THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0035 OF 2016

(Arising from Arua Grade One Magistrate's Civil Suit No. 0029 of 2003)

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1. **AKENA CHRISTOPHER** }
2. **OTTO FABIO** }
3. **OKELLO CHARLES** }
4. **ABONGA PATRICK** }
5. **OPIYO DAVID** }…………………………………………… **APPELLANTS**
6. **OPOTO VINCENT** }
7. **OKEE MARTIN** }
8. **OBINA AUGUSTINE** }
9. **OJAK DOMINIC** }
10. **LABONGO RICHARD** }

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VERSUS

OPWONYA NOAH ……………………………………………………… **RESPONDENT**

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Before: Hon Justice Stephen Mubiru.

JUDGMENT

25 The appellants jointly and severally sued the respondent for a declaration that they are joint owners of a plot of land measuring approximately 276 acres located at, Cubu Aloya village, Pawel Parish, Pece Division, Gulu Municipality general damages for trespass to land, a mesne profits, a permanent injunction, interest and costs. The appellants sued as representatives of 18 families currently occupying the land and their claim was that they were born and have lived on 30 the land since 1969 only to receive a letter from the respondent's advocate during the year 2003 directing them to vacate the land. The respondent proceeded to plant some rice on the land and to cause a survey of the land.

In his written statement of defence, the respondent denied the claim in toto and contended 35 instead that the land originally belonged to his grandfather Ool Tekamoi. On his death it passed

to the respondent's father Noah Watdok and it is from him that the respondent inherited it. He secured a grant of letters of administration to the estate of the deceased.

The suit has had a chequered history. It was filed in the year 2003 as a Land Claim before the Gulu District Land Tribunal and was heard up to the stage of closure of the claimants" case and opening of the defence case. When the Land Tribunal became defunct, the case was assigned by the Chief Magistrate to two Grade One magistrates in succession, one of whom conducted a scheduling conference and the other continued with the trial to its conclusion.

In the proceedings before the District Land Tribunal, second appellant Otto Fabiano testified as P.W.1 and stated that the respondent is his cousin, being the son of his paternal uncle. The witness and his father migrated from Anaka in 1956 and settled on the land now in dispute. The land was given to them by Eronayo Kidega. There were several other people already living on the land which was largely wild forest. The land was owned and used communally. The respondent's step mother, wife to his father Noah Watdok, occupied land measuring approximately one acre in the neighbourhood, the Eastern side of the land. The respondent sparked off the dispute when he attempted to cause a survey of the land and to obtain title to it.

P.W.2 Abonga Patrick, the fourth appellant, testified that he was born on the land in 1949. His father Naptali Latigo settled on the land in 1932. The respondent came to live on the land with his step-mother, Angwech, who occupied about one and a half acres of the land, in 1959 when he was brought by his father from Labora, Koro sub-county. All occupants of the land were permitted to settle thereon by a one Erunayo Kidega of the Cubu Clan, at diverse times. It is in 2003 that the respondent came with a team of surveyors to the land and this was followed subsequently by a letter dated 11th September, 2003 from his advocate directing the appellants to quit the land.

P.W.3 Akena Christopher, the first appellant, testified that he was born in 1966 and by that time his father and grandfather were living on the land measuring approximately 100 - 200 acres. The respondent has step brothers living on the land but he himself does not live there. P.W.4 Okello Charles Otto, the third appellant, testified that at the age of 13, he came with his father from

Anaka in 1971 and settled on the land in dispute. Most of the appellants were already occupying parts of the land. His was the last family to settle onto the land. The suit was prompted by the respondent's lawyer's letter asking them to vacate the land. P.W.5 Aryemo Ventorina, testified that at the age of 15 years she migrated from Alero together with her husband and two children to live on the land in dispute. It is Eronayo Kidega who gave them the area they occupy. It was covered by a forest at the time. Some of the appellants had settled in the neighbourhood before her while others settled after her. She had lived on the land for over 55 years using it communally with the rest. She has three huts on the land. The respondent has never lived on the land save for his father and step-mother. She was surprised when the respondent issued a letter demanding that they vacate the land.

The appellants' case closed on 18th August, 2005. The case was adjourned for the opening of the defence case but unfortunately the District Land Committee became defunct. The mandate of the district land tribunals having expired, the Chief justice was prompted to issue Practice Direction No.1 of 2006 transferring the hearing of the land cases to the Chief Magistrate and Grade One Magistrates' courts.

Before re-assigning the case, the Chief Magistrate on 8th March, 2007, recorded the evidence of D.W.1 Noah Marcelino Opwonya, who testified that the land in dispute measures approximately 200 acres. It was originally owned by their grandfather Oola Tekamoi. It was inherited by his father Noah Watdok around the year 1953. Some of the appellants were permitted to live on the land and others only to grow crops. He worked and lived in Nairobi until 1976 when he returned and asked some of the appellants' fathers to vacate the land but they did not until their death around 1986 - 2000. He permitted their burial on the land because of the insecurity that prevailed then. The dispute was sparked off by the appellants beginning to sell off parts of the land. For example the first appellant sold off part of the land on 9th June, 2007 to a Pentecostal Church without his consent. He decided that they should vacate the land. When they realised he wanted to evict them, they filed a baseless claim in the Land Tribunal. Since 1976, he has reminded the appellants as squatters that the land is not theirs.

The respondent Noah Opwonya testified as D.W.2 and stated that the land in dispute is family customary land. The first appellant was born on the land. He attempted to cause a survey of the land but the appellants stopped him and filed a claim. They have instead sold off parts of the land. He was studying abroad but on his return in 1972 he asked the first appellant's father to vacate the land. He vacated but his wife and son of P.W.4 refused to vacate the land.

The case stalled for the next three years until the Chief Magistrate then assigned it to the first Grade One magistrate Ms. Aciro Joan who on 8th April, 2010 conducted a scheduling conference. She proceeded to record afresh the testimony of P.W.1 Akena Christopher, P.W.2 Otto Fabiano, P.W.3 Okello Charles and P.W.4 Abonya Patrick. The case then stalled for some time until the Chief Magistrate re-assigned it to the second Grade One magistrate Mr. Barigye Said who on 9th February, 2012 continued with the trial by recording the testimony of D.W1 Opwonya Noah, D.W.2 Okello Milton and D.W.3 Evaristo Opio. The defence closed its case.

The Court then visited the *locus in quo* on 8th November, 2014 but objections were raised by the appellants to the conduct of proceedings thereat. They insisted that the District Land Tribunal had visited the *locus in quo* before and that instead of conducting a second visit, the court should rely on what the District Land Tribunal had recorded on its prior visit. In light of the appellant's objections and apparent hostility, the Court called off proceedings at the *locus in quo* in order to avoid a break-out of violence.

In his judgment, the trial Magistrate found that there was no evidence on record to show that that the District Land Tribunal visited the *locus in quo*. The court was thus unable to determine the boundaries of the land occupied by each of the appellants. At the *locus in quo,* it was prevented by the appellants from viewing or inspecting the land. The Court was not in position to make a declaration of ownership in respect of land it never had opportunity to see. Moreover, the appellants engaged in dilatory conduct in the pursuit of their claim indicating a lack of seriousness. The court would not declare them owners of the land. Having failed to prove their case, the appellants were not entitled to any relief. The suit was dismissed with costs.

The appellants were 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 failed to consider the evidence adduced by the appellants hence arriving at a wrong decision.
2. The learned trial Magistrate erred in law and fact when he relied on the failed locus visit to dismiss the appellants' case.
3. The learned trial Magistrate erred in law and fact when he held that the appellants had not proved any cause of action against the respondent.

In their submissions, counsel for the appellant, Mr. Geoffrey Anyur together Mr. Sabiiti Omara, abandoned the third ground. As regards the first ground, they argued that in the judgment of the court below, the court commented that the submissions of counsel for the plaintiff to the effect that they were too brief. The court ignored the evidence on record and instead decided the case based on submissions of counsel. In his testimony, P.W.1 was clear that he was born on the land in 1966. He found his father settled and his grandfather too. They were buried there. That they had come to the land by 1956. They were given land by Kidega the original settler. The evidence of P.W.2 too was not considered. He stated that had used the land from 1953 to 2003 when the respondent wrote them a notice to vacate the land. They sued to protect their interest. In his defence, the respondent acknowledged their occupation and said that it was temporary settlement. A period of over forty years cannot be temporary. Reference was made to the decision in High Court *C.A No. 5 of 2010, Omunga Bakhit*. Had the trial court evaluated the evidence properly, it should have found that the land belongs to the appellants.

As regards ground 2, counsel submitted that the court summarised the events which happened when it went to visit the *locus in quo*. The court correctly stated the law, but the court did not follow it. The record of proceedings indicates that on the date of locus visit, only A4 Obonga Patrick was present. The notice for the locus had been given the previous day. An application for adjournment was rejected. But in the judgment, it was indicated that counsel and the appellants had frustrated the locus visit. Judgment was denied because the Magistrate could not verify the boundary. Absence of the locus visit notes was an irregularity that was not fatal. At the locus it was established the appellants were in possession. It is the appellant's possession that should

have been considered and judgment should have been entered in their favour. Reference is made to the decision in *High Court Civil Appeal No. 27 2012*, *Magbwi Erikulano* which defined possession. The respondent had testified that the appellants got the land from his father on a temporary basis. The respondents' witnesses acknowledged that the appellants settled thereon for that long. They prayed that the appeal be allowed with costs.

In response, counsel for the respondent, Mr. Moses Oyet and Mr. Ocaya Acellam Paul, submitted that the burden was on the appellants to prove the suit. The decision of the court below was based on evidence and not on the submissions of counsel. The evidence was considered and the court was not satisfied. P.W.1 stated that the land belonged to the Cubu Clan. They had no basis of claiming the land. They should not depart from their pleadings. The appeal should be dismissed.

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.

Before considering the merits of the appeal, it is necessary to take stock of the impact of the chequered history of the suit that saw it traverse the District Land Tribunal, the Chief Magistrate, and two Grade one Magistrates over a period of thirteen years, before a decision was made, in

order to determine whether or not it had an impact on the fairness and propriety of the trial. As plainly understood, there is a danger of not having a fair trial in a matter in which the judicial officer is required to decide the case on basis of evidence he or she has not heard in court. This is because the judicial officer's ability to evaluate credibility is believed to be influenced by the demeanour of the witnesses. Failure of the tribunal or the first magistrate to whom a case is assigned at first instance to handle it to completion may in some situations have a prejudicial effect on the parties and result into an ineffective trial. But for the trial to be found to have been ineffective based on such a procedural irregularity, it should be demonstrated that the error made it impossible to ensure that a fair decision is reached. Whether an order should be made for a suit to be tried *de novo* thus depends on the circumstances of each case.

The fair trial guarantees are not merely concerned with the institutional dimension of the administration of justice but there is also strong emphasis on the procedural aspects. There are certain requirements pertaining to the proceedings themselves that ought to be met in order to comply with the principles of a fair trial. These guarantees are numerous and diverse. Where prejudicial events occur during a trial, for an appellate court to direct re-trial, the proceedings must have fallen below an objective standard of reasonableness. It must be shown firstly that that the trial was so deficient or wrought with errors so serious that it fell below the standard of fairness and secondly, that the deficiency complained of occasioned a miscarriage of justice.

A civil proceeding is generally considered fair if the parties have been given the opportunity to be heard (right to be heard; adversariality principle), when it is conducted within a reasonable time (the right to a speedy trial) and in such a way that parties are given a reasonable opportunity to present their case to the court under conditions which do not place one of them at substantial disadvantage vis-à-vis the other (the principle of equality of arms). Finally, it is considered that the fundamental constitutional guarantee of a fair civil trial is the requirement that the proceedings take place in public, i.e. the open court requirement.

It is generally stated that the right to a fair trial in civil proceedings comprises: the right of access to a court and, consequently, the right to be heard by a competent, independent and impartial tribunal; the right to equality of arms; the right to a public hearing, and the right to be heard

within a reasonable time. It is important to note that these rights, although fundamental, are not absolute. This relativity was confirmed in *Snyder v. Massachusetts, (1934) 291 U.S. 97, 116-117,* where the Court famously stated: 'Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept....What is fair in one set of circumstances may be an act of tyranny in others." The challenge underlying compliance with the requirements of the right to a fair trial is finding the balance between access to the courts and effective protection of individual rights, on one hand, and the right to be heard, on the other. This is particularly true in the context of civil proceedings.

In criminal trials, section 144 (1) of *The Magistrate's Courts Act* authorises a magistrate to take over trial of a partly heard case and to act on the evidence recorded by his or her predecessor, or partly recorded by his or her predecessor and partly by himself or herself, or he or she may re-summon the witnesses and recommence the trial. A conviction passed on evidence not wholly recorded by the magistrate before whom the conviction is held, may be set aside if the High Court is of opinion that the accused has been materially prejudiced by that evidence, and may order a new inquiry or trial.

Similarly under Order 18 rule 11 (1) of *The Civil Procedure Rules*, where a judge is prevented by death, transfer or other cause from concluding the trial of a suit, his or her successor may deal with any evidence taken down as if the evidence had been taken down by him or her or under his or her direction under those rules, and may proceed with the suit from the stage at which his or her predecessor left it. In addition, a retrial (or a trial *de novo*) of a suit the hearing of which is uncompleted by one judicial officer can be done by another Judicial officer under the Court's inherent powers under the provisions of section 98 of *The Civil Procedure Act* (see *Y. Mwima Hyabene v. Attorney General and another, S.C. Civil Appeal No.14 of 1994*).

Both section 144 (1) of *The Magistrate's Courts Act* and Order 18 rule 11 (1) of *The Civil Procedure Rules* are designed to be invoked only in cases where the exigencies of the circumstances not only are likely to, but will defeat the ends of justice if a succeeding Magistrate does not, or is not allowed to adopt and continue with the trial started by a predecessor, owing to the latter becoming unavailable to complete the trial. In order for any of the two provisions to be

invoked, three elements must exist all together:- (i) a Magistrate should have recorded the evidence in the case either in part or in whole; (ii) the said Magistrate should have ceased to exercise jurisdiction in that case; and (iii) another Magistrate should have succeeded him or her and such successor Magistrate must have jurisdiction to try the case.

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It is only if the above conditions are complied with that the successor Magistrate is vested with jurisdiction to act on the evidence already recorded in the case. If this is not complied with the successor magistrate would have no authority or jurisdiction to try the case. Where the reasons as to why the predecessor trial magistrate was unable to complete the trial are not evident on the
10 record, the proceedings of the successor magistrate will be found to have been conducted without jurisdiction, hence a nullity. Therefore, where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of the proper administration
15 of justice.

The need for a judicial officer who decides a case to hear all or at least some of the witnesses, is mainly premised on the assumed importance of observing the demeanour of witnesses as they testify. The term "demeanour" is used as a legal shorthand to refer to the appearance and
20 behaviour of a witness in giving oral evidence as opposed to the content of the evidence (see the words of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co Ltd 1919 SC (HL) 35 at 36*). No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach too significant a weight to such impressions in assessing credibility risks making judgments which at best have no rational
25 basis and at worst reflect conscious or unconscious biases and prejudices. Courts tend to rely on these considerations as little as possible. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable
30 facts.

Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts successor or appellate judicial officers in a permanent position of disadvantage as against the first or trial judicial officer. This is because the respect given to findings of fact based on the demeanour of the witnesses is not always deserved. The ability of judicial officers to discern with accuracy from a witness's demeanour, or the tone of his voice, whether he or she is telling the truth is doubtable. For example if a witness speaks hesitantly, is that the mark of a cautious man, whose statements are for that reason to be respected, or is he or she taking time to fabricate? Is the emphatic witness putting on an act to deceive the court, or is he or she speaking from the fullness of his or her heart, knowing that he or she is right? Is he or she likely to be more truthful if he or she looks the judicial officer straight in the face than if he or she casts his or her eyes on the ground perhaps from shyness or a natural timidity? (see *Laurentide Motels v. Beauport (City), [1989] 1 S.C.R. 705, [1989] S.C.J. No. 30 (Q.L.), 94 N.R. 1, 23 Q.A.C. 1, 45 M.P.L.R. 1 at p. 799 S.C.R., para. 245*).

In *Faryna v. Chorny [1952] 2 D.L.R. 354*, it was held that the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. The credibility of a witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his or her story to an examination of its consistency with the probabilities that surround the currently existing conditions. It was stated thus;

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295*. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not refer-ring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

Since the law does not clothe the trial Judicial officer with a divine insight into the hearts and minds of the witnesses, it is now well settled that the right to a fair trial is not violated when the case is decided by a judicial officer who partly recorded the evidence in the case.

5 Every person has the right to a speedy trial as provided by the Constitution. Hence according to Order 17 rule 2 (a) of *The Civil Procedure Rules*, the hearing of a suit should be continued from day to day until all the witnesses in attendance have been examined, it should not be adjourned unless necessary for exceptional reasons to be recorded. The right to a speedy hearing is therefore consistent with reasonable delays and depends upon the circumstances of each case.
10 The right is necessarily relative. To determine whether or not the right was violated in a particular case, the court will consider; the length of delay, the reason for the delay, the parties' assertion of their right, and prejudice to the parties. Failure to assert the right will be deemed a waiver and make it difficult for a party to prove that he or she was denied an expeditious trial.

15 In the instant case, the trial was rather protracted which took over thirteen years to conclude. The passage of time militates against the trial being started *de novo*. Re-hearing may prejudice the parties because of accountable loss of memory on the part of either of them. The Magistrates who took over the proceedings from the District Land tribunal acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted them to do so. It cannot be lost
20 in mind that public policy demands that justice be swiftly concluded.

It was contended by counsel for the appellants in ground three that it was erroneous of the trial Magistrate to have found that the plaint did not disclose a cause of action. In the first place, according to Order 2 rule 9 of *The Civil Procedure Rules*, no suit is open to objection on the
25 ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not (see *Western Highland Creameries Ltd and another v. Stanbic Bank Uganda Ltd and Two others, H. C. Civil Suit No. 462 of 2011*). Perusal of the plaint reveals that the suit was filed for a declaration of appellants' rights in the land. Any person entitled to any right as to any property,
30 may institute a suit against any person denying, or interested in denying, his or her title to right,

and the Court may in its discretion make therein a declaration that he or she is so entitled, and the plaintiff need not in such suit ask for any relief.

When a person is in lawful or peaceful possession of a property and such possession is disturbed or threatened by the defendant, a suit lies for a declaration of title and consequential relief of injunction (see *Anathula Sudhakar v. P. Buchi Reddy, AIR 2008 SC 203; Ellis v. Duke of Bedford (1899) 1 Ch 494* and *Guaranty Trust Company of New York v. Hannay and Company Limited [1915] 2 KB 536*). It is a judgment that defines the legal relationship between parties and their rights in a matter before the court. Typically it states the court's authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything but sometimes a declaratory judgment may be made along with other relief, e.g. damages or injunctions (see *Osborn's Concise Law Dictionary*, Eleventh Edition (2009).

Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction (see *Sikuku Agaitano v. Uganda Baati Ltd H. C. Civil Suit No. 298 of 2012*).

Such a suit is also known as a "Quiet Title" suit. A suit to quiet title is one filed to establish ownership of land (which includes the improvements affixed to that land). The plaintiff in a quiet title suit seeks a court order that (a) establishes the plaintiff's dominant title rights and / or (b) prevents the defendant(s) from making any subsequent claim to the property. A quiet title suit also is known as "a suit to remove a cloud in title." A cloud is any claim or potential claim to ownership of the land. The cloud can be a claim of full ownership of the land or a claim of partial ownership, such as an easement that purports to give the defendant the right to use the land in some fashion. That being the very nature of the suit filed by the appellants, ground three of the appeal succeeds.

With regard to the second ground of appeal, it is contended that the learned trial Magistrate erred in law and fact when he relied on the failed locus visit to dismiss the appellants' case. It is trite under Order 18 r 14 of *The Civil Procedure Rules* that the court may at any stage of a suit inspect any property or thing concerning which any question may arise. Such inspection by the Court can only be for the purpose of understanding the evidence given by the witnesses. In other words, the observation of the trial Magistrate at the time of inspection can be used only for the purpose of better following and understanding the evidence adduced in the case or to test its accuracy. The judgment cannot be based solely on the result of personal inspection. It follows therefore that it is not mandatory in every dispute relating to land that such inspection should be made.

That the decision whether or not to visit the *locus in quo* depends on the issues to be decided in each case is augmented further by the language of *Practice Direction No. 1 of 2007* which stipulates that during the hearing of the land disputes, the Court "should take interest" in visiting the *locus in quo*. The need to visit the *locus in quo* is driven by the nature of the issues for determination in the particular case. Whether or not the court should visit the *locus in quo* is therefore entirely in the discretion of the trial Magistrate. For a failure to conduct such an inspection to be fatal to the proceedings, it should be demonstrated that without the visit, the court was handicapped in following and understanding the evidence adduced in the case or was otherwise unable to test its accuracy. The facts observed during the visit to the *locus in quo* enable the Court to give its verdict in conformity with the real nature of things.

Since visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better, the judgment cannot be based solely on the result of such inspection. Such visits are intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore is 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 (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)*. In this case it is a purported landlord attempting to evict persons considered to be squatters on his land. It is not about trespass across a defined boundary. It is their presence on the land that is

being challenged. for that reason I have not found that this is a case where the trial court would be handicapped in following and understanding the evidence adduced in court or would otherwise unable to test its accuracy. It was erroneous of the court therefore to have dismissed the suit mainly for failure to visit the *locus in quo*, when the evidence before it was sufficient to guide a decision on the merits. This ground as well succeeds.

Lastly, in ground one it is submitted that the trial court erred when it failed to evaluate the evidence. It was the plaintiffs' case that their parents had migrated onto that land as way back as some years before 1956 by the permission of Eronayo Kidega. The defendant and his witnesses acknowledged that the presence of the appellants for that long on this land was with the permission of his grandfather and father respectively. Some of the appellants have lived on the land since then while others only grow crops thereon. He worked and lived in Nairobi until 1976 when he returned and asked some of the appellants' fathers to vacate the land but they did not until their death around 1986 - 2000. He permitted their burial on the land because of the insecurity that prevailed then. The dispute was only sparked off by the appellants beginning to sell off parts of the land. On their part the appellant contend that the dispute was sparked off by the respondent's lawyer's letter asking them to vacate the land.

Form the testimony of D.W.1 Noah Marcelino Opwonya, to the effect that upon his return from Nairobi in 1976 he asked the appellants' fathers to vacate the land, their continued occupation of the land thereafter became adverse. According to section 6 and 11 (1) of *The Limitation Act*, the right of action to recover land is deemed to accrue when adverse possession is taken of the land. Then section 5 of the Act provides that no action may be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her. Finally, section 16 of the Act is to the effect that at the expiration of the period prescribed by this Act for any person to bring an action to recover land the title of that person to the land is extinguished.

Adverse possession is a recognised method of acquiring title to land, accomplished by an open, visible, and exclusive possession uninterruptedly for a set period of time. It is trite law that uninterrupted and uncontested possession of land for a specified period, hostile to the rights and

interests of the true owner, is considered to be one of the legally recognized modes of acquisition of ownership of land (see *Perry v. Clissold [1907] AC 73, at 79*). The essential elements of an adverse possession sufficient to create title to land in a claimant are that the owner is ousted of possession and kept out uninterruptedly for the requisite period of time by an open, visible, and exclusive possession by the claimant, under a claim of right, with the intention of using the land as his own, and without the owner's consent. The possession must be hostile and under a claim of right, actual, open, notorious, exclusive, continuous, and uninterrupted.

In respect of unregistered land, the adverse possessor of land acquires ownership when the right of action to terminate the adverse possession expires, under the concept of "extinctive prescription" reflected in sections 5 and 16 of *The Limitation Act.* Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land (see for example *Rwajuma v. Jingo Mukasa, H.C. Civil Suit No. 508 of 2012*). As a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years, but also the adverse possessor is vested with title thereto. The appellants have been in adverse possession since 1976. The twelve year limitation period expired in 1982 without the defendant having taken action for their ejectment. He could not during the year 2003, twenty one years after expiry of the limitation period, seek to evict them from the land. They had by then acquired long since acquired ownership when the right of action to terminate the adverse possession expired.

It is settled law that a permanent injunction is a remedy for preventing wrongs and preserving rights so that by single exercise of equitable power an injury is both restrained and repaired, for the purpose of dispensing complete justice between the parties. Permanent or final injunctions are granted as a remedy against an infringement or violation which has been proven at trial. Such an injunction will be granted to prevent ongoing or future infringement or violations. By the letter addressed to the appellants demanding that they leave the land, the defendant threatened their quite possession and enjoyment of the land and they are therefore entitled to the equitable relief of a permanent injunction.

In the final result, the appeal is allowed. The judgment of the court below is set aside and in its place one is entered;

a) declaring the appellants owners of the respective parts of the land under their exclusive possession.

5 b) A permanent injunction issues against the respondent, his servants, employees or persons claiming under him from asserting title over that part of the land that is currently under actual exclusive possession of the appellants.

c) The costs of the appeal and of the suit are awarded to the appellants.

10 Dated at Gulu this 13th day of December, 2018

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Stephen Mubiru
Judge,
13th December, 2018.

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