attempts to reconcile with the first respondent were unsuccessful. Whichever the exact period

was, there is no doubt that the appellant's departure from that home was merely transitory, contingent, and for a temporary purpose. Thus is apparent in her conduct of taking refuge at her parents' home after the marital misunderstanding and subsequent return.

5 Moreover, there is no evidence to show that the family jointly took all the steps associated with abandoning the land in dispute as their ordinary place of residence to return to Dure, and that the appellant was an unreasonable objector. When courts find that a family has jointly taken all the steps associated with abandoning its ordinary residence to take it up in another, they are generally unwilling to let one spouse's alleged reservations about the move stand in the way of
10 finding a shared and settled purpose. For example in *Feder*, 63 F.3d at 224, that Mrs. Feder did not intend to remain in Australia permanently and believed that she would leave if her marriage did not improve did not void the couple's settled purpose to live as a family in the place where the husband had found work.

15 Although in a proper case the court may find that the family as a unit has manifested a settled purpose to change ordinary residence, despite the fact that one spouse may have had qualms about the move, the court is unable in the instant case to find a settled mutual intent from which such abandonment can be inferred. Ordinary residence did not change because the land in dispute was the last place the appellant, the first respondent and their children resided together as
20 a family unit. For all intents and purposes therefore, the home on the land in dispute remained the "ordinary residence" of the family, hence it constituted family land within the meaning of section 39 (1) (a) of *The Land Act*.

That being the case, section 39 (1) (b) of *The Land Act* prohibits a spouse from entering into any
25 contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land, except with the prior written consent of the other spouse. According to section 38A (5) of *The Land Act*, this restriction does not apply to spouses who are legally separated. In the instant case the appellant and the first respondent had not legally separated. The first respondent was bound by law to seek the express consent of the appellant before selling this land, which he did not. A
30 transaction of sale of family land entered into by one spouse without the express written consent of the other is void. Where such transaction is entered into by a purchaser in good faith and for

value without notice that that requirement has not been complied with, the transaction is void but the purchaser has the right to claim from any person with whom he or she entered into the transaction, any money paid or any consideration given by him or her in respect of the transaction (see Section 39 (4) of *The Land Act*).

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In her testimony, the first respondent admitted that at the time she entered into the transaction, (if she did at all) she knew the land to belong to the family of the appellant and the first respondent. In any event, the standard of due diligence imposed on a purchaser of unregistered land is much higher than that expected of a purchaser of registered land (see *Williams and Glyn's Bank Ltd v. Boland*, [1981] AC 487). A purchaser of unregistered land who does not undertake the otherwise expected "lengthy and often technical investigation of title," is bound by equities relating to that land of which he or she had actual or constructive notice. The second respondent's purported purchase was therefore not made in good faith since she had notice that this was family land and that the requirement of spousal consent had not been complied with.

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As regards the award of general damages, an appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd.*, S.C.C.A. No. 10 of 1993 (unreported) and *Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises*. S.C.C.A No. 16 of 2006).

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In the instant case, the award of damages was hinged on the supposed proof of a valid sale of the land in dispute to the second respondent. In light of the findings I have made, the court below premised its award on an entirely erroneous construction of the law and the facts before it. It is the duty of this court to correct that error by setting aside the award of damages and the rest of the orders made by the court below. Hence, the award of damages and all the orders made are hereby set aside.

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For all the foregoing reasons, I find that the decision of the trial court was wrong and cannot be sustained by the evidence on record. I accordingly set it aside and instead enter judgment in favour of the appellant against both respondents in the following terms;

- 5 a) The sale of the land in dispute by the first respondent to the second respondent is declared null and void.
- b) The appellant is declared co-owner of the land in dispute and is entitled to quiet possession and use thereof.
- c) A permanent injunction hereby issues against both respondents, their servants, agents and persons claiming under them, restraining them from evicting, interfering with or otherwise disturbing the appellant's quiet possession, user and enjoyment of the land.
- 10 d) The appellant is awarded the costs of this appeal and those of the court below.

Dated at Gulu this 27th day of September, 2018

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Stephen Mubiru
Judge,
27th September, 2018.