IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 26 of 2016

In the matter between

OKULLO MAKMOI THOMAS **APPELLANT**

And

APIYO ALICE **RESPONDENT**

Heard: 12 February 2019

Delivered: 28 February 2019

Summary: dispute over customary ownership of land.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for a declaration that she is owner, under customary tenure, of a plot of land measuring approximately 40 metres by 37 metres located at, Vanguard sub-ward, Vanguard Parish, Pece Division, Gulu Municipality general damages for trespass to land, an order of vacant possession, a permanent injunction, interest and costs.

[2] Her claim was that the land in dispute originally belonged to her mother Susan Lakwech who in turn acquired it from her late father Ajulino Uma Laloyo who died during the year 1979 and was buried on that land. The respondent's mother enjoyed quiet possession of the land until the year 1991 when she permitted her brother in law, the appellant, to reside on the land. In the year 2009, without any

claim of right, the appellant began claiming the land as his own. Before her death in the year 2013, the respondent's late mother Susan Lakwech filed a suit against him before the L.C.II Court of Vanguard Parish which was decided in her favour. He appealed to the L.C.III Court of Pece Division which reversed the decision of the L.C.III Court but the decision was nullified by the Chief Magistrate's Court which ordered a re-trial, hence the suit from which this appeal arises.

[3] In his written statement of defence, the appellant denied the claim in toto. He averred that he bought the land in dispute in 1989 at a price of shs. 150,000/= from Yona Aling and her two sons Uhuru Bosco and Acaye Nelson. He made further payments of one goat and shs. 30,000/= in 1991 and an additional sum of shs. 40,000/= on 23rd January, 1998. He has lived on the land for over twenty six years. He has since planted mango trees and oranges on the land and constructed thereon two permanent buildings and a grass thatched hut.

The respondent's evidence in the court below:

[4] At the trial the respondent, Apio Alice, testified as P.W.1 and stated that the respondent is brother in law to her late mother, she having married his late brother, Akwinino Kidega. Her mother inherited that land from the estate of her late father Ajulini Uma and the respondent in turn inherited it from her. In 1991, the respondent's late mother Susan Lakwech permitted the appellant, who had migrated from Paimol Kitgum, to occupy the land temporarily provided he constructed for her a house before constructing his own. The appellant instead constructed a house of his own without constructing one for her mother which prompted her mother to sue the appellant before the L.C.II Court of Vanguard Parish.

[5] P.W.2 No. 34450 CPL Arop Denis, a son of the respondent, testified that the appellant's brother was married to his grandmother the late Susan Lakwech. He is not aware of any transaction between his uncles Acaye and Uhuru on one part and the appellant on the other. The appellant has two semi-permanent structures

and a grass-thatched hut on the land and has been occupying the land since 1991 when he came thereunto during the insurgency with a promise to build Susan Lakwech a grass thatched house on the land. The appellant worked as a Magistrate in the Court at Gulu. In the year 2009, Susan Lakwech demanded that the appellant should leave the land.

The appellant's evidence in the court below:

[6] Testifying in his defence as D.W.1, the appellant Okullu Makmoi Thomas, stated that he bought the land in dispute in 1989 from Yona Aling, Acaye nelson and Uhuru Bosco wife and sons of the late Ajulino Uma respectively. He paid a total of shs. 220,000/= in three instalments and one goat. He made the first payment of shs. 150,000/= in 1989 but has no document in respect thereof. The second instalment of shs. 30,000/= and a goat was paid on 25th January, 1991. The last instalment of shs. 40,000/= was paid on 23rd January, 1992. His wife Margaret Abako is now in possession of the land. He has two permanent buildings and five grass-thatched huts on the land. He planted some trees on the plot. He does not know how the sellers acquired the land. They did not have a grant of letters of administration to the estate of the late Ajulino Uma.

[7] D.W.2 Odur Kitara Charles testified that he did not know the late Ajulino Uma. On 23rd January, 1992 he witnessed the payment of shs. 40,000/= by the appellant to Uhuru Bosco. He did not witness any of the other payments. D.W.3 Abalo Margaret, the appellant's wife testified that the land in dispute belongs to her husband, the appellant who bought it at a price of shs. 150,000/= from Acaye Nelson and his mother Aling Yona in 1989 and she witnessed the transaction. In 2009, the respondent and her mother sued the appellant in the L.C.II Court. Later the appellant paid shs. 30,000/= and in 1998 he paid shs. 40,000/= and a goat to Aling Yona. They built a house on the plot, Susan Lakwech was the daughter of Ajulino Uma.

Proceedings at the *locus in quo*:

[8] The trial court visited the *locus in quo* where it recorded evidence from additional persons as follows; (i) Nyeko Andrew who stated that the land in dispute belonged to the father of Susan Lakwech. Uhuru Bosco was Susan Lakwech's nephew. The brother of the appellant was cohabiting with Susan Lakwech. She granted the appellant temporary stay on the land during the insurgency. (ii) Odur Kitara who stated that Uhuru inherited the land from Acaye. He witnessed payment of shs. 40,000/= on 23rd January, 1998. Lastly, from (iii) Odong Walter Kitara who stated that the Late Oola who died in 1993 was the father of Uhuru. Susan Lakwech was a sister to Oola. Acaye was a brother to Oola.

Judgment of the court below:

[9] In his judgment, the trial Magistrate found that there was overwhelming evidence that the land in dispute originally belonged to Yona Aling with her husband Ajulino Uma, parents of Susan Lakwech, mother of the respondent. Acaye Nelson and Uhuru Bosco were nephews of Susan Lakwech. The appellant did not prove the transaction of purchase between him and Yona Aling. Acaye Nelson did not own the land and any transaction with him was null and void. There is no proof that the appellant paid the sum of shs. 150,000= as claimed. Payment of shs. 30,000/= and a goat on 25th January, 1991 and shs. 40,000/= on 23rd January, 1992 was made to Acaye Nelson and Uhuru Bosco respectively who had no interest in the land and there is no evidence that any of them was acting for and on behalf of Yona Aling. None of them had capacity to sell the land. The transaction is null and void and the appellant is therefore a trespasser on the land. Judgment was thus entered in favour of the respondent. She was declared owner of the land in dispute with orders of a permanent injunction, vacant possession within ninety days, general damages of shs. 5,000,000/= and costs.

The grounds of appeal:

[10] 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 failed to properly evaluate the evidence on record that the appellant had acquired title as a result of adverse possession.
2. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record that the appellant had acquired title as a result of prescription.
3. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record that the appellant had acquired a proper title to the suit land by way of purchase.
4. The learned trial Magistrate erred in law and fact when he did not find that the suit was barred / caught up by limitation.
5. The learned trial Magistrate erred in law and fact in the conduct of the locus visit by obtaining evidence from witnesses who did not testify in court.
6. The learned trial Magistrate misdirected himself on the evidence on record, the law and facts when he held that the appellant's occupation of the suit land was challenged before the Local Council Courts.

[11] Although both parties were given time to file written submissions, none of them did.

Duties of a first appellate court:

[12] This being a first appeal, it is the duty of this 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.

Errors in conducting proceedings at the *locus in quo*:

[13] For reasons of convenience, ground five relating to the conduct of proceedings at the *locus in quo* will be considered first 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 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 court while there, to have recorded evidence from; (i) Nyeko Andrew, (ii) Odur Kitara and (iii) Odong Walter Kitara.

[14] 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 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 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.

[15] 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 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 three additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those three witnesses.

Evaluation of evidence relating to the appellant's root of title:

[16] Grounds one, two, three and six will be considered together in so far as they relate to the trial court's evaluation of evidence relating to the appellant's root of title. It is contended by the appellant that had the trial court properly directed itself, it could have found that the appellant was the rightful owner of the land in dispute either by purchase, adverse possession or prescription. On appeal the appellant therefore relies on three different bases to claim title, while at the trial he relied only on one, purchase.

[17] As regards the claim of acquisition by purchase, when considering the validity of a claimed purchase of unregistered land, the court needs first to establish the root of title. This means identifying, as far back in time as is possible, a proven original owner to use as a point of reference, to commence the chain of ownership which will end with the current owner. Once the root is established, it is then necessary to show an unbroken chain of ownership from the root to the seller. Where one or more of the previous owners is known to have died whilst they still owned the property, and the sale was by the personal representative of the owner, then it is necessary to show how the deceased's legal interest in the land passed to the personal representative of the deceased. In that case, the grant of probate (or letters of administration as the case may be) must be produced as part of the chain of ownership. In the alternative, there should be cogent evidence of inheritance under custom.

[18] In the instant case, it was common ground between the parties that the proven most historical original owners of the land in dispute were Yona Aling and her husband Ajulino Uma, parents of Susan Lakwech, mother of the respondent. It was then incumbent on the appellant from that point to prove the chain of ownership which would end with him as the current owner. He stated that he purchased the land from Yona Aling and her two sons Uhuru Bosco and Acaye Nelson by way of payment of a sum of shs. 150,000/= on an unspecified date in the year 1989. Being their daughter, the respondent's mother Susan Lakwech was a direct beneficiary of their estates.

[19] From the available evidence, it is not clear as to whom, between Yona Aling and her husband Ajulino Uma, the land belonged or whether they were joint tenants, or tenants in common in respect of this land. If it belonged to one of them, the it must have passed to the estate of that sole owner upon his or her death. If they held the property as tenants in common, the beneficial interest in the property passed to their respective personal representatives in defined shares, which may or may not be equal, upon their death. If they were joint tenants, in that case the

law would deem each of them to own the whole of the legal and beneficial estates in trust for each other equally in undivided shares, almost as if they were a single legal entity. So, when one died the whole of the legal and beneficial title passed to the survivor. As the survivor, in that case Yona Aling would be solely entitled to the legal and beneficial estates as though she acquired the property originally in her sole name.

[20] The burden of proof of ownership of unregistered land lies on the one who claims it as his or her own. It turned out that Acaye Nelson and Uhuru Bosco were nephews of Susan Lakwech and not sons of Yona Aling and her husband Ajulino Uma, yet the appellant claimed to have made further payments of one goat and shs. 30,000/= in 1991 and an additional sum of shs. 40,000/= on 23rd January, 1998 to the two. The appellant did not adduce evidence of any grant of probate (or letters of administration as the case may be) in favour of either Yona Aling, Acaye Nelson or Uhuru Bosco as part of the chain of ownership. He also did not adduce any cogent evidence of inheritance by any of them under custom. In absence of evidence to how the legal and beneficial interest in the land that was known to have vested in either Yona Aling or her husband Ajulino Uma or both, was transmitted to Acaye Nelson and Uhuru Bosco, the trio could not pass valid title. On the other hand, the claimed transaction of 1989 between Yona Aling and the appellant had no cogent evidence to support it. It was not explained how and why the sale spanned over a period of nine years, beginning with Yona Aling and ending with Acaye Nelson and Uhuru Bosco. A person without title to land has no legal capacity to sell land to another and cannot pass title save to a bona fide purchaser for value without notice. Such a contract is null and may be voided at the instance of the true owner or his or her legal representative.

[21] On the other hand, a purchaser of unregistered land who does not undertake the otherwise expected meticulous investigation of title which will often ordinarily involve him or her in quite elaborate inquiries, cannot claim to be a bona fide purchaser. Constructive notice applies if a purchaser knows facts which made "it

imperative to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper" (see *Macmillan v. Bishopsgate Investment Trust (No. 3) [1995]1 WLR 978*). When it is proved that such a purchaser acquired knowledge of circumstances which would put an honest and reasonable man on inquiry (see *Baden v. Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA, [1993] 1 WLR 509*), and yet he did not undertake the necessary inquires, such a purchaser cannot claim to have bought in good faith.

[22] The ascertainment of good faith, or lack of it, and the determination of whether due diligence and prudence were exercised or not, are questions of fact which require evidence. **M**ere refusal of a purchaser to believe that such defect existed, or his or her wilful closing of his or her eyes to the possibility of the existence of a defect in the vendor's title will not make the purchaser an innocent purchaser for value if it later develops that the title was in fact defective, and it appears that he or she would have had such notice of the defect had he or she acted with that measure of precaution which may reasonably be required of a prudent person in a like situation. The burden of proof to establish the status of a purchaser in good faith lies upon the one who asserts it. This *onus probandi* cannot be discharged by mere invocation of the legal presumption of good faith.

[23] In the instant case, the appellant at the time of the purported transaction knew that Ajulino Uma was dead. He did not adduce any evidence to show what inquiries he made before transacting with either Yona Aling nor Acaye Nelson and Uhuru Bosco. There is no evidence to show that he took any precautions that meet the standard of prudence required in the circumstances. He was negligent in not taking the necessary steps to determine the status of the vendor(s) despite the presence of circumstances which would have impelled a reasonably cautious man to do so. He had constructive notice of the fact that neither of them was a holder of a grant of probate (or letters of administration as the case may be) or had inherited the land under custom. He cannot therefore be

considered as a buyer in good faith as he never exercised due diligence required under the circumstances. The trial, court therefore came to the correct conclusion when it found that the appellant did not prove that he secured good title to the land by purchase.

Alternative claim of acquisition by adverse possession or prescription:

[24] In what appears to be an alternative, the appellant seeks to rely on either, adverse possession or prescription, or both, as his basis of title to the land. In a way the argument on appeal raising adverse possession as the basis of his claim contradicts his defence of acquisition by purchase on which he relied at trial. This is because a party claiming title by adverse possession always claims in derogation of the right of the real owner. Such a party admits that the legal title is in another but rests his or her claim, not upon a title in himself or herself, as the true owner, but upon holding adversely to the true owner for the period prescribed by the statute of limitations.

[25] That aside, there is general prohibition against new arguments on appeal due to 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. Consequently, a new point of law not argued at the trial will not be permitted on appeal except if court is satisfied that had it been raised at the trial, no new evidence could have been adduced by the adverse party at the trial to contradict it. Where it is evident that evidence could have been gathered and introduced to rebut the issue in the trial court, this establishes the likelihood of prejudice to the adversary and the appellate court will not permit such a point to be raised for the first time on appeal. The bottom line is that appellate courts are not designed, nor permitted, to receive evidence. They will only look at the evidence that was properly admitted at the trial court and properly made part of the record on appeal.

[26] It appears to this court that neither of these two alternatives was pleaded nor considered at the trial to be an issue in the case. Nevertheless, this court is satisfied that had either of them been raised at the trial, no new evidence could have been adduced by the respondent to contradict either of them. The evidence that was adduced by the respondent covers both possibilities because on appeal they are being presented as alternative arguments, albeit depending on different legal rules, which though are dependent on the same facts as those presented to the trial court. Consequently the court has not found any likelihood of prejudice to the respondent and for that reason will consider both defences as points raised for the first time on appeal.

[27] 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.* In the absence of specific statutory provision, the period of prescription is fixed by analogy to the period derived from *The Limitation Act* for the acquisition of title to land by adverse possession. 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.

[28] On the other hand, adverse possession is constituted by the actual, open, hostile, and continuous possession of land to the exclusion of its true owner for the period prescribed by sections 5 and 16 of *The Limitation Act*. Adverse possession is similar to prescription, as a mode for the acquisition of title to land by occupying it for a period of time. Prescription though is not the same, however, because title acquired under it is presumed to have resulted from a lost grant, as opposed to the expiration of the statutory time limit in adverse possession. In order that adverse possession may ripen into legal title, non-

permissive use by the adverse claimant that is actual, open and notorious, exclusive, hostile, and continuous for the statutory period must be established. All of these elements must coexist if title is to be acquired by adverse possession.

[29] According to section 11 of *The Limitation Act*, the right of action does not accrue until adverse possession is taken of the land. The implication is that one cannot claim to be an adverse possessor when such possession was acquired with the consent or permission of the owner who henceforth acquiesced in the continued possession. No matter how long the real owner is out of actual possession, his or her title and his or her constructive possession remain until an actual hostile possession is taken. Otherwise, time stops running when the owner asserts his or her right or if the adverse possessor admits that the owner has a superior right. An assertion of the rights of action can occur by instituting an action to recover the land or by making a peaceful but effective entry on the land. In order to stop time for running, the entry must amount to a resumption of possession.

[30] In order to establish adverse possession, the possession must be openly hostile. When used in the context of adverse possession, "hostile" is a term of art. It does not imply ill will. "Hostile" possession has been defined as possession that is opposed and antagonistic to all other claims, and which conveys the clear message that the possessor intends to possess the land as his or her own (see *Smith v. Tippett, 569 A.2d 1186*). It is not necessary that the adverse possessor intend to take away from the owner something which he or she knows to belong to another or even that he or she be indifferent concerning the legal title. It is the intent to possess, and not the intent to take irrespective of the owner's right, which governs.

[31] Hostile possession means that the claimant must occupy the land in opposition to the true owner's rights. There need not be a dispute or fighting over title as long as the claimant intends to claim the land and hold it against the interests of the

owner and all the world. Possession must be hostile from its commencement and must continue throughout the statutory period. In cases where title by adverse possession is claimed, the initial possession must have come about either by mistake or by deliberate intrusion.

[32] In the instant case, it was the uncontroverted testimony of the respondent that her mother Susan Lakwech inherited the land in dispute from the estate of her late father Ajulino Uma and the respondent in turn inherited it from her mother Susan Lakwech. In 1991, the respondent's late mother Susan Lakwech permitted the appellant, who had migrated from Paimol Kitgum, to occupy the land temporarily provided he constructed for her a house before constructing his own. The appellant instead constructed a house of his own without constructing one for her mother which prompted her mother to sue the appellant before the L.C.II Court of Vanguard Parish during the year 2009.

[33] The implication is that for the period between the year 1991 and 2009, the appellant occupied the land with the consent of the then owner of the land, Susan Lakwech. Adverse possession began in the year 2009 when the appellant expressed the intention to hold the land against the interests of the true owner and all the world. That period is only six years until 2015 when he filed the suit from which this appeal arises, which is shorter that the twelve year period that would under sections 5 and 16 of *The Limitation Act* have resulted in the appellant acquiring title by "extinctive prescription" as a result of adverse possession that was sufficiently hostile, open, and notorious possession of the land, under colour of title.

[34] Having failed to establish an interest in law in the land in dispute, this raises the question whether the appellant could instead rely on equity for laying such a claim, more especially on the common law doctrine of proprietary estoppel. This doctrine has been used to found a claim for a person who is unable to rely on the normal rules concerning the creation or transfer (and sometimes enforcement) of

an interest in land (see *Ramsden v. Davson (1866) L.R. 1 H.L. 129; Crabb v. Arun District Council [1976] 1 Ch.183* and Megarry and Wade's *The Law of Real Property (8th Edition)* at pages 710 to 711, para 16-001). It is an equitable remedy, which will operate to prevent the legal owner of property from asserting their strict legal rights in respect of that property when it would be inequitable to allow him to do so.

[35] Circumstances must be such that it would be unconscionable for a party to deny that which, knowingly or unknowingly, he or she has allowed or encouraged another to assume to his or her detriment. This is usually the case where a stranger begins to build on land supposing it to be his or her own, and the true owner, perceiving that mistake, abstains from setting the stranger right, and leave him or her to persevere in his or her error. A Court of equity will not allow the true owner afterwards to assert his or her title to the land on which the stranger has expended money on the supposition that the land was his or her own.

[36] This doctrine will operate where the claimant is under a unilateral misapprehension that he or she has acquired or will acquire rights in land where that misapprehension was encouraged by representations made by the legal owner or where the legal owner did not correct the claimant's misapprehension. However, it is trite that a person is not to be deprived of his or her legal rights by mere acquiescence unless he or she has acted in such a way as would make it fraudulent for him or her to set up those rights.

[37] This requires proof by the appellant that; (i) he made a mistake as to his legal rights; (ii) that he expended some money or did some act (not necessarily upon the respondent's land) on the faith of his mistaken belief; (iii) the respondent, the possessor of the legal right, knew of the existence of her own right which is inconsistent with the right claimed by the appellant; (iv) the respondent, the possessor of the legal right, knew of the appellant's mistaken belief of his rights;

and (v) the respondent, the possessor of the legal right, encouraged the appellant in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting her legal right (see *Willmott v. Barber (1880) 15 Ch D 96* and *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850*).

[38] In the instant case, the appellant was not under any misapprehension. From the very beginning he knew that his possession would be only temporary. Although he expended money by construction of buildings on the land, he did not do so on the faith of any mistaken belief. Until the year 2009 when the respondent's mother sued the appellant, neither the respondent nor her mother knew of the existence any right claimed by the appellant in the land, which was inconsistent with their own rights. None of them until then knew of the appellant's mistaken belief of his rights, if he had any, and none of them encouraged the appellant in his expenditure of money, either directly or by abstaining from asserting their legal rights, with knowledge of the appellant's mistaken belief.

[39] To the contrary, having attempted in bad faith to acquire title to the land by a purported purchase from persons who had no capacity to sell the land, and using that in a calculated scheme to deprive the respondent of her land, the appellant cannot be granted a remedy in equity, since he who comes to equity must come with clean hands. Having considered all the alternative arguments that the appellant seeks to rely on to establish title to the land and found them not to be available to him, I therefore find no merit in grounds one, two, three and six and consequently all three grounds have failed.

<u>Whether the suit was barred by limitation</u>.

[40] This leaves only the fourth ground for consideration by which the appellant contends the learned trial Magistrate erred in law and fact when he did not find that the suit was time barred or barred by limitation. It is trite that **a** cause of

action arises when a right of the plaintiff is affected by the defendant's 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*).

[41] A person cannot be an adverse possessor if the owner gives permission to use the land. Permission is an absolute bar to a claim of adverse possession, since legally speaking, such a person in possession is merely given a revocable license to use the property. A person claiming to be an adverse possessor must have acted as if he were the owner and not merely one acting with permission of the owner. There should be evidence of use and occupation of the land that was hostile to and adverse to the rights of the owner. A claim of ownership through adverse possession will not succeed when the trespasser actually had the authority to be on the land. A trespasser who uses land by permission of the owner can never be an adverse possessor, no matter how long that use may continue.

[42] Therefore, for the period between the year 1991 and 2009, the appellant occupied the land with the consent of the then owner of the land, Susan Lakwech. It is during the year 2009 when the appellant was sued before the L.C.II Court of Vanguard Parish that his adverse possession began. It is then that the appellant expressed the intention to hold the land against the interests of the true owner and all the world, hence assuming a stance hostile to the interests of the respondent and her mother and became an adverse possessor of the land.

[43] According to section 11 of *The Limitation Act*, the right of action is not deemed to accrue until adverse possession is taken of the land. Since the appellant's adverse possession began in the year 2009, when the respondent filed the suit on 15th January, 2015 she was still within the 12 year period of limitation stipulated by section 5 of *The Limitation Act*, in respect of actions for recovery of land. This ground of appeal accordingly fails as well.

Order :

[44] In the final result, the appellant not having succeeded on any of the grounds of appeal raised, there is no merit in the appeal. It is dismissed with the costs of the appeal and of the court below being awarded to the respondent.

_____

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : Mr. Henry Kilama Komakech.

For the respondent : Mr. Michael Okot.