

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0039 OF 2015

MUGERWA EVARISTO===== APPELLANT

VERSUS

NATIONAL FORESTRY AUTHORITY=====RESPONDENT

CORAM: Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Ezekiel Muhanguzi, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of my brother Hon. Mr. Justice Ezekiel Muhanguzi, JA.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this..... 16th day of Jan.....2020.


.....
HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

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VERSUS

NATIONAL FORESTRY AUTHORITY ::::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the judgement of High Court in Civil Suit No.005 of 2008 dated
28/11/14)

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Coram: Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF EZEKIEL MUHANGUZI, JA

Introduction

5 This is a first appeal from the judgment of the High Court in Civil Suit
No. 005 of 2008 wherein Musoke –Kibuuka, J dismissed the appellant's
suit with costs to the respondent.

Brief Background

The appellant sued the respondent for a declaration that the piece of
land comprised in LRV 1370 Folio 19 Buddu Block 783 plot 11
measuring 98.71 hectares at Byante, Kitunga, Kyanamukaaka, Masaka
District was not a gazetted Forest Reserve at the time it was leased to
him (the appellant). The appellant also sought a permanent injunction
restraining the respondent from evicting him from the suit land,

25 general damages for trespass, costs of the suit and in the alternative, an order that the appellant be offered alternative piece of land in lieu.

30 The facts of this case as accepted by the learned trial Judge are that on the 22nd February 1985, the appellant, upon application for a lease was registered as a registered proprietor of Plot 11 Buddu Block 783 land at Byante, Kitunga, Kyanamukaaka Masaka District, measuring approximately 98.71 hectares. Ever since he had been the registered proprietor until the defendant started challenging his title.

3 The respondent admitted that the appellant was a registered proprietor of the suit land but claims that at the time he obtained title on the disputed land, it was a Forest Reserve gazetted in 1932 vide Legal Notice No. 41 of 1948, and in 1965.

The said land was also subsequently re-gazetted vide Legal Notice No. 186 and in 1998 by way of statutory instruments.

40 At trial, during scheduling, three issues were raised for determination of court namely:-

1. Whether the piece of land comprising in LRV 1370 Folio 19 Buddu Block 783 plot 11 measuring 98.71 hectares at Byante, Kitunga, Kyanamukaaka, Masaka district was part of Mujuzi Forest Reserve at the time the plaintiff acquired the title in the suit property;

45 **2. Whether the lease over the suit land is legal and was legally obtained, and**

3. Remedies to the parties

50 The learned trial Judge heard and determined the matter in favour of the respondent and found that the suit property was part of the Mujuzi Forest Reserve, therefore the title by the appellant was illegally obtained and is thus null and void, and that the registration of the



appellant on the said title as the proprietor of the suit land was effected in error because the land was unavailable for leasing.

The learned trial Judge ordered that the appellant be evicted from the suit land within 14 days from the date of his judgment, an order requiring the appellant to hand over the owner's copy of the certificate of title held by him to the Commissioner for Land Registration for cancellation, an injunction restraining the appellant, his agents, employees or successors, from treating any part of the suit land as belonging to him and from carrying out there on any activity prohibited by law and an order requiring the appellant to pay the respondent's costs in respect of the suit.

Being dissatisfied with the whole decision of the trial court, the appellant appealed to this court on five grounds set out the memorandum of appeal as follows:-

1. *That the learned trial judge erred in law and fact when he declared that the suit land formed part of the Mujuzi Central Forest Reserve.*
2. *That leaned trial judge erred in law and fact when he held that the certificate of tile obtained by the plaintiff on Buddu Block 783, plot 11 was obtained illegally and the certificate of tile issued to the plaintiff is null and void.*
3. *The learned trial judge erred in law and fact when he held that Registration of the plaintiff as the proprietor of Buddu No. 783 plot 11 was effected in error as the land was not available for leasing.*
4. *The learned judge erred in law when he ordered for cancellation of the certificate of title held by the plaintiff/appellant when no fraud was pleaded, particularized and proved by the defendant (Respondent).*
5. *The learned trial judge erred in law and fact when he wrongly awarded the defendant/Respondent prayers sough for in the written statement of defence when no counterclaim was filed by the defendant/Respondent.*



The appellant asked court for orders that:-

- (a) *The plaintiff/appellant be declared the rightful owner of the suit land.*
- (b) *The High Court orders and awards against the appellant be set aside.*
- (c) *The costs of this appeal and the lower court be met by the respondent.*
- 85 (d) *In the alternative but without prejudice, the defendant/Respondent to lease an alternative piece of land to the appellant.*

Representation

At the hearing of this appeal, learned Counsel, Mr. Ngobi Baliddawa, represented the appellant, while learned Counsel, Mr. Joseph Kwesiga represented the respondent. Both parties were absent in court.

Submission for the appellant

It was submitted for the appellant on ground one that the learned trial Judge erred in law and fact when he found that the suit land formed part of Mujuzi Central Forest Reserve. Counsel argued that the respondent did not rebut the fact that the appellant was a registered proprietor of the land in issue and thus his title is indefeasible. He pointed out that the appellant acquired the said title legally because the said title was obtained from Uganda Land Commission in 1985 without notice that the respondent had gazetted it. Counsel argued that the respondent cannot claim ownership of the suit land without a certificate of title to that effect. He prayed court to allow this ground of appeal.

On the second ground, counsel submitted that the learned trial Judge erred in law when he held that the appellant's title was obtained illegally and is thus null and void. Counsel argued that the said title in respect of the land in issue was obtained from the Uganda Land Commission which by then was a body vested with powers to hold all



public land on behalf of the Government. He pointed out that the evidence on record confirms that the appellant was granted title after all the requisite procedures were taken and thus the learned trial Judge erred in law when he ruled otherwise that the title was illegally obtained. He prayed that court also allows this ground of appeal.

On the third ground, counsel was of the view that since the appellant obtained the land in issue legally, the trial Judge erred in finding that the registration of the appellant as the proprietor was effected in error. He pointed out that the appellant had been in possession of the suit land for over 22 years and that if the respondent was aggrieved, she ought to have sued the Uganda Land Commission and Commissioner Land Registration by way of a fresh suit or by way of counter claim in the original suit. He prayed court to find merit in this ground and allow it.

On ground four, counsel submitted that the learned trial Judge erred in law and fact when he ordered for cancellation of the certificate of title held by the appellant when no fraud was pleaded, particularized and proved by the respondent. He contended that the respondent did not plead fraud at trial and thus it was an error on the part of the learned trial Judge to give an order for cancellation of the appellant's title without proof of the fraudulent acts on his part. He asked court to equally allow this ground of appeal.

On the last ground, counsel contended that it was illegal for the learned trial Judge to grant prayers sought in the written statement of defence to the respondent without a counter claim. Counsel pointed out that the prayers that were sought in the respondent's written statement of defence, constituted a cause of action in trespass which would have been contained in a counter claim in order for court to grant such prayers. He asked court to allow this ground of appeal as well. Further



that this appeal be allowed with costs here and the lower court to the appellant; that the High Court judgment against the appellant be set aside and he (appellant) be declared a rightful owner of the land in issue.

And in the alternative, that the respondent leases an alternative equivalent piece of land to the appellant or pays compensation to the appellant at current market value of the suit land per Articles 26 and 237 (1) of the Constitution.

Submissions for the Respondent

In reply, Mr. Kwesiga submitted that the evidence on record that was adduced at trial proved that the suit land was part of Mujuzi Central Forest Reserve and the same was gazetted in 1948 as Central Reserve as per Legal Notice No. 41 of 1948. Counsel referred to DW1's evidence who testified that the joint report showed that the suit land was part of Mujuzi Central Forest Reserve, and this was corroborated with the appellant's evidence at trial that he was informed by his junior surveyor then that there was idle land/public land contrary to what he stated earlier in his evidence that he had no knowledge that the land was gazetted as a Forest Reserve.

Further counsel pointed out that Exh D5, a joint boundary opening report, showed that the land in issue was surveyed and mapped on cadaster map sheet number 79/4, 88/1 & 2 and this proves that it was surveyed at the time it was gazetted and therefore the learned trial Judge properly found that the suit land was part of Mujuzi Central Forest Reserve.

On grounds two, three and four, counsel argued that since the appellant was the Masaka District senior staff surveyor, he ought to have carried out due diligence to inquire with the District Forest Office



165 and ascertain whether the suit land was free but he rather used his office and acquired the land illegally.

He pointed out that at the time the appellant acquired the title in respect of the land in issue, the then Forests Act prohibited any person from clearing, occupying any land in forest reserves for purposes of planting or cultivating crops or for commercial purposes and as such the same Act applied to the Uganda Land Commission. The Uganda Land Commission could not have had powers to lease any land in a forest reserve to any one which in this case was effected contrary to section 13 of the Forests Act and thus renders the appellants title null and void.

Further, counsel relied on DW2's evidence that the appellant's title does not have a record in the office of surveys and mapping, Entebbe and thus is no title at all since it does not even have a deed plan. In support of his submissions counsel relied on ***Makula International Ltd v Cardinal Nsubuga Wamala & Anor Civil Appeal No. 4 of 1981***, for the proposition that once illegality is brought to the attention of court, it overrides all questions of pleadings including admissions thereon and a court of law cannot sanction that which is illegal.

On ground five, counsel argued that the learned trial Judge was justified to award the prayers sought in the written statements of defence because court has inherent powers to determine cases and make orders it deems necessary to meet the ends of justice. He asked court to dismiss this appeal with costs.

Consideration of the appeal

I have carefully considered the written submissions of both parties, read the court record and the authorities cited.



195 This is a first appeal and therefore, it is the duty of this court as a first appellate court to re-evaluate all the evidence on record and reach its own findings of fact on the issues, as required under rule 30(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10. The duty of a first appellate court was stated in ***Fr. Narsensio Begumisa & 3 Others v Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2001***, where the Supreme Court held as follows:-

200 *"It is well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."*

205 The question to be determined in this appeal is a question of fact as to whether the land at Byante Plot 11 Buddu Block 783 at Masaka, is under Mujuzi Central Forest Reserve. The appellant contends that he surveyed the land in 1984 and obtained the title from the Uganda Land Commission in 1985. On the other hand, the respondent argues that it
10 gazetted the land first in 1914, 1932 and later in 1948.

DW1, Opat Bernard a surveyor working with the respondent testified that upon direction from his director Mr. Levi Etwogu to open
15 boundaries, he worked together with Masaka District surveyors and their findings were that the suit land was inside the forest reserve which had been surveyed in 1914.

The appellant testified as PW1 at trial and stated that by the time he obtained the title, he had no knowledge that the land was gazetted by the respondent an indication that the appellant did not carry out all the due diligence before he obtained his title over public land.

220 In his judgment at pages 79 and 80 of the record of appeal the learned trial Judge found that:-

225 *"The last declaration of Mujuzi Central Forest Reserve, was in 1998, under the then law enforce (The Forest Act Cap. 146) (now repealed) S.I. 63 of 1998 or S.I 146-1. The Forests (Forest Reserve Declaration) Order was saved by section 95(2) of the National Forestry and Tree Planting Act, 2003, the Forests (Forest Reserving Declaration Order, in its first schedule shows that Mujuzi Forest has maintained the same original area of 6, 079 hectares as was in 1914. This means that no part of the Forest Reserve had ever been de-gazetted. The area of 98.71 hectares at Byante, Kitunga, which the plaintiff registered under his names on 22.02.1985, was part of Mujuzi Central Forest Reserve. It had not been de-gazetted.*

230 *Secondly there is nothing on the record to show that prior to the offer of the suit property to the plaintiff for leasing, an exclusion order of the piece of 98.71 hectares was made by the chief conservator for forests."*

235 I am therefore unable to fault the learned trial Judge. I find that the land comprised in LRV 1370 Folio 19 Buddu Block 783 Plot 11 measuring 98.71 hectares at Byante, Kitunga, Kyanamukaaka, Masaka District was and still is under Mujuzi Central Forest Reserve. Since this ground is resolved in the negative, it is not necessary to look at the
40 merits of the remaining grounds.

Conclusion

In the result, I find this appeal has no merit and it is hereby disallowed.

The judgment and orders of the High Court are hereby upheld. I so order.

45 Dated at Kampala this.....16th.....day of.....Jan.....2020.





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Ezekiel Muhanguzi
Justice of Appeal

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THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: KIRYABWIRE, MUHANGUZI AND MADRAMA, JJA)

CIVIL APPEAL NO 0039 OF 2015

MUGERWA EVARISTO KAFEERO}APPELLANT

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VERSUS

NATIONAL FORESTRY AUTHORITY}RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

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I have had the benefit of reading in draft the judgment of my learned brother Hon Mr Justice Ezekiel Muhanguzi, JA. I agree with the analysis of the facts and issues for resolution in this appeal. I also agree that the appeal should fail for the reasons that are contained in the judgement and would like to add some words of my own.

20

Ground 1 of the appeal which is on the question of whether the learned trial judge erred in law and fact when he declared that the suit land formed part of the Mujuzi Central Forest Reserve is clearly on a question of fact and arose from the pleadings of the plaintiff/appellant in the plaint. The record clearly indicates that paragraph 4 (g) of the plaint avers as follows:

(g) The plaintiff will aver that the piece of land comprised in LRV 1370 folio 12 Buddu Block 783 Plot 11 at Byante has never been gazetted as a Forest reserve.

25

It followed that all the trial court needed to determine was whether the property comprised in the certificate of title in the names of the plaintiff formed part of the gazetted Forest reserve described above. The other pleadings clearly indicated that the plaintiff is the registered proprietor of the suit property as described in paragraph 4 (g) above. The matter in controversy was not whether the plaintiff was the registered proprietor since this was an admitted fact. The origin of the dispute as disclosed in the plaint was that in August 2006 some employees of the

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5 defendant started interfering with the plaintiffs quiet enjoyment of the property
on the ground that it was part of a Central Government Forest Reserve It is clearly
pleaded that on 9 August 2006 the plaintiff notified the defendant in writing that
he intended to open boundaries of his land and requested for the defendants
cooperation in that matter. When the plaintiff started opening the boundaries, he
10 was stopped by the defendant/respondents officials. The plaintiff thereafter
obtained a court order authorising him to open the boundaries but the
defendants officials still refused to allow surveyors to do the job. In the particulars
of special damages contained in paragraph 5 of the plaint, the plaintiffs claim was
for the survey expenses on obtaining a lease offer and processing the certificate
15 of title and ground rent. Secondly it was for opening boundaries three times when
the dispute arose and legal expenses of obtaining a court order.

The plaintiff prayed for a declaration that the plaintiff's piece of land is not part of
the Forest reserve. Secondly, the plaintiff prayed for a permanent injunction to
restrain the officials of the defendant/respondent to this appeal from evicting the
20 plaintiff from the suit property. Thirdly, the plaintiff prayed for general damages
for trespass.

The defendant on the other hand and as averred in the written statement of
defence stated that the suit property was part of Mujuzi Forest reserve. This was
pursuant to gazetting it as such by Legal Notice No 41 of 1948. The Forest reserve
25 was managed on behalf of the government of Uganda in trust for the people of
Uganda. What is pertinent in my view is paragraph 10 of the written statement of
defence where the respondent who was the defendant in the High Court averred
as follows:

10. The defendant will further aver in answer to paragraph 3 that Uganda Land
30 Commission had no right or authority to grant the plaintiff a lease of the suit property,
and so he cannot claim any right under such authority.

There is clearly an implicit admission that the plaintiff/the appellant to this appeal
had been granted a lease of the suit property by Uganda Land Commission. In the
premises the defendant prayed for declaration that the title was issued in error
35 and is null and void. The defendant further counterclaimed for a permanent

Decision of Hon. Mr. Justice Christopher Madrama Izama *Handwritten: Finally maximum 735 security 2020 style ATTORNEY COURT OF APPEAL Opiokoleni*



5 injunction to restrain the plaintiff/appellant, his agents from trespassing on the
suit property. The defendant also prayed for punitive and exemplary damages to
issue against the plaintiff in favour of the defendant.

The learned trial judge set out the agreed issues in the Judgment as:

- 10 1. Whether the piece of land comprised in LRV 1370 folio 19 Buddu Block 785
Plot 11 measuring approximately 98.71 hectares at Byante, Kitunga,
Kyanamukaaka, Masaka District was part of the Mujuzi Central Forest
Reserve at the time the plaintiff acquired the title to the suit property.
2. Whether the lease of the suit property is illegal and was illegally obtained;
and
- 15 3. Remedies to the parties.

The certificate of title held by the plaintiff was not denied. The learned trial judge
established that by the time the plaintiff was granted a lease to the suit property
by Uganda Land Commission, it was part of a central Forest reserve described
above and had not been de-gazetted. On the second issue, the learned trial judge
20 held that the property was held by Uganda Land Commission under a public trust
both under the 1967 Constitution as well as the Constitution of the Republic of
Uganda 1995 inclusive of the National Forestry and Tree Planting Act and the
Forests Act. He further held that the plaintiff who was a former surveyor had
cunningly obtained a certificate of title to the suit property. He further noted that
25 the defendant had not pleaded the particulars of fraud for impeachment of title
and the matter proceeded under the doctrine of property held in trust for the
public. He held that the plaintiff did not deserve any compensation in the
circumstances of the case. He dismissed the suit with costs and issued
declarations that the suit is part of the Mujuzi Central Forest Reserve. He further
30 declared that the title to the suit property had been obtained illegally and the
certificate of title issued to the plaintiff is null and void. He issued a declaration
that the registration of the plaintiff as proprietor of the suit property was effected
in error as the land was not available for leasing. He issued an eviction order
against the plaintiff and granted the injunction prayed for by the defendant.



5 Grounds 2, 3, 4 and 5 of the appeal are intertwined. I will again set out the grounds of appeal for ease of reference.

10 2. The learned trial judge erred in law and fact when he held that the certificate of title obtained by the plaintiff on Buddu Block 783, Plot 11 was obtained illegally and a certificate of title issued to the plaintiff is null and void.

3. The learned trial judge erred in law and fact when he held that the registration of the plaintiff as proprietor of Buddu Block 783, Plot 11 was effected in error as the land was not available for leasing.

4. The learned trial judge erred in law when he ordered for cancellation of the certificate of title held by the plaintiff/appellant when no fraud was pleaded, particularised and proved by the defendant/respondent.

5. The learned trial judge erred in law and fact when he wrongly awarded the defendant/respondents prayers sought for in the written statement of defence when no counterclaim was filed by the defendant/respondent.

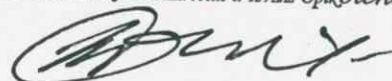
20 On the 4th and 5th grounds of appeal, it cannot be said that the defendant filed no counterclaim. The problem is that the body of the written statement of defence contains a counterclaim in substance but not in form.

Order 8 rule 7 of the Civil Procedure Rules provides for the filing of a counterclaim in the following words:

25 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.

30 It may be stated that the defendant did not specifically state that it counterclaimed against the plaintiff. However, there was no need to have a title as a counterclaim because this is provided for by Order 8 rule 8 of the Civil Procedure Rules which provides that:

8. Title of counterclaim



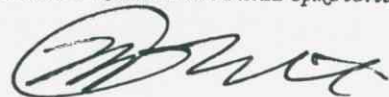
5 Where a defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the plaintiff together with any other persons, he or she shall add to the title of his or her defence a further title similar to the title in the plaint, setting forth the names of all the persons who, if the counterclaim were to be enforced by cross action, would be defendants to the cross action and shall deliver to 10 the court his or her defence for service on such of them as are parties to the action together with his or her defence for service on the plaintiff within the period within which he or she is required to file his or her defence.

In this particular action, the defendant did not raise any counterclaim against any other person other than the plaintiff. In those circumstances it 15 was not necessary to raise a counterclaim title as prescribed by rule 8 (supra). In the premises, the written statement of defence clearly specified the claim against the plaintiff and clearly specified the orders sought against the plaintiff. In any case, under Order 6 rules 17 of the Civil Procedure Rules, no technical objection shall be made to any pleading on 20 the ground of alleged want of form. It is therefore a question of form rather than substance for the defendant not to have mentioned in the written statement of defence that it was counterclaiming against the plaintiff in terms of Order 8 rule 7 of the Civil Procedure Rules. In any case, the learned trial judge specifically indicated that the defendant had not pleaded any 25 fraud but found it wise to consider the law on the basis of the pleadings as it were. Issues arise from pleadings in terms of Order 15 rules 1 of the Civil Procedure Rules which provides *inter alia* that.

1. Framing of issues.

(1) Issues arise when a material proposition of law or fact is affirmed by the one 30 party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence.



5 (3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: issues of law and issues of fact.

10 (5) At the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

15 The rules speak for themselves. The learned trial judge in accordance with the rules framed the issues arising from the pleadings of the parties and in the scheduling conference agreed issues were set out. The learned trial judge further issued the declarations prayed for by the plaintiff. Order 2 rule 9 of the Civil Procedure Rules allows the court to issue declaratory judgments whether any consequential relief such as cancellation of title is or could be claimed or not. Order 2 rule 9 of the Civil Procedure Rules provides that:

20 No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

25 The judgment in **Ellis v Duke of Bedford (1899) 1 Ch. 494** shows that the rule considered in that case which is Order 25 rule 5 is in *pari materia* with the Ugandan Order 2 rule 9 of the Civil Procedure Rules.

30 **In Halsbury's laws of England 3rd Edition Volume 22** Para 1610 at pages 746 – 747, it is stated that:

It is however sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without reference to their enforcement. Such merely declaratory judgments may now be given and the court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not ...

5 The rule in *pari materia* with Order 2 rule 9 of the Civil Procedure Rules has been held to confer a right of action whether consequential relief could be obtained or not and there was no restriction in the rule as to whether the plaintiff had to first have a cause of action or not as held in **Guaranty Trust Company of New York v Hannay and Company Ltd. [1915] 2 KB 536.**

10 Pickford LJ held that:

15 The next contention is that, even if there is no necessity for a cause of action, the declaration can only be made at the instance of the person claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. ... I think the effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration.

20 It follows that on a procedural point when the learned trial judge declared that the certificate of title obtained was an illegality, was null and void, even if there was no prayer for cancellation of title, the question was whether he could condone the existence of what he had declared was an illegality. The principle in **Makula International v Cardinal Nsubuga Wamala and another Court of Appeal Civil Appeal No 4 of 1981** is clear that an
25 illegality once brought to the attention of court, overrides all questions of pleadings including admissions made thereon. In other words, the court has inherent powers to issue such orders as are in the interest of justice and to prevent an abuse of the process of court. A court of law should not perpetrate an illegality once brought to its attention.

30 In the premises, the appeal can be determined on the basis of a finding that the certificate of title issued to the appellant was an illegality. Once this court finds that it was an illegality, the rest of the grounds of appeal would be determined in the negative. In the premises, I concur with my learned brother Honourable Justice Ezekiel Muhanguzi that the question of whether



5 the suit property was in a gazetted the forest land is a question of fact. This was established and what was left was whether in the circumstances, the certificate of title could be lawfully held by the appellant having been issued by Uganda Land Commission in whom all land in Uganda was vested at the material time.

10 I have considered the law as contained in the revised edition of the laws of Uganda 2000. The Forests Act Cap 246 laws of Uganda 2000 prohibit certain activities when sections 13 and 18 thereof are considered and make them an offence:

13. Prohibited acts.

(1) Subject to any exemptions granted under this Act, no person shall cut, take, work or remove forest produce in or from a forest reserve, village forest or open land unless he or she is licensed to do so under this Act.

(2) Except as may be permitted by rules made under this Act, no person shall—

(a) clear, use or occupy any land in a forest reserve for—

20 (i) grazing;

(ii) camping;

(iii) fish farming;

(iv) the planting or cultivation of crops;

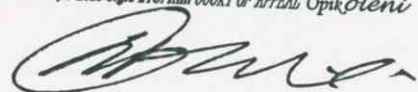
(v) the erection of buildings or enclosures; or

25 (vi) recreational, commercial, residential or industrial purposes; or

(b) construct or reopen any road, track or bridge in a forest reserve.

18. Contraventions.

Any person who contravenes any of the provisions of this Act or any rules made under this Act or any of the terms or conditions of a licence or permit granted under this Act or who knowingly receives any forest produce which has been cut



5 or removed in contravention of this Act or any rules made under this Act or of any of the terms or conditions of a licence granted under this Act commits an offence.

10 The granting of the lease in a forest reserve would serve no useful purpose as carrying out the activities covenanted in the lease would constitute an offence. The record clearly indicates that the lease which was signed by Uganda Land Commission has a term with effect from 7th December 1984 was subject to the Public Lands Act. The lease was for 49 years and subject to covenants. The covenant indicated that the property was leased for purposes of mixed farming only. The granting of a certificate of title for a
15 lease in a forest reserve does not take away the fact that the property had already been gazetted as a Central Government Forest Reserve, a fact which was proved in the suit. The law is that a lease for mixed farming cannot lawfully be granted in a forest reserve as it would be for an unlawful purpose expressly prohibited by sections 13 and 18 of the Forests Act and
20 therefore an illegality.

This proposition of law Makula International v His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11 is that a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings, including any
25 admissions made thereon. The Court of Appeal cited with approval the decision in **Belvoir Finance Co. Ltd v Harold and G Cole & Co. Ltd [1969] 2 ALL ER 904** and judgment of Donaldson J at page 908 that:

30 I think illegality, once brought to the attention of court, overrides all questions of pleadings, and therefore this is, and remains a real and indeed insuperable difficulty in the way of the defendant so far as the Mercantile agency defence is concerned.

Further in **Mercantile Credit Co. Ltd v Hamblin [1964] 1 ALL ER 680**, illegality was not pleaded, though the defendant sought to rely on it as a



5 defence. The plaintiff asserted that for illegality to be relied on, it had to be pleaded. The defendant sought leave to amend the defence. Stephenson J held that counsel was not acting improperly to draw courts attention to an illegality of the transaction. On the contrary it was counsel's duty, however embarrassing to prevent the court from enforcing an illegal contract.

10 In **Bostel Brothers Ltd v Hurlock [1948] 2 All ER 312** the Court of Appeal per Somervell LJ stated at 312:

The principle of law relied on was stated concisely and in a form appropriate to the present issue by Ellenborough CJ in *Langton v Hughes* (1 M & S 593, 596):
What is done in contravention of the provisions of an Act or Parliament, cannot be made the subject-matter of an action.

15 The law does not assist a guilty party of an illegal contract. In **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152** the Court of Appeal England considered the effect of illegality in the lead judgment of Kerr LJ who in summary stated that it is settled law that any contract prohibited by statute, either expressly or by implication is illegal and void.

20 In the circumstances of this appeal, while it is true that the Land the subject matter of the lease was a land vested in the Uganda Land Commission by 1984 by virtue of the Constitution of the Republic of Uganda 1967, the Public Lands Act 1969 and the Land Reform Decree 1975, this did not confer on Uganda Land Commission power to breach the provisions of the Forest Act Cap 146 (revised edition).

25 The Constitution of 1967 as amended by the Constitutional Amendment Statute No. 8 of 1980 provided under article 108 (3) thereof that:

The Land Commission shall hold and manage any land vested in it by this Constitution or any law or acquired in Uganda by the Government of Uganda and shall have such powers as may be conferred upon it by the Parliament.

5 Further, section 2 (1) of the Public Lands Act gives the Uganda Land Commission powers to sell, lease or otherwise deal with land held by it. It has power under section 17 of the Public Lands Act to grant estates, create rights or interests in or deal in Public land vested in it.

10 While it is true that there is a covenant implied by section 22 (5) of the repealed Public Lands Act that the controlling authority has full power to grant the lease, this just supported the law that all land in Uganda was vested in the Uganda Land Commission. The question is on what terms?

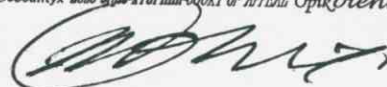
The learned trial judge based his judgment on the doctrine that the land was held in trust for Ugandans as a forest reserve. The trust element is fortified by the then preamble of the repealed Land Reform Decree which was applicable in December 1984 when the lease was granted.

The Land Reform Decree, Decree 3 of 1975 and the preamble thereof provided that:

20 A Decree to provide for the vesting of title to all Land in Uganda in Trust for the People of Uganda, to Facilitate the Use of Land for Economic and Social Development and For Other Matters Connected Therewith.

25 All land in Uganda was at the material time held in trust as rightly held by the learned trial judge. It is a fact that the Uganda Land Commission was the Land Lord till the coming into force of the 1995 Constitution of the Republic of Uganda which partially transferred some of its rights to District Land Boards to hold land held in public interest in trust for the citizens.

30 A trustee only holds property in trust for the beneficiaries. The law indicated who the beneficiaries of forest lines are and forbade certain actions to be done on the land. To grant a lease in the forest reserve would be in breach of trust. According to Philip H. Pettit in, **Equity and the Law of Trusts**; Fourth Edition, London Butterworths, 1979, a trust is a right of



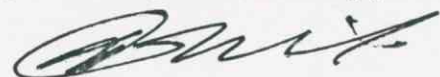
5 property held by one person called the trustee for the benefit of another person, the *cestui que trust* or beneficiary.

The **Trustees Act Cap 164** section 1 (r) thereof defines a trust as follows:

10 (r) "trust" does not include the duties incident to an estate conveyed by way of mortgage, but with this exception, "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee;

15 The definition is wide enough to include trust for purposes or specified objects created by statutory law. By the reviewed statutory law, all forests reserves in Uganda were by 1984 vested in the Uganda Land Commission to hold the same for the purposes stated in the various Acts that deal with the management of forests for the public good. These include sections 13 and 18 of the Forests Act (supra) which we have considered above. It *inter*
20 *alia* forbids the use of forest reserves for purposes of mixed farming. To grant a lease and include a covenant in the lease for the lessee to engage in mixed farming would be in breach of statutory trust. In the premises, I cannot fault the learned trial judge's conclusion that the forest reserves were vested in the Uganda Land Commission to be held in trust for the
25 lawful public purposes. Uganda Land Commission was a trustee for purposes stipulated under the statutory law.

30 Further, the appellant sought compensation in the alternative on the footing that the property actually was a forest reserve. However the learned trial judge on the merits found that he was not innocent in acquiring title to part of a forest reserve. The above notwithstanding, the appellant never included the Uganda Land Commission as a party to the suit. Uganda Land Commission is a corporation with perpetual succession with a right to sue or be sued in its own names. Any orders which could have been made



5 against any acts of the Uganda Land Commission could only be made against the Uganda Land Commission and not the respondent.

In the premises I concur with the proposed order that this appeal should be dismissed with costs.

Dated at Kampala the 16th day of January 2020

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Christopher Madrama Izama

Justice of Appeal