

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CIVIL APPEAL No. 0051 OF 2017

(Arising from Kitgum Grade One Magistrate's Court Civil Suit No. 0066 of 2012)

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ATUNYA VALIRYANO APPELLANT

VERSUS

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OKENY DELPHINO RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The respondent sued the appellant for recovery of approximately 200 acres of land, at Pacu Lagwee village in Lamwo district, general damages, a permanent injunction, interest and costs. His case was that he acquired the land in dispute as virgin vacant land in 1973. Apart from the year 1975 when a one Besensio Ogano's trespass on that land was stopped by the then Parish Chief, the respondent enjoyed quiet possession of the land henceforth until the year 2009 when the appellant began his encroachment on the land, claiming to be the customary owner thereof. Decisions by the L.C.II and L.C.III Courts had directed that the warring parties use the land jointly but a re-trial was subsequently ordered by the Chief Magistrate's Court, hence the suit.

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In his written statement of defence, the appellant denied the respondent's claim in toto. He contended instead that the land in dispute is owned customarily. It was first occupied by his great grandfather in the 1940s. The appellant is the third descendant to acquire the land by inheritance. The land in dispute belongs to the Pacu Clan and is used as communal farmland. Both the appellant and the respondent belong to the Pacu Clan and derive their interest in the land by virtue of their membership to that clan. The appellant is only a custodian of the clan land. The respondent has no exclusive rights to the land but only user rights as a member of the clan. The L.C.II and L.C.III Courts decided in favour of the appellant, holding that the parties should use the land jointly. The appellant therefore instead sought at declaration that the land in dispute

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belongs to the Pacu Clan and that the respondent has no rightful claim to exclusive user, a permanent injunction, and costs.

5 Testifying as P.W.1, the respondent Okeny Delfino stated that the appellant is the Hoe Chief (Rwot Kweri) of their area. The respondent had occupied the land from 1973 until 2004 when he vacated it to live in and IDP Camp. The land in dispute is in the care of Lagwee Kimuku but the appellant has since October 2009 trespassed on it by undertaking cultivation thereon. The appellant has encouraged other members of the clan to cultivate it. Over sixty persons, all members of the Pacu Clan mobilised by the appellant, have since trespassed onto the land. The
10 appellant is a relative of Bicensio Ogeno and Besneri Ludega who in 1975 made a futile attempt to take over the land. P.W.2 Keneri Okwee, a neighbour, testified that the appellant during the year 2009 trespassed onto land that belongs to the respondent. He has since 1964 seen the respondent cultivate the land.

15 P.W.3 Gaetano Onek testified that when he settled in the area on the Western side of the land in dispute during the year 1986, he found the land in dispute in the possession of the respondent. During the year 2009, the appellant and several others encroached onto the land and distributed it among themselves. The L.C.II and the L.C.III decided against the appellant. The land belongs to the respondent and not the Pacu Clan. P.W.4 Achwo Kwiranima testified that the respondent was
20 a Parish Chief from 1966 - 1983 while the appellant was a Sub-Parish Chief. The land in dispute belongs to the respondent. Decisions by the L.C. Courts were in favour of the respondent. The respondent cultivated 16 acres of the land and received material support from the agricultural officer. The respondent closed his case.

25 In his defence as D.W.1, the appellant Atunya Valeriano testified that both parties belong to the Pacu Clan. The land claimed by the respondent, is part of a total of approximately 10,500 acres which belong to the Pacu Clan. The appellant was born and raised on the land in dispute and both his parents were buried on that land. The land was first occupied by his great grandfather Pacu during the 1940s and he is now the third descendant in succession to occupy the land. He is
30 the custodian of the clan land and he and the respondents being members of that clan, enjoy benefits of the land. The respondent has no exclusive possession but only user rights of the land.

The dispute began in 2008 when the respondent claimed exclusive ownership of the land. The L.C.II Court of Paloga decided that the land was communal and it belonged to the Pacu clan. The L.C.III Court upheld that decision and directed that all parties continue to utilise the land.

5 D.W.2 Kal Okwera Dario testified that the appellant is his neighbour and a clan brother of the respondent. The land was first occupied by his great grandfather Pacu during the 1940s and he is now the third descendant in succession to occupy the land. The appellant is a clan leader and custodian of the land. The land is communally owned by the Pacu clan and its members only enjoy user rights. The land is occupied by members of the Pacu Clan who have homesteads on it
10 from time immemorial and the dispute only arose in the year 2008 when the respondent claimed exclusive ownership of the land. The respondent is only attempting to forcefully obtain exclusive possession from the clan. D.W.3 Olweny Charles Pidomoi, the Rwot Kweri of Gena village testified that the land was first occupied by his great grandfather Pacu during the 1940s and he is now the third descendant in succession to occupy the land. The land is communally owned by
15 the Pacu clan and its members only enjoy user rights. The land is occupied by members of the Pacu Clan who have homesteads on it from time immemorial and the dispute only arose in the year 2008 when the respondent claimed exclusive ownership of the land. The respondent is only attempting to forcefully obtain exclusive possession from the clan.

20 Although the court indicated that the next step was to visit the *locus in quo*, there is nothing on the record to show that this was done. In his judgment, the trial magistrate found that the respondent had enjoyed exclusive possession and user of the land in dispute since 1973 following its acquisition as virgin vacant land. Had it belonged to the Pacu Clan, he opined, the respondent would not have enjoyed such a long period of exclusive use. Had it been clan land
25 before 1973, then the respondent would not have acquired exclusive possession. The land is private property of the respondent and does not belong to the Pau Clan land. The appellant's entry onto the land in 2009 constituted an act of trespass. The respondent was declared rightful owner of the land, was granted vacant possession, a permanent injunction issued against the appellant and the costs of the suit were awarded to the respondent.

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

1. The learned trial Magistrate erred in law and fact when he entered judgment against the appellant and issued a permanent injunction against the appellant's clan members who are not parties to the suit against principles of fair trial hence occasioned a miscarriage of justice to the appellant and his clan members.
2. The learned trial Magistrate erred in law and fact when he failed to consider the fact that the suit land forms part of the Pacu Clan customary .
3. The learned trial Magistrate Grade One erred in law and fact when he wrongly disregarded the evidence of the appellant on record for want of corroboration thereby occasioning a miscarriage of justice.
4. The learned trial Magistrate Grade One erred in law and fact when he failed to properly conduct the locus visit thus occasioning a miscarriage of justice.

In their submissions, counsel for the appellant, M/s Masaba, Owakukikoru-Muhumuza & Co. Advocates, argued that the appellant is only a Hoe Chief and custodian of Clan land. Although the respondent claimed that the appellant had brought about 60 people onto the land, he did not sue any of them. It was erroneous for the trial magistrate to enter judgment against the said clan members when they had not been afforded a hearing, yet the appellant was not sued in a representative capacity. The boundaries of the land in dispute were never defined in the oral testimony of the witnesses and the court never visited the *locus in quo* to establish them.

In response, counsel for the respondent, Mr. Jude Ogik, submitted that the trial magistrate scrutinised and evaluated all the evidence. The respondent found a virgin unoccupied piece of vacant land way back in 1973 and turned it into a farm. The appellant only intended to annex the respondent's land to the Pacu Clan land have entered thereon only in 2009 upon return from the IDP Camp.

It is the duty of this court as a first appellate court 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 *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. 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 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.

All grounds of appeal will be considered concurrently. It is evident from the record of appeal that the respondent's claim is based on exclusive use and control of the land in dispute as private property under customary law (exclusivity). The land having been acquired as *terra nullius* (belonging to no one or no man's land). His claim in essence was that when he acquired it in 1973, it was a tract of territory practically unoccupied, without settled inhabitants. Acquisition of the land as *terra nullius* would entail an additional requirement of evidence to show that land on this village was practically unoccupied or claimed by anyone during or around that year and that under custom, such acquisition was recognised as vesting private rights of ownership.

The common law accepts all types of customary interests in land, "even though those interests are of a kind unknown to English law" (see *Oyekan v. Adele* [1957] 2 All ER 785). Section 54 of *The Public Lands Act* of 1969 (then in force) had defined customary tenure as "a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons." Customary tenure is recognized by Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and s. 2 of the *Land Act*, Cap 227 as one of the four tenure systems of Uganda. It is defined by s. 1 (l) together with s. 3 of the *Land Act* as system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which include; (a) applicable to a specific area of land and a specific description or class of persons; (b) governed by rules

generally accepted as binding and authoritative by the class of persons to which it applies; (c) applicable to any persons acquiring land in that area in accordance with those rules; (d) characterised by local customary regulation; (e) applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in,
5 land; (f) providing for communal ownership and use of land; (g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and (h) which is owned in perpetuity.

Customary tenure is characterised by local customary rules regulating transactions in land,
10 individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules. Therefore, a person seeking to establish customary ownership of
15 land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with
20 establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply.

In the instant case, the customary law under which the respondent claimed to have acquired the
25 land as *terra nullius* is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the respondent to adduce evidence of the customary law by virtue of which he would gain interest in vacant land only by the fact of occupancy. Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure (see *Bwetegeine*
30 *Kiiza and Another v. Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009*; *Lwanga v. Kabagambe, C.A. Civil Application No. 125 of 2009*; *Musisi v. Edco and Another, H.C. Civil Appeal No. 52 of*

2010; and *Abner, et al., v. Jibke, et al.*, 1 MILR 3 (Aug 6, 1984). Possession or use of land does not, in itself, convey any rights in the land under custom. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative.

5 The mere absence of agricultural practices or other activities common to exclusive use of land that could have prevailed before the memory of man or in the 1940s, following the enactment of *The Public Lands Act, 1962*, (repealed by *The Public Lands Act, 1969*) could not during the 1970s, justify the claiming of land as *terra nullius*, as if it had no owner. This is because under section 11 (1) (a) of the 1962 Act, all "Public Land" (land that had not been demised by way of
10 lease under the provisions of *The Crown Lands Ordinance, 1903*), was vested in the Uganda Land Commission. By *The Crown Lands Ordinance*, except for land held under Leasehold, Freehold and Mailo Tenure, all land had been declared "crown land," vested in the Queen of England as holder of the radical title. Upon the enactment of *The Public Lands Act, 1962*, Crown land was after independence renamed Public Land. That land was vested respectively in the
15 Uganda Land Commission, the Buganda Land Board, Administration Land Boards, Public Bodies and Urban Authorities. Subsequently, sections 1 and 21 of *The Public Lands Act, 1969* re-vested all that land in the Uganda Land Commission and Public Bodies, only.

Since by virtue of *The Crown Lands Ordinance*, "crown land," vested in the Queen of England
20 as holder of the radical title in freehold, the doctrine of discovery or *terra nullius* ceased to have a legal basis. Under Section 24 (4), thereof, indigenous Ugandans had a right to occupy any land (outside the Buganda Kingdom and urban areas) not granted in freehold or leasehold without prior license or consent [only] in accordance with their customary law. Under section 22 (2) of *The Public Lands Act, 1962*, and subsequently section 24 (1) of *The Public Lands Act, 1969*, it
25 was lawful for persons holding by customary tenure, to occupy without grant, lease or license from a Controlling Authority, any un-alienated public land vested in an Administration Land Board;- (a) which was not in an urban area; and (b) in respect of which no tenancy or other right of occupancy had been created. "Customary Tenure" was defined by section 54 of *The Public Lands Act, 1969*, to mean "a system of land tenure regulated by laws or customs which are
30 limited in their operation to a particular description or class of persons."

That being the status of the statutory law that prevailed at the time, the respondent could not rely on the principle of the first taker or discoverer, under the doctrine of discovery or *terra nullius* in respect of "Public Land," and more particularly land within an area already inhabited by the indigenous peoples of the Pacu Clan. His occupancy of what was otherwise Public land at the
5 time would only be lawful if it was shown to be under customary tenure held in accordance with customary law. This notion of wild land as uncultivated and thus bereft of ownership, the ancient idea that un-owned land could be claimed by whoever first discovered it, was not shown to have any basis in statutory or customary law in force during or around 1973, at the time the respondent claimed to have acquired ownership of the land under that doctrine. In any event,
10 uncultivated land is not necessarily *terra nullius*. Customary nomadic modes of occupancy of land when asserted cannot be ignored. Proof of ownership of land under customary tenure is not established only by evidence of long user or occupation of land, without more (see *Bwetegeine Kiiza and Another v Kadooba Kiiza C.A. Civil Appeal No. 59 of 2009*). One is required to show that the acquisition of the land was in accordance with a system of land tenure regulated by laws
15 or customs which are limited in their operation to a particular description or class of persons.

Being neither private property nor being appropriated and managed as public property, land in collective property regimes, or "commons" under free and open access, may often be mistakenly associated with an absence of property or ownership, and hence considered as *terra nullius*. The
20 idea that wild or minimally altered land constitutes waste is inconsistent with the planning, coordination, skills, and activities involved in native hunting, gathering, trapping, fishing, and non-sedentary agriculture, which took thousands of years to develop and a lifetime for each generation to acquire and pass on, typical of communal customary land ownership systems, such as that claimed by the appellant on behalf of the Pacu Clan. The fact that a tract of land was left
25 unutilised or used for purposes other than agriculture, does not necessarily mean that the clan did not possess the land in such a way as to acquire ownership. Hence the respondent failed in his claim of title by right of discovery.

On the other hand, the appellant's defence was based on long-term (inclusive) communal land
30 tenure. It was necessary for that purpose to establish the present social organisation of the people living on the land, in order to establish long-term communal tenure rather than personal use and

possession of the land. Customary land tenure recognises communal "ownership" and "use" of land (see section 3 (1) (f) of *The Land Act*). Under section 15 (1) of *The Land Act* an association may be formed for the "communal ownership and management" of land.

5 Communal Land Ownership has been defined as "a system whereby land is collectively owned by an extended family, clan or community of ancestrally related people, with the control or administration vested in a leader or his appointee who may give out portions of the land to the community or non-community members to be used on an individual basis, on a more or less nucleated family basis, on a co-operative basis or through some other such recognised
10 arrangement, for variable lengths of time" (see Edwin A. Gyasi, *The Adaptability of African Communal Land Tenure to Economic Opportunity: The Example of Land Acquisition for Oil Palm Farming in Ghana*, *Africa: Journal of the International African Institute*, Vol. 64, No. 3 (1994), pp. 391-405). It has also been defined as "situations where groups, communities, or one or more villages have well defined, exclusive rights to jointly own and / or manage particular
15 areas of natural resources such as land, forest and water." (see Kirsten Ewers Andersen, *Communal Tenure and the Governance of Common Property Resources in Asia: Lessons from Experiences in Selected Countries*, (2011: 3).

Therefore, exclusive possessory rights under exclusive usufruct may not necessarily translate
20 into exclusive ownership rights under customary tenure. Gerrit Pienaar, Professor of Private Law, Northwest University (Potchefstroom campus), South Africa, in his journal article, *The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?* (*Stellenbosch Law Review*, Volume 19, Issue 2, Jan 2008, p. 259 - 277) posits that communal land tenure displays the following features; (a) land rights are embedded in a range of
25 social relationships, including household and kinship networks, and various forms of community membership, often multiple and overlapping in character; (b) Land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure. In a specific community rights may be individualised (dwelling); communal (grazing, hunting, fishing and trapping) or mixed (seasonal cropping combined with grazing and other activities); (c) Access to
30 land is guaranteed by norms and values embodied in the community's land ethic. This implies that access through defined social rights is distinct from control of land by systems of authority

and administration; (d) The rights are derived from accepted membership of a social unit and can be acquired by birth, affiliation, allegiance or transactions; (e) Social, political and resource use boundaries are usually clear, but often flexible and negotiable, and sometimes the source of tension and conflict; (f) The balance of power between gender, competing communities, right-
5 holders, land administration authorities and traditional authorities is flexible; (g) The inherent flexibility and negotiability of land tenure rights mean that they are adaptable to changing conditions, but susceptible to capture by powerful external forces (like the state) or processes (like capital investments).

10 Similarly, in the South African Constitutional Court decision of *Alexkor v. Richtersveld Community and others, 2004 (5) SA 460*, communal land ownership was said to be characterised by; (i) communality; (ii) inalienability; (iii) exclusive use and occupation by the community; (iv) the right to exploit natural sources above and below the surface, including the minerals. In *The Land Act, Cap 22* communal "ownership," presents the idea of "collective property." The idea is
15 that the community allocates land for the private use of its members. These determinations are made on the basis of social interest through mechanisms of collective decision-making or collective control, of varying levels of formality; anything from a leisurely debate among the elders of the community to the formation and implementation of strict rules. Usually rights to family garden plots and fields are decided at the household or sub-clan level, while communal
20 resources such as grazing lands and water are regulated communally.

Access to land is through the right of avail which is a general right held by the community as a whole, but in which every member automatically participates. In this sense, under customary tenure of the communal type, land is "owned" by the community and the individual members
25 enjoy only rights of user, otherwise known as usufructuary rights, based on accepted membership to the particular community. The more common practice is for a traditional authority to distribute land parcels to clans or sub-clan heads who, in turn, distribute the land to households. The household head then has the responsibility of distributing the land among household dependents. This means that these lands are not privately alienable or disposable to
30 non-members, and the rights are imprescriptible.

In this sense, communal "ownership," is a system, where all members of a community have rights in the land within the community's territory. Land is held as the collective property of the community. Collective property differs from private property, where the holder is an individual (physical or juridical person), differs from public property, where the holder is the State, and also
5 differs from an open access regime (common property) where anyone holds use rights. In these terms, collective property outlines a flexible combination of resource use and management modes. While a collective property may be partitioned, it still is a common property as the claims of individual families are endorsed by the community's own internal rules to which all member families have agreed. In communal tenure, both the boundaries of the land owned in common
10 and group membership are clearly defined and rights accruing from it are only capable of entitlement and enjoyment within that system, and hence it is not capable of alienation or assignment. The only people entitled to use the land are members of a community: in limited access communal property, all members of the community have a right to use the land, and a right not to be excluded from it, and a right to exclude all non-members from it. These are
15 necessary conditions to exclude outsiders and to secure the rights of group members so that these rights cannot be taken away or changed unilaterally.

Evidence of communal ownership of land is to be found in; (i) a system of governance that enforces exclusive use and occupation by the community, the exclusivity being related to the
20 rights exercised by the community and not to individualised rights. The indigenous community must have had exclusive occupation of the land from time immemorial; (ii) an established uniform system or set of customary norms that regulate possession and use of the land which, although they may be highly flexible, are certain, considered as binding and are frequently followed by members of the community. These may be practices, customs and traditions that are
25 integral to the distinctive culture of the group claiming the right. All decisions pertaining to the land must be made by the community; (iii) beneficial occupation and use of the subject land i.e. personal and usufructuary rights (inclusivity), forming part of their inclusive communal activities; (iv) and that the usufructuary rights in issue are not irreconcilable with the nature of the community's attachment to the land. It is for the latter reason that land held as communal
30 customary land may not be alienated without the consent of the specific community.

Communal ownership is thus a term used to describe those situations where rights to use resources are held by a community. A system in which resources are governed by rules whose point is to make them available for use by all or any members of the society, is in essence a "collective property" system. In this context, the word ownership is misleading. Land ownership is defined in terms of user rights and not exclusive ownership rights. A person does not really own land: but rights in land. Communal customary tenure is in essence a bundle of rights, which may vary from community to community.

These rights can be placed in three broad categories; - (i) user rights; such as the right to access the land, draw benefits from the land or exploit it for economic benefit; (ii) control or decision-making rights, such as the rights to manage the land (plant a crop, decide what tree to cut, where to graze) or exclude (prevent others from accessing the land); and (iii) powers of alienation, such as the right to rent out, sell, or transfer the rights to others. In most cases, there are overlapping sets of rights, underneath the general classifications. An area within land held under customary tenure may be classified as common property, but individuals and groups are often allowed to use the land, either for access (e.g. recreation), withdrawal (cutting grass for thatching or fetching firewood), or even management, under co-management arrangements or concessions. At the other end of the spectrum on individual private property, members of the community may have rights, e.g. to cross the land with their animals (access), or to take drinking water or harvest particular products (withdrawal), or the right of the community to regulate alienation or the land use (manage). The holder of all these interests, if they vest in one person in relation to land, will have the whole bundle of rights and interests.

Thus the "owner" of a piece of land forming part of communal land only has an interest or estate in the land, since communal land is collectively owned. The community is assumed to hold the complete bundle of rights, including alienation rights. The members of the community only have varying levels of usufruct rights. Usufruct is the right of enjoying a thing the ownership of which is vested in another. Thus "ownership" is seen as a set of different modalities of usufruct rights, some permanent and some temporary.

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Under customary tenure therefore, possession is not a definitive proof of ownership just as non-possession is not inconsistent therewith. Exclusive possession where land is owned communally is possession without any title whatever. It is mere holding or possession without any right or title at all but possession only in the sense of holder. The usufructuary is first of all entitled to the possession of the property, he or she has rights of use and enjoyment to the property, even to the exclusion of third parties and the owner. A possessor of a usufruct has a right to be respected in his or her possession and should he or she be disturbed therein, to be protected in or restored to said possession. However, the right conferred are purely of usufruct. The usufruct holder has the right to exclusive possession of the property but not as owner.

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When a person possesses property in full ownership, they have the right of; (i) possession; (ii) the income derived from it; and (iii) the right to sell, lease, mortgage or otherwise transfer the property, management and exclusion rights. In contrast, a usufruct provides the usufructuary with only the right to use, possess, and derive income from the property subject to the usufruct, but without the right to alienate. Unless specifically granted the right to sell without the consent of the owner, the usufructuary may not sell the without the owner's consent. For the duration of the usufruct the owners may not interfere with the usufructuary's peaceful possession and use of the property subject to usufruct. A usufruct can terminate if the parties agree but may also be terminated unilaterally by the usufructuary by way of an express renunciation. The usufruct may be terminated by the owner if the usufructuary commits waste, alienates any part of it without authority, or abuses his enjoyment in any other manner.

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When land is owned communally, in order for exclusive possession to confer or constitute proof of ownership, there ought to be evidence of enjoyment by the community of three principal rights: *usus*, the right to utilise the land for one's own purposes; *fructus*, the right to gather and use the fruits of the land; and *abusus*, the right to alienate, i.e. to sell, lease, grant as a gift, or mortgage. In contrast, individual members or smaller units of the community enjoy only the first two of these rights since theirs are usufructuary rights. Ownership is incomplete without having a right to alienate the property in issue.

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Communal ownership confers onto the community and not the individual members, rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land. It is a group interest that inheres in present and future generations. Court though has to be mindful of the fact that under some forms of communal customary tenure, the rights to property may be defined as comprising the freedom to dispose either partially or in full, taking into account restrictions and the rights of the community.

At common law, factual possession of land signifies an appropriate degree of exclusive physical control. For vast lands, possession requires knowledge of its boundaries and the ability to exercise control over them (see *Powell v. McFarlane (1977) 38 P&CR 452*). In respect of claims over adjacent unoccupied land, there should be evidence that the claimant deals with the cleared and un-cleared portions of the land, co-extensive with the boundaries, in the same way that a rightful owner would deal with it. Once there is evidence of open, notorious, continuous, exclusive possession or occupation of any part thereof as would constructively apply to all of it, in such cases occupancy of a part may be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by the claimant. A person exercising such possession therefore, for all practical purposes, is the "owner" of the land since it is trite that "possession is good against all the world except the person who can show a good title" (see *Asher v. Whitlock (1865) LR 1 QB 1*, per Cockburn CJ at 5).

However, when dealing with claims of communal ownership of land, where ownership has existed from time immemorial, courts should do so with a consciousness of the special nature of such claims and the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. In many instances references to custom are contained in family narratives of how land rights were first acquired and passed down over generations. The courts must not undervalue the evidence presented by claimants of communal land ownership simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law tort case (see for example the Canadian case of *Delgamuukw v. British Columbia*, Supreme

Court of British Columbia [1991] 3 WWR 187; British Columbia Court of Appeal [1993] 5 WWR 97 and Supreme Court of Canada [1997] 3 SCR 1010). The dangers of looking at customary law through a common-law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions (see *Mabo v. The State of Queensland (No 2)* (1992) 175 CLR 1).

In order to establish a communal ownership under custom, it is necessary for claimants to be able to establish the existence of a clan or similar community, that this clan has observed the laws and customs of that land and that the clan has maintained its traditional connection to the land from time immemorial. "Taking into account the [customary] perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criterion. The group's relationship with the land is paramount. To impose rigid concepts and criteria is to ignore [customary] social and cultural practices that may reflect the significance of the land to the group seeking title. The mere fact that the group travelled within its territory and did not cultivate the land should not take away from its title claim.... legal protection [is given] to historical patterns of occupation in recognition of the importance of the relationship of an [indigenous] community to its land.... occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture..." (see *R v. Marshall; R v. Bernard* 2005 SCC 43).

For land that is not under continuous physical possession, there ought to be evidence of open access to members of the community for activities such as hunting, grazing, drawing water, hewing firewood, performing sacred ceremonies, etc. even without exercising rights of ownership as known to common law. But even in absence of such evidence, land that is inhabited, even though sparsely with a low level of exploitation of natural resources, cannot be *terra nullius*. Because of the nature of traditional land-use in many of Uganda's indigenous communities being communal, rotational or pastoral, what appears to be unused, under-utilised, or ambiguously owned land at a given time may not be so. Families in the clan or an indigenous community can use the land plots that are not claimed by other families in a given season and

this may happen in rotation. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood.

5 Communal occupancy thus refers not only to the presence of a specific community in villages or permanently settled areas but also the use of adjacent lands and even remote territories to pursue a traditional mode of life. The notion of occupancy is much wider when dealing with communal ownership. Viewed in this light, occupancy is a relative term that is subject to the specific community's culture. Occupation should therefore be proved by evidence, not necessarily of
10 regular and intensive use of the land, but of the traditions and culture of the group that connect it with the land in question. Each case has to be determined on its own merits and quality of evidence.

The court is as well cognisant of section 22 (1) of *The Land Act* which recognises that even for
15 land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, where the customary law of the area makes provision for it. Individuals or households may as well cause their portions of the land to be demarcated and transferred to them, if such portions are in accordance with customary law, made available for the occupation and use of that individual or household (see section 22 (3) (b) of *The Land Act*).
20 The application is subject to the approval of the association. This not only is an indication of the fact that even for land held in a private capacity but forming part of communal land, the community may have some rights to regulate what can be done on or with the land, but it is also a tacit acknowledgement of the fact that the administrative responsibilities associated with communal land often rest with individual traditional leadership or councils as trustees of the
25 community, in areas that observe customary land law. An avenue is now created by the Act for the incorporation of those bodies into legal persons as a representation of the collective, and streamlining their roles.

This presents the reality of limited private ownership rights existing even within communal
30 ownership. It is an avenue for a process of devolution involving the shifting of rights from the community to the family (households) and individual as exclusive private property. To convert

communal title into fee simple estates, the communal interest in the former must be modified in such a way as to ensure a good title in the latter. A prerequisite for such conversion is that the decision to modify or surrender communal title must be made by the collective decision of the community as a whole in accordance with their customary law (see *Chippewas of Sarnia Band v. Canada (AG)*, 195 D.L.R. (4th) 135 and Jack Woodward, *Converting the communal aboriginal interest into private property*, in Lippert (ed) *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (2000) 93-102).

Where it is permissible by custom for such a decision to be taken at the family, the clan, the lineage or other smaller unit of the community, then it should be demonstrated to have been taken in accordance with the common values of the community. Otherwise, Western-style land privatisation can dispossess communities of different kinds, forcing them to trespass when they go looking for water, pasture, thatch, firewood, minor forest products and the like, by limiting access to newly privatised land, which may put food (and other forms of social security among small farmers) at risk, (see Charles Geisler, *New Terra Nullius Narratives and the Gentrification of Africa's "Empty Lands,"* (2012: 22)

Under communal customary tenure, the traditional authority responsible for allocation of land does so to an individual on a semi-permanent rights basis (the only real limitation being that the land cannot be sold, especially to a person who is not a member of the community), for agricultural and residential purposes, while land for grazing remains a communal resource. The range of land use rights in-between the extremes of individual rights on the one hand to common property use on the other, depends on internal customary practices adhered to by local communities, which rules and practices are also dynamic, changing over time with new leadership, and often interacting with new rules imposed by external regulations or market opportunities. These practices are as a result often obscured and require explicit evidence of the customary norms of the particular community, which unfortunately, as in the instant case, is very often not canvassed during the trial. There is a pressing need to represent evidence of these norms and practices in order to give visibility to the internal complex practices within the customary tenure system, if their judicial protection and enforcement is to be attained.

In the instant case, the exclusive possession proved by the respondent was of a nature that established rights of *usus* (the right to utilise the land for his own purposes); *fructus*, (the right to gather and use the fruits of the land); but there was no evidence of *abusus*, (the right to alienate). The respondent proved only a usufruct restricted to the right to use, possess, and derive income
5 from the land subject to the usufruct, but without the right to alienate. For the duration of the usufruct the rest of the members of the community could not interfere with his peaceful possession and use of the land subject to usufruct, for as long as that use was consistent with the group nature of the ownership and the enjoyment of the land by future generations. In the suit, the respondent did not seek protection from interference with his exclusive enjoyment of the
10 usufruct but sought instead to assert exclusive possession as an owner. A usufructuary enjoys exclusive rights over his or her land, but subject to the overriding interests of the community. The attempt to convert that land to a use inconsistent with the group nature of the ownership and enjoyment of the land, from possessory rights into ownership rights, would justify termination of the respondent's usufruct by the Clan.

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He could not acquire ownership of communal land through prescription either. Land held communally by a community identified on the basis of ethnicity, culture or similar community of interest, cannot generally be subject to prescriptive rights arising from adverse possession by a member of that community. This is because possession does not become adverse when the
20 intention to hold adversely is wanting. A true owner is neither dispossessed nor is the true owner discontinued in possession, if a person takes possession with the permission of the true owner. It is however true that, if the person in permissive possession changes his or her *animus* and continues to hold with an open and continuous assertion of a hostile title, his or her possession becomes adverse to the true owner. A possession is adverse only if in fact one holds possession
25 by denying title of the owner or by showing hostility by act or words as against owner of the property in question. A person put into the occupation of land, or a person put into permissive possession of that land, does not occupy it as of right. In such cases, the owner of the property is properly considered to be in possession. A person holding land by way of adverse possession must publish his or her intention to deny right of the real owner. The intention of the adverse
30 possessor must be with notice, or knowledge of the real owner. Unless enjoyment of the land is

accompanied by adverse *animus*, mere possession for a long period even over the statutory period, is not sufficient to mature the title to the land by adverse possession.

On the other hand, apart from pleading that the land in dispute belongs to the Pacu Clan and
5 stating so in their testimony, the appellant and his witnesses did not adduce evidence to show
that the Pacu Clan had observed any localised system of laws and customs that relate to that land
and that the clan has maintained any traditional connection to it from time immemorial as
ancestral land or forming part of lands traditionally occupied by the clan. There is no evidence of
open access to this land by members of the community for activities such as rotational farming,
10 hunting, grazing, drawing water, hewing firewood, performing sacred ceremonies, etc. There is
neither evidence of regular and intensive use of the land by the clan nor evidence of traditions
and culture of the clan that connect it with the land so as to constitute it into land that forms part
of the clan's distinctive culture. The respondent thus did not prove occupation, even in its
extended meaning, of that land by the Pacu Clan before the acts complained of. The only factor
15 in the appellant's favour is that the burden of proof lay upon the respondent rather than the
appellant.

It however so happens that the respondent, the appellant and the rest of the occupants all belong
to the Pacu Clan. The respondent chose to sue only one individual out of the over sixty persons
20 occupying what he claims to be his land, presumably because he was acting as a member of, or
in the interest of a group or class of persons. His explanation for that decision is that it is the
appellant who brought or authorised the rest of the clan members to occupy his land. In his
testimony, the respondent stated that that the appellant is the Hoe Chief (Rwot Kweri) of their
area. The Rwot Kweri is the traditional authority entrusted with fiduciary "ownership" over the
25 community's land, and the concomitant responsibility of land distribution. The Rwot Kweri is
deemed to hold the land for and on behalf of all members of the community. That the respondent
chose to sue him alone and exclude the rest of the "trespassers" is acknowledgement of the
capacity in which he allocated the land to the over sixty other clan members. The respondent's
conduct is thus a tacit acknowledgment of the status of the land as communal land. It is this
30 conduct that slightly tilts the weight of the evidence in favour of the appellant. The respondent

sought to assert exclusive ownership rights over what was for all practical purposes hitherto communal land owned collectively by the Pacu Clan.

When an individual member of the community claims to own, in his or her own capacity, land which is otherwise held communally, then the burden lies on such a member to adduce evidence to show that the land was made available for the occupation and use of that individual, and is privately owned in accordance with customary law. In order to succeed with such a claim, the respondent bore the burden of proof to show that his claimed exclusive possessory or ownership rights were created in accordance with customary law and that the rights granted were subjected to the approval of the relevant unit of the community. The respondent did not discharge this burden. There was no evidence of a collective decision of the community to cede the hitherto communal title over that tract of land, to the respondent's private ownership. Therefore, the respondent did not prove a degree of exclusivity that is capable of evincing title.

Considering the balance of probabilities, the conduct of the parties tends to tilt the weight of the evidence in favour of the appellant rather than the respondent. "If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). When left in doubt, the party with the burden of showing that something took place will not have satisfied the court that it did. In the instant case, the respondent failed to attain the required level of proof. Based on the evidence adduced during the trial, it is more probable than not that the land in dispute is communal land of the Pacu Clan, and not the private property of the respondent. It was therefore erroneous for the court below to have decided in the respondent's favour. The suit ought to have been dismissed instead. In the final result, the appeal is allowed. The judgment of the court below is set aside. Instead, judgment is entered in favour of the appellant by way of dismissal of the suit. The costs of the suit and of appeal are awarded to the appellant.

Dated at Gulu this 6th day of December, 2018

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Stephen Mubiru
Judge,
6th December, 2018.

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