IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0033 of 2016

In the matter between

1. **ODONGOTOO YASINTO**
2. **ADONGA BIMENY**
3. **OKOT SANTO**
4. **AKELLO SANTINA**
5. **ACALUM ALICE ANYING GABRIELLA**
6. **HELLEN OBONYO JINO**
7. **LUMUMBA OKIDI PATRICK**
8. **AKULLU BETTY**
9. **KINYERA DENIS** **APPELLANTS**

And

AKUMU HELLEN **RESPONDENT**

Heard: 20 August, 2019.
Delivered: 12 September, 2019.

Evidence *— Judicial Notice — under section 56 (2) and (3) of The Evidence Act, courts are empowered to take judicial notice of practices that have attained such notoriety that court would be justified in taking judicial notice of — A court can use this doctrine to admit as proved such facts that are common knowledge to a judicial professional or to an average, well-informed citizen — courts take cognisance or notice of matters which are so notorious or clearly established that formal evidence of their existence is unnecessary, and matters of common knowledge and everyday life.*

Family Law *— Acholi customary law of inheritance — In Acholi traditional custom, death of a propertied member of the family results not in inheritance but rather in a rearrangement of duties and of rights of participation in the produce of the land or rights of usage of the land itself — The rules of customary intestacy law settles the estate upon the eldest son (typically where the deceased is male) or to the eldest daughter (typically where the deceased is female) or sole surviving child, in such a way that it devolves to him or her undivided but subject to provisions of user for the widow, the daughters, younger sons, and other close relatives — "Inheritance" under Acholi customary intestacy law with regard to land belonging to the head of a family is a term of art whose essence is re-allotment by way of devolution of the authority to mange as more or less a trustee, rather than devolution into private property of an individual.*

Land Law *— a grantor of land cannot give away what he or she does not possess — The appellants claimed to have been allocated the land they occupy by the sub-county officials yet the sub-county did not own any land in that area.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellants jointly and severally seeking recovery of approximately 15 acres of land situated at Ogwal Owoo village, Pece Parish, Patongon Town Council, in Agago District, a declaration that she is the rightful owner of that land, an order of vacant possession, general damages for trespass to land, a permanent injunction restraining the appellants from further acts of trespass onto the land, and the costs of the suit.

[2] The respondents' claim was that the land in dispute was first acquired by her late father Simon Aming as vacant, unclaimed land. She was born on that land in 1956 and lived thereon until her marriage. Upon the death of her father in 1993, it was inherited by her mother Atito Kereni. When she too died in the year 2013, it was inherited by the respondent. The appellants took advantage of the old age of her mother, and the absence of the respondent from the land, since she lived in her marital home at Palabek village in Lamwo district at the material time, and

began encroachment on the land in 1995 after the death of her father. Following the death of her husband, the respondent was during the year 2001 forced by her in-laws to return to the home of her parents on the land in dispute, only to find that the appellants had occupied it. Graves of her mother and deceased sister Akumu Yowino are still visible on the land. When she challenged the appellants' presence on the land they claimed that it had been allocated to them by the sub-county authorities as part of an IDP Camp during the LRA insurgency. When the appellants refused to vacate the land after the camp was disbanded in 2002 she sued them before the L.C. Courts. The appellants refused to vacate the and despite decisions directing them to leave, hence the suit.

[3] The appellants fled a joint written statement of defence in which the 1st appellant Odongtoo Yasinto stated that he only occupies an area measuring 50 x 50 feet he purchased from a one Opio Marino and his wife Ayaa Yochpina during the year 2000. The 2nd appellant Adonga Bimeny stated that he is the rightful owner of the 100 x 150 metre area of the land he is occupying which he accumulated by multiple purchases from different sellers in 1993. He contended further that the respondent's father was ordinarily resident in Kiteny village. He was only given a small portion of the land in dispute on which he was permitted to erect a temporary structure during the time he was employed as a security guard at the Cotton Co-operative Society within the area. The 5th appellant Acalum Alice Anying Gabriella stated that she only occupies an area measuring 50 x 50 feet she inherited from her late sister Latigi Mary who in turn purchased it from purchased from Patongo sub-county upon the closure of the cotton store in 1993.

[4] The 6th appellant Hellen Obonyo Jino stated that she was sued under an incorrect name since her true name is Acan Hellen Lucy and further that the land she occupies belongs to a one Obonyo Jimmy who should have been the proper defendant. The 7th appellant Lumumba Okidi Patrick stated that he only occupies an area measuring 20 x 25 feet he purchased from a one Adera Martha during the year 2000 and has lived on the land for more than 14 years. The 8th

appellant Akullu Betty stated that he only occupies an area measuring 48 x 54 feet he inherited from a one Ojok Akwilino during the year 2002. The 9th appellant Kinyera Denis stated that he originally occupied an area measuring 50 x 100 feet he purchased but later sold off an area measuring 10 x 15 feet to the 3rd appellant Okot Santo and was left with an area measuring 25 x 50 feet.

[5] The appellants contended that they acquired their respective portions at different intervals and have no knowledge of the prior status of the land before their respective acquisitions. They were fully settled on the land ten years before numerous other displaced people joined them. The 1st, 2nd and 9th appellants are the sons of the late Adera Martha. They planted eucalyptus and *Neem* trees on the land. The respondent was displaced from Kiteng village, took refuge on the prisons land and from there successfully sued a one Ojok Akwilino whose plot she took over and it is on that plot that she buried her late mother. Her suit is a design for dispossessing the rest of the appellants of their land. They prayed that the suit be dismissed with costs.

The respondent's evidence in the court below:

[6] The respondent, Akumu Hellen, testified as P.W.1 and stated that the land in dispute measures approximately 15 acres. It belonged to her late father Seniro Simon Anyii who acquired it in 1951. Her father lived on that land until his death in 1987. Thereafter her mother Atito Kereni retained possession of the land and upon her death in 2003 she was buried on that very land. There are multiple other graves of her relatives on the land. The appellants had by the year 2002 began encroachment on the land claiming to have bought it from the Local Government. She sued them before the L.C. Courts with mixed results. P.W.2 Oboke Moses testified that the land in dispute belonged to the respondent's father in the past. The appellants have since trespassed onto the land. P.W.3 Oboke Misisera testified that the appellants had wrongfully occupied land that belongs to the respondent. P.W.4 Akongo Josca testified that the appellants had

wrongfully occupied land belonging got the respondent's father and had constructed grass thatched houses thereon.

The appellants' evidence in the court below:

[7] D.W.1 Odong-too Yasinto testified that he bought the area he is occupying in the year 2000 at the price of shs. 200,000/= from a one Nyangkol who in turn bought it from the Patongo sub-county authorities. D.W.2 Adonga Bimeny testified that he bought the area he is occupying on 1st November, 1993 from the Patongo Sub-county authorities after they partitioned the land into multiple plots. He paid shs. 6,000/= to the sub-county cashier. He has since planted trees and constructed a grass-thatched house on the land. D.W.3 Akello Santina testified that she bought the area he is occupying at the price of shs. 8,000/= from Patongo sub-county authorities in 1993 and occupied the land until the year 2014 when a dispute erupted with the respondent over ownership of the land. She has since constructed grass-thatched houses on the land.

[8] D.W.4 Acalum Oroma testified that her sister Mary Latigi acquired the land in 1993. She applied for a plot from the sub-county and she was allocated that land. She constructed two grass thatched houses and latrine on the land, and planted a Neem tree. D.W.5 Okidi Patrick Lumumba testified that he bought the land he is occupying from a one Adera Martha on 24th March, 2000 who in turn acquired it from Patongo sub-county authorities. He has since constructed three houses and planted three orange trees and two Neem trees. D.W.6 Akullu Betty testified that she settled on the plot of her mother's uncle in the year 2000. Her uncle acquired the land as a beneficiary of the distribution undertaken by the sub-county. She has since constructed grass-thatched houses and planted Neem trees on the land.

[9] D.W.7 Odur Alex testified that he applied for the land on 2nd December, 1993. The land was then allocated to him by the Area Land committee. D.W.8 Kinyera

Denis testified that the land originally belonged to Adera Martha who acquired it on 12th December, 1993 but is now deceased. He obtained the land from her. Later he sold part to of it to D.W.5 Okidi Patrick Lumumba and a one Okello. D.W.9 Acan Hellen Lucy testified that the land in dispute belonged to her late husband who settled there in 1995. She was willing to vacate the land because it did not belong her and she did not know how her late husband acquired it. D.W.10 Odong Phillips Winston was available as a witness for five of the appellants but never testified.

Proceedings at the *locus in quo*:

[10] The court then on 9th November, 2015 visited the *locus in quo* where it recorded evidence from; (i) Omara Baptist; (ii) Ocan John Ajuawan; (iii) Otto Jothn Akwinya; (iv) Opio Marino; (v) Opio Raphael Agem; and (vi) Ojok Akwilino. It prepared a sketch map of the land, illustrating the area occupied by each of the appellants. In his judgment, the trial Magistrate found that the land in dispute was privately owned before establishment of the sub-county. Both parties agreed that the respondent's father was resident in the area, as an employee of a cooperative society situated within the area at the time. The home of the respondent's father is situated right in the middle of the land in dispute. The court found that the respondent's father had lived on the land in dispute from 1951 until his death in the year 1993. Her father was buried on that land. The appellants claimed to have been allocated the land they occupy by the sub-county officials yet the sub-county did not own any land in that area.

Judgment of the court below:

[11] The court found that the customary owner of the land was the respondent's late father Simon Aming. The appellants were therefore trespassers on the land since they were not permitted by the respondent to occupy her father's land and the sub-county had no authority to grant them permission. Judgment was entered in

her favour. She was declared the rightful customary owner of the land, the appellants were given ninety days within which to demolish their structures on the land and vacate it, a permanent injunction was issued against each of the appellants. Each of the appellants was ordered to pay the appellant shs. 1,000,000/= in general damages for trespass to land with interest thereon at the rate of 10% per annum from the date of judgment until payment in full. The costs of the suit were awarded to the respondent.

The grounds of appeal:

[12] The appellants were dissatisfied by the decision and jointly appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence thereby arriving at a wrong conclusion that the land belongs to the respondent whereas not.
2. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence thereby failing to make a finding that the suit was time barred.
3. The trial Magistrate erred in law and fact when he conducted proceedings at the locus in quo in an illegal manner and in the absence of counsel for the appellant, thereby taking evidence improperly leading to a miscarriage of justice.

Arguments of Counsel for the appellants:

[13] In their submissions, counsel for the appellants, argued that the plots comprising the land in dispute were created around 1992 - 1993 and were allocated to the appellants by Patongo sub-county officials, that being an urban area. The respondent claimed the land belonged to her father in the past but the name of her father is inconsistent with that mentioned by her witnesses. She admitted that when she returned from her marriage, she found the appellants occupying

the land. She filed the suit twenty years after that. Her father who died in 1993 and her mother who died in 2003 never made an attempt to recover the land from the appellants. The suit therefore was time barred. They prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[14] In response, counsel for the respondent, submitted that it was during 2002 that the respondent initiated proceedings before the L.C. Courts for the recovery of that land. Coupled with the fact of insurgency that constituted a disability, the suit was not time barred. The respondent's late father Simon Amir acquired the land in 1951. He lived on that land for 42 years until his death in 1993. The respondent had the right under custom and the Constitution to inherit the land. Patongo sub-county from which the appellants claimed to have acquired title to the land had never occupied, owned or utilised the land. There was never evidence adduced that Patongo sub-county was ever constituted into a controlling authority. The decision was not based on evidence recorded from witnesses at the locus in quo but rather the testimony given in court. Irregularities of the proceedings at the locus in quo did not affect the outcome. He prayed that the appeal be dismissed.

Duties of a first appellate court:

[15] 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*).

[16] 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 first ground of appeal is struck out for being too general:

[17] I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

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

[18] By ground three of appeal, the trial court is faulted for the manner in which it conducted proceedings at the *locus in quo*. 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).* Admission of the evidence of the six persons; ((i) Omara Baptist; (ii) Ocan John Ajuawan; (iii) Otto Jothn Akwinya; (iv) Opio Marino; (v) Opio Raphael Agem; and (vi) Ojok Akwilino, during those proceedings was an error. The appellants were not represented by counsel during the trial. Argument that it was erroneous to proceed in the absence of counsel is misconceived. All other aspects of conduct of proceedings thereat were complied with. I have not found any other error.

[19] Notwithstanding that procedural error, 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. 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.

[20] 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 six 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 six witnesses. More so, the trial court too did not rely on the evidence of this six witnesses. This ground of appeal therefore fails.

Limitation period for filing the suit

[21] In the second ground of appeal, the trial court is faulted for failure to find that the suit was time barred. Under sections 5 and 6 of *The Limitation Act*, actions for recovery of land must be commenced within a period of twelve years from the date of adverse possession. Under section 16 of *The Limitation Act*, time begins to run when the defendant secures adverse possession of the land. adverse possession is constituted by the actual, open, hostile, and continuous possession of land to the exclusion of its true owner.

[22] From their pleadings and testimony, acquisitions of parts of the land in dispute by the appellants were in three categories. The earliest acquisitions were during 1993 and this was by two of the appellants; the 2nd appellant Adonga Bimeny who testified as D.W.2 and said he bought on 1st November, 1993, and the 5th appellant Acalum Alice Anying Gabriella who testified as D.W.4 stating that her sister Mary Latigi acquired the land in 1993. The next category comprises three of the appellants who acquired parts of the land in dispute they occupy sometime after 1993 but before the year 2000. This category includes 3rd appellant Okot Santo who did not testify but D.W.8 Kinyera Denis testified that he sold to him part of the land he purchased from Adera Martha who in turn obtained hers on 12th December,1993; the 9th appellant Kinyera Denis who testified as D.W.8 and

stated that he bought from Adera Martha who obtained the land on 12th December,1993, and the 6th appellant Hellen Obonyo Jino who testified as D.W.9 stating that her true name was Acan Hellen Lucy and the land she occupied belonged to her late husband who settled thereon in 1995.

[23] The last category of acquisitions were by three of the appellants and it occurred during the year 2000. This includes the 1st appellant Odongtoo Yasinto who testified as D.W.1 stating that he bought in the year 2000; the 7th appellant Lumumba Okidi Patrick who testified as D.W.5 stating that he bought from Adera Martha on 24th March, 2000 and the 8th appellant Akullu Betty who testified as D.W.6 stating that she settled on the plot of her mother's uncle in the year 2000.

[24] In her testimony, the respondent testified that she first sued the appellants during the year 2002 before the L.C.1 Court, (i.e. 9 years at the latest from the first year of adverse possession, 1993 and two years from the latest acquisition, the year 2000). The suit filed afresh in 2014 was upon order of a re-trial. The implication is that the respondent challenged the appellants' occupation of the land in dispute by legal proceedings, initiated three years before expiry of the limitation period, at the latest. The suit was therefore not time barred. This ground too fails.

[25] Form the evidence adduced by both parties to the suit, it turned out that all the appellants traced their root of title to allocations by the Patongo sub-county authorities. It is trite that a grantor of land cannot give away what he or she does not possess (see *Mwebesa and three others v. Shumuk Springs Development Limited and three others, H.C. Civil Suit No. 126 of 2009*). The principle of *nemo dat quod non habet* applies (no-one can give something they do not possess). There was no evidence to show that the land at any point whether in fact or law vested in Patongo sub-county. Patongo sub-county authorities therefore never had the legal capacity to create interests therein transferable to the appellants. What it did is more or less compulsory acquisition, which power is subject to established processes which were not complied with in the instant case.

[26] The respondent claimed the land under the Acholi law of customary inheritance. Although 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, under section 56 (2) and (3) of *The Evidence Act,* courts are empowered to take judicial notice of practices that have attained such notoriety that court would be justified in taking judicial notice of (see *Geoffrey Mugambi and two others v. David K. M'mugambi and three others, C.A. No. 153 of 1989 (K)*. A court can use this doctrine to admit as proved such facts that are common knowledge to a judicial professional or to an average, well-informed citizen. Under these provisions, the courts take cognisance or notice of matters which are so notorious or clearly established that formal evidence of their existence is unnecessary, and matters of common knowledge and everyday life.

[27] The essential basis for taking judicial notice is that the fact involved is of a class that is so notorious or "generally known" as to give rise to the presumption that all reasonably intelligent persons are aware of it. A court may take judicial notice, i.e. accept a statement as true without formal proof where the statement; (a) would be considered as common knowledge without dispute among reasonable people, or (b) is capable of being shown to be true by reference to a readily accessible source of indisputable accuracy. A fact is notorious in the sense of being of a class so generally known as to give rise to the presumption that all persons are aware of it (see *Holland v. Jones (1971) 23 CLR 149 at 153* and D Byrne, J d Heydon, *Cross on Evidence*, 3rd Aust. Ed., 1986 at 112). The reference to "all persons" need not literally mean "everybody"; in an appropriate case it can mean all persons in a particular area or locality, or all persons of a particular background, calling or profession (see *Cross on Evidence*, 3rd Aust. Ed., 1986 at 101). When a court takes judicial notice of something, then there is no need to call evidence in that regard (see *R v. Simpson [1983] 3 All ER 789; [1983] 1 WLR 1494; (1984) 78 Cr App R 115; [1984] Crim LR 39*).

[28] It is a fact so generally known as to give rise to the presumption that all reasonably intelligent persons are aware of it that in Acholi traditional custom, death of a propertied member of the family results not in inheritance but rather in a rearrangement of duties and of rights of participation in the produce of the land or rights of usage of the land itself. The land is re-allotted according to the rules of customary intestacy law. What follows is not inheritance but re-allotment in accordance with settled rules generally fixed for all. In each generation, the rules of customary intestacy law settles the estate upon the eldest son (typically where the deceased is male) or to the eldest daughter (typically where the deceased is female) or sole surviving child, in such a way that it devolves to him or her undivided but subject to provisions of user for the widow, the daughters, younger sons, and other close relatives.

[29] This is an established pattern of behaviour that can be objectively verified within the Acholi customary social setting or communities that it applies indiscriminately to men and women. It is a practice which is seen by the communities themselves as having a binding quality. It is of immemorial antiquity, certain and reasonable, obligatory, not repugnant to statute law, though it may derogate from the common law concept of inheritance. It is a practice so vital and an intrinsic part of the customary socio- economic system of the Acholi that it is treated as if it were law. It is a valid custom that this court can take judicial notice of. In that regard, upon the death of her mother, the land in dispute devolved to the respondent under the Acholi customary intestacy law

[30] To take by inheritance is defined as "to take as heir on death of ancestor; to take by descent from ancestor; to take or receive, as right or title, by law from ancestor at his demise" (see *Black's Law Dictionary, 8th edition,* 2004). Whereas Inheritance commonly denotes devolution of property under the law of descent and distribution, "inheritance" under Acholi customary intestacy law with regard to land belonging to the head of a family is a term of art whose essence is re-allotment by way of devolution of the authority to mange as more or less a

trustee, rather than devolution into private property of an individual. This is the nature of right that was vested in the respondent upon the demise of both her parents.

[31] On the other hand, the appellants claimed as purchasers of the land either directly from Patongo sub-county or upon subsequent purchases from persons who acquired it from that sub-county. It was never disputed that the respondent's mother was in possession of part of the land until her death in 2003. All the appellants who acquired land in her neighbourhood were clearly aware of her possession. Had they undertaken proper inquiries, they would have discovered she claimed as owner of the land Patongo sub-county was purporting to sell to them. The appellants cannot take the benefit of the protection extended to bona-fide purchasers of land without notice of adverse claims.

[32] A purchaser of unregistered land who does not undertake the otherwise expected lengthy and often technical investigation of title, which will often ordinarily involve him in quite elaborate inquiries, is bound by equities relating to that land of which he had actual or constructive notice. Constructive notice is the knowledge which the courts impute to a person upon presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him on further enquiry or from wilfully abstaining from inquiry to avoid notice (see *Hunt v. Luck (1901) 1 Ch 45*). None of the appellants satisfies the standard of due diligence imposed on a purchaser of unregistered land which is much higher that that expected of a purchaser of registered land. In the instant case, before purchase of the land, none of the appellants inquired from the sub-county authorities or their respective predecessors in title as to the status of the respondent's mother on the land.

Order :

[33] In the final result, there is no merit in the appeal. It is accordingly dismissed. The costs of the appeal and of the trial are awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Ladwar, Oneka and Co. Advocates

For the respondent : Mr. Silver Oyet.