IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 069 of 2018

In the matter between

JOKKENE IGNATIUS **APPELLANT**

And

1. **OTTU ALFONSE**
2. **NEKOMIA LAKONY**
3. **ONEN TAMPIRA**
4. **OKELLO S/o ONEKA**
5. **OKUMU DANARI** **RESPONDENTS**

Heard: 26 August, 2019.
Delivered: 12 September, 2019.

Land law *— Customary communal land ownership — Under communal customary tenure, land is "owned" by the community and the individual members enjoy only rights of user — communal "ownership," presents the idea of "collective property." The idea is that the community allocates land for the private use of its members — Under a communal land ownership system, non-members of the community are excluded from using the common areas, except with permission of the community — The system of customary communal land ownership and use established by The Land Act is one that has aspects of "collective property" alongside "common property" and limited "private ownership" rights enjoyed by individuals or households — Even for land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, "where the customary law of the area makes provision for it" — This complex communal customary tenure comprises rights in common to pastures and forested land alongside more or less exclusive private rights to agricultural and residential parcels — There should be evidence of regulation of the use of such land at*

the community level by restricting exploitation to a specific community — Conversion of user from communal grazing rights to private property or communal farming of such land has to occur in accordance with established customary rules.

***Civil Procedure** — Cause of action — In determining whether or not a plaint discloses a cause of action, the court must look only at the plaint together with anything attached so as to form part of it.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally seeking a declaration that land measuring approximately 56 acres out of approximately 400 acres situated at Bokober village, Pagik Parish, Paicho sub-county, in Gulu District belongs to the estate of the late Marcelino Obonyo Agwang, general damages for trespass to land, *mesne* profits, a permanent injunction restraining the respondents from further acts of trespass onto the land, interest and the costs of the suit.

[2] The appellant's claim was that during or around the year 1964 the late Marcelino Obonyo Agwang found approximately 400 acres of land, out of which approximately 56 acres are now in dispute, vacant and unclaimed by any person. He occupied it and utilised it henceforth. The late Marcelino Obonyo Agwang enjoyed quiet possession of the land until his death during the year 2004. His family continued to utilise it thereafter until the year 2007 when they received a letter from the 5th respondent, writing on behalf of the Pawoatomoro, Lamwo, Bura and Paromo Clans claiming that the 56 acres of land occupied by the family of the late Marcelino Obonyo Agwang, belong to them. The appellant took no action until the year 2013 when the respondents began to partition off approximately 50 acres from the land occupied by the family of the late Marcelino

Obonyo Agwang. They planted boundary marks and proceeded to cut down trees within the area partitioned off. Attempts to mediate the ensuing dispute failed, hence the suit.

[3] In their written statement of defence, the respondents denied the appellant's claim in *toto*. They averred that they are the rightful customary owners of the land in dispute They prayed that the suit be dismissed with costs.

The appellant's evidence in the court below:

[4] The appellant, Jokkene Ignatius, testified as P.W.1 and stated that the 5th respondent's father settled on land across Labunya stream before the appellant's father settled on the land in dispute in 1964 when the appellant was only six years old. The appellant inherited the land that was originally acquired by his late father Marcelino Obonyo Agwang as vacant unclaimed land in 1964. They lived on the land until 1997 when insurgency forced them to vacate. The respondents on return from the camps in 2007 served him with a notice directing him to obtain the consent of four different clans if he sought to re-occupy the land. In the year 2012, the 5th respondent led a group of people who came from across the Labunyang stream and partitioned off part of the land. They have since occupied approximately 60 acres of the land, preventing him thereby from grazing his livestock and cultivating that part. The road to Wilulu Primary School separated his land from that of the 1st respondent. The 2nd respondent lives at Bura village, about 6 kilometres away from the land in dispute. He is occupying approximately 48 acres of the land in dispute.

[5] P.W.2 Opet Pa Antonio, is a neighbour to the East of the land just as the 1st, 3rd and 6th respondents are its neighbours to the West. He testified that the land in dispute belongs to the appellant. Since his childhood he had seen the appellant in possession of the land but the respondents began trespassing thereon right from the time they were still resident in an IDP Camp. They continue to occupy

part of it to-date. The natural boundary between the 5th respondent's land and the one in dispute is Maa Stream. The appellant used to graze cattle on the land and plough part of it using ox-ploughs. It is only during the dry season that the neighbours, including the 5th respondent, would graze their cattle on the appellant's land. It is not communal land. The 5th respondent is resident at Atup village, which neighbours Bokober village.

[6] P.W.3 Odur Galdino, the appellant's herdsman since July, 2015 testified that the land in dispute is at Atup village, between Labunyang and Maa Streams. Neither the appellant nor the respondents come from Bokober village, which neighbours Atup village. The land in dispute is approximately thirty acres and the respondents have occupied it wrongfully. The appellant inherited it from his late father late father Agwang. It is partly true that the land in dispute is customary grazing land for the people of Bokeber, since cattle belonging to other people from time to time stray onto it. In the past the appellant's father utilised it but for purpose of livestock keeping other people would bring their cattle to graze. The respondents have since converted parts of it into gardens.

[7] P.W.4 Omona Maurencio testified that he is a neighbour two miles to the West of the land. The appellant's father lived on the land in dispute from 1964 until his death during the insurgency. The respondent's land is about one and a half miles away from the one in dispute. the grandfather and mother of the appellant were buried in Pakwelo. The appellant's father came from Paicho but married the appellant's mother from Pakwelo. They settled on the land in dispute after they got married in 1963. The land in dispute was not communally owned. It belonged to the appellant's late father and he occupied it from 1964. He used part of it for grazing and the other part for cultivation. The appellant retains possession of the part used for grazing while the respondent have since 2013 occupied the one for cultivation.

The respondents' evidence in the court below:

[8] In his defence, D.W.1 Ottu Alfonsio testified that in 1964 the late Danieri Okumu gave 30 acres of land at Bokober village to the appellant's father Marcelino Obonyo Agwang. The appellant now claims 300 acres of communal grazing land used by people from Bura and Bokober villages. Labunyang stream constitutes the Southern boundary of the land in dispute. The appellant is claiming grazing land. There are old homesteads, mango trees, old kraals (*Dwol Dyang*) on the land in dispute. Before the insurgency the appellant lived at Bokober village but not on the land in dispute. The appellant should have sought permission from the four clans before settling on the land.

[9] D.W.2 Nekomia Lakony testified that his father Opobo lived and was buried on the land in dispute and the site of his grave is marked by a *Chwa* tree. Due to poor health, he has lived at Cwero trading Centre since 1946. The community has been using the land in dispute for grazing. He too grazed cattle on the land in dispute and also had gardens on it since the time of his father in 1923. The appellant's father too used to graze cattle on the land in dispute and his kraal is still visible thereon. The land belongs to him, his family and the community of Bura and Bokober villages.D.W.3 Onen Tampira testified that he and his father Oneka Masimino before him had been using the land in dispute since 1969 for settlement, grazing and farming. His father's old homesteads and kraals still exist on the land in dispute. The appellant comes from Pakwelo. They had a homestead on the land in dispute established thereon in 1972 and on return from Ajanyi where they had fled following the murder of a one Aliga by one of their relatives, they occupied the same piece of land in 1982. Their kraal is still visible thereon. The appellant now claims 300 acres of communal grazing land used by people from Bura and Bokober villages.

[10] D.W.4 Okello Amos testified that the appellant's father was given 30 acres in 1964. He is now claiming 300 acres of communal grazing land used by people

from Bura and Bokober villages. Him and his father Oneka Masimino before him had been using the land in dispute since the year 1970 for settlement, grazing and farming. On return from Ajanyi in 1982 they settled on the land they had occupied before, on land that is not in dispute. The dispute began following the death of the appellant's father. The appellant has a kraal on the land in dispute where the witness has cultivated about five acres. They too have an old kraal on the same land. The community used to graze on that land, on weekly rotation and partly for cultivation. On return from the IDP Camp he built a home outside the land in dispute but uses it for subsistence farming, growing corps on gardens he inherited from his late father.

[11] D.W.5 Okumu Danieri testified that in 1964 his late father Danieri Okumu gave 30 acres of land at Bokober village to the appellant's father Marcelino Obonyo Agwang. The land in dispute is used communally. The community of Bokober village was using it for gazing, cultivation and settlement. His father gave the appellant's father Agwang 30 acres within which is the area where the father of the witness used to have his homestead. The appellant established his homestead where the homestead of the witness' father used to be. The appellant is grabbing more land and does not want them to use the grazing land. The land was converted into farmland after the cattle were rustled by the Karimojong. Everyone, including the appellant then returned to their old homesteads. There were no homesteads on the land in dispute since it was used for grazing only.

[12] D.W.6 Opio Santo, a neighbour to the land in dispute who has about six gardens on the land in dispute and also grazes his seven head of cattle thereon, testified that he and his father Obita Apanyi before him had been using the land in dispute since 1962 for settlement, grazing and farming Although he is resident at Bura village, which is across Maa Stream, he owns a kraal on the land in dispute. The appellant occupied some land before the insurgency but it was not the one in dispute since that was used as communal grazing land. It is communal grazing land used by people from Bura and Bokober villages. On return from the IDP

Camp he built a home outside the land in dispute but uses it for subsistence farming, growing corps on gardens he inherited from his late father.

Proceedings at the *locus in quo*:

[13] The court then visited the *locus in quo* on 3rd September, 2018 where it was unable to make out distinct boundaries. Different spots of the land in dispute were under cultivation by the respondent's people. The appellant was unable to show court the boundaries of his 300 acres of land. Between the area in dispute and the appellant's homestead are a number of occupants, who are not parties to the suit. The respondents are cultivating close to the stream and the appellant has no activity within that area. The court prepared a sketch map illustrating its observations.

Judgment of the court below:

[14] In his judgment, the trial Magistrate found that the witnesses produced by the appellant were not elaborate enough in proving his claimed inheritance of the land in dispute. The appellant's parents were buried at Pakwelo and this proves that the land in dispute has never been the appellant's ancestral land. When the court visited the *locus in quo*, it did not find evidence of a long period of occupancy as claimed by the appellant. The appellant had only recently built a house on the land in dispute and could not demonstrate to court the boundaries of the 400 acres he claimed. The court found that the land was used communally for grazing after the insurgency and the appellant had occupied parts of it just like several other people. The respondents had proved that they are customary owners of the land in dispute. The appellant not only failed to prove ownership of the 400 acres but also failed to establish trespass thereon by the respondents. The suit was dismissed with costs to the respondents.

The grounds of appeal:

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

1. The trial Magistrate erred in law and fact when he declared that the respondent had no cause of action and failed to declare himself as regards ownership of the land hence came to a wrong decision that occasioned a miscarriage of justice.
2. The trial Magistrate erred in law and fact when he failed to conduct proceedings at the *locus in quo* in a manner consistent with a proper procedure.

Arguments of Counsel for the appellant:

[16] In his submissions, counsel for the appellant, submitted that in his pleadings, the appellant indicated that he claimed the land in dispute by inheritance upon the death of his father Marcelino Obonyo Agwang. He utilised the land until the break out of insurgency and he returned to occupy it in 2007. The dispute over it only erupted in 2013 when the respondents crossed the stream and began cutting down trees and interfering with the boundaries. The claim that it was communal land was refuted by the appellant's witnesses. The appellant would only permit them to graze their cattle on the land during the dry seasons. In their defence, the respondents admitted trespassing onto the land without the appellant's permission. They admitted having attempted to partition the land, which is inconsistent with communal land rights. At the *locus in quo*, the trial court simply recorded its observations without recording evidence given by the parties. They prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[17] In response, counsel for the respondent, submitted that it was the testimony of P.W.2 Opet Pa'Antonio and P.W.3 Odur Galdino that the land in dispute would serve as communal grazing land during the dry seasons only. This contradicted the appellant's evidence that he is the exclusive owner of the land. The respondents have no claim over land at Bokeber village occupied exclusively by the appellant but only the part that is used communally. The trial court came to the right conclusion when it found that he had no claim over communal land. Although there are flaws in the proceedings conducted at the *locus in quo*, they are not fatal. The observations made by the court buttressed the respondent's evidence in court. The appeal should therefore be dismissed.

Duties of a first appellate court:

[18] 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).

[19] In exercise of its appellate jurisdiction, this 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.

Ground one; cause of action.

[20] With regard to the first ground of appeal, a plaint discloses a cause of action if its averments show that the plaintiff enjoyed a right which has been violated and the defendant is responsible for that violation *(see Auto Garage v. Motokov (No3) [1971] EA 514 and Joseph Mpamya v. Attorney General, [1966] II KALR 121)*. It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (*see Cooke v. Gull, LR 8 E.P 116 and Read v. Brown 22 QBD 31);* in the further alternative, it is defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant *(see Attorney General v. Major General Tinyefuza, Constitutional Petition No.1* of 1997). A cause of action arises when a right of the plaintiff is affected by the defendant's act or omissions *(see Elly B. Mugabi v. Nyanza Textile Industries Ltd [1992-93] HCB 227).* The pleadings therefore must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable *(see Auto Garage and others v. Motokov (No.3) [1971] E.A 514).*

[21] In determining whether or not a plaint discloses a cause of action, the court must look only at the plaint together with anything attached so as to form part of it *(see Onesforo Bamuwayira and two others v. Attorney General [1973] HCB 87; Nagoko v. Sir Charles Turyahamba and another [1976]HCB 99 and Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72).* Under Order 7 rule 11 (a) and (d) of *The Civil Procedure Rules*, a plaint that does not disclose a cause of action or where the suit appears from the statement in the plaint to be barred by any law, must be rejected.

[22] This being a suit for recovery of land based on trespass, the appellant was only required to plead facts establishing that; (i) he has a legal interest in the land (he claimed to be customary owner by inheritance - paragraphs 3 (a) - (d) of the plaint); (ii) he has been deprived of the enjoyment of that legal interest (the defendants have since the year 2013 unlawfully entered onto the land and partitioned off part of it - paragraph 3 (e), (f) and 5 of the plaint); and that (iii) the defendants are liable (the defendants have cut down his trees, grazed animals on the land and continue to exhibit violent conduct towards him - paragraphs 3 (g) and 6-9 of the plaint). The appellant claimed as administrator and one of the beneficiaries of the estate of his late father, Marcelino Obonyo Agwang (paragraphs 1 of the plaint). Under sections 25 and 180 of *The Succession Act*, all property in an intestate estate devolves upon the personal representative of the deceased. Under section 11 of *The Law Reform (Miscellaneous Provisions) Act,* with a few exceptions regarding claims of a personal nature, on the death of any person, all causes of action subsisting against or vested in him or her survive against, or, as the case may be, for the benefit of his or her estate. The trial court therefore misdirected itself when it found that the appellant had not disclosed a cause of action against the respondents. This ground succeeds.

Ground two; Proceedings at the *locus in quo*

[23] For convenience, consideration of the second ground of appeal will be done in two parts; that regarding the proceedings at the *locus in quo* and then the finding that the land is communal grazing land. Firstly, it is contended that proceedings at the *locus in quo* were erroneous. I have examined the record of proceedings and have not found evidence of witnesses' testimony thereat taken down in the form of a narrative as required by the rules of procedure. The record of proceedings thereat only lists eight observations made by court.

[24] 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*.

[25] 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 whether or not 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.

[26] However, according to section 70 of, no decree may be reversed or modified for error, defect or irregularity *The Civil Procedure Act* 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. I find that considering the nature of the dispute at hand, this irregularity is not fatal since the issues in controversy were about the nature of possession and the attendant rights, and not so much about boundaries of the land in dispute. This part of the ground fails.

The trial Court's finding that the suit land was communal grazing land.

[27] The second limb of the ground concerns the court's finding that the land in dispute was communal grazing land. Section 1 (j) of *The Land Act* defines "community" as an indigenous community of Uganda as provided for in the Third Schedule to the Constitution, or any clan or sub-clan of any such indigenous community communally occupying, using or managing land. The respondent thus sought to enforce some form of communal claim to land held under customary tenure. on behalf of on behalf of the Pawoatomoro, Lamwo, Bura and Paromo Clans.

[28] Communal customary land ownership is to be contrasted from private land ownership. Private land ownership allocates particular parcels of land to particular individuals to use and manage as they please, to the exclusion of others (even others who have a greater need for the resources) and to the exclusion also of any detailed control by society. In exercising this authority, the property owner is not understood to be acting as an agent or official of the society. He or she may act on their initiative without giving anyone else an explanation, or may enter into cooperative arrangements with others, just as they like. They may even transfer this right of decision to someone else, in which case that person acquires the same rights they had. In general, the right of a proprietor to decide as she pleases about the land they own applies whether or not others are affected by their decision.

[29] On the other hand, customary land ownership recognises communal "ownership" and "use" of land (see section 3 (1) (f) of *The Land Act*). Under section 15 (1) of *The Land Act* an association may be formed for the "communal ownership and management" of land. By providing for customary tenure of a communal type, *The Land Act* deals with various forms of what is essentially the authority over the use and disposition of land, such as; "ownership", "use", and "management."

In the Act, communal "ownership," presents the idea of "collective property," based on the notion that the community as a whole determines how important resources, such as land, are to be used. The idea is that the community allocates land for the private use of its members. These determinations are made on the basis of social interest through mechanisms of collective decision-making or collective control, of varying levels of formality, anything from a leisurely debate among the elders of the community to the formation and implementation of strict rules. In this sense, land is "owned" by the community and the individual members enjoy only rights of user.

[30] Alongside the idea of "communal ownership," by providing for "use" and "management," through providing for the setting aside of one or more areas of land for "common use" by members of the group for such activities as; the grazing and watering of livestock, hunting, the gathering of wood fuel and building materials, the gathering of honey and other forest resources for food and medicinal purposes, or such other purposes as may be traditional among the community using the land communally (see section 23 (1) of *The Land Act*), the Act creates a right of commons within a community where each member has a right to use independently the holdings of the community. Access to tracts of land that are categorised as "common property" or a "common good" is regulated at the community level by restricting exploitation to community members and by imposing limits to the quantity of goods being withdrawn from the common good. Under a communal land ownership system, non-members of the community are excluded from using the common areas, except with permission of the community. Less frequently, and generally only among hunter-gatherer and pastoral communities, no part of the domain is earmarked for private use.

[31] Communal land ownership is a system in which land use is governed by rules whose point is to make the land available for use by all or any member of the community, is in essence a "common property" system. A tract of common land, for example, may be used by everyone in a community for grazing cattle or

gathering firewood. The aim of any restrictions on use is simply to secure fair access for all and to prevent anyone from using the common resource in a way that would preclude its use by others. Therefore, the system of customary communal land ownership and use established by *The Land Act* is one that has aspects of "collective property" alongside "common property" and limited "private ownership" rights enjoyed by individuals or households.

[32] Conversely, there are also communities whose lands are entirely comprised of discrete family parcels, but who use, govern, and transfer these in accordance with community sustained norms ("customary law"). For example, section 22 (1) of *The Land Act* recognises that even for land communally owned, part of the land may be occupied and used by individuals and families for their own purposes and benefit, "where the customary law of the area makes provision for it." Individuals or households may as well cause their portions of the land to be demarcated and transferred to them, of such land which in accordance with customary law, is made available for the occupation and use of that individual or household, (see section 22 (3) (b) of *The Land Act*). This presents the reality of limited private ownership rights existing even within communal customary ownership. Individual and family interests to specific parts of the community property are acknowledged and nested under collective tenure as derivative rights. While permitting the alienation of private parcels from the community area or its authority, this provision at the same time leaves the definition of private rights in community lands to community decision-making or customary law.

[33] Hence communal land refers to the entire domain of the community, including parcels set aside for the exclusive use of a family, individual or sub-community group under usufruct rights. A Certificate of Customary Ownership issued under section 4 (1) of *The Land Act* to a community holding land under customary tenure therefore covers both communally owned lands and parcels allocated for exclusive private use of community members. Save for registered private owners, title to communal land is vested directly in communities, a form of

exclusive collective possession. The implication of section 8 (2) (f) of *The Land Act,* is that Communal owners to whom a certificate of customary ownership has been issued may alienate certain parts of that property or the entire property, unless restricted by the conditions of the certificate. This may entail majority community support, and / or the permission of elected or traditional leaders. Of course, communities may themselves determine that their land is not alienable or even leasable.

[34] This complex communal customary tenure comprises rights in common to pastures and forested land alongside more or less exclusive private rights to agricultural and residential parcels. In this context, the word ownership is misleading. A person does not really own land, but rights in land. Communal customary tenure is in essence a bundle of rights, which may vary from community to community. The holder of all these interests, if they vest in one person in relation to land, will have the whole bundle of rights and interests. The "owner" of land therefore only has an interest or estate in the land, whose categorisation will depend on the degree of exclusive use that is accorded to that person, such that limited "private ownership" offers the highest degree, while "common property" confers exclusivity only as against non-members of the community.

[35] On the other hand, in the dual system applied in Uganda, the common law recognises a number of property interests, such as ownership, possession, use and management. Consequently, there are many variants of customary communal ownership of land. In some communities, the system may confer rights of direct use, including the right to forage, plant, build etc. Some of these rights might be vested in individuals, usually male, others in larger groups such as descent groups (for example clans) or those to whom they gave permission, or they may be vested in a small group, such as an individual and his or her household (family). These rights could be acquired directly or indirectly through

marriage or by marriage, permission or affiliation. Sometimes sex, age and status may be determinants of the acquisition or vesting of such rights.

[36] In other communities, there could be rights of control over types of land and over the transfer of property vested in leaders and those of status in the social hierarchy, such as elders and chiefs. Some would vest in those lower in the hierarchy such as household heads. Residual and symbolic rights vested in the descent group or individuals may exist in which property interests are closely related with the status of different holders of rights. The granting or transfer of property rights in this type of society reflects not just property interests or wealth but political, social organisation, kinship ties etc. There may be rights to indirect economic gain, tribute or rent vested in descent groups or representatives of such groups, in return for land use rights. Such rights might include the right to receive goods and services, but also to receive symbolic things.

[37] Most communities in which permanent user rights are granted allow for land inheritance. In some communities, sales of communal land are more or less still banned since ownership of land does not confer any personal individual right of ownership *(see for example Tufele Liamatua v. Mose American Samoa, Pacific Law Materials 1988),* while in others such transactions are strictly regulated by members of the family, the clan or the chiefs, where an "owner" may sell a land, if his next of kin agree or approve *(see for example the Pacific Islands case of Tereia Timi v. Meme Tong Kiribati Land Appeals No. 1of 1996).* Yet in others communal control is all but practically gone. Many customary norms prevent members of the community selling community property, although each member may hold an exclusive right to land, including the right to bequeath it to heirs. In some customary regimes, sale of family parcels within the domain has long been permitted, subject to permission of the traditional authority.

[38] Some communities that still have control over vast land are yet to transit into a state of "collective property." In such communities, land is "common property"

and any member of the community may have the right to take up and use available land, and in so doing, hold it in his or her exclusive possession for as long as he or she continues using it. The limit to this right is that such member should not hold land out of use, nor take up so much as to deprive others their own right to similarly take up land.

[39] Although communal ownership of land as "collective property" does not confer any personal individual right of ownership but rather rights of use subject to community interest, as individual clan or traditional leaders of the community exercise more and more control over such property, sometimes allocating more land to themselves and their assigns, it is gradually converted into private property. The categorisation of interests in communal land thus depends on the extent of one's right to exclusive use. There are rights of direct use, rights of indirect economic gain, rights of control, rights of transfer, residual rights and symbolic rights *(see Tony Chapelle, Customary Land Tenure in Fiji: Old Truths and Middle-aged Myths, The Journal of the Polynesian Society, Vol. 87, No. 2 (June 1978), pp. 71-88).* There is no universal practice. How these rights or interests are divided will vary from community to community.

[40] In *The Land Act, Cap 22* communal "ownership," presents the idea of "collective property." The idea is that the community allocates land for the private use of its members. These determinations are made on the basis of social interest through mechanisms of collective decision-making or collective control, of varying levels of formality; anything from a leisurely debate among the elders of the community to the formation and implementation of strict rules. Usually rights to family garden plots and fields are decided at the household or sub-clan level, while communal resources such as grazing lands and water are regulated communally.

[41] In the instant case, there was no evidence adduced showing regulation of the use of this land at the community level by restricting exploitation to a specific community. Even if it were communally owned, there was no evidence of

conversion of the use of this land pursuant to any established communal rules, from grazing land to private property or communal farming as the respondents appeared to be doing when they began partitioning it off in the year 2013. To the contrary, the available evidence suggests exclusive possession by the late Marcelino Obonyo Agwang with seasonal permission for neighbours to gain access during the dry seasons.

[42] P.W.2 Opet Pa Antonio testified that the appellant used to graze cattle on the land and plough part of it using ox-ploughs. It is only during the dry season that the neighbours, including the 5th respondent, would graze their cattle on the appellant's land. P.W.3 Odur Galdino testified that in the past the appellant's father utilised it but for purpose of livestock keeping other people would bring their cattle to graze. Cattle belonging to other people would from time to time stray onto the land in dispute. Whereas D.W.1 Ottu Alfonsio, D.W.2 Nekomia Lakony,D.W.4 Okello Amos, D.W.5 Okumu Danieri and D.W.6 Opio Santo claimed that the community from Bura and Bokober villages has been using the land in dispute for grazing and that their kraals still exist on the land in dispute, none were found during the visit to the *locus in quo*.

[43] Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. The plaintiff must succeed by the strength of his or her own title and not by the weakness of the defendant's. If someone is in possession and is sued for recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them (see *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*). The balance of the evidence adduced was in favour of the appellant and had the trial court properly directed itself it would have come to that conclusion.

[44] By forcefully taking over the land and partitioning it against the will of the appellant, the respondents committed trespass onto his land. Trespass to land is actionable *per se* and general damages are presumed. It is on that account that the appellant is hereby awarded nominal general damages of shs. 2,000,000/= per annum hence shs.12,000,000/= from 2013 to-date. Interest thereon at the rate of 8% per annum from the date of judgment until payment in full.

Order:

[45] In the final result, the appeal succeeds. The judgment of the court below is set aside. Instead judgment is entered for the appellant against the respondents jointly and severally in the following terms;

a) A declaration that the appellant is the rightful customary owner of the land in dispute, on his side of across Labunya stream, which forms the natural boundary between his land and that of the respondents.

b) An order of vacant possession.

c) A permanent injunction restraining the respondents, their agents and persons claiming under them, from further act of trespass on land on the appellant's side of across Labunya stream.

d) General damages of shs. 12,000,000/=

e) Interest thereon at the rate of 8% per annum from the date of judgment until payment in full.

f) The costs of the appeal and of the court below.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Katutsi and Lamunu Advocates

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