IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0013 of 2014

In the matter between

OTTO AUGUSTINO AITA **APPELLANT**

And

AKENA NEKOMIA **RESPONDENT**

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

Civil Procedure— *Order 18 rule 14 of The Civil Procedure Rules — The court may at any stage of a suit inspect any property or thing concerning which any question may arise.*

Land law *— A visit to the locus in quo must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. 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 or lest Court may run the risk of turning itself a witness in the case. — Boundaries to customarily owned land — The creation of a boundary must be concurrent with the parties' intent to establish the location of the boundary. Land boundaries are created, recognised and perpetuated by the landowners themselves, not the court. It is therefore for the parties to adduce evidence in court as to their true location. — The court will look for evidence of the intention to create the boundary and the evidence resulting from the physical action taken by the owners to establish its location on the ground, guided by the order or hierarchy of evidence based primarily upon the variation in the level of certainty that exists with each form of evidence, reputed to be; natural objects, artificial objects, course, and distance. — When the description of the boundaries is consistent but the dispute is over title, examination of the rival claimants' actions and subsequent treatment of the land will often yield important clues as to the conflicting claims.*

Evidence *— section 166 of The Evidence Act — The improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. — A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for a declaration that he is the owner of land under customary tenure, measuring approximately thirty acres, forming part of a larger chunk of land measuring approximately one square mile, situated at Gem village, Paibona Parish, Awach sub-county, Aswa County in Gulu District, an order of eviction, permanent injunction, general damages for trespass to land, *mesne* profits, interest and costs.

[2] The respondent's case was that his father Mathias Abwang settled on the land in dispute during the year 1947. Following the death of the appellant's father, his uncle, a one Everesto Oyweyo, brought the respondent from Atanga to live together with him on the land in dispute. Later on, the appellant migrated to Akor, located approximately 12 kilometres away from the land in dispute. During the year 2008, insurgency forced the appellant to migrate back to an area within the vicinity of the land in dispute. From there the appellant began encroaching onto the respondent's land by undertaking agricultural activities thereon, hence the suit.

[3] In his written statement of defence, the appellant stated that his family has lived on the land in dispute since the year 1954 and have never vacated. The land was given to them by Valenti Ongwech and Kapipi Alengo who owned it at the time. The respondent was at all material time a neighbour to Kapipi Alengo. During the year 1971 the appellant fled into exile in Tanzania but left behind the rest of his family. When his father died in 1979, he was buried on that very land. They were displaced by the insurgency but continued cultivating the land to which they eventually returned at the end of the insurgency. They have never encroached onto the respondent's land. They prayed that the suit be dismissed.

The appellant's evidence in the court below:

[4] In his defence as D.W.1 the appellant, Otto Augustine, testified that the land in dispute belonged to his late Uncle Everesto Oyweyo who told him that he acquired it from Valenti Ongwech and Kapipi Alengo. He was raised on that land. He first constructed a grass thatched house on the land in 1969. From 1971 to 1979 he was in exile in Tanzania and on return went back to that land and put up another grass thatched house. In 1986 he was forced by insurgency to vacate the land and live in and IDP Camp. He returned to the land in 1990 and lived there until 1996. It is in the year 2007 that the respondent began to claim the land as his. He has thirteen graves of deceased relatives buried on that land, trees he planted, and four fish ponds. The respondent's father was a neighbour to the South of the land. The grazing land belonged to the late Everesto Oyweyo. When he returned to the land in the year 2007, he found it still vacant.

[5] D.W.2 Agoya Grey testified that the land in dispute has belonged to the appellant for over 50 years. The respondent is a neighbour to the appellant. The appellant was occupying the land by the breakout of insurgency. During their stay in the camp, both parties were utilising the land. At the end of the insurgency the appellant returned to the land. The appellant has a house on the land and used to graze livestock on the land. Before him it was Everesto Oyweyo who used to

graze livestock on the land and was buried thereon when he died in 1979. The respondent had a separate grazing land.

The respondent's evidence in the court below:

[6] P.W.1 Akena Nekomia testified that the land in dispute measures approximately 30 acres and forms part of a larger chunk of land measuring approximately one square mile. He used to graze livestock on the land but the appellant had since the year 2008 encroached onto the 30 acres now in dispute. He has since then built five houses on the land. He came from Akor, situated about 12 miles away, to encroach onto the land. The land originally belonged to his late father Mathias Abwang who died in the year 1960. He inherited the land from his late father. In the 1950s, the late Mathias Abwang had permitted Everesto Oyweyo to graze his livestock on approximately 30 acres forming part of the land. It is on that part of the land that he was buried when he died. The respondent is in effective occupation of only twenty acres, which land is insufficient for his livestock. The rest of the land is occupied by members of his family. The appellant's brother Akena Antonio used to live on the land together with Everesto Oyweyo, but later during the year 1964 he migrated to Akor. The appellant too vacated the land and in 1979 he fled into exile to Tanzania from where he returned to Akor to live with his brothers.

[7] P.W.2 Opobo Marion testified that he is a former Parish Chief of the area. During the year 1964 the appellant migrated from the land in dispute to Akor village. The land in dispute originally belonged to the respondent's father and upon his death the respondent took it over. When the appellant returned from exile in 1979 he went to Akor village. The appellant returned to the land in dispute during the 1990s and began construction of a building. The dispute began around the year 2006 when people were returning from the camps. The two parties returned from Awach IDP Cam where they had taken refuge during the insurgency. The appellant's uncle Everesto Oyweyo had lived on the land in the 1950s. Mathias

Abwang and Everesto Oyweyo to graze his livestock used to graze their cattle together on that land. The respondent now occupies the land where Everesto Oyweyo used to live. Everesto Oyweyo left the land in 1964 and went to Akor, leaving behind his son Obwolo Silvano, another of the appellant's cousins and he still lives on the land. Everesto Oyweyo married the appellant's mother and that is how the appellant initially came to the land. They did not have any child together. The appellant is occupying the very land where his mother used to live. The two parties live approximately two kilometres apart on that land. By the time the appellant returned, the respondent was grazing on part of the land and using the other part for growing crops.

[8] P.W.3 Bongomin Jackson testified that the land in dispute measures approximately six acres and is occupied by both parties. The respondent inherited the land from his late father. The appellant's father came and lived with the respondent's father and that is how the appellant came onto the land. Because of the war, the appellant migrated to Akor Centre in 1971. From there they went into an IDP Camp and at the end of the insurgency the appellant returned to Akor while the respondent returned to the land in dispute. It is two years prior to the filing of the suit that the appellant returned to the land in dispute and constructed a building. He now has four to five grass thatched houses on the land. He occupied the very land which had been given to his late uncle to graze livestock. The two Mathias Abwang and Everesto Oyweyo used to graze their livestock on the land but had not established any boundary. When the appellant left the land in 1971 the respondent continued to utilise the land. Everesto Oyweyo was not given the land permanently and when he died he was buried on a separate smaller piece of land.

Proceedings at the *locus in quo*:

[9] The trial court then visited the *locus in quo* on 2nd March, 2013 from where it recorded additional evidence from; (i) Odwar Yosam; (ii) Anyach Collina; (iii)

Safia Lodwong; (iv) Ojara David; (v) Obwoya Marcensio; (vi) Quirino Okot. It observed the location of a boundary. The court prepared a sketch map illustrating the features seen during the visit. It shows that the immediate neighbour to the South of the land in dispute is Anyach Collina. Further South is the land occupied by the respondent. Within the area in dispute is located the former homestead of Kapipi Alengo and the appellant's home. The immediate neighbour to the North is Obwoya Marcensio.

Judgment of the court below:

[10] In his judgement, the trial Magistrate found that the appellant's uncle, Everesto Oyweyo, used to live on the land in dispute and utilised part of it. He used to graze his cattle on the land from the 1950s, together with the respondent's father, Mathias Abwong. It was the latter who settled first in the area at a time when the land was still vacant and unclaimed. Valenti Ongwech and Kapipi Alengo came later and settled in the neighbourhood. When they vacated the land, Everesto Oyweyo occupied a part close to that they had vacated and when he eventually died he was buried thereon. It is not true that the appellant had a family on that land before the year 1990.

[11] The appellant had several graves of his deceased relatives on the land. Remains of the respondent's boundary were visible indicating that the area in dispute used to be the respondent's grazing land before the appellant encroached upon it and began cultivation. It was difficult from the available evidence to pronounce any of the parties as exclusive owner of the land. Their respective predecessors, Everesto Oyweyo and Mathias Abwong used to utilise it together. There was no evidence to show that it is Mathias Abwong who gave part of the land to Everesto Oyweyo, and if so, how much of it he gave him. It was not clear whether or not it was given to him on temporary basis or permanently. The evidence showed that the two predecessors used the land in common. As their successors each of the parties had an interest in the land and thus none could be declared a trespasser.

It was therefore found imperative that the two parties share the land; the appellant was to take 10 acres while the respondent was to take 20 acres to include the location of his homestead. In the event that the land is bigger than the estimated thirty acres, the excess was to be taken by the appellant. The subdivision was to be undertaken after three months from the date of the judgment to enable the appellant harvest his crops. The prayers for award of damages, issuance of an injunction and costs were dismissed. Each party was directed to bear its own costs.

The ground of appeal:

[12] Being dissatisfied with the decision, the appellant appealed to this court on the following ground namely;

1. The trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion and occasioning a miscarriage of justice.

[13] The appellant did not file submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did counsel for the respondent file submissions. It is nevertheless 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*).

Duties of a first appellate court:

[14] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Ground of appeal; too general.

[15] The court finds the only ground of appeal is too general that it offends the provisions of Order 43 rule (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*).

[16] That on its own would have disposed of this appeal but I think it necessary to consider the merits of appeal under the general duty of this court to subject the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. In any event, by virtue of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*, courts are enjoined to administer substantive justice without undue regard to technicalities; it is not desirable to place undue emphasis on form rather than the substance of the pleadings. Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. Courts have always been liberal and generous in interpreting pleadings. The evidence will be re-evaluated on bass of two broad considerations, the procedural aspects of the trial and the correctness of the decision.

[17] As regards the procedural aspects of the trial, the law permits the trial court to carry out an inspection of the locus in quo. According to Order 18 rule 14 of *The Civil Procedure Rules*, the court may at any stage of a suit inspect any property or thing concerning which any question may arise. Therefore, where it appears to the court that in the interest of justice, the court should have a view of any place, person or thing connected with the case the court may, where the view relates to a place, either adjourn the court to that place and there continue the proceedings or adjourn the case and proceed to view the place, person, or thing concerned. The purpose of visiting the *locus in quo* is for the court to view the place where issues that led to the case before the court arose in order to enable it understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. It is also for the proper determination of the case before the court in the interest of justice.

[18] Therefore, a visit to the *locus in quo* must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. 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 or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*). It was an error for the court to have recorded evidence from; ((i) Odwar Yosam; (ii) Anyach Collina; (iii) Safia Lodwong; (iv) Ojara David; (v) Obwoya Marcensio; (vi) Quirino Okot, who had not testified in court.

[19] That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

[20] A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the six additional witnesses, since I am of the opinion that there was sufficient evidence to guide

the proper decision of this case, independently of the evidence of those three witnesses.

[21] Concerning the correctness of the decision, it t is trite that in our legal system, there cannot be a "draw" in litigation. Court must make a finding in favour of one of the parties, against the other. If a judicial officer finds it more likely than not that something did take place, then it is treated as having taken place. If he or she finds it more likely than not that it did not take place, then it is treated as not having taken place. A judicial officer is not allowed to sit on the fence. He or she has to find for one side or the other. Generally speaking in most cases a judicial officer is able to make up his or her mind where the truth lies without expressly needing to rely upon the burden of proof. However, in the occasional difficult case, sometimes the burden of proof will come to his or her rescue. "If the evidence is such that the tribunal can say" we think it more probable than not," the burden is discharged, but if the probabilities are equal it is not" (see *Miller v. Minister of Pensions [1947] 2 All ER 372*). When left in doubt, the party with the burden of showing that something took place will not have satisfied the court that it did.

[22] The trial court directed the sub-division of the land, which would entail the creation of new boundaries to each party's holdings. A boundary is a physical entity marked by physical objects, called monuments, whether natural or artificial. The monument itself is a physical manifestation or representation which embodies the authority of the landowners (the title holders) together with their intent to establish the boundary. A boundary can only be created through the division of an existing estate into two or more parts. The creation of a boundary must, therefore, involve the intentional division of the estate by someone having authority, with reliance upon a limit or extent which is made definite and certain in the form of a monument marking the intended location of the boundary.

[23] In order for a boundary to be created, the owner must first intend on creating a boundary. The intent of the owner is paramount to determining the boundary location. If there is no intent to create a boundary, then no boundary can be created. The creation of a boundary must be concurrent with the parties' intent to establish the location of the boundary. Land boundaries are created, recognised and perpetuated by the landowners themselves, not the court. It is therefore for the parties to adduce evidence in court as to their true location.

[24] Boundaries to customarily owned land have a tendency to fade with the memories of those aware of their first intent. Knowledge of their location may become lost as the physical evidence of their location deteriorates or is destroyed. When evidence as to their location has been lost, destroyed or faded beyond recognition, it is for the court to discern and re-establish their true location from available oral evidence, extrinsic evidence and through the application of the rules of construction, but not to create new boundaries, except where the litigation was purposely for orders of sub-division. The court will look for evidence of the intention to create the boundary and the evidence resulting from the physical action taken by the owners to establish its location on the ground, guided by the order or hierarchy of evidence based primarily upon the variation in the level of certainty that exists with each form of evidence, reputed to be; natural objects, artificial objects, course, and distance. When the reasons for adhering to the presumed priority ranking do not apply to the case, the presumed ranking should fail and the best available evidence should prevail. The location may be established though different methods, such as; (i) by a written contract, (ii) by an oral contract, (iii) by an implied contract revealed by their actions over a long period of time, (iv) by a representation made by one party and passive or active reliance by the other incurring substantial costs which now estops one of the owners evidence of their mutual satisfaction, or (v) by some bona-fide right established in reliance upon a point or line acquiesced to by the landowners.

[25] Only in the case of divisible rights in land can a win-win solution be achieved by court. Outside a suit for sub-division of land, an order directing a subdivision of land, such as was made by the trial court in the instant case, runs the danger of creating new boundaries that may unfairly alter existing vested rights in land. A suit for assertion of title is aimed at establishing existing vested rights in land and thus cannot be permitted to be employed as a means of creating, disturbing or altering them. Otherwise the very purpose of establishing the existence of a pre-dispute permanent boundary for the success of such a suit would be completely defeated. The trial court misdirected itself when it ordered a sub-division of the land.

[26] In the instant case, the suit was for recovery of land based on assertion of title to it. An interest or title in an object of property; a just and legal claim to hold, use, or enjoy it, or to convey or donate it, as one may please. Title is the formal right of ownership of land. It is the union of all the elements which constitute ownership. Title is the means whereby the owner of land has the just possession of his or her property. One who holds vested rights *in rem* in land is said to have title whether he or she holds them for his or her own benefit or the benefit of another. The term “title” is commonly used to specifically relate to ownership. On the other hand, “interest” is the most general term that can be employed to denote a right, claim, title, or legal share in land. More particularly it means a right to have an advantage accruing from the land; any right in the nature of property, but less than title. Interests in land reflect those particular third-party interests which most often impose restrictions upon the title holder’s land rights. Interests in or ownership of land may be held individually, jointly, in common, or in corporate form. It was for the court to determine the nature of interest or right of ownership asserted in this particular parcel of land by each of the parties.

[27] A first step in land conflict resolution is a thorough analysis of the conflict. It is necessary to have a clear and deep understanding of the special characteristics of the particular conflict, the causes of the conflict and the actors involved

(including their positions, attitudes, behaviour, interests, needs and motivations), as well as their relations with one another. Each party's claim in the instant case was for exclusive, individual title over the 30 acres or so, of land. Each of them claimed the entire land by inheritance. While the appellant claimed his predecessor Everesto Oyweyo owned the land exclusively, the respondent claimed that the appellant and the appellant's predecessor only enjoyed a temporary stay on the land during which it was used communally with his own predecessor Mathias Abwang, which occupancy lasted from the 1950s until 1964 when they migrated to Akor and never returned, with the land thereby reverting to the respondent. Although the appellant claimed to have returned to the land at intermittent intervals thereafter, the respondent contended that the appellant only returned in 2006 and that is what sparked off the conflict. This therefore is a conflict that had to be considered from its historical or chronological perspective.

[28] It turns out that both parties asserted the same or indivisible property rights over the parcel of land. Each sought to exclude the other. Exclusive rights to land depend on establishing the extent of its boundaries, coupled with three principal rights: *usus*, the right to utilise the land for one's own purposes; *fructus*, the right to gather and use the fruits of the land; and *abusus*, the right to alienate, i.e. to sell, lease, grant as a gift, or mortgage. The parcel must be well defined with regard to its location. The description of the boundaries should be sufficiently definite and certain, which may be aided by extrinsic evidence if necessary, to identify the parcel of land, and should be capable of isolating it apart from any other parcel. The description is but one piece of the evidence; the actions of the claimants before, during and after the creation of the boundaries provide the court with extrinsic evidence which must be considered.

[29] The respondent contended the derivation of his late father's, Mathias Abwang, ownership of the land in dispute was by way of occupying land that was *Terra nullius,* during the year 1947. This version invokes the doctrine of prior appropriation. By that doctrine, as among appropriators of formerly unoccupied

and unclaimed land, the principle of "first in time, first in right" controls by prioritising possessory rights according to the time of their original acquisition. Under that doctrine, possessory rights are determined by priority of beneficial use. The amount of land being put to a beneficial use is the measure of land that the appropriator is entitled to use in the future, as long as it does not interfere with another prior appropriation. Thus, an appropriator gains the exclusive possessory right to use the land that has been appropriated, over any subsequent appropriators and to the exclusion of subsequent appropriators. The date of the appropriation determines the user's priority to use the land, with the earliest user having a superior right.

[30] When the description of the boundaries is consistent but the dispute is over title, examination of the rival claimants' actions and subsequent treatment of the land will often yield important clues as to the conflicting claims. All the facts and circumstances that prevailed at the time of the creation of the rival interests will be considered together with the conduct of the parties thereafter. It was the respondent's case that during the 1950s, the late Mathias Abwang had permitted Everesto Oyweyo to graze his livestock on the land. It is Everesto Oyweyo who later brought the respondent from Atanga to live together with him on the land in dispute. This was corroborated by P.W.2 Opobo Marion who testified that the appellant's uncle Everesto Oyweyo had lived on the land during the 1950s. He married the appellant's mother and that is how the appellant initially came to the land. Both Mathias Abwang and Everesto Oyweyo used to graze their livestock together on that land.

[31] With land owned communally, groups of people, who are closely bound together by historical ties with one another, common interests and values, share the land mainly for purposes of subsistence. Members may graze their livestock on the commonage. As far as the commonage is concerned, no individual may claim exclusive use of the land (see T. W. Bennett, *Customary Law in South Africa*, Juta (2004) at p 398). Access to the commonage is based on socially-defined

membership that is reinforced and managed within the group, based on the reciprocal obligations of the members in the social hierarchy. Membership of the community is the basis of an individual's entitlement to use of the land. The respondent's claim was thus contradictory when he stated there had been communal use of the land between his father, Mathias Abwang, and the respondent's uncle, Everesto Oyweyo, yet in the same breath he sought to assert a claim to his exclusive use of the land.

[32] Furthermore, it is trite that without two contiguous estates, there can be no boundary. In order to create a new boundary, there must be a conveyance of a right or title which causes a separation in the estate of the grantor. There was no evidence adduced of a conveyance between Mathias Abwang and Everesto Oyweyo to support the respondent's claim that the land formerly occupied by Everesto Oyweyo at any time before, formed part of the land acquired as *Terra nullius* by Mathias Abwang. With any conveyance of land, there can only be one of two possibilities. Either the owner intends to convey property to an existing boundary, or intends to create a new boundary, thereby retaining ownership of a remaining portion of their land and creating a boundary dividing the two ownerships. Without a conveyance to a separate owner, there can be no separation of ownership.

[33] Without a separation of ownership, there can be no boundary created, yet when the court visited the *locus in quo*, it found a boundary separating the land occupied by the respondent, from the land in didpute. The inference is that the land occupied by Everesto Oyweyo did not form part of land which belonged to Mathias Abwang. Everesto Oyweyo's acquisition lay outside land to which Mathias Abwang, as a first appropriator, had gained exclusive possessory rights to the exclusion of subsequent appropriators.

[34] On the other hand, the appellant's version was that the land was given to his late uncle, Everesto Oyweyo, by Valenti Ongwech and Kapipi Alengo who owned it at

the time. The respondent was at all material time only a neighbour South of the land, that belonged to Kapipi Alengo. When the trial court visited the *locus in quo*, the sketch map it prepared indicates that Kapipi Alengo's house is located on the land in didpute. This corroborates the appellant's version of the land having previously belonged to Kapipi Alengo rather than Mathias Abwang. Possession is a question of fact to be decided on the merits of each particular case. It may be established by evidence of physical residence on the land. It may also be established by a show of some visible or external sign which indicates control over the piece of land in question. The respondent had no developments on the land, yet the appellant was found in possession and artefacts of his predecessor in tile too were found on the land.

[35] The respondent sought to rely on the fact that on intermittent occasions the appellant had vacated the land. The respondent contended that the appellant left the land in 1971 whereupon the respondent continued to utilise the land. He construed this as abandonment of the land. On the other hand, the appellant's case was that he vacated the land on intermittent occasions by reason of safety and security concerns. Abandonment is an intentional relinquishment of a known right. Under section 37 (2) (b) of *The Land Act*, where a tenant by occupancy leaves the whole of the land unattended to by himself or herself or a member of his or her family or his or her authorised agent for three years or more, he or she is taken to have abandoned his or her occupancy.

[36] While abandonment requires an intent by the possessor to abandon (and non-use raises a presumption of intent to abandon), forfeiture follows failure to use the land for an unreasonable period of time, regardless of the owner's intent. Intent to abandon, actual or inferred, is not an element of forfeiture. Forfeiture is the involuntary or forced loss of the possessory right, caused by the failure of the proprietor or owner of that right to do or perform some act required for its maintenance. Forfeiture in cases of this nature requires proof only of non-use,

lapse of time and incapacity to exclude. The evidence did no establish any of the requisite factors.

Order:

[37] In the final result, had the trial court properly directed itself, it would have found that the respondent failed to prove his case to the required standard and should have dismissed the case. On that account, the judgment of the court below is set side. Instead the appeal is allowed, and judgment is entered dismissing the suit. The costs of the appeal and of the court below are awarded to the appellant.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondent :