

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0079 OF 2016

(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 020 of 2011)

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ODUR CELESTINO **APPELLANT**

VERSUS

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JOYCE MARY MUTO **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The appellant sued the respondent for recovery of approximately four acres of land, at Onyona Pea village, Onyona Parish, Koch Oongako sub-county in Gulu District, general damages for trespass to land, *mesne profits*, a permanent injunction, interest and costs. His case was that during the year 1961, his uncle Festo Wala gave him sixty acres of land as a gift *inter vivos*. He occupied the land together with his family and used it peacefully until the year 2005 when they were forced by insurgency to vacate the land and relocate into the IDP Camp at Koch Goma. After the camp was disbanded, they returned and occupied the land only to be served with a notice to vacate the land, from the respondent who claimed to have leased the land. The appellant contended the respondent acquired the lease fraudulently but did not plead any particulars of fraud.

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In her written statement of defence, the respondent denied the claim in toto. She contended that the appellant resides at Kalang in Koch, far away from the land in dispute and has never been given any part of the land in dispute by his uncle as claimed. The land originally belonged to Mzee Gideon Okema, the respondent's father in law, he having acquired and lived on the land since 1934. He subsequently gave the land to the respondent's husband. The respondent's husband James Muto-Abayo Watling has since the year 1984 been the registered proprietor of the land under a leasehold Register Volume 1316 Folio 2 Plot 4, Block 5 and together with her, had lived there peacefully even before acquisition of the lease title. She counterclaimed for

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similar orders on grounds that the appellant has since 2007 trespassed onto the land, destroyed trees and the respondent's crops thereon, and undertaken cultivation. Although upon intervention of the local L.C. the appellant undertook to vacate the land, he never did so.

5 The appellant Celestino Opoka testified as P.W.1, and stated that he inherited the approximately 30 acres of land in 1962 from his paternal uncle Festo Wala. The respondent and her husband James Mutto were his neighbours but have since around the year 2008 - 2009 encroached onto about six acres of his land, cut down his cassava and planted their own crops. In 1982 he learnt about the respondent's husband's process of acquisition of a lease title and although he was
10 invited by the Land Inspection Committee, he refused to participate in that process but he later heard that the land had been surveyed, although he has never seen any of the mark stones. The respondent's husband lived on the neighbouring land for only four years and has never returned. The respondent and her children have since occupied the land that James Mutto used to occupy. It is from there that she began the encroachment into his land.

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P.W.2 Odongo Ongwen Santo, a neighbour, testified that the land in dispute belongs to the appellant. The land measuring approximately 50 - 80 acres originally belonged to the appellant's grandfather Atwanga and on his death it was inherited by the appellant's paternal uncle Festo Wala. The appellant inherited it from Festo Wala and occupied until the year 2011 when the
20 respondent slashed a part of it. She now occupies almost half of the land in dispute. That was the close of the appellant's case.

In her defence, the respondent Joyce Mary Mutto testified as D.W.1 and stated that upon her marriage to James Mutto Watling Apayo, she lived on that land from 1969. Her husband has
25 since 1989 lived in the UK. The land originally belonged to her father in law and Festo Wala has never lived on it. Her husband obtained a lease in respect of 94.7 hectares of the land in 1982 and the title deed was issued to him in 1984. The appellant has since 2008 occupied about 4 acres of the land and permitted approximately 100 people to settle within that area. He has since refused to vacate the land. D.W.2 Okello Patrick, a neighbour to both parties, testified that he has since
30 1974 known the land in dispute, measuring approximately 200 acres, to belong to the

respondent's husband who acquired it from his late father, Gideon Okema. It is in 1988 that the appellant trespassed onto the land. The respondent has well closed her case at that point.

The Court then visited the *locus in quo* where it recorded evidence from; (i) Aoka Kamilo who
5 stated that the respondent's husband began living on the land in 1976; (ii) John Oceng Makmoi,
who stated that the land belongs to the respondent. D.W.2 Okello Patrick, who stated that the
mark stones were planted in 1974; (iii) Naphthali Okeny, who stated that the respondent's father in
law settled onto the land in 1934. The appellant and his father lived across the road; and (iv)
Oryema Bosco Odur, who stated that the mark stones were planted in 1982 while the conflict
10 began in 2007.

In his judgment, the trial Magistrate found that the land in dispute is registered as LRV 1316,
Folio 2, Plot 4, Block 5 Onyona Koch Omot Gulu, measuring approximately 94.7 hectares, and
is registered in the names of James Moto-Abayo Watling. It belonged to the late Gideon Okema
15 and the remains of his house were visible on the land during the *locus in quo* visit. He was the
respondent's father in law and the registered proprietor of the land is her husband. The
respondent therefore is not a trespasser on the land. The boundaries of the land given to the
appellant in 1962 by his uncle Festo Wala were not defined in evidence and it does not extend
into the area covered by the respondent's husband's title. The appellant could not define the
20 boundary between his and the respondent's husband's land. It is the appellant who encroached
onto the respondent's land without any claim of right. The suit was dismissed and judgment
entered for the respondent against the appellant on the counterclaim with a declaration that her
husband is the lawful registered owner of the land, she was awarded general damages of shs.
10,000,000/=, a permanent injunction was issued against the appellant, an order of vacant
25 possession within thirty days and costs of the suit and counterclaim.

The appellant was dissatisfied with the decision and appealed to this court on the following
grounds, namely;

1. Had the learned trial Magistrate considered the point that no inspection / survey was ever
30 conducted on the suit land, he would have found that the suit land was registered
fraudulently.

2. Had learned trial Magistrate properly considered the long an uninterrupted settlement by the appellant on the suit land, he would not have declared him a trespasser.
3. Had learned trial Magistrate scrutinised the lease (documents of title) granted to the respondent, he would have established that it had expired according no interest in the suit land to her.
4. The trial Magistrate erred in law and fact when he failed to properly conduct / relied on unsworn testimonies at locus thereby occasioning a miscarriage of justice.

In his submissions, counsel for the appellant, Mr. Ocorobiya Lloyd, argued that the trial court found there was no fraud involved, yet according to the evidence adduced in court the appellant and his witness testified that the land not been inspected by the Area Land Committee. The appellant was thus not notified that the land on which he was residing had a title to it issued. The respondent confirmed this. There is no inspection report. She confirmed that none of the sub-county officials was present. It was said the inspection was done in 1974 yet in her testimony she said it was in 1982. The decision in *Kampala District Land Board v. Chemical Distributors National Housing Corporation*, is about procedures and if not followed it vitiates the title. A similar decision is also in *Matovu and 2 others v. Seviiri and another*, [1979] HCB 174.

As regards the second ground, he submitted that the finding to the effect that the appellant was a trespasser is wrong. He could not have been a trespasser because the court in its judgment found the appellant was given land in 1961. The respondent came onto the land in 1982, almost 21 years after the appellant had been on the land. Her husband had not been in Uganda since 1979. He was not on the land and thus he could not have acquired the lease in 1982 when he was not in Uganda. There is evidence of the respondent that she was never at any time present on the land in dispute as far back as 1968, she was serving in various hospitals around the country. The longest being 1977 - 2002. There was no way she had possession whether actual, constructive or otherwise. She did not tell the court how the land was being used and yet the appellant said he had been using it for over twenty years. He began to see the respondent's husband in 1982. The respondent never lived in the area at all.

He argued further that the third ground of appeal regards the expired lease. If for arguments sake it is admitted the husband to the respondent was given the land, the lease expired after five years from 1st October, 1982. By 1987, the lease had expired. It was never renewed or extended. Annexure "A" to the Written Statement of Defence shows the title was granted for an initial term
5 of 5 years. Section 24 (3) and (b) and (4) of *The Public lands Act* required compensation of customary tenants. The appellant, pleaded a gift and when he testified he said he inherited. Counsel relied on *Babweyaka's case* on long stay on land as a basis for a claim. *West Nile Teacher's Savings and Credit Cooperative Society Limited v. Tabu David*, on an expired title.

10 Lastly, counsel argued in respect of the visit to the *locus in quo* that a number of people were allowed to testify. They were not sworn. They were not cross-examined. Their evidence favoured the respondent because it puts the respondent's family on the land in 1976 yet they obtained the title in 1982 and the respondent's father in law is placed on the land in 1934. It did not affect the title but only the question who was there first. The court should find the lower court erred to side
15 with the respondent despite the overwhelming evidence of the appellant. He prayed that the appeal be allowed and the title be cancelled for it was obtained fraudulently. Counsel for the respondent did not file an submissions.

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence
20 presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. 25 Nsibambi [1980] HCB 81*). The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account
30 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.

It is convenient for this court to consider ground 4 of the appeal first. It is argued that the court below erred in recording evidence from persons who had not testified in court and that this 5 occasioned a miscarriage of justice. Visiting the *locus in quo* is essentially for purposes of enabling the trial court 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 and therefore must be limited to an inspection of the specific aspects of the case as canvassed during 10 the oral testimony in court and to testing the evidence on those points only. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha* [1969] EA 506, *De Souza v. Uganda* [1967] EA 784, *Yeseri Waibi v. Edisa Byandala* [1982] HCB 28 and *Nsibambi v. Nankya* [1980] HCB 81). It was an error for the 15 court to have recorded evidence from; (i) Aoka Kamilo, (ii) John Oceng Makmoi, (iii) Naphali Okeny, and (iv) Oryema Bosco Odur.

That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in 20 any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the 25 court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for 30 any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is

reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the four additional witnesses, since I am of the opinion that
5 there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those four witnesses. This ground accordingly fails.

Grounds 1 and 3 will be considered next and concurrently since they relate to the validity of the title deed. On the face of the title deed, it shows that by Instrument No. 23219 of 21st June, 1982
10 the lease was extended to the full term of 49 years as from 1st October, 1982, the date of commencement of the initial term. It was therefore not an expired lease as argued by counsel for the appellant. It is due to expire on 1st October, 2031. The title deed presented by the respondent satisfies both the juridical and spatial components of title in that; it is properly sealed, reflects the requisite Volume, Folio and plot numbers, it defines the tenure as leasehold, specifies the
15 duration as 49 years, identifies the respondent's husband as registered owner and the deed print illustrates its spatial aspect. On the face of it, it is a valid title deed.

Section 59 of *The Registration of Titles Act*, guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made
20 invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*, which essentially relate to fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the
25 world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker [1967] AC 569*).

The appellant claims that the title was obtained fraudulently. Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practice to get
30 advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disabling and any unfair way by which another is cheated or it is intended to

deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya* S.C. Civil Appeal No. 36 of 1995). In seeking cancellation or rectification of title on
5 account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others*, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd.*, S.C. Civil Appeal No. 22of 1992). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond
10 mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited [1987] HCB 130* and *M. Kibalya v. Kibalya [1994-95] HCB 80*). Anyone impeaching a registered title must prove actual fraud on part of the registered proprietor, i.e. dishonesty of some sort, and not constructive or equitable fraud.

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In the instant case, neither did the appellant plead particulars of fraud nor did he prove any to the required standard. The evidence certainly did not reveal any fraud attributable to the registered proprietor. The argument by counsel for the appellant that the land was not inspected by the Area Land Committee, and that the appellant was not notified is not borne out by the evidence on
20 record. To the contrary, the appellant testified that in 1982 he learnt about the respondent's husband's process of acquisition of a lease title and although he was invited by the Land Inspection Committee, he refused to participate in that process but he later heard that the land had been surveyed, although he has never seen any of the mark stones. That testimony does not support the argument that there was no inspection report, which was never proved as a fact. The
25 evidence suggests that an inspection was done but the appellant chose not to participate, despite the prior notification. The respondent testified that she was not present during the inspection and therefore her testimony could not be relied upon for the determination of the identity of the persons who attended that process. The argument that the respondent's husband had not been in Uganda since 1979, was not on the land and thus he could not have acquired the lease in 1982
30 when he was not in Uganda, is unfounded as well. One does not have to be physically present in order to secure an interest in land. The two grounds of appeal therefore fail as well.

Lastly, the argument in respect of ground 2 is that the appellant had enjoyed a long uninterrupted occupancy that should have vitiated the respondent's title. Under section 64 of *The Registration of Titles Act*, the proprietor of land or of any estate or interest in land under the operation of the Act, except in the case of fraud, holds the land or estate or interest in land subject only to such encumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other encumbrances, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the certificate of title or instrument evidencing the title of such proprietor.

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Under section 64 (2) of *The Registration of Titles Act*, land included in any certificate of title is deemed to be subject to the reservations, exceptions, covenants, conditions and powers, if any, contained in the grant of that land, and to any rights subsisting under any adverse possession of the land. In essence, the registered proprietor's estate is not paramount where any part of the proprietor's parcel has been adversely occupied. In the plaint, the respondent claimed to have obtained the land in dispute by way of gift. An *inter vivos* gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift (See *Standard Trust Co. v Hill*, [1922] 2 W.W.R. 1003, 1004 (*Alta. Sup. Ct. App. D*)).

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A gift *inter vivos* involves an owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land from one person to another, made gratuitously, and not upon any consideration of blood or money. It has been legally defined as “the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee” (see *Black's Law Dictionary*, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187). The appellant did not adduce evidence to prove such a grant.

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To the contrary, in his testimony the appellant claimed acquisition by inheritance. Inheritance denotes devolution of property under the law of descent and distribution. Inheritance entails a

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process guided by rules that govern the devolution and administration of a deceased person's estate. It follows that an individual who claims property of a deceased person only by dint of family affiliation does not necessarily claim by inheritance unless and until it is proved that the devolution was in accordance with the relevant law of descent and distribution under custom or enactment. The appellant still did not adduce evidence to prove such inheritance.

It is only on appeal that the appellant first raises adverse possession as a justification of his presence on the respondent's husband's land. Adverse possession was not the basis of his claim in the court below. It is trite that a party is bound by his or her pleadings and that only evidence relevant to the pleadings may be received (see *Mohan Musisi Kiwanuka v. Asha Chand*, S. C. Civil Appeal No. 14 of 2002; *Lukyamuzi v. House and Tenant Agencies Ltd* [1983] HCB 74 and *Dhamji Ramji v. Rambhai and Company (U) Ltd* [1970] EA 515). Courts have long frowned on the practice of raising new arguments on appeal. The concerns are twofold: first, prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial and second, the lack of a sufficient record upon which to make the findings of fact necessary to properly rule on the new issue (see *Brown v. Dean*, [1910] A.C. 373).

In addition, the general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Despite this general rule, there have been exceptional cases in which courts have entertained issues on appeal for the first time. There are three possible scenarios with regard to the raising of new issues on appeal. An appeal on a new issue may be permitted upon any subsequent change to the procedural or substantive law; denied, despite the change in the law, except in exceptional circumstances; or permitted where a law has been declared unconstitutional, that is to say where there is no longer any legal basis to the decision. Consequently, a new point of law not argued at the trial will only be permitted on appeal if court is satisfied that had it been raised at the trial, no evidence could have been adduced by the adverse party at the trial to contradict it, which is not the case here.

That aside, the type of adverse possession capable of vitiating a title is one that is peaceful, actual, hostile, open, notorious, continuous, uninterrupted and exclusive in respect of the entire

land in issue, for more than twelve years (see *Kintu Nambalu v. Efulaimu Kamira* [1975] HCB 222 and *Buckinghamshire County Council v. Moran* [1990] Ch. 623). The concept of adverse possession contemplates a hostile possession i.e. possession which is expressly or impliedly in denial of the title of the true owner to the knowledge of the true owner that the adverse possessor
5 claiming the title as an owner in himself. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. In other words the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under *The Limitation Act*. The owner of the land must have actual knowledge of the adverse possession. Non-use of the land by the owner, even for a long time, won't affect his or
10 her title, but the position will be altered when another person takes possession of the land and asserts rights over it and the person having title omits or neglects to take legal action against such person for more than twelve years.

It is trite that a cause of action arises when a right of the plaintiff is affected by the defendant's
15 act or omissions (see *Elly B. Mugabi v. Nyanza Textile Industries Ltd* [1992-93] HCB 227). Limitation begins to run from the date of the cause of action to the date of filing the suit (See *Miramago F. X. S. v. Attorney General* [1979] HCB 24). Continuity in this context means regular uninterrupted occupancy of the land. When there is a break in occupation, the limitation clock begins to run from the beginning of the renewed possession.

20 Section 25 of *The Limitation Act* which provides for postponement of limitation period in case of fraud or mistake, is inapplicable in so far as the appellant stopped only at pleading that the respondent acquired the lease fraudulently, but he neither pleaded the particulars of fraud and when they were discovered. Fraud must not only be specifically pleaded but also the particulars
25 of the fraud alleged must be stated on the face of the pleading (see *BEA Timber Co. v. Inder Singh Gill* [1979] EA 463). Under section 25 of *The Limitation Act*, the limitation period does not begin to run until such a time when the plaintiff is invariably aware, or could have with reasonable diligence been aware of the fraud, but this must be pleaded (see *Sunday Edward Mukooli v. Nabbale Teopista and three others, H.C. Civil Suit No. 282 of 2013*).

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Being an exception, Order 7 Rule 6 and Order 18 rule 13 of *The Civil Procedure Rules* it was mandatory to plead the exception since the suit was filed outside the period of limitation and failure to do so renders the plaint fatally defective (see *E. Otabona v. Attorney General (1991) ULSLR 150; Iga v. Makerere University [1972] EA 65* and). A plaint that does not plead an exception where the cause of action is barred by limitation, is bad in law. The title deed was issued in October, 1982 yet the suit to challenge its validity was filed in 2016, nearly 22 years out of time. The appellant did not plead any facts to bring his suit within the statutory exception. The suit was barred in law and was rightly dismissed. In the final result, the appeal has no merit. It is dismissed with costs to the respondent.

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Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.