



In their defence, the appellants contended that the respondent had unlawfully purchased land lying within a road reserve and that construction of the road to Bibia which began on 30<sup>th</sup> October 2008 had been done in accordance with the approved Council plans and therefore the respondent was not entitled to any damages. In its judgment, the trial court found that the respondent owned the plot of land in issue and that by constructing a road through part of that plot, the appellant had trespassed on the respondent's land. The court entered judgment for the respondent and awarded the reliefs mentioned earlier.

Being dissatisfied with that decision, the appellants appealed on the following grounds, namely; -

1. The learned trial magistrate erred in law and fact in finding that the respondent was lawful owner of the suit land which is a public road located in Arua Municipality by virtue of purchase from a customary owner of land.
2. The learned trial magistrate erred in law and fact by declaring the appellant trespassers on the suit land which is a public road and restraining them from further trespass onto the respondent's land .
3. The learned trial magistrate erred both in law and fact when he failed to properly evaluate the all the evidence on record and awarded special damages worth Ug shs. 3,000,000/= for a demolished house, general damages worth Ug shs. 2,000,000/= for trespass to land and compensation worth Ug shs. 45,000,000/= for the suit land on which part of a public road is constructed when they were not proved by the respondent.

At the hearing of the appeal, the appellants were represented by Mr. Sammuel Ondoma while the respondent was represented by Mr. Paul Manzi. In arguing the appeal, both counsel addressed grounds one and two together and grounds three separately. The appellant seeks orders setting aside the judgment and orders of the court below, a declaration that the appellant owns and maintains the suit land which is a public road as it is of public importance and an award of costs, both of the appeal and of the trial. The respondent opposes the appeal.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the court below to a fresh scrutiny and re-appraisal before coming to its

own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others vs Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although 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.

The nature of this duty was put more appropriately in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

An appeal ..... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he 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 the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).

In his submissions in support of the appeal, counsel for the appellant argued that P.W.2 respondent's predecessor in title, did not present any evidence of ownership of the land in dispute. She claimed that the land had previously belonged to her husband but could not specify when it was acquired. Furthermore, that customary tenure in urban areas had been abolished by law. Furthermore, that P.W.2 having abandoned the land at one point, there is no evidence to show that she applied to any controlling authority for revival of the customary tenancy. He cited *Kampala District Land Board and another v Venancius Babuyaka and three others, S.C.C.A. No. 2 of 2007* in support of that submission and that therefore the respondent could not have acquired rightful ownership of the land.

Counsel further questioned reliance by the court below on a survey that was done by P.W. 4 as having been done in an irregular manner without approval of the municipal authorities and in absence of any of the interested parties apart from the respondent. He contended that the opening of the road to Bibia was done in accordance with the approved Arua Town plans and there was

no trespass to the respondent's land since the respondent did not have any developments on the land in dispute. Lastly, he argued that the award of damages was not consistent with the principles regarding the award and assessment of damages. He prayed that the appeal be allowed and the orders sought be granted.

In response, counsel for the respondent argued that the trial magistrate properly appraised the evidence adduced and came to the right conclusion. He argued that the land had previously been owned by P.W.2's husband before the respondent bought it. There were clear boundaries demarcated by the neighbouring houses and the testimony of P.W.4 confirmed the appellants' encroachment on his land. He argued that the temporary abandonment of the land by P.W.2 and her husband had not been voluntary and therefore their rights as customary tenants were revived when they returned after the war. Since it was a revival of an existing tenancy rather than the creation of a new one, there was no need to be authorized by the controlling authority. There was trespass to the respondent's land since during the demarcation of the dimensions of the road before the construction began, the respondent's houses were not marked yet during the construction of the road his kitchen was demolished

In grounds one and two, the dispute is essentially over the status of a plot of land within River Oli Division of Arua Municipality. The contention on one hand is that the respondent's occupancy of the plot under customary tenure was illegal and therefore there was no trespass on the land in fact and on the other that he was a lawful owner of the plot as customary tenant.

Customary tenure is recognized by Article 237 (3) (a) of *The Constitution of the Republic of Uganda 1995*, and s. 2 of the *Land Act*, Cap 227 as one of the four tenure systems of Uganda. It is defined by s. 1 (l) together with s. 3 of the *Land Act* as system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which include; (a) applicable to a specific area of land and a specific description or class of persons; (b) governed by rules generally accepted as binding and authoritative by the class of persons to which it applies; (c) applicable to any persons acquiring land in that area in accordance with those rules; (d) characterised by local customary regulation; (e) applying local customary regulation and management to individual and household ownership, use and

occupation of, and transactions in, land; (f) providing for communal ownership and use of land; (g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and (h) which is owned in perpetuity.

Customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules. Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character and thereafter evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply. Review of judicial practice in this area presents three modes of proof of customary ownership.

In the first category, are customary rules that over the years, in the legislative history of land legislation in Uganda, have attained documentation by way of codification. These include persons holding under the *Ankole Landlord and Tenant Law of 1937*, the *Toro Landlord and Tenant Law of 1937* or Bibanja holdings by virtue of the *Busuulu and Envujjo Law 1928* the latter of which under s. 8 (1) provided that except a wife or a child of the holder of a kibanja, or a person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof, no person had the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner. Under s. 29 (1) (a) of the *Land Act*, such former customary tenants on land now have the status of lawful tenants. In such cases, there is no need to prove the nature and scope of the applicable customary rules and their binding and authoritative character but rather the production of evidence to show that the specific land in question is one to which

such rules apply and that the acquisition was in accordance with those rules, for example by production of Busuulu Tickets, as was done in *John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*, and in *Kiwalabye v Kifamba H.C. Civil Suit No. 458 of 2012*. For such interests, production of an agreement purporting to sell and transfer a Kibanja holding is not sufficient proof of acquisition of a lawful holding. There is an additional need to prove consent of the mailo owner, e.g. introduction to the registered owner and payment of a “Kanzu” (see *Muluta Joseph v Katama Sylvano S.C. Civil Appeal No. 11 of 1999*).

In the second category, are instances where because of the more or less homogeneous nature of the community in a specific area, the customary practices regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of the specific parcel of land in that area have attained notoriety that court would be justified in taking judicial notice of such practices under section 56 (3) of the *Evidence Act*. In such situations, a court would take judicial notice as a fact, the existence of such practices which are not subject to reasonable dispute because they are generally known within the trial court’s territorial jurisdiction. Such judicial notice has been taken in matters of distribution of land as part of an estate of a deceased person such as in the case of *Geoffrey Mugambi and two others v David K. M’ugambi and three others, C.A. No. 153 of 1989 (K)* (unreported), where the parties did not adduce evidence to prove the relevant Meru customary law of land distribution. But the Court of Appeal of Kenya held that as the custom was not only notorious but was also documented, the trial Judge was perfectly entitled to take judicial notice of it and it was not therefore necessary to call evidence to prove it. The Court held thus;

“Inheritance under Meru law is patrilineal. The pattern of inheritance is based on the equal distribution of a man’s property among his sons, subject to the proviso that the eldest son generally gets a slightly larger share. In a polygamous household, the distribution of land is by reference to the house of each wife equally, irrespective of the number of sons in the house.” This is the Meru customary law which the Judge applied in an attempt to distribute the deceased’s land among his sons. There was no evidence to suggest either that the deceased had divided his land among the houses of his wives or among his sons. The respondents’ claim was made in their capacity as the sons of the deceased and not on the basis of membership of the various houses of the deceased’s wives. There is no doubt that the Judge understood the custom and

applied it correctly in this case. The respondents had shown that no provision had been made for them by the deceased. This ground of appeal therefore must fail.

In the last category, are cases where the customary rules are neither notorious nor documented. In such cases, the customary law must be established for the Court's guidance by the party intending to rely on it. As a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of persons who would be likely to know of its existence, if it existed, or by way of expert opinion adduced by the parties since under s. 46 of the *Evidence Act*, which permits the court to receive such evidence when the court has to form an opinion as to the existence of any general custom or right, such opinions as to the existence of that custom or right, are relevant. In *Ernest Kinyanjui Kimani v Muira Gikanga [1965] EA 735 at 789*, the court stated:

As a matter of necessity, the customary law must be accurately and definitely established. ...The onus to do so is on the party who puts forward the customary law. ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.

In the instant case, the customary law under which the respondent acquired the land is neither documented nor of such notoriety as would have justified the trial court to take judicial notice of. It was therefore incumbent upon the respondent to adduce evidence of the customary law. In his judgment at page 9 of the record of appeal, the learned trial magistrate found as follows;

The clear and uncontested evidence of P.W.2, 3, and 4 was clear (sic) on this and equally was not contested by the defence and was supported by the evidence of D.W.1 above that at the time Arua Municipality was planned, there were many people in the place and owned land but without land titles. Land holding of this nature in my view is lawful and in line with Article 237 (3) (a) of the 1995 Constitution (customary) and protected under Article 26 of the Constitution.

In coming to the conclusion that the respondent owned the land in question under customary tenure, the learned trial magistrate did not advert to any evidence establishing the existence of any customary rules limited in their operation, which regulated the ownership, use, management and occupation of the disputed land. Any customary law relating to this specific plot of land, being undocumented and not proven to be notorious, was incapable of being judicially noticed

and therefore required proof by persons who would be likely to know of its existence, if it existed at all, or by way of expert opinion. I have reviewed the testimonies of P.W.2, PW3 and P.W.4 which the learned trial magistrate relied on to support the finding that this land was held under customary tenure and I have found that none of those witnesses claimed to be persons with knowledge of the customary law relating to that piece of land, or experts generally of the customary land law of the area in which the land is situated.

The thrust of the testimony of P.W.2 (Rutu Awuru), PW3 (Topista Naima) and P.W.4 (Ajidia Charles) was not centered on acquisition by the respondent through any known and established customary practice but rather on long undisturbed occupancy of the land. In his judgment, the learned trial magistrate at pages 7 – 9 of the record evaluated the evidence of the three witnesses and that of D.W.1. He came to the conclusion that the land belonged to the respondent based on long uninterrupted user and occupancy. The reasoning behind this conclusion is flawed. Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure. That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative in respect of that land, in such circumstances.

I am aware that there exists a line of precedent which seems to suggest that evidence of user of unregistered land may be sufficient to establish customary ownership of such land. One such decision is that of *Marko Matovu and two others v Mohammed Sseviiri and two others, S.C. Civil Appeal No. 7 of 1978* where it was decided that;

There is no definition of customary tenure perhaps because it is so well understood by the people. Where a person has a kibanja, it is generally accepted that he thereby established customary tenure on public land. But not all people live on a kibanja. In many areas people grow seasonal crops on the land they occupy and in other places some use the land for grazing cattle only. Yet all these people also enjoy customary rights over land they use.

Although at the time it was decided there was no statutory definition of customary tenure, s.54 of *Public Lands Act* of 1969 (by then repealed) had defined customary tenure as “a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons.” That definition suggests that evidence of user and occupation

ought to be coupled with evidence of the relevant “laws or customs” limited in their operation to a particular description or class of persons, which definition the *Land Act*, Cap 227 has now extended to include rules limited in their operation to a specific area of land or persons in relation to that land. If the court in *Matovu’s case* and such similar cases decided that mere user and occupancy was enough to prove customary ownership, then it is distinguishable from the instant case since at the time *Matovu’s case* was decided there was no statutory definition of customary tenure, which statutory definition now exists. However, that case may also be understood as having decided that occupation and user is part of the evidence to be considered in determining whether or not land is owned under customary tenure.

Irrespective of the existence of that line of authorities, I am of the view that proof of ownership of land under customary tenure is not established only by evidence of long user or occupation, without more. I am fortified in this view by the decision in *Bwetegeine Kiiza and Another v Kadooba Kiiza C.A. Civil Appeal NO. 59 of 2009*; where the respondent claimed ownership of the land in dispute on the basis that it had been given to him as a gift by the Bataka (local elders) of the area and also due to the fact that since he had from then onwards occupied and used it for a long time, on that basis he had acquired a customary interest in the land. The court decided;

We have carefully perused the record, and it is our finding that there was no evidence led or adduced to prove the custom that LCs and the Bataka (local elders) can allocate land in the form of a gift from which arises a customary interest in Bunyoro.....We also disagree with the finding that as a general rule when one occupies or develops land then *ipso facto*, a customary interest is created. The effect of that holding is that no matter how one comes to the land, as long as one develops it, a customary interest is acquired. Even trespassers would then acquire interest on property which they otherwise shouldn't. In any event this was not proven in evidence and, as a general proposition of customary law, would be unacceptable. It is clear from the authorities above that customary law must be accurately and definitely established and sweeping generalities will not do under this test.

The learned trial magistrate therefore erred when he found that the respondent had proved customary ownership of the land in dispute based only on evidence of a long period of occupation and user without proof that such occupancy and user was in accordance with known customary rules accepted as binding and authoritative in respect of that land, proved by the evidence adduced before him to that effect.

On the other hand, being land in an urban area, it is doubtful that the disputed land could lawfully be held under customary ownership, following the decision in *Kampala District Land Board and another v Venansio Babweyaka and Others S.C. Civil Appeal No.2 of 2007*. In that case, the respondents had been in exclusive possession of the suit land (vested in the appellant by law) since 1998, having acquired it from their predecessors who had been in exclusive possession thereof since 1970. The respondents had utilized it for the business of selling timber and as a motor garage. They had constructed structures on the land to facilitate their trade which included timber sheds and offices. They also paid taxes and rates to the Kampala City Council. When the appellant allocated it to a third party, the respondents sued to stop their deprivation of the property and claimed to be customary tenants on the land. Concerning the issue whether the respondents were customary tenants on the land, the Supreme Court held that;

[There was] a prohibition of customary tenure in urban areas [which] is clear from Section 24 (1) (a) of the *Public Lands Act*. The provisions of subsection (5) merely enabled the Minister to extend the prohibition to other areas especially the rural areas as can be seen from the *Public Land (Restriction of Customary Tenure) Order 1969 (SI 103/1969)*. Therefore, at the time the predecessors of the respondents occupied the suit land in 1970 they could not do so under customary tenure.... Restrictions on acquisition of customary tenure under the *Public Lands Act* seem to have continued as the law continued to govern all types of public land including customary tenure subject to the provisions of the Decree. In order to acquire fresh customary tenure one had to apply to the prescribed authorities and receive approval of his or her application. There was no evidence that such prescribed authorities existed nor that the respondents or their predecessors acquired fresh customary tenure in accordance with the *Land Reform Decree*. I would therefore hold that the respondents could not have legally acquired customary tenure in an urban area of Kampala City prior to the enactment of the *Land Act 1998*.... the provisions of the *Land Act* could not apply retrospectively to legalize acquisition of customary tenure in urban areas before 1998.... the respondents failed to establish that they were occupying the suit land under customary tenure. There was no evidence to show under what kind of custom or practice they occupied the land and whether that custom had been recognized and regulated by a particular group or class of persons living in the area.

Similar decisions can be found in *Tifu Lukwago v Samwiri Mudde Kizza and Nabitaka S.C. Civil Appeal No. 13 of 1996* and in *Paul Kisekka Ssaku v Seventh Day Adventist Church S.C. Civil Appeal No. 8 of 1993* and *Lawrence Kitts v Bugisu Cooperative Union [2010] 1 H.C.B 23* to the

effect that customary interests in public land were extinguished by the provisions of section 3(1) of the *Land Reform decree*.

In her testimony, P.W.2 did not reveal when and how her husband had acquired the land. Her testimony was that she had given birth to ten children while living on the land. At a point in time she had lived in exile during which their houses on the land were demolished. She did not reveal when exactly she returned from exile but at the time she sold the land to the respondent in May 1995, there was no house on the land. It was vacant land.

Needless to say, involuntary abandonment of a customary holding does not terminate one's interest therein, where such interest existed before. In *John Busuulwa v John Kityo and others C.A. Civil Appeal No. 112 of 2003*, the appellant, who had acquired his certificate of title to the land in February 1988 to land situate in rural Mpigi District, sought to evict the respondents who were bibanja holders on the land having acquired them in the mid 1940s. The appellant argued that at the time he acquired the land, it was vacant. The respondents argued that the land was vacant simply because they had been forced by the NRA / NRM war to abandon their bibanja on the land. They temporarily vacated their bibanja because of the insecurity brought about by the NRA bush war in the area. After the end of the war, the respondents returned only to find that the appellant had started cultivating their Bibanja without notice or compensation to them. The Court of Appeal held that the Bibanja were not deliberately abandoned in which case they did not revert to the landlord. The court upheld their customary holding in the land, despite the forced period of abandonment for the duration of the guerilla war.

In contrast to the principle stated in the above mentioned decision, in the instant case, the land in issue is in an urban area. From the evidence outlined before, if P.W.2 occupied the land under customary tenure at any time from 1969 up to 1995, her interest in the land was abolished by the successive laws in force by then, (section 24 of the *Public Lands Act, 1969* and s. 5 (1) of the *Land Reform Decree, 1975*) which abolished customary tenure in urban areas. The abandonment due to the 1979 war had no legal significance since P.W.2 and her husband had no customary interest in the land due to that abolition of customary tenure in urban areas. To revive the interest, if at all it had existed before then, she and her husband needed to have applied to the

controlling authority as the law in force then required. There was no evidence adduced that she undertook that process and that she was duly authorized to own the land under that tenure. In absence of such evidence, she did not revive any customary interest she may have had in the land by simply returning to it from exile. The respondent could not have acquired an interest in the land in 1995, which P.W.2 did not have.

There was no evidence adduced by the respondent establishing a system of customary tenure over the suit property. Neither was there evidence of such tenure as matter of fact nor by virtue of authorization by the relevant controlling authority. On that account, the learned trial magistrate erred when he found that the respondent had proved customary ownership of the land in absence of evidence to show that his predecessor in title indeed held such an interest in the land. P.W.2 could not have passed on by sale, an interest in the land that did not exist in law.

Lastly on this issue of the relevant tenure under which the land was held, although in paragraph 4 of his plaint the respondent claimed to be owner of the land in dispute, he did not specify that he owned it under customary tenure, or any other tenure for that matter. A perusal of the record of proceedings shows that not a single witness ever referred to the land as being held under customary tenure, leave alone any other type of tenure. The question of customary tenure did not feature among the four issues which had to be determined by the court. Although the record of appeal at page 37 indicates that both counsel opted to file written submissions, these were not included in the record of appeal. In the circumstances, it is possible that the question of customary tenure was first raised during the submissions of counsel. For the court to consider an issue raised for the first time that late in the proceedings is a course of action recognized in law. In *Odd Jobs v Mubia* [1970] E.A. 476, it was held:

A court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision; on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.

That decision was subsequently followed by the Court of Appeal for Eastern Africa in the cases of *Nkalubo v Kibirige* [1973] E.A. 102 and *Railways Corporation v East African Road Services Ltd.* [1975] E.A. 128. I have carefully perused the record, and it is my finding though that there

was no evidence led or adduced to prove the custom which allowed P.W.2 to sell the land in issue to the respondent. It is not certain therefore why the trial magistrate canvassed in his judgment, an issue that was not addressed by the pleadings and in respect of which no evidence had been adduced by the parties. In the circumstances, it was a misdirection to find that the respondent was a customary owner of the land on that account as well.

The next aspect of the two grounds addresses the lawfulness of the demolition of the respondent's property on the land. In absence of evidence of any form of tenure under which the respondent held the land, resolving this issues requires first of all a determination of the legal status of the respondent on this land. In the court below, the respondent appears to have relied on the fact that he had developments on the land as evidence of his ownership thereof.

Having failed to establish an interest in law in the land in dispute, this raises the question whether the respondent could instead rely on equity for laying such a claim, more especially on the common law doctrine of proprietary estoppel. This doctrine 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. In *Crabb v Arun District Council* [1976] 1 Ch.183, Lord Denning explained the basis for the claim as follows: "the basis of this proprietary estoppel, as indeed of promissory estoppel, is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law." It will prevent a person from insisting on his strict legal rights, whether arising under a contract, or on his title deeds, or by statute, when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. It is illustrated in *Ramsden v. Dvson* (1866) L.R. 1 H.L. 129, thus;

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake to which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

This doctrine will operate where the claimant is under a unilateral misapprehension that he 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. 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. As is shown in *Crabb v Arun District Council* that one aspect of modern proprietary estoppel is that it can be used as a cause of action, rather than just a defense contrary to the well known mantra that estoppel may be used as a shield, but not a sword.

That doctrine is founded on acquiescence, which requires proof of passive encouragement. Megarry and Wade's *The Law of Real Property (8th Edition)* at pages 710 to 711, para 16-001 summarises the requirements in relation to proprietary estoppel as follows:

A representation or assurance (by acquiescence or encouragement) made to the Claimant that the claimant has acquired or will acquire rights in respect of the property. The claimant must act to his detriment in consequence of his (reasonable) reliance upon the representation. There must also be some unconscionable action by the owner in denying the Claimant the right or benefit which he expected to receive.

Acquiescence can only be raised against a party who knows of his rights. As Lord Diplock put it in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850, 884* thus:

The party estopped by acquiescence, must at the time of his active or passive encouragement, know of the existence of his legal right and of the other party's mistaken belief in his own inconsistent legal right. It is not enough that he should know of the facts which give rise to his legal right. He must also know that he is entitled to the legal right to which these facts give rise.

In *Willmott v Barber (1880) 15 Ch D 96*, the House of Lords described five elements which were required to be shown if a person's legal rights were to be overborne by a proprietary estoppel. It explained the required probanda as follows;

It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the

first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.... the principle requires a very much broader approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment..... The inquiry which I have to make therefore, as it seems to me, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared ...

In the subsequent decision of Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 the court favoured a broader approach directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that he knowingly, or unknowingly allowed or encouraged another to mistakenly assume legal rights, rather than inquiring whether the circumstances could be fitted within the confines of the strict probanda of *Willmott v Barber*. In the latter case, knowledge of the true position of the party alleged to be estopped is merely one of the factors to be considered in the inquiry, and may be most pertinent in considering the requirement of unconscionability. Such knowledge might be determinative in a case of pure acquiescence, in which no active encouragement was offered at all, but might be less relevant in a case where there was some active encouragement coupled with acquiescence and inactivity.

The broader approach was approved by the House of Lords in *Thorner v Major* [2009] UKHL 18 where the court approved the analysis of an estoppel as being based on three main elements of representation / assurance, reliance and detriment, and held that cases of pure acquiescence were to be analysed as cases in which the landowner's conduct in standing-by in silence served as the

required element of representation / assurance. Thus, there was no additional requirement that the estopped party was to have known of the other party's mistaken belief.

If the legal owner stands by and allows the claimant to, for example, build on his land or improve his property in the mistaken belief that the claimant had acquired or would acquire rights in respect of that land or property then an estoppel will operate so as to prevent the legal owner insisting upon his strict legal rights. It applies where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act. The essential elements of proprietary estoppel are further summarized in McGee, *Snell's Equity*, 13 ed. (2000) at pp. 727-28, as follows: an equity arises where: (a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property; (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.

It will be observed from the above summary that to rely on such equity, two things are required, first; that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. The land in dispute in the instant case does not belong to the appellant. Although as a planning and regulatory authority it may have encouraged the plaintiff in his expenditure of money, either directly or indirectly, by abstaining from asserting its legal right and duty in enforcing planning laws and regulations, I am hesitant to extend this common law doctrine to found a claim for improvements on land which did not belong to the appellant in the first place. In my view, this common law doctrine does not apply in respect of land that is not owned by anyone but is rather entrusted to the management of District Land Boards. It also does not apply to acquiescence based only on failure to enforce planning laws and regulations. Therefore, the respondent cannot rely on proprietary estoppel to found an interest in the land nor for his developments on the land.

In the result, there is no evidence on record to prove that either the appellant or the respondent had proprietary rights over the land. This being unregistered land not owned by any person or authority, under Article 241 (1) (a) of the *Constitution of the Republic of Uganda, 1995* and s. 59 1 (a) of the *Land Act*, it is land managed by the District Land Board with power of that Board to allocate it. The respondent is neither a tenant by occupancy on the land since it is unregistered land. Section 4 (1) and 9 (1) of the *Land Act* provide for the issuance of certificates of customary ownership and conversion into freehold of customary holdings respectively, on former public land. The provisions pre-suppose the possibility that persons can be customary tenants on former public land. The respondent did not prove that he was such a tenant. Does an occupier of unregistered land thereby become a customary owner? Does an occupier of unregistered land acquire any interest in the land by virtue of the long duration of such occupancy only? To me the answer to both questions is negative. An occupier who has no statutory right to occupation is prima facie a trespasser, and at best, a tenant at sufferance.

The common law definition of a tenancy at sufferance is the situation which arises where a tenant, having entered upon the land under a valid tenancy, holds over at the end of the tenancy, without the landlord's assent or dissent. (See *Remon v City of London Real Property Co. Ltd.*, [1921] 1 KB 49, 58). *Halsburys Laws of England (4th Edition)* says this of tenancy at sufferance;

A person who enters on land by a lawful title and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance.

In our jurisprudence, the meaning of the expression has been extended to include persons in occupation of former public land, who continued to do so without the authorization of controlling authorities (in the past) or the District Land Boards (in modern times) or other statutory right to occupation. This can be found in decisions like *Lwanga v Kabagambe, C.A. Civil Application No. 125 of 2009*, where the applicant sought a certificate of importance for an intended third appeal to the Supreme Court against a finding that his claim over 3,000 acres of former public land was too big to be called a customary holding. His claim was based on a lease offer that was never accepted. The court found that if he were to be a customary tenant, he was at sufferance, and the land was available for leasing to the occupier or to anyone else. In *Musisi v Edco and Another, H.C. Civil Appeal No. 52 of 2010*, by virtue of *The Land Reform Decree*,

1975 and the *Public Lands Act, 1969*, the system of occupying public land under customary tenure was to continue, but only at sufferance and any such land could be granted by the Commission to any person including the holder of the tenure in accordance with the Decree.

A tenancy at sufferance may be converted into a tenancy at will if the landlord signifies his consent. For example in *Wheeler v Mercer* [1957] AC 416, [1956] 3 All ER 631 the landlord had given valid notice to quit the leased land. This notice had expired. The tenant nevertheless remained in possession while negotiations for a new lease were under way. These negotiations broke down. The House of Lords held that there was a tenancy at will, which could be terminated at any time by the landlord. In the instant case, the trial court was not presented with evidence of any conduct on the part of the appellant that can be construed as having signified its consent to the respondent's occupation of the land. Neither is there evidence to prove that the District Land Board signified its consent to the respondent's occupation of this unregistered land under its authority and management. For all intents and purposes, the respondent was therefore technically a tenant at sufferance on the land, his occupancy being characterized by toleration or absence of objection rather than genuine approval.

The genesis of this dispute can be traced back to 1981 when a statutory body named the Reconstruction and Development Corporation was created for purposes of the physical reconstruction and development of reconstruction areas within its jurisdiction and mandate. The Reconstruction and Development Corporation was authorized by s. 35 of *The Reconstruction and Development Corporation Act, 1981 (No. 5 of 1981)*, to compulsorily acquire land within a reconstruction area, and for that purpose, the Act provided as follows;-

- 35 For the purpose of acquisition of land within a reconstruction area, s 17 (which became s. 16 following the year 2000 revision and reissue of the Laws of Uganda) of the *Town and Country Planning Act* shall be construed as if,
- (a) The following paragraph has been added to sub-section (1)
  - (b) Any land within a planning area required for any of the matters set out in an out-line or detailed scheme approved for the area and in particular and without prejudice to the generality of the foregoing for....
  - (c) after the word "authority" in line 3 of subsection (3) there were added the words "the Corporation"

Apart from the Development Corporation, a Division Council, such as the appellant, being a local government, was by virtue of s 42 of the *Land Act*, authorized to acquire land in accordance with articles 26 and 237 (2) of the Constitution. Furthermore, s. 16 (1) (a) of the *Town and Country Planning Act*, by virtue of that empowerment, authorized the appellant, on the advice of the Board and in accordance with that enactment, to acquire;-

- (a) any land in the planning area required for roads, open spaces, gardens, schools, places of religious worship, recreation grounds, car parks, aerodromes, markets, slaughterhouses and cemeteries; and
  - (b) any land within the planning area which has not been developed in accordance with the outline scheme or a detailed scheme.
- (2) Any land acquired under subsection (1) shall be deemed to have been acquired for a public purpose.

The procedure for compulsory land acquisition for a public purpose is specified by sections 3 – 7 of the *Land Acquisition Act Cap 226*, and briefly is that when the Minister is satisfied that any land is required by a local government for a public purpose, he is required to make a declaration to that effect by statutory instrument. The Minister should then cause a copy of the declaration to be served on the registered proprietor of the land specified in the declaration or the occupier or controlling authority. The land should then be marked out by an assessment officer and measured and a plan of the land made, if it has not already been made. Persons having an interest in the land should then be given notice. The Assessment Officer should then publish the notice in the *Gazette* and exhibit it at convenient places on or near the land stating that the Government intends to take possession of the land and that claims to compensation for all interest in the land be made to him or her. Upon publication of the notice, the Assessment Officer should then proceed to hold an inquiry into claims and rejections made in respect of the land and then make an award specifying the true area of the land and compensation to be allowed for the land. The Assessment Officer should then serve a copy of the award on the Minister and on those persons having an interest in the land and the Government then pays and compensates them in accordance with the award. Finally, the Assessment Officer should then take possession as soon as he has made the award.

The Kenya Court of Appeal in the case of *Onyango and Others v Town Council of Awendo [2010] I E.A. 321* reiterated the position that procedural requirements for compulsory acquisition

are absolutely necessary and ought to be complied with to effectuate the acquisition. It further held that such acquisitions have to be carried out in strict conformity with the constitutional provisions and in good faith.

Before considering the option of compulsory acquisition, and throughout the preparation and procedural stages, acquiring authorities are expected to seek to acquire land by negotiation wherever practicable. They are expected to identify all those with rights which would be infringed if the development contemplated was carried out, and seek to secure release of those rights by negotiation. In the instant case, the evidence adduced during the trial in the court below did not specifically address the issue whether any land in the area was compulsorily acquired either by the Development Corporation or the Division Council.

There was uncontroverted evidence of D.W.2. at page 31 lines 21 to 24 of the record of appeal, where he said that occupiers of the land, including the respondent, were served with notices to vacate and given ample time to do so before the construction works began. The witness though did not explain by what process the appellant acquired the land needed for a road in an otherwise occupied stretch of land. According to D.W.1 at page 28 of the record of appeal, lines 13 – 15, the appellant was only able to undertake bush-clearing of about 3.5 metres and was unable to clear the whole width of 15 metres of the planned road because of the many structures found at the location. If the appellant thereafter acquired any of the land compulsorily, there is no evidence of compliance with the statutory procedure for compulsory land acquisition, in which case the respondent would have a prima facie claim for compensation in respect of any of his developments found to have been lawfully on the land, if at all they were demolished.

The success of his claim nevertheless hinged not only on whether the respondent had a legally recognized proprietary claim in respect of any of the affected property but also on whether such property could be the subject of a lawful claim for compensation. In *Joseph Ihugo Mwaura and others v The Attorney General and others, Petition No. 498 of 2009 (Unreported)*, the High Court of Kenya decided that the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 (similar to our article 26 (2) of the Constitution) does not create

proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework.

It is for that reason that a tenant at sufferance is not covered by articles 26 and 237 (2) of the Constitution and is not entitled to compensation in the event of compulsory acquisition of land, considering that at common law a tenancy at sufferance may be terminated at any time and recovery of possession effected. According to the Court of Appeal in its decision of, *Hajati Mulagusi v Pade C.A Civil Appeal No. 28 of 2010*, a trespasser or a tenant at sufferance is not entitled to compensation. In light of the uncontroverted evidence of D.W.2 at page 31 lines 21 to 24 of the record of appeal, to the effect that the respondent was among the occupiers served with notices to vacate and given ample time to do so before the construction works began, he cannot even complain of lack of adequate notice to vacate, as a tenant at sufferance.

It is no wonder therefore that the cases in which non compliance with procedures of compulsory acquisition of land have resulted in an award of damages, have been based on proof of a lawful proprietary interest by the plaintiff. For example in *Olwit and Another v Mukono Municipal Council, H.C. Civil Suit No. 63 of 2011*, the Plaintiffs owned separate residential houses on land situate within the respondent Municipality. They produced evidence of ownership and approved building plans, duly approved in 1994 by the relevant authorities. On 18<sup>th</sup> July 2010, without any notice to any of them, the defendant's agents started construction of a road, during which process they destroyed part of the second plaintiff's structures and marked that of the first Plaintiff for demolition. The Plaintiffs had purchased the land in the mid 1990's when the road in issue had not yet been gazetted. The court found that their right to own property guaranteed by Article 26 of the Constitution, and providing that no person shall be deprived of property or any interest or right over property unless prompt payment of fair and adequate compensation is made prior to the taking possession or acquisition of the property, had been violated and accordingly awarded them general and special damages alongside injunctive orders.

Similarly in *Onegi Obel and another v the Attorney General and another, H.C. Civil Suit No. 66 of 2002*, the first plaintiff was the registered proprietor of the suit land comprised in L.H.R Vol 902 Folio 7 at Alero Gulu District, to which he had become the registered proprietor in 1975. He

later helped to incorporate the second plaintiff company with himself and his wife as shareholders. The first plaintiff then permitted the second plaintiff to carry on the business of ranching and general farming on the said suit land. The 2<sup>nd</sup> plaintiff then constructed on the land a farm house a cattle dip, a rice mill, underground fuel tanks and a bridge and stocked his farm land with 1000 boran animals. Sometime in the wake of the insurgency in the Acholi sub region some of the above infrastructure on the suit land was destroyed, vandalized and looted. About the year 2001, the Ministry of works constructed an eight kilometer and 20 metres wide public road, with 50 feet reserved on either side, across the suit land cutting it into half without the consent of the plaintiffs. It also excavated murrum and carried away the same leaving the spots uncovered. The plaintiffs complained that by constructing this road the defendant turned the private bridge into a public utility, rendered the farm house, the cattle dip and the rice mill useless because the said road passed too close to them. The court found that the conduct of the defendant amounted to compulsorily depriving the plaintiff of his property rights over the land without compensation in violation of his property rights guaranteed by article 26(2) of the Uganda Constitution. The court made an award of general and special damages.

In the instant case, having been a tenant at sufferance on the land in dispute, the respondent was not covered by articles 26 and 237 (2) of the Constitution and was not entitled to compensation in the event of any compulsory acquisition of the land he occupied, since he had no legal or equitable interest in the land.

Furthermore, the construction of roads within a Municipality or Division of a Municipality is an aspect of physical planning. Section 37 (5) of the *Land Act*, empowers an Urban Council within whose jurisdiction land in an urban area is situated, to restrict and regulate physical developments, subject to any existing scheme approved under the *Town and Country Planning Act* (which has since April 2011 been repealed and replaced by *The Physical Planning Act, 8 of 2010*). The question then follows whether any of the respondent's property rights were violated.

When the appellant embarked on the construction of the road to Bibia, it did so not as a land owner or land management authority, but as a local government. Under item 4 of part 2 (Functions and services for which district councils are responsible) of the second schedule of *The*

*Local Governments Act, Cap 243*, District Councils are responsible for the construction, rehabilitation and maintenance of roads not under the responsibility of the Central Government. Under item 20 of part 4 (functions and services to be devolved by a district council to lower local government councils) of the same schedule, District Councils are required to devolve to lower local government councils, the maintenance of community roads (*Bulungi Bwansi roads*) and specifically under item 21 of Part 5. (B) (Functions and services to be devolved by a city or municipal council to divisions) the repair of murrum and earth roads is entrusted to Municipal Councils and Divisions. From the above provisions, the appellant's authority in matters of related with roads is limited to the repair of murrum and earth roads within its area of jurisdiction. It may engage in activities of construction of such roads possibly as an agent of the District Council. For this purpose, it may be necessary to acquire land compulsorily.

From the testimony of D.W.1 at Page 28 of the record of appeal, the most recent planning scheme of Arua Municipality was done in 1983 and it included the road in issue. According to this witness, the plan was done by the Reconstruction and Development Corporation. This is a corporation which was set up by *The Reconstruction and Development Corporation Act, 1981 (No. 5 of 1981)*. The plan referred to by this witness is presumably the one which constituted the scheme that had been approved by the Minister responsible for housing and urban development which *The Town and Country Planning (Declaration of Schemes) (No. 1) Instrument, S.I 246 – 6*, declared to have come in force of the reconstruction and development scheme for Arua. According to regulation 3 (a) and (c) thereof, the scheme for Arua was from the date of publication of that instrument (as S.I. 29 of 1988), available for inspection at the municipal offices of Arua, and at the offices of the resident managers of the Reconstruction and Development Corporation at Arua, among other places.

Therefore, by the time the respondent acquired the disputed plot in 1995, the reconstruction and development scheme for Arua had been in place and available for inspection for over seven years at the various places mentioned by the Statutory Instrument. According to D.W.1, the plan showed that the disputed land fell partly within road reserve and partly within the set-back of the planned road. Apparently, the respondent did not carry out due diligence before entering into the transaction of purchase with P.W.2. At page 19 of the record, the first time the respondent made

any enquiries about the existence and dimensions of the road in that area was after 31<sup>st</sup> October 2008, more than twelve years after the purported purchase, following the demolition of his houses on the land.

The standard of due diligence imposed on a purchaser of unregistered land is much higher than that expected of a purchaser of registered land. The reason is illustrated by the decision in *Williams and Glyn's Bank Ltd v Boland*, [1981] AC 487 where Lord Wilberforce when commenting on the Torrens system of land registration said:-

The system of land registration....is designed to simplify and to cheapen conveyancing. It is intended to replace the often complicated and voluminous title deeds of property by a single land certificate, on the strength of which land can be dealt with. In place of the lengthy and often technical investigation of title to which a purchaser was committed, all he has to do is consult the register.....Above all, the system is designed to free the purchaser from the hazards of notice – real or constructive – which, in the case of unregistered land, involve him in inquiries, often quite elaborate, failing which he might be bound by equities.

Therefore, a purchaser of unregistered land who does not undertake the otherwise expected “lengthy and often technical investigation of title” which will often ordinarily involve him in quite elaborate inquiries, is bound by equities relating to that land of which he had actual or constructive notice. According to Cheshire and Burns in their book *Modern Law of Real Property, 16th Edition page 60*; constructive notice is generally taken to include two different things: (a) the notice which is implied when a purchaser omits to investigate the vendor’s title properly or to make reasonable inquiries as to the deeds or facts which come to his knowledge; (b) the notice which is imputed to a purchaser by reason of the fact that his solicitor or other legal agent has actual or implied notice of some fact. This is generally called imputed notice. In *Hunt v Luck (1901) 1 Ch 45* the court considered the nature of constructive notice. Farwell J said: “Constructive notice is the knowledge which the courts impute to a person upon presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him on further enquiry or from willfully abstaining from inquiry to avoid notice.”

In *Uganda Posts and Telecommunications v A.K.P.M. Lutaaya, S.C. Civil Appeal No. 36 of 1995*, it was held that a person who conducts a perfunctory search of title to land before purchase, takes it subject to existing equitable interests in the land. In that case, the respondent had limited his due diligence before the purchase, to a mere search of the register. He had not carried out a physical inspection of the land and the court found that had he done so, he would have discovered that the respondent had an earth satellite station constructed and operational on the land. He therefore took the land subject to the respondent's possessory interests.

In this case, the respondent did not undertake any inquiries, elaborate or otherwise, with a view to establishing existing planned developments over that land under the 1983 reconstruction and development scheme for Arua, yet the plans were available for inspection. Had he undertaken a proper search, he would have discovered that the area of land he was about to purchase was not designated as a residential plot and was instead the subject of a planned road to Bibia. The presumption is so strong of the fact that due diligence would have readily disclosed the existence of the plan that constructive knowledge of this fact cannot be allowed to be rebutted by his abstaining from making the necessary inquiry.

The time material to an inquiry of this nature is that before and during the conclusion of the transaction. The trial court does not appear to have considered this at all but instead delved in inquiries made by the respondent immediately before or after 31<sup>st</sup> October 2008, following the demolition of his houses on the land, a period of more than twelve years after the purported purchase. At page 19 of the record, the respondent testified that his first inquiry about the plan and road in issue was in October 2008. He tendered a letter dated 25<sup>th</sup> October 2008 to that effect in evidence, as exhibit P.E.2. This shows that he made the inquiries a few days before construction of the road began. He was supported in this by the testimony of P.W.4. Their joint evidence in that regard was of no evidential value in the determination of the question whether the respondent's acquisition of the land in dispute was subject to the planned road or not as indicated on the 1983 reconstruction and development scheme for Arua. In *Regina -v- Pratt (1855) 4 E & B 860*, Crompton J, Erle J held; "I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and re-passing, he is a trespasser." In the instant case, the respondent proceeded to construct

buildings and occupy land reserved for a public road. He has practically been a trespasser on that land since 1995.

As a final aspect of the alleged encroachment onto his land, both at the trial and during submissions on appeal, the respondent contended that the road had exceeded the dimensions indicated on the 1983 development scheme for Arua. In this he relied on the testimony of the respondent at page 20 of the record where he testified that the road encroached ten metres onto his land. Under cross-examination at page 21 of the record, he contended that his land was not in a road reserve because there was no road when he bought the land. P.W.4 at page 12 of the record of appeal supported him in this when he testified that following a survey he undertook, he found that the respondent's land was about ten metres away from the road.

Under s. 2 of the *Roads Act, Cap 358*, the Minister may by statutory instrument declare an area bounded by imaginary lines parallel to and distant not more than fifty feet from the centre line of any road to be a road reserve. According to item 3 (e) of the first schedule and item 2 (d) of the second schedule to *The Roads (Road Reserves) (Declaration) Instrument, S.1 358—1*, roads under the mandate of the local governments in Arua will either have reserves bounded by imaginary lines parallel to and distant fifty feet from centre line or parallel to and distant thirty feet from centre line. By comparison, *The National Physical Planning Standards and Guidelines, 2011* published by the Directorate of Physical Planning and Urban Development of the Ministry of Lands, Housing and Urban Development, at page 26 recommend the following road reserves for urban roads; 30 metres for Secondary Distributor Roads and 18 metres for Tertiary (Local Distributor) roads. These are roads which link locally important centers to each other, to more important centers, or to higher class roads (rural / market centers) and linkage between locally important traffic generators and their rural hinterland. Their major function is to provide both mobility and access. Therefore, at 15 metres, the road to Bibia was within both the statutory maximum and the recommended national standards.

In relation to any road within or passing through any government town, s. 4 of the *Roads Act, Cap 358* authorizes the Minister, subject to provisions of the *Public Health Act* or any regulations or orders made under the *Public Health Act* or any scheme made under the *Town and*

*Country Planning Act*, by an order published in the Gazette to prescribe the line in which buildings shall be erected in such town or area; or to prescribe the distance from the centre of the road within which no building shall be erected in such town or area. This is technically known as the road setback. These are the minimum distances a building must be set away from the boundaries of a plot for reasons of health, safety, maintenance and amenity. In absence of a duly gazetted order of the Minister designating the setback for Arua Town, I have sought guidance from *The National Physical Planning Standards and Guidelines, 2011* which is a policy statement published by the Directorate of Physical Planning and Urban Development of the Ministry of Lands, Housing and Urban Development. At page 3 it provides as follows;

### 2.3 BUILDING LINES

Buildings must be set back from plot boundaries for reasons of privacy, amenity, health and safety. The walls of the building must be on or behind the specified building lines detailed in table 1, subject to all other standards being met.

Table 1, at page 8 of the Guidelines specifies Site Standards for Residential Development and provides for the following setbacks at the front of a plot; 8 metres for Low Density areas, 6 metres for Medium Density areas, 3 metres for Detached High Density areas and 3 metres for Semi-Detached High Density areas. In the instant case, there was no evidence adduced at the trial that the Minister prescribed any road setback inconsistent with the 1983 development scheme for Arua. In his testimony, D.W.1 at page 28 line 17 of the record of appeal testified that the setback was 6 metres. That being the case, the respondent was liable to observe the road reserve and setback dimensions that were indicated on Sheet No. 11/4/241/Northwest/4. for the road to Bibia. A setback is measured from the point where the road reserve ends. Therefore, in respect of the road to Bibia, the total area allowed for both the road reserve and the setback was 21 metres. Therefore when P.W.4 at page 12 of the record of appeal testified that following a survey he undertook, he found that the respondent's land was about ten metres away from the road, was evidence in proof of the fact that the disputed plot fell within the area of 21 metres from the centre of the road, within which there should not have been any buildings.

The court below does not appear to have properly evaluated evidence relating to the respondent's contention was that his plot was located outside the demarcations of the approved plan for the road, Sheet No. 11/4/241/Northwest/4, which was tendered in court as exhibit P.E. 4 at page 25

of the record of appeal. According to P.W.4, the respondent's plot was about 10 metres away from the road. In contrast, D.W.1 in his testimony at page 29 stated that the road was constructed in accordance with Sheet No. 11/4/241/Northwest/4. Faced with the two versions, the trial court subjected this evidence to evaluation at page 10 of the record and came to the conclusion that whether or not the road followed the cartographic map, it did not displace the respondent's right to the land. I find that the court misdirected itself when it failed to decide whether or not the disputed land was outside or within the planned area of the road, before coming to the conclusion that the respondent's property rights had been violated.

The trial court having failed in its duty in that respect, I have subjected this part of the evidence to fresh scrutiny. I find that the procedure for conduct of a proper survey was explained by D.W.1 at page 28 to 29 of the record. This part of his evidence was not challenged during cross-examination. On the other hand, there is evidence of P.W.4 who appears to have conducted the survey in a manner inconsistent with that process. Without any explanation for his departure from the established procedure, the manner in which that survey was done becomes suspect. The suspicion is compounded further by the fact that the physical survey was not witnessed by anyone. It appears to have proceeded as a partisan survey rather than as an independent survey. According to D.W.2 at page 30 of the record, a private surveyor had been engaged in the 1983 survey which led to the production of Sheet No. 11/4/241/Northwest/4. In opening the road, it is the drawing that guided the process and according to this witness at line 25 of page 31 of the record of appeal, the road was not diverted from the approved plan. I am inclined to believe the evidence of both D.W.1 and D.W.2 for its consistence on this point as opposed to that of P.W.4. Why the respondent's buildings had not been marked was explained by D.W.2 at page 31 line 6 of the record during re-examination. He said marking of structures was done at random intervals. I am satisfied therefore that on the preponderance of evidence, the disputed land lay within the area planned for the road. Part of it lay within the road reserve while another part lay within the road setback.

That being the case, this particular road falls under the category of roads in respect of which item 3 (e) of the first schedule to *The Roads (Road Reserves) (Declaration) Instrument, S.1 358—1*, allows a road reserve (an area on either side of the road set aside for future expansion) that runs

parallel to and distant fifty feet (approximately fifteen metres) from the centre line. In respect of the land in dispute, the appellant was only able to open 3.5 metres of the allowed and planned width of 15 metres. In *Turner v Ringwood Highway Board [1870] LR 9 Eq 418 1870*, it was decided that once a highway exists the public has a right to use the whole of the width of the highway and not just that part of it currently used to pass or re-pass. Therefore, the respondent's construction of any structures in the road reserve extending up to a distance of fifty feet (approximately fifteen metres) from the centre line contravened s. 3 of the *Roads Act* which provides as follows;

Subject to any order which may be made under section 4, no person shall, except with the written permission of the road authority, erect any building or plant any tree or permanent crops within a road reserve.

The record of proceedings at the *locus in quo* which is at page 34 line 31 indicates that the respondent showed court the location of his building (a kitchen) which had been demolished during the construction of the road and the location was in the middle of the road. The respondent did not present to the trial court any evidence of authorization for construction at that spot. The court below therefore erred when it found that the respondent's structures, which were built within that road reserve after it had been gazetted in 1988, were compensatable.

On the other hand, Arua Town was declared a planning area pursuant to the *Town and Country Planning Ordinance, Cap. 105*. Although repealed on 13<sup>th</sup> September 1951, section 32 of the *Town and Country Planning Act, Cap 246*, saved all declarations of planning areas made under the repealed Ordinance which for that reason remained in force. Therefore, by 1983 when the plan for the road was made, Arua was still a planning area. According to regulation 2 (4) of *The Town and Country Planning Regulations S1 146-1*, any person who erected any building or developed any land in a planning area, after the area has been declared to be a planning area, without first obtaining from the Planning Committee permission so to do, committed an offence and was liable upon conviction to a fine not exceeding one thousand shillings or in default of payment to imprisonment for any period not exceeding four months and in the case of a continuing offence was liable to a further penalty not exceeding twenty shillings for each day during which the offence continued after written notice of the offence has been served on the offender.

Whereas regulation 36 (1) of *The Public Health (Building) Rules, S.I 281—1*, permits Local authorities to grant permits for erection of temporary buildings, regulation 36 (2) forbids the grant of such permits for a building any of the walls of which are to be constructed wholly or partly of stone, brick or concrete. The evidence of respondent at page 19 of the record of appeal indicates that the walls of his houses were made of unbaked bricks. At page 21, while under cross-examination he admitted that he did not obtain written permission from the Division or Municipality to construct his houses on the land. He continued further at page 22 while under re-examination that he had no approved plans for the construction because the buildings were semi-permanent. From that evidence, the respondent's buildings could not qualify for permits for erection of temporary buildings.

Under s. 18 (2) of the *Town and Country Planning Act*, no compensation was payable in respect of any building the erection of which was begun after the date of the publication of the order declaring a planning area, unless the erection was begun under and erected in accordance with the permission of the board or a committee or a local authority which by virtue of s. 9 (3) of the *Town and Country Planning Act* was Arua Town council. The nature of the buildings constructed by the respondent required express approval of the planning committee. He did not procure any yet he proceeded to construct within an area that had been declared to be a planning area, and earmarked for a road. He decided to shut his eyes to the illegality of the constructions and in the court below, purported to rely on it to establish a right. The law does not allow a party to do so. A party will not be allowed to base its claim on its own wrong (See *Nabro Properties Ltd vs. Sky Structures Ltd & 2 others [2002] 2 KLR at page 299* where Gicheru J.A stated the law as follows: “it is a maxim of law recognized and established that no man shall take advantage of his own wrong”).

Not even the doctrine of estoppel may be invoked to render valid a claim which the legislature has, on grounds of general public policy, enacted is to be invalid. Failure of the appellant to enforce the planning laws was not in the circumstance of this case proved to constitute acquiescence that could render valid the construction of buildings by the respondent in contravention of the planning laws and procedures. While I appreciate the considerable investments that might have gone into the construction of the semi-permanent houses and

sympathize with the situation of the respondent, I believe his recourse lay in a claim in law against the one who sold him the land rather than the appellant. There was evidence that the respondent was given sufficient notice of the impending construction of the road to enable him to relocate, which he apparently never heeded, to his subsequent detriment. In the circumstances, grounds one and two of the appeal succeed.

Regarding the third ground of appeal, the guiding principle is that an Appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v Uganda Transport company (1975) Ltd.*, S.C.C.A. No. 10 of 1993 (unreported) and *Twaiga Chemicals Ltd. v Viola Bamusede t/a Triple B Enterprises*. S.C.C.A No. 16 of 2006).

In the instant case, the award of damages was hinged on the supposed proof of a customary interest in the land. In light of the findings I have made in respect of grounds one and two, the court below premised its award on an entirely erroneous construction of the law and the facts before it. It is the duty of this court to correct that error by setting aside the award of damages and the rest of the orders made by the court below. For that reason, ground three succeeds as well and the award of damages and orders of the trial court are hereby set aside.

In the final result, the appeal is allowed. The judgment, decree and orders of the court below are set aside. The costs of the appeal and those of the trial are awarded to the appellant.

Dated at Arua this 8<sup>th</sup> day of September 2016.

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Stephen Mubiru  
Judge