IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0046 of 2019

In the matter between

THE REGISTERED TRUSTEES OF THE DIOCESE OF NOTHERN UGANDA **APPELLANT**

And

ACELLAM GRACE **RESPONDENT**

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

Land Law— *Boundaries — A road may be an abuttal to a parcel of land but it may not necessarily serve as boundary marker, unless there is clear evidence to show that such was the intention. — A conventional boundary is one established by express or tacit agreement between adjacent owners regarding their mutual boundary. It is not necessary that this conventional line should have been acquiesced in for any special period after the express or tacit agreement. — Where no supporting evidence is available to fix a road as a boundary marker, probably the best evidence of the boundary position is the nature of occupation and user of the subject land and nearby parcels on both sides of that road.*

Family Law *— section 191 of The Succession Act — no right to any part of the property of a person who has died intestate may be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.*

Evidence *— 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. 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. — 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.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant and another jointly and severally for recovery of the value of her land wrongfully sold to the appellant, general damages and the costs of the suit. Her claim was that she inherited approximately 3,960 square meters of land situated at Ajan village, Lamora Parish, in Omoro District. Without any claim of right, the appellant's co-defendant, D.W.2 Odong Vincent, on or about 5th July, 2016 wrongfully sold that land to the appellant at the price of shs. 3,000,000/= As a result of that sale, the respondent lost the only piece of land she had for her sustenance, hence the claim for its value and general damages for the resultant loss and inconvenience.

[2] In his written statement of defence, the appellant's co-defendant, D.W.2 Odong Vincent, refuted the respondent's claim and contended that the suit was bad in law, vexatious and frivolous. The appellant did not file a written statement of defence.

The appellant's evidence in the court below:

[3] D.W.1 Akwero Fiona, the appellant's Assistant Health Coordinator, testified that the appellant bought the land at a price of shs. 3,000,000/= by an agreement of sale dated 5th July, 2016 to which she was one of the witnesses. Negotiations for the purchase of the land, which involved residents and neighbours to the land,

began in April, 2016 and were concluded in July, 2016. The respondent never laid any claim to the land. The appellant began construction of buildings on the land which stopped at wall-plate level several months later when they run out of funds. That is when the respondent first laid claim to the land.

[4] D.W.2 Odong Vincent testified that the land in dispute originally belonged to his grandfather the late Saul Olum. On his death in 1975 it was inherited by his father Odok William. It is from him that he in turn inherited it. It was used for cultivation only until the year 2008 at the end of the insurgency when his two brothers D.W.3 Okwera Wilson and Okech Phillips settled thereon. It is him who with the consent of the family, by an agreement of sale dated 5th July, 2016 sold the land to the appellant. Before that, his grandfather had in 1938 given part of his land to Awere Primary School. The respondent has a home to the South of the land he sold but it is across the feeder road from Awere Primary School to Awere Trading Centre. There was an attempt by the clan to mediate the dispute between him and the respondent over that land following the transaction of sale. He offered the respondent two bulls as compensation to stem her claim over the land, which the respondent rejected.

[5] D.W.3, Okwera Wilson, the biological brother of D.W.2 Odong Vincent, testified that he is a neighbour to the East of the land in dispute. The land in dispute originally belonged to his grandfather the late Saul Olum. On his death in 1975 it was inherited by his father Odok William. He was one of the sellers of the land in dispute and he shared in the proceeds. The land belonged to their family. His grandfather had in 1938 given part of his land to Awere Primary School. His brother, D.W.2 Odong Vincent, had with the consent of the family, by an agreement of sale dated 5th July, 2016 sold part of the family land now in dispute to the appellant. It is D.W.2 Odong Vincent who used to cultivate the portion that he sold off. It is after the sale that the respondent began to claim the land. The respondent has a home to the South of the land he sold but it is across the feeder road from Awere Primary School to Awere Trading Centre. D.W.4 Akena

Timothy testified that the respondent was absent at the time of sale of the land. The land belongs to the respondent's mother, not to the respondent. The respondent has authority over the land that belonged to her late mother Mariam Achieng.

The respondent's evidence in the court below:

[6] P.W.1 Acellam Grace, the respondent, testified that the approximately 400 acres of land were bequeathed to her in a will of her late mother, Mariam Achieng as her only child. It originally belonged to her late grandfather Rwot Owiny Petero from whom it was inherited by her late mother Mariam Achieng wife of Simeo Ocoko Acellam. She was born on that land in 1955 and has lived thereon since then. Neither she nor her relatives live on the approximately one acre in dispute, but it forms part of the rest of the land she inherited. The appellant is in the process of building a health centre on the land. The appellant's co-defendant, D.W.2 Odong Vincent, is her maternal uncle. Two brothers of the appellant's co-defendant live elsewhere on the land. It is during the year 2006 that permission was granted by the elders for the burial of D.W.2 Odong Vincent's parents on the land due to the insecurity caused by the insurgency. That is when D.W.2 Odong Vincent's brothers; D.W.3 Okwera Wilson and Okech Phillips settled on the land. It is on that land that her deceased mother, Mariam Achieng, was buried. The part sold to the appellant belonged to her mother and she was buried on the land of which it forms part. No one was buried on the land in dispute.

[7] P.W.2, Luka Orach, a neighbour to the West of the land in dispute testified that the land in dispute formed part of a larger chunk of land which originally belonged to the respondent's late grandfather Rwot Owiny Petero from whom it was inherited by her late mother Mariam Achieng. The respondent does not have a house on the one acre of land in dispute, and her mother was not buried thereon. The appellant built a health centre and school on the land in dispute.

Proceedings at the *locus in quo*:

[8] The court visited the *locus in quo* on 19th December, 2018 where it found that the land in dispute measures approximately 60 x 66 metres with an incomplete permanent structure constructed by the appellant. Adjacent to and surrounding the plot is a cassava garden and thereafter the respondent's six grass thatched houses. The appellant's co-defendant's home, D.W.2 Odong Vincent, and gardens are approximately a kilometre away. A sketch map was prepared.

Judgment of the court below:

[9] In his judgment delivered on 6th March, 2019, the trial Magistrate found that at the *locus in quo* it was established that the respondent lived closest to the land in dispute while the appellant's co-defendant, D.W.2 Odong Vincent, had no physical connection to it. There was no evidence to show that the appellant's co-defendant, D.W.2 Odong Vincent, ever inherited the land yet the respondent was in possession of land in its neighbourhood. D.W.2 Odong Vincent under cross-examination by implication admitted that the land he sold to the appellant formed part of the respondent's inheritance. This was because he attempted to compensate the respondent for the land so as to stop her complaints. He had no interest in the land he was capable of passing on to the appellant. Had the appellants undertaken proper inquiries before the transaction, they would have discovered that the land was the subject of an existing dispute. The appellants therefore were not bona fide purchasers of the land. The appellant therefore is a trespasser on that land. The respondent was awarded shs. 3,000,000/= in general damages and an order of vacant possession of the land. The respondent was awarded the costs of the suit.

The grounds of appeal:

[10] The appellants were dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he held that the suit land belongs to the respondent.
2. The learned trial Magistrate erred in law and fact when he held that the purchase of the land by the appellant was invalid.
3. The learned trial Magistrate erred in law and fact when he awarded remedies not prayed for by the respondent.
4. The learned trial Magistrate erred in law and fact when he awarded costs against the appellant.
5. The learned trial Magistrate failed to properly evaluate evidence on record regarding the purchase of land by the appellant thereby arriving at a wrong decision.

Duties of a first appellate court:

[11] The parties did not file submissions despite having been given sufficient time within which to do so. Nevertheless, 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*).

[12] 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, two, four and five; evaluation of evidence, findings of court and award of costs to the respondent.

[13] By grounds one, two, four and five, the trial court is criticised for the manner in which it evaluated the evidence, made its findings and awarded costs to the respondent. First, an important distinction has to be made between transfer of property by inheritance and transfer by bequest, legacy, or will. What distinguishes bequests or gifts from inheritance through intestate succession is that the former require some affirmative act by the testator or donor in order to make the gift effective. Necessarily, such act can be taken only during the lifetime of the testator or donor. 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). Inheritance therefore denotes devolution of property under the law of descent and distribution.

[14] The privilege of receiving property by inheritance is not a natural right but a creation of law. The process of devolution is regulated by the relevant law of descent and distribution which may be either customary, statutory or both. Under both systems, inheritance primarily and narrowly deals with the transmission of property, or of rights to such property, which by necessary implication excludes taking by deed, grant or purchase. Whether testate or intestate, inheritance entails a process guided by rules that govern the devolution and administration of

a deceased person's estate. The common purpose of inheritance under both the customary and statutory legal regimes is that the property of the deceased intestate should be left to the use and benefit of his or her closest relatives or those who were dependent upon him or her during his or her lifetime. By virtue of the procedural requirements embedded in the concept of inheritance, it follows that an individual who claims property of a deceased person only by dint of social affiliation does not necessarily claim by inheritance unless and until it is proved that the devolution was in accordance with the relevant law of descent and distribution under custom or enactment.

[15] Under the legislative regime, section 191 of *The Succession Act* provides that no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction. Before the trial court, there was no evidence that the respondent ever took out letters of administration. Therefore, the respondent could not have acquired the land in dispute through such a process. That left only one other possibility, inheritance by custom.

[16] The burden was on the respondent to prove that she had acquired the land in dispute following rules that govern the devolution and administration of a deceased person's estate under a specific customary law, by adducing evidence clarifying or defining what those rules are within the customary context. Customary law concerns the rules, practices and customs of indigenous peoples and local communities. It is, by definition, intrinsic to the life and custom of indigenous peoples and local communities. What has the status of "custom" and what amounts to "customary law" as such will depend very much on how indigenous peoples and local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law" (see *Osborne's Concise Law Dictionary*, Ninth Edition (Sweet and Maxwell, 2001).

"Customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws" (see *Black's Law Dictionary*, 8th edition, 2004). It is also defined by section 1 (1) (a) of *The Magistrates Courts Act* as "the rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by Parliament."

[17] It was incumbent upon the respondent to adduce evidence of customary laws and traditions concerning transfer of property from persons in one generation to those of another, or, in a few instances, to other persons within the same generation in accordance with what, in modem legal terms, would be called the laws of intestate succession and bequest. In the instant case, there is absolutely no evidence regarding intestate succession, i.e. transfer of property by operation of customary law upon the death of the property holder without explicit provision by will or bequest as to who will inherit or take afterwards.

[18] Apart from asserting that she acquired the land in dispute by inheritance, the respondent did not adduce any evidence regarding the custom under which that devolution by inheritance occurred, the rules and practices of inheritance which determine the settling of estates of intestate deceased persons under that custom or how the estates should devolve, compliance with those established rules and practices of inheritance in his specific instance, and that those rules and practices are not incompatible with the provisions of the constitution, any written law and are not repugnant to natural justice, equity and good conscience. That being the case, the trial court misdirected itself when it found as a fact that the land belonged to the respondent simply on basis of the fact that the respondent was in possession of land neighbouring the one in dispute.

[19] The respondent's claim though appears to have been based on a customary norm that the eldest born son, if any, normally is expected to be the sole heir but

where a man dies, and has no son, then his inheritance passes to his daughter(s). It is by that tradition that the land devolved from Rwot Owiny Petero from to Mariam Achieng, his only child. It can plausibly be inferred that as a matter of unwritten custom or tradition, only one daughter, perhaps the older or oldest, would inherit. 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.

[20] 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.

[21] 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*).

[22] 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.

[23] 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 estate of Mariam Achieng devolved to the respondent under the Acholi customary intestacy law.

[24] Although, there is no evidence led to the effect that the respondent in turn was the only child of Mariam Achieng, this is unimportant in light of the circumstances of this case. Such evidence would be necessary if it were a dispute over distribution of the estate, which it is not, with regard to issues to do with "per capita" ("by total headcount" or "by a total number of individuals") distribution under section 28 (1) of *The Succession Act*, all members of a particular beneficiary group receive an equal share of the distribution. A share is not created for the deceased beneficiary and all of the shares of the other beneficiaries will be increased accordingly if a beneficiary of the identified group is deceased. On the other hand, in a "*per stirpes*" ("by representation" or "by class") distribution under section 28 (2) of *The Succession Act*, a generational approach is used. If a beneficiary survives the deceased but dies before distribution, then the benefits pass on to that person's children in equal shares.

[25] Both the respondent and the appellant's co-defendant claimed title by customary inheritance. The question then was whether or not the one acre in dispute was comprised in the estate of the late Mariam Achieng as contended by the respondent or rather the estate of the late Odok William as contended by D.W.2 Odong Vincent. The claim by the respondent was based on her having physical possession of the land in dispute both before and after the sale while that of D.W.2 Odong Vincent was based on the fact that the respondent's residence is separated from the land in dispute by the feeder road from Awere Primary School to Awere Trading Centre and that before the sale, his family had used the land for cultivation of crops.

[26] A road may be an abuttal to a parcel of land but it may not necessarily serve as boundary marker, unless there is clear evidence to show that such was the intention. Where no supporting evidence is available to fix a road as a boundary marker, probably the best evidence of the boundary position is the nature of occupation and user of the subject land and nearby parcels on both sides of that road. A conventional boundary is one established by express or tacit agreement

between adjacent owners regarding their mutual boundary. It is not necessary that this conventional line should have been acquiesced in for any special period after the express or tacit agreement. Long and undisturbed occupation provides strong evidence that the occupations are guided by the boundary as originally laid. Delay in objecting may and frequently does establish acquiescence, as conduct acknowledging the correct location of the mutual boundary. In the instant case, presence of the respondent's cassava garden across that road showed that the feeder road from Awere Primary School to Awere Trading Centre was never intended to serve as boundary marker between the estate of Mariam Achieng and that of the late Odok William.

[27] It is settled that when the issue is as to who has a better right to possess a particular piece of land, the law will ascribe possession to the person who proves a better title, legal title or possessory title, i.e. the title may be of ownership or possession. There are two elements necessary for legal possession: (i) a sufficient degree of physical custody and control ("factual possession"); and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). The objective acts of physical possession must be coupled with such intention which may be, and frequently is, deduced from the physical acts themselves.

[28] Possession must be considered in every case with reference to the peculiar circumstances. The character and value of the land, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests, all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of possession (see *Johnston v. O'Neill [1911] AC 581*). When the court visited the *locus in quo*, it found that save for the appellant's recently constructed building, the respondent was in occupation of the land in dispute by unequivocally using the land exclusively for her obviously intended purposes performing such acts as would be expected of owners of such

land in due course. The respondent's activities on the land coupled with the attempt by D.W.2 Odong Vincent to compensate her with two bulls in lieu of her being dispossessed, bore convincing evidence as to the continued open and notorious possession of the land by the respondent and her predecessors, to the exclusion of the appellants, D.W.2 Odong Vincent and their predecessors.

[29] While D.W.2 Odong Vincent only asserted family title, the respondent asserted not only individual title, but possession of the area before and after the transaction of 5th July, 2016. It appears to me that when the question is who has a better right to possess a piece of land, the person who claims a mere right to possess it as of right and not as a tenant of the other and the person who has proved title to it, the law will come in strongly in aid of the person who has proved title, that is the respondent. Besides, D.W.2 Odong Vincent did not prove that he had exclusive possession of the area in dispute before the transaction of 5th July, 2016 and D.W.4 Akena Timothy testified that the land belonged to the respondent's mother only that he dispute the respondent's ownership thereof. The trial court therefore came to the correct conclusion. There is no merit in the four grounds of appeal.

Ground three; courts' grant of relief not sought for by the respondent.

[30] By the third ground of appeal, the trial court is criticised for having granted the respondent relief that she never sought in her pleadings. When there has been a violation of a private right by deprivation of property, redress can be accomplished either by the restoration of that of which a person has been deprived, or by awarding him or her compensation therefor. In her plaint, the respondent sought a recovery of the value of her land wrongfully sold to the appellant and general damages, yet she was awarded general damages and an order of vacant possession instead.

[31] According to Order 7 rule 7 of *The Civil Procedure Rules*, every plaint is required to state specifically the relief which the plaintiff claims, either simply or in the alternative. A party's case is defined, circumscribed and limited by its pleading. This is why such a pleading demand so much care and skill to draft. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings. It is well settled that no amount of evidence can be considered to find a case for which there has been absolutely no foundation in the pleadings. A question which did not arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court. A Court cannot make out a case not pleaded nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint. The court cannot, on finding that the plaintiff has not made out the case put forth by him or her, grant some other relief for in doing so it would have denied the defendant an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief.

[32] However, it is not desirable to place undue emphasis on form instead the substance of the pleadings. All pleadings should be so construed as to do substantial justice. Pleadings should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Instead the court must find out whether in substance the parties knew the case, the relief and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, the parties knew the case and they proceeded to trial on those issues by producing evidence, the relief will be granted. Therefore, if a relief is not specifically sought in the pleadings and yet it is covered as one of the issues by implication, and the parties knew that the said relief was involved in the trial, then the mere fact that the relief was not expressly stated in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence.

[33] On the other hand the object and purpose of pleadings is to enable the adversary party to know the case it has to meet. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. They are intended to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. In order to have a fair trial it is imperative that the party should state the essential material facts and the relief to be sought so that other party may not be taken by surprise. A relief not specifically pleaded can be considered by the Court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a case for the grant of that relief and the issues framed also generally cover the question involved and the parties proceed on the basis that such a relief was at issue and had led evidence thereon. This should be only in exceptional cases where the Court is fully satisfied that the pleadings and issues generally cover the relief subsequently claimed and that the parties being conscious of the relief sought, had led evidence on such issue. But where the Court is not satisfied that such relief was at issue, the question of resorting to the exception to the general rule does not arise.

[34] What the Court has to consider in dealing with a question like this is: did the parties know that the relief in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the relief was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and the pleadings do not support such a relief, such that the defendant had no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to a miscarriage of justice. To allow one party to rely upon a matter in respect of which the other party did not

lead evidence and has had no opportunity to lead evidence, would introduce prejudice, and in doing justice to one party, the Court cannot do injustice to another.

[35] The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. A relief which is not claimed but flows from the facts can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. The facts to be pleaded and proved for establishing a claim for a general damages for a wrongful sale are different from the facts to be pleaded and proved for making out a case justifying an order of eviction.

[36] A suit for vacant possession seeks to recover the possession of or title to land based on a prior and better right to hold the land. On the other hand, a suit for a wrongful sale is premised on the claim that she as owner neither expressly nor impliedly assented to or ratified the disposition of her property. Being an intentional tort not requiring proof of a wrongful intent, one who buys property in good faith from a party lacking title and the right to sell may be liable for damages for the wrongful sale because mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defences in such action. In contrast, a bona fide purchaser for value without notice may not be liable for ejectment. While damages based on the value of the property may be recovered, specific recovery of the property is no part of a suit for a wrongful sale. What was filed and tried as a suit for the value of the land and general damages turned out to be one for damages in addition to restoring possession of the land.

[37] When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. The relief accorded exceeded that pleaded. The trial court in effect granted a relief that was never asserted, claimed or prayed for. This ground of appeal succeeds.

[38] Whereas section 80 (2) of *The Civil Procedure Act* provides that appellate courts have the same powers and perform as nearly as may be, the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted in them, trial courts have an institutional advantage over appellate courts in the conduct of fact-bound inquiries. Certainly where the appellate court finds an error of law in the trial court's judgement arising from the application of a wrong legal standard, the appellate court will articulate the correct legal standard and review the relevant factual findings of the trial court accordingly.

[39] Section 80 (1) (e) of *The Civil Procedure Act* empowers an appellate court to order a new trial. An order for retrial is an exceptional measure to which resort must necessarily be limited. A trial *de novo* is usually ordered by an appellate court when the original trial fails to make a determination in a manner dictated by law or for a grave irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial. A retrial should not be ordered unless the following conditions are met; (i) that the original trial was null or defective; (ii) that the interests of justice require it; (iii) that the witnesses who had testified were readily available to do so again should a retrial be ordered; and (iv) no injustice will be occasioned to the other party if an order for retrial is made. These conditions are conjunctive and not disjunctive. The context of each retrial is unique, and its impact can only be addressed by taking into account this individual context. The discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the parties, the interests of justice, the nature of the dispute, the circumstances of the case in

hand and considerations of public interest. These factors (and others) would be determined on a case by case basis.

[40] Section 80 (1) (e) of *The Civil Procedure Act* empowers an appellate court to order a full or partial retrial. When an appellate court finds that parts of the trial court's decision is based on a misapprehension of the matters of fact or law in issue, in circumstances where the material on record is insufficient to guide the decision of the appellate court, that part of the decision of the trial court should be vacated or reversed and the case should be remitted back to the trial court to obtain the relevant facts and decide the case according to a proper understanding of those issues of fact or law. Thus the appellate court is able to set out the appropriate parameters of a retrial, taking into account the specific context of each case as well as the relevant principles of law.

[41] A partial retrial is justifiable so as to provide a remedy for a circumscribed and severable error. This is so where it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice, and where no injustice will result from retaining the decision upon the remaining issues, a court may order a new trial limited to that issue. When error exists only as to one or more issues and the judgment in other respects is free from error, and when the error can clearly be seen not to have reached over and affected those issues in which there was no error, the practice of the appellate courts is to limit the new trial to the issues affected by the error. The advantages of such partial new trials are obvious. Where some of the issues have been fully and fairly tried and determined nothing meritorious is to be gained from making the parties try them over again and both society and the parties lose from the added expense, effort and delay which the retrial entails. However, if the issues are not severable or are interwoven with the remaining issues, the court may not order a partial retrial.

[42] This court finds that the present situation gives rise to appropriate circumstances for a partial retrial. Apart from establishing the value of the land and assessment of general damages, no evidence relating to any other aspect of the first trial is necessary. A partial retrial is appropriate since evidence of the value of the land and general damages is not intertwined with evidence of liability. The liability issues are not inseparably intertwined with issues of the value of the land and general damages. This is a case in which the issues to be retried are so distinct and separable from others that a trial of them alone may be had without injustice. The interests of justice would not be well served if retrial were not ordered to allow the trial court the opportunity to fully assess the entirety of the relevant evidence and provide a reasoned opinion in light of facts establishing the value of the land and general damages.

[43] In the final result, the appeal succeeds on one ground only and is accordingly allowed. Orders and reliefs in a judgment which are unrelated to the relief sought or the issues joined in the claim tried on pleadings cannot be sustained. The orders and awards made in the judgment of the court below are accordingly set aside. Instead the suit is remitted to the trial court, for a re-trial limited to;

a) Assessment of the value of the land wrongfully sold to the appellant.
b) Assessment of general damages for the wrongful sale.
c) A third of the costs of this appeal is awarded to the appellant.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : ……

For the respondent :…….