IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0091 of 2019

In the matter between

LUKWIYA JIMMY **APPELLANT**

And

OBURO MATIYA **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Civil Procedure *—Framing Grounds of Appeal — Order 43 r (1) and (2) of The Civil Procedure Rules — A memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. — grounds of appeal must not be argumentative. They should be stated concisely without any argument or narrative. They should be limited to specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, and in a third appeal the matters of law of great public or general importance, which are considered to have been wrongly decided.*

Land Law *— Locus in quo — Practice Direction No.1 of 2007 (Practice Direction on the Issue of Orders Relating to Registered Land Which Affect or Impact on the Tenants by Occupancy) — Outlines the procedure to be followed in conducting such proceedings — Determination of Boundaries — The boundary is binding even when it is not reflected in writing where adjoining occupants of unregistered land treat a line as being the boundary between them, though that line may be different from the officially recognised boundary — when those actions continue uninterrupted for such a duration of time that to depart from it would be unconscionable, the parties are deemed to have established the line as the boundary.*

Evidence *— The term exhibits is confined to articles which have been formally proved and admitted in evidence. The mere marking of a document for identification does not dispense with the formal proof thereof. It follows therefore that once a document has been marked for identification, it must be proved.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for recovery of two plots of unregistered land, one measuring 30 x 50 meters known as plot 11 Dagomin Crescent and the other measuring approximately 25 x 50 meters, both situated at Mican village, Kanyagoga "C" Parish, Bar Dege Division in Gulu Municipality, a declaration that the two plots belong to the appellant, a declaration that the respondent is a trespasser onto the land, general damages for trespass to land, *mesne* profits, a permanent injunction, interest and costs.

[2] The appellant's claim was that his late father, Mzee Asaleri Okere, acquired the land in dispute ay back in 1912 as vacant unclaimed land and occupied it until his death during the year 1972. He was buried on that land long with his daughter Esteri Abanya and his deceased grandchildren. The appellant and the rest of his siblings inherited the and continued to live thereon until the year 1982 when the appellant was transferred to work in Kotido District, whereupon he left the rest of his siblings on the land. Suring 1997, insurgency forced the respondent to migrate onto the land in dispute. Upon the restoration of normalcy during the year 2006, the appellant demanded that the respondent vacates the land, to no avail, hence the suit.

[3] In his written statement of defence, the respondent contended that it is the respondent's grandfather, Musa Ali who first acquired the land in dispute as vacant unclaimed land when he occupied. The respondent inherited the land in dispute from his deceased father, the late Temteo Onguti, during the year 1983.

In previous litigation with the Diocese of Northern Uganda, the respondent and other occupants of the land were declared the rightful customary owners thereof. The respondent has been regularly paying Municipal rates payable in respect of the land in the name of his late father. It is during a preliminary survey of his land that he discovered the appellant had erroneously included part of it in his own earlier survey of plot 11. The appellant has since then destroyed the respondent's cassava garden on that part of the land and constructed a grass thatched hut thereon. The respondent therefore counterclaimed for a declaration that land belong to the respondent a declaration that the appellant is a trespasser onto the land, general damages for trespass to land, *mesne* profits, a permanent injunction, interest and costs.

[4] In his reply to the counterclaim, the appellant stated that the late Temteo Onguti occupied the land temporarily and later vacated during the year 1970. The respondent's late father, Onyango, is not in any way related to Temteo Onguti. The respondent is not entitled to the remedies sought since he has no basis for claiming an interest in the land in dispute.

The appellant's evidence in the court below:

[5] P.W.1 Lukwiya Jimmy testified that his late father, Mzee Asaleri Okere, acquired the land in dispute ay back in 1912 as vacant unclaimed land and occupied it until his death during the year 1972. He was buried on that land. The appellant left the land in dispute during the year 1982 when he was posted to work in Kotido, leaving behind his sisters P.W.6 Florence Agula and Min Oringi. He has a grass thatched house on the land, which he built in 1998 and he used to pay municipal rates for plot No. 11 (document P. ID.2 (a) to (c) dated 6th March, 1978; 9th December, 1983 and 5th December, 1995 respectively). On 19th October, 1995 he received a five year lease offer for plot No. 11 with effect from 1st November, 1995 (document P. ID.1). He had during the year 1995 begun construction thereon a permanent house at foundation level. Instructions had on

5th December, 1995 (document P. ID.1) been issued for preparation of a lease agreement. The respondent trespassed onto the land in 1997 but he let him stay due to the then prevailing insurgency.

[6] That the appellant returned to the land in 1994 and found that the respondent had trespassed onto an area measuring 50 x 80 metres. The five year lease offer he obtained was in respect of one plot, which is to the West of and adjoining the land in dispute (document P. ID.4 dated 19th October, 1995). One of the conditions for the lease offer was for him to construct a building worth not less than shs. 60,000,000/= and that explain the building now at foundation level, whose construction he began during the year 1995. It is not true that his late father, Mzee Asaleri Okere, acquired the land as a gift from the Church. When the insurgency ended in the year 2006 he asked the respondent to vacate but he refused to do so.

[7] P.W.2 Penina Amito testified that she is the biological daughter of Mzee Asaleri Okere. She was born on the land in dispute and lived thereon until her marriage in 1958, when she left for her matrimonial home. Mzee Asaleri Okere acquired the land while he was a cook at the Church, from a one Asaleri Okello who had vacated it. It during the insurgency that the respondent requested the appellant to reside on the land temporarily. When the appellant returned later after the insurgency, he asked the respondent to leave but he refused to. Mzee Asaleri Okere used to pay ground rent for the land but upon his demise, the appellant took up the responsibility. There are graves of their deceased relatives on the land, *nsamya* trees, mango trees, *mivule* trees, all planted by the late Mzee Asaleri Okere on the land.

[8] P.W.3 Atube Julius testified that he had known the appellant since childhood as he lived in the neighbourhood of the land in dispute. The appellant's late father, Mzee Asaleri Okere, acquired the land as a gift from the Church. Land in that entire area belonged to the Church of Uganda. The appellant was born and

raised on that land. The appellant inherited the land in dispute from Mzee Asaleri Okere in 1971. The respondent's land is in Ajulu but due to insurgency he requested the appellant to reside on the land temporarily. Later after the insurgency, the appellant asked the respondent to leave but he refused to do so. Temteo Onguti did not live on the land in dispute but rather the one South of it. He was no aware of previous litigation between the Church and other persons that included the respondent.

[9] P.W.4 Loum Joe Denis testified that the land in dispute belonged to his late grandfather, Mzee Asaleri Okere. It is during the insurgency that the respondent came to reside on the land in dispute. The land belonged to the appellant's father. Later after the insurgency, the appellant asked the respondent to leave but he refused to do so. The respondent's land is in Ajulu and that is where his father was buried.

[10] P.W.5 Odoch William Oketayot testified that the appellant inherited the land in dispute from his late father, Mzee Asaleri Okere. During the insurgency, the respondent left his land in Ajulu, settled for some time in Laliya and eventually came and settled on the land in dispute. The respondent did not require the appellant's consent to reside on the land. The respondent came onto the land from Patiko sub-county. The land originally measured 200 square meters in all during the appellant's father's lifetime, not 50 x 80 meters. Later after the insurgency, the appellant asked the respondent to leave but he refused to do so.

[11] P.W.6 Agula Florence testified that it is during the year 1975 when she began living with the Appellant on the land in dispute. The land measured two acres at the time. The appellant left the land in dispute during the year 1982 when he was posted to work in Kotido, leaving behind his sister Aol Milly and the witness. By 1986 their possession had not been disturbed by anyone.

The respondent's evidence in the court below:

[12] D.W.1 Abalo Julia testified that she came to live with the respondent on the land in dispute during the year 1985. By then her late husband, Oburo Matiya, was already resident on the land, living with his paternal uncle Temteo Onguti on the land, before the latter died in 1983. There was no insurgency at the time. Upon the death of Temteo Onguti, the respondent occupied the and in 1990, constructed a house thereon and continued paying ground rent for the land. The appellant's sister, Aol Winnie trespassed onto the land and constructed a hut thereon during the year 2017 and 2018. Temteo Onguti used to repair bicycles from under a Tamarind tree which still exists on the land. It is during the year 2015 that the appellant began claiming the land as his.

Proceedings at the *locus in quo*:

[13] The trial court then visited the *locus in quo* on 17th April, 2019 where it observed two survey mark-stones separating the land in dispute from that West of it. One of the mark stones was right behind the respondent's permanent house. The appellant has five graves of his deceased relatives on the land in dispute. The respondent too was buried on the land in dispute during the year 2018. There are six huts on the land occupied by the respondent's relatives. The appellant's nieces constructed two grass thatched huts on the land.

[14] The Court prepared two sketch maps on illustrating the features seen during the visit. The first map illustrates the area in dispute, from the respondent's perspective, as being an inverted block "L" or figure "7" shape. It abuts on Dagomin Crescent Road to the North, National Water and Sewerage Corporation facility to the East, the area on which is located the appellant's foundation of an incomplete building to the South. To the West is land that belongs to Penina Labeja. The lower south-west enclave of the inverted block "L" or figure "7" shaped area is where five graves of the appellants' deceased relatives are

located. Within the contested area, is the respondent's permanent house, the respondent's grave, five huts and a latrine tending mostly towards the North of that area and two huts attributed to the appellant's sisters, one eucalyptus tree and multiple mango trees, all features tending towards the South of the area. The second map illustrates the area in dispute from the appellant's perspective. From that perspective, the entire area, including the enclave on which is located the five graves, is one plot, rectangular in shape.

[15] All the features mentioned above are enclosed within its boundaries. Three survey mark-stones delimit the dimensions of that rectangular plot; one at the North-West corner, the other at the South-West corner and the last in more or less the middle of the northern boundary along Dangomin crescent Road. However, the ones on the South-East and North East corners as well as the one that ideally should be more or less in the middle of the Southern boundary, that should longitudinally correspond to the one more or less the middle of the northern boundary, along Dangomin crescent Road, were not found. The respondent's grave is the south-most feature of the respondent's property, closest to what would, for all intents and purposes, serve as an imaginary latitudinal boundary line between the Northern part dominated by the respondent's features, and the Southern part dominated by the appellant's features.

Judgment of the court below:

[16] In his judgment delivered on 31st May, 2019 the trial Magistrate found that at the *locus in quo*, the court found that the plot of land over which the appellant obtained what is now an expired lease offer is different and separate from the land in dispute. The land in dispute is occupied by the respondent who has his developments thereon. The respondent has a permanent building on the land which cannot be characterised as a temporary settlement. When the appellant undertook survey of the land upon obtaining the lease offer, he planted some of

the survey mark stones right behind the respondent's house. The portion on which the graves of the appellant's deceased relatives are located is not within the area claimed by the respondent. The land occupied by the appellant is different from that occupied by the respondent. Although the appellant disputed the respondent's blood relationship with the late Temteo Onguti, he did not dispute the fact that the late Temteo Onguti occupied the land in the past, who by implication was a bona fide occupant of what previously was public land. Although the appellant's sister trespassed onto the land in 1987 when they constructed grass thatched huts thereon, the appellant cannot be held accountable for their actions. The fact that the respondent was recognise sin a suit previously decided against the Diocese of Northern Uganda, the fact that he paid ground rent for the land following the death of Temteo Onguti, all together provided further proof of the fact that he has been a resident of the area for a long time. The appellant failed to prove that the land in dispute forms part of the estate of his late grandfather. The respondent proved his case on the balance of probability that he is not a trespasser onto the land. For that reason the suit was dismissed for lack of a cause of action and judgment entered in favour of the respondent on his counterclaim with costs. A permanent injunction was issued restraining the appellant from further interference with the respondent's quiet possession and enjoyment of the land.

The grounds of appeal:

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

1. The learned trial Magistrate erred in law and in fact when he failed to properly and judiciously evaluate all the evidence on court record and that obtained at the *locus in quo* and thus reached a wrong decision that the appellant was not the lawful owner of the suit land, hence a trespasser on the land.

2. The learned trial Magistrate erred in law and in fact when he failed to properly conduct proceedings at the *locus in quo*, ignored some of the evidence available there and therefore reached a wrong decision.
3. The learned trial Magistrate erred in law and in fact when he misapplied Physical Planning laws and those relating to land within municipalities, thereby reaching a wrong decision.
4. The learned trial Magistrate erred in law and in fact when he failed to evaluate evidence on record regarding the existence of several old graves of the appellant's deceased relatives indicating he is the more probable owner of the land compared to the respondent's lack of evidence of occupancy.
5. The learned trial Magistrate erred in law and in fact when he held that the graves lay outside the area enclosed by the survey mark-stones yet at the *locus in quo* it was demonstrated that they lay within that area.
6. The learned trial Magistrate erred in law and in fact when he held that the land was customary land belonging to the respondent when there was no evidence to that effect whatsoever.
7. The learned trial Magistrate erred in law and in fact when he held that the matter was *res judicata* in light of an earlier decision by the Chief Magistrate's Court when no evidence to that effect had ben adduced in court.
8. The learned trial Magistrate erred in law and in fact when he held that the respondent's interest was recognised when he paid ground rent following the death of Temteo, yet there was no evidence of the same tendered in court during the trial, save for ground rent payment receipts tendered by the appellant.
9. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate evidence on record and the locus findings thus reaching a wrong conclusion that there was another parcel of land belonging to the appellant at the same locality other than the suit land where the boundaries were well ascertained during locus by mark stones behind the

structure, another down, then another clearly seen from the locus mapping.

10. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate evidence thus reaching a wrong conclusion that the appellant's relatives' graves were not within the suit land whereas they were, as they were clearly within the marks tones that the appellant described in court and showed court during locus.
11. The learned trial Magistrate erred in law and in fact when he disregarded the evidence of the appellant on record and indicated that the respondent had sought refuge from the appellant claiming insurgency, thus reaching a wrong conclusion.
12. The learned trial Magistrate erred in law and in fact when he concentrated more and considered minor contradictions in the appellant's witnesses that did not go to the root of the case of who the actual owner is and who the trespasser is, thus reaching a wrong conclusion.
13. The learned trial Magistrate erred in law and in fact when he failed to evaluate the evidence on record and reached a wrong conclusion that the appellant failed to prove that the suit land was his (whereas he did) as clearly seen, by among others, his relatives' graves on the locus map.
14. The learned trial Magistrate erred in law and in fact when he held that the respondent had proved his case on the balance of probabilities, whereas not.
15. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record and thus came to a wrong conclusion that the counter-claimant was the customary owner of the suit land, when there was no evidence to prove the same in favour of the counterclaimant, but rather ample evidence in favour of the ownership claim by the appellant.
16. The learned trial Magistrate erred in law and in fact in declaring the respondent the owner of the suit land in clear violation of the law applicable to land situated within a municipal setting.

17. The learned trial Magistrate erred in law and in fact when he found that the respondent had inherited the suit land from his late father “Temteo Onguti” who had himself inherited it from the respondent’s alleged grandfather Musa Ali, whereas these were not facts and there was no record of the same during trial, thus reaching a wrong conclusion.
18. The learned trial Magistrate erred in law and in fact when he dismissed the appellant’s case in his judgment, for lack of a cause of action.

Arguments of Counsel for the appellant:

[18] In their submissions, counsel for the appellant argued that the trial Magistrate erred when he found that the land in dispute was different from that whose boundaries are marked by survey mark stones. The visit to the *locus in quo* and the sketch map that was prepared thereat does not indicate any such distinctive boundary. It is one single plot and not two plots as found by the trial Magistrate. The entire land was enclosed within the boundaries marked by the survey mark stones. The court rightly observed that to exclude the area covered by the graves would have given the land in dispute an irregular shape. The respondent occupied part of that land during the insurgency. It was erroneous for the trial Magistrate to have found that there was no cause of action yet there was evidence of the respondent’s unlawful presence on the appellant’s land. The trial Magistrate completely ignored the significance of the presence of graves of the appellant’s deceased relatives on that land. The respondent had no grave of any of his relatives on the land until his forceful burial thereon in the year 2018. Neither was Temteo Onguti, from whom the respondent claimed title, buried on that land. It was erroneous to have declared the respondent a customary owner of the land and not issue an eviction order in light of the presence of the appellant’s sisters’ huts on the same land. The trial Magistrate did not allude to any of the material arguments presented in counsel for the appellant’s written submissions to the court. They prayed that the appeal be allowed.

Arguments of Counsel for the respondents:

[19] The respondents did not file submissions in response.

Duties of a first appellate court:

[20] 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*).

[21] 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 fourteen struck out for being too general.

[22] The court finds the first and fourteenth grounds of appeal are too general that they offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is

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

Grounds four, five six, seven, eight, nine, ten, thirteen, fifteen and seventeen struck out for being argumentative

[23] Furthermore, the court finds rounds 4, 5, 6, 7, 8, 9, 10, 13, 15 and 17 to be argumentative. According to Order 43 rule 1 (2) of *The Civil Procedure Rules*, grounds of appeal must not be argumentative. They should be stated concisely without any argument or narrative. They should be limited to specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, and in a third appeal the matters of law of great public or general importance, which are considered to have been wrongly decided. A ground contains narrative when apart from specifying the points considered to have been wrongly decided, it also contains averments that seek to illustrate or contextualise the point. An argument is merely a set of statements positing premises ending with one which is designated as the conclusion. A ground of appeal is considered argumentative when it contains evaluative averments suggesting a desired conclusion, or includes inferences

and characterisations of facts. Grounds 4, 5, 6, 7, 8, 9, 10, 13, 15 and 17 all fell foul to this requirement and are accordingly struck out.

Ground two; Errors in conducting the proceedings at the *locus in quo*

[24] In the second ground of appeal, the trial court is criticised for conducting proceedings at the *locus in quo* in an irregular manner and in considering the evidence obtained thereat in a selective manner. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*).

[25] Practice Direction No.1 of 2007 (*Practice Direction on the Issue of Orders Relating to Registered Land Which Affect or Impact on the Tenants by Occupancy*) outlines the procedure to be followed in conducting such proceedings. I have examined the record and have not found any material violation. Counsel for the applicant did not point out any either in her submissions.

[26] Upon examining the trial record, I find that the trial court was guided by both parties in identifying features they considered important to their respective cases. The only variation of import in the two versions is the extent of the boundaries of the land. In the appellant's version, the graves of his deceased relatives and the foundation of his incomplete building were included in the land in dispute to give it the appearance of a rectangle, while that of the respondent excluded the two features, giving the land in dispute the shape of an inverted block "L" or figure "7." The two sketch maps are available on the record.

[27] In his evaluation of the observations made during that visit, the trial Magistrate stated that "the land in dispute is occupied by the respondent who has his

developments thereon. The respondent has a permanent building on the land which cannot be characterised as a temporary settlement. When the appellant undertook survey of the land upon obtaining the lease offer, he planted some of the survey mark stones right behind the respondent's house. The portion on which the graves of the appellant's deceased relatives are located is not within the area claimed by the respondent. The land occupied by the appellant is different from that occupied by the respondent." These observations are consistent with the illustration made in the two sketch maps and his notes taken during that visit. There is no merit in the ground; it accordingly fails.

Ground three; Court's misapplication of Physical Planning Law.

[28] The third ground of appeal criticises the trial court for its misapplication of Physical Planning laws. It was submitted by counsel for the appellant that the trial court erred when it failed to find that the land in dispute is comprised in one single plot and not two plots. The entire land was enclosed within the boundaries marked by the survey mark stones. This submission is contrary to the appellant's pleadings, his testimony and the court's observations made at the *locus in quo*. In paragraph 3 (a) of his plaint, the appellant sought a declaration that "the land measuring approximately 30 x 50 plot 11 Dangomin Crescent and un-plotted land of about 25 x 50 all situate at Mican village…"

[29] During his testimony under cross-examination, the appellant stated that "…the five year lease offer I obtained was in respect of one plot, which is to the West of and adjoining the land in dispute…" The two sketch maps prepared at the *locus in quo* illustrate three survey mark-stones were found; one at the North-West corner, the other at the South-West corner and the last in more or less the middle of the northern boundary along Dangomin crescent Road. The one that ideally should be more or less in the middle of the Southern boundary, that should longitudinally correspond to the one more or less the middle of the northern boundary, along Dangomin crescent Road, was not found. The extreme Eastern

boundary marked by the South-East and North East corners had no mark stones at all.

[30] All the above aspects of the case consistently show that the land might at one time have been one block but during the year 1995, when the appellant caused its survey, it was split longitudinally into two; the part to the West was surveyed and mapped and became plot No. 11 while the other part to the East remained un-surveyed and unmapped. The three marks stones that were visible and the one that was missing were planted to delimit the boundaries of plot 11, which excludes the part that remained un-surveyed, to the East.

[31] The dispute arose from the fact that despite the survey having been undertaken in a longitudinal fashion, splitting the land into two adjoining parts, East and West, the occupation and user by the two parties established a latitudinal pattern, North and South. The respondent's artefacts and activities on the land are predominantly on the Northern part traversing the two plots (the surveyed plot 11 and the un-surveyed adjoining it to the East) while those of the appellant are predominantly to the south, they too traversing the two plots (the surveyed plot 11 and the un-surveyed adjoining it to the East). The respondent's grave is the south-most feature of the Northern side he occupied, closest to what would, for all intents and purposes, serve as an imaginary latitudinal boundary line between the Northern part dominated by the respondent's features, and the Southern part dominated by the appellant's features. In the sketch map illustrating the appellant's demonstration of features at the *locus in quo*, the trial Magistrate marked this imaginary line, beginning from the East around the area of the Eucalyptus tree and continuing in a straight line to the Western boundary.

[32] When adjoining occupants of unregistered land treat a line as being the boundary between them, though that line may be different from the officially recognised boundary that existed hitherto, and when those actions continue uninterrupted for such a duration of time that to depart from it would be unconscionable, the

parties are deemed to have established the line as the boundary, through recognition and acquiescence, regardless of the location of the officially recognised boundary that existed hitherto. The boundary is binding even when it is not reflected in writing. For not less than nine years, the conduct of the appellant and the respondent reflected the imaginary line, beginning from the East around the area of the Eucalyptus tree and continuing in a straight line to the Western boundary, as the boundary marking the limits of each other's activities on the land in dispute. It became established as the boundary line, through recognition and acquiescence, regardless of the location of the officially recognised boundary that existed hitherto.

[33] The issue as to whether or not this well-established latitudinal pattern of occupation and user by the two parties is consistent with the Municipal plans in light of the longitudinal sub-division, was not canvassed by evidence or in argument during the trial. The trial Magistrate cannot be faulted for having made his decision without taking into account a matter that was never canvassed by the pleadings of either party, by the evidence of either party nor submitted to him by either party as one of the issues to be tried. This ground too fails.

Grounds eleven, twelve and sixteen. Findings as to Respondent's settlement on land.

[34] In grounds 11, 12 and 16, the court is said to have erred when it failed to find that the respondent settled on the land during insurgency, attaching too much weight to contradictions in the appellant's evidence and finding that the land is owned by the respondent. During the hearing, the appellant alluded to his having obtained, at one time in the history of this land, a lease offer of five years' initial term with effect from 1st November, 1995. He produced photocopies of the lease offer form and general receipts for payment of the municipal rates. That set of documents was received as "documents identified" but none of them was ever exhibited. There is a distinction between exhibits and articles marked for identification.

[35] The term exhibits is confined to articles which have been formally proved and admitted in evidence (see *Des Raj Shema v. R. (1953) EACA 310*). The mere marking of a document for identification does not dispense with the formal proof thereof (*see Okwonga Anthony v. Uganda S. C. Criminal Appeal No.20 of 2000*). It follows therefore that once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. The document then becomes part of the court record. If the document is not admitted into evidence as an exhibit, it only remains as hearsay evidence, untested and an unauthenticated account. The trial Magistrate therefore cannot be faulted for not having attached any weight to those documents.

[36] As regards the two versions presented to the court explaining the respondent's presence on the land, the court heard the testimony of the appellant, P.W.2 Penina Amito, P.W.3 Atube Julius, P.W.4 Loum Joe Denis and P.W.5 Odoch William Oketayot, all of whom consistently testified that the appellant was born and raised on that land, which he later inherited from his father, Mzee Asaleri Okere in 1971. The respondent's land is in Ajulu but due to insurgency he in 1997 requested the appellant to reside on the land temporarily.

[37] To refute this evidence, the respondent's wife D.W.1 Abalo Julia testified that she came to live with the respondent on the land in dispute during the year 1985. She contradicted herself when she continued by saying that it is upon the death of Temteo Onguti, that the respondent occupied the land in 1990, whereupon he constructed a house thereon and continued paying ground rent for the land. In further contradiction she stated further that by the time she joined her late husband Oburo Matiya in 1985, he was already resident on the land, living with his paternal uncle Temteo Onguti on the land, before the latter died in 1983. Apart from these contradictions being unexplained, it was not clear whether or not her testimony was entirely based on knowledge or parts of it on information, and in the latter case, which parts were so affected. He evidence was unreliable

and should not have been preferred in light of that of the appellant and his witnesses. The court trial court therefore misdirected itself its evaluation of this part of the evidence.

[38] I find as that the appellant's evidence proved it as a fact that the appellant had in 1994 returned from Kotido and was occupying the land. The respondent came to live on this land three years later, during the year 1997, as an internally displaced person by reason of the then prevailing insurgency. It was the appellant's case that later after the insurgency during the year 2006, the appellant asked the respondent to leave but he refused to do so. The implication is that the respondent had by that time occupied the Northern part of the appellants land for nine years, during which time he had constructed a permanent house, despite the fact that the fact that the appellant was resident on the land.

[39] The common law doctrine of proprietary estoppel has been used to found a claim for a person who is unable to rely on the normal rules concerning the creation or transfer (and sometimes enforcement) of an interest in land (see *Ramsden v. Davson (1866) L.R. 1 H.L. 129; Crabb v. Arun District Council [1976] 1 Ch.183* and Megarry and Wade's *The Law of Real Property (8th Edition)* at pages 710 to 711, para 16-001). It is an equitable remedy, which will operate to prevent the legal owner of property from asserting their strict legal rights in respect of that property when it would be inequitable to allow him to do so. Circumstances must be such that it would be unconscionable for a party to deny that which, knowingly or unknowingly, he or she has allowed or encouraged another to assume to his or her detriment. This is usually the case where a stranger begins to build on land supposing it to be his or her own, and the true owner, perceiving that mistake, abstains from setting the stranger right, and leave him or her to persevere in his or her error. A Court of equity will not allow the true owner afterwards to assert his or her title to the land on which the stranger has expended money on the supposition that the land was his or her own.

[40] This doctrine will operate where the claimant is under a unilateral misapprehension that he or she has acquired or will acquire rights in land where that misapprehension was encouraged by representations made by the legal owner or where the legal owner did not correct the claimant's misapprehension. However, it is trite that a person is not to be deprived of his or her legal rights by mere acquiescence unless he or she has acted in such a way as would make it fraudulent for him or her to set up those rights. This requires proof by the claimant that; (i) he made a mistake as to his legal rights; (ii) that he expended some money or did some act (not necessarily upon the respondent's land) on the faith of his mistaken belief; (iii) the respondent, the possessor of the legal right, knew of the existence of her own right which is inconsistent with the right claimed by the appellant; (iv) the respondent, the possessor of the legal right, knew of the appellant's mistaken belief of his rights; and (v) the respondent, the possessor of the legal right, encouraged the appellant in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting her legal right (see *Willmott v. Barber (1880) 15 Ch D 96* and *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850*).

[41] In the instant case, it was the appellant's evidence that the late Temteo Onguti occupied the land temporarily and later vacated during the year 1970. Taken on its face value, the respondent's version was that he was under a misapprehension that the land belonged to Temteo Onguti. This would negate the appellant's version that from the very beginning the respondent knew that his possession would only be temporary. The respondent expended money by construction of a permanent building on the land, on the faith of that mistaken belief, which was inconsistent with the appellant's rights. The appellant encouraged the respondent in his expenditure of money, indirectly by abstaining from asserting his legal rights, with knowledge of the appellant's mistaken belief.

[42] At common law**,** acquiescence of a degree that amounts to passive encouragement**,** may by way of a proprietary estoppel, deprive an owner of land

in favour of an occupier of land in possession under a mistaken belief in his or her own inconsistent legal right, when it is unconscionable for the owner to reassert his or her title (see *Willmott v. Barber (1880) 15 Ch D 96* and *Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1982] QB 133*). I find on the facts of this case that the appellant's acquiescence was of a degree that amounted to passive encouragement. It would be unconscionable for the appellant to deny that which, knowingly or unknowingly, he allowed or encouraged the respondent to assume to his detriment. Proprietary estoppel will in this case operate to prevent the appellant as legal owner of the land from asserting his strict legal rights in respect of the Northern part of the land occupied by the respondent, because it is unconscionable for the appellant to reassert his title. For different reasons, I come to the same conclusion as the trial Magistrate. It was the right outcome that the suit be dismissed, and judgment entered on the counterclaim in favour of the respondent.

Order:

[43] In the final result, there is no merit in the appeal, and it is accordingly dismissed with costs to the respondent.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

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

For the respondent :