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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 15 OF 2019

NATIONAL FORESTRY AUTHORITY APPELLANT

VERSUS

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- 1. OMUHEREZA BASALIZA WILLIAM**
- 2. KANYABUZANA PAULINE**
- 3. BURIKARARA JOSEPH**
- 4. TUGUME MUGISHA EPHRAIM**

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- 5. BAHEMUKA PAUL & 35 OTHERS RESPONDENTS**

(An Appeal from the Decision of the High Court of Uganda at Fort Portal by Hon. Justice Mr. Oyuko Anthony Ojok dated 15th May 2018).

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CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Stephen Musota, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

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This appeal arises from the decision of the High Court in High Court Civil Suit No. 0025 of 2013 at Fort Portal in which the respondents were plaintiffs in a representative suit and the appellant was the defendant. The High Court found for the respondents and issued a number of orders against the appellant.

Being dissatisfied with the decision of the High Court the appellant preferred this appeal on a number of grounds which are set out herein.

Background

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The brief facts of the background to this appeal, is set out by the trial Judge at pages 2 and 3 of his Judgment as follows:-

5 *"The plaintiffs claimed to be lawful customary owners of the suit land having inherited the same from their grandparents from way back in 1940s to date.*

10 *That the Defendant in conjunction with the Police unlawfully evicted them destroying their properties, crops, animals, causing the arrest and prosecution of some of them. They also contended that they had never been presented with proof by the Defendant showing that the suit land was actually for the Defendant. The Plaintiffs prayed for damages to a tune of UGX 500,000,000/=.*

15 *The Defendant on the other hand denied all the contents in the plaint and averred that the Plaintiffs are not the owners of the suit land the same is a gazetted forest reserve which was declared in 1932, 1965, 1968 and 1998. Thus, the Plaintiffs are not entitled to the remedies sought. That when the boundaries of Buhungiro Central Forest Reserve were opened on the 26th and 27th day of August 2013, all the occupants of the forest reserve voluntary vacated the reserve and a Police post was established at Buhungiro Central Forest reserve to protect the same.*

20 *The Plaintiffs in reply stated that the Central Forest Reserve does not extend to the land they own and the Central Forest Reserve is distinct from their land.*

Agreed facts were:

- 25 *o That the Defendant's Forest Reserve should be determined in accordance with the gazetting map or Boundary plan of 1950 for Buhungiro Central Forest Reserve.*
- That the acreage of the said gazetting Map or Boundary Plan is approximately 1020 hectares equivalent to 3.94sq. Miles.*
 - That the Plaintiffs were evicted from the suit land by the Defendant.*

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- The following documents are admitted; Minutes of the sensitization meeting, joint boundary report, and forest reserves legal notices and declarations.

As already stated above, the High Court found for the respondents and the appellant being dissatisfied with his decision filed this appeal on the following grounds:-

- 10
1. *The learned trial Judge erred in law and fact when he held that the Suit land is not a forest reserve.*
 2. *The learned trial Judge erred in law and fact when he held that the plaintiffs are the rightful and customary owners of the suit land situate at Katikara, Kyakabamba village, Migongwe parish, Kakabara Sub*
 - 15 *County, Kyegegwa District.*
 3. *The Learned trial Judge erred in law fact when he held that there was excess land in Buhungiro Central Forest Reserve outside the gazette area.*
 4. *The learned trial Judge erred in fact when he held that any land in*
 - 20 *excess of the gazatted area was the suit land whereas not.*
 5. *The learned trial Judge erred in fact when he found that any land in excess of the gazzetted area belonged to plaintiffs whereas not.*
 6. *The learned trial Judge erred in fact when he found that the joint survey and independent surveyor's reports proved that the suit land belonged*
 - 25 *to the respondents.*
 7. *The Judge erred in law when he wholly relied on the independent surveyor's report in isolation in light of the contradictions and inconsistencies in the survey reports tendered in evidence.*
 8. *The trial Judge erred in law and fact when he held that the respondents*
 - 30 *were unlawfully evicted from the suit land.*

5 9. *The learned trial Judge erred in law when he awarded special damages that were not strictly proved.*

 10. *The learned trial Judge erred in law and fact when he awarded excessive damages to the respondents.*

When this appeal came up for hearing learned Counsel *Mr. Moses Muhumuza* and *Mr. Joseph Kwegisa* appeared for the appellant while *Mr. Muhumuza Kahwa* learned Counsel appeared for the respondents.

The Appellant's case

It was submitted for the appellant that:-

15 The land in question is part of a national forest reserve having been designated as such in 1950. The evidence at the trial indicated that the suit land fall within the boundaries of the forest reserve as far back as 1950. There was no other plan that defined the boundaries of the forest by way of natural fortunes as contended by the respondents. He referred us to a map of 1950 in respect of the Buhungiro forest reserve, for the proposition that the boundaries then indicated the suit land.

20 Counsel referred us to a sketch map drawn by one of the expert witness, and submitted that, the same was not accurate as it left out a large part of the forest reserve.

 He submitted further that, due to errors in the drawings and plans part of the forest reserve being claimed by the respondents does not appear to fall within the borders.
25 However, Counsel submitted, that such an error in drawing room did not affect the area covered by the forest reserve on the ground.

It was further submitted that, the respondents failed to prove that they were customary owners of the land in dispute. They provided no evidence of their prolonged occupancy such as the trees, plants a long time ago.

5 Counsel faulted the learned trial Judge for having decided the suit on the basis of the 1950 plan without taking into account all the other evidence that had been adduced.

Counsel went on to challenge the award of damages, contending that they had not been proved.

He asked Court to allow the appeal and grant orders sought.

10 **The Respondent's reply**

Mr. Kahwa for the respondents opposed the appeal and supported the findings and the order of the trial Judge.

He submitted that, the expert witnesses in this case had been agreed upon by both parties to assist Court in determining the technical question of boundaries. Both
15 experts Counsel submitted agreed that, there was excess land outside the forest reserve. This excess land Counsel contended is where the respondents were evicted from.

It was Counsel's submission, that a forest reserve is a creature of the law. Accordingly the reserve is limited to the area set out in the law that created it. In this
20 regard, the Buhungiro forest reserve was gazetted to cover 1,020 hectares and once this area was demarcated off, the remaining land that did not fall under the forest reserve acreage was excess land.

This is the excess land that, the respondents occupied and were evicted from. Counsel submitted that, the land reserved from the forest remains intact and that
25 the appellant had no jurisdiction over the land outside it. He asked Court to uphold the finding of the learned trial Judge, on all issues including the issue of damages.

Resolution of the Court

This is a first appeal and as such this Court is required to re-evaluate all the evidence that was available to the trial Judge and make its own inferences on all
30 issues of law and fact. See; *Rule 30(1)* of the Rules of this Court and *Fr. Narcensio*

5 *Begumisa & others vs Eric Tibebaaga; Supreme Court Civil Appeal No. 17 of 2002* in which *Mulenga JSC* explained on this principle as follows:-

10 "The legal obligation on a first appellate court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In *Coghlan vs. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) put the matter as follows -

20 "Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge,

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5 even on a question of fact turning on the credibility of witnesses whom
the court has not seen."

10 In Pandya vs. R (1957) EA 336, the Court of Appeal for Eastern Africa quoted
this passage with approval, observing that the principles declared therein are
basic and applicable to all first appeals within its jurisdiction. It held that the
High Court sitting on an appeal from a Magistrate's court had -

"erred in law in that it had not treated the evidence as a whole to that
fresh and exhaustive scrutiny which the appellant was entitled to
expect"

15 The principle behind Pandya vs. R (supra) was subsequently stressed in Ruwala
vs. R (1957) EA 570, but with explanation that it was applicable only where the
first appellate court had failed to consider and weigh the evidence. More
recently, this Court reiterated that principle in Kifamunte Henry vs. Uganda,
Criminal Appeal No. 10/97 and Bogere Moses & Another vs. Uganda, Criminal
Appeal No. 1/97. In the latter case, we had this to say -

20 "What causes concern to us about the judgment, however, is that it is
not apparent that the Court of Appeal subjected the evidence as a whole
to scrutiny that it ought to have done. And in particular it is not
indicated anywhere in the judgment that the material issues raised in
the appeal received the court's due consideration. While we would not
25 attempt to prescribe any format in which a judgment of the court
should be written, we think that where a material issue of objection is
raised on appeal, the appellant is entitled to receive adjudication on
such issue from the appellate court even if the adjudication be handed
out in summary form... In our recent decision in Kifamunte Henry vs.
30 Uganda we reiterated that it was the duty of the first appellate court to
rehear the case on appeal by reconsidering all the materials which were

5 (i) *That the applicants are hereby appointed representatives to file a suit against the respondent on their own behalf and on behalf of 30 other lawful and or customary occupants of land situate at Katikara - Kyakabamba village, Migongwe Parish, Kakabara Sub-county, Kyegegwa District listed in this application.*"

10 Annexure A₃ to the plaint sets out a list of persons who claim that their properties were lost or destroyed when the appellant evicted them from the suit land. They are 35 in number, including 4 of the persons whose names are set out in the plaint. Burikara Joseph whose name appears in the plaint does not appear in the list of persons set out in annexure A₃ to the plaint.

15 It appears therefore that the persons claiming under the plaint are 39 in number, as the plaint does not sufficiently disclose the 3rd plaintiff's cause of action as his name does not appear on the list of persons evicted from the suit land.

In the premises I shall proceed on the evaluation of evidence in respect of 39 claimants.

20 The respondents' claim is set out in paragraph 3 of the plaint as follows:-

"3. The plaintiffs' cause of action giving rise to the claim against the defendant is for:-

25 **a) A declaration** that the plaintiffs are rightful, lawful and customary owners of the suit land situate at Katikara - Kyakabamba. Migongwe, Kakabara Sub-county in Kyegegwa District.

b) A declaration that the eviction of the plaintiffs from the suit land by the defendant was illegal and

5 unconstitutional, high handed, arbitrary, oppressive and
inhuman.

c) An order for the recovery of the suit land, restoration and
allowing the plaintiffs to return the Suit land.

10 *d) An order* of eviction and vacant possession against the
defendant's officials currently occupying the suit land.

e) A permanent injunction restraining the defendant, its
employees, officials, agents from further evicting the
plaintiffs from the suit land and or interfering with the
plaintiffs use and occupation of the suit land.

15 *f) Special damages* for the destroyed crops, houses,
household items, animals, chattels and for movable and
immovable items as listed in *Annexure A2* and assessed
and valued thereafter:

20 *g) General and exemplary damages* for the illegal and
unconstitutional manner, violence, high handedness,
arbitrary, oppressive inhuman displacement and forced
refuge, pain and suffering, torture, starvation, inhuman
treatment, denial of shelter and rights to property.

25 *h) Interest on (f) (g) and (h) above* at Court rate from the
date of the cause of action till payment in full.

i) Costs of the suit.

*j) In the alternative, an order for compensation for special
general an exemplary damages as pleaded in 3(f), (g) and
(h) above.*

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5 The plaintiff goes further to narrate the facts giving raise to cause of action in paragraph 4 as follows:-

"4. The facts giving rise to the plaintiffs' cause of action against the defendant arose as hereunder;

10 *a. At all material times, the plaintiffs' have been the lawful owners of the suit land situate at Katikara - Kyakabamba village, Migongwe Parish, Kakabara Sub-county, Kyegegwa District by first acquisition and occupation as open land way back in the 1940s to date by their grandparents passing on the same by bequeath and inheritance thereby becoming lawful and customary owners thereof which approximately measures 400 acres combined.*

15 *b. The plaintiffs have since settled, occupied, developed, utilized, possessed and used the suit land for various purposes including but not limited to residential holding, burial, grounds, cultivation of food and cash crops, rearing and grazing animals and planting commercial trees without any interference and unhindered.*

20 *c. On the 23rd June, 2011, the defendant unlawfully wrote a letter to some of the plaintiffs threatening to evict them and it has on various occasions attempted to use actual and physical force to evict them claiming that the suit land belongs to the defendant, whereas not.*

25 *d. On 29th July, 2011 the plaintiffs through their lawyers, wrote to the defendant challenging the threatened eviction and requested for proof of ownership of the suit land from the defendant, which request was adamantly ignored. Nevertheless the defendant continued to threaten forceful eviction of the plaintiffs. A copy of the said letter is attached hereto and marked Annexure.*

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5 e. On or about the 28th day of August; 2013, the defendant's officials in
the company of the Uganda Police from Kyegegwa District Police
Station brutally and forcefully evicted the plaintiffs from the suit
without giving them no chance to organize themselves, park, load,
10 transport and harvest any crops and drive their animals and. some of
the plaintiffs were wrongfully and illegally arrested, detained,
summarily prosecuted, convicted and sentenced under **The Forest
and Tree Planting Act NO.8 of 2005** charged before the Kyegegwa
Grade one Magistrate's Court a conviction being challenged on
appeal.

15 In his Judgment the learned trial Judge, summarised the issues/evidence adduced at
the trial as follows at pages 3 and 4 of his Judgment:-

Issues:

- 20 1) Whether the suit land situate at Katikara, Kyakabamba and
Igundu 'B' Villages, Migongwe Parish, Kakabara Sub-County,
Kyenjojo District claimed by the Defendant is a Forest Reserve?
2) Whether the Plaintiffs were lawfully evicted from the suit land
above?
3) Whether the Plaintiffs suffered any loss, damages and destruction?
4) Whether the parties are entitled to the remedies or reliefs sought?

25 *Summary of evidence:*

PW10 Muhereza Basaliza William told Court that the Defendant chased
him and the co-plaintiffs off the suit land on the 28th August 2013. He told
Court that the land he was staying on was customarily owned having
been on it since birth and his grandparents had stayed on the same for a
30 Long period. The Plaintiffs were forcefully evicted and their properties

5 destroyed yet the land does not belong to the Defendant. He prayed for compensation for the properties lost to a tune of UGX 2,035,763,015/=.

PW2 Bagurna Brian, the surveyor told Court that upon opening the boundaries, it was found that the area as occupied by NFA was in excess of the gazetted 1,020 Hectares of the 1950 boundary plan. That upon
10 marking off the 1,020 hectares, Katikara Village was found outside the Buhungiro Central Forest Reserve. The Report was tendered in Court and marked PE1.

PW3 Bazirake Ntawera Charles Godfrey told Court that according to his assessment and evaluation of what the 40 farmers lost at the District
15 rate, it came to UGX 2,035,763,015/= The assessment covered crops, buildings, among others. The assessment report was tendered in Court and marked PE2. He told Court that he saw destroyed buildings and abandoned crops, some eaten, others ready for harvest and some vandalised. Some trees were cut. That his assessment was based on the
20 District rates.

PW 4 Joseph Burikarara told Court that he was born on the suit land and acquired the same customarily from his father who -also acquired it from his father. That he and the other Plaintiffs had lived on the suit land for long and it was not part of the Central Forest Reserve. That
25 since eviction the Defendant had planted trees and cleared the land.

DWI Opal Zachary Bernard Onumbe told Court that the Plaintiffs had encroached on the Central, Forest Reserve of Buhungiro and together with the, Kyegegwa District Task Force, the people were allowed to vacate the forest voluntarily and there was no destruction
30 of property. However, he was not present during the eviction of the

5 *Plaintiffs. That Police was also dispatched to stop resettlement but did not torture anyone.*

10 *DW2 Owuna Jimmy told Court that he was involved in the evictions and they were conducted in the most peaceful manner, with no destruction of property or crops. That the encroachers were also given time to harvest their crops and leave in peace and that was from February 2013 to August 2013. Radio announcements were also made during this time. That after the 6 months grace period only 8 people were found on the suit land and arrested. He also told Court that encroachment started in 2011 and later eviction in 2013. That the people that were evicted were those between the two rivers which are the natural marks of the Central Forest Reserve.*

15 *DW3 Robert Owiny corroborated the evidence of DW2.*

The issues set out in the Judgment are the same as those agreed upon by the parties and set out in their joint scheduling memorandum. The issues framed by the parties and accepted by the learned trial Judge do not address the whole respondents' claim as set out in the plaint already reproduced above.

20 The respondents' standing in the suit is premised on the claim that they were customary owners of the land in issue. This is clearly set out in the plaint and again in the joint scheduling memorandum.

25 In the later document the plaintiffs' now respondents' case is set out as follows:-

"The plaintiffs' case;-

The plaintiffs are rightful, lawful and customary owners of the suit land situate at Katikara Kyakabamba, Migongwe, Kakabara Sub-county in Kyegegwa District by first acquisition and occupation as open land way

5 *back in 1940s to date by their grandparents passing on the same by*
bequeath and inheritance thereby be coming lawful and customary
owners for the same. The plaintiffs have settled, occupied, developed
utilized and possess the same with various seasonal and permanent
10 *crops. That the defendant's land comprised of a Forest Reserve does not*
cover plaintiffs' land. On 28th August, 2011, the defendant's agents
comprised of Uganda Police, LDUs, SPCs and UPDF Officers and rangers
unlawfully, violently, brutally 'evicted them from the land and caused
destruction of their homesteads, dwellings, households, crops and
15 *animals. The plaintiffs seek remedies pleaded for under paragraphs 3*
and 9 of the plaint."

With all due respect to the learned trial Judge, he ought to have framed the first issue as to relate to the question regarding respondents' *locus standi*.

20 That is: *"whether or not the respondents were rightful, lawful and /or customary*
owners of the disputed land".

All the other issues are premised on the resolution of the question of the respondents' rights as customary tenants on the disputed land.

The Judge clearly appreciated the law regarding the burden of proof in Civil Suits when at page 4 of his Judgment he stated thus:-

25 *"In civil cases, it is an established principle that the burden of proof lies on*
the Plaintiff to prove his/her case on the balance of probabilities. Therefore,
a party can only be called to dispute or rebut what has been proved by the
other side. This is so because the person who alleges is the one who is
interested in the Court believing his contention. (See: Muller versus Minister

5 *of Pensions, [1947] 2 ALLER 372, Lugazi Progressive School & Another
versus Serunjogi & Others [2001-2005] 2 HCB 12).*

10 *Sections 101, 102, 103 and '106 of the Evidence Act, place the burden of proof
on the party who asserts the affirmative of the questions or the issue in dispute.
The Sections impose the burden of proof upon a person who alleges the facts to
exist.*

*In the instant case it was therefore the duty of the Plaintiffs to prove their case a
balance of probabilities."*

However, the learned trial Judge did not thereafter set out the issue regarding the
question of the respondent's claim as customary tenants on the suit land.

15 The respondents who were the plaintiffs at the High Court had the burden of
proving that they owned the land in issue by establishing the nature of tenure under
which their claim was based.

Customary tenure is defined in the last Section 1 (1) of the Land Act as follows;

20 *"Customary tenure is a system of land regulated by customary rules which are
limited in their operation to a particular description or class of persons of which
are described in Section 3"*

The Supreme Court in *Kampala District Land Board and George Mutale vs Venansio
Babweyaka and others, Supreme Court Civil Appeal No. 2 of 2007*, held that customary
tenancy must be proved.

25 In that case Odoki, CJ who wrote the lead judgment held as follows;

*"I am in agreement with the learned justice of appeal that the respondents
failed to establish that they were occupying the suit land under customary
tenure. There was no evidence to show under what kind of custom or practice*

5 *they occupied the land and whether that custom had been recognized and regulated by a particular group or class of persons in the area”.*

The respondents were under duty to prove, customary law of the people of the Toro custom under which they occupied the land. This is so because the disputed land fall within the boundaries of the former Toro Kingdom as set out in the Toro Agreement
10 of 1901.

In respect of land the Toro agreement stipulated as follows:-

*“All the waste and uncultivated land which is waste and uncultivated at the date of this Agreement; all forests, mines, minerals, and salt deposits in the Toro district shall be considered to be the property of Her Majesty’s Government, the
15 revenue derived therefrom being included within the general revenue of the Uganda Protectorate; but the natives of the Toro district shall have the same privileges with regard in the forests as have been laid down and formulated in the aforesaid regulations in force in the Uganda Protectorate as are applicable to the natives of each province or other administrative division of the
20 Protectorate within such province or administrative division...”*

From the above excerpt, it clearly shows that ownership of land by “natives” could only be established by occupancy and custom. The evidence adduced in Court to prove customary ownership did not refer to any customary ownership neither did it refer to any custom. Nothing was provided to Court by way of evidence to prove that
25 indeed the respondents were customary owners of this suit land.

If indeed they were, before 1901, then by virtue of the Toro Agreement 1901 it is not possible to determine from the evidence adduced by the respondents when they or their ancestors first entered that land. The evidence suggests that, they occupied

5 the land 40 to 50 years before the evictions of 2013. They even asserted that they had lived on the land for over 200 years.

The 1st plaintiff witness Omuhereza Basalize William in respect of the claim to land stated as follows in cross examination:-

"Cross examination by counsel Kwesiga to Omuhereza Basaliza William.

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-I have lived there for 41 years

-Inherited from my father.

-He died in 1985. I was 13 years old.

-He had also inherited from his father

-My mother told me the status of his land

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-My dad married her and she found him on the land 2013

-It was never part of any land dispute with NFA.

-It was ambushed with eviction

-My mother showed me the bananas and coffee crops in proof of ownership.

-Long stay by all plaintiffs

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-Some people were arrested Nankwasa, Bosco etc.

-Police took them. Taken to court and detained in prison.

-currently I live in the suburbs of Kyegegwa

-Others are still hanging at Itambiro places

-my dad was born 1922

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-paragraph 4 of the plaintiff says 19402.i do not know.

-He told my mum"

PW4 stated as follows in his testimony.

*"PW4: JOSEPH BURIKARARA BORN AGAIN CHRISTIAN ON OATH
STATES:*

5 *I am 59 years old. Resident of Igunda LC 1, Migongwe Sub County of Kakabara, Kyegegwa.*

I am a teacher at kisoko primary school. That is Kijaguzo parish.

I am still in service. I am one of the 39 plaintiffs.

10 *I acquired land in Kakabara by inheritance Land was first acquired by my father Eteera Paulo. He inherited it from his father BINAGWA. I was born on the suit-land Katikara Igunda LC 1.*

In 1957 on the suit land.

KAKULIREMU is wife to; the late Paul Kizza S/O Beteera. She inherited from her late husband.

15 *Bahemuka Paul acquired the land from his grandfather Katema. Tugume Mugisha bought from Tinka Begira S/O Begira. I do not recall when. Tinka has lived there for over 48 years.*

20 *Alex Brown bought from Muhabuzi Mosese. About 8 years ago. Barigye bought from Kakurirernu wife of late Paulo Kizza. 1 Tinkasimire John inherited from his father Begira. Over 40 years ago. Bamulabe James bought from someone over 10 years ago. Akugizibwe Omuhereza inherited from Kanyabuzana.*

25 *Nankwasa William bought from Basaliza. Milly Kihika bought from Kajura Ibrahim over 10 years ago. Bahemuka Vicent inherited from his father Bahernuka and grandfather Ocaki. Musabe James inherited from late Paul Kwezi. Begira Kohen inherited from Kaheeru. Kabubare bought from Tinka Begira. Kembaga Joyce inherited from her late husband Paul Kizza.*

- 5 *I was born on this land. By the time I came of understanding age this was a flat land. 3 streams are Rwigarwe, Katayira and Katinguta. Savannah land, with scattered trees.*
- Buhingiro forest is in Kyatega parish borders with Migongwe Parish. There are feeder roads. One from Igunda to Igamba and*
- 10 *Mpaara. Another from Migogwe passes through joining the road.*
- In the area were schools. Nursery school in Kyakabamba, Migongwe Primary school at the trading centre. Kakabara primary school and home light. I studied at Kakabara primary school. Five Kms away.*
- 15 *There was Kyakababa Passover church, Kyakabamba catholic church, Iganda health centre III Kakabara. And then some clinics in the trading centres, Kabani Igoridwe e.t.c.*
- The suit land is not in the Forest Reserve. The forest area is in Kyatega parish.*
- 20 *The boundaries were set by the colonial masters. They have never changed. Iganda and Kyakebamba lie in Kyakabamba parish.”*

25 The respondents did not produce graduated tax tickets to confirm they were residents in the area for a long. It was mandatory for every male adult to pay graduated tax and retain the ticket from the colonial days up to 1997. The graduated tax ticket was also used as an identification document.

No records were produced from the Gomborora (sub-county) office to show the record of births, death, graduated tax payers register or any such evidence. There were no graves found on the whole of the disputed land by the values who prepared the valuation repair, no mature trees of species foreign to the locality were found,

5 such as fruit trees, avocado, mangoes, coffee and others possibly identified to have been older than 10 years.

There is no record from the Kingdom of Toro offices, confirming that indeed the respondents or their ancestors were the Toro King's subjects at any one time between 1900 and 1995. There was no evidence that they belonged to any clans of
10 Toro and as such performed any cultural obligations to the King. No independent witness from the local government, the Toro Kingdom government, retired chiefs or elders were called to confirm their oral testimonies.

According to PW3 an independent expert witness who valued and quantified the loss, noted that, there were no roads, no schools, no churches, no mosques, no sign
15 of pit sawing, nothing in the disputed area that points to long term settlement.

The evidence adduced by the respondents fell far short of discharging the burden of proof on a balance of probabilities that, indeed they were customary owners of the land in issue.

Perhaps one would suggest that they could have been *bonafide* occupants. This was
20 not pleaded. Even if it had been pleaded, no proof had been provided to Court to show that they had occupied and utilized the disputed land by 1982. The land Reform Decree of 1975 abolished fresh customary ownership of land. Ownership of land was vested in the state and any person who was occupying public land prior to the passing of the decree under customary law, became tenants of the state at
25 sufferance. Ownership by occupancy was granted a legal cover under the Land Act of 1998 that repealed the Land Reform Decree, provided that, the occupants of such land, were in continuous occupation for 12 years prior the coming into force of the 1995 Constitution.

5 See: Section 3, 4 and 5 of the Land Reform Decree. Decree No. 3 of 1975. Section
5(1) of that Decree stated as follows:-

10 *5(1) With effect from the commencement of this Decree no person may
occupy public land by customary tenure except with the permission in
writing of the prescribed authority which permission shall not be
unreasonably withheld.*

This Section's marginal note states:-

"Fresh acquisition of customary tenure"

15 It appears clearly from this Section that between 1975 and 1998 customary tenants
were obliged by the law to obtain written permission from government conferring
upon them such a status or confirming it. No evidence of such permission was
adduced in Court by any of the respondents. No evidence was adduced to prove that
they were lawful or *bonafide* occupants of the suit land.

20 The learned trial Judge with all due respect proceeded to determine the suit on an
erroneous assumption that once the appellant failed to prove that, the land in issue
was indeed a forest reserve then, he ought to find for the respondents. The learned
trial Judge ought to have dealt with the issue of the respondents own claim and *locus
standi* first which he did not. Had he done so he would have found that customary
tenancy had not been proved.

25 I find that, the learned trial Judge failed to properly evaluate the evidence on record
and as a result arrived at a wrong conclusion that the respondents had proved that
indeed they were customary owners of the suit land.

30 My finding is that the respondents failed to prove on a balance of probabilities that
they were the customary owners of the disputed land. This finding would dispose of

5 this appeal and the respondents claim was unsustainable in the first place. I would set aside the Judgment of the trial Court and substitute it with an order dismissing the suit.

However, because the issues raised herein are of public importance and relate to some important questions of law, I shall proceed to determine the rest of them.

10 **Ground 2**

Whether the suit land is a forest reserve.

Exhibit PE1 is a boundary and Area verification for Buhungiro Centre Forest Reserve. It is dated 29th May 2014 and was prepared by Mr. Brian Baguma a registered surveyor on the instruction the respondents.

15 He testified for the plaintiffs now respondents as PW2 in Court. In his report he makes the following observations in respect of the disputed boundaries.

“4. FINDINGS

1. *It was found out that the position of cairns No.1, 2, & 3 on the ground properly conform to what is defined on the Boundary Plan.*

20 2. *Cairns No. 4, 4B, 5, 7, 8 could not be located on the ground. These have been indicated by red color on the drawing attached. Cairns No. 1 at Rwabunyonyi. 2 at Nyanga, 6 at Ngangi, 9 at Katamba and 10 at Hamuhungeera were found damaged but the witness mark was found still*
25 *visible and those were coordinated.*

3. *Cairns No. 2 and 5, and 4A at Kabasasira and Kyaiseruboha and Rwebitabaga respectively were found intact and were coordinated.*

30 4. *The positions of the Cairns were plotted against the digitized river boundaries to generate a map attached in Appendix I. It was found out*

5 that the shape formed by the cairns on the ground do not conform to that
on the 1950 Boundary Plan especially at Rwebitabaga (4A), Kyaiseruboha
(5) and Katamba (9). This shape formed a total area of 1020Ha.

10 5. The 1950 Boundary Plan shows that the CFR boundary follow river
Rwigarwe. However, it was found out that the boundary line leaves the
river outside with a heavily denser virgin forest. While the 2006 survey
existing in the land office in Kyenjojo district covers that area it takes
more area than what was gazetted. The 2006 Cadastral Survey covers a
total of 1158Ha as opposed to the 1020Ha which appears in the Gazette
15 Statutory Instrument thus covering an-excess of 138Ha.

6. It was found out that the positions of Cairns No.1, 2, & 3 fairly conform to
the 2006 surveyed boundary leaving the people of Nyanga community
outside the Forest Reserve."

20 In respect of the above observations he makes the following recommendations.

"RECOMMENDATION

25 Based on the observations above and the ground situation, it shows that there
are many errors in the records with NFA pertaining the boundaries of
Buhungiro Central Forest Reserve, and based on the Gazette information the
Forest Reserve currently covers much more land on the ground than that
Appearing in the Gazette. This is evident in the survey records currently
available at the land office in Kyenjojo, and therefore, to the best of my
knowledge and professional experience, I thus recommend.

- 5
1. *A re-survey to harmonize the existing boundary information Land Office with the gazette and the physical ground situation,*
 2. *The new Survey should follow properly the positions of the mentioned Rivers and Cairns which were setup in 1950 so that it does not affect the neighboring community like Katikara.*
 - 10 3. *The re- survey should properly cover the area stipulated in the gazette and leave out what was not gazetted to the lawful indigenous owners for instance the complainants in this matter (Katikara).*

Thereafter he proceeds to make conclusions based on what he terms Technical approach as follows:-

15 **“Findings**

On plotting the field data defining the location of the physical boundaries as defined by River Kataire and River Rwigarwe against the 1950 Boundary Plan, it was found out that the boundary line on the 1950 Boundary Plan falls far off the physical position of the Rivers on the ground. This has been indicated in the drawing attached below with the hatched area showing the extra land between the defined boundary on the 1950 Boundary Plan and the physical location of River Kataire and River Rwigarwe on the ground.”

20

- 25
2. *It was also discovered that the total area physically occupied by Buhungiro Central Forest Reserve on the ground is 1447.86 hectares as opposed to the appears in the gazette Statutory Instrument*
This forms an excess of 427.86 hectares being occupied by the Forest and thus claimed by NFA hence creating a dispute and in contest. This excess
is justified by the fact that the 1950 Boundary Plan when positioned on
- 30

5 *the ground does not follow the natural rivers as is indicated on the map. The Boundary Plan leaves out part of the land belonging to the Forest Reserve as has been hatched as in the above drawing, hence encroaching onto the neighbouring land belonging to the natives of Katikara village. This means that the 1950 survey that produced the Boundary Plan being*
10 *referred to did not precisely capture the physical location of the Rivers Rwigarwe and Kataira on the ground hence encroaching onto the neighboring land of Katikara.*
On the drawing below, the excess area has been subdivided off the map which clearly follows the physical positions of the rivers and the cairns.
15 *The area hatched indicates the excess area of the 1020 covering a total of 427.86 ha and covers Katikara village. The indented line in appendix 2 shows where the NFA 1020 hectares should stop.*

20 It is apparent from the evidence contained in this report that, the physical forest cover of Buhungiro forest, on the ground is larger than 1020 acres set out in the instrument the created, the Forest Reserve in 1950.

25 Whereas the physical survey records at the Kyenjonjo District Land Office indicate that the physical forest covers 1,447.86 hectares, the gazetted forest area is 1,020 hectares. The variance is 427.86 hectares. This is the land referred to as “excess’ that is the subject of this matter.

 This begs the question as to who owns the ‘excess land’ under physical forest cover but outside the 1,020 hectares mentioned in the instrument that created the Buhungiro Forest Reserve.

30 By 1950, the land under forest was vested in the crown and belonged to the colonial state. There is on record Legal Notice No.87 of 1932, issued under The Forest

5 Ordinance (Cap 71, Revised Laws 1923) it was issued by The Acting Governor of Uganda Protectorate and states as follows:-

10 *“His Excellency the Acting Governor has been pleased to declare the areas set forth in Schedules 1 and 11 hereof to be undemarcated forests and further to declare the areas set forth in schedule III hereof to be Demarcated or un-demarcated forests as indicated in the fifth column of that schedule. A. E. WEATHERHEAD Acting Chief Secretary to the Government”.*

The record indicates that Buhungiro Forest is not listed in Schedule 1. However, the record is incomplete as it does not contain the page showing Schedule II and III. I have not been able to obtain the missing pages.

15 Be that as it may, what is pertinent in this legal notice is that, forests could be physically identified and declared either as demarcated or un-demarcated and classified by Legal Notice.

20 What appears from the evidence is that in 1950 a number of forests were surveyed in order to ascertain the acreage and to have them gazetted as Forest Reserves. Boundary plans were prepared following the survey and in respect of Buhungiro Forest the plan is indicated on the record as BP1315. This Forest Boundary Plan exists and is available at the District Land Office.

25 This is the boundary plan that is referred to by PW2 Brain Bagume in a report exhibit PE1 the excerpt of which is already reproduced above. This boundary plan No. BP 1315 is in respect of Buhungiro Forest reserve, made in 1950, when plotted on the ground covers 1,447.86 hectares. However, the areas of Buhungiro Forest Reserve in the gazette declaring it a forest reserve in 1950, is indicated as “Approximately 1,020 hectares.

5 Therefore, the evidence reveals a disparity between the approximate areas of 1,020 hectares as set out in Statutory Instruments creating the forest reserve and the physical forest cover of 1,447.86 on the ground which corresponds with in the boundary plan of 1950 reference number BP1315.

10 This disparity was not corrected in the 1965 Statutory Notice which appears to have been concerned more with categorizing forests which had been gazzetted, into two categories:- the Local Forest Reserves and Central Forest Reserves. The technical data, relating to acreage and boundaries remained as it was in 1950. In 1968, following the coming into force of the 1967 Republican Constitution that abolished kingdoms and changed all the Country's local administration units into Districts. In
15 the result a number of Districts were created from the unit that was formally Buganda Kingdom a fresh Statutory Notice, the purpose of which was to indicate under which jurisdiction the local forest reserves fall. Again the technical data relating to acreage and boundaries remained as it was in 1950. The boundary plan BP 1315 in respect of Buhungiro forest remained unchanged.

20 Once again following the coming into force of the 1995 Constitution and subsequently the Land Act of 1998, fresh categorization of Forest Reserves was necessary. This culminated in the issuance of Statutory Instrument No.63 of 1998, under which Buhungiro Forest was categorized as a Central Forest Reserve. The technical data remained the same as it was in 1950. The boundary plan still
25 remained BP 1345 and the areas were still indicated as approximately 1,020 hectares. The map reference (cadastre sheet at the lands office, remained the same agreed fact as it was in 1950.

With the above facts I now proceed to the Genesis of this dispute. I am constrained to reproduce here the first fact agreed upon by both parties that the trial, which is
30 already set out at page 2 of this Judgment. The parties agreed that:-

- 5 o *That the Defendant's Forest Reserve should be determined in accordance with the gazetting map or Boundary plan of 1950 for Buhungiro Central Forest Reserve.*

10 The appellant is established under the National Forestry and Tree Planting Act, 2003 under Section 52. Therefore prior to that, forests were managed by Government department known as the Forests Department. Following the coming into existence of the appellant as a legal entity entrusted with the management of forest, as submitted by Counsel soon after its establishment the appellant proceed to carry out an exercise to determine the physical boundaries of forest reserves under its jurisdiction. This exercise must therefore have commenced sometime after 2003. 15 The earliest record indicating the presence of the respondents on the disputed land was 8th June 2009 when some of them submitted a joint application for registration of 400 acres as freehold in respect of the disputed land. This was a joint application. When all the above facts are put together the jigsaw puzzle starts clearly to take 20 shape.

A physical survey was carried out on Buhungiro Forest Reserve on the basis of BP1315 of 1950 revealing that plan covered a wider area than the 1,020 indicated in the Statutory Instrument of 1998, 1968, 1965.

25 It is apparent that once the technical team from the appellant and the Kabarole District Land Office, became aware of the disparity between the Boundary Plan of 1950 and the acreage set out in the gazette notices of 1965, 1968 and 1998 they were conceived that there was “excess land” outside the Central Forest Reserve.

30 They arrived at an erroneous conclusion that was free land which was outside the jurisdiction of National Forest Authority, because in their view the forest reserve was limited to only 1,020 acres.

5 They proceed to declare the forest outside that 1,020 acres “excess” land.

In a report compiled by two private surveyors Mr. Opar Wonumbe and Mr. Caleb Mwesigwa the above fact became clear when in their report they state as follows in respect of the ‘excess land’.

10 *“This land cannot be claimed by National Forest Authority, since the area falls outside the protected area”.*

It appears that armed with such legally unjustified conclusion, a scheme was hatched by land grabbers to instigate people to occupy and later claim this so called ‘excess land’. The encroachers it appears entered the land between 2008-2013. I find so because, there is no written record anywhere indicating their presence
15 earlier than that. Further, if it were true that the respondents had occupied the land for more than 50 years as they claim then, each one would have owned and occupied a different piece of land with a separate and distinct history of acquisition and occupation.

This was not the case because in December 2008, the respondents jointly applied
20 for one freehold title covering 400 acres. The application for freehold was made by Tinkansimire Begira Aloysious, Basaliza and Bahemuka. Their application indicated that the whole of 400 acres of the disputed land was one joint customary holding owned by the applicants. The purpose of the application was to have that whole land of 400 acres converted into one freehold title and vested in only four of them jointly.
25 This was on 8th June 2009. Ordinarily each individual would have applied on his or her own in respect of his or her own customary holding. Each application would have to prove occupation and customary ownership.

On 4th April 2013, the four person and others totaling 35 applied for a Representative Order to represent 327 other persons in suit against the appellant,

5 claiming ownership of the same land in respect of which a freehold title had been applied for by only four of them.

The 1st respondent in that application for a Representative Order (P.1777) Deponed swore an affidavit in its support paragraph1 of which reads as follows:-

10 *"1. That I am and adult male(40) years Ugandan of sound mind, a dully nominated representative of other 327 persons who own various pieces of unregistered land situate at Katikara-Kyakabamba Migongwa Kakebah, sub-county Kyegegwa District.*

Paragraph 3 of the same affidavit states that the very same land in respect of which a representative order was being applied for was the same land in respect of which
15 the 1st respondent, the 5th respondent and other 2 persons had already applied for and had been granted a freehold offer by the District Land Board exclusively the owners of that land. The freehold offer is in fact annexed to the very affidavit as annexure B. The claim that 327 peasant farmers appears clearly to have been a fraud in view of the four main respondent's application for a freehold title in respect
20 of the same land prior to the filing of the suit from which this appeal arises.

I have already found that there is no evidence to show that the respondents had lived on the suit land for long time. Indeed in their own evidence, they concede that were arrested, prosecuted and convicted under the National Forests and Tree Planting Act on charges of trespass which they appear to have conceded to.

25 Further the fact that, meetings were held between National Forests Authority, Local Government officials and the respondents wherein the respondents were allowed time to harvest their crops and to peacefully vacate the land in dispute, is also not dispute.

5 It appears clearly to me that this was a land grabbing scheme, hatched by only four people namely the 1st respondent Basaliza William, the 5th respondent Bahemiika Paul and Tinkansimire Begira and Aloysious Begira with support from unknown public servants in local administration and the land office.

Under this scheme the four persons would obtain a freehold title in their names in
10 respect of 400 acres of forest and pass it to their sponsors in form of an outright transfer and sale. The buyer would therefore become a *bonafide* purchaser for value without notice. Similarly in the event that they were unsuccessful in retaining the land they would obtain vast sums of tax payers' money by way of compensation for eviction and destruction of property as seen in the damages sought and warded in
15 this case.

I would conclude this issue with the following findings:-

1. The area covered by the forest reserve is 1,447.86 hectares as set out in Boundary Plan referred to above and not 1,020 hectares indicated as the approximate area on the schedule to the 1998 Gazette.
- 20 2. The 1,020 hectares indicated in the Gazette Notices of 1998, 1968 and 1965 was a reference to an estimation of the area covered by the forest in 1950, upon which instructions to survey were issued, prior to the determination of the exact area covered by the forest.
- 25 3. The survey carried out in 1950 determined the exact forest area to be 1,447.86 hectares as indicated on the Boundary Plan BP 1315. However, the approximated area (1,020 hectares) indicated in the schedule to the Gazette remained unchanged. Therefore, there is no and there has never been any excess land which could have been legally occupied by the respondents as all of the disputed land has
30 always been part of the forest reserve.

5 I accordingly answer issues 1, 2, 3, 4, 5, 6, 7 and 8 in the affirmative.

Having upheld the first eight grounds of the appeal, it follows that the 8th and 9th grounds which are in respect of damages must also fail.

However, I would like to refer to those issues as part of the evaluation of the whole evidence.

10 The representative order issued to the respondents under *Order 1 Rule 8* dated 27th September 2013 has already been reproduced above. It clearly states that the respondents were appointed to represent 30 lawful and or customary occupants of the suit land.

15 This is at variance with *Miscellaneous Application No. 0019 of 2013* on which a list of 334 persons was attached. The valuation report carried out by G.Bazirake Ntawera annexure PE2 set out a list of 40 claimants. It is not clear from the judgment how many persons he considered plaintiffs and how many he considered claimants, he neither named them nor listed them

20 In respect of special damages the Judge put the position of the law correctly when he stated at page 10 of his Judgment as follows:-

25 *"Special damages are such a loss as the law will not presume to be consequences of the Defendant. It depends on the special circumstances of the case) must always be explicitly claimed in the pleadings and proved at the trial. It must be proved by evidence both that the loss was incurred and that it was the direct result of the Defendant's conduct."*

But he erred when he failed to disallow this claim that had not been proved at the close of the trial and instead ordered that the award will abide the result of a valuation report by as District valuer! Such a report could not be part of a Judgment

5 since it would not have been produced in evidence, cross examined upon and exhibited indeed as an appellant Court I are unable to know how much was awarded as special damages in this case.

There was no basis upon which an award of general damages let alone, exemplary damages could have been awarded. The claim for loss by the various claimants most
10 of who were not parties to the suit can only be described as fiction if not outright attempt to defraud the tax payer.

The 40 claimants listed in Ex PE 2 were stated to be poor peasants practicing subsistence farming. The report indicates that in fact they were by commercial farmers with scores of acres of crop all in one season in one year.

15 The first claimant on that list Kakuliremu Grace is said to have owned over 60 acres land under different crops at that time. Just one person. Her claim was amounting to shs.77,006,000/= one peasant farmers in one season, upon which the valuer added 30 percent disturbance allowance to make a total of shs.100,107,800/=. The 5th respondent Behemuka Paul is stated to have lost over 40 acres of crops all ready for
20 harvest in one season between April and August 2013, his individual claim amounted to shs. 89,949, 600/= one peasant farmer. Muhabuzi Moses a peasant is stated to have lost over 83 acres of mature crops valued shs.180,099,400/=. The 1st respondent on his part was stated to have lost over 60 acres of mature crops valued at shs.182,050,700/=.

25 The total claim by 40 claimants listed in the report is shs. 1,850,693,650/=. On average therefore each claimant was to receive shs. 46,267,341.25/=.

This kind of exaggerated claim that is certainly fraudulent ought to have been rejected. The whole of the plaintiffs now respondents claim was a fraud and a grand corruption scheme, orchestrated by technical offices from the land office, the

5 surveys department, local authorities and financed by commercial land grabbers. The other claimants were just pawns in the game of chess. There was no basis upon which any Court let alone the High Court could have allowed such claim. There was no basis upon which an award of general or exemplary damages could have been made. I have already rejected it. Courts of law cannot accept to be used as
10 instruments of fraud and corruption. This Court cannot lend a hand to an illegality. See: *Makula International Ltd vs His Eminence Emmanuel Cardinal Nsubuga and Rev. Fr. Dr. Kyeyune, Court of Appeal Civil Appeal No. 4 of 1981 or 1982 HCB 11*

I find that this appeal has merit and it is hereby allowed on all grounds.

15 Before I leave this matter I ascertained from the High Court file from which this appeal arises that the respondents were paid through their lawyers Kaahwa, Kafuuzi and Bwiruka Advocates a total of Ugshs. 1,571,250,000.00/= between 20th August 2018 and 13th September 2018 following Garnishee proceedings in High Court at Fort Portal *Miscellaneous Application No. 46 of 2018*.

This money must be refunded by each of the persons who received it.

20 Accordingly the respondents' advocates are ordered to file accountability of the said money with the Registrar of this Court within 14 days of the date of this Judgment.

It is further ordered as follows:-

1. *This appeal is allowed and the Judgment and decree of the High Court is hereby set aside and substituted with this Judgment.*
- 25 2. *The freehold offer issued to the 1st respondent and three others by Kyenjonjo District Land Board is hereby canceled.*
3. *It is hereby declared and held that Buhungiro Central Forest Reserve covers an area of 1,447.86 hectares as reflected on the Boundary Plan Map Number 1345, survey map sheet Nth A 6. S. IV map sheet reference No. 67/2 KYAKA and not*

5

approximately 1,020 hectares as indicated on schedule to Statutory Instrument No. 63 of 1998.

10

4. *It is hereby ordered that the schedule to S1 63 in respect of KA/1, Buhungiro, KABAROLE SERIES SHEET and 732 D.O.S, Map Sheet Reference 67/2 BP 1345 be amended in the last column by deleting therefrom 1,020 hectares and substituting the same with 1,447.86 hectares.*

5. *That a copy of this Judgment be availed to the Hon. The Attorney General and to the Minister responsible for forests.*

6. *That the five appellants named in plaint shall pay the costs at this Court and the Court below.*

15

Dated at Kampala this^{21st}.....day of ^{JULY}..... 2020.

.....


Kenneth Kakuru
JUSTICE OF APPEAL

20

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NO. 15 OF 2019**

5 **NATIONAL FORESTRY AUTHORITY ::::::::::::::::::::::::::::::::::: APPELLANT**

VERSUS

- 10 **1. OMUHEREZA BASALIZA WILLIAM**
- 2. KANYABUZANA PAULINE**
- 3. BURIKARARA JOSEPH**
- 4. TUGUME MUGISHA EPHRAIM**
- 5. BAHEMUKA PAUL & 35 OTHERS ::::::::::::::::::::::::::::::::::: RESPONDENT**

15 *(An Appeal from the decision of the High Court of Uganda at Fort Portal by Hon. Justice Mr. Oyuko Anthony Ojok dated 15th May 2018)*

CORAM:

- 20 **HON. MR. JUSTICE KENNETH KAKURU, JA**
- HON. JUSTICE STEPHEN MUSOTA, JA**
- HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA**

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

25 I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA.

I agree that for the reasons he has given and the orders he has proposed, this appeal should be allowed.

Dated at Kampala this 21st day of July 2020

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.....

Stephen Musota
JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 15 OF 2019
(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)**

10 **NATIONAL FORESTRY AUTHORITY}APPELLANT**

VERSUS

1. OMUHEREZA BASALIZA WILLIAM}

2. KANYABUZANA PAULINE}

3. BURIKARARA JOSEPH}

15 **4. TUGUME MUGISHA EPHRAIM}**

5. BAHEMUKA PAUL AND 35 OTHERS}RESPONDENTS

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Kakuru, JA and I agree with his analysis of the facts and the law.

20 I concur with the judgment not on the ground of *locus standi* of the Respondents because occupancy can be proved by physical presence alone and the issue of whether the Respondents were lawfully evicted could be handled on merit based on the Appellants right to carry out eviction on occupied land. On the other hand, the right of the Appellant to evict the
25 Respondent is based exclusively on the proposition that the area in dispute is within the forest reserve and within the mandate of the Appellant to keep.

I wish to add in my own words that even if there was "excess" land, such a finding could not in the circumstances determine on which part of the boundaries or any part of the forest reserve, such an excess land is situated

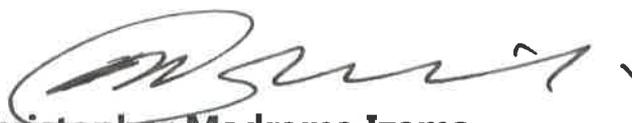


5 or would be situated and who would determine that. Further, a finding of excess land on a basis of measurements alone could not on that account lead automatically to a finding for the Respondents.

10 In any case, I agree with my learned brother Hon. Kakuru, JA that there is no excess land and the evidence adduced in the trial court shows that the surveyed forest reserve comprises of 1447.86 hectares of land and not 1020 hectares. The notice in the gazette on which the conclusion that there was excess land was based on an approximation of the size of the forest reserve being about 1020 hectares. Other documents, however show the actual size of the Forest Reserve was established to be 1447.86 hectares.

15 In the premises, I concur with the judgment of my learned brother Kakuru, JA that the appeal be allowed with the orders he has proposed and for the reasons he has set out in his judgment leading to a finding that the forest reserve covers 1447.86 hectares and there is no "excess land" and I have nothing useful to add to that.

20 Dated at Kampala the 21st day of July 2020



Christopher Madrama Izama

Justice of Appeal