IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 027 of 2019

In the matter between

OPIO WILLIAM **APPELLANT**

And

ODIDA JUSTINE **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Family Law *—Succession — an administrator holds estate property on bare trust for the beneficiaries, since the administrator's role is merely distribution. All that the grant does is give the administrator the legal power necessary to deal with the assets — a beneficiary may trace estate property wrongfully disposed and recover the property or proceeds from the property — Tracing allows a claimant to locate misappropriated assets in order to assert their property rights and seek an appropriate remedy by identifying the value of an asset into substitutes it has been exchanged for — on the other hand, "following" is a process of following the same asset as it moves from one person to another, where its identity was not lost in the hands of the recipient. — The question is not whether the respondent himself was dishonest, but rather whether he had knowledge of circumstances which made it unconscionable to purchase the land.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent seeking a declaration of ownership of land under customary tenure measuring approximately three (3) acres situated at Gwenotwon Ward, Alokulum Parish, Ongako sub-county, Omoro County by then in Gulu District, currently in Omoro District, recovery of that land, general damages for trespass to land, a permanent injunction restraining him from further acts of trespass onto that land, interest and the costs of the suit. The appellant's case was that the land in dispute originally belonged to his father Gaetano Okot. Together they lived on that land until they were displaced into an IDP Camp. At the end of the insurgency he attempted to repossess the land during the year 2009 but was prevented by the respondent, who proceeded to cut down all trees he and his father had planted on the land. The respondent has since constructed houses on the land, hence the suit.

[2] In his written statement of defence, the respondent denied the appellant's claim. He contended that he acquired the land in dispute by purchase from the rightful owner, the appellant's mother Veronica Achieng Ogayi, who applied the proceeds towards enabling the appellant marry a wife. He has his homestead, eucalyptus trees and crops on the land. He prayed that the suit be dismissed.

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

[4] The appellant, Opio William, testified as P.W.1 and stated that the land in dispute forms part of the five acres that belonged to his late father Gaetano Okot who lived on that land with his family. Before his death, he had planted multiple species of trees, constructed houses and buried multiple deceased relatives on the land. He and the entire family vacated the land into an IDP Camp within Alokulum Seminary. At the end of the insurgency in 2008, the Seminary administrators asked all IDPs to vacate their land. The respondent had settled onto part of the appellant's land during the insurgency but has since then refused to vacate, claiming to have purchased the land from the appellant's mother Veronica Achieng. However, Veronica Achieng had only borrowed shs.

370,000/= from the respondent while the respondent claimed to have paid shs. 1,500,000/= to her as the purchase price. The appellant raised the money and offered to refund it but the respondent rejected it. The appellant purported to have purchased three acres of the land and has constructed three houses on the land. At the time of the alleged transaction, the appellant lived in Alero. The appellant is the administrator of the estate of his late father having obtained a grant of letters of administration during the year 2012.

[5] P.W.2 Veronica Achieng Ogayi testified that she permitted the respondent to settle on the land during the insurgency as one of the IDPs. She borrowed shs. 700,000/= in three instalments, from the respondent for payment of school fees for one of her sons, Ojok Innocent, then a student in a secondary school. The loan was unsecured. She later attempted to refund the money but the respondent rejected it. She never sold the land since it belonged to her late husband Gaetano Okot who was buried on that very land when he died. She has not sold any part of the land to anyone. Most of their neighbours bought land from her late husband.

[6] P.W.3 Oryem Boniface testified that he was the L.C 1 Chairman at the material time. He remembers P.W.2 Veronica Achieng Ogayi having told him that the respondent had lent her some money to enable her settle hospital bills. Later the respondent claimed to have purchased about two acres of the land in the year 2009. The size of the land was not specified in the agreement. It is the L.C.1 General Secretary who affixed a stamp on the respondent's purchase agreement.

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

[7] In his defence, as D.W.1, the respondent Odida Justine Oryema testified that he purchased the land in dispute, measuring approximately one and a half acres, from P.W.2 Veronica Achieng Ogayi for shs. 1,895,000/= paid in instalments over

a period of two years starting on 21st June, 2007 and ending on 20th June, 2009. At the time of the sale, the appellant was resident in Alero, her husband Gaetano Okot was dead and she had been inherited by a one Mateo Oketa. Her husband's grave was visible on the land. It was during the year 2011 that the dispute erupted when P.W.2 Veronica Achieng Ogayi attempted to revoke the sale, claiming the appellant had found someone offering a better price. He has lived on the land since the year 2007. Before that transaction she had sold parts of the land to multiple persons now neighbouring the land. It is not true that P.W.2 Veronica Achieng Ogayi borrowed money from him.

[8] D.W.2 Okech Santo testified that P.W.2 Veronica Achieng Ogayi is her aunt. It is him who identified the land in dispute as being available for sale. He witnessed the transaction of sale of one and a half acres of land, between the respondent and P.W.2 Veronica Achieng Ogayi. He was present when two of the instalments were paid; shs. 150,000/= on 5th December, 2007 and shs. 270,000/= on 19th March, 2009. The respondent paid a total of shs. 1,500,000/= The dispute was sparked off by the appellant's subsequent sale of the same piece of land to another person at a higher price and sought to evict the respondent from the land. D.W.3 Ayella Nelson testified that during the year 2007 the respondent purchased the land in dispute from the appellant's mother P.W.2 Veronica Achieng Ogayi, at the price of shs. 1,500,000/= Some of the instalments were paid in his presence. At the time of sale P.W.2 had lost her husband.

[9] D.W.4 Acii Christine testified that P.W.2 Veronica Achieng Ogayi sold the land in dispute to the respondent. She is the one who got the respondent interested in purchasing it, witnessed the inspection and transaction of sale of the land as well as payment of the purchase price in instalments. P.W.2 later sold the same piece of land to a one Obalim and that is what sparked off the dispute. At the time of the transaction Ogayi, husband to P.W.2 was deceased. P.W.2 did not borrow money from the respondent but it was rather a sale. The appellant has no development on the land but the respondent planted trees thereon.

[10] D.W.5 Oloya Geoffrey the L.C.1 General Secretary at the material time testified that sometime in 2009 he was approached by P.W.2 with a complaint that a one Omanya Sidaro had refused to vacate her land. On hearing from both parties. It transpired that P.W.2 claimed to have borrowed shs. 150,000/= from Omanya Sidaro while the latter claimed it was a transaction for purchase of land, and he produced a sale agreement to back his version. It was agreed that she refunds the money but she referred him to the respondent who she said had bought the land and it is the respondent who refunded the sum. When P.W.2 later showed the respondent the boundaries of the land, the respondent complained that it was too small for the price of shs. 1,500,000/= he had paid her. She threatened to refund the money with interest of shs. 500,000/= but the respondent demanded for shs. 36,000,000/= since P.W.2 had kept his money for two years. The respondent claimed that P.W.2 had re-sold the same land to a one Obalim Ronny at shs. 2,000,000/= meant to be used to refund the respondent's purchase price. She then colluded with the appellant to challenge the sale to the respondent. P.W.2 has the habit of selling land and then later seeking to recover it. By the time she sold the land, her husband was deceased.

Proceedings at the *locus in quo*:

[11] The court visited the *locus in quo* on 12th December, 2018 where it observed that the land in dispute measures approximately three acres. The appellant does not live on the land but the respondent and his mother does. Both neighbours to the East and South of the land in dispute bought their current holdings from P.W.2 Veronica Achieng Ogayi. There are graves of the appellant's deceased relatives in the centre and the extreme Northern part of the land in dispute. Most of the land is bushy as a result of a court injunction. A sketch map for the land in dispute was prepared.

Judgment of the court below:

[12] In his judgment delivered on 21st February, 2019, the trial Magistrate found that the transaction between the respondent and Achieng Veronica was not a mortgage but a sale. Following several instalments received by Achieng Veronica, a final agreement was signed. The respondent's version was unbelievable by reason of the contradictory evidence relating to the amount borrowed. The number of instalments paid are too numerous and the duration of over two years too long for a transaction of borrowing. Achieng Veronica did not disclose the terms of the alleged borrowing. There is no evidence of repayment over the two year period. At the *locus in quo*, the court established that two of the neighbours too had purchased their holdings from Achieng Veronica. This corroborated the respondent's claim that she had sold him the land in dispute. Although it is clear that the suit land once formed part of the estate of the late Gaetano Ojok, there is no evidence to show that the appellant inherited the land. The appellant had never challenged any of the previous sales made by his mother. He is therefore estopped from denying the sale effected by his mother since he "ratified her actions by not complaining against the other buyers of part of the estate." This is notwithstanding that the appellant does not even claim as an administrator

The grounds of appeal:

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

1. The trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record as to whether the suit property forms part of the estate of the late Gaetano Okot thereby arriving at a wrong conclusion, hence occasioning a miscarriage of justice to the appellant.
2. The trial Magistrate erred in law and fact when she failed to consider the fact that the alleged sale agreement was not for the sale of land but was

for borrowing money between the respondent and Aceng Veronica and not a sale of land, hence occasioning a miscarriage of justice to the appellant.

3. The trial Magistrate erred in law and fact when she heavily relied on witnesses at the *locus in quo* and the doctrine of estoppel, hence arriving at a wrong conclusion occasioning a miscarriage of justice to the appellant

Arguments of Counsel for the appellant:

[14] Counsel for the appellant never filed submissions despite having been accorded time for doing so. In their submissions

Arguments of Counsel for the respondents:

[15] In their submissions, counsel for the respondent submitted that the trial Magistrate came to the correct conclusion when he found that the appellant had not adduced evidence of inheritance of the land from his father. Since the land had been sold to the respondent, it could not form part of the estate of the late Okot Gaetano. The finding that the appellant's mother sold the land to the respondent was backed by the available evidence. The court rightly rejected the claim that the appellant's mother only borrowed money from the respondent. The appellant was given an alternative of paying the market value of the land to the respondent. The appeal should therefore be dismissed.

Duties of a first appellate court:

[16] 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*).

[17] 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.

Grounds one and three; findings as to ownership.

[18] In grounds 1 and 3 of the appeal, the trial court is faulted for its failure to find that the land in dispute forms part of the estate of the late Gaetano Okot and reliance on the doctrine of estoppel. Indeed, the trial court made a finding of fact that the land in dispute belongs to the estate of the late Gaetano Okot. According to section 180 of *The Succession Act*, an administrator of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after the death of the deceased (see section 180 of *The Succession Act*). At that point in time the beneficial interest passes and all assets are then held by the administrator on bare trust for the beneficiaries, since the administrator's role is merely distribution. All that the grant does is give the administrator the legal power necessary to deal with the assets.

[19] On the other hand, a beneficiary may trace estate property wrongfully disposed and recover the property or proceeds from the property (see *Ciro Citterio Menswear plc v. Thakrar and Others [2002] 1 WLR 2217* and *Re Diplock, [1948] Ch.465*). The main advantage of tracing in equity is that it will not be defeated by the irretrievable mixing of property (see *Agip (Africa) Ltd v. Jackson [1991] Ch 417; Re Hallett's Estate (1880) 13 Ch D 696* and *Sinclair v. Brougham [1914] AC 398*).

[20] Whereas Common Law views property as physical assets, equity is able to view property metaphysically (see *Re Diplock [1948] Ch 465 at 520*). Tracing allows a claimant to locate misappropriated assets in order to assert their property rights and seek an appropriate remedy by identifying the value of an asset into substitutes it has been exchanged for. It applies to situations where property has been the subject of fiduciary obligations before it got into the wrong hands. The property can be followed into the hands of the other person and the beneficiary can assert a proprietary right.

[21] Tracing is the process of identifying a new asset as substitute for the old. Equity is able to assume that the claimant's property continues to exist in the mixture, albeit that it is not possible to say which specific property belongs to which party. When the claimant has traced an equitable proprietary interest into a mixed property, an equitable charge will be placed on the whole property as security for the claim (see *Re Hallett's Estate (1880) 13 Ch D 696 at 708-10 (Jessel MR); Sinclair v. Brougham [1914] AC 398 at 420-2 (Viscount Haldane LC), at 441-2 (Lord Parker of Waddington), and at 459-60 (Lord Sumner); El Ajou v. DollarLand Holding [1993] 3 All ER 717at 735-6 (Millett J*). This gives the claimant a power to sell the relevant asset to which the charge is attached and so recover the value received and retained by the defendant plus interest. In order for there to be a successful action of tracing property, the claimant must be able to identify his or her property which has been unlawfully taken, show that the property has been used to acquire some other new property which is identifiable, and the chain of

substitute must be unbroken. Actions of tracing will fail if there is a bona fide purchaser for value, without notice because the interference by bona fide third party will destroy the equitable interest, thereby making the chain of proprietary interest for tracing broken.

[22] On the other hand, "following" is a process of following the same asset as it moves from one person to another, where its identity was not lost in the hands of the recipient (see *Foskett v. McKeown [2001] 1 AC 102*). Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice that choice is often dictated by the circumstances. "Following" and "tracing" are both exercises in locating assets which are or may be taken to represent an asset belonging to claimants and to which they assert ownership. One can either follow the asset or the value, or both where the process of ascertaining what happened to the asset necessarily involves both tracing and following.

[23] If the claim relates to the original property, the claimant needs to follow the property into the possession of the defendant. If the claim relates to the substitute property, the claimant needs to trace the value of the property from the original property in which the claimant had an equitable proprietary interest into the substitute property that was received by the defendant. Claims to recover estate property from third parties arise in response to the administrator's duty to preserve identifiable property, which is the true meaning of "tracing." In *Foskett v McKeown [2001] 1 AC 102 at 109D*, Lord Browne-Wilkinson said that “it is a process whereby assets are identified.” In the same case, Lord Millet stated at 128C as follows: "tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and

justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset."

[24] It will be appreciated from the above statements of principle that for a claimant to be able to trace his or her original asset into the traceable proceeds thereof or substituted asset, he or she must first show his or her ownership of, or a proprietary interest in, the original asset. For example in *Scott v. Scott and others (1963) 109 CLR 649*, an administrator of an estate of a deceased person, in breach of his duties applied estate moneys together with his own in the purchase of a property in which he lived till his death. Shortly prior to his death he repaid to the estate the amount of estate moneys used by him in its purchase. After its purchase the property had increased substantially in value. One of the issues which arose for decision was whether the estate was entitled to share in the increase in value of the property in the same proportion to the total increase as the amount of estate moneys employed in the purchase bore to the total purchase price. The High Court of Australia (McTiernan, Taylor and Owen JJ) held that the estate was so entitled. The following observations of the High Court of Australia at 658-663 are relevant to the present case:

> But if all that the remainderman were entitled to was repayment to the estate of the amount misapplied then the effect of the remedy that would have been available against W. H. Scott in his lifetime would have been merely to confirm the misapplication of that sum and to condone the breach of estate. This would mean, in effect, that the administrator was, in 1942, at liberty to use estate moneys in conjunction with moneys of his own in purchasing the property subject only to a liability to account for the estate moneys so used and to keep for himself the whole of the profit made upon any

resale of the property. The proposition has only to be stated not only to realize its injustice but also to show that it is completely inconsistent with the proposition that has been consistently stated on so many occasions over the last two centuries … (658)

There is, of course, abundant authority for the proposition that if estate moneys have been exclusively used in the purchase of property the beneficiary may elect to take the property itself. There is also authority for the proposition that if estate funds from two different estates are exclusively used by a common administrator in the purchase of land in his name which has increased in value each estate will be held entitled to a proportionate part of the increase: *The Lord Provost etc. of Edinburgh v. Lord Advocate*. In such a case it would be unthinkable that each estate should be entitled merely to a charge for the amount misapplied with, perhaps, some allowance for interest, and the administrator left with a residual profit. Why, then, should a administrator who has mixed moneys of his own with estate moneys for the purpose of purchasing lands which have greatly increased in value be held entitled, upon repayment of the estate moneys misapplied, to retain the whole of any profit which has resulted, at least in part, from the misuse of the estate money?... (660)

No doubt it is true to say that in this case the estate was entitled to assert a lien upon the property purchased with the mixed fund to secure the amount misapplied. But it is erroneous to say that in the circumstances of this case this was the full measure of the relief to which the estate was entitled… In its final analysis the appellant's argument on this branch of the case seems to rest upon the assertion that it cannot be said that there was any liability to account for any part of the profit which accrued to the administrator or, ultimately, to his estate, unless it can be established that the estate of the testatrix became entitled to a beneficial interest in the property which W. H. Scott purchased. This, it was said, could not upon the authorities be established. Upon this latter proposition we will make some observations presently. But for the moment we are content to assume that this could not be established for the basic contention finds no support in the innumerable and varied cased in which administrators have been held liable to account for profits arising from the misapplication of estate moneys… (661-662)

> Clearly enough the estate was entitled as against W. H. Scott to seek an order for sale to enforce its lien and upon any such sale the profit would have been realised… he could not be allowed to escape his liability to account merely by repayment of the amount of estate moneys misapplied. Accordingly, we take the view that repayment of the sum of £1,014 in 1959 did not operate to defeat the beneficiaries' right to a sale; this, we think, could have been defeated only by an accounting for profits as on a notional sale. (662-663)"

[25] As administrator of the estate of the late Gaetano Okot and as a person entitled to a beneficial interest in the property, the appellant had the right and duty to follow it into the hands of the respondent. Although the respondent claimed in his defence that the appellant was estopped from recovery, this defence was not available. Section 114 of *The Evidence Act* encapsulates estoppel by conduct. Estoppel is a legal device whereby a court may prevent or "estop" a person from making assertions or from going back on his or her word.

[26] An estoppel by conduct arises where one person (the representor) induces another (the representee) to adopt and act upon an assumption of fact (common law estoppel) or an assumption as to the future conduct of the representor (equitable estoppel). An estoppel will only arise where the representee has acted on the assumption in such a way that he or she will suffer detriment if the representor acts inconsistently with the assumption. At common law, the estoppel prevents the representor from denying the truth of the assumption in litigation between the parties, so the rights of the parties are determined by reference to the assumed state of affairs.

[27] In equity, the estoppel prevents the representor from acting inconsistently with the assumption, without taking steps to ensure that the departure does not cause harm to the representee. Those steps might include compensating the representee for any financial loss, or giving the representee reasonable notice of

the intention to depart from the assumption, so that the representee can resume his or her original position. If the representor acts inconsistently with the assumption without taking any such steps, then the court must fashion relief by which to give effect to the estoppel. The law of estoppel looks chiefly at the situation of the person relying on the estoppel. As a consequence, the knowledge of the person sought to be estopped is immaterial. It is not essential that the person sought to be estopped should have acted with any intention to deceive.

[28] If a person, either by words or by conduct, has intimated that he or she consents to an act which has been done, and that he or she will offer no opposition to it, although it could not have been lawfully done without his or her consent, and he or she thereby induces others to do that from which they otherwise might have abstained, he or she cannot question the legality of the act he or she had so sanctioned to the prejudice of those who have so given faith to his or her words, or to the fair inference to be drawn from his or her conduct.

[29] In order to apply the doctrine the court must be satisfied that; (i) the representor engaged in conduct amounting to a representation, intended to induce a course of conduct by the representee upon adopting the assumption on which the estoppel is based; (ii) the representor reasonably expected such reliance; (iii) an act or omission of the representee resulting from the representation of such a nature that he or she will suffer detriment if the assumption is not adhered to; (iv) it must be unconscionable or unjust for the representor to depart from the assumption (see *Stanbic Bank Uganda Ltd v. Uganda Crocs Limited S.C. Civil Appeal No.4 of 200*4; *Seton Laing Co. v. Lafone (1887) 19 QBD 68* and).

[30] A defendant who raises estoppel as an affirmative defence alleges that the plaintiff's own actions prevent him or her from seeking a remedy in court. Reasonable reliance is the core of estoppel by conduct. In determining whether or not it was reasonable of the representee to rely on the representation, the court considers what is prudent and sensible behaviour, taking into account the

behavioural norms of the time and place. Reasonableness is not a question of what people actually do but of what courts think is a reasonable standard of conduct for society to enforce against its citizens through the mechanism of tort law (see P Cane, *The Anatomy of Tort Law*, Hart (1997) p 42).

[31] Whereas a person is deemed to act wilfully, whatever his or her real intention may be, if he or she so conducts himself or herself that a reasonable person would take the representation to be true and believe that it was meant that he or she should act upon it, the reasonableness standard imposes responsibility on a representee to take care to protect his or her own interests, and defines the standard of care that must be taken. The question then is whether the doctrine of estoppel by conduct can be invoked upon the facts of the present case.

[32] In view of the fact that the appellant was never privy to the transaction, I do not find the principle of estoppel by conduct to be applicable in the circumstances of this case. The respondent was fully aware and conscious of the fact that the land originally belonged to Gaetano Okot, then deceased, and that the person purporting to sell it to him was the widow of Gaetano Okot. I find that in these circumstances the doctrine of estoppel by conduct was inapplicable and should not have been applied.

[33] On the other hand, equity regards the beneficiary of an estate of a deceased person as the true owner and will not allow a statute to be used as a cloak for fraud by a third party. Equity prevents a party from relying upon statute if to do so would be unconscionable and unfair. Equity will not permit a party to rely upon a legal form, or the formal wording of a law, in a way that would be substantially unconscionable. Had the trial court properly directed itself, it would not have come to the conclusion it did. These grounds of appeal therefore succeed.

Ground two; court's finding that the transaction was of borrowing and not of sale.

[34] By the second ground of appeal, the trial court is faulted for its failure to find that the transaction was of borrowing and not one of sale. It is trite that the right to sell un-registered land is vested only in the person who holds valid title to that land. He or she who has no title cannot sell (see *Mortgage Business plc v. O'Shaughnessy [2012] 1 WLR 1521*). Parties must act in good faith. Consequently land should be purchased after taking reasonable care to ascertain that the transferor has the requisite power to transfer the said land. The common law principle of *nemo dat quod non habet* has long held that a person cannot convey a superior title to the one already held.

[35] Prior to the administration of the estate of a deceased person, a beneficiary's interest in the land can subsist only in equity. As a matter of basic land law, an equitable owner of land cannot grant a legal interest. A person cannot grant a greater interest than he or she possesses. Before distribution of the estate of the deceased by the legal representative of the deceased, the beneficiary has only a proprietary interest in equity, in the estate property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

[36] The beneficiary, with only a proprietary interest in equity, could protect that interest by either "tracing" or "following," both of which are not remedies but processes (see *Boscawen and others v. Bajwa and another [1996] WLR 328*). Therefore, the court must do two things: first, trace the asset into the appropriate property; and, secondly, identify the best remedy to bring against that property. The court may order compensation (see *Target Holdings Ltd v. Redferns [1996] 1 AC 421*); order that the property be restored by transferring it to original owner (see *Foskett v. McKeown [2001] 1 AC 102*); order the property to be held on resulting trust (see *El Ajou v. Dollar Land Holdings Plc [1995] 2 All ER 213*); or

constructive trust (see *Westdeustche Landesbank Girozentrale v. Islington LBC [1996] 2 All ER 961; [1996] AC 669; [1996] 2 WLR 802*); or be subject to a charge (see *Vaughan v. Barlow Clowes International Ltd [1992] 4 All ER 22*).

[37] It is settled that where property is transferred in breach of the beneficiary's interests in identifiable estate property, a beneficiary can either bring a proprietary claim to recover the property or a personal claim against a knowing recipient of the estate property. As a matter of law, there is no one remedy which should be applied, instead the courts appear to be prepared to impose whichever remedy seems to be most appropriate in the circumstances and whichever remedy provides the most convenient solution. The onus is on the plaintiff to claim the remedy which is most appropriate in the given situation. Where one asset is exchanged for another, a claimant can elect whether to follow the original assets into the hands of the new owner or to trace its value into the new asset in the hands of the original owner though of course, he or she cannot recover twice. In practice, the choice is often dictated by circumstances. For example, if the estate property has ceased to exist in traceable form, the beneficiary will seek a personal claim from the legal representative.

[38] Where a beneficiary can follow estate property into the hands of a third party, without the intervention of a bona fide purchaser for value without notice, he or she can assert his or her equitable proprietary interest and require the asset to be restored to the estate. It matters not how many successive transactions there may have been, so long as tracing is possible and no bona fide purchaser is involved, his or her proprietary claim is almost unfettered. Where the claimant has a right to proceed against a particular asset in the defendant's hands, it amounts to a proprietary claim. The remedy is proprietary and wide-ranging because it attaches to the property and the liability of the third party will depend on his possession of that property. If that estate property is particularly unique and valuable or one that is likely to appreciate in value, the establishment of a proprietary claim will enable the claimant to claim entitlement to any profits

derived from that estate property in addition to claiming it back in specie. Only when the third party is no longer in possession of estate property or where the estate property is no longer identifiable so that a tracing claim is lost, will personal remedies be considered. Hence, a proprietary claim is usually the most sought-after remedy and is the most valuable among them all.

[39] Circumstances in which the right to trace is lost are in four categories which can be identified, as follows: (1) where the property is in the hands of a bona fide purchaser for value without notice (see *In Re Diplock[1948] 1 Ch 465* and *Bishopsgate Investment v. Homan[1995] 1 All ER 347*); (2) where the property has been dissipated (see ***Snell's Equity***, 33rd Edition: page 792 para 30.064); (3) where it would be inequitable to allow the claimant to trace his property (see ***Snell's Equity***, 33rd Edition: page 792 para 30.066): and (4) where the property is in the hands of a person who can show that, following receipt, he or she has changed his position in good faith.

[40] On the other hand, the maxim "he who comes into equity must come with clean hands" bars relief for anyone guilty of improper conduct in the matter at hand (see *Coatsworth v. Johnson (1886) 55 LSQB 22;* Cross *v. Cross (1983) 4 FLR 235* and *Mountford and another v. Scott [1974] 1 All ER 248; [1973] 3 WLR 884*). The courts do not look at general conduct of a person but their specific conduct in connection to the case. Although equity does not demand that its suitors shall have led blameless lives (see *Loughran v. Loughran, 292 U.S. 216 at 217 (1934*), this maxim requires that someone bringing a suit against another person and asking the court for equitable relief must be innocent of wrongdoing or unfair conduct relating to the subject matter of his or her claim. The bad conduct that is condemned by the clean hands doctrine must be a part of the transaction that is the subject of the suit. The court has to determine whether the appellant acted unethically or in bad faith with respect to the subject of the complaint.

[41] Equity would demand that the liability of a third party should be reduced or extinguished if his or her position has been so changed by the receipt of the claimant's property that it could be inequitable for him or her to make restitution of all or part of the property received. Although the scope and range of the inhibition that inequitability places on the process of tracing remain uncertain and not yet fully explored by the Courts, in general the enforcement of a proprietary right against a third party does not depend on questions of inequitability to the third party but on the vindication of the beneficiary's property rights (see *Foskett v. McKeown [2001] 1 A.C. 102*). It is triggered by the mere fact of receipt, thus recognising the endurance of property rights. The inhibition will definitely not be available where that party is a wrongdoer by reason of knowing receipt, which includes a person who changes his or her position knowing the facts of the claimant's interest in the property or cause of action against him or her.

[42] For knowing receipt, some cases have indicated that constructive knowledge would suffice, (see for example *Karak Rubber Co. Ltd. [1972] 1 W.L.R. 602 (Ch) at 632*, per Brightman J.; *Belmont Finance Corp Ltd. v. Williams Furniture Ltd. (No 2) [1980] 1 All E.R. 393 (CA) at 405*, per Buckley L.J.), whereas other cases have required a state of mind which is closer to dishonesty (see *Re Montagu's Settlement Trusts [1987] Ch 264 at 281*, per Megarry V.C.; and *Eagle Trust Plc v. S.B.C. Securities Ltd. [1996] 1 B.C.L.C. 121 (Ch) at 151*, per Arden J.). Just as there is now a single test of dishonesty so ought there to be a single test of knowledge for knowing receipt. The test preferred by some courts is that of "unconscionable" receipt (see *Bank of Credit and Commerce International (Overseas) Ltd (BCCI) v. Akindele [2000] 3 WLR 1423, pp1437-1439*)., in which case the recipient's state of knowledge must be such as to make it unconscionable for him or her to retain the benefit of the receipt. The question is not whether the respondent himself was dishonest, but rather whether he had knowledge of circumstances which made it unconscionable to purchase the land. Actual knowledge rather than mere constructive knowledge is required. A restitutionary claim arises in its nature from the fact of vitiation and the fact of

receipt. The consequence is that no change of position defence applies to a proprietary claim of this nature.

[43] The approach within this jurisdiction has tended to be that of constructive knowledge. A purchaser in a transaction of this nature is expected to have a certain level of knowledge about its nature. To have knowledge about the types of precautions or inquiry that should be taken in respect of it, especially where it was easy for him to carry out and what he was liable to uncover, and to have a certain level of perceptiveness in relation to the circumstances surrounding the transfer, such as one would expect of the "reasonable buyer" in that position. A purchaser is liable even without actual knowledge if, because of his or her obtuseness, he or she does not have the actual knowledge that a reasonable purchaser would have had in the same circumstances. The appellant proved that respondent purchased estate property with the required knowledge, or without making the necessary inquiries that would have disclosed that it was estate property; and also that the sale to him was made in breach of the beneficiary's interests in the estate property, by a person not competent to transact in the property.

Order:

[44] In the final result, the appeal succeeds. The judgment of the court below is set aside and instead judgment is entered for the appellant against the respondent, with;

a) A declaration that the land in dispute belongs to the estate of the late Gaetano Okot.
b) A declaration that the respondent's purchase of the land is null and void hence vacant possession is to be returned to the beneficiaries of the estate of the late Gaetano Okot.
c) A permanent injunction restraining the respondent, his agents and persons claiming under him from further acts of trespass on the land.

d) The costs of the suit and of the appeal are awarded to the appellant.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

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