IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Civil Appeal No. 114 of 2018

In the matter between

KOMAKETCH WALTER **APPELLANT**

And

DR. OKOT CHRISTOPHER **RESPONDENT**

Heard: 22 July 2019

Delivered: 29 August 2019

Land law *— Customary tenure - 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 - Actual possession of vast lands is established by evidence showing sufficient control demonstrating both an intention to control and an intention to exclude others from the entire land - Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before.*

Evidence *— Ancient documents — Assumption that court may presume that the signature and every other part of that document, which purports to be in the handwriting of any particular person, on a document thirty years old produced from proper custody, is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested - Witness credibility - qualities to look out for relevant in the determination of the reliability of witnesses - Questions on the weight of evidence are not determined by arbitrary rules, but by common sense, logic and experience - A court may rely on parts of the testimony of a witness which are truthful and reject*

the parts which are false - Evidence obtained at the locus in quo must be dealt with as an integral part of the findings on credibility rather than just as an add-on

Civil Procedure *— Proceedings at the Locus in quo - at the* locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court - The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a locus in quo - Pleadings - The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his or her evidence to the issue disclosed by them - Departure from pleadings - A departure occurs where a party introduces in evidence something new, separate and distinct, which is not a mere variation, modification or development of the facts that were pleaded -a defendant who does not file a counterclaim is not entitled to affirmative remedies in the suit, save the dismissal of the suit -*

Family Law *— Exhumations - the dead are left with the rights of "decent sepulture" and "the right to be suffered to rest undisturbed until the body shall have been resolved into its original elements - It is immoral and illegal to disturb human remains without lawful authority - Exhumation is permitted only exceptionally.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for a declaration that the appellant has no claim whatsoever to land belonging to the respondent's father, an order of exhumation of the remains of the appellant's grandmother buried by the appellant's late father, Ojok Charles, on the land in dispute on 16th August, 2016, general damages for trespass to land, interest and costs.

[2] His case was that he is the son and a beneficiary of the estate of the late Odera Paul. Before his death, the late Odera Paul owned approximately 400 hectares of

land at Laminlawino, Ongako sub-county, Omoro District, which he inherited from his late father Owot Meca. By the time of his death in 1987, the deceased was in the process of acquiring a lease title over that land. The family of the deceased occupied that land until the insurgency in 1988. They returned to the land after the insurgency in the year 2004. Without any claim of right and consent of the beneficiaries of the estate of the deceased, the appellant on 16th August, 2016 buried the remains of his deceased grandmother on the land in dispute.

[3] In his defence, the appellant stated that he is the son of the late Ojok Charles. Before his death, his father owned the land in dispute having inherited the same from his late father Oryem Alexander who was the first settler thereon in 1947. The appellant's late father Ojok Charles was born on that land in 1958 and lived there on his entire life. Therefore, there was no need to seek the respondent's consent for the re-burial of the remains of his grandmother, Anek Maria, on the land as his father did on 16th August, 2016.

The respondent's evidence in the court below:

[4] In his testimony as P.W.1, the respondent Dr. Okot Christopher, testified that he was a young boy in lower primary school when he first saw the appellant's mother in 1981. She had taken refuge within the family of the respondent's father following a misunderstanding with her husband, grandfather of the appellant. She was a "sister" to the respondent's father only because they came from the same sub-county in Ongako. On 16th April, 2016, without the permission of the family of the late Odera Paul, the appellant's father exhumed the remains of the appellant's grandmother from Layibi and buried them on the land in dispute. He had sought permission to do so on 14th April, 2016 which the family had declined to grant. He then forcefully undertook the re-burial claiming that the land on which she had originally been buried at Layibi had been sold and the purchaser had directed that he wanted the land free of graves. The family was persuaded to allow him undertake the re-burial since he said he had no claim to the land, but refused to budge. A few days later, the respondent was surprised to find a hut

constructed near the site of the re-burial on the land in dispute. When the respondent attempted to open up a garden near the hut the appellant's father stopped him claiming the land belonged to his late mother, yet she had only lived briefly at their homestead before returning to her marital home. She never undertook any cultivation on the land and used to cultivate at her marital home in Koro.

[5] P.W.2 Ocaya David, the respondent's paternal uncle, testified that the appellant's father buried the remains of the appellant's late grandmother on land belonging to the late Odera Paul, father of the respondent. Before him, the land was occupied by the respondent's grandfather Owot Meca. Both Owot Meca and Odera Paul were buried on that land and the respondent's house is near their graves. They used to rear livestock on the land and undertook crop farming thereon. The appellant has no claim to the land. Out of compassion, the respondent's father had at one time accommodated the appellant's grandmother, Anek Maria. The appellant's father re-buried the remains of the appellant's grandmother on the compound where Odera Paul used to live.

[6] P.W.3 Ajok Rose Odera, widow of the late Odera Paul testified that she came to know the appellant when he was a young boy. The appellant's grandmother had domestic trouble in her marital home in Koro. The deceased Odera Paul being her uncle, he gave her refuge in his home and she lived with them for about two years. She was never given any part of the land. During the two years, she would go to Koro to dig and then return. She eventually returned to Koro following the death of her husband. The appellant's farther sought permission to bury the remains of the appellant's grandmother on the land but when his request was rejected, he sneaked in the night and buried them on the land nevertheless.

[7] P.W.4 Opiru Lalobo, the respondent's cousin testified that the appellant is a neighbour across *Tochi* Stream. The appellant's father was not permitted to re-bury the remains of the appellant's grandmother on the land but he did so

forcefully and re-buried her on the compound of their grandfather. This witness was not available for cross-examination. P.W.5 Owiny Hillary, a former Parish Chief then testified that the land in dispute, also known as Arom Dog Tochi, belonged to the late Paul Odera who utilised it for mixed farming. He inherited it from his father Owot Meca. Neither Anek Maria, Ojok Charles, nor Oryem Alexander lived on the land. By 1976, the neighbour to the South of the land in dispute was the appellant's grandfather Oryem Alexander, separated from the land in dispute by Tochi Stream. One of his two wives was Anek Maria, grandmother of the appellant. He attended her burial at Layibi. The home of Oryem Alexander was at Angaba in Koro sub-county. By subsequent developments, the land where the body of Anek Maria was buried in Layibi became a road reserve and directives were made to exhume it and bury it elsewhere. That is when the applecart's father exhumed it and buried it on the land in dispute.

[8] P.W.6 Ojok Michael testified that their late father Paul Odera inherited the land in dispute from his father Owot Meca. He established a livestock farm on the land and in 1976 applied for a lease. On 18th October, 1978 he received an offer for a lease. At the time the time he testified, this witness had recently planted pine trees on the land. The family of the late Ojok Charles owned land neighbouring that one in dispute, but cross Tochi Stream. Anek Maria was the mother of Ojok Charles. Oryem Alexander did not plant acacia trees to mark the boundary. That closed the respondent's case.

<u>The appellant's evidence in the court below</u>:

[9] The appellant's father was the original defendant in the suit but died before closure of the respondent's case and he was substituted by his son, the appellant, as legal representative of the estate. In his defence as D.W.1, the appellant Komakech Walter testified that inherited the land from his late father Ojok Charles, who in turn inherited it from his late father Alexander Oryem.

Alexander Oryem had two wives; one Ajulina Ajok lived across Tochi Stream in Koro while the other Anek Maria, the appellant's biological grandmother, lived on the land in dispute. When Ojok Charles died he was buried at his home in Pakwach. The appellant's mother was Abanya Linah and when she died during the year 2007 she was buried a kilometre away from the land in dispute. His grandfather Ojok Charles died in 2007 during the insurgency and was buried at Koro Abili. Before his death, his grandfather Oryem Alexander had planted half an acre of acacia trees on the land in dispute, about twenty years before the suit was filed. The acacia trees still exist on the land in dispute. His father Ojok Charles, transferred the remains of the late Anek Maria, who died in 2004, onto the land in dispute on 16th June, 2016. Where she was re-buried the remains of her former homestead were still visible. The family of respondents has since planted pine trees on the land in dispute, established a kraal and stopped him from accessing it. The respondent's fathers homesteaded is approximately half a kilometre from the land in dispute.

[10] D.W.2 Lukwiya Vincent, an immediate neighbour to the land in dispute, testified that Oryem Alexander had two wives; one Ajulina Ajok lived across Tochi Stream in Koro while the other Anek Maria, the appellant's biological grandmother, lived on the land in dispute. He did not know though how Oryem Alexander acquired the land in dispute. When he died he was buried in Koro Abili in an IDP Camp. Ogaba Kirikal the father of Oryem Alexander was buried on the land in dispute. Paul Odera was keeping livestock on the land West of the one in dispute. The approximately one and a half acres of acacia on the land in dispute was planted by Oryem Alexander. The appellant's land is to the East while that of the respondent is to the West. they share a common boundary. The remains of Anek Maria's former homestead were still visible where she was re-buried on 16th June, 2016. The stones of a local granary *(Deero)* too are still visible at that location. The respondent and members of his family have since planted pine trees on the land in dispute, established a kraal and stopped the appellant from

accessing the land. The respondent's father's homesteaded is approximately half a kilometre from the land in dispute.

[11] D.W.3 Anywar Santo testified that the land in dispute is approximately fifty acres and belonged to the appellant's grandfather, Oryem Alexander. The witness lives about five kilometres from the land in dispute but grew up as a neighbour to the land in dispute. The land in dispute was occupied by Anek Maria, the second wife of Oryem Alexander. Ojok Charles was buried at his home in Pakwach. Oryem Alexander acquired the land in dispute long before 1950. Paul Odera had land that measured approximately fifteen acres. The remains of Anek Maria's former homestead were still visible where she was re-buried on 16th June, 2016. The stones of a local granary *(Deero)* too are still visible at that location. The respondent and members of his family have since planted pine trees on the land in dispute, established a kraal and stopped the appellant from accessing the land. The respondent's fathers homesteaded is approximately half a kilometre from the land in dispute.

[12] D.W.4 Obina Celestino testified that he lives about three kilometres from the land in dispute but grew up as a neighbour to the land in dispute. Oryem Alexander had two homes; one in Koro and the other on the land in dispute which he acquired long before 1943 when he inherited it from his late father Ogaba Kirikal. The appellant closed his defence.

Proceedings at the *locus in quo*:

[13] The court then visited the *locus in quo* on 22nd October, 2018 where it found that there were no clearly ascertainable boundaries. It was a big chunk of undeveloped land with only one visible grave on it, that of Anek Maria. The appellant was not in actual possession while the respondent owned two kraals on neighbouring land, to the North of the one in dispute, where he also has a house and pine trees. The appellant pointed out a spot on the land in dispute with old

bricks and stones which he identified as the former granary at the home of the second wife of Oryem Alexander, Anek Maria. The court prepared a sketch map of the area in dispute.

Judgment of the court below:

[14] In his judgment delivered on 30th November, 2018 the trial Magistrate noted that at the *locus in quo*, the appellant failed to point out the location of the grave of Acayo Jacinta. Although he was able to point out trees that were planted by Alexander Oryem, he was only told and for that reason it was hearsay evidence. The respondent had cassava growing on the land in dispute and that proved that he was in adverse possession. If the late Ojok Charles had owned the land in dispute then he would not have been buried at Pakwach where his sisters and brothers live. His mother was buried a kilometre away from the land in dispute. This confirms the evidence of the respondent that Anek Maria was accommodated as a relative and not as a second wife of Alexander Oryem. The respondent had proved on the balance of probabilities that he is the owner of the land in dispute. At the *locus in quo*, the respondent showed the court the location of old and new existing kraals. This confirms that Anek Maria lived on the land only temporarily and left. The evidence of P.W.3 Ajok Rose Odera, widow of the late Odera Paul was that of a person who had first hand information. None of the appellant's paternal relatives live in the neighbourhood of the land in dispute. This is a patrilineal society where inheritance is patrilineal. Anek Maria was a niece to Paul Odera and therefore not his clan member. The appellant is claiming land from a clan he does not belong to. The land as described by P.W.2 Ocaya David is consistent with the size of land offered to be leased by the respondent's father. The remnants of the homestead seen at the locus in quo are most probably those for the home of Paul Odera since the kraals were nearby yet none of the appellant's relatives live in the neighbourhood. This supports the inference that Anek Maria was only hosted temporarily at the home of Paul

Odera. She vacated without any intention of returning until the appellant's father forcefully returned and re-buried her remains on the land.

[15] In his judgment, the trial Magistrate disregarded the evidence of P.W.4 Opiru Lalobo for he was never cross-examined. He found that the testimony of P.W.5 Owiny Hillary was corroborated by observations made at the locus in quo where Paul Odera's new and old kraals were found next to the land claimed by the appellant. There was no clear boundary between the two locations. He therefore found that he land claimed by the appellant lies within the land that was offered to the respondent's father in 1976. The acacia trees were not boundary marks and possession could not be inferred from their presence on the land. The local granary seen on the land belonged to the home of the late Paul Odera, where the appellant's grandmother had been hosted temporarily. Before her death, she never made any attempt to return to the land. The land in dispute forms part of the 400 hectares that were offered to the respondent's father to lease. The respondent was declared owner of the land. The forced re-burial of Anek Maria on land she had vacated without any attempt to return to it during her life time constituted trespass onto the land. A permanent injunction was issued against the appellant. The prayer for exhumation was rejected since it was tantamount to disturbing the peace of the dead and the late Anek Maria was a relative of Odera Paul. The respondent was awarded the costs of the suit.

The grounds of appeal:

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

1. The learned trial Court erred in law and fact when he failed to properly evaluate the evidence at the *locus in quo*, thereby reaching a wrong conclusion and / decision.

2. The learned trial Magistrate erred in law and fact when he relied on evidence that lay outside the disputed land to confirm that the respondent is the lawful owner of the suit land.
3. The learned trial Magistrate erred in law and fact when he ignored the evidence of D.W.2. Lukwiya Vincent a neighbour to the land but instead relied on tat of P.W.5 Owiny Hillary a witness who lived about five kilometres away from the land.
4. The learned trial Magistrate erred in law and fact when he relied on evidence of an expired lease to determine the size of ownership of the land.
5. The learned trial Magistrate erred in law and fact in finding that the appellant is not the owner of fifty acres of the land neighbouring that of the respondent to the North of the land in dispute and that as such he must pay the respondent's cots of the suit.

Arguments of Counsel for the appellant:

[17] In his submissions, counsel for the appellant, argued that the land in dispute was owned under customary tenure. At the *locus in quo*, the trial magistrate observed that the land occupied by the respondent was adjacent to the one in dispute. The appellant pointed out a spot on the land in dispute with old bricks and stones which he identified as the former granary at the home of the second wife of Oryem Alexander, Anek Maria. This spot was referred to in the testimony of all the appellant's witnesses. This physical evidence seen at the *locus in quo* supported that of the appellant and his witnesses. Whereas in his judgment the trial magistrate stated that the respondent had a garden of cassava on the land in dispute, this is not reflected in the observations made at *the locus in quo*. All the respondent's activities lay outside the land in dispute. It is the appellant and his witnesses who showed court the old homestead of Anek Maria and Alexander Oryem, the acacia trees, the Vino tree all on the land in dispute. It was therefore erroneous for the trial magistrate to have found that it was the respondent in

possession of the land in dispute. There was no evidence that the land offered to the respondent's father was ever surveyed. It was erroneous for the trial Magistrate to have found to the contrary. The claim that the land was only given to Anek Maria temporarily was never pleaded. Whereas P.W.5 Owiny Hillary lived five kilometres away, his evidence was wrongly preferred to that of D.W.2. Lukwiya Vincent, an immediate neighbour to the land in dispute who has never lived anywhere else. The appeal should therefore be allowed.

Arguments of Counsel for the respondent:

[18] In response, counsel for the respondent argued that the appellant's father had instead of burying the remains of his wife at the home of the appellant's grandfather across the *Tochi* Stream, had forcefully re-buried them on the respondent's land. While the appellant presented contradictory evidence, that of the respondent was consistent. The witnesses presented by the appellant had no knowledge of the history of ownership of the land. They relied mostly on hearsay. At the *locus in quo* the court observed that the appellant was not in possession of the land in dispute. *Tochi* stream formed the natural boundary between the land that belonged to the appellant's grandfather Alexander Oryem and the land in dispute belonging to the respondent. The respondent's family vacated the land in 1987 following the death of Odera Paul and the breakout of insurgency. The witnesses called by the respondent all identified Tochi Stream as the boundary. The appellant never pleaded that the respondent was only a neighbour to the North and neither did he describe the boundary of the land he claimed. At the *locus in quo*, none of the appellant's witnesses demonstrated a common boundary between the land claimed by the appellant and that in possession of the respondent. D.W.2. Lukwiya Vincent acknowledged having been embroiled in a previous boundary dispute with the respondent. His testimony therefore was rightly passed over and that of P.W.5 Owiny Hillary correctly preferred. The latter participated in the inspection that was done in 1976. The late Anek Maria was a bare licensee who occupied the land temporarily, returning to her matrimonial

home after two years. During her stay on the land, she would go back to Koro to cultivate. Her stay on the land was limited to accommodation. She did not acquire any interest in the land. In 1976, the respondent's father applied for conversion of his customary holding into a lease. P.W.2 was part of the team that inspected the land. The respondent and his witnesses narrated the history of ownership of the land from time immemorial. The respondent and his family is in possession and the appellant's father only forcefully re-buried his mother thereon. He prayed that the appeal be dismissed.

Duties of a first appellate court:

[19] 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.

The fourth ground of appeal

[20] In the fourth ground of appeal, the trial Magistrate is faulted for having relied on the expired lease offer that had been granted to the respondent's father in 1978, to find in favour of the respondent, yet he had claimed to own the land under customary tenure. The claim stated in the plaint was that the respondent's father Odera Paul inherited approximately 400 hectares of land at Laminlawino, Ongako sub-county, Omoro District, from his late father Owot Meca. He thereafter applied for a lease but had not completed the process by the time of his death in 1987.

[21] Customary tenure is characterised by local customary rules regulating transactions in land, 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 (see section 1 (*l*) of *The Land Act*, Cap 227). The respondent's claim was premised on this land having been under the customary tenure of his grandfather.

[22] The onus of proving customary inheritance begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition of the property of the deceased in accordance with those rules. Apart from asserting that he inherited the land in dispute from his late father Odera Paul who in turn inherited it from his own father Owot Meca, the respondent did not adduce any evidence regarding the custom under which that inheritance occurred, the rules and practices of inheritance which determine the settling of estates of intestate deceased persons under that custom or how estates should devolve, compliance with those established rules and practices of inheritance in his specific instance, and that those rules and

practices are not incompatible with the provisions of the constitution, any written law and are not repugnant to natural justice, equity and good conscience. His entire claim depended on proof of his claimed root of title in customary inheritance which he failed to establish.

[23] 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 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. The respondent did not lead such evidence, neither by himself nor of persons who would be likely to know of the existence of such customs as he claimed, that guided his acquisition of the various portions of the 400 hectares (slightly over one and half square miles) of land that he claimed.

[24] On the other hand, under section 90 of *The Evidence Act*, when any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of that document, which purports to be in the handwriting of any particular person, is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. The documents received and marked as P.ID.1having been made on 23rd March, 1976 and 18th October, 1978 respectively are more forty years old. Although the trial court received the documents only as set identified by P.W.6 Ojok Michael, they were legally admissible as exhibits and for that reason are hereby reviewed.

[25] One of those documents is an application for a lease dated 23rd March, 1976 and it shows that the late Paulo O. Odera applied for approximately two square miles of land for purposes of establishing a mixed farm for rearing cattle, goats, sheep and a banana plantation. The standard form required him to state whether at the time of application the land was occupied by customary tenure or otherwise and the words inserted are "No." The second document is an inspection report dated 9th April, 1976 which indicated that that land applied for was "free and empty." In response to the question whether it was being used communally or otherwise the answer inserted is "Nil." In response to the question whether there was any type of development of the land, the answer inserted is "Nil." The last document is a lease offer dated 18th October, 1978 which indicated that the offer was for five years with effect from the 1st day of the month in which survey would be completed. There is no evidence that a survey was ever undertaken. Conditions 4 and 5 thereof required acceptance to be made in writing within one month of the date of offer and payment of the prescribed fees within the same period. There is no evidence that such acceptance was ever made nor that the prescribed fees were paid.

[26] The late Paulo O. Odera having declared at the time of application on 23rd March, 1976 that the land he was applying for was not "occupied by customary tenure or otherwise," this was verified at the inspection that took place two years later on 18th October, 1978 where it was confirmed that the land applied for was "free and empty" and was not "being used communally or otherwise." The implication is that the land was vacant as at 18th October, 1978 and was not occupied by customary tenure as claimed by the respondent. The oral testimony of the respondent and his witnesses is refuted by the documentary evidence on which they sought to rely to prove that customary ownership. By virtue of that set of documents, occupancy of the land by the respondent's father, if any, then must have began after 1978. For all intents and purpose this was vacant, public land at the time the respondent's father applied for a lease.

[27] Under section 1 of *The Land Reform Decree of 1975,* the law in force then, all land in Uganda had been declared public land to be administered by the Uganda Land Commission in accordance with *The Public Lands Act* of 1969, subject to such modification as were necessary to bring the Act into conformity with the Decree. Under both *The Public Lands Act* and *The Land Reform decree, 1975,* occupants, including customary tenants on public land, were only tenants at sufferance and controlling authorities had power to lease such land to any person.

[28] Regulation 1 *The Land Reform Regulations 1976* (S.I 26 of 1976) in force at the time provided that any person wishing to obtain permission to occupy public land by customary tenure had to apply to the sub county chief in charge of the area where the land is situated. The applicant then had to be registered as a customary occupant of land by the sub-county Land Committee according to Regulation 3. Since there was no evidence that the respondent nor his father before him undertook any of these processes, the respondent's family was barred from acquiring interest in the land of a customary nature by section 5 (1) of *The Land Reform Decree* which prohibited the occupation of unoccupied public land by customary tenure without permission of the prescribed authority, and Section 6 which made it an offence for one to do so (see *Paul Kisekka Saku v. Seventh Day Adventist Church Association of Uganda, S. C. Civil Appeal No. 8 of 1993*). Any customary occupation without consent of the prescribed authority was declared unlawful (see also *Tifu Lukwago v. Samwiri Mudde Kizza and Nabitaka S. C. Civil Appeal No. 13 of 1996* and *Paul Kiseka Ssaku v. Seventh Day Adventist Church S. C. Civil Appeal No. 8 of 1993*).

[29] In any event, a lease offer did not create an interest in land. According to Regulation 10 of *The Public Lands Rules S.I 201-1* (revoked in March 2001 by rule 98 of *The Land Regulations, S.1. 16 of 2001*), being the law in force at the time, an offeree of a lease on public land was a mere tenant at sufferance and he could only acquire interest at registration. It provided that:

> Any occupation or use by a grantee or lessee of land which the controlling authority has agreed to alienate shall until registration of the grant or lease be on sufferance only and at the sole risk of such grantee or lessee.

[30] The implication of Rule 10 of *The Public Lands Rules* therefore was that an offerree of a lease by a Controlling Authority did not acquire an interest in the land so offered until actual registration of that lease. There being no evidence that the respondent's father subsequently caused a survey of the land and obtained a title to the land, it was erroneous of the trial Magistrate to have found that the land in dispute forms part of the 400 hectares that were offered to the respondent's father to lease and to have declared the respondent owner of the land.

Actual and constructive possession

[31] Having failed to prove customary ownership of the land nor any right *in rem* therein, the alternative was for the respondent to rely on actual possession of the land. 400 hectares (approximately 990 acres) of land is slightly over one and half square miles. It fits the description of "vast land." When the court visited the *locus in quo*, the trial Magistrate observed that "it was a big chunk of undeveloped land." Actual possession of vast lands is established by evidence showing sufficient control demonstrating both an intention to control and an intention to exclude others from the entire land. Whether or not acts of possession done on parts of an area establish actual possession of the whole area must, however, be a matter of degree. I do not think that it can on principle be held that a finding of actual possession of 400 hectares (slightly over one and half square miles) of land may be based only on constructive possession by way of activities on a small portion thereof, in the name of the whole. Where the land is of a nature that it cannot easily placed under physical occupation at all time, the character and nature of the constructive possession, the extent of which is sought to be

broadened and lengthened by construction so as to cover lands not in actual possession, must not, however, be equivocal.

[32] The presumption of constructive possession does not arise at all with respect to land of which there is no actual possession or occupation or beyond the bounds of such actual possession or occupation except where there is unequivocal 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. The onus of proof was upon the respondent to adduce evidence in respect to the vast wilderness land that he and his ancestors had such open, notorious, continuous, exclusive possession or occupation of a substantial part thereof as would constructively apply to all of it, such as would operate to extinguish the title of any true owner and vest in the appellant possessory control.

[33] In cases where constructive possession of vast lands is sought on basis of activities on a small portion thereof, in the name of the whole, there ought to be evidence of the scale of area covered by the existing activities. In this case, there was no evidence led as to the number of livestock reared on the land both in the past and present. There was no evidence led as to the variety of crops that were grown nor the size of gardens that were established on the land both in the past and present. Secondly, such occupancy 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. In this case that occupation was cast into equivocation by the appellant's evidence.

[34] The bottom line is that there was no evidence of any form of occupation by the respondent or his predecessors, of a nature that would form the basis of a finding of constructive possession of the entire 400 hectares by way of activities only on a small portion thereof occupied by two kraals and a house. In absence of such evidence, the court should have been hesitant to recognise that possession as

proof of the existence of customary interests in such a vast land, without proof that the respondent or his predecessors had ever reduced any substantial part of it to actual occupation. The plaintiff failed to prove his claimed customary tenure over the 400 hectares of land and neither did he prove actual possession thereof. The lease offer could not form a valid basis for supporting a finding in his favour, Consequently this ground succeeds. By reference to that ground alone, I am driven to conclude, with all due respect to the trial court that it made an error of law, but the errors do not end there.

Grounds 1, 2 and 4 of appeal

[35] Grounds 1, 2 and 4 will be considered concurrently in so far as they fault the trial Magistrate's evaluation of oral evidence viz-a-viz that obtained at *locus in quo*. In evaluation of the evidence, the court had to determine which of the two versions was more plausible. The appellant's version was that the land in dispute originally belonged to his great grandfather, Ogaba Kirikal. His grandmother the late Anek Maria lived on the land in dispute as the second wife of his grandfather Alexander Oryem when he inherited it from his late Ogaba Kirikal long before 1943. That his late father Ojok Charles was born on this land in 1958 and lived thereon until the break out of the insurgency. As proof of her existence on the land, the court was to find remains of her former homestead, approximately one and a half acres of acacia planted by her late husband Oryem Alexander, and stones of a local granary (*Deero*). The homestead of the respondent's late father Odera Paul was located half a kilometre away from the land in dispute.

[36] The respondent's version was that the land in dispute was originally occupied by his grandfather Owot Meca. His late father Odera Paul was born and lived on this land until his death in 1987. The appellant's grandfather Alexander Oryem who lived in Koro, was the immediate neighbour to this land across Tochi Stream, which formed the natural common boundary between the two adjoining pieces of land. The appellant's grandmother the late Anek Maria was only temporarily

hosted at the home of the late Odera Paul, who was her uncle, where she took temporary refuge as she continued to return to Koro, to cultivate her gardens for about two years and later returned to her marital home. She never returned to that land until the appellant's father re-buried her remains thereon on 16th August, 2016.

[37] In the determination of which of the two versions is more plausible, the trial Magistrate engaged in some fanciful argument, to wit; if the late Ojok Charles had owned the land in dispute then he would not have been buried at Pakwach where his sisters and brothers live (implying that one must always be buried on land they own); his mother was buried a kilometre away from the land in dispute (there is no evidence of this on record); the respondent had cassava growing on the land in dispute and that proved that he was in adverse possession (the cassava referred to was not seen when the court visited the *locus in quo*); this confirms the evidence of the respondent that Anek Maria was accommodated as a relative and not as a second wife of Alexander Oryem (yet both the respondent and P.W.4 Opiru Lalobo testified that one of the two wives of Oryem Alexander was Anek Maria, grandmother of the appellant); none of the appellant's paternal relatives live in the neighbourhood of the land in dispute (implying that one can only own land in close proximity of one's paternal relatives); (without evidence to that effect) he found that the acacia trees were not planted but grew wild, were not boundary marks and possession could not be inferred from their presence on the land; at the *locus in quo* he found that "the respondent owned two kraals on neighbouring land, to the North of the one in dispute, where he also has a house and pine trees," (implying the land in possession of the respondent is distinct from the one in dispute) yet in his judgment he held that the land in dispute formed part of the 400 hectares claimed by the respondent and that the respondent was in possession, and so on. The reasons given springing from the observations made at the *locus in quo* were highly speculative and ought not to have been used as substitutes of evidence in the case.

[38] The trial Magistrate thus not only misconstrued significant parts of the evidence but also opted to predominantly consider speculative matters extraneous to the evidence adduced by the parries rather than deal with the relative strengths of the evidence before him. The only instance when he focused on that aspect was when he preferred the evidence of P.W.3 Ajok Rose Odera, widow of the late Odera Paul and P.W.5 Owiny Hillary, a former Parish Chief to that of D.W.2 Lukwiya Vincent, an immediate neighbour to the land in dispute, opining that the two had first hand information.

[39] Part of this failure is attributable to the manner in which proceedings were conducted at the *locus in quo*. The record of proceedings thereat only lists eight observations made by court. Being a procedure undertaken pursuant to Order 18 rule 14 of *The Civil Procedure Rules,* proceedings at the *locus in quo* are an extension of what transpires in court. They are undertaken for purposes of inspection of a property or thing concerning which a question arises during the trial. For the inspection of immovable property, objects that cannot be brought conveniently to the court, or the scene of a particular occurrence, the court may hold a view at the *locus in quo*. According to section 138 (1) (b) of *The Magistrates Courts Act* and Order 18 rule 5 of *The Civil Procedure Rules*, evidence of a witness in a trial should ordinarily be taken down in the form of a narrative, and this by implication includes proceedings at the *locus in quo*.

[40] Therefore at the *locus in quo*, a witness who testified in court but desires to explain or demonstrate anything visible to court must be sworn, be available for cross examination and re-examination, as he or she demonstrates to court the physical aspects of the oral evidence he or she gave in court (see *Karamat v. R [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; [1956] 40 Cr App R 13*). Evidentiary statements made under examination should be noted in the record to the extent they can be assumed to be of significance in the case. The court should make a detailed record of the evidence given, the features pointed out and illustrations made during the inspection of a *locus in quo*. The record in the

instant case does not disclose if the witnesses were sworn and if any questions were asked by any of the parties at the *locus in quo* concerning what the court ultimately observed. As matters stand, the observations made are hanging, not backed by evidence recorded from witnesses.

[41] It is settled law that when the trial court has reached a conclusion on the primary facts, the appellate court when re-evaluating the evidence may come to a different conclusion where; - (i) there was no evidence to support the finding, (ii) the finding was based on a misunderstanding of the evidence, (iii) it is shown that the Magistrate was clearly wrong and reached a conclusion which on the evidence he or she was not entitled to reach, (iv) the findings of credibility are perverse, or (v) it is a finding which no reasonable court could have reached, based on the evidence on record. Though it ought, of course, to give weight to the opinion of the trial court, where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge (see *Benmax v. Austin Motor Company Ltd [1955] 1 All ER 326 at 327*).

[42] Having formed the opinion that there was no evidence to support some of the findings of fact made by the trial Magistrate, that most of the findings were based on a misunderstanding of the evidence, and that the findings of credibility of the key witnesses are perverse, and since it has been generally demonstrated while considering the third ground of appeal that the trial Magistrate was clearly wrong and reached conclusions which on the evidence he was not entitled to reach, this court is therefore at liberty to evaluate the inferences drawn from the facts disclosed by the evidence.

[43] One method for determining truthfulness and reliability of oral testimony is to examine the statement of each witness as regards its internal consistency and external consistency with other available evidence, i.e. inconsistencies between

the party's or witness' factual account and the objective evidence. The qualities to look out for relevant in the determination of the reliability of witnesses in the instant case included;- the opportunity the witnesses had to observe the events; whether the testimony of the witnesses was based on hearsay; the ability of the witness to recall events accurately; the relationship of the witnesses to the parties to the litigation; whether the witness had any interest in the outcome of the litigation; whether part of the testimony of the witnesses was found to be not credible; whether the witnesses appeared to have a bias; the extent to which the testimony of the witnesses was based on opinion and inference; whether the facts which the witness relied on in forming such opinion were established; and any other evidence which supports or contradicts the testimony of the witnesses. A statement is more likely to be true if it accords with known facts, available physical evidence, or other evidence from a source independent of the witness.

[44] It is the task of the court to look at all the evidence as a whole, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. Some parts of the evidence may shine with the light of credibility. The court must consider all these points together; and although some matters may go against and some matters count in favour of credibility, it is for the court to decide which are the important, and which are the less important features of the evidence, and to reach its view on the evidence as a whole. A court must not reach its conclusion before surveying all the evidence relevant to the decision (see *Mibanga v. Secretary of State for the Home Department, [2005] EWCA Civ 367*). For weighing evidence and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited. Questions on the weight of evidence are not determined by arbitrary rules, but by common sense, logic and experience. (See *Phipson on Evidence*, 10th Edition, para 2011).

[45] In *Attorney General of Hong Kong v. Wong Muk ping [1987] 2 All ER 488; (1987) 85 Cr App R 167,* Lord Bridge of Harwich while delivering the judgment of the Judicial Committee of Privy Council commented at pages 493 and 173 respectively:

> It is common place of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability.

[46] In that regard a Court may partly accept and partly reject some of the evidence given by a witness. A court may rely on parts of the testimony of a witness which are truthful and reject the parts which are false. It may believe the evidence of a contradicting witness and reject the part containing lies or, reject the whole evidence of such witness who may be telling lies, but act on the rest of the evidence, or accept reasonable explanation for the inconsistencies (see *Uganda v. Rutaro [1976] HCB 162; Uganda v. George W. Yiga [1977] HCB 217*; *Saggu v. Road Master Cycles (U) Ltd. [2002] I EA 258; Kiiza Besigye v. Museveni Y. K and Electoral Commission [2001 – 2005] 3 HCB 4*). A judicial officer must use his or her common sense and good judgment in coming to conclusions of fact (see *DPP v. Hester [1972] 2 WLR 910; [1972] 3 All ER 440; (1973) 57 Cr App R 212; [1973] AC 296*).

[47] Just as one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence. What a trial court does at his peril is to reach a conclusion by reference only to a party's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the evidence

obtained at the *locus in quo*. Evidence obtained at the *locus in quo* must be dealt with as an integral part of the findings on credibility rather than just as an add-on. To artificially separate observations made at the *locus in quo* from the rest of the evidence, then reach conclusions as to the credibility of witnesses without reference to those observations; and then, no doubt inevitably on that premise, find that the observations made at the *locus in quo* were of no assistance to a party seeking to rely on them, that is a structural failing in the evaluation of evidence, not just an error of appreciation.

[48] As regards internal consistency of the appellant's version, the strong points are that the appellant relied on the testimony of D.W.2 Lukwiya Vincent, who being an immediate neighbour to the land in dispute had opportunity to observe the events on the land including the presence thereon of Anek Maria, grandmother of the appellant, as one of the two wives of Oryem Alexander and the latter's planting of over an acre of acacia trees thereon; his responses during cross-examination revealed that he had the ability to recall events accurately; he had no blood, marital or business relationship to any of the parties to the litigation; he had no interest in the outcome of the litigation; no part of his testimony was found to be not credible; the alleged bias he could have had related to a boundary dispute in the past that had long been settled. The weak aspects of his case were that his evidence regarding the historical origin of his claimed possession of the land was based on hearsay.

[49] As regards the external consistency of the appellant's version, the appellant pleaded the fact of his grandfather having been in possession as way back as prior to 1947. He testified that his late father Ojok Charles was born on this land in 1958 and lived thereon until the break out of the insurgency. He and all his witnesses testified that as proof of her previous existence on the land, the court was to find remains of her former homestead, approximately one and a half acres of acacia trees planted by her late husband Oryem Alexander, and stones of a

local granary (*Deero*). Indeed when the court visited the *locus in quo*, these items were found to exist on the land.

[50] With regard to the internal consistency of the respondent's version, the only strong point is that he relied on the testimony of P.W.5 Owiny Hillary, a former Parish Chief, whose responses during cross-examination revealed that he had the ability to recall events accurately; he had no blood, marital or business relationship to any of the parties to the litigation; and he had no interest in the outcome of the litigation. Apart from him, the rest of the respondent's witnesses were his close relatives, with an interest in the outcome of the litigation. Unfortunately for the respondent, part of the testimony P.W.5 was found not to be credible; although he claimed it was only the respondent's father in possession of the 400 hectares of land that were inspected in 1976, P.ID.1 comprising the application for that land dated 23rd March, 1976 the inspection report dated 9th April, 1976 and the lease offer dated 18th October, 1978 show that the land was "vacant," "free and empty" and was not "being used communally or otherwise" at the time. He could not have found the respondent's father in possession and declared otherwise in his inspection report.

[51] Furthermore, not being an immediate neighbour to the land in dispute, who only visited it during an inspection that took place in 1976, P.W.5 did not have the opportunity to observe the day-today events on the land including the presence thereon of Anek Maria, grandmother of the appellant, as one of the two wives of Oryem Alexander and the latter's planting of over an acre of acacia trees thereon as contended by the appellant, or as a mere guest who took refuge at the home of the respondent's father as contended by the respondent. The respondent's version was weakened further when his evidence regarding the historical origin of his claimed possession of the land was refuted absolutely by P.ID.1 comprising the application for that land dated 23rd March, 1976 the inspection report dated 9th April, 1976 and the lease offer dated 18th October, 1978. The alternative is that the land in dispute did not from part of the land that was

inspected since both parties claim to have been in possession decades before that inspection.

[52] As regards the external consistency of the respondent's version, the respondent did not present any explanation for the presence of the over one acre plantation of acacia trees that was alluded to by the appellant and his witnesses in court, and shown to the court during the visit to the *locus in quo*. Without evidence to support its finding, the trial court erroneously deemed it to be a cove of trees growing wild. The appellant had stated that the respondent's homestead is half a kilometre away from the land in dispute and indeed when the court visited the *locus in quo* it found that although there was no clear boundary, "the respondent owned two kraals on neighbouring land, to the North of the one in dispute, where he also has a house and pine trees." He variously referred to it as the "undisputed land," the "adjacent land," and "land not in contention." He nevertheless went ahead to hold erroneously that the land in dispute comprised part of the 400 hectares offered to the respondent's father.

Departure from pleadings

[53] The external consistency of the respondent's version was weakened further by the lame attempt to explain away the presence on the land in dispute, of stones of a local granary (*Deero*) and the remnants of the former homestead of Anek Maria, grandmother of the appellant, as one of the two wives of Oryem Alexander. The respondent's version was that although Anek Maria had lived on the land, she had done so only temporarily for two years. Despite having filed an amended plaint on 12th September, 2018 before P.W.5 Owiny Hillary and P.W.6 Ojok Michael had testified, this aspect of the respondent's case was never pleaded and was only introduced at the hearing. It constituted a departure from their pleadings. A departure occurs where a party introduces in evidence something new, separate and distinct, which is not a mere variation, modification or development of the facts that were pleaded (see *Waghorn v. Wimpey*

(George) and Co. [1969] 1 WLR 1764). The test is whether the opposing party's conduct of the case would have been any different had the adversary pleaded the impugned aspect of their case. The question is if the allegations made in evidence had been made in the pleadings in the first place, the opposing party's preparation of the case, and conduct of the trial, would have been any different.

[54] I find that had this fact been averred in the respondent's pleadings in the first place, the appellant's preparation of the case, and conduct of the trial, would have been substantially different. The contention would then not have been whether the late Anek Maria, grandmother of the appellant, had ever lived on and been in possession of the land at all, but rather the terms and circumstances of her occupancy. That is where the issue of *Tochi* Stream would have been relevant to the determination of the question as to whether or not the late Anek Maria was ever granted any exclusive rights to what in that case would be land owned by the respondent's father. The case as pleased by the respondent was that of trespass by a person who had lived all her life across *Tochi* Stream and her no possessory or other rights in the land in dispute. This certainly prejudiced the appellant who now had to defend a suit whose evidence related to material facts that had not been pleaded.

[55] The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his or her evidence to the issue disclosed by them (see *Esso Petroleum Company Limited v. Southport Corporation [1956] AC 218*). The rules on pleadings require the parties to set out fully the nature of the question to be decided by stating the facts upon which the parties rely and the orders which they seek, otherwise the courts risk embarking on a roving enquiry. The function of the court in a civil trial is to decide the dispute as formulated between the parties, rather than undertaking a roving inquiry. For that reason, when a departure from the pleadings occurs, the party not in breach has the remedy of applying for an order to strike out the offending pleading before or

during the hearing and failure to do so is not a bar to bringing up matter in submissions (see *Kahigiriza James v. Busasi Sezi [1982] HCB 148*).

[56] Where departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that such evidence is not permitted unless the pleading is appropriately amended. Therefore, in the event of an inconsistency between the pleading and evidence adduced in court, such that the inconsistence is revealed in the course of hearing of evidence, the offending part of the evidence may be rejected or the offending part of the pleading may be struck out on application (see *Opika-Opoka v. Munno Newspapers and Another [1988-90] HCB 91* and *Lukyamuzi Eriab v. House and Tenant Agencies Limited [1983] HCB 74*). The trial court should therefore have rejected the respondent's version that Anek Maria, grandmother of the appellant, had lived on the land in dispute only temporarily for two years.

[57] Once that explanation is discounted, what remains as the only explanation for the presence of stones of a local granary (*Deero*), the remnants of the former homestead, and the over one acre forest of acacia trees is that the land in dispute was previously occupied by the late Anek Maria, grandmother of the appellant as one of the two wives of Oryem Alexander. The credibility of the appellant's version could then be determined by assessing how it did or did not fit in with the available physical evidence. Unless fabricated or staged, physical evidence is not subject to the limitations of lies, impeachment, intimidation, forgetfulness or pursuit of self interest that oral evidence is prone to. Physical evidence only has to be detected, preserved, evaluated, and explained. Once the possibility of its being fabricated or staged is ruled out, it should then be examined and compared with the witnesses' testimony. The court may then determine the reliability of their respective accounts. The court looks at the physical evidence and attempts to determine how it fits into the overall scenario as presented in the contending versions.

[58] In the instant case, having had a homestead where she lived as early as years before 1958 and where her husband also planted a forest of more than an acre of acacia trees, the late Anek Maria's presence on that land could not have been of a temporary nature. Temporary use of land will be associated with activities and material placed on the land that might be easily removed and relocated, while permanent use will be associated with activities and material placed on the land that might be deliberately designed to require great difficulty in removing after installation. In addition, activities associated with temporary use are more likely to be of the type that require more frequent inspection or adjustment in comparison to those associated with permanent use.

The fifth ground of appeal

[59] It is contended in the fifth ground that it was wrong for the trial court not to have found that fifty acres of the land in dispute belonged to Anek Maria and hence the appellant as legal representative of that estate. It is trite that a defendant who does not file a counterclaim is not entitled to affirmative remedies in the suit, save the dismissal of the suit. Moreover, the appellant's evidence did not establish customary ownership of the land either. Worse still, the boundaries of the fifty acres were never demonstrated to court. The appellant's evidence established only the fact of possession of the land in dispute as shown to court and illustrated in the sketch map. That said, 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*). Possession may thus only be terminated by a person with better title to the land. To be entitled to evict the plaintiffs from the land, the defendants must prove a better title to the land.

[60] I find that the evidence on record established that the appellant's grandmother Anek Maria had been in occupation of the land for over thirty years, interrupted only by the period of insurgency. When the late Anek Maria vacated the land as a result of the insurgency, that did not terminate her possessory rights over the

land. Involuntary abandonment of a holding does not terminate one's interest therein, where such interest existed before (see *John Busuulwa v. John Kityo and others C.A. Civil Appeal No. 112 of 2003*). It is irrelevant that she did not attempt to return until her death at Layibi in the year 2004. It is a fact that this court has taken judicial notice of before that the insurgency which pervaded this region did not end until some time during the year 2006. It therefore makes sense that only her remains could be returned, as her son did on 16th August, 2016. Although the trial court came to a wrong conclusion that the land on which her remains were re-interred did not belong to her but is the property of the respondent, it made the right decision when it rejected the respondent's prayer for the removal of her remains there from.

[61] At all times, a person who has died must be treated with respect, and the privacy of their family and friends must be protected. It is immoral and illegal to disturb human remains without lawful authority. It is for that reason that trespassing on burial places is an offence under section 120 of *The Penal Code Act*. Therefore, no person with the intention of wounding the feelings of any person, or with the knowledge that the feelings of any person are likely to be wounded, should commit acts of trespass in any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offer any indignity to any human corpse. One who does so commits an offence. Consequently, no known cemetery, burial ground, human remains, or burial object may be knowingly disturbed by the owner or occupier of the land on which the cemetery or burial ground is located for the purposes of developing or changing the use of any part of such land, without first obtaining an order permitting such act from court.

[62] Most societies and cultures that embrace burial as a means of bodily disposal exhibit an entrenched reluctance to disturb the earthly repose of the dead for two reasons. The first is public health concerns around the potential transmission of disease from decaying corpses. Secondly, and more fundamentally, exhumation offends the basic moral premise of allowing the dead to "rest in peace" and is

generally regarded as a forbidden or sacrilegious act. As a result, exhumation is subject to strict legal controls. After a body has been buried, it is considered to be in the custody of the law; therefore, disinterment is not a matter of right. The disturbance or removal of an interred body is subject to the control and direction of the court.

[63] In *Litteral v. Litteral, 131 Mo.App. 306, 111 S.W. 872, 873 (1908*), the court declared that the dead were left with the rights, if they may be called rights, of "decent sepulture" and "the right to be suffered to rest undisturbed until the body shall have been resolved into its original elements." It added that "the duty rests on all, including the courts, not to disturb the body, except in cases of necessity or for some cogent reason which appeals strongly to human nature or to one's sense of propriety." The court in *McGriggs v. McGriggs, 192 So. 3d 350* adopted the following principles as applicable to a petition to exhume a body:

> [T]here [is] a presumption against removal growing stronger with the passage of time and with the remoteness of the connection with the decedent by the one desiring removal. The first rule [is] that the surviving spouse [has] the paramount right to designate the burial site and, if the parties were living in normal marital relations, a very strong case [is] required to justify judicial interference with the survivor's wish. Secondly, in the absence of a surviving spouse, the right of selection of a burial site [is] in the next of kin in order of their relation to the decedent, and the rights of more distant kin might be modified by circumstances of special intimacy or association with the decedent. Thirdly, to what extent the desires of the decedent as to place of burial should prevail against those of the surviving spouse [is] an open question, but as against the remoter connections, such wishes, especially if strongly and recently expressed, [will] usually prevail. Factors to which various courts generally have given consideration in permitting disinterment and removal of a body have included public interest, wishes of the decedent, rights and feelings of those entitled to be heard by reason of relationship, rights and principles of religious bodies or other organizations which granted interment in the first burial site, and whether consent was given to interment in the first burial site by the one claiming the right of removal. We are of the opinion all of these factors are to be

> considered when appropriate to determining such question and its determination is particularly one for a court of equity. There is no rigid rule for either permitting or refusing removal of a body once interred and each case must be determined on its own merits with due regard to public welfare, the wishes of the decedent and the rights and feelings of those entitled to be heard by reason of relationship or association.

[64] Three general principles are evident. First, it is presumed that a "decently buried" body should remain undisturbed where it was placed unless good reason is given to exhume it. Second, disinterment is considered the private concern of the immediate family. Third, if there is disagreement among the close relatives regarding a proposal for exhumation the matter is adjudicated by a court. The court considers (in order of importance) the wishes and religious beliefs of the deceased (if these can be determined), the wishes of the spouse of the deceased, the opinions of other close relatives, and the norms and practices of the people having the closest cultural affiliation to the deceased, when determining if exhumation should be allowed.

[65] Because of the presumption of the permanence of burial and the resultant general disinclination to disturb human remains, a compelling reason is required before exhumation will be allowed. Exhumation is permitted only exceptionally in cases where disinterment would be regarded as acceptable by right-thinking members of society. Examples of situations where exhumation may occur include: (i) when a court orders an exhumation as part of a criminal investigation; (ii) for public health reasons (for example if a graveyard or cemetery is being moved); and (iii) for family reasons (for example if the family of the deceased person asks for the remains to be moved to another burial ground, another part of the country, or abroad).

[66] Reasons for exhumation fall into two broad categories: public interest, and personal reasons. Exhumation is thus ordinarily done with some definite objectives under an order of court such as; (i) identification (confirming the

individuality for any criminal or civil purpose arising after the burial or in respect of individuals who were not identified or were mis-identified at the time of burial); (ii) to establish the cause of death (when any foul play is suspected, exhumation may be ordered depending upon the public demand or request by the relatives, to determine the cause of death); to undertake a second autopsy (when the first autopsy report is being challenged or is ambiguous. This may involve any criminal or civil issue). Public interest concerns may come to the fore where planned development projects (e.g. new infrastructure or buildings) require multiple graves in older and frequently disused burial grounds to be cleared, as the demands of the living take precedence over the longer-term dead.

[67] Before granting a prayer for exhumation, the court should be satisfied that the applicant;- owns the land on which the cemetery or burial ground is located; has specified the number of graves believed to be present and their locations can be determined from the use of minimally invasive investigation techniques; has proof of notification, or in the alternative a plan for notification of the known descendants of those buried or believed to be buried in such cemetery or burial ground; has specified the method of disinterment, the location and method of disposition of the remains, the approximate cost of the process, and the approximate number of graves to be affected; there are measures in place for observing applicable religious or cultural rites and practices; and that the applicant has a respectful proposal for the disinterment and proper disposition of the human remains.

[68] In making a determination whether or not to grant the prayer, the court takes into account;- the presumption in favour of leaving the cemetery or burial ground undisturbed; the concerns and comments of any descendants of those buried in the burial ground or cemetery and any other interested parties; the economic and other costs of mitigation; the possibility of recovering all the remains considering the passage of time and method of interment; the adequacy of the applicant's plans for disinterment and proper disposition of the human remains or burial

objects; the balancing of the applicant's interest in disinterment with the public's and any descendant's interest in the value of the undisturbed cultural and natural environment; and any other compelling factors which the court deems relevant.

[69] There is no legislation governing exhumations in Uganda yet exhumations are carried out not only for forensic or medico-legal purposes, but also as illustrated in this case, for changing places of burial. Nevertheless, exhumation or disinterment is generally considered as insulting and socially unaccepted (*taboo*) procedure by most cultures. The court may refuse to grant an order permitting exhumation in the following circumstances:- where the consent of the next of kin has not been given; where the person died very recently; when the burial plot cannot be identified; when the remains lie unidentified in a common plot (for example the burial plot of a religious order); when due respect to the person who died cannot be guaranteed; when the remains to be exhumed are located below a body that is not to be exhumed; when public health and decency cannot be protected; or where the conditions of the soil or other environmental aspects in the graveyard would make an exhumation difficult or unsafe. Exhumation needs strict controls in the interests of public welfare, the wishes of the deceased and the feelings of the families of those involved.

[70] Since the exhumation of a deceased body or human remains can be a very emotive and sensitive issue, particularly for the relatives and friends of the deceased, it is necessary for the court to arrive at its decision with circumspection. In a landmark U.S. Supreme Court decision, *Dougherty v. Mercantile Safe Deposit and Trust Company, 387 A.2d 244, 246-47 (Md. 1978*), Justice Cardozo stated, "the dead are to rest where they have been lain unless reason of substance is brought forward for disturbing their repose." A burial will usually not be disturbed in the absence of strong and convincing evidence of new and unforeseen events. Removal and re-interment of a body is allowable where there are compelling reasons (see *Hood v. Spratt, 357 So.2d 135, 136–37 (Miss.1978*).

[71] The law does not favour disinterment, based on the public policy that the sanctity of the grave should be maintained. Once buried, a body should not be disturbed. A court will not ordinarily order or permit a body to be disinterred unless there is a strong showing of necessity that disinterment is within the interests of justice. Each case is individually decided, based on its own particular facts and circumstances. The courts frequently allow a change of burial place in order to enable people who were together during life to be buried together, such as husbands and wives, or family members. Disinterment for the purposes of reburial in a family plot acquired at a later date is generally authorised by the courts, particularly if the request is made by the surviving members of the family of the deceased.

[72] Exhumations may also be driven by personal reasons, in the low-profile, single grave disinterment situations involving comparatively recent burials and occurring within the private, familial sphere. In such cases, the surviving spouse or next of kin of a deceased person has the right to let the body remain undisturbed. This right, however, is not absolute and can be violated when it conflicts with the public good or when the demands of justice require it. Subsequent circumstances may require a change of burial. If a body was improperly buried, i.e. buried at a wrong place, the court will order the body removed for reburial or where family members wish for an alternate resting place for the deceased. Each case must be determined on its own merits with due regard to public welfare, the wishes of the deceased and the rights and feelings of those entitled to be heard by reason of relationship or association although from a policy perspective, the absence of any discernible public benefit makes disturbing the dead more difficult to justify in these cases.

[73] The dead, hopefully at peace, are not lightly moved. Considering public policy on exhumations occurring for only the most compelling reasons, that exhumations are only allowed in the rarest of circumstances, an owner of land who allows the burial of a deceased person on his or her property cannot later remove the body against the will of the surviving spouse or next of kin. Similarly, an owner of land

may not assert that a burial was made without his or her consent if he or she fails to raise any objections within a reasonable time after the interment of the deceased. For all the foregoing reasons, the trial court therefore came to the right conclusion when it rejected the prayer for exhumation of the remains of the late a Anek Maria, the appellant's grandmother, from the land in dispute.

Order :

[74] In the final result, appeal having succeeded substantially, it is allowed. The judgment of the court below is set aside. Instead judgment is entered dismissing the suit. The costs of this court and the court below, are awarded to the appellant against the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Oyet and Co. Advocates

For the respondent : M/s Odongo and Co. Advocates