THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT PORT PORTAL

CIVIL SUIT NO. 0072 OF 2006

CHAD NYAKAIRU :: PLAINTIFF

VERSUS

1. **EDIRISA NYAKAIRU**
2. **STEVE WILLIAMS :: DEFENDANTS**

BEFORE HON. JUSTICE VINCENT WAGONA

JUDGMENT

BACKGROUND:

The Plaintiff is the registered proprietor of land comprised in LRV 1894, Folio 11, Block 46, Plot 20, at Burahya Toro, Kabarole, Fort-Portal, constituting the suit land that includes an adjacent unregistered portion of land bordering Kyaninga Crater Lake. The Plaintiff sued the Defendants in respect of the suit land seeking among others orders for vacant possession, eviction, permanent injunction and general damages for alleged trespass and unlawful occupation. It was the case of the Plaintiff that that he purchased the registered land from Paulo Kamanyire in September 1990. That in 2006, the 2nd Defendant fraudulently purchased from the 1st Defendant the adjacent portion of the suit land bordering with the lake, to which the 1st Defendant had no title as it is public land, upon which the Plaintiff has a right of easement to the lake. That the 2nd Defendant among others planted trees thereon and obstructed the Plaintiff's easement rights to the lake.

The 1st Defendant on the other hand contended that he was the lawful owner of the suit land having purchased it from Paulo Kamanyire in 1989 and had been in

possession from then. That on 22nd December 2005, he sold the adjacent portion of the land to the 2nd Defendant. The 2nd Defendant averred that the portion of land that he purchased from the 1st Defendant does not form part of the Plaintiff's registered land and the Plaintiff has no claim over an easement. That he had enjoyed uninterrupted occupation and use of that part of the land since 2005. That he had permission from the National Environment Management Authority (NEMA) to use the land and had applied to the District Land Board for registration of the land into his names. By way of counter claim, the 2nd Defendant sought declarations that the said portion of the land does not form part of the Plaintiff's land and that he is the lawful owner thereof.

EVIDENCE OF THE PLAINTIFF:

PW1: CHAD NYAKAIRU the Plaintiff stated that in or about September 1990 he purchased the suit land from Paulo Kamanyire. That in 2006, the 2nd Defendant fraudulently purchased the adjacent land next to the lake from the 1st Defendant who had no title to it as it is public land protected by NEMA, and upon which the Plaintiff had a right of easement to the lake. That the 2nd Defendant among others planted trees thereon that blocked his easement to the lake and hindered his proposed eco-tourism business plan.

In cross examination the Plaintiff stated that he had a leasehold certificate that he later converted to freehold in 2018 in respect of the land. That he did not have the sale agreement because Mr. Kanyoro and Mr. Makulima who purchased the land on his behalf were dead, except lawyer Kagaba Vincent who witnessed the agreement. That he did not personally inspect the land but sent his uncle Mr. Makulima who visited the land. That he paid about UGX 4 million through Mr.

Kanyoro and Mr. Makulima. The witness accepted that he had no documentary proof of acknowledgment of payment from Kamanyire and also that the consideration was not stated in the transfer form. The Plaintiff stated that the first time he visited the land was a year or two after the purchase and that around 1992-1993, he put up a temporary house and somebody to guard the land; that in 2006, when he filed this suit, it was not the 1st Defendant that was using this land. The Plaintiff stated that by owning the titled land, he was entitled to use the public land adjacent to the lake but the 2nd Defendant had planted trees to block his view and access to the lake and had put up houses.

In further cross examination the Plaintiff stated that he never met Paul Kamanyire but that he signed the transfer forms in the presence of Mr. Vincent Kagaba and Mr. Kanyoro, after Kamanyire had been paid. In reference to a letter by Paul Kamanyire to Uganda Land Commission **(part of Exhibit PX1)** referring to him as his son whereas he was not, the Plaintiff stated that it was out of cultural courtesy because Kamanyire was older than him. In re-examination, the Plaintiff stated that the transfer form bears the signatures of the Plaintiff, Paul Kamanyire, and the lawyer Vincent Kagaba and that he has never encountered any objections or claims by the estate of the late Paul Kamanyire.

PW2: KAGABA VINCENT testified that until 3/9/1997, he was a practicing lawyer in Fort Portal under Kagaba & Co. Advocates and had handled many transactions between parties. That he recalled that before Paul Kamanyire died, they came to his office with a transfer of land document involving Chad K. Nyakairu and Paul Kamanyire. That they requested PW2 as a lawyer to witness the transfer and he signed. In cross-examination by Counsel for the 1st Defendant, PW2 stated that it was Paul Kamanyire and Chad K. Nyakairu that came to his

office together and requested him to witness the transfer. The witness stated that he was not the one who filled the transfer form, he did not see the sale agreement, no purchase price was exchanged in his office and he did know how much.

In cross examination PW2 testified that he wrote his name on the transfer form but did not remember whether the two clients signed in his presence as it was 30 years ago. The witness confirmed that the signature on the consent to transfer was his. In re-examination the witness clarified that there was no space for his signature but that he did witness the transaction by writing his name on the transfer form.

In further cross examination, the witness stated that he did practice with Mr. Nyakabula (as Kagaba & Nyakabula Advocates) for over 15 years and was conversant with his signature; that he recognized the signature on the 1st Defendant's purchase agreement **(Exhibit DX1)** as being that of Nyakabula.

PW3: ALINDA PETER a Senior Land Management Officer at Kabarole District testified that he carried out an inspection or verification exercise involving the suit land and made a report dated 24/1/2013 where he observed that there were existing titles for both the Plaintiff and 2nd Defendant, that the land in dispute was outside of the two titles and that there was tree planting on the land next to the lake; that the water body was below the titled lands. In cross examination the witness stated that the disputed land is Government land and that in 2013, the 2nd Defendant had indicated that he wanted to develop it and the district land surveyor was involved. The witness stated that he looked at the Plaintiff's title and that of the 2nd Defendant and observed that there was a common boundary line and the strip of land next to the lake was not titled and was public land and it is a buffer zone for the lake; that these are gazzetted on cadastral maps and the district land surveyor

had picked the coordinates. The witness stated that NEMA is tasked to give permits in respect of land near water bodies and there is a need for a permit before use of such natural resources.

PW4: DR.KOOJO CHARLES AMOOTI an Environment Management Consultant stated that in September 2014 prior to the Plaintiff's application to NEMA for a permit to do eco-tourism business **(Exhibit PX2),** the Plaintiff engaged PW4 to conduct an environmental study on the suit land and prepared a report that was filed with NEMA **(Exhibit PX3)**. In cross examination PW4 stated that he investigated the ownership of the land based on the certificate of title and also met the LCI Chairman and came to the conclusion that the Plaintiff was the owner of the land. In respect of the land adjacent to the titled land, the witness stated that the law did not give the Plaintiff ownership but that the Plaintiff had a right over a view of the lake.

PW5: JOHN KABAGAMBE in his evidence in chief stated that as LC1 Chairperson he acknowledged that the Plaintiff was the owner of the land comprised in LRV 1894, Folio 11, Block 46, Plot 20, at Burahya Toro, Kabarole Fort -portal and that he had been in possession of it for a long time having bought it in or about September 1990 from Paul Kamanyire; that as the owner of the land, the Plaintiff had the right of easement on the adjacent public land next to the lake. The witness told court that as a leader and a resident of the said area, he knew it as a fact that the 1st Defendant had no land to sell to the 2nd Defendant and that his sale to the 2nd Defendant, of the land adjacent to the Plaintiff's land was null and void. In cross examination, the witness stated that he first got to know the 1st Defendant when they were together at Kamengo Primary School. That he was not aware that the 1st Defendant had bought the suit land from Paul Kamanyire and had

never seen him using the land. PW5 stated that in 2005, he was LCI Chairperson of Kasenene village and he was aware that the Plaintiff bought the land from Kamanyire in 1990. That he knew it because the Plaintiff came and reported to him in 1993 and started using the land and that in 2002 the Plaintiff entrusted him to construct a house for workers. In re–examination PW5 confirmed his evidence that the land that the Plaintiff bought from Kamanyire had a title; that at the boundary of that land, there is a piece of land that goes down to Lake Kyaniga; and that because the Plaintiff owned the land with the title, he had a right to use that public land close to the lake. In cross examination the witness maintained that the public land that was located between the Plaintiff's land and the Crater Lake belonged to the Plaintiff but that the 1st Defendant came and sold it to the 2nd Defendant

PW6: KAMANYIRE PAUL in his evidence in chief stated that he was the son and legal heir of Paulo Kamanyire. That in or about September 1990 the Plaintiff purchased the suit land from his father Paulo Kamanyire. That he knew it because the family had been using the land for grazing and around 1992 his father told them that he had sold the land to Chad Nyakairu and they should stop using it. In cross examination the witness said that Yolam Kyahukurwa cultivated on the land but had never been a caretaker. The witness stated that the 1st Defendant had never come to their late father's home. That he saw the Plaintiff on the land in 2002 when he came to their home and told them that the land belonged to him.

EVIDENCE OF THE 1ST DEFENDANT:

DW1: NYAKAIRU EDIRISA the 1st Defendant in his evidence in chief stated that he was the owner of the suit land having purchased it from Paulo Kamanyire on 10th July 1989 by written agreement at UGX 2,500,000/= of which he paid

UGX, 1,500,000/= to Paulo Kamanyire at execution of the agreement (**Exhibit DX1**) and the balance of UGX 1,000,000/= on 30th September 1990 acknowledged at the back of the agreement. That after execution of the agreement, the late Paulo Kamanyire allowed him to take possession of the suit land and introduced to him Yolamu Kyajukura who became his caretaker to rent out the land to the villagers on his behalf. That he constructed a small temporary house on the suit land to house his workers and planted pine and eucalyptus trees which the Plaintiff cut down in 2007. That his agreement later got lost when he was shifting from Karamaga Cell to Kitumba in January 2002, which prompted him to get the office copy from his lawyer Mr. V.W K Nyakabwa. That after the death of Paulo Kamanyire, the family said that there was no evidence of payment of the balance, which prompted him to pay an additional UGX 1,000,000/= to the family on 15th February 2002, after which they executed for him a document (**Part of Exhibit DX 10**), acknowledging that he did not owe the family any money in respect of the said land. In cross-examination, the 1st Defendant said that although there was no appointed administrator of the estate, he transacted with Katusabe a son of the deceased who was the heir and some of the children and that he paid the balance of UGX 1,000,000/= to the family as opposed to paying it to an individual.

The witness stated that on 22nd December 2005, he sold his interest in the strip of the suit land extending to the Crater Lake to the 2nd Defendant.

That he had maintained a long and quiet possession and use of the suit land since 1989 when he bought it from Paulo Kamanyire up to the year 2006 when the Plaintiff started claiming the land. That when the Plaintiff served him with summons to file a defence in this suit, his lawyers carried out a search and discovered that the Plaintiff was on 25th August 1991 registered on the certificate

of title for the suit land; that the instrument of transfer was purportedly executed by Paulo Kamanyire on 30th September 1990 long after Kamanyire had sold the suit land to him; that the instrument of transfer did not indicate any consideration; that there was no land sale agreement executed between Paulo Kamanyire and the Plaintiff; that there was no passport photographs or identity card of Paulo Kamanyire presented by the Plaintiff to the Registrar of Titles during the registration process; and that there was a letter dated 17th September 1990 purportedly signed by Paul Kamanyire surrendering the suit land back to the Government and introducing the Plaintiff as his son yet they had no relationship at all. The witness stated that from these findings in the land registry, it was clear that the Plaintiff procured his registration as proprietor of the suit land through fraud.

In cross examination during trial, the 1st Defendant stated that the whole suit land was his but that he sold the part that was not titled, to the 2nd Defendant. In cross examination during proceedings held at locus, the 1st Defendant stated that in fact he never bought that land next to the lake that he later sold to the 2nd Defendant. That a woman called Maria who had been occupying the land ran mad and ran away and left it and there was no body to claim the land, so he claimed it. In re-examination during proceedings held at locus, the 1st Defendant clarified that he took over the land after Maria left in 1989 and no one claimed it up to when he was sued in court. That he explained to the 2nd Defendant that he could not put other development on that portion of the land other than indigenous trees.

The 1st Defendant during trial, accepted in cross examination, that he did not have a land title for the part that he sold to the 2nd Defendant and that he was aware that it was public land managed by NEMA. The witness further accepted that when making the sale agreement with the 2nd Defendant, he did not obtain the consent of

NEMA. The witness stated that the land was not located in Kasenene village as put to him, but rather, between Kasenene and Buzinda. The witness accepted that Mr. Kabagambe who was the LCI Chairman of Kasenene did not witness the sale agreement between him and the 2nd Defendant although his name had been stated in the agreement. That the one who signed was Bagonza Benon the LC1 Chairman of Buzinda, because according to the witness, the land was located at the border between Buzinda and Kasenene and so any of the LC1 Chair persons could sign; that the sale agreement was drafted by the 2nd Defendant. In further cross examination, it was his evidence that what the 1st Defendant was selling to the 2nd Defendant was a *Kibanja*.

The witness maintained in cross examination that he did not believe that the land title held by the Plaintiff was genuine and that he came to know about the title in 2006 when the case was already in court. The witness said that at the time he bought the land, the title had got lost but that this was not stated in the sale agreement. The 1st Defendant accepted that he has never filed a case against the estate of Paulo Kamanyire in respect of the suit land.

The witness accepted in cross examination, that his signature contained in the sale agreement with Paul Kamanyire differs from his signature contained in his witness statement; and also that his signature on the agreement between him and the 2nd Defendant is different from that on the agreement between him and Kamanyire. In re-examination, the 1st Defendant stated that he has a problem with signatures and that is why his signatures kept changing. That he keeps forgetting his signature.

During proceedings held at locus, the 1st Defendant stated that from 1989 to 2006 he had developments on the suit land, and that he was there up to 2006 when the

Plaintiff claimed the land and chased away his people who were working there. That by the time the Plaintiff came on the land the 1st Defendant had spent 16 years there.

DW2: YOLAMU KYAHUKURA in his evidence in chief stated that he knew the suit land well and that at all material times from 1989 to 2006 when Paulo Kamanyire was in possession of the land, the witness was his employee with responsibility to look after the land and collect dues from tenants who cultivated on the land, until 1989 when Paulo Kamanyire sold the land to the 1st Defendant and he continued to do the same work for the 1st Defendant up to 2006 when the Plaintiff barred them from using the suit land claiming it to be his. That the 1stDefendant at all material times had used the suit land for cultivating, grazing and scenic enjoyment and he had a small temporary house on the suit land for workers and that the witness also did plant for him some pine and eucalyptus trees which were later cut down by the Plaintiff when he started claiming the suit land. In cross examination he stated that he did not witness the sale but that Paul Kamanyire told him that he had sold the land to the 1st Defendant.

DW3: KATUSABE ROBERT in his evidence in chief stated that he was a son of the late Paulo Kamanyire and was his legal heir. The witness stated that the suit land originally belonged to his father the late Paulo Kamanyire who was the registered proprietor thereof but that on 10th July 1989, he sold it to Edirisa Nyakairu, the 1st Defendant. That after the purchase price had been agreed upon at UGX 2,500,000/= their father took the 1st Defendant around the land to show him the boundaries after which they proceeded to town to get a lawyer to draft and witness their land sale agreement. The witness stated that when his father and the 1st Defendant returned later that evening, his father handed over the suit land to the

1st Defendant and introduced to him Yolamu Kyahukura who used to care take the suit land on his behalf and the 1st Defendant also appointed him as his care taker.

The witness stated that the 1st Defendant paid the full purchase price for the suit land and the family of Paulo Kamanyire did not claim any unpaid balance of the purchase price from him. In cross examination the witness first denied ever receiving UGX 1,000,000/= from the 1st Defendant after the death of Paulo Kamanyire, adding that since the 1st Defendant had already bought the land, there was no need for them to receive more money. In further cross examination, the witness turned around and accepted that he did receive money from the 1st Defendant and that this was after the death of Paulo Kamanyire and that he shared the money with his brothers. In response to the question as to what this money was meant for, since his earlier evidence had been that the 1st Defendant had already fully paid for the land, the witness said that the 1st Defendant came and said that one of his documents was lost and upon his request, they made another copy for him. The witness stated that only 4 of the children including him signed on the document acknowledging receipt of the money from the 1st Defendant, although the amount was not stated in the document.

In further cross examination, the witness accepted that he was aware that the land had a title but that he never saw it as it was kept by his father. The witness accepted that in 1991, Mr. Paul Kamanyire was still living but that he was not aware that by October 1991, Chad Nyakairu was the owner of this land.

DW4: KABAGANDA LEONIDA in his evidence in chief stated that she was a sister to the late Sefuroza Kabaramagi Kamanyire who was the wife of the late Paulo Kamanyire the original owner of the suit land. That Paulo Kamanyire

allowed her to cultivate the suit land and when he sold it off to the 1st Defendant in 1989, he notified her. That with the 1st Defendant's permission, the witness continued to cultivate on the suit land from the time he bought it up to 2006 when she and others were barred from using it by the Plaintiff who had started claiming ownership of it. In cross examination by Counsel for the Plaintiff the witness said she was not aware that this land had a title and that she did not see the sale agreement selling to the 1st Defendant.

DW6: KIRUNGI ROSE in her evidence in chief stated that she knew the 1st Defendant who bought the suit land from her late father Paulo Kamanyire in 1989. That on 5th July 1989, her late father notified her that he was going to sell the suit land to the 1st Defendant since she was one of the people cultivating on it. That when the 1st Defendant bought the suit land and put it under the care of Yolamu Kyahukura, she requested him to continue cultivating on it, which he accepted. That she cultivated on the suit land from 1989 when the 1st Defendant bought it up to 2006 when the Plaintiff chased her away and for all that time she was under the supervision of Yolamu Kyahukura. That she had never seen the Plaintiff on the suit land for the period she cultivated on it.

In cross examination, the witness said that she knew that the land had a title in the names of Paul Kamanyire; that the registered proprietor of that land was now Edirisa Nyakairu the 1st Defendant. The witness stated that she knew it very well that Edirisa Nyakairu (1st Defendant) after buying the land from Paulo Kamanyire, had to transfer the land from Kamanyire to his names; that her father told her that the land had been transferred into the names of the 1st Defendant. When shown a copy of the land title, the witness told court that she did not see the name of Edirisa Nyakairu on it. The witness however maintained that she was telling the truth.

In further cross examination, the witness told court that she was never paid or signed for any money paid by Edirisa Nyakiru the 1st Defendant after the death of Paulo Kamanyire allegedly as balance on payment for the land. The witness said that it was Paulo Kamanyire who had been paid. In further cross examination when confronted with a copy of the document dated 15/2/2002 signed by the witness in respect of the money, the witness turned around and accepted and confirmed that she did receive the payment; that it was the remaining balance and not a bribe. That the money was shared among those whose names were recorded in the document.

EVIDENCE OF THE 2ND DEFENDANT

DW5: STEVE WILLIAMS in his evidence in chief stated that by agreement dated 22nd December, 2005 **(Exhibit DX2)**, he purchased a piece of land situate along the shoreline of lake Kyaninga at Kasenene, Harugongo, Rwengaju, Busoro Kabarole District from the 1st Defendant for Ug. Shs 10,000,000/=. That he noticed that there was devastating soil erosion around the lake shores. That he took it upon himself to obtain the necessary approvals to restore the forest cover and arrest the soil erosion. The witness stated that in 2006, he obtained approval from the National Environment Management Authority (NEMA) **(Exhibit DX 16)** to undertake reforestation of the entire shoreline of Lake Kyaninga and started tree planting. That the tree planting initially went on well until the Plaintiff started interfering with the said activity and uprooting and destroying some of the seedlings/trees. The witness said that since 2005 when he purchased the said land from the 1st Defendant, he had preserved the natural habitat along the shores of Lake Kyaninga. The witness averred that he was in physical possession of the suit land; that he has enjoyed uninterrupted possession of the land from 2005 to date;

and that his part of the suit land is not part of the land comprised in the Plaintiff's registered land. That through his interaction with NEMA, NFA and his lawyers, the 2nd Defendant knew that the Plaintiff did not have legal rights to the suit land comprising the lake shore, which rested under the management of NEMA; that the Plaintiff could not claim any right and/or easement for property under NEMA's management.

In cross examination, in describing the land that he had bought from the 1st Defendant, he stated that NEMA had demarcated 100 meters from the lake shore to the hill that is protected by NEMA while the rest was outside the protected area. That some of the land he had bought was inside the protected area of 100 meters forming the lake shore while some of it was outside. The witness did not agree that it was all public land. That he had applied for a land title but he had not obtained it because the process was halted by this case.

In cross examination as to how the 2nd Defendant had convinced himself of the ownership before buying the suit land, the 2nd Defendant stated that he had bought the neighboring land in 2004 and the LCI Chairman of the time was present and also signed on the agreement showing that the 1st Defendant was the neighbour. Regarding the location of the land he had bought from the 1st Defendant, the 2nd Defendant in cross examination stated that the boundary was in the middle and that some of the land was in Buzinda LC1 village while some of it was in Kasenene LC1 village. That the drafted agreement had named the 2 LC1 Chairpersons but eventually it was the LC1 Chairman of Buzinda alone that witnessed the agreement. The 2nd Defendant maintained that he bought the land that goes up to the lake and as such he was the one who had the easement rights to the lake. That he was however told by NEMA, that 100 meters to the lake was the lake shore.

In cross examination as to the Plaintiff's easement rights, the 2nd Defendant stated that the Plaintiff had a right of easement to the lake like any other Ugandan but not by virtue of holding adjacent land with a land title, because he (the 2nd Defendant) had land in front of the land of the Plaintiff, which was outside the land title of the Plaintiff.

In further cross examination, the 2nd Defendant accepted that he was not a Ugandan and that because of that, he could not hold customary land. He contended that he bought untitled land which thereby became a lease hold upon purchase. In cross examination as to what interest he was buying from the 1st Defendant, the 2nd Defendant said that he was buying the 1st Defendant's interest of beneficial ownership and that to his assumption, he was buying *customary* land. In response to the question as to whether he was aware that it was illegal for him to purport to acquire customary land when the law does not allow him, the witness answered that when he bought, it was automatically converted to lease title.

In cross examination regarding the due diligence that he carried out, the witness stated that he asked all the neighbours and also that the other agreement of the land he first bought, showed the 1st Defendant as the neighbour; that they also asked the LCIII, Sub County Committee, and they all said that the land was owned by the 1st Defendant; that he also went to the Land Board to check if there were any titles there and there was not. The 2nd Defendant however accepted that there was no neighbour who signed on this agreement; in this regard, he explained that he himself was the neighbour while the 1st Defendant was the other neighbour. The 2nd Defendant stated that at the time he bought the land from the 1st Defendant, the LC1 Chairman confirmed to him that the 1st Defendant was the owner of the neighbouring land.

During proceedings held at the locus, the 2nd Defendant sad that he bought the land from the 1st Defendant in 2005 and started planting indigenous trees to mark the boundary. That in the 1st year there was no problem and in 2006 the Plaintiff started claiming the land, and the trees were uprooted and the case went to court. That he first saw the Plaintiff in 2006, who told the witness that he had land in the area but that he (Plaintiff) did not know the land.

In cross examination during proceedings held at locus, the witness stated that he established the measurements of the land he bought to be10 acres, 4 of which were taken up by the lake shore managed by NEMA. That the 1st Defendant had told him that he had bought the land; that the 1st Defendant did not disclose to him that the land was previously occupied by Maria and that he had just heard about Maria at the locus proceedings. That he never saw the 1st Defendant's purchase agreement for the land that the 1st Defendant sold to him.

ISSUES:

1. **Whether the Plaintiff is a bonafide purchaser of the titled land to wit; LRV 1894, Folio 11, Block 46 Plot 20 at Burahya Toro.**
2. **Whether the Plaintiff's title was obtained fraudulently.**
3. **Whether the Plaintiff is the owner of the stretch of land between the titled land and the Crater Lake.**
4. **Whether the 2nd Defendant is entitled to the counter claim**
5. **What remedies are available to the parties?**

REPRESENTATION:

Mr. Ronald Oine of M/s Tumusiime Kabega & Co. Advocates represented the Plaintiff. Mr. Musinguzi Bernard of M/s Kayonga, Musinguzi & Co. Advocates represented the 1st Defendant. Mr. Ariho Kenan of M/s Katera & Kagumire Advocates represented the 2nd Defendant.

SCHEDULE FOR FILING WRITTEN SUBMISSIONS:

On 8/9/2022, the court fixed a schedule for filing written submissions as agreed upon by all the parties as follows: the Plaintiff's submission were be filed by 13/10/2022; the Defendants' submissions were be filed by 14/11/2022; any rejoinder by the Plaintiff was to be filed by 28/11/2022.

The case was mentioned on 28/11/2022 with a view of tracking compliance with the court schedule and fixing a date for judgment. It was established that the Plaintiff had filed his submissions on 14/10/2022. The 2nd Defendant had filed on 17/11/2022. It was later established that the Plaintiff filed a rejoinder on 16/01/2023.

Prior to the mention date of 28/11/2022, the 1st Defendant had on 15/11/2022, filed a letter to request for extension of time to file submissions which was also formally raised in court on the mention date of 28/11/2022. The judgment date was fixed for 2/2/2023 on the understanding that the 1st Defendant would use the time between 28/11/2022 and 2/2/2023 to file their submissions. This was not done.

SUBMISSIONS:

PRELIMINARY OBJECTIONS RAISED DURING FINAL SUBMISSIONS:

Submissions of the Plaintiff:

During final submissions, Counsel for the Plaintiff raised 2 preliminary objections.

1st Preliminary Objection:

It was submitted that the claims for recovery of land and cancellation of the Plaintiff's Title therein were statute-barred by limitation and as such, ought to be struck out. That **Section 5 of the Limitation Act** provides that: *"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."*

That in **Ababiri Muhamood& 4 Others -vs- Mukomba Anastansia & Another HCCS No. 22 of 2015,** Court held that: *"…since this was an action for recovery of land, **the cause of action must have arisen at the date the Defendant (the Plaintiff in the instant case) acquired the land**. By inference, a cause of action relating to land should accrue on the date that the Plaintiff (in this case, the 1st Defendant) claims it was wrongly appropriated."**(Emphasis added)*

That it followed therefore that the 1st Defendant's claims for recovery of land in his Amended Written Statement of Defense filed in October 2007 (16 years after the Plaintiff's registration on the suit property) were well out of the **twelve (12) years** prescribed by law for actions for recovery of land and hence, ought to be rejected by this Court.

That in **Wanumi Godfrey &Another -vs- Mukasa Fred & 2 Others HCCS No. 574 of 2020,** Court held that: *"A suit which is barred by statute where the Plaintiff has not pleaded grounds of exemption from limitation in accordance with* ***O.7 r.6 Civil Procedure Rules*** *must be rejected because in such a suit, the Court is barred from granting a relief or remedy."*

That in **Dima Dominic Poro -vs Inyani Godfrey and Another, High Court Civil Appeal No. 0017 of 2016**, Hon. Justice Stephen Mubiru held that: *"Statutes of limitation are in their nature strict and inflexible enactments. They are not concerned with merits. Once the axe falls, it falls, and a Defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights."*

That in this case the 1st Defendant's claim for recovery of land and cancellation of the Plaintiff's Title was statute-barred by limitation and that the same should be rejected.

2nd Preliminary Objection:

It was submitted that the 1st Defendant's claims for recovery of land and cancellation of the Plaintiff's Title were incompetently before the Court and therefore ought to be dismissed since the Defendant did not file a Counter-claim against the Plaintiff.

That it is trite law under **Order 8 rules 2, 7 and 8 Civil Procedure Rules** that in any matter where a Defendant wishes to counter-allege or claim against the Plaintiff, the Defendant must file a Counter-claim and upon failure to comply with

the said provision, the Defendant cannot be heard to seek Orders or remedies from the Court, in the Plaintiff's suit. Accordingly, that since the 1st Defendant's prayers were untenable and improperly sought from Court, all the remedies sought by the 1st Defendant should be denied.

Submissions of the 2nd Defendant:

It was submitted for the 2nd Defendant that the Plaintiff's preliminary objections had come very late in the proceedings and as such, should be rejected; that preliminary objections must be raised prior to or during scheduling and not at the point of submissions. Counsel cited **Justice Musa Ssekaana** in his book **Civil Procedure and Practice in Uganda (2nd Edition, 2017)** at **pp.330 & 331** that: "*however, it should be noted that any preliminary objection should be raised during the scheduling conference before the suit is set down for hearing……. It means that the point of law must be raised before parties open their respective cases however it can be argued during the closing addresses of counsel, and the court can pronounce itself on it in the final judgment……" (Emphasis added)*

Rejoinder by the Plaintiff:

Counsel for the Plaintiff in his submissions in rejoinder submitted that a Preliminary Objection can be raised at any time, before Judgment. He referred to the case of **Polypack Ltd & Another -vs- Multiple ICD Ltd HCCS No. 385 of 2017**, where Hon. Justice John Eudes Keitirima cited with approval the Supreme Court decision in **Tororo Cement Co. Ltd -vs- Frokina International Ltd**

SCCA No. 2 of 2001 and held that: *"It is not mandatory for a party to clarify in his or her pleadings of their intention to raise a Preliminary Objection. In other words, a preliminary point of law can be raised at any time. The Plaintiffs' submission that the Preliminary Objections raised by the Defendant were not pleaded is therefore not tenable."*

CONSIDERATION OF PRELIMINARY OBJECTIONS BY COURT:

Raising a preliminary objection before the case is set down for hearing is intended to avoid the element of surprise. This is because failure to raise substantive responses to the objecting parties' claims until trial, or worse, until the close of trial, is contrary to the spirit and requirements of the Civil Procedure Rules and the goal of fair contest that underlies those Rules. Such a failure also undermines the important principle that the parties to a civil suit are entitled to have their differences resolved on the basis of the issues joined in the pleadings.

The position however is that preliminary objections can be raised at any time.

In this case the preliminary objections were raised during final submissions when evidence had been adduced by all the parties and each party has had an opportunity to cross examine witnesses on the issues. I will therefore resolve the preliminary objections when determining the merits of the case. I will now delve into the merits.

Whether the Plaintiff is a bona-fide purchaser of the titled land to wit; LRV 1894 Folio 11 Block 46 Plot 20 at Burahya Toro; Whether the Plaintiff's title was obtained fraudulently.

Submissions of the Plaintiff:

It was submitted for the Plaintiff that the Plaintiff was a bona-fide purchaser for value of the registered suit land having purchased the same from the Late Paulo Kamanyire in September 1990 at UGX. 4,000,000/= through agents Mr. Makulima and Mr. Kanyoro. That **PW1's** testimony pertaining to his purchase of the suit property was corroborated by **PW5- Kabagambe John,** the LC.I Chairman. It was submitted that the Late Paulo Kamanyire's reference to the Plaintiff as *"his son"* in the letter dated 17th September 1990 could be used to impute fraud on the Plaintiff as the 1stDefendant never challenged its authenticity and that in the Plaintiff's Transfer Form **(ExD.3)**, the Plaintiff never represented himself as a son of the Late Paulo Kamanyire. That no police report or handwriting expert's report was ever tendered in Court by the 1st Defendant to prove forgery. It was submitted that the Plaintiff had been in possession of the land since 1990 to date, with several developments and crops thereon.

It was submitted that the standard of proof in fraud cases is higher than that in other civil matters. **[See M. Kibalya v. Kibalya [1994-5] HCB 8].** That in **Miao Hua Xian -vs- DFCU Bank & Another HCCS No. 78 of 2016,** Court held that: ***"acts of impropriety that would amount to fraud must be proved and evinced by more cogent evidence other than inferences deduced from the inconsistencies in the Witnesses testimonies."*** It was contended that the 1st Defendant had not adduced any evidence to discharge the burden of proof of fraud to the required standard. That conversely, Court should take cognizance of the illegalities orchestrated by the Defendants jointly and severally, which render their proprietary claims to the suit property untenable; namely:

(i) 1st Defendant's signature on the impugned Sale Agreement **(ExD.1)** and his Witness Statement differed;

(ii) Never indicated in the Sale Agreement **(ExD.1)** that the Title Deed of Late Paulo Kamanyire was lost;

(iii) 1st Defendant transacted with Katushabe Robert who had neither Letters of Administration nor a Grant of Probate;

(iv) 1st Defendant had no evidence that the UGX. 1,000,000/= that he allegedly paid as the final installment for the land was ever distributed among the family members of the Late Paulo Kamanyire;

(v) There was no attempt to consult and engage **PW5,** the LC.I Chairman for Kasenene prior to the sale to the 2nd Defendant;

(vi) The servient tenement is public land belonging to NEMA;

(vii) **DW1** did not obtain any consent from NEMA prior to the sale to the 2nd Defendant;

(viii) The servient tenement was unregistered, Kibanja land which he purportedly sold to the 2nd Defendant, a non-Ugandan;

(ix) During the locus visit, **DW1** stated that he grabbed the servient tenement after its owner one Maria became mad and ran away.

(x) **DW3-Katusabe Robert** denied receiving any money from **DW1** as payment for suit land; he had no evidence of distribution of money amongst the beneficiaries of the Estate of the Late Paulo Kamanyire;

(xi) **DW5 – Steve Williams:** conceded that NEMA did not consent to his impugned purchase of the servient tenement from **DW1;** he had never paid any stamp duty in respect of the servient tenement; he is not a Ugandan; he purchased a customary interest.

(xii) **DW6-Kirungi Rose** denied she ever received any money from the 1st Defendant for the suit land after the death of the Late Paulo Kamanyire**;**

It was submitted that the above were some facts to demonstrate that the 1st Defendant never legally acquired any proprietary interest in the suit land and in the servient tenement and as such, had nothing to sell to the 2nd Defendant.

It was submitted that having failed to prove any of the fraud allegations against the Plaintiff, the Plaintiff's Title remains indefeasible and conclusive proof of the Plaintiff's ownership of the suit land in accordance with **Section 59 of the Registration of Titles Act**. It was further submitted that the Defendants' transactions in the suit land as well as the servient tenement were fraudulent, illegal, null and void ab initio. That therefore, all the Defendants' actions be nullified/cancelled, and the Plaintiff be declared as the rightful owner of land comprised in LRV Folio 11 Block 46 Plot 20 at BurahyaToro, entitled to an easement of the scenic view of Lake Kyaninga over the servient tenement.

Whether the Plaintiff is the owner of the stretch of land between the titled land and the Crater Lake.

<u>Submissions of the Plaintiff</u>:

It was submitted for the Plaintiff that the Plaintiff does not claim ownership of the servient tenement but asserted that it was public land to which he, as the most immediate, adjacent neighbor thereto, was entitled to enjoy as an easement, access and a view of Lake Kyaninga which easements are being maliciously and unlawfully denied by the 2nd Defendant.

That **PW3** -Alinda Peter made an Inspection Report **(ExP.6)** wherein he stated that use of the servient tenement is *"supposed to be by leasing and/or on special permit*

to the immediate adjacent land owner (in this case, the Plaintiff)". That the Plaintiff applied to NEMA for the said permit **(ExP.2)** in September 2014 but had to date not received a response from NEMA. That the observations in **ExP.6** further buttressed the Plaintiff's claim to the first priority/superior right of use, access and enjoyment to the servient tenement, as compared to any of the Defendants.

That the Plaintiff contended that the 2nd Defendant's actions on the servient tenement were intended to stifle and frustrate the Plaintiff's proposed development of the suit property into an Eco Lodge and Tourism Site since it would provide direct competition to the 2nd Defendant's business, Kyaninga Lodge.

That in the premises, Court should find that the Plaintiff was the rightful owner of land comprised in LRV Folio 11, Block 46, Plot 20, at Burahya Toro, and was entitled to access, use and quiet enjoyment of the servient tenement.

Submissions of the 2nd Defendant:

It was submitted for the 2nd Defendant that the Plaintiff had admitted that he was not the owner of this parcel of land and by this admission this issue should be answered in the negative.

It was contended that the said land was 10 acres and conceded that 4 of those 10 acres were within the protected zone that as a matter of law was land held by Government/NEMA on behalf of the public. It was contended that the remaining 6 acres was not statutory public land under the control of NEMA. That the 1st Defendant occupied the land from 1989 and therefore pursuant to the concept of

extinctive prescription, he had obtained ownership of the same at the time of sale in December 2005.

It was submitted that an easement has been defined by **John T.** Mugambwa in his book **Source Book on Uganda's Land Law** at **p. 280** as: ***" An easement is a right which attaches to a particular piece of land and which allows the owner of that land to use the land of another person in a particular way or restrict its use by that other person to a certain extent***". That in **Stewart GawayaTegule v Kampala City Council & Another HCCS 214/2011,** an easement was defined as a right of cross or otherwise use of someone else's land for a specific purpose. It allows another to use and or enter into property of another without possessing it. It was submitted that according to **Meggary and Wade "The Law of Real Property" 8th Edition p. 1258 para. 27-032,** an easement as distinguished from a public right must always be appurtenant to land i.e. it is a right exercisable by the owner of land by virtue of his said ownership while a public right, on the other hand, is exercisable by anyone.

It was contended that the right to access and or view the lake if at all it existed was not attached/based on ownership of an estate in land; that it was a public right because the subject of this right is public in nature. That accordingly, a private person could legally claim an easement over another's property in the form of access or view of a lake. It was therefore submitted that the easement claimed by the Plaintiff had no legal basis. That Alinda Peter (PW3) a Senior Land Management Officer at Kabarole District did not provide the legal basis for his proposition that the said strip was vested in authorities like NEMA and that the same could only be used by leasing and or on special permit with first priority going to the immediate adjacent neighbour. It was contended that even if PW3's

report was to be taken as the correct position, the 6-acre strip immediately neighboring the titled land was not a buffer zone.

It was submitted that the **National Environmental Management Act** only places restriction on the use of lake shores and **Section 53(8)** of the Act defines a lake shore to mean land not more than 100 meters adjacent to or bordering the lake. It was thus contended that the contested 6 acres were outside the lakeshore. Further, that the only authorization granted in respect of the protected zone surrounding the lake was granted to the 2nd Defendant **[see DEX16]** and that the Plaintiff on the other hand had never been granted any such permission. This court was thus invited to find that the Plaintiff held no easement over the said strip of land and have the case against the 2nd Defendant accordingly dismissed.

The 1st Defendant did not have a right to sell public land:

It was contended that the contested strip of land outside the protected zone was approximately 6 acres and the protected zone which was categorized as NEMA/public land is approximately 4 Acres. It was conceded that the 1st Defendant therefore could not and did not obtain ownership over the 4 acres of NEMA land and any attempts to exercise ownership rights let alone sell the same to the 2nd Defendant were irregular and legally untenable.

It was contended however that the position was different for the 6 Acres of land falling outside the protected zone. It was submitted that the 1st Defendant had, had uninterrupted possession of this piece of unregistered land since 1989. That no action was ever brought by the Plaintiff to contest his said occupation and in the premise, the attempt to contest the 1st Defendant's ownership of the said piece of land after 17 years of uninterrupted occupation by the 1st Defendant was statute

barred and should be dismissed. That **Section 5 of the Limitation Act** bars any action for recovery of any land upon expiry of 12 years from the date on which the right of action accrued. That **Section 6 and 11** of the **Limitation Act** further provides that if the claim is possession based, the limitation shall begin to run from the time the Defendant took possession. That the right to bring an action therefore accrues when adverse possession occurs. That in **Kiwanuka Fredrick Kakumutwe -vs- Kibirige Edward CACA 272/2017,** the Court of Appeal held that a suit for a claim of right to land cannot be instituted after the expiration of 12 years from the date the right of action accrued. [see also **Kintu Nambalu -vs- Efulaimu Kamira, 1975 HCB 222].** That it is trite that uninterrupted and uncontested possession of land for over 12 years is considered to be one of the modes of acquisition of land ownership in Uganda. It was cited that in **Oyee & 2 Others v Zubeida HCCA 27/2012**, it was held that in respect of unregistered land, the adverse possessor acquires ownership when the right of action to terminate the adverse possession expires under the concept of "extinctive prescription" reflected in section 5 and 16 of the Limitation Act. That as a rule, limitation not only cuts off the owner's right to bring an action for recovery of the suit land that has been in adverse possession for 12 years but also the adverse possessor is vested with title thereto.

It was thus submitted that the 1st Defendant by virtue of his uninterrupted occupation of the unregistered strip of land since 1989 up to December 2005, obtained title over the same by operation of the concept of extinctive prescription.

***The 2nd Defendant did not sell customary land*:**

It was contended that the said unregistered strip was not under customary tenure. That the Plaintiff did not lead any evidence to show that this property was held

under customary tenure and in the absence of such evidence the property cannot be categorized as such. That in **Atunya v Okeny H.C.C.A 51/2017**, it was held that the onus of proving customary tenure lies with the person alleging and that proof of mere occupancy and use of any unregistered land however long that occupancy and use may be without more is not proof of customary tenure. That in **Balamu Bwetegaine Kiiza & another -vs- Zephania Kadooba Kiiza CACA 59 of 2009**, the Court of Appeal stated that the mere occupation and development of land does not ipso facto create a customary interest in the land and that proof of holding in accordance with the customs of the place must be adduced. That in the instant case, there is no proof that ownership of the said strip is of a customary nature and therefore this court cannot consider it as such.

It was contended that at all material times, the 2nd Defendant knew that he was buying unregistered land to which he could easily obtain title from the District Land Board by operation of **Section 59(1) of the Land Act**. That it is also clear from clause 4 of **DEX 15** that the parties intended to have the said property registered upon purchase. That it was no surprise therefore that the 2nd Defendant applied for a leasehold title to the same following the said purchase. (***See paragraph 7 of the 2nd Defendant's WSD and page 242 of the Record of proceedings***).

It was contended that the intention of the parties therefore was to convey to the 2nd Defendant an equitable interest for which he could obtain a leasehold title upon registration. That to realise that intention, the 2nd Defendant proceeded to apply for lease title immediately upon purchase that was yet to be issued to-date partly due to the subsistence of this suit. This court was invited to give effect to the commercial and legal intention of the parties by holding that the 2nd Defendant has

got a right to apply and be granted a leasehold title over unregistered land purchased with the intention of obtaining a leasehold title to the same. That in **KCB Bank Limited v Formula Feeds Limited & 5 Others CACA 076/2016**, where mailo titles had been issued to non-Ugandans, the Court of Appeal ordered that the same be converted to lease titles to give effect to the commercial and legal intention of the transaction and avoid the absurdity in the transaction since the purchasers had paid valuable consideration for the property. This court was thus implored to apply the principle in **KCB Bank Limited v Formula Feeds Limited & 5 Others (supra)** and uphold the 2nd Defendant's acquisition of the said land subject to obtaining the lease which he has already applied for.

This court, in the spirit of the Court of Appeal's holding in the **Formula Feeds** case (**Supra**), was invited to give effect to the 1st and 2nd Defendants' intention under the sale agreement dated 22nd December 2005 **(DEX15)** by holding that the 2nd Defendant was entitled to apply and obtain a leasehold title over the said unregistered strip having purchased the same for valuable consideration from the 1st Defendant.

It was submitted that in any event and **without prejudice to the foregoing**, in the unlikely event that court was to find that the 2nd Defendant could not lawfully acquire the suit land from the 1st Defendant, the 1st Defendant whose possession of the suit land since 1989 was not challenged within the limitation period would remain the rightful owner of the land.

Whether the 2nd Defendant is entitled to the counter claim

Submissions of the 2nd Defendant:

The Counterclaim was for a declaration that the unregistered parcel of land is not part and parcel of the Counter-Defendant's alleged certificate of title; a declaration that the Counterclaimant is the owner of the suit land; special damages of UGX. 850,000/=; general damages; interest; and costs of the counterclaim. It was submitted that it was an agreed fact that the said unregistered strip did not form part parcel of the land comprised in **LRV Folio 11 Block 46 Plot 20**.That it was also admitted by the Counter-Defendant that he did not own the said unregistered parcel of land. This Honourable was thus invited to find that the unregistered parcel did not form part of the counter-Defendant's alleged certificate of title. Regarding whether the Counterclaimant was entitled to a declaration that he is the owner of the suit parcel of land for which he had applied for a leasehold title, Counsel for the 2nd Defendant reiterated the earlier submissions and invited this court to find that the Counter-claimant was indeed the owner thereof.

Submissions of the Plaintiff:

It was submitted for the Plaintiff that the 2nd Defendant's acquisition and use of the servient tenement was tainted with fraud and illegality and as such, the 2nd Defendant had no legally protectable interest therein. That it followed therefore that the 2nd Defendant, a non-Ugandan, had no *locus standi* to sustain a cause of action / Counter-claim over customary land nor could he as an individual, have locus to enforce rights over public land. That moreover, during locus, the 1st Defendant had testified that he never purchased the servient tenement but rather took over the land from a mad woman called Maria. That having illegally acquired the land, the 1st Defendant obtained no interest therein and as such, could not purport to pass on any legal or equitable interest therein, to the 2nd Defendant.

That be that as it may, no evidence was ever led by the 2nd Defendant to prove any of his claims in the Counter-claim. That the Special Damages claimed were not specifically proved as required by law. That similarly, the claim for trespass was legally untenable because the 2nd Defendant's alleged proprietary interest in the suit property was marred with illegality.

That accordingly, this issue be resolved in the negative and that the 2nd Defendant's Counter-claim be dismissed with Costs to the Plaintiff.

What remedies are available to the parties?

<u>Submissions of the Plaintiff</u>:

It was submitted for the Plaintiff that having proved that the Plaintiff was the rightful and lawful owner of land comprised in LRV Folio 11, Block 46, Plot 20, at Burahya Toro, the Plaintiff should granted the following remedies: A Declaration that the Plaintiff is the rightful and lawful owner of land comprised in LRV Folio 11, Block 46, Plot 20, at Burahya Toro *(now FRV HQT 40 Folio 9 Plot 20 at Burahya Toro)*; A Declaration that the 1st Defendant's impugned sale of the servient tenement to the 2nd Defendant was fraudulent, illegal, null and void ab initio; An Order of Permanent Injunction restraining the Defendants, their agents or anybody deriving their authority from them from committing any further trespass, occupation, interference, access or enjoyment of both LRV Folio 11, Block 46, Plot 20, at Burahya Toro as well as the servient tenement; An Order of immediate eviction of the 2ndDefendant from the servient tenement; An Order directing the Defendants to handover vacant and peaceful possession of the

servient tenement to the Plaintiff as the owner of the immediate adjacent property to the servient tenement.

General Damages:

It was submitted that in **Prof Ephraim Kamuntu vs Attorney General, Civil Suit No. 38 of 2016**, Court held that the award of General Damages is at the discretion of court in respect of what the law presumes to be the natural and probable consequences of the Defendants' acts or omissions. That such discretion must be exercised judiciously.

It was contended that in this case, the high-handedness of the Defendants' actions as well as the Plaintiffs' evidence that he lost several prospective business partners, been subjected to gross financial hardship, great emotional anguish and inconvenience, justifed the award of **UGX. 300,000,000/=** to the Plaintiff as General Damages.

Punitive Damages:

It was submitted that punitive or exemplary damages are an exception to the rule that Damages generally are to compensate the injured person. That these are awardable to punish, deter, express outrage of Court at the Defendants' malicious, vindictive, oppressive and/or malicious conduct. That in **Ahmed El Termewy-vs-Hassan Awdi & Others, HCCS No. 95 of 2012,** Court cited with approval the decision in **Obongo-vs- Municipal Council of Kisumu [1971] EA 91**, wherein it was held that: *"It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the Defendant and this is regarded as increasing the injury suffered by the Plaintiff, as, for example, by causing him humiliation or*

distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and although the benefit goes to the person who was wronged, their object is entirely punitive".

It was submitted that in considering the award of Punitive Damages, court should consider inter alia the untruthful and refractory demeanor of the Defendants' witnesses while they were testifying during the trial. That Court be pleased to grant an award of Punitive Damages as sought by the Plaintiff of UGX. 500,000,000/=.

It was furthermore submitted that despite having been cited for Contempt of Court, the 2nd Defendant had to date not deposited the fine directed by Court. It was therefore prayed that the 2nd Defendant be directed to immediately deposit the sum of **UGX. 20,000,000/=** in Court, so as to purge his Contempt of Court Orders.

Costs of the suit:

Finally, it was contended that in accordance with **Section 27(1) of the Civil Procedure Act** and considering the protracted nature of this suit spanning over 16 years, the Plaintiff be awarded Costs of the suit.

Submissions of the 2nd Defendant:

It was submitted that the Plaintiff was not entitled to any of the Orders and declarations sought. That the Plaintiff had admitted that he was not the owner of the land bordering the Crater Lake and that even though he claimed an easement on the same, he had provided no legal basis for his claim. That accordingly his suit against the 2nd Defendant should be dismissed with costs.

On the other hand, it was prayed that the 2nd Defendant's Counter-claim be allowed with costs.

ALLEGED CONTEMPT BY THE 2ND DEFENDANT:

Submissions of the 2nd Defendant:

It was submitted that the Plaintiff had not made reference to any application for contempt filed in this court or proceedings as a basis for the said order and neither had he presented a copy of the said order in evidence; that the said alleged order was a creation of the Plaintiff. This court was invited to reject the Plaintiff's claim.

Rejoinder by the Plaintiff:

It was submitted that the Plaintiff had filed in this Court, *Misc. Application No. 0076 of 2019, Chad Nyakairu -vs- Steve Williams,* for Contempt of Court and the 2nd Defendant had personally deponed the Affidavit in Reply thereto. That the Court delivered it's Ruling on the Application on **22nd March 2021** and therein ordered the 2nd Defendant to pay a fine of **UGX. 20,000,000/= (Uganda Shillings Twenty Million Only)** to the account of the High Court *(Fort Portal)* **within 30 days from the date of the Ruling**. That to date however, the 2nd Defendant had not complied with this Order. **(A copy of the Ruling was attached)**.

It was thus prayed that the 2nd Defendant be directed to immediately deposit the sum of **UGX. 20,000,000/=** in Court, so as to purge his Contempt of Court Orders.

Remedies sought under the Counter-Claim by the 2nd Defendant:

Special Damages:

It was submitted that it is trite that special damages must be specifically pleaded and proven **[United Building Services Limited -vs- Yafesi Muzira HCCS 154/2005].** It was submitted that the Counter-Defendant had descended onto the land bordering the Crater Lake, over which the counter claimant has a permit from NEMA, and unlawfully uprooted trees planted by the Counter-Defendant.

It was submitted that the cost of replacing the uprooted trees is UGX. 850,000/= to which the Counter-claimant was entitled as special damages.

General Damages:

It was submitted that the Counterclaimant was also entitled to general damages. That in the case of **Luzinda-vs-Ssekamatte& 3 Ors HCCS 366/2017** it was held that as far as damages are concerned, it is trite law that general damages were to be awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Defendant.

It was contended that in the instant case, the Counter Defendant's acts of trespass and violence had greatly threatened the Counterclaimant as well as halted the implementation of the counter-claimant's development plans over the said strip of land. That the justice of this case therefore required that the Counter-Defendant be ordered to pay a sum of UGX 400,000,000/= as general damages to the Counter-claimant.

Costs of the Suit:

In so far as the costs of this case were concerned, it was submitted that it is trite that costs follow the event and that a successful party is entitled to costs unless the circumstance of the case negate such an award.

It was thus contended that in this case in accordance with **Section 27(1)** of the **Civil Procedure Act**, the counter-claimant should be granted costs of the counterclaim.

RESOLUTION BY COURT:

Burden and standard of proof:

This being a civil suit, the burden of proof lies with the Plaintiff. To decide in his favour, the court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that the more probable conclusion is that for which the Plaintiff contends, since the standard of proof is on the balance of probabilities / preponderance of evidence **(see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*).** The burden of proof is on the Plaintiff to prove on the balance of probabilities that he has a better claim to the land than the one made by the Defendant.

Whether the Plaintiff is a bona-fide purchaser of the titled land to wit; LRV 1894 Folio 11 Block 46 Plot 20 at Burahya Toro; Whether the Plaintiff's title was obtained fraudulently.

It was the Plaintiff's claim that he is a bona-fide purchaser for value. For one to claim to be a bona fide purchaser for value, he must prove the four (4) elements as stated in the case of **Hannington Njuki V. George William Musisi [1999] KALR 794**, namely:

i. *That the Defendant holds a duplicate certificate of title.*

ii. *That the purchaser purchased the property for valuable consideration.*

iii. *That he or she bought in good faith without any such defect in title.*

iv. *That the vendor was the former registered owner of the property.*

In **Mpagazile versus Nehumsi (1992 – 93) HCB 148**, it was held that a bona-fide purchaser becomes one by taking steps to inquire to know whether the land belongs to the seller or whether he has any title or Power of Attorney to sell the land.

In **Okullo V. Apiyo, High Court Civil Appeal No. 026 of 2016**, it was held that:**"***The ascertainment of good faith, or lack of it, and the determination of whether due diligence and prudence were exercised or not, are questions of fact which require evidence…. The burden of proof to establish the status of a purchaser in good faith lies upon the one who asserts it".*

The Plaintiff's evidence of purchase was that Mr. Kanyoro and Mr. Makulima (both deceased) as his agents, saw the land for him, inspected it and went ahead to procure it on his behalf. That he sent them money and they conducted the transactions on his behalf. The transfer form **PEX 8** was witnessed by his lawyer Vincent Kagaba. The purchase price was about Ugsh 4,000,000/= (four million shillings). He presented PEX 1, a copy of his Duplicate Certificate of title registered in his names on 25th October 1991. Vincent Kagaba, PW2 confirmed

that he witnessed the transfer forms. There is evidence that the late Paulo Kamanyire was the former registered owner of the said land. I find satisfactory evidence that the late Kamanyire's title was not defective.

On the other hand, the 1st Defendant's never saw the title and he does not have a a copy of the title to the said land. He presented a sale agreement DEX1 between himself and the late Kamanyire which was inconclusive in terms of the proof of consideration paid and the witnesses he presented, never witnessed the transaction.

After the death of Kamanyire, he transacted with a few family members who were not administrators of the estate of the late Kamanyire and offered them money whose amount went undocumented and under circumstances I find suspicious.

Weighing the Plaintiff's evidence of purchase against the 1st Defendant's evidence, I find it more probable that the Plaintiff acquired the land and the land title from Kamanyire and soon thereafter, registered his interest into his names and has a title deed.

Section 59 of the Registration of Titles Act (RTA), guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in Sections 64, 77, 136 and 176 of the RTA, which essentially relate to fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of

which he or she is registered **(**Justice Stephen Mubiru in **Loum Kennedy Vs. Obwoma Charles, Civil Suit No. 021 of 2016 at pages 4 and 5).**

In **John Katarikawe v. William Katwiremu & Anor [1977] HCB 187**, it was held, *inter alia*, that the provisions of Section 61 (now S.59) RTA are clear that once a person is registered as proprietor of land, his title is indefeasible except for fraud.

Similarly the position in **Olinda De Souza v. Kasamali Manji [1962] EA 756** is that in absence of fraud, possession of a certificate of title by a registered proprietor is conclusive evidence of ownership of the land and the registered proprietor has indefeasible title against the whole world.

In the case of **Fredrick J. K Zaabwe v. Orient Bank & 5 Ors, S.C.C.A.No. 4 of 2006** (at page 28 of the lead judgment) Justice Katureebe (JSC as he then was), relied on the definition of fraud in **Black's Law Dictionary, (6th Ed) page 660** which states as follows:

> ***"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture…….A generic term, embracing all multifarious, means which human ingenuity***

can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc. …….

As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture……."

The Hon. Justice Stephen Mubiru in **Loum Kennedy & Anor. Vs. Obwoma Charles, Civil Suit No. 021 of 2016** held that fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practices to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disenabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest **(**see: **Kampala Bottlers Limited v. Damanico Limited, S.C. Civil Appeal No. 22 of 1992; Sejjaaka Nalima v. Rebecca Musoke, S. C. Civil Appeal No. 2 of 1985; and Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya S.C. Civil Appeal No. 36 of 1995).** The Learned Judge further noted that in seeking cancellation or rectification of the title on account of fraud in the transaction, the alleged fraud must be attributable to

the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents. The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see: **Sebuliba v. Cooperative bank Limited [1987] HCB 130 and M. Kibalya v. Kibalya [1994-95] HCB 80).**

In **Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992,** it was held that:

> *" fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters, it was further held that;*
>
> *'The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."*

In this case, it was the evidence of the Plaintiff that in or about September 1990, he purchased the suit land from Paulo Kamanyire and later converted the leasehold title to freehold title. The land is now registered in the names of the Plaintiff. The 1st Defendant alleged fraud on the part of the Plaintiff and contended that the process through which the Plaintiff acquired the title to the suit land was tainted with fraud and illegalities on the grounds that his lawyers carried out a search in the Office of the Registrar of Titles and discovered that the instrument of transfer did not indicate any consideration; that there was no land sale agreement; that there was no passport photographs or identity card of Paulo Kamanyire; and that there was a letter dated 17th September 1990 purportedly signed by Paul Kamanyire

surrendering the suit land back to the Government and introducing the Plaintiff as his son yet they have no relationship at all.

After a careful evaluation of the evidence, I have noted that the 1st Defendant's sale/purchase agreement with Paulo Kamanyire of 10th July 1989 (**Exhibit DX1**) stated that on full payment of the purchase price, the vendor would sign the necessary transfer forms and cause the title to be transferred into the purchaser's names. It was the evidence of the 1st Defendant that he paid the balance of UGX 1,000,000/= on 30th September 1990 and thereby completed the payment. The agreement did not state that at that time the land title was lost or misplaced.

I do not believe that the 1st Defendant having genuinely bought the suit land in 1989, whose land title he knew full well had got lost or misplaced, where he had completed payment, and the vendor had undertaken to cause the transfer upon completion of payment, would have sat back and done nothing about the missing title, until 2006 when he realized that it was in the hands of the Plaintiff at the time of this suit. I am inclined to believe based on the evidence of **DW3 Katusabe Robert** the son of the late Paulo Kamanyire that in 1991, Paulo Kamanyire was still alive, and that the land title all along existed and was always kept by Paulo Kamanyire and I believe the Plaintiff that Kamanyire later transmitted it to him following the purchase of the land by the Plaintiff. There is evidence that no one from the family of the late Paulo Kamanyire has ever challenged the purchase of the suit land from Paulo Kamanyire by the Plaintiff; and there is no evidence of any claim by the family of Paulo Kamanyire that the land title had got lost or misplaced. It would be expected that, had the 1st Defendant genuinely dealt with Paulo Kamanyire, he would have received or demanded the transfer documents and the land title from Paulo Kamanyire in whose custody they were or demanded

that Paulo Kamanyire causes the transfer into the 1st Defendant's names as was provided in the agreement.

The 1st Defendant stated to the effect that his lawyers told him that they conducted a search and found out that in the office of the Registrar of Titles, there was no land sale agreement executed between Paulo Kamanyire and the Plaintiff and no passport photographs or identity card of Paulo Kamanyire. But no evidence of the search was ever exhibited in this court and in particular, no evidence was adduced from the office of the Registrar of Titles to prove that these documents were indeed lacking.

The Plaintiff was not the author of the letter of 17th September 1990 by Paul Kamanyire, there was no proof that the letter was a forgery, and the Plaintiff explained why Paulo Kamanyire referred to him as a son, that it was out of cultural courtesy for an elder to refer to a younger person as a son. There is no evidence that any member of the family of the late Paulo Kamanyire or anyone else has ever complained about the authenticity of the said letter to any person or authority. The Plaintiff gave evidence that the transfer form bears the signatures of the Plaintiff, Paul Kamanyire, and lawyer Vincent Kagaba and this evidence was never successfully challenged or controverted. Based on the available evidence, I have no reason to doubt the authenticity of the said letter or the transfer forms.

In the light of my evaluation of the evidence, I believe that the failure on the part of the Plaintiff to produce an agreement and the omissions in the transfer form arose from the Plaintiff's lack of close follow up, when he entrusted the land purchase and acquisition process to Mr. Kanyoro and Mr. Makulima (now deceased) and only made himself available in the chambers of the lawyer to sign

the transfer form. There is no evidence to suggest that this modus operandi on the part of the Plaintiff was actuated by fraud on his part.

I believe based on the evidence of the Plaintiff and his lawyer PW2 that the 2 persons who presented themselves in the lawyer's chambers to sign the transfer form, were the Plaintiff and his agent Kanyoro, without the seller Paulo Kamanyire, after he had already been paid and he had surrendered the signed transfer forms and letter introducing the Plaintiff to Uganda Land Commission. I am inclined to believe that PW2 was honest but mistaken when he asserted that the persons who went to his chambers were the Plaintiff and Paulo Kamanyire.

Regarding the circumstances surrounding the purchase agreement of the 1st Defendant for the suit land from Paulo Kamanyire, I have observed that whereas it states that it was signed in the presence of lawyer Mr. V.W K Nyakabwa, the transaction was not witnessed by any one else such as an LC Chairperson or neighbours on the village where the land is located. Additionally, I found it suspicious that the acknowledgment of the payment of the balance, a crucial aspect of the agreement, was not concluded through addendum to the agreement. Furthermore, the evidence of purchase by the 1st Defendant was discredited when DW 3 and DW6 at first vehemently denied ever receiving money from the 1st Defendant in connection with the transaction until they were confronted with documentary evidence. The absence of witnesses to the purchase agreement of the 1st Defendant coupled with the discredited evidence of DW 3 and DW6 suggested that the 1st Defendant and the 2 witnesses had something to hide regarding the circumstances surrounding the transaction and they were not being truthful.

The 1st Defendant accepted that his signature in his purchase agreement with Paul Kamanyire differs from the one in his witness statement and also that his signature in the sale agreement with the 2nd Defendant is different from that in his purchase agreement with Kamanyire. His explanation was that he has a problem with signatures and that he keeps forgetting his signature. I was not satisfied with the explanation of the 1st Defendant that his use of different signatures in different transaction documents, is because he keeps forgetting his signature. I concluded that he was not being truthful. The 1st Defendant is the same person who at first claimed that the land he had sold to the 2nd Defendant was part of the land he had bought from the late Paulo Kamanyire, but he later turned around and disclosed that in fact he had never bought the said land but that he only claimed it and took it over, when the former occupant had ran mad and left the land. When the time came for the 1st Defendant to sell that portion of the suit land to the 2nd Defendant, he deceived the 2nd Defendant that it was part of the land he had bought from Kamanyire. He was not honest to court as well as to the 2nd Defendant in his dealings in the land that he sold to the 2nd Defendant. Although the land that the 1st Defendant sold to the 2nd Defendant was located in Kasenene village as stated in the agreement (**Exhibit DX15)** as well as the evidence in chief of the 2nd Defendant, PW5 the LC1 Chairman of Kasenene village was not invited to witness the transaction; and to explain this omission, at trial, both the 1st Defendant and the 2nd Defendant preferred to present the position that the land was located between Kasenene and Buzinda; which in any case, then, would have required both LC1 Chair persons to witness the transaction. I am inclined based on the evidence of PW5 the LC1 Chairman, to infer that the 1st Defendant did not want to involve PW5 as a witness in the transaction, because he was aware that PW5 knew that he had no land to sell to the 2nd Defendant.

In the light of all the available evidence, I find that the evidence of DW2 YOLAM KYAHUKURA, DW3 KATUSABE ROBERT, DW4 KABAGANDA LEONIDA and DW6 KIRUNGI ROSE is insufficient to convince this court that the 1st Defendant had bought, owned and occupied the suit land. None of them witnessed the transaction between the 1st Defendant and Paulo Kamanyire. The 1st Defendant was not known by PW 5 the LC1 Chairman to own any land on the village and the 1st Defendant and the 2nd Defendant did not involve PW5 the LC1 Chairman in the land transactions concerning the suit land.

It is recalled that the burden of pleading and proving fraud lies on the person alleging it and the standard of proof is beyond a balance of probabilities required in ordinary civil cases. In this case it is the 1st Defendant who bears the burden of proof.

At the same time, the 1st Defendant did not file a Counter-claim against the Plaintiff. **Order 8 rule 2** of the Civil Procedure Rules provides that:

> *"a Defendant in an action may set off, or set up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether the setoff or counterclaim sounds in damages or not, and the setoff or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim."*

Rule 7 adds that where any Defendant seeks to rely upon any grounds as supporting a right of counterclaim, he or she shall, in his or her statement of defence, state specifically that he or she does so by way of counterclaim.

In the case of **Stanbic Bank Uganda Limited Vs Emmanuel Muhwezi, Miscellaneous Application No. 1117 of 2017** the Hon. Justice B. Kainamura stated that**:** *"For one to be entitled to a prayer the same must emanate from one's pleadings. The Defendant in its WSD only prayed that the suit be dismissed with costs, there is no counter-claim. So how can the Defendant now seek that a judgment on admission be entered against the respondent. I think not."*

The mode of raising complaints by a Defendant is through a counter claim and the prayers sought must emanate from the pleadings. The 1st Defendant did not file a counterclaim.

I find based on the evidence and merits of the case, that the evidence of the Plaintiff regarding the purchase transactions relating to the suit land is more credible and more plausible than the evidence of the 1st Defendant's dealings in the suit land. The 1st Defendant failed to prove his basis for alleging fraud against the Plaintiff. I find that the 1st Defendant failed to satisfy the court that the title of the Plaintiff was obtained through fraud attributed to the Plaintiff or to any of his agents. Therefore, it has not been proved that the Plaintiff's title was obtained fraudulently. I therefore find and hold that the Plaintiff is a bona-fide purchaser of the titled land to wit; LRV 1894 Folio 11 Block 46 Plot 20 at Burahya Toro and his title was not obtained fraudulently.

Whether the Plaintiff is the owner of the stretch of land between the titled land and the Crater Lake.

PW1 CHAD NYAKAIRU the Plaintiff testified that he had sued the 2nd Defendant because he had planted trees in the land adjacent to that of the Plaintiff thereby blocking the Plaintiff's view of the lake and ability to use the same land for

eco tourism when he gets a permit. The Plaintiff elaborated that his suit against the 2nd Defendant was based on the 2nd Defendant's planting of trees to block the view and access to the lake, putting up houses opposite the Plaintiff's land and claiming to have bought the land; that the 2nd Defendant was not trespassing on his titled land but was affecting the Plaintiff's easement to use the public land which he was entitled to use.

PW3: ALINDA PETER a Senior Land Management Officer at Kabarole District testified that that there were existing titles for both the Plaintif and the 2nd Defendant and that the land in dispute was outside of the two titles. In cross examination by Counsel for the 2nd Defendant, the witness stated that the disputed land is under Government. The witness stated that he looked at the Plaintiff's title and that of the 2nd Defendant and that there was a common boundary line and the strip of land next to the lake was not titled and was public and it is a buffer zone for the lake; that these are gazzetted on cadastral maps and the District Land Surveyor picked the coordinates. The witness stated that NEMA is tasked to give permits in respect of land near water bodies and there is a need for a permit before use of such natural resources.

PW4: DR.KOOJO CHARLES AMOOTI an Environment Managemen Consultant in cross examination stated that he investigated the ownership of the property and looked at the land title and that he was aware that in relation to the land adjacent to the title, the law does not give the Plaintiff ownership; that the Plaintiff only had a right over a view of the lake.

DW5: STEVE WILLIAMS the 2nd Defendant stated that the portion of land that he bought from the 1st Defendant partly falls within the protected reserves and that

he went ahead and secured authorization from NEMA **(Exhibit DX16)** to do afforestation and re-afforestation.

It is an admitted fact that the said portion of land located between the titled land of the Plaintiff and the Crater Lake falls within land described as public land. The Plaintiff admitted that the said land is public land. PW 4 Dr. Koojo Charles Amooti an Environment Management Consultant confirmed that the portion that stretches to the Crater Lake is public land. The 2nd Defendant also stated that the portion he bought partly falls within the protected reserves of the lake shore.

I thus find and hold that the Plaintiff's does not own the land located between the Crater Lake (Lake Kyaninga) and the Plaintiff's titled land. I therefore resolve this issue in the negative.

The second leg of the issue relates to the easement over the public land. The Plaintiff averred that he enjoyed an easement over the public land to view the Crater Lake. That the actions of the 2nd Defendant of planting trees blocked his view of the lake and violated his right of an easement over the said land to the Crater Lake and blocked his plans to establish eco-tourism business when he obtains a permit that he has already applied for from NEMA.

The Black's Law Dictionary defines an easement at page 600 as privilege, service, or convenience which one neighbor has of another, by prescription, grant, or necessary implication, and without profit; as a way over his land, a gate-way, water-course. That it also includes the liberty, privilege, or advantage without profit, which the owner of one parcel of land may have in or over the lands of another. It may be a private or public easement.

The same **Black's Law Dictionary** defines a private easement as one in which the enjoyment is restricted to one or a few individuals, while a public easement as one the right to the enjoyment of which is vested in the public generally or in an entire community; such as an easement of passage on the public streets and highways or of navigation on a stream.

Counsel for the 2nd Defendant relied on a definition *easement* in the book of **John T. Mugambwa, Source Book on Uganda's Land Law** at p. 280 as follows:

> *"An easement is a right which attaches to a particular piece of land and which allows the owner of that land to use the land of another person in a particular way or restrict its use by that other person to a certain extent*"

According to **Meggary and Wade's text book titled "The law of real property" 8th Ed page 1245,** it stated that:

> *"common law recognized a limited number of rights which one landowner could acquire over the land of another, and these rights were called easements and profits, examples of easements are right of way, right of lights and right of water……..*
>
> *Four requirements must be satisfied before there can be an easement. First, there must be a dominant tenement and a serviette tenement. Secondly, the easement must confer a benefit on (or accommodate) the dominant tenement. Thirdly, the dominant and serviette tenements must not be owned and occupied by the same person. Fourthly, the easement must he capable of forming the subject-matter of a grant."*

For the Plaintiff to access the lake, he must go through the adjacent land. I find that by virtue of the Plaintiff's ownership of the titled land immediately adjacent to the

Crater Lake, the Plaintiff by necessary implication has a right to use the land as a gateway to the Crater Lake.

I also find it fair to conclude that in this case, the Plaintiff's registered land qualifies as the dominant tenement and the unregistered land is the serviette tenement. The Plaintiff is asking to utilize the serviette tenement for his eco tourism business and has carried out all the prerequisite environmental studies as to the suitability of the land for his intended business. He owns the dominant tenement which is his registered land, while the serviette tenement is public land. The said land being public land is under the management of government under controlling authorities and agencies like NEMA. Usage of the land requires a permit form NEMA and may require other approvals.

I find therefore that the Plaintiff does not own the stretch of land between LRV Folio 11 Block 46 Plot 20 at Burahya Toro and the Crater Lake.

From the title **(Exhibit PEX1)**, in the lease agreement which forms part of the title, it was indicated that the registered proprietor was to use his land for grazing purposes, and for any other use, he had to seek consent of the lessor. For the Plaintiff to change the use of his registered land to eco tourism business, he needed permission from the lessor (Uganda Land Commission).

Further, for the Plaintiff to make use of the adjacent land next to the Crater Lake for eco tourism business, he needs permission from the relevant authorities, in this case, such as NEMA. As an example of approvals and permissions under relevant laws required, Section 117 to 121 of the National Environment Act of 2019 provides for the granting of Environmental Easements to facilitate the conservation and enhancement of the environment. The Plaintiff is entitled to apply for the necessary approvals to allow him to utilize the said land.

In conclusion, the Plaintiff is not the owner of the stretch of land between the titled land and the Crater Lake. Therefore, the Plaintiff's claim to the enjoyment of an easement over the land next to his titled land that stretches to the Crater Lake, for the purpose of his planned establishment of an eco tourism business, cannot be granted by this court. He should apply to the relevant authorities.

Whether the 2nd Defendant is entitled to the counter claim

In the counter claim the 2nd Defendant sought a declaration that the suit land (the portion of land adjacent to the Plaintiff's titled land going up to the Crater Lake), that the 2nd Defendant avers that he bought from the 1st Defendant, is not part and parcel of the Plaintiff's titled land; a declaration that the 2nd Defendant is the owner of the suit land; special damages of Ugx 850,000/=; general damages; interest on special damages at a bank rate at 2.5% from filing till the date of judgment and on general damages from the date of judgment till full payment; and costs of the suit.

The court has already found that the suit land as it relates to the 2nd Defendant's claim does not fall within the Plaintiff's titled land. Therefore the 2nd Defendant succeeds on the first prayer and it is hereby declared that the land that stretches to the lake, that the 2nd Defendant claims to have bought from the 1st Defendant, does not fall within the Plaintiff's registered land.

PW3: ALINDA PETER a Senior Land Management Officer at Kabarole District testified that there were existing titles for both the Plaintif and the 2nd Defendant and the land in dispute was outside of the two titles. In cross examination by Counsel for the 2nd Defendant, the witness stated that the disputed land is under Government. The witness stated that he looked at the Plaintiff's title and that of the

2nd Defendant and that there was a common boundary line and the strip of land next to the lake was not titled and was public land and it is a buffer zone for the lake; that these are gazzetted on cadastral maps and that the District Land Surveyor picked the coordinates. In cross examination by Counsel for the 2nd Defendant, the witness stated that the disputed land is under Government; that in 2013, the 2nd Defendant Steve Williams had indicated that he wanted to develop it and the district land surveyor was involved.

DW1: NYAKAIRU EDIRISA the 1st Defendant in re-examination during proceedings held at locus stated that he took over the land after Maria left in 1989 and no one claimed it up to when he was sued in court. That he explained to the 2nd Defendant that the 2nd Defendant could not put other development on that portion of the land other than indigenous trees. The 1st Defendant during trial, accepted in cross examination, that he did not have a land title for the part that he sold to the 2nd Defendant and that he was aware that it was public land managed by NEMA. The witness further accepted that when making the sale agreement with the 2nd Defendant, he did not obtain the consent of NEMA.

DW5: STEVE WILLIAMS the 2nd Defendant as against the above evidence stated that it was only a part but not the whole portion of the land that he bought from the 1st Defendant that falls within the protected reserves. In cross examination, the witness stated that he established the measurements of the land he bought to be 10 acres, 4 of which were taken up by the lake shore managed by NEMA.

The above version of the 2nd Defendant's evidence was not put to PW3 during the cross examination of PW3. Further, the 2nd Defendant did not bring any evidence

from a Government Surveyor to prove his claim that part of the land he bought was outside public land. The evidence of PW3 ALINDA PETER a Senior Land Management Officer at Kabarole District corroborated by the evidence of the 1st Defendant, confirms and I find that the entire portion of land that the 2nd Defendant bought from the 1st Defendant is public land and / or constitutes part of the protected lake shore.

It was submitted and cited for the 2nd Defendant, that **Section 53(6)** read together with **53(3)** and **(5)** of **the National Environment Act, 2019** bar anyone from undertaking any activities in the protected zones along lakeshores. That by operation of the **Article 237(2) (b) of the Constitution of the Republic of Uganda, 1995** the protected zones are held by the government of Uganda on behalf of the citizens under the public trust doctrine. It was conceded that the 1st Defendant therefore could not and did not obtain ownership over 4 acres of NEMA land out of 10 acres that the 2nd Defendant bought from the 1st Defendant, and that therefore, any attempts to exercise ownership rights let alone sell the 4 acres to the 2nd Defendant were irregular and legally untenable.

It was contended however that the position is different for the 6 Acres of land falling outside the protected zone.

The above submission is untenable and prayer fails on the ground that this court has concluded on the basis of the evidence of PW3: ALINDA PETER a Senior Land Management Officer at Kabarole District, corroborated by the evidence of the 1st Defendant, that the entire portion of land that the 2nd Defendant bought from the 1st Defendant is public land and / or constitutes part of the protected lake shore.

It is public land that falls within the protected areas and thus property of Government managed by NEMA.

The 1st Defendant revealed to court that he never bought the land that he sold to the 2nd Defendant from any one. That he only took over and occupied the land after the previous occupant ran mad and abandoned the land and went away. As it turned out, the land is public land that constitutes the shores of the Crater Lake (Lake Kyaninga). Therefore, it follows that the sale by the 1st Defendant to the 2nd Defendant of the entire piece of land was illegal, null and void ab-initio.

Further, it was the evidence of the 2nd Defendant during cross examination that to his understanding, the interest he had bought from the 1st Defendant was customary land. By his own admission, the 2nd Defendant is a non-Ugandan. Article 237 of the 1995 Constitution of Uganda prohibits non Ugandans from owning customary land. **(**See **Okwonga George & 2othes Vs. Okello James Harrison, Civil Appeal No. 80 of 2018** by the Hon. Justice Mubiru**).** The 2nd Defendant being a non-Ugandan could not purport to own land under customary land and court cannot declare him as such.

I should also address the 2nd Defendant's permit from NEMA. It was the evidence of the 2nd Defendant that he noticed that there was devastating soil erosion around the lake shores as all the protective forest cover had been cut down. That he took it upon himself to obtain the necessary approvals to restore the forest cover and arrest the soil erosion. That in 2006, he obtained approval from the National Environment Management Authority (NEMA) (**Exhibit DX16)** to undertake reforestation and afforestation of the entire shoreline of lake Kyaninga. The 2nd Defendant averred that with the assistance of the Kabarole District Environment

Office and National Forestry Authority (NFA), among others, he was able to identify appropriate tree species for reforesting. That the tree planting initially went on well until the Plaintiff started interfering with the said activity.

I have reviewed **Exhibit DX16** and found that what NEMA issued was a **Certificate of Approval of Environmental Impact Assessment** in respect of the proposed reforestation and afforestation of the shores of Lake Kyaninga on condition that the 2nd Defendant shall:

(i) apply for and obtain a permit for carrying out tree planting activities within the regulated zone of Lake Kyaninga in line with the National Environment (Wetlands, River Banks and Lake-shores Management) Regulations, 2000;

(ii) liaise with the National forestry authority and the District Environment Officer, Kabarole for guidance on tree species to be planted;

(iii) ensure that no trees are planted on the cliff but leave a 50m protection zone for natural regeneration;

(iv) ensure that any planting of trees on communal land beyond your allocated land is done after comprehensive consultations with the communities on modalities for planting and harvesting of trees to avoid social conflict.

In this case there is no evidence that the 2nd Defendant complied with conditions (i) and (iv). I find that the 2nd Defendant did not fully comply with the requirements of the NEMA approval in that he did not obtain a permit for carrying out tree planting activities and there were no consultations with the communities. Had he done so, probably the concerns and interests of the Plaintiff would have been addressed and the dispute may never have arisen.

Based on the above analysis, the court finds that the 2nd Defendant is not the owner of the suit land located between the Plaintiff's registered land and the Crater Lake (Lake Kyaninga) and he did not fully comply with the conditions set out in the **Certificate of Approval of Environmental Impact Assessment** by NEMA (**Exhibit DX16)** and as such, the court declines to make the declaration sought by the 2nd Defendant that he is the owner of the suit land.

In the result, the 2nd Defendant's counter claim partly succeeds to the extent that the court holds that the land that stretches to the lake, that the 2nd Defendant claims to have bought from the 1st Defendant, does not fall within the Plaintiff's registered land. The 2nd Defendant's counter-claim in relation to the claim that the 2nd Defendant is the owner of the suit land that he bought from the 1st Defendant is hereby dismissed.

In conclusion the Plaintiff has proved his case to the required standard, except where it was found and stated otherwise.

What remedies are available to the parties?

<u>The Plaintiff</u>:

<u>General Damages</u>:

It was submitted without more, that on the facts of the instant case, the evidence on court record, the high-handedness of the Defendants' actions as well as the Plaintiffs' testimony that he had lost several prospective business partners, had been subjected to gross financial hardship, great emotional anguish and

inconvenience, necessitated the grant of an award for General Damages to the Plaintiff of **UGX. 300,000,000/=.**

It was the evidence of the Plaintiff and it is on record that the Plaintiff has always been in possession and use of the titled suit land. Therefore no one prevented the Plaintiff from using the land.

As for the adjacent untitled land, the evidence is that the Plaintiff applied to NEMA for a permit so as to use the land for eco tourism business but that NEMA has never responded to his application. Given that one needed a permit from NEMA in order to use the land for the said business, the Plaintiff's inability to use the land for business cannot be attributed to any of the Defendants. Therefore the court finds that the claim that the Plaintiff had lost several prospective business partners and had been subjected to gross financial hardship, and great emotional anguish and inconvenience, to justify an award of general damages to him of **UGX. 300,000,000/=** is unsupported by evidence and cannot be granted.

<u>Punitive Damages</u>:

It was submitted that these are awardable to punish, deter, express outrage of Court at the Defendants' malicious, vindictive, oppressive and/or malicious conduct.

That in this case court should inter-alia consider the untruthful and refractory demeanor of the Defendants' witnesses while they were testifying during the trial and be pleased to grant an award of Punitive Damages of UGX. 500,000,000/=.

The court finds that the above claim cannot stand because no specific evidence of the Defendants' malicious, vindictive, oppressive and/or malicious conduct was

cited and I have found none. Regarding the alleged untruthful and refractory demeanor of the Defendants' witnesses while they were testifying, I have found no sufficient evidence to justify any award in this regard.

As for the 2nd Defendant having been cited for Contempt, the court's attention was drawn to the ruling in *Misc. Application No. 0076 of 2019, Chad Nyakairu -vs- Steve Williams*, that was delivered on 22nd March 2021 where court ordered the 2nd Defendant to pay a fine of **UGX. 20,000,000/=** to the account of the High Court *(Fort Portal)* within 30 days from the date of the Ruling; that to date however, the 2nd Defendant has not complied with this Order. Accordingly, if the the said order has not been obeyed by the 2nd Defendant as alleged, the same should be enforced under the same case file (*Misc. Application No. 0076 of 2019, Chad Nyakairu -vs- Steve Williams).*

Remedies sought by 1st Defendant under Counter-Claim

Special Damages:

It was submitted that the Chad Nyakairu descended onto the land bordering the Crater Lake and unlawfully uprooted trees planted by Steve Williams who has a permit from NEMA over the land (see DEX16). It was submitted that the cost of replacing the uprooted trees is UGX. 850,000/=. That in the premises the court is invited to hold that the conduct of Chad Nyakairu was unlawful and that Steve Williams is entitled to UGX. 850,000/= as special damages.

It was the evidence of Steve that the tree planting activities initially went well until the Plaintiff started interfering with the said activity to the extent of sometimes uprooting and destroying some of the seedlings/trees. The evidence is unclear as to

whether the Plaintiff uprooted seedlings or grown trees and is also unclear to the court as to whether the claimed amount of UGX. 850,000/= is in respect of seedlings or grown trees. The court is therefore unable to exercise its discretion to award the special damages of UGX. 850,000/= and therefore declines to do so.

General Damages:

It was submitted that Steve Williams is also entitled to general damages. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Defendant. It was contended that in the instant case, Chad Nyakairu's acts of trespass and violence have greatly threatened Steve Williams as well as halted the implementation of his development plans over the said strip of land. That the justice of this case therefore requires that the Counter-Defendant be ordered to pay a sum of UGX 400,000,000/= as general damages to the Counter-claimant.

I have noted that there was no evidence of threats or violence adduced against Chad Nyakairu. There was also no evidence of permitted development plans on the said strip of land that has been held to be public land, whose implementation was halted by the acts of Chad Nyakairu. The court therefore declines to award general damages in this regard.

Costs of the Suit:

It was submitted that it is trite that costs follow the event and that a successful party is entitled to costs unless the circumstance of the case negate such an award. That in this case in accordance with **Section 27(1)** of the **Civil Procedure Act**, the counter-claimant should be granted costs of the counterclaim.

In the 2nd Defendant's counter claim he sought a declaration that the portion of the suit land that he bought from the 1st Defendant does not form part of the Plaintiff's land. This part of the counter claim succeeded. The other part of the counter claim was that the 2nd Defendant sought a declaration that he is the lawful owner of the portion of the suit land that he purchased from the 1st Defendant. In my view, this was the most important part of the counter claim and it failed. The 2nd Defendant's counter claim was therefore largely unsuccessful. I find that the circumstances of this case negate the award of costs to the 2nd Defendant.

I therefore make the following Declarations and Orders:

1. **That the Plaintiff is the rightful and lawful owner of land comprised in LRV Folio 11 Block 46 Plot 20 at Burahya Toro (now FRV HQT 40 Folio 9 Plot 20 at Burahya Toro).**

2. **That an Order of Permanent Injunction doth issue, restraining the 1st Defendant, his agents or any person deriving authority from him, from committing any acts of trespass or interference with the Plaintiff's land comprised in LRV Folio 11 Block 46 Plot 20 at Burahya Toro (now FRV HQT 40 Folio 9 Plot 20 at Burahya Toro).**

3. **That the sale by the 1st Defendant to the 2nd Defendant of the portion of land located between LRV 1894 Folio 11, Block 46, Plot 20 at Burahya Toro, Kabarole, Fort Portal (now FRV HQT 40 Folio 9 Plot 20 at Burahya Toro) and Lake Kyaninga, was illegal, null and void ab-initio.**

4. **That none of the parties herein lawfully owns the land located between LRV 1894 Folio 11, Block 46, Plot 20 at Burahya Toro, Kabarole, Fort**

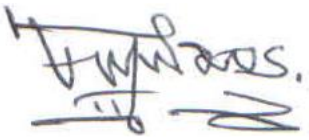
Portal (now FRV HQT 40 Folio 9 Plot 20 at Burahya Toro) and Lake Kyaninga, as it is Government land and / or constitutes the lake shore.

5. **That an Order of Permanent Injunction doth issue, restraining any person from carrying on activities on the land located between LRV 1894 Folio 11, Block 46, Plot 20 at Burahya Toro, Kabarole, Fort Portal (now FRV HQT 40 Folio 9 Plot 20 at Burahya Toro), and Lake Kyaninga, that may interfere with the protection of the lake shore, unless lawfully and properly permitted.**

6. **That the 1st Defendant and the 2nd Defendant shall pay to the Plaintiff the costs of this suit.**

It is so ordered

Dated at High Court Fort-portal this 2nd day of February 2023.



Vincent Wagona

High Court Judge

Fort-portal