THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0114 OF 2016

WILLY JAGWE:::APPELLANT

VERSUS

WILFRED BUGINGO:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Bashaija, J. dated the 26th day of February, 2016 in Consolidated Civil Suits No. 0116 of 2014 (Nakawa Central Circuit) and No. 0359 of 2014 (Land Division))

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. LADY JUSTICE IRENE MULYAGONJA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

This appeal is from the decision of the High Court (Bashaija, J.) concerning a dispute over a piece of land (the suit land), in which the respondent was declared owner of the suit land, and the appellant found to have had no legal interest in the suit land. The High Court also found the appellant to have committed acts of trespass on the suit land which occasioned damages to the respondent's property thereon, for which the appellant was liable. The High Court assessed and awarded substantial general and special damages to the respondent to be paid by the appellant.

Background

At the time of institution of the relevant suits, the suit land, which is situated in Mubende District, was registered as Freehold Register Volume HQT 117 Folio 7, Block 427 Plot 380 at Lwensololo, with the respondent as the owner. However, the respondent's ownership of the suit land was disputed by the appellant. In a suit filed in the then High Court Central Circuit at Nakawa vide Civil Suit No. 116 of 2014, the appellant asked the Court to cancel the respondent's certificate of title citing several grounds, including that the title held by the respondent had been obtained fraudulently. The appellant also claimed that he had a legal interest, either as a customary tenant or as a lawful and/or bonafide occupant. The respondent filed a defence in that suit

in which he stated that he was the lawfully registered proprietor of the suit land, and that the appellant had no legal interest in the suit land.

Another dispute over the suit land was manifested in a separate suit filed at the High Court Land Division vide Civil Suit No. 359 of 2014. The suit was filed by the respondent against 26 persons, who did not include the appellant. The respondent claimed that he was the registered owner of the suit land, and that the defendants in that suit had trespassed on the suit land and occasioned damages to his property thereon, leading him to suffer damages for which those persons were liable.

Several common issues of law and fact featured in the two highlighted suits, especially with regard to the rightful ownership of the suit land, and therefore, by order of 17th October, 2014, the High Court ordered the two highlighted suits to be consolidated and heard together. The High Court also ordered the respondent to "draft an amended plaint to reflect the consolidation and serve the opposite parties". The matter was heard and judgment entered, declaring the respondent to be the lawful owner of the suit land, and that the appellant had no interest thereon. The High Court issued a permanent injunction to restrain the appellant from interfering with the respondent's enjoyment of the suit land. The High Court also found the appellant to have committed acts of trespass on the suit and awarded damages to the respondent as follows; special damages to the tune of Ug. Shs. 2,837,000,000/= and general damages to the tune of Ug. Shs. 500,000,000/= with interest, as well as costs of the suit.

The appellant was dissatisfied with the decision and appealed to this Court, setting out 11 grounds in his memorandum of appeal. Those grounds of appeal, as well as the submissions in support, and those in opposition by the respondent have been set out in the judgment of my learned brother Cheborion, JA and I need not repeat them here. In my view, those grounds relate to 5 major issues, as follows:

"1. **Whether the learned trial Judge erred when he found that the respondent is the lawful owner of the suit land.**

2. **Whether the learned trial Judge erred to award special and general damages as he did.**

3. **Whether the learned trial Judge committed any procedural errors during the determination of the relevant suits.**

4. **Whether if any, the procedural errors in 3, occasioned a miscarriage of justice.**

5. **What remedies should this Court order on this appeal?**

I will proceed to determine the above issues, while having regard to the submissions for both parties.

Issue 1: Whether the learned trial Judge erred when he found that the respondent is the lawful owner of the suit land

In the two consolidated suits before the trial Court, the appellant and the respondent, each presented their respective claims to the suit land. In Civil Suit No. 116 of 2014, the appellant claimed either as a customary owner or lawful and/or bonafide occupant of the suit land. He stated that he owned a piece of land-Singo Block 426 Plot 43 in Mubende District, and there was land adjacent to it, which he had, in about 2012, purchased from its previous customary owners. This adjacent land was the suit land. The appellant presented evidence of purchase from the said customary owners. The appellant noted that the respondent had a certificate of title to the suit land, but he contested the title and claimed that it was obtained fraudulently and illegally.

In his defence to that suit, the respondent acknowledged that the appellant was the owner of Singo Block 426 Plot 43, but that he (the respondent) was the owner of the adjacent land that the appellant was trying to claim. The respondent stated that he had gone to the suit land in 2005, and on ascertaining that it was public, vacant and unoccupied land, he had taken possession of it, and started to carry out tree planting and other commercial farming activities thereon. Further, that in or around January, 2013, he had, applied and been granted freehold for the suit land by Mubende District Land Board, the controlling authority. Thereafter, he had obtained a certificate of title to reflect that grant.

In Civil Suit 359 of 2014, the appellant, as the registered owner of the suit land, claimed that 26 persons, the defendants in that suit had trespassed on the suit land.

The evidence of the case was as follows. The respondent who testified as PW1 stated that he was the registered owner of the suit land and adduced a certificate of title for the suit land (Exhibit P1). He stated that around 2000, he had occupied the suit land, which was then vacant. In 2013, after he had been utilizing the suit land since 2000, he applied to Mubende District Land Board, for a freehold title, which after due process, had made to him a freehold grant for the suit land. He had thereafter processed a title for the suit land. At page 172 of the record, the learned trial Judge asked the respondent to explain his statement that the suit land was vacant, when he occupied it, to which he responded:

> **"As I said my lord, this land [suit land] neighbours my former 2 plots 119 and 142. So while I was there that land I found there was nobody then I started using it until 2013 when I applied for a title for it."**

In cross examination, the respondent was further asked to clarify the basis for his belief that the suit land was vacant at the time he occupied it. He answered that around 2005, he had hired a surveyor to open boundaries for separate parcels of land (Plots 119 and 142), which he had purchased in the area. The surveyor had alerted him to existence of vacant land in the area, and he had thereafter occupied and utilized the said land. Further, in cross examination, the respondent was asked why, if he had ascertained that the suit land was vacant in 2005, had he waited 8 years until 2013, to apply for a certificate of ownership to the suit land, to which he answered at page 188 of the record that he had been preoccupied with other activities during that time.

In further cross examination, certain issues in the application process for his certificate to the suit land were put to the respondent. These issues will be considered later, but at this point, it is necessary to first consider the appellant's evidence in the case.

The appellant testified as DW2. He stated that in 2001, he purchased land measuring 5 square miles located in Bunakabwa, Kiteredde Manyogaseka Parish in Mubende District, from its then registered owner-West Mengo Growers Cooperative Union. The land was registered as Leasehold Resister Volume 2640, Folio 14, Block 426 Plot 43 (Plot 43) situate at the referred to area, and he took possession, after the purchase. At page 466 of the record,

the appellant testified that on taking possession of Plot 43, he found some people-about 12 in number, in possession of part of that land. He subsequently entered negotiations with those 12 persons, for them to vacate Plot 43, and an agreement Exhibit D2 was concluded to pay those persons, where after, they duly vacated that land. At page 469 of the record, the appellant stated that the part of plot 43, which had been occupied by the said 12 persons, was the suit land, over which he had a dispute with the respondent. I pause here to refer to the appellant's plaint in Civil Suit 116 of 2014, so as to ascertain the precise nature of his case. Paragraph 5 of that plaint stated as follows:

> **"5. The facts constituting the plaintiff's cause of action are as follows.**
>
> **(i) The plaintiff has at all material times since the 3rd day of December, 2001 been in possession of the suit land measuring 6.5 square miles.**
>
> **(ii) The 5 square miles out of the 6.5 square miles were comprised in Plot 43 Singo Block (sic) while the 1.5 square miles were fenced off together with the 5 Square miles totaling to 6.5 square miles all known by the residents as former West Mengo land and belonging to Will Jagwe the plaintiff hereto. Copies of the surveyor's reports are attached hereto and marked "A".**
>
> **(iii) That sometime in 2012, some residents instituted Civil Suit No. 102 of 2012 in the Nakawa High Court of Uganda claiming to be customary occupants on the suit land, which suit is pending in the High Court with directives that the boundaries be opened to ascertain the boundaries of 5 square miles. A copy of the pleadings is attached hereto and marked "B".**
>
> **(iv) That an order of the High Court was extracted to the effect that;**
>
> **(a) Boundaries were to be opened distinguishing the 5 square miles from the 2-5 square miles that were being claimed by the plaintiffs.**
>
> **(b) That a survey report was to be filed in Court.**

(c) That the status quo was to be maintained until further orders of Court. the said Court order is attached hereto and marked "C"

(v) That contrary to the orders of Court the 1st and 2nd defendants together with their agents and employees have gone ahead and fraudulently applied for the land through the area committee on forged signatures of the neighbours in utter disregard of the Court Order. Copies of the deed prints are attacked hereto and marked "D"

(vi) That the 1st defendant's subdivisions have further overlapped over the plaintiff's land comprised in Plot 43 Singo Block 426 measuring 5 Square miles.

(vii) That sometime in April 2012 the plaintiff had purchased several bibanja interests from 12 customary tenants which he has been in occupation as a lawful customary tenant.

(viii) That unknown to the plaintiff the 1st defendant sometime in October, 2013 (well knowing or having constructive notice that the plaintiff has an interest in and is in occupation of the suit land) and with intention to defect (sic) the plaintiff's interests fraudulently applied for conversion to freehold on the suit land. Copies of the application to the Area Land Committee is attached hereto and collectively marked "E".

(ix) That 1st defendant and 2nd defendant being an agent of the 1st defendant have started unlawfully fencing off the suit land, clearing the shrubs, destroying the plaintiff's barbed wire, cultivating and constructing semi-permanent houses. Copies of photos showing the unlawful acts of the defendants are attached hereto and marked "F".

At paragraph 6 of the plaint, it was stated:

"6. The plaintiff shall aver that the grant of conversion to freehold and/or application by the 1st defendant was irregular, highhanded and done with malafides in so far as the plaintiff being the customary tenant should have been given an opportunity to apply for the suit land."

At paragraph 7, the plaintiff alleged several particulars of fraud committed in the process of registration of the respondent as the lawful owner of the suit land, among which at 7 (a) was that:

> **"Applying for conversion whereas the 1st defendant (respondent) was aware and/or had constructive notice of the fact that the plaintiff is a customary tenant in occupation of the suit land and had an interest thereon."**

I observe that it is now an established practice that the pleadings should set out a party's case with precision, in order to assist the Court to render a just adjudication. As Oder, JSC stated in the authority of **Interfreight Forwarders (U) Ltd vs East African Development Bank, Supreme Court Civil Appeal No. 33 of 1992 (unreported)**:

> **"The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."**

The appellant's case was anything but precise. He claimed that: 1) the suit land had been fenced off and enclosed with Plot 43; 2) or that he was a customary owner or that he was a lawful and/or bonafide occupant on the suit land having purchased the interests of its previous owners who owned similar interests in the land. My view is that the claim that the suit land had somewhat been fenced off is untenable and is unsupportable on the evidence on record. The respondent was in possession of a certificate of title, which must have been obtained after the suit land had been surveyed. It is improbable that the boundaries on that title overlapped to Plot 43 that belongs to the appellant.

As for the claim that the appellant had purchased the suit land from its previous owners, it is worth stating that none of those alleged previous owners were called to testify. The appellant was content to adduce in evidence a document (Exhibit D2) titled "Memorandum of Agreement of Understanding" made between the appellant on the one hand, and on the

other hand, 12 persons, namely: Rwamunyamugabo, Kaibanda, Ngoga John, Musongarere Fred, Frank Basheke, Nsemerirwe John, Ndaihanga Godfrey, Nalukwago Ssuna, Sebusumba, Mugamani, Salongo and Kanyalugungu. The recitals in the same agreement indicated as follows:

> **"Whereas the first party is the <u>legal owner of the land mentioned</u> above, and the other parties to this memorandum are farmers/occupants on the same land."**

The agreement of the parties was as follows:

> " **That the first party shall pay Uganda Shillings 10,000,000/= (Ten Million Shillings Only) to each of the other parties mentioned above as compensation to vacate the said land which each of them is occupying.**
>
> **That the occupants shall vacate the said land within two (2) months from date of compensation.**
>
> **That these are the only occupants having been gathered by the area LC 3 Chairperson and duly agreed in a meeting between the 1st party and the occupants hereto.**
>
> **That the occupants hereto upon execution hereof shall have no claim whatsoever and all developments thereon shall be the property of the 1st party.**
>
> **That the subject land shall with effect from the two (2) months cease to have any occupants as verified by the occupants, are LCs and the LC 3 Chairperson."**

Two points can be made with regard to this document. First, it concerned Plot 43 which belonged to the appellant and not the suit land which was a distinct piece of land. As such, it could not be the basis of a claim that the appellant was a customary owner or a lawful and/or bonafide occupant on the suit land, having purchased it from its previous owners, who had such interests. The learned trial Judge considered Exhibit D2, and stated that the sale agreement related to customary interests on Plot 43 and not on Plot 380, the suit land. Having scrutinized the evidence, I have no reason to fault the learned trial Judge's conclusions in that regard.

The respondent's claim on the other hand was that he is the registered owner of the suit land, as evidenced by the relevant certificate of title. He had obtained that title after Mubende District Land Board granted to him freehold for the suit land which was previously unregistered.

I note that the appellant sought to impeach the respondent's certificate of title on grounds that it was obtained fraudulently and illegally. Under the Registration of Titles Act, Cap. 230, only a person who has been deprived of an interest in any land can sustain a cause of action of fraud against the registered proprietor. **Section 176** of that Act provides:

> **"176. Registered proprietor protected against ejectment except in certain cases.**
>
> **"No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases—**
>
> **(a) ...**
>
> **(b) ...**
>
> **(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;**
>
> **(d) ..."**

In my view, one logical construction of the above provision is that a person with no legal interest in the contested land should not be permitted to sustain an action to eject its registered proprietor. I found earlier in this judgment that on the view of the evidence on record, the appellant's claim to have had an interest in the suit land, cannot be maintained. Thus, his fraud allegations against the respondent who is the registered proprietor of the suit land do not have to be considered. Accordingly, it is unnecessary to consider all the other allegations of fraud that the appellant raises, which I would summarily dismiss.

I will now turn to consider the appellant's claims of illegality against the manner that the respondent acquired his title. Counsel for the appellant

raised two allegations of illegality. First, that when the respondent applied for freehold for the suit land from Mubende District Land Board, he purported to do so as a customary owner of the suit land whereas he was not. It must be stated that the case for the respondent was that in about 2000, he settled on the suit land, which was then "vacant" and started to utilize it. Later, in 2013, when it was still unoccupied, he applied to the district land board and was granted freehold. Under, the Ugandan land administration system, a District Land Board is mandated to hold specified land. In this regard, it is necessary to make reference to **Articles 240 and 241 of the 1995 Constitution**, which provide as follows:

> **"240. District land boards.**
>
> **(1) There shall be a district land board for each district.**
>
> **(2) Parliament shall prescribe the membership, procedure and terms of service of a district land board.**
>
> **241. Functions of district land boards.**
>
> **(1) The functions of a district land board are—**
>
> **(a) to hold and allocate land in the district which is not owned by any person or authority;**
>
> **(b) to facilitate the registration and transfer of interests in land; and**
>
> **(c) to deal with all other matters connected with land in the district in accordance with laws made by Parliament."**

On the face of it, the freehold interest comprised in the respondent's certificate of title was granted by the Mubende District Land Board, in exercise of its powers to allocate land that is not owned by anybody, within its jurisdiction. However, the appellant has highlighted an issue in the process by which the respondent applied for and was granted freehold by Mubende District Land Board. It was claimed that in the application process, the respondent alleged to be a customary owner of the suit yet he was not. Counsel for the appellant submitted that the respondent could not qualify as a customary owner in the terms of **Section 3** of the **Land Act, Cap. 227**, which sets out the incidents of customary land tenure. By virtue of that

provision, a customary owner is a person who owns land in accordance with the customs in the area in which he owns the land.

Counsel for the respondent replied that the respondent's allegation that he was a customary owner was supported by the unimpeached evidence on record. The appellant had failed to adduce evidence to disprove the respondent's customary ownership claim at the trial, and is instead asking this Court to constitute itself into a trial Court to investigate that matter. Moreover, according to counsel for the respondent, where a person purporting to be a customary owner applies for conversion to freehold, the Area Land Committee is empowered to adjudicate on whether that person is a customary owner. In other words, the Area Land Committee has the power to determine who qualifies as a customary owner. Of Course, it is true that the Area Land Committee, has to satisfy itself that the person who has lodged an application for conversion to freehold is a customary owner. But in doing so, it has to follow the Land Act, Cap. 227 which lays down the incidents of a customary land owner.

In the present case, it was not open to the respondent to claim that he was a customary owner of the suit land. His case, from which he could not be permitted to depart was that he merely occupied the suit land as vacant land that adjoined to land he owned in the area. Hence, the case for the respondent was that the suit land was "land that was not owned by anyone" in terms of Article 241 (1) (a) of the 1995 Constitution, and was thus held by the District Land Board. It is therefore, misconceived for counsel for the respondent to insist that the respondent was a customary owner of the suit land.

As to whether, the respondent wrongfully held out as a customary owner in his application for freehold, it is true that the respondent lodged his application to Mubende District Land Board on Form 4 of the Land Regulations 2004. Form 4 is envisaged to be used in two scenarios under those Regulations. First, it may be used if a person intends to convert his/her land holding from customary to freehold, and in this regard Regulation 10 provides:

"10. Application to convert customary tenure to freehold

An application to convert customary tenure to freehold shall be in Form 4 specified in the First Schedule to these Regulations."

The second scenario is where a person wants to apply for a first time grant of freehold, he/she may also lodge an application on Form 4 as stipulated under Regulation 12, which provides:

"12. Application for grant of land in freehold

An application for a grant of land in freehold shall be in Form 4 specified in the First Schedule to these Regulations."

The second scenario applies to the respondent. He had been occupying the suit land which was vacant land or in terms of Article 241 (1) (a) of the 1995 Constitution, land that belonged to no one, and land under the control of the District Land Board. The Board was empowered to deal with land under its control including by granting freehold to the respondent, who applied for that purpose. Thus, the respondent proceeded properly when he applied for a grant of freehold using Form 4.

The second claim of illegality was based on the respondent's non-payment of stamp duty on the freehold grant for the suit land. The appellant contended that the respondent did not pay all the requisite stamp duty when he acquired the title to the suit land, as found by the trial Court. It was counsel's view, that in failing to pay stamp duty, the respondent intended to defraud Government. Counsel for the appellant submitted that the legal principle is that a certificate of title granted when a registered owner has not paid stamp duty is illegal and liable to be cancelled. In support of that proposition, he relied on the authorities of **Makula International vs. Cardinal Nsubuga and Another [1982] HCB 11; Mudiima Issa and Others vs. Kayanja, High Court Civil Suit No. 232 of 2009 (unreported) and Samuel Kizito Mubiru and Another vs. Byensibye and Another, High Court Civil Suit No. 513 of 1982 (unreported).** Counsel urged this Court to nullify the respondent's certificate of title.

On the other hand, counsel for the respondent submitted that the respondent was merely converting from customary to freehold tenure, and that transaction did not attract stamp duty, a fact which both Mubende District Land Board and the Registrar of Titles were alive to. In those

circumstances, counsel urged this Court to find that the appellant's submissions were misconceived.

I earlier found that the respondent was not a customary owner of the suit land, but rather was a person who was granted freehold for the suit land which was by then unregistered land. The **Stamps Duty Act, Cap. 342** the law in force at the time was silent as to whether a "fresh" freehold grant attracted stamp duty. This may be compared to, for example, a lease grant for which the Act imposed stamp duty of 1% on the value of the land the subject of the lease. However, even assuming that stamp duty although payable, was not paid on the relevant freehold grant to the respondent, the solution should not, in my view lie in nullifying that grant or the certificate of title granted to the respondent. The respondent had an equitable interest in the suit land at the time he applied for the freehold grant, and the Mubende District Land Board did not object to making that grant. Therefore, the appellant's claim that the respondent did not pay stamp duty should be treated as information by an informer that should be investigated by the Uganda Revenue Authority for purposes of ensuring that the respondent pays any outstanding stamp duty.

In conclusion, I would hold that the learned trial Judge was correct to find that the respondent is the lawful owner of the suit land. The respondent presented a plausible version that he came to occupy the suit land which was vacant land, and under the control of the relevant District Land Board. He subsequently applied to that Land Board and was granted freehold for the suit land, and thereafter he processed a certificate of title to reflect that grant. I would answer the issue 1 in the negative.

I will proceed to answer issue 3- **Whether the learned trial Judge committed any procedural errors during the determination of the relevant suits-**because in my view, this issue will have a bearing on issues 2 and 4. The case for the appellant is that the learned trial Judge committed procedural errors as follows. First, he mishandled the process of consolidation of the suits in that although there had been consolidation of two suits, only Civil Suit No. 359 of 2014 was determined while Civil Suit No. 116 of 2014 was completely ignored. Second, the learned trial Judge erred not to conduct a locus visit to the suit land. This Court therefore, has to

determine whether such errors were committed and if so, whether those errors occasioned a miscarriage of justice.

I will deal with the issue of consolidation. **Order XI** of the **Civil Procedure Rules, S.I 71-1 (CPR)** provides:

> **"ORDER XI—CONSOLIDATION OF SUITS.**
>
> **1. Consolidation of suits.**
>
> **Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may, either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit—**
>
> **(a) order a consolidation of those suits; and**
>
> **(b) direct that further proceedings in any of the suits be stayed until further order.**
>
> **2. Procedure under this Order.**
>
> **Applications under this Order shall be by summons in chambers."**

The CPR follows the common law where it was accepted that a Court had discretion to order consolidation of suits in certain circumstances. In **Daws v Daily Sketch & Sunday Graphic Ltd and Another and Darke and Others vs. Same [1960] 1 All ER 397**, Wilmer LJ quoting from the decision in **Payne v British Time Recorder Co Ltd & Curtis Ltd ([1921] 2 KB at p 16)**, it was said that this discretion could be exercised:

> **"Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."**

In the present case, a common question of fact relating to the ownership of the suit land, arose in each consolidated action. Therefore, I would find that the order for consolidation was justified. Having said that, it is my view, and with the greatest of respect that the learned trial Judge lost his way with regard to the legal implication of consolidation of suits. Consolidated suits,

retain their separate status having been filed as such and it is necessary for a Court to be mindful of the pleadings in each suit, and especially in the present case, where the parties in each suit were different. Civil Suit No. 116 of 2014 was filed by Mr. Willy Jagwe against Mr. Bugingo Wilfred and Another, and was an action to seek the cancellation of Mr. Bugingo's title to the suit land. Mr. Bugingo filed a defence in which he stated that he had obtained the title to the suit land rightfully. On the other hand, Civil Suit No. 359 of 2014 was filed by Mr. Bugingo against Mr. Kamugisha Frank and 25 other persons, who did not include the Mr. Jagwe. It was therein claimed that those persons had trespassed on the suit land and destroyed Mr. Bugingo's property thereon.

Of course it was necessary to determine the lawful owner of the suit land, before the Court could decide whether the defendants in Civil Suit 359 of 2014 were trespassers thereon. However, it is strange that Mr. Jagwe was asked to defend himself against the trespass claims raised in Civil Suit 359 of 2014, yet he was not a party thereto. The confusion seems to have started with the learned trial Judge's consolidation Order, in which he ordered for the filing of an amended plaint purportedly to reflect the consolidation of the suits. This was not justified, because, in my view, despite consolidation, the relevant suits remain separate and are supposed to be maintained as such. I would therefore hold that the learned trial Judge adopted an irregular and improper procedure in handling the consolidated suits, in so far as he lumped the suits together and disregarded their separate identities. The irregular procedure obviously occasioned a miscarriage of justice because the appellant was condemned to pay substantial general and special damages for acts of trespass for which he was not liable.

The next alleged procedural error was the learned trial Judge's finding that it was unnecessary to conduct a locus visit to the suit land. Counsel for the appellant submitted that the locus visit was necessary for clarification of several aspects of the evidence as follows; 1) if the respondent had any property on the suit land that was destroyed by the alleged acts of trespass; 2) what the precise boundaries of the suit land were; and 3) whether a survey had been carried out to determine the boundaries for the suit land as the respondent alleged. On the other hand, the respondent submitted that the learned trial Judge properly exercised his discretion against ordering a

locus visit because it was unnecessary in the present case. Counsel for the respondent submitted that the evidence received in Court was sufficient to form the basis of the judgment that the learned trial judge entered in favour of the respondent.

It is unnecessary to decide whether it was necessary to conduct a locus visit to determine if the respondent had any property on the suit land that was destroyed, because I found earlier that the appellant was erroneously held liable for acts of trespass that were not pleaded against him.

I will now proceed to determine whether it was necessary to conduct a locus visit to determine the precise boundaries of the suit land. It bears mentioning that Courts are encouraged to take interest in visiting the locus in quo, especially when such visits may help to clarify the evidence adduced in any matter. **See: Practice Direction No. 1 of 2007 and the authority of Yowasi Kabiguruka vs. Samuel Byarufu, Court of Appeal Civil Appeal No. 18 of 2008 (unreported).**

The appellant contends that a visit to the locus in quo was necessary for the Court to reappraise the accuracy of the boundaries of the suit land. In other words, the appellant contends that the boundaries indicated on the certificate of title for the suit land should have been re-investigated in a locus visit by the Court. This argument must be rejected, because, under the Section 59 of the Registration of Titles Act Cap. 230, a certificate of title is conclusive evidence of the particulars contained on it. The provision stipulates:

> **"59. Certificate to be conclusive evidence of title.**
>
> **No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power."**

In view of the above provision, the certificate of title to the suit land that was adduced in evidence in the trial Court was rightly considered as being conclusive evidence of the boundaries of the suit land. Thus, it was unnecessary to conduct a locus visit to purportedly clarify the boundaries of the suit land. In my view, there was nothing to clarify. I therefore find no reason to fault the learned trial Judge on this point.

Issues 2 and 4

Did the improper procedure highlighted while resolving issue 3, occasion a miscarriage of justice? In my view it did, in so far as the appellant was required to answer for allegations of trespass which had been made in Civil Suit No. 359 of 2014 to which he was not a party. It is clear from that suit that the respondent knew the persons who had trespassed on the suit land, and he listed 26 persons, who did not include the appellant. It is unsurprising that the trespass case and evidence against the appellant was far-fetched as can be seen from the analysis in the judgment of the learned trial. It is equally surprising that the learned trial Judge believed that case and evidence.

In his judgment, the learned trial Judge found as a fact that certain persons, other than the appellant, including PW3 Nsimbi Robert, had gone and committed acts of trespass on the suit land, when they went thereon and destroyed the respondent's property. The learned trial Judge found that those trespassers were workers of the appellant, and rejected the appellant's evidence in which he denied that the trespassers were his workers. Further, the learned trial Judge considered but rejected the submissions for the appellant that the respondent had not pleaded trespass against the appellant. He stated at page 905 of the record:

> **"Therefore, it would be incorrect to argue that there are no pleaded facts by the plaintiff (respondent) that link the 1st defendant to the alleged trespass. While it is true that PW1 testified that the 1st defendant (appellant) was not physically present at the scene, merely not being at the scene does not imply that the 1st defendant never played any role in the alleged trespass. There is cogent evidence directly linking him and pointing to his role as the master mind of the trespass and the resultant destruction of the plaintiff's property. PW3 Nsimbi Robert and PW5 Kibirango testified of to how they were instructed by the 1st defendant**

for whom they worked on his farm, to invade the suit land. These were co-defendants with the 1st defendant in the suit before they settled it by consent with the plaintiff and withdrew their respective claims. Therefore, even assuming that the defendants who were retained in the suit were not workers of the 1st defendant, as inaccurately opined by counsel for the 1st defendant, the corroborated evidence of the others defendants who settled their case with the plaintiff still places the 1st defendant squarely at the centre of the whole scheme of things as a master mind of their actions and the resultant destruction."

I will make two observations. First, there is cause for any reasonable person to doubt the impartiality and credibility of the evidence that was given by the alleged appellant's former workers. After all, these were people who had reached a compromise with the respondent, the appellant's legal adversary, to settle claims that the respondent had against them. Secondly, even if I were to assume that PW3 and PW5 gave credible evidence, it mattered for nothing, because the respondent did not plead trespass against the appellant. Quite simply, the appellant was not a party to the respondent's trespass claim in Civil Suit No. 359 of 2014, and he should not have been vexed with answering those claims. It follows, therefore, that the learned trial Judge erred to order for the appellant to pay to the respondent the respective quanta of special and general damages that he did for acts of trespass for which the appellant was not liable.

I would answer issues 2 and 3 in the affirmative.

Last but not least, issue 5 on the proper findings and orders the Court should make on this appeal. Consistent with the reasons given in this judgment, I would summarize those findings and orders as follows. The learned trial Judge was right to find and declare that the respondent is the lawful owner of the suit land, and to issue a permanent injunction to restrain the appellant from laying claim to the suit land. However, and in respectful departure from the contrary holding of Cheborion, JA, I would hold that the appellant neither committed nor could he be held liable for any acts of trespass on the suit land. Accordingly, the learned trial Judge erred to find otherwise and also erred to order for the appellant to pay Ug. Shs. 2,837,000,000/= as special damages and Ug. Shs. 500,000,000/= as general damages for a combined sum of Ug. Shs. 3,337,000,000/= (Three Billion, Three Hundred and Thirty-

Seven Million Shillings). I would set aside that combined award of damages as well as the respective rates of interest awarded thereon.

Although the appeal only partially succeeds, I would order for each party to bear its own costs of the appeal as well as those of the proceedings in the Court below.

I would also order a copy of this judgment to be availed to the Uganda Revenue Authority which may regard as information from an informer, the appellant's claim that the respondent never paid the necessary stamp duty on the relevant freehold grant he obtained from Mubende District Land Board. If that information is found to be true, the Uganda Revenue Authority should make a tax assessment and ensure that the respondent pays any outstanding taxes.

I would, therefore, allow this appeal in part, on the terms set out in this judgment.

In conclusion, as brought out by the respective judgments of the members of the Court, the appeal only succeeds in part, and the Court enters judgment on the following terms:

1) By majority decision (Musoke and Cheborion, JA; Mulyagonja, JA dissenting), the decision of the learned trial Judge declaring the respondent as the lawful owner of the suit land is upheld.

2) By majority decision (Musoke and Mulyagonja, JA; Cheborion, JA dissenting), the decision of the learned trial Judge awarding the respondent a combined sum of Ug. Shs. 3,337,000,000/= as damages for loss suffered due to the appellant's acts of trespass on the suit land, is set aside. The majority finds that the appellant did not commit any acts of trespass on the suit land.

3) The Court is equally divided on costs, and consequently makes no order on the costs of appeal. For the same reason, the appeal against the learned trial Judge's order on costs fails, and that order is maintained.

4) The Court also hereby directs the Registrar of this Court to furnish a copy of this Judgment to the Uganda Revenue Authority so that any unpaid

stamp duty on the transaction by which the respondent got registered as proprietor of the suit land can be assessed and collected.

It is so ordered.

Dated at Kampala this ..... day of.....2022.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.0114 OF 2016

WILLY JAGWE::APPELLANT

VERSUS

BUGINGO WILFRED:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala before Bashaija, J dated 26th February, 2016 in consolidated Civil Suits No.0116 of 2014 and No.0359 of 2014)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. LADY JUSTICE IRENE MULYAGONJA, JA

JUDGMENT OF CHEBORION BARISHAKI, JA

This appeal arises from the judgment and orders of Andrew Bashaija, J, delivered in February, 2016 in which he entered judgment in favor of the plaintiff in the following terms:

1. *The plaintiff is the rightful owner of the suit land having acquired it lawfully and without fraud.*

2. *The defendants jointly and severally have no interest in the suit land and are mere trespassers thereon.*

3. *The certificate of title for the suit land does not in any way overlap onto the land comprised in LRV 2640 Folio 14 Singo Block 426 Plot 43.*

4. *The 1st defendant is vicariously liable in equal measure for whatever damages his agents and servants – the co-defendants occasioned to the plaintiff on the suit land and he in equal measure committed the trespass through his agents/servants the co-defendants herein.*

5. *The plaintiff is awarded shs. 2, 837, 000, 000/= (Uganda Shillings Two Billion Eight Hundred Thirty Seven Million Only) special damages with interest of 25% per annum from June 2014 till payment in full.*

6. *The plaintiff is awarded shs.500,000,000/= (Uganda Shillings Five Hundred Million only) general damages with interest of 25% from the date of judgment until payment in full.*

7. *An order of permanent injunction restraining the defendants from further interfering, cultivating and or using the suit land.*

8. *Costs of the suit are awarded to the plaintiff.*

The brief facts of the appeal are that the plaintiff instituted the relevant suits seeking for declaratory orders that he is the lawful registered owner of land comprised in FRV HQT 177 Folio 7 Block 427 Plot 380 at Lwensololo, in Mubende District, measuring approximately 414.3480 hectares; and that the

defendants jointly and severally have no legal or equitable interest or otherwise in the suit land and are mere trespassers; and a permanent injunction restraining the defendants, their agents, servants, and persons claiming interest from them from further entering, cultivating and /or using the suit land in any manner that affects the plaintiff's quiet possession, use, and proprietary interest therein, special and general damages, interest, and costs of the suit.

The background to the appeal was ably articulated by the trial Judge in his judgment as follows; the plaintiff (now respondent) essentially contended that prior to his acquisition of the certificate of title as the registered proprietor, he was at all material times, since 2005, in occupation and use of the suit land carrying out tree planting and other agricultural activities including animal and crop husbandry. That subsequently in 2012 he applied to the controlling authority, the Mubende District Land Board, as an occupier and he was granted a lease on the suit land devoid of any third party claims.

Further, that around June, 2014, the 1st defendant (now the appellant) who is the registered owner of the adjacent land comprised in Singo Block 426 Plot 43 measuring 5 sq. miles instructed his agents, the other defendants, to enter on to the suit land and they trespassed thereon and exacted immense destruction of his barbed wire fence and a wide expanse of planted trees which he had grown and nurtured primarily for commercial purposes. That the destruction extended to the other adjoining Plots of land comprised in Singo Block 427 Plot 119 and Plot 142 also belonging to the plaintiff.

The learned trial Judge accepted the plaintiff's averments that the defendants were motivated by greed, ill will, and acted illegally and maliciously in order to frustrate his activities with the aim of driving him out and forcefully grabbing his land. That as a result, he had suffered enormous financial loss, immediate and future economic loss for which he holds the defendants liable and seeks the remedies outlined above.

Initially on 27th June 2014, the plaintiff instituted a suit against 26 defendants who did not include the appellant. On 17th July, 2014, the 26 defendants filed a joint defence and counterclaim against the plaintiff and his farm manager a one Deziderio Biryomumeisho. The defendants contended that they have at all material times been on the suit land as bona fide occupants and /or lawful occupants as customary tenants. They also averred that in 2012 they instituted a suit against Willy Jagwe, the 1st defendant and the registered owner of Plot 43 measuring 5 sq miles, but discovered that they were in fact settled outside his title but on the suit land under Plot 380 the titled land of the plaintiff, which they alleged the 1st Plaintiff obtained illegally and/or fraudulently; the particulars of which they set out in their counterclaim.

On 3rd October, 2014, the plaintiff amended the plaint and included the current 1st defendant while dropping others leaving only 18 defendants. Subsequently on 17th October, 2014, under *HCMA No.1183 of 2014,* and pursuant to ***Order 11 r.2 CPR***, *Civil Suit No. 116 of 2014 Willy Jagwe vs. Bugingo Wilfred & Another,* which the current 1st defendant had earlier

instituted at Nakawa High Court against the current plaintiff and his farm manager was transferred by the Nakawa High Court to the Land Division and consolidated with the instant *Civil Suit No. 359 of 2014 Bugingo Wilfred vs. Willy Jagwe & Others.*

After the consolidation the plaintiff entered into consent settlements with some of the defendants and they withdrew their respective claims against one another. The plaintiff maintained the suit against the 1st, 2nd, 6th, and 18th defendants; the latter three of whom also maintained their counterclaim filed earlier with their joint defence. The 2nd defendant in particular averred that he is a lawful occupant on the suit land having been settled there by the Government of Uganda. The 6th defendant had a defence filed but did not testify or attend court proceedings. The 18th defendant plainly averred that he came on the suit land at the invitation of his brother, one Nsimbi Robert.

On 3rd December, 2014, the 1st defendant filed his defence in the consolidated suits and denied the plaintiff's allegations. The 1st defendant contended that he bought land comprised in Singo Block 426 Plot 43 measuring 5 sq. miles from West Mengo Co-operative Growers previously in occupation for over 20 years, and that he became the registered owner and was in occupation for 10 years. That on 14th April, 2012, he purchased bona fide and/or lawful customary interests from the tenants on the land neighboring his registered land. That unknown to him the plaintiff in September, 2013, applied to the Area Land Committee for conversion of the plaintiff's purported customary interest to

freehold tenure on the same land which the 1st defendant had purchased from the tenants. That as such the plaintiff illegally and fraudulently obtained title to the suit land. Further, that the suit land overlaps on and encroaches upon the 1st defendant's titled land comprised in Plot 43, and that the plaintiff's title ought to be cancelled and the plaintiff's suit dismissed with costs.

As stated, judgment was given in favour of the plaintiff in the terms indicated earlier. Being dissatisfied, the appellant appealed to this Court on the following grounds;

1. *The learned trial judge erred in law and fact when he held that the respondent's pleadings disclosed a cause of action against the appellant.*
2. *The learned trial judge erred in law and fact when he held that the respondent had pleaded facts linking the appellant to the trespass and destruction of property.*
3. *The learned trial judge erred in law and fact when he held that the appellant was vicariously liable for trespass for actions of persons who were parties to the suit.*
4. *The learned trial judge erred in law and fact when he held that the appellant was vicariously liable for acts of trespass allegedly committed by various persons in the absence of evidence that: (i) their actions were authorised by the appellant; (ii) They were acting in the course of their employment; (iii) Their actions were ratified by the appellant.*

5. *The learned trial judge erred in law and fact when he held that a locus visit to the locus in quo was not necessary.*

6. *The learned trial judge erred in law and fact when he held that the respondent lawfully and without fraud obtained a certificate of title over the suit land.*

7. *The learned trial judge erred in law and fact when he determined HCCS No 359 of 2014 and completely ignored Nakawa High Court Civil Suit No.116 of 2013 yet both suits had been consolidated.*

8. *The learned trial judge applied wrong principles of law in awarding the respondent general damages of UGX 5000, 000, 000/= (Uganda Shillings Five Hundred Million only).*

9. *The learned trial judge erred in law and fact in awarding the respondent special damages of UGX 2, 837, 000, 000/= (Uganda Shillings Two Billion Eight Hundred Thirty Seven Million Only).*

10. *The learned trial judge erred in law and fact when he awarded interest at the commercial rate of 25% in a case of trespass and destruction of property.*

11. *The learned trial judge erred in law and fact when he held that the appellant did not have customary interest in the suit property.*

At the hearing of the appeal, the appellant was represented by Mr. Serwanga Samuel, Mr. Mudde John Bosco and Mr. Nsibambi Peter Kimanje while the

respondent was repressnted by Mr. Lwayanga Moses holding brief for Mr. Swabur Marzuq and Mr. Allan Peter Musoke

Both counsels filed written submissions which we have taken into consideration in this judgment.

Counsel for the appellant argued grounds 5, 6, 7 independently, 3 and 4 together, 1 and 2 together, 8, 9 and 10 together and 11 separately. On the other hand, counsel for the respondent opted to argue grounds 11, 6, 1 and 2 concurrently, 3 and 4 concurrently and 7, 5, 8, 9 and 10 independently.

On ground 5 of the appeal, counsel for the appellant faulted the trial Judge for not visiting the locus in quo and holding that it was not necessary. Counsel argued that this case necessitated a visit to the locus in quo to enable the parties clarify on the evidence tendered so that Court would reach a just decision. Counsel submitted that his oral application to the lower Court to visit locus in quo on grounds of contradictions regarding trees, what was destroyed, boundaries of the land and whether a survey was done were rejected because Court was satisfied that the witnesses had amply clarified the evidence.

Counsel contended that a visit to the locus in quo was key to the determination of the dispute because from the evidence adduced, it was not clear whether there were actually 500 Hectares of planted pine trees on the suit land (Plot 380) yet Court awarded special damages of Shs 2,837,000,000/= and general damages of Shs 500,000/=. He also contended that it was not clear whether

Plot 43 and Plot 380 were originally fenced off as a whole and whether there was an overlap on Plot 43 by Plot 380. He argued that no surveyor was called by the respondent to verify the ground coordinates of Plot 380 and the private surveyor Frank Mugisha (PW4) was only called to produce documents authored by other people. He submitted that Frank Mugisha also did not know the various coordinates and boundaries of Plots 380 and 43 and how they related to each other.

Counsel argued that when Court directed the District Land Surveyor to open boundaries of Plot 43, the respondent and his agents frustrated the exercise by causing chaos.

Counsel opined that when the peculiar circumstances of this case are taken into consideration, a visit to the locus in quo was inevitable and would have been in line with Clause 3 of ***Practice Direction No.1 of 2007*** which provides that during the hearing of land disputes the Court should take interest in visiting the locus in quo. Counsel relied on **Yowasi Kabaguruka v Samuel Byarufu, CACA No.13 of 2008 and Yesero Waibi v Edirisa Luni Byandala (1982) HCB 28** to support his submissions.

On ground 6 of the appeal, counsel for the appellant faulted the trial Judge for finding that the respondent lawfully and without fraud obtained a certificate of title over the suit land. Counsel challenged the trial Judge's decision because in his view, the trial Judge did not consider three pertinent issues, namely; first, non-payment of stamp duty by the respondent which rendered the

procedure of registration of the freehold certificate of title an illegality. He argued that any contract designed to defraud the government of revenue is illegal and the effect is to prevent the plaintiff from recovering under such circumstances. Counsel relied on **Makula International Ltd v Cardinal Nsubuga and Anor [1982] HCB 11, Mudiima Issa and Others v Elly Kayan and Others HCCS No.232 of 2009 and Samuel Kizito Mubiru and Anor v Byensibye and Anor HCCS No. 513 of 1982** to support his submissions.

Secondly, counsel contended that the respondent was not a customary occupant and could not therefore qualify to apply for conversion of customary tenure into freehold. Counsel submitted that no evidence was adduced to show that the respondent was a customary occupant on the suit land as provided under S.3 (1) of the Land Act. He relied on **Kampala District Land Board and George Mitala v Venasio Babweyaka and Ors SCCA No.2 of 2007** for the proposition that customary tenure must be proved and **Kaberuka and Anor v NK Investments Ltd and Anor CACA No.80 of 2008** for the proposition that mere cultivation of crops on land does not constitute proof of customary ownership.

Thirdly, the respondent and or his agent obtained the appellant's signature on the form for conversion from customary tenure to freehold without his knowledge and or consent. Counsel faulted the trial Judge for downplaying the importance of the appellant as a neighbor being involved in the process of acquisition of a freehold title. Counsel submitted that trial Judge should not

have treated PW2 Kalyango Rashid's admission of writing the appellant's name and signing on his behalf without instruction as an informality but rather an irregularity. Counsel argued that fraud was attributable to the respondent because he opted to deal with the appellant's manager instead of the appellant personally to avoid notifying him of the process of the application for conversion. Furthermore, the respondent's manager Biryomumaisho fraudulently acted with his knowledge in obtaining the names of the neighbours which fraud can be imputed on him as a principal. He relied on **Kampala Bottlers Ltd v Damanico (U) Ltd SCCA No.22 of 1992, David Sejjaka Nalima V Rebecca Musoke Civil Suit No. 486 of 1983 and Frederick Zzabwe v Orient Bank and 5 Others SCCA No.4 of 2006** to support his submissions.

On ground 7, counsel for the appellant faulted the trial judge for determining **HCCS No.359 of 2014** and ignoring **Nakawa HCCS No.116 of 2013** despite the two suits having been consolidated. Counsel argued that in his judgment, the trial Judge neither made mention of the facts nor any findings in respect to the claims that the appellant made in the Nakawa suit. He submitted that failure to determine the Nakawa suit was tantamount to neglecting the appellant's entire claim and a miscarriage of justice to him. He prayed that this Court orders a retrial for a fair and balanced determination of the issues in controversy. He relied on **Kivamukuteesa Consumers v Ssebugwawo Nelson**

[1986] HCB 61 for the proposition that after consolidation of suits, the two consolidated claims become one suit.

On grounds 3 and 4 of the appeal, counsel for the appellant faulted the trial Judge for holding the appellant vicariously liable for trespass for the actions of persons who were not parties to the suit and without evidence that their actions were authorized by the appellant. Counsel relied on **Muwonge v Attorney General [1967] EA 17** for the proposition that a master is liable for the acts of his servant committed within the course of his employment or within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. Counsel argued that the trial Judge erred when he concluded that the appellant was the principal of the other defendants who were his agents. Counsel faulted the trial Judge for relying on evidence adduced by counsel for the respondents in HCMA No.745 of 2014 which was not subjected to cross examination by the appellant because he was not party to the suit. Counsel described the evidence adduced as submissions from the bar which the trial Judge should not have relied on. Counsel contended that counsel Godfrey Lule who submitted that about 10 of the respondents were agents and servants of Willy Jaggwe did not specify the said respondents and therefore his evidence from the bar was inadmissible. Counsel relied on **Fredrick James Jjunju & Ors v Madhvani Group Ltd & Anor HCMA No.688 of 2015** arising out of HCCS No. 508 of 2014 and **Kengrow Industries Ltd v C.C Chandran SCCA No.7 of 2001** for the

proposition that submissions by counsel from the bar does not amount to evidence.

Counsel submitted that the appellant had testified that the 2nd to 18th defendants were not his employees and that they had sued him in Nakawa Court alleging that he had stolen their land which the respondent was claiming. Counsel argued that the evidence of Nsimbi and others could not be relied upon because their testimony was compromised through entering into a consent judgment with the respondent to exclude them from liability. It was counsel for the appellant's submission that once joint tort feasors are sued and liability of some of the tort feasors is extinguished by way of a consent judgment, the other joint tortfeasors are released from liability (release bar rule). He relied on the decision of **Brinsmead v Harrison (1872)2 LR 7** for the proposition that a judgment in an action against one of several joint feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied.

On grounds 1 and 2 of the appeal, counsel for the appellant faulted the trial Judge for holding that the respondent's pleadings disclosed a cause of action against the appellant and that the respondent had pleaded facts linking the appellant to trespass and destruction of property. Counsel argued that the respondent's amended plaint ought to have been rejected under O.7 r.11 (a) of the Civil Procedure Rules SI 71-1 because the particulars of the illegality and trespass did not show the capacity in which the appellant allegedly influenced

the actions of the other defendants but rather merely mentioned that the appellant instructed the 2nd to 17th defendants to enter the suit land and destroy the plaintiff's plantation. Furthermore, there was no averment in the plaint that the other defendants were employees or agents of the appellant and that the appellant was vicariously liable for their acts. He relied on **Kateregga and Anor v UEB [1995-1998]1 EA 95** for the proposition that a plaintiff must prove that a tortfeasor was the employer's servant and was acting in the scope of his employment.

Counsel for the appellant faulted the trial Judge for not making a ruling on the issue of cause of action at the beginning of the trial but rather at the end of it. Counsel further submitted that the despite addressing the issue of cause of action at the end of the suit, the trial Judge did not use the three stage test set out in **Auto Garage v Motokov (No.3) [1971] EA 514** to determine its existence. Counsel also took issue with the trial Judge resolving the issue of cause of action simultaneously with trespass rather than considering the plaint alone.

Counsel submitted that under O.6 r.3 of the CPR a party should state particulars with dates in their pleadings in all cases in which particulars are necessary. He relied on **Tororo Cement v Frokina International Ltd SCCA No.2 of 2001** to support his submissions. He prayed that this Court reviews the plaint in its entirety and finds that it failed to disclose a cause of action against the appellant.

On grounds 8, 9 and 10 of the appeal, counsel for the appellant faulted the trial Judge for awarding general and special damages to the respondent at a commercial rate of 25% in a case of trespass and destruction of property. Counsel submitted that the alleged trees that the trial Judge based his assessment of damages on were not on the suit property. He argued that the respondent had admitted that the picture he had shown Court were for other pieces of land but not Plot 380 (the suit land).

Counsel faulted the trial Judge's decision of awarding general damages for future economic loss on the ground that he did so by relying on principles used in cases of personal injuries rather than trespass to land. Furthermore, he argued that the cases the trial Judge relied on were applicable for award of general damages for personal injuries causing future economic loss and not trespass to land.

Secondly, counsel contended that the trial Judge's award of general damages was based on speculation of what would compensate and place the respondent in a position to benefit commercially from his tree plantation yet at the time of the alleged trespass, he was not commercially benefiting from the tree plantation. He relied on **Robert Coussens v Attorney General SCCA No.8 of 1999** for the proposition that an estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess.

Thirdly, counsel argued that the trial Judge considered the neighbouring Plots of land when awarding general damages yet the suit was instituted specifically in relation to the land comprised in Singo Block 426 Plot 380. He faulted the trial Judge for this because in his view, Court cannot award a remedy that was not specifically pleaded and for which no opportunity has been accorded to the party condemned to pay it to present facts challenging the Court's decision to award the same. He relied on the decision of **Uganda Interfreight Forwarders [U] Ltd v East African Development Bank SCCA No. 33 of 1992** for the proposition that a party is expected and is bound to prove the case as alleged by him and as covered in the issues framed.

Regarding special damages, counsel argued that the trial Judge erred to award them because they were not specifically proved though pleaded. He disputed the award as unlawful, based on unproven amounts and therefore untenable in law because the trial Judge failed to evaluate evidence and failed to take into account the principle of remoteness of damages. Counsel submitted that the suit land is approximately 414.3 hectares yet the respondent indicated it to be 500 hectares meaning that the special damages were not strictly proved. Furthermore, counsel submitted that despite the respondent admitting that there was no pine on the suit land, Court went ahead to award special damages.

Counsel further submitted that the appellant was not liable for the sum of UGX 250,000,000/= claimed by the defendant as special damages for seedlings

bought but not used because there was no nexus between the alleged trespass and loss of seedlings. In his view, the loss was so remote and unconnected with the actions of the appellant and/or the tort feasor to be awarded as special damages by the Court. He prayed that the same be set aside by this Court.

Regarding interest rate, counsel submitted that it was erroneous because the respondent did not specifically plead the rate and the suit being a tortious claim and the award being compensatory, Court should have awarded interest at 6 or 8%. Counsel relied on **Ecta (U) Ltd v Geraldine S. Namurimu and Josephine Namukasa SCCA No.29 of 1994** for the proposition that though Court has discretion to award reasonable interest on the decretal amount, a distinction must be made between awards arising out of commercial or business transactions which would normally attract a higher interest, and awards general damages which are mainly compensatory. Counsel opined that since the suit arose from a land dispute, the proper interest rate should have been at Court rate. He also relied on **Bank of Baroda (U) Ltd v Kamuganda (2006) 1 EA 11** which cited with approval the case of **Milton Obote Foundation v Kennon Trainig Ltd SCCS No. 25 of 1995 (Unreported)** to support his submissions.

On ground 11 of the appeal, counsel for the appellant faulted the trial Judge for holding that the appellant did not have customary interest in the suit land. Counsel argued that sufficient evidence was led in the trial court to prove that the appellant had acquired customary interest in the suit land as evidenced by

a sale agreement admitted as **Exhibit D2**. He submitted that the trial Judge erroneously rejected the appellant's oral evidence in support of his customary interest. Counsel prayed that this ground be resolved in favour of the appellant.

In reply, counsel for the respondent opposed the appeal in its entirety and supported the judgment and orders of the trial Judge. He opined that the appeal was based on conjecture, devoid of merit and a mere plot by the appellant to constitute this Court into a trial Court to determine issues that were neither raised at the lower Court nor form part of Court record. He submitted that the appellant's written submissions were variously littered with careless and utterly false statements that were neither hinged on any evidence nor proceedings on record of the trial Court.

In reply to ground 11, counsel submitted that the trial Judge properly evaluated the evidence presented in support of the appellant's claim of having a customary interest on Plot 380 and rightly came to the conclusion that he did not have customary interest therein. Counsel argued that if the appellant had any customary interest, it was in respect of his former land comprised in Plot 43 which had subsequently been sub-divided and sold off to Indo Agencies Ltd. Counsel invited Court to consider the appellant's oral testimony in respect of this issue, Exhibit D2 and Exhibit P.20 which was a letter from West Mengo to the appellant introducing the 12 occupants of Plot 43. He expressed surprise that Frank Kamugisha, the LC2 of Manyogasekka who was one of the 12

occupants of Plot 43 did not raise any concerns that the suit land belonged to the appellant as a customary tenant when the area land committee visited the respondent's land.

In response to ground 6, counsel supported the trial Judge's conclusion that the respondent acquired the certificate of title to Plot 380 without fraud. He submitted that the appellant had failed to discharge the burden of proof in his allegation of fraud against the respondent to the required standard.

Regarding the allegation of non-payment of stamp duty, counsel conceded that it may be fraudulent but only where the person represents themselves as having paid it whereas not or deliberately pays a lesser amount. Counsel argued that in the respondent's case, no fraud was occasioned because stamp duty as a tax was not required. He submitted that stamp duty of 1% of the value of land prescribed by the Stamp Duty Act, 2014 under Schedule 2, items 31, 38 and 62 is applicable to acquisition of leases and land transfers upon purchase from one proprietor to another. He argued that the authorities relied on by appellant were distinguishable from the present case because they involved land transfers while in this case, the respondent was mercly converting his customary tenure to freehold. He argued that during conversion from customary tenure to freehold, what is required is payment of a fee of UGX 15,000/= as provided by S.9 (3) of the Land Act and regulations 2 and 4 of the Land Regulations, 2004.

Counsel contended that since Mubende Local Government Council advised the Commissioner Land Registration to prepare a freehold title in respect of the respondent despite non-payment of stamp duty which was not queried by the Commissioner, it was evidence that he did not evade paying stamp duty.

Regarding the allegation that the respondent was not a customary occupant and therefore could not purport to convert customary tenure into freehold, counsel submitted that the appellant failed to disprove it in the trial Court and therefore failed to discharge the burden of proof placed upon him. He further submitted that it would be against the rules of natural justice for the appellant to seek reliefs that would affect the rights of a third party (Mubende District Land Board) yet it was not a party to the suit. Counsel submitted that on his part, the respondent lawfully acquired the certificate of title to Plot 380. He opined that the authorities relied upon by the appellant were not applicable to the circumstances of the case because the respondents in the decided cases claimed customary tenures on land in urban areas which was contrary to the Public Lands Act and, the Land Act gives the Area Land Committee the power to determine who a customary tenant is which was done in this case.

Regarding the allegation that the appellant's signature was fraudulently obtained without his knowledge or consent, counsel submitted that the appellant failed to prove forgery of his signature by the respondent. He further submitted that for the appellant to allege indirect fraud against the respondent is departure from his pleadings and evidence before the trial Court. Despite

this, counsel maintained that from PW2's evidence, it was evident that the respondent was not directly involved and neither was he present when the appellant's name was written on the application form. Regarding the allegation that PW2 was compromised by the respondent, counsel submitted that the appellant did not substantiate it and even after cross examination, PW2's testimony remained unshaken. Regarding the allegation that the respondent deliberately decided not to deal with the appellant when gathering names during the conversion process, counsel contended that the same did not amount to fraud on the respondent's part. He prayed that we uphold the lower Court's decision on the same.

In reply to grounds 1 and 2, counsel supported the trial Judge's position that the respondent's pleadings disclosed a cause of action against the appellant. He argued that paragraph 9 of the respondent's amended plaint met the test for a cause of action as set out in **Auto Garage v Motokov (supra).** In addition, paragraphs 6-8 showed the right enjoyed by the plaintiff, paragraphs 9-12 showed that the right was violated and paragraphs 13, 15 and 16(iv) show that the defendant was responsible.

Counsel also argued that the respondent's claim that the appellant instructed the 2nd to 17th defendants was sufficient notice to the appellant of the nature of case and claim against him. He contended that the appellant's reply in paragraphs 7 and 9 of his written statement of defence that the other defendants were not his agents, employees or servants and that he was not

liable for their acts and omission was proof that the respondent's pleadings gave him fair notice of the case that he was going to meet.

On ground 3 and 4, counsel for the respondent supported the trial Judge's finding that the appellant was vicariously liable for the trespass and actions of the 2nd to 17th defendants. He argued that there was sufficient evidence before Court to show that the appellant had supervisory authority over the other defendants and directed their actions of trespass onto the respondent's land that resulted into the destruction of his plantation. He opined that vicarious liability encompasses supervisory and subordinate relationships and is not restricted to employment as traditionally perceived from contracts of service. Counsel expressed reservation about the appellant distancing himself from the defendants yet it was him and his son, counsel Lule Godfrey (DW4) who secured legal representation for all the defendants when they were arrested for trespass on the respondents land. It was also PW4, Kibirango Vincent's testimony that the appellant spearheaded the illegal planting of trees on the respondent's land and destruction of his plantation.

Regarding the allegation that the testimonies of Nsimbi (PW3) and other defendants' testimonies being compromised by entering consent judgment with the respondent, thus excluding them from liability, counsel argued that it did not affect their capacity as competent witnesses against the appellant. He further argued that the appellant had opportunity to cross examine the

witnesses to discredit their evidence but was unsuccessful and Court was right to rely on their testimony.

Regarding release of tortfeasors, counsel for the respondent submitted that **Brinsmead v Harrison (supra)** which counsel for the appellant relied on was bad law because it was outlawed in **Newcrest Mining Ltd v Michael Emery Thorton [2012] HCA 60.** He further submitted that the **Brinsmead case** is distinguishable from the instant case because in the former, the plaintiff suffered damage as a result of a tort caused by three persons who could be sued as joint tortfeasors but sued one of them who unfortunately failed to satisfy the judgment. Court held that he could not sue the other tortfeasors for the outstanding balance. In the instant case, the appellant was sued as the master mind of the trespass together with other tortfeasors. Counsel also argued that our Civil Procedure Act and Rules which are in tandem with the spirit of the 1935 U.K Act, obviate applicability of the **Brinsmead case** in our jurisdiction. He submitted that under our Rules, a plaintiff is at liberty to sue any number of people if his rights against them arise from the same transaction or from a series of similar transactions and judgment can be entered against them according to their liabilities.

Regarding inadmissibility of DW4 counsel Lule Godfrey's testimony because it was evidence from the bar, counsel for the respondent argued that the authorities relied on by the appellant's counsel were inapplicable. He contended that the statements made by DW4 as counsel in HCMA No. 745 of

2014 were restated by him when he appeared as a witness. Counsel further submitted that the appellant failed to taint DW4's credibility during the trial and should not turn around to challenge DW4's evidence as being submissions from the bar.

In reply to ground 7 of the appeal, counsel submitted upon consolidation, HCCS No.359 of 2014 and Nakawa HCCS No. 116 of 2013 became one suit and were determined as such. He relied on **Kivamukuteesa Consumers (supra)** to support his submissions. He argued that the trial Court on several occasions referred to both suits before it and did not ignore any suit. It addressed all the issues in the consolidated suits and resolved them.

On ground 5 of the appeal, counsel supported the trial Judge's decision to refuse counsel for the appellant's application for a visit to the locus in quo. Counsel relied on **De Souza v Uganda [1967] E.A at 787** cited with approval in **Yesero Waibi v Edirisa Luni Byandala (supra)** for the proposition that it is settled law that a Court may only visit a locus in quo to check on the evidence given by the witnesses, but not to fill evidential gaps; visiting locus is relevant if there is need for a judicial officer to satisfy doubt in his/her mind as to the testimony of the witnesses. Counsel submitted that after hearing all the evidence adduced, it was at the discretion of the trial Judge to determine whether a visit to the locus in quo was necessary. Counsel opined that there was no merit in any of the areas that the appellant raised as grounds that necessitated a visit to the locus in quo.

Counsel for the respondent submitted that ***Practice Direction No.1 of 2007*** that counsel for the appellant alluded to was not law but rather an administrative guideline which does not erode the jurisdiction or discretion of Court. He therefore opined that the appellant's understanding of the Practice Direction was misconceived. He relied on **David Wesley Tusingwire v The Attorney General SCCA No.4 of 2016** to support his submissions and argued that the **Yowasi Kabiguruka case (supra)** was cited out of context.

On ground 8 of the appeal, counsel for the respondent submitted that before awarding general damages to the respondent, the trial Judge evaluated all the evidence relating to the extent of destruction occasioned to the respondent's property by the different parties. Counsel supported the quantum of general damages awarded by the trial Judge because in his view, the respondent had demonstrated that the suit property was being used for commercial mixed farming on Plot 380 and over 500 hectares for commercial afro-forestry spread over Plots 119, 142 and 380 which were adjoining lands. He submitted that it was erroneous for the appellant to limit destruction to the suit property to Plot 380 only.

Counsel submitted that the appellant's criticism of the trial Judge for relying on a personal injury case like **Robert Coussens (supra)** to award general damages was unjustified because he used a similar personal injury case of **Ecta (U) Ltd** to fault the Court. Counsel argued that the appellant did not demonstrate what wrong principles of law the trial Court relied on in awarding

general damages. Counsel opined that the question of whether a successful party deserves general damages is one of law and is at the discretion of the trial Court.

On whether the trial Judge's award of general damages was based on speculation, counsel for the respondent submitted that from its very definition in the **Robert Coussens case (supra)**, general damages are an estimate of prospective loss and explains the bedrock of the discretion of Court.

On whether the acts of the appellant affected the respondent's earning, counsel for the respondent submitted that it affected his economic standing and projected earnings. He invited Court to consider factors that relate to commercial mixed agriculture and agro-forestry such as when the investment commenced, how the value of the investment appreciates with time and when both ventures reach their full economic value. Counsel denied that the damages were not pleaded and hasten to add that even if they were not pleaded, Court was duty bound to evaluate all the evidence adduced in the course of the trial. He relied on **Uganda Breweries Ltd v Uganda Railways Corporation SCCA No.6 of 2001** to support his submissions.

On ground 9 of the appeal, counsel for the respondent supported the trial Judge's award of special damages of **UGX 2,837,000,000/=**. He submitted that the respondent pleaded particulars of his pecuniary loss and proved the same. Regarding the size of the suit property and presence of pine trees thereon, counsel for the respondent submitted that at all times the respondent

maintained that Plot 380 is approximately 414.3 hectares and that the acreage of Plot 380 is different from the size of the destroyed commercial agro-forest which is over 500 hectares/1235 acres/2 square miles. He faults the appellant for limiting trespass and destruction to Plot 380. Counsel further submitted that the special damages were not remote but rather the direct and foreseeable result of the acts of the appellant.

On ground 10 of the appeal, counsel for the respondent supported the award of interest at commercial rate. He submitted that the respondent adduced sufficient evidence to prove that he was using the suit land for commercial tree planting and Court found the destruction caused by the appellant to have far reaching adverse commercial consequences.

He prayed that the appeal be dismissed with costs.

In rejoinder, counsel for the appellant reiterated his earlier submissions.

On ground 11 regarding the appellant's customary interest in the suit land, counsel contended that the trial Judge ignored the fact that Plot 380 did not exist on 4th April, 2012 when the appellant entered into negotiations with the various bibanja holders on the suit land. It was his submission that the trial Judge expected the appellant to quote a non-existent Plot number in Exhibit D2 in order to validate it, which was erroneous. He hastened to add that the appellant clearly indicated that both Plots 380 and 43 were enclosed in one fence at the time he purchased it from West Mengo Growers.

Regarding ground 6 of the appeal, counsel submitted that the Freehold Offer by the Secretary of the District Land Board stated that stamp duty was to be paid before registration. That the request to prepare a Freehold title (Exhibit P8) clearly indicated that all fees except stamp duty had been paid and the trial Judge alluded to the same in his judgment. He maintained that the non-payment of stamp duty was illegal especially owing to the fact that he did not adduce evidence of any waiver by Mubende District Land Board.

Counsel submitted that the issue of the respondent's customary tenancy was not smuggled in but was part of the appellant's pleadings under particulars of fraud in paragraph 7(a). In his view, it was immaterial whether the Area Land Committee recommended the conversion from customary tenure to freehold.

Regarding the appellant's signature on the application form, counsel submitted that filling in the appellant's name was not a mere informality but an act of fraud. Counsel also wondered why the trial Judge in his judgment omitted to comment on Exhibit 5 which required signatures of all neighbours. Counsel argued that the appellant participated in the fraud when he confirmed that at the time that the forms were returned to him, he filled the other parts, drew the sketch of the land and took it to the Area Land Committee. He referred to **Kampala Bottlers (supra)** for the proposition that the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such acts either directly or by necessary implication. He argued that the respondent opted to use other means to obtain

the appellant's signature appended onto the various forms illegally and without his knowledge and or consent instead of contacting him.

On grounds 3 and 4, counsel for the appellant argued that there was no evidence of authorization by the appellant, that the persons were acting in the course of their employment or evidence to prove that their actions were ratified by the appellant.

I have studied the Record of Appeal and the judgment of the lower Court. I have also considered the submissions of counsel for both parties in their conferencing notes and written submissions and the authorities that were availed to Court for which I am grateful.

It is trite that as a first appellate Court, we are obliged to reappraise the evidence on Court record and come up with our own conclusions. Rule 30 of the Judicature (Court of Appeal Rules) Directions is instructive in that regard and also empowers this Court to take additional evidence where necessary. This duty was well explained in **Father Narsensio Begumisa and 3 Others v. Eric Tibebaga SCCA 17 of 2000; [2004] KALR 236** thus;

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

I shall resolve the grounds of appeal in the order in which they appear in the memorandum of appeal. I shall join the grounds which I find to be related.

The gravamen of counsel for the appellant's argument on grounds 1 and 2 of the appeal is that the respondent's pleadings did not disclose a cause of action against the appellant and the trial Judge ought to have rejected the plaint under Order 7 r.11 of the CPR which he failed to do. Counsel for the appellant's issue with the respondent's amended plaint is that it did not show the capacity in which the appellant influenced the actions of the other defendants and as such the plaint failed to fulfill the third element of a cause of action that the respondent was liable for the violation of the appellant's right. Further that in his finding, the trial Judge only addressed the first limb of the three-stage test that the plaintiff enjoyed a right but did not address the other aspects. To worsen matters, he resolved the issue of cause of action together with that of trespass. On his part, counsel for the respondent contended that the respondent's amended plaint met the test for a cause of action as set out in **Auto Garage v Motokov (supra).** That paragraphs 6-8 showed the right enjoyed by the plaintiff, paragraphs 9-12 showed that the right was violated and paragraphs 13, 15 and 16(iv) showed that the defendant was responsible. He also argued that the respondent pleaded facts that linked the appellant to the trespass individually and vicariously.

In **Major General David Tinyefunza vs. Attorney General of Uganda Supreme Court Constitutional Appeal No. 1 of 1997,** the Court cited with

approval the definition of a cause of action by Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206 as follows:

> *"A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. ... It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."*

See also the **Tororo Cement case (supra)**

In the *locus classicus* case of **Auto Garage (supra)**, it was held that for a cause of action to exist, the plaintiff must have enjoyed a right, the right must have been violated and; the defendant is liable.

It is settled law that for a Court to determine whether there is a cause of action, it only relies upon the plaint. In **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998** Wambuzi CJ as he then was held that in determining whether a plaint discloses a cause of

action under Order 7 rule 11 or a reasonable cause of action under order 6 rule 29 (before revision of the rules now order 6 rule 30) only the plaint can be looked at. In **Attorney General vs. Oluoch (1972) EA.392**, the court held that the question (referring to cause of action) is determined upon perusal of the plaint and attachments thereon with an assumption that facts pleaded or implied therein are true.

I accept counsel for the appellant's submission that the trial Judge simultaneously addressed the issue of cause of action (issue 1) with that of trespass (issue 5) and in the process addressing one limb of the three stage test of a cause of action. The trial Judge was alive to the essential elements of a cause of action as set out in **Auto Garage (supra)** and the principle of law that in determining whether a plaint discloses a cause of action, the court looks only at the plaint and its annexures if any, and nowhere else as enunciated in ***Kapeka Coffee Works Ltd & Anor vs. NPART CACA No.3 of 2000.*** In disposing off issue 1 on cause of action, he held that *"this (referring to having a certificate of title) bestows on the plaintiff all rights accruing to the owner of such land under the law, which invariably vests him with a cause of action against any person who may be in violation his rights in the suit land. That disposes of Issue No.1 which is answered in the affirmative".*

I shall therefore consider the other two essential elements of a cause of action. A cursory perusal of paragraph 5 of the respondent's amended plaint in the lower Court indicates that he sued the defendants including the appellant

jointly and severally. He prayed for a declaration that he was the lawful owner of the suit land and that the defendants were mere trespassers on it, a permanent injunction against the defendants, general and special damages, interest and costs of the suit. From this paragraph, it is clear that the violation of right that the respondent complained about was trespass on the suit land wherein he was the registered proprietor and he alleged that the defendants were liable jointly and severally.

With regard to counsel for the appellant's submission that the plaint did not indicate the capacity of the appellant to instruct the others, I am of the considered view that indication of the appellant's participation in the trespass sufficed at that stage. If a plaint contains the particulars enumerated under Order 7 rule 1 of the CPR, proof of the allegations therein should be reserved for the trial stage. I therefore find that the plaint disclosed a cause of action.

As to when a Court may reject a plaint for non-disclosure of a cause of action, Order 6 rule 30(1) of the CPR is instructive. It provides that the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.

As indicated earlier in this judgment, the parties agreed to frame the issue of cause of action as the first issue. From page 80 of the record of proceedings (page 183 of the Record of Appeal), it is the trial Judge who raised the issue of cause of action against the 1st defendant during the examination in chief of the plaintiff because he did not understand why the 1st defendant was being sued. Subsequently, Mr. Kuteesa, counsel for the appellant submitted that after the plaintiff's evidence in chief, there was no cause of action against the 1st defendant. He prayed that the point be taken before proceeding with the suit in order to determine whether or not the suit against the 1st defendant should proceed. He proposed to either make oral submissions; which he was not ready to do immediately or make written submissions in two to three days. The record does not capture what guidance Court gave counsel but whatever it was, it is evident that counsel accepted it. I can deduce that from counsel's words wherein he stated that *"with that guidance my lord we are ready to cross examine..."* and indeed he proceeded with cross examination of the plaintiff. With such a discourse, it is absurd for counsel for the appellant to fault the trial Judge for not making a ruling on the issue at the beginning.

Therefore grounds 1 and 2 of the appeal must fail.

On grounds 3 and 4, counsel for the appellant criticized the trial Judge for finding the appellant vicariously liable for trespass for the actions of persons who were not parties to the suit and without evidence that their actions were authorized by him. Counsel relied on **Muwonge v Attorney General [1967] EA**

17 for the proposition that a master is liable for the acts of his servant committed within the course of his employment or within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. On the other hand, counsel for the respondent argued that there was sufficient evidence before Court to show that the appellant was in supervisory authority over the other defendants and directed their actions of trespass onto the respondent's land that resulted into the destruction of his plantation. He opined that vicarious liability encompasses supervisory and subordinate relationships and is not restricted to employment as traditionally perceived from contracts of service.

Vicarious liability is guided by a Latin maxim, ***qui facit per alium facit perse*** *i.e.* he who does something through another is deemed to have done it himself. **Blacks Law Dictionary, 8th Edition** defines "***vicarious liability***" to mean *liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.*

Before arriving at the decision that the appellant was vicariously liable for the actions of the other defendants, the trial Judge relied on the testimonies of PW3 Nsimbi Robert and PW5 Kibirango who testified that they were instructed by the 1st defendant on whose farm they worked, to invade the suit land. They were co-defendants with the 1st defendant in the suit before they settled it by consent with the plaintiff who then withdrew claims against them. He also

relied on the testimony of DW4 Godfrey Lule, a son to the appellant. He held that in ***HCMA No. 745 of 2014. Wilfred Bugingo vs. Kamugisha Frank & Others,*** arising from the instant suit, DW4 Godfrey Lule and another lawyer Sselulika Allan appeared for all the defendants; the respondents therein. He held that while opposing the application, they clearly stated on court record, at page 4 of the typed proceedings line 70, that the respondents therein, the defendants in the instant case, are; "agents and servants of Willy Jagwe in this suit".

The trial Judge therefore held that the corroborated evidence of the other defendants who settled their case with the plaintiff still placed the 1st defendant squarely at the centre of the whole scheme of things as a master - mind of their actions and the resultant destruction and that Godfrey Lule's evidence undoubtedly placed the 1st defendant in the position of a principal and the co - defendants as his agents.

Counsel took issue with the trial Judge's reliance on evidence from **HCMA No. 745 of 2014 Wilfred Bugingo vs. Kamugisha Frank & Others** because in his view, the finding on vicarious liability was based on statements made by lawyers of the respondent which were never subjected to cross examination and the appellant was not party to the proceedings. Counsel submitted that the statements made by counsel in that Application were submissions from the bar which could not be relied on. Counsel for the respondent conceded that the appellant was not party to HCMA No. 745 of 2014 but contended that Counsel Godfrey Lule reiterated the statements he made when he appeared as DW4.

I have read Counsel Godfrey Lule's statement in HCMA No. 745 of 2014 which he admitted when he appeared as DW4 in the consolidated suit. It is of very little evidential value if it is considered in isolation. As rightly submitted by counsel for the appellant, at page 45 of the supplementary record of Appeal, all that Godfrey Lule submitted while raising a preliminary objection was that about ten (10) of the respondents in the said application were agents and servants of Willy Jaggwe. He did not specify which of the ten respondents were actually agents and servants of Willy Jaggwe. The trial Judge overruled his preliminary objection after failing to appreciate counsel's point because in his view, it did not raise any issue that amounted to issues of law in the context of Order 15 rule 2 of the CPR. He described what counsel raised as *"just facts if they are capable of being proved relating to multiplicity of filing of several suits by similar parties"*. Those facts were proved later on and led to the consolidation of two of the three suit among the parties.

However, if counsel Lule's statements are considered together with the testimonies of PW3 (Nsimbi Robert) and PW5 (Kibirango Vicent) who were the 5th and the 16th respondents respectively in HCMA No. 745 of 2014, the only inevitable inference one can draw is that PW3 and PW5 were agents of the appellant. During examination in chief, PW3 testified that he was a care taker of the appellant's land at Bunakabwa. He further testified that on 14th June 2014, the appellant telephoned him and said that he should mobilise people who were trespassing on his land to go to the public land belonging to Bugingo

and plant eucaplyptus trees. That the appellant bought the trees and sent his driver to bring them in a car and they planted the trees on the respondent's land. PW5 on his part testified that it was PW3 that recruited him to plant trees, not the appellant.

Counsel for the appellant submitted that the evidence of Nsimbi and others could not be relied on because it was compromised through entering a consent judgment with the respondent to exclude them from liability. I accept counsel for the respondent's submission that PW3 and PW5 were still competent witnesses against the appellant. Counsel for the 1st defendant tried, though unsuccessfully, to impeach the credibility of PW3 and PW5 as witnesses through cross examination. Counsel asked PW3 about his evidence being influenced by monetary reward of UGX 6,000,000/= from the respondent received through his brother Serunjongi something PW3 denied. PW3 also denied being facilitated by the respondent to come to Court. On his part, PW5 testified that the respondent did not ask him to come and give evidence in Court. That on the contrary he did so on his own conviction.

Counsel for the appellant submitted that the consent judgment entered between the respondent and some of the defendants released all defendants as joint tortfeasors. He relied on **Brinsmead v Harrison (1872)2 LR 7** for the proposition that a judgment in an action against one of several joint feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. Counsel for the respondent argued that

Brinsmead (supra) was not applicable in the appeal because it was outlawed in the United Kingdom (UK) in the **Newcrest case (supra)**.

In the **Newcrest case,** court was tasked with determining whether the restriction in S.7(1)(b) of the Western Australia Act which provided that sums recoverable under judgments given in multiple actions for damages "shall not in the aggregate exceed the amount of the damages awarded by the judgment first given" applied only to damages awarded by a court following a judicial assessment or whether the restriction also applied to a judgment entered by the consent of the parties in a superior court of record. In its determination, it considered the **Brinsmead** rule which had the effect that 'the tort is merged in the judgment even though there is no satisfaction'. According to the rule, the single action resulting from the joint commission of tort merged in the first judgment which the plaintiff obtained in respect of it. A plaintiff who recovered action against any one joint tortfeasor was barred from subsequently recovering judgment against any other joint tortfeasor responsible for that tort whether in an action commenced before, at the same time as, or after the action in which a final judgment had already been recovered. It was noted that the rule had been considered in England by the Law Revision Committee which took effect as S.6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935 [1935 UK Act]. The said section provided that;

> *"A judgment recovered against one or more persons in respect of an actionable wrong committed jointly shall not while unsatisfied, be a*

bar to an action against any others liable jointly in respect of the same wrong. Provided that the plaintiff shall not be entitled to levy execution for, or to be paid, a sum exceeding, in the aggregate, the amount of the first judgment obtained against any of the persons so liable, nor to recover the costs of any subsequent action, unless that Judge before whom it is tried is of opinion that there was reasonable ground for bringing it."

From the above case, it is abundantly clear that S.6 (1) of the Law Reform (Married Women and Tortfeasors) Act 1935 outlawed the Brinsmead rule. I find that the consent judgment entered between the respondent and some of the defendants did not release all defendants as joint tortfeasors.

Therefore grounds 3 and 4 must fail.

The gist of ground 5 of the appeal is that the trial Judge erred by not visiting the locus in quo despite counsel for the appellant's application to do so. Counsel for the respondent on the other hand supported the trial Judge for refusing counsel's application because in his view there was no need to do so.

As rightly submitted by counsel for the appellant, ***Practice Direction No. 1 of 2007*** para 3 enjoins Courts to take interest in visiting the locus in quo during the hearing of land disputes. Counsel for the respondent submitted that ***Practice Direction No.1 of 2007*** that counsel for the appellant alluded to was not law but rather an administrative guideline which does not erode the jurisdiction or discretion of Court. He therefore opined that the appellant's

understanding of the Practice Direction was misconceived. He relied on **David Wesley Tusingwire v The Attorney General SCCA No.4 of 2016** to support his submissions and argued that the **Yowasi Kabiguruka case (supra)** was cited out of context.

In **Tusingwire (supra)**, it was held that Practice Directions were made under the Chief Justice's exercise of his administrative and supervisory function as per Article 133 (1) (b) of the Constitution. The said Article provides that the Chief Justice may issue orders and directions to the Courts necessary for the proper and efficient administration of justice. Court further held that the Practice Directions of the Anti-Corruption Division 2009 is not an Act of Parliament but it is common knowledge that it is subject to the same principles of interpretation as other laws. ***Practice Direction No.1 of 2007*** was also made pursuant to Article 133(1) of the Constitution and it states that it shall apply to proceedings before judges, registrars and all courts subordinate to the High Court, including the Land Tribunals and Local Council Courts.

I do not accept counsel for the respondent's submission that **Yowasi Kabiguruka case (supra)** was cited out of context. The case though not necessarily on all fours with the current appeal, had similarities with it. In the **Yowasi case**, the appellant challenged a High Court decision because the appellate Judge having found that the appeal had been filed out of time went ahead to order a retrial. The appellate Judge found that the two litigants claimed separate pieces of land which were contiguous to another. He also

found that one party alleged that the other trespassed into his property which allegation one of the parties denied. Evidence was heard but no visit was made to the locus but in his view the case merited a visit to the locus in quo by Court in order to determine whether the alleged trespass was actual. He held that the need to visit the locus in quo cries loud. The Court of Appeal upheld the appellate Judge's decision. Justice Engwau who wrote the lead judgment with which the rest of the Coram agreed to held that "I would entirely agree with the learned judge that according to the circumstances of this case, "the need to visit the locus in quo cries out loud" in order to investigate the alleged fraud. It was very necessary to investigate which land belonged to the appellant as opposed to the respondent's land.

Both counsel also ably stated the principles governing visits to locus in quo which is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them lest Court may run the risk of turning itself a witness in the case. See **Yeseri Waibi Edirisa Byandala and De Souza v Uganda (supra).**

It is now settled law that whether or not a Court should visit locus in quo is discretionary and is dependent upon the circumstances of each case. That decision essentially rests on the need to enable the Judicial Officer to understand better the evidence adduced before him or her during the oral testimony of witnesses in Court. It may also be for purposes of enabling the Judicial Officer make up his or her mind on disputed points raised as to something to be seen there. In light of the above, what I have to determine is

whether in the given circumstances of the case, a locus visit could not be dispensed with.

On page 969 of the record of proceedings (page 626 of the Record of Appeal), Mr. Kuteesa (counsel for the 1st defendant) submitted that given the evidence that had been adduced, it was proper for Court to visit locus in quo. The reasons he advanced were allegations regarding trees, what was destroyed, boundaries of the land and whether a survey was done. In declining his application, the trial Judge held that there was sufficient material on Court that satisfied and addressed the issues which were raised by the parties in their scheduling memorandum. Court therefore would not find it necessary to visit the locus as it had previously thought because every fact was clear in its mind according to the evidence that had been adduced. What would have been necessary to require the visit was amply clarified upon to the satisfaction of the Court by the witnesses on either side. This ruling is what the appellant is dissatisfied with.

The reasons counsel for the appellant advanced in support of a locus visit in the lower Court are substantially the same with those he advanced at appeal. He added that it was not clear whether there were actually 500 Hectares of planted pine trees on the suit land (Plot 380) yet special damages were awarded. He also contended that it was not clear whether Plot 43 and Plot 380 were originally fenced off as a whole and whether there was an overlap on Plot 43 by Plot 380. I shall resolve counsel's concern in regard to overlap first.

In his judgment, the trial Judge held that "taking the evidence on this particular issue (Issue No.4: Whether the certificate of title for Plot 380 overlaps on to Plot 43) as a whole, it is in (sic) no doubt that the 1st defendant totally failed to prove his allegations that the suit land under Plot 380 overlaps and encroaches on Plot 43. The 1st defendant's own witness DW5 the District Staff Surveyor refuted the claim of overlap as much as PW4, an expert surveyor, that it was totally impossible in the circumstances. The two witnesses are technical persons and experts in their field of mapping and surveys. There is no good reason to doubt their independent professional evidence".

It is worth noting that counsel for the appellant took issue with the evidence of Frank Mugisha (PW4) whom he described as a private surveyor who was only called to produce documents authored by other people. He submitted that Frank Mugisha also did not know the various coordinates and boundaries of Plots 380 and 43 and how they related to each other. I do not find merit in this argument because Frank Mugisha told Court he came to clarify to Court the boundary dispute between Plots 380 and 43. He testified that in order to do his work, he got official documents from both Mubende District Survey Office and Entebbe Surveys and Mapping Department. During cross examination, he ably explained how Plots 380 and 43 relate to each other and during re-examination he explained that the correct position was that Plot 43 was not inclusive of Plot 380. He also corroborated DW5 the District Staff Surveyor's evidence that there

was no overlap between Plot 380 and 43. Therefore, I find that there was sufficient evidence before the Court to show that there was no overlap between Plots 380 and 43. As such the trial Judge was not obliged to visit the locus in quo in that regard.

Regarding the exact size of land the respondent's pine trees occupied on the suit land (Plot 380), it was the respondent's evidence that the suit land was 414.3 Hectares. He explained that although he had applied for 500 Hectares of land, during survey it was discovered that the suit land was approximately 414.3 Hectares. During cross examination Court asked the respondent about the pictures that he showed Court in proof of the extent of destruction, he testified that the destruction was on Plot 380 but all the trees were for other pieces of land. When Court further asked him whether the pictures of the destroyed banana plantation and pine which he had showed it were on the suit land, he answered that on the suit land was the fence. With such clear evidence before Court, a visit to the locus in quo was unnecessary. I will address the issue of award of special damages on the suit land later on in my judgment while resolving ground 8. After re-evaluating all evidence in regard to this ground, I am unable to fault the trial Judge for declining to visit the locus in quo.

Therefore ground 5 of the appeal must fail.

The gravamen of counsel for the appellant's argument under ground 6 of the appeal as I understand it is that the trial Judge erred in finding that the

respondent lawfully and without fraud obtained a certificate of title over the suit land. Counsel for the appellant's submissions on this ground is three pronged to wit; (1) that the respondent did not pay stamp duty, (2) the respondent was not a customary occupant and could not therefore qualify to apply for conversion of customary tenure into freehold and (3) that he and his agents forged the appellant's signature during the process of conversion.

On the other hand, the gist of counsel for the respondent's submission is that the appellant failed to discharge the burden of proof in regard to fraud. He contended that no fraud was occasioned by the non-payment of stamp duty because stamp duty as a tax was not required. He submitted that stamp duty of 1% of the value of land prescribed by the Stamp Duty Act, 2014 under Schedule 2, items 31, 38 and 62 is only applicable to acquisition of leases and land transfers upon purchase from one proprietor to another.

Regarding forgery of the appellant's signature, after evaluating evidence in regard to this issue, the trial Judge held thus; "I therefore agree with the proposition that PW2 did not sign or purport to sign for the first defendant, but simply filled in the names of his master the owner of the adjacent land to the suit land. That could not by any stretch of imagination amount to forgery or fraud; which ultimately renders the evidence of the hand writing expert's report quite irrelevant to the fact in issue".

I have carefully looked at the application forms in Exhibits P2, P3 and P4 and the testimony of PW2. I am in agreement with the trial judge that the issue of

forgery of the appellant's signature cannot arise because what was required and was in fact done by PW2 was filling of the appellant's name, not purporting to sign on behalf of the appellant. I also agree with the trial Judge that filling in the name of the appellant on the forms by his Estates Manager falls within the ambit of; "the informality or irregularity in the application or proceedings to bring the land under this Act", envisaged under ***Section 59 RTA*** and hence it would not impeach the plaintiff's title on that account. For avoidance of doubt, ***Section 59 of the RTA*** provides that a certificate of title is conclusive evidence of ownership and cannot be impeached or defeated by reason or on account of any informality or irregularity in the application or proceedings to bring the land under the Act. I therefore find no merit in this limb of counsel for the appellant's argument.

Regarding the argument that the respondent was not a customary owner over the suit land as provided under S.3 (1) of the Land Act, counsel relied on **Kampala District Land Board and George Mitala v Venasio Babweyaka and Ors SCCA No.2 of 2007** for the proposition that customary tenure must be proved and **Kaberuka and Anor v NK Investments Ltd and Anor CACA No.80 of 2008** for the proposition that mere cultivation of crops on land does not constitute proof of customary ownership. Counsel for the respondent submitted that the appellant failed to disprove the respondent's customary ownership in the trial Court and therefore failed to discharge the burden of proof placed upon him. He further submitted that it would be against the rules

of natural justice for the appellant to seek reliefs that would affect the rights of a third party (Mubende District Land Board) yet it was not a party to the suit.

In **Kampala Bottlers (supra)**, Justice Odoki, CJ (as he then was) in finding that the respondents were not customary tenants held that 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 they occupied the land and whether that custom had been recognized and regulated by a particular group or class of persons in the area. In **Kaberuka (supra)**, it was held that in this case there was no attempt by the appellants to prove by evidence that they were occupying the land under customary tenure and if so under what kind of custom or practice they occupied the suit land. I do not accept the argument of Mr. Muhimbura that mere cultivation of crops on land constitutes proof of customary tenancy.

I accept counsel for the respondent's argument that the above authorities on which counsel for the appellant relied are distinguishable from the present case because they were concerned with customary tenancy in urban areas which was prohibited by the Public Lands Act. Be that it may, I note that under S.5(1)(a) and (j) of the Land Act, it is the Area Land Committee that is enjoined to determine, verify and mark the boundaries of all interests in the land which is the subject of the application and advise the Land Board on questions of customary law. There is cogent evidence on record that the Area Land

Committee visited the suit land and carried out its duties before recommending that the applicant be issued with a certificate of customary ownership. If Mubende District Land Board was not satisfied about the respondent's customary interests in the land, it reserved the right to reject the Committee's report, which it did not. Secondly, there is no dispute that the suit land previously was public land which belonged to Mubende District and under Section 10 of the Land Act, the respondent or anyone else for that matter could have directly applied for a free hold title over it without proving any interest in it. Therefore, I am satisfied that the respondent had customary interest in the suit land.

Regarding failure to pay stamp duty, counsel for the respondent argued that stamp duty was not payable because this was conversion from customary tenancy to freehold tenancy, not a transfer or lease. He argued that what was payable was the prescribed fee of 15,000/= which the applicant did. I am unable to accept that line of argument. As rightly pointed out by counsel for the appellant the Freehold Offer by the Secretary of the District Land Board stated that stamp duty was to be paid before registration. If stamp duty was not payable in the process of obtaining a certificate of title, Mubende District Local Government would not have taken issue with it. In his judgment, the trial Judge alluded to it when he held that *Exhibit P8* also indicates that all dues except stamp duty had been paid on *Exhibit P10;* a receipt No.00050350 issued by the Mubende District Local Government.

Under S.32 (1) of the Stamp Duty Act, 2014 the effect of non-payment of stamp duty on an instrument that is chargeable with duty is that it is inadmissible in evidence. However S.33 of the same Act bars calling in question such an instrument once it is has been admitted in evidence at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. I am alive to the fact that any contract intended to defraud government of duty is an offence under S.61 of the Stamp Duty Act. However, I am not satisfied that the appellant proved that the respondent intended to defraud government of revenue in light of the authorities of **Mudiima Issa and Samuel Kizito (supra)** where in both instances the purchasers understated the value of the land in their transfer instruments so as to pay less stamp duty. This is not to say that the respondent shall be excused from paying the stamp duty that he owes which under S.52 (1) of the Stamp Duty Act is considered a debt to Government. He should return to Mubende District Land Board and have the stamp duty chargeable assessed and pay the same under S.29 (1) of the Stamp Duty Act. Otherwise, the Commissioner General of Uganda Revenue Authority reserves the right to sue him for it under S.52 (2) of the same Act. Therefore ground 6 of the appeal must also fail.

On ground 7 of the appeal, the trial Judge was faulted for determining HCCS No.359 of 2014 in isolation from Nakawa HCCS No.116 of 2014 (herein Nakawa suit) yet the two had been consolidated. It is settled law that when suits are consolidated under Order 11 r.2 of the CPR, they become one suit. There is no

requirement for the trial Court to treat them independently lest it defeats the very purpose of consolidation. I am persuaded by the decision of **Kivamukuteesa Consumers v Ssebugwawo Nelson [1986] HCB 61**, where it was held that after consolidation, the two actions proceeded as a single action.

Be that as it may, in the Nakawa suit, the plaintiff (now appellant) sued the defendants (now respondent and a one Biryamumeisha Deziderio) jointly and severally for a declaration to the effect that the plaintiff is the lawful and/or bonafide occupant of the land now comprised in Plot 380 Singo Block 426, a declaration that the subdivision which overlaps into the certificate of title comprised of Plot 43 Singo Block 426 Mubende District is unconstitutional, illegal, unlawful and amounts to appropriation of the plaintiff's right to own property and/or was procured and effected through fraud, an order of cancellation of the FRV certificate of title issued to the 1st defendant by the Commissioner Land Registration, an order of a permanent injunction restraining the defendants, their agents and those claiming under them from interfering with the plaintiff's use, occupation and possession of the suit land, general damages, interest and costs of the suit. From the record of proceedings, upon consolidation of the suits, the parties agreed to treat HCCS No. 359 of 2014 as the head suit while the Nakawa suit was treated as the counterclaim.

At the scheduling conference, the parties agreed on the following issues; whether the suit discloses a cause of action against the 1st defendant, whether the plaintiff's title to the suit land was obtained illegally and/or through fraud,

whether all the defendants are customary tenants or bona fide/ lawful occupants on the suit land, whether the certificate of title of the plaintiff for Plot 380 overlaps that of the 1st defendant in Plot 43, whether the defendants are trespassers on the suit land of the plaintiff, whether the counter defendants are trespassers on the land of the 1st defendant/counterclaimant and whether the parties are entitled to the remedies sought. From a perusal of the judgment, the trial Judge addressed all these issues and considered all the evidence adduced by both parties before arriving at a conclusion.

I find no merit in counsel for the appellant's submission that while summarizing facts in respect of HCCS 359, the trial Judge did not mention anything to do with the Nakawa suit. After consolidation, the appellant was given opportunity to file his defence and the trial Judge mentioned his counterclaim (plaint) while summarizing the case though he was of the view that it did not meet the formal requirements under ***Order 8 r.7 of the CPR***. For avoidance of doubt he stated that:

> *"On 3rd December, 2014, the 1st defendant filed his defence in the consolidated suits and denied the plaintiff's allegations. Even though the he never specifically set up a counterclaim in accordance with the formal requirements under* ***Order 8 r.7 CPR****, the substance of 1st defendant's pleadings clearly depicts that he advanced a claim against the plaintiff. This is discernible from the particulars of fraud and /or illegality he leveled alleged against the plaintiff. Taking the substance over the form of the*

pleadings, court has taken due consideration of that fact in the resolution of issues.

The 1st defendant contends that he bought land comprised in Singo Block 426 Plot 43 measuring 5 sq. miles from West Mengo Co-operative Growers previously in occupation for over 20 years, and that he became registered owner and was in occupation for 10 years. That on 14th April, 2012, he purchased bona fide and/or lawful customary interests from the tenants on the land neighboring his registered land. That unknown to him the plaintiff in September, 2013, applied to the Area Land Committee for conversion of the plaintiff's purported customary interest to freehold tenure on the same land which the 1st defendant had purchased from the tenants. That as such the plaintiff illegally and fraudulently obtained title to the suit land. Further, that the suit land overlaps on and encroaches upon the 1st defendant's titled land comprised in Plot 43, and that the plaintiff's title ought to be cancelled and the plaintiff's suit dismissed with costs..."

From a reading of the above, I find counsel for the appellant's criticism of the trial Judge in that regard to be unfounded.

Therefore ground 7 of the appeal must fail.

On grounds 8 and 9, counsel for the appellant faulted the trial Judge for awarding general and special damages to the respondent. Counsel for the respondent supported the trial judge's findings.

The principle upon which this Court may interfere with an award of damages has been discussed in a number of cases. In ***Patel V Samaj and Another (1941) 11 EACA 1*** where the Court of Appeal of Eastern Africa cited with approval ***Flint V Lovell (1935) 1 KB 360*** where Green LJ stated that,

> *"In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."*

The trial judge amply stated the law on special and general damages in his judgment. In awarding general damages of UGX 500,000,000/=, the trial judge took into account the nature of the trespass, the impunity with which the tortuous acts were executed, the general inconvenience the respondent was put through at the instance of the defendants, and in general the extent of the destruction occasioned on the suit land and adjoining Plots of land of the plaintiff and future economic loss.

Counsel for the appellant faulted the trial Judge for relying on ***Robert Cuossens vs. Attorney General, SCCA No. 8 of 1999*** which was a personal injury case for awarding general damages for future economic loss. I do not find merit in counsel's submission because nothing precludes a judicial officer from relying on a case which may not necessarily be on all fours with the

matter before him / her but contains a principle relevant to the matter before him/her. The Judge only needs to be alive to the peculiar circumstances of the matter before him/her and use the principle appropriately. For general damages, he relied on ***Halsbury's Law of England 3rd Edition Vol. 38 paragraph 1222,*** which was cited and relied upon in ***Placid Weli vs. Hippo Tours & 2 Others HCCS No. 939 of 1996*** that trespass is actionable per se even if no damage was done to land, and that a plaintiff is entitled to recover damages even though he has suffered no actual loss, but where trespass has caused the loss, the plaintiff is entitled to receive such an amount as will compensate him or her for the loss. Further, that the purpose of damages is to put the plaintiff in as good a position as he would be if the trespass had not occurred.

I however, find that in light of the circumstances of this case, the award of shs. 500,000,000/= as general damages was on the higher side. I would award a sum of shs 100,000,000/= as general damages with interest at Court rate from the date of judgment until payment in full.

For special damages, he relied on ***Stroms vs. Hutchinson (1905) AC 515***; and ***Dr. Godwin Turyasingura vs. Wheels of Africa HCCS 485 of 1995,*** where it was held that special damages must be specifically pleaded and strictly proved. Further, in the case of ***Musoke David vs. Departed Asian's Property Custodian Board [1990 – 1994) EA, 219,*** it was held that due to their peculiar nature the law requires that a plaintiff gives warning in his pleadings

of the items constituting his claim for special damages with sufficient specificity in order that there may be no surprise at the trial.

I do not accept counsel for appellant's submission that special damages were pleaded but not proved. PW6 Biryomumaisho Deziderio the respondent's farm manager adduced in evidence *Exhibit P19;* the "Record of Farm Expenditure" as proof of the claimed loss and explained each item in detail. The trial Judge noted that the testimony of PW6 in respect to the content of *Exhibit P19* regarding the claimed loss presented as special damages was never challenged in any way by contrary evidence in rebuttal or through cross - examination by Counsel for the defendants. It is only at submission stage that Counsel for the 1st defendant raised questions on some of the items in *Exhibit P19* regarding the special damages.

As indicated earlier in this judgment, it was the respondent's evidence that the suit land was 414.3 hectares. Under paragraph 5(a) of the amended plaint, it was stated that Plot 380 approximately measures 414.348 hectares. However, under paragraph 16, the particulars of special damages were loss of commercial income from 500 hectares of pine trees and the evidence of PW6 in Exhibit P19 was in respect of 500 hectares. The trial Judge was alive to this during the proceeding of the matter. On page 197 of the record of Appeal, he stated thus:

> *"I don't know how you will prove the rest of the farm was affected when it is actually not the suit land. Unless you want to institute a*

suit against Mr. Jaggwe and others for those other but as far as we are concerned it is Plot 380 or no other. I believe your lawyer will also explain that one to you".

Even in his judgment, he was alive to this fact when he noted that even though evidence was adduced as to the destruction and loss occasioned on the other adjoining lands of the plaintiff, that does not fall within the particulars of special damages pleaded in respect to the suit land, but would invariably be proof of general damages. To that end, I do not find that there is any discrepancy in the claim for special damages as pleaded merely because the size of the suit land is different from the extent of the special damages pleaded and proved.

During cross examination Court asked the respondent about the pictures that he showed Court in proof of the extent of destruction, he testified that the destruction was on Plot 380 but all the trees were for other pieces of land. When Court further asked him whether the pictures of the destroyed banana plantation and pine which he had showed it were on the suit land, he answered that on the suit land was the fence. When asked about how the appellant trespassed on his land, he testified that it was "by clearing, getting ready to plant seasonal crops, burning where I had cleared because I was going to plant trees but it was temporary".

On his part, PW6 testified during examination in chief that there were pine trees on all three Plots (119, 142 and 380) which comprised the farm. However

during cross examination, he admitted that the biggest part of Plot 380 did not have trees but was predominantly planted with seasonal crops. PW3 (Nsimbi) on pages 345 and 346 of the Record of Appeal also testified that the land had trees but where they were going to plant the eucalyptus there was nothing. He clarified that the land neighboring Mr. Jaggwe's land was clear.

What I am able to deduce from these testimonies is that Mr. Bugingo did not have pine trees on the suit land but had intentions of planting trees on the suit land and had cleared it for the said purposes. Unfortunately PW3 (Nsimbi) and others trespassed on it and the plan was aborted. However, his other Plots had trees but it was hard for people to distinguish the Plots because they were jointly known as his farm. I am therefore of the considered view that it was erroneous for the trial Judge to award special damages in excess of the suit land.

The evidence on record indicates that the respondent had paid for 500,000 seedlings at a cost of Shs.500= per seedling amounting to Shs. 250,000,000=. I would therefore award 250,000,000/- as special damages.

Therefore ground 8 of the appeal fails while ground 9 succeeds.

On ground 10 of the appeal, counsel for the appellant faulted the trial Judge for awarding damages to the respondent at a commercial rate of 25% p.a in a case of trespass and destruction of property. He argued that it was erroneous for the trial Judge to award interest at 25% p.a because the respondent did not specifically plead the rate and the suit being a tortious claim and the award

being compensatory, Court should have awarded interest at 6 or 8%. Counsel relied on **Ecta (U) Ltd v Geraldine S. Namirimu and Josephine Namukasa SCCA No.29 of 1994** for the proposition that though Court has discretion to award reasonable interest on the decretal amount, a distinction must be made between awards arising out of commercial or business transactions which would normally attract a higher interest, and awards general damages which are mainly compensatory. Counsel opined that since the suit arose from a land dispute, the proper interest rate should have been at Court rate. He also relied on **Bank of Baroda (U) Ltd v Kamuganda (2006) 1 EA 11** which cited with approval the case of **Milton Obote Foundation v Kennon Training Ltd SCCS No. 25 of 1995 (Unreported)** to support his submissions.

It is settled law that interest rate is awarded at the discretion of Court, Under **Section 26(2)** of the Civil Procedure Act (CPA), it is within the discretion of court to award interest at a rate that it deems fit. The principle was reiterated by Oder JSC in **Premchandra Shenoi & Anor v. Maximov Oleg Petrovich SCCA No. 9 of 2003** that "in considering what rate of interest the respondent should have been awarded in the instant case, I agree that the principle applied by this Court in **Sietco vs. Noble Builders (U) Ltd (Supra)** to the effect that it is a matter of the Court's discretion is applicable".

For avoidance of doubt **Section 26(2) of the CPA** provides that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on

principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

Although I agree with counsel for the appellant that this was a land dispute and the respondent's claim of trespass was tortious in nature, it was the respondent's evidence that he had cleared the suit land for planting pine trees and had in fact ordered for seedlings before the appellant's trespass and destruction of the suit land. It was also his evidence that he planted trees on a large scale on the adjoining lands for commercial purposes and that when his workers were invaded, they left the farm and that although at the time of the trial they had returned and could now go ahead to plant the pine trees, it would be at a loss. He also emphasized that the appellant's destruction also spread and affected the trees on the adjoining Plots. I therefore agree with the trial judge's award of interest on special damages at commercial rate of 25% p.a.

Therefore ground 10 of the appeal must fail.

Counsel for the appellant's submission on ground 11 of the appeal is that the trial Judge erred in holding that the appellant did not have customary interest in the suit land. Counsel argued that sufficient evidence was led in the trial court to prove that the appellant had acquired customary interest in the suit land as evidenced by a sale agreement admitted as **Exhibit D2**. He submitted

that the trial Judge erroneously rejected the appellant's oral evidence in support of his customary interest. In reply to ground 11, counsel submitted that the trial Judge properly evaluated the evidence presented in support of the appellant's claim of having a customary interest on Plot 380 and rightly came to the conclusion that he did not have customary interest therein. Counsel argued that if the appellant had any customary interest, it was in respect of his former land comprised in Plot 43 which had subsequently been sub-divided and sold off to Indo Agencies Ltd.

The trial judge held that after carefully evaluating the evidence on this particular point, the inevitable conclusion is that the 1st defendant has no interest whatsoever in the suit land. *Exhibit D2*, the sale agreement which he sought to rely on sharply contradicts rather than support his claim in the pleadings. The customary interests he purports to have purchased from tenants on the suit land does not ordinarily fall within land regulated under the ***Registration of Titles Act (Cap.230)*** which is the subject of the sale agreement. The sale agreement is specifically in respect to;

> *"LAND COMPRISED IN LEASEHOLD REGISTER VOLUME 2640 FOLIO 14 PLOT 43 SINGO BLOCK 426."*

This could only mean that the customary interests the 1st defendant purchased, if any, existed only on his registered land in Plot 43, and not outside it as he erroneously seems to suggest by his claim. I have reviewed the evidence adduced by the appellant in regard to this matter and I agree with the trial Judge that the appellant has no interest in the suit land which was former public land.

In conclusion, the appeal subtantially fails. I, on the main uphold the judgment of the lower Court and make the following orders;

1. The award shs 2,837,000,000/= awarded to the respondent as special damages is set aside and sunstituted with an award of shs 250,000,000/= for the seedlings that were purchased but not planted.

2. The award of shs 500,000,000/= awarded to the respondent as general damages is set aside and substituted with an award of shs 100,000,000/= for the inconvenience caused to the respondent.

3. Interest on special damages is awarded at 25% p.a from June 2014 until payment in full and on general damages at Court rate from the date of judgment until payment in full.

4. The appellant shall pay to the respondent half of the costs of this appeal and the entire costs in the lower Court.

I so order

Dated at Kampala this .....22nd.....day of .....March.....2022

CHEBORION BARISHAKI

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram: Musoke, Barishaki Cheborion, & Mulyagonja; JJA

CIVIL APPEAL NO. 114 OF 2016

BETWEEN

WILLY JAGWE :: APPELLANT

AND

BUGINGO WILFRED :: RESPONDENT

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my brother Cheborion Barishaki, JA, in which he concluded that the appeal substantially failed and upheld the decision of the trial judge. He also upheld the orders of the trial judge that damages were due to the respondent though he varied them by reducing the special damages awarded from UGX 2,837,000,000/= to 250,000,000/= and general damages from UGX 500,000,000 to UGX 100,000,000/=, with interest on the special damages at the rate of 25% per annum from June 2014 to the date of payment in full. He further awarded interest on the general damages at court rate from the date of judgment till payment in full.

However, with the greatest respect to my learned brother Barishaki, JA, I am unable to agree with the finding and decision that because the land in dispute was previously public land which belonged to Mubende District, and any person could have applied for a freehold title over it, Mubende

District Land Board properly and lawfully allocated a freehold title to the respondent over it when he applied for it as a customary tenant.

I am also of the view that the respondent is not entitled to the awards of damages above for the reasons stated in the judgment of my learned sister, Elizabeth Musoke, JA. However, I am in full agreement with her finding that the respondent did not hold a customary interest in the land in dispute before his application to the Land Board for the grant of a freehold title, though I explain the concept further in this judgment. However, with the greatest respect, I am unable to agree with the opinion of my learned sister, at page 12 of her judgment, that the respondent proceeded properly under Form 4 under the Land Regulations (2004) when he applied for the grant of a freehold title. It is for those reasons that I have found it necessary to set out my opinion on those two points of law as they relate to the facts of this case in this judgment.

My views on this matter are premised on the provisions of the Constitution of the Republic of Uganda, 1995, as amended and the Land Act, 1998, as amended. They are also premised on previous decision of this court which were commended to us by the appellant's counsel in his submissions.

In his testimony, Mr Wilfred Bugingo, the respondent stated that he came onto the land in 2005 because he found it empty when he called in a surveyor to open boundaries of two stretches of land that he previously held in the same area, adjacent to the land in dispute. At page 44 of the record of proceedings in the trial court (overleaf from page 165 in marker ink) he states as follows:

> *"I settled on this land way back around 2000 then around 2013 I decided to apply for a freehold title for it. I went to Mubende district to seek guidance and they told me to get a form and go to the Area Land Committee."*

Asked what he was doing on the land before his application for a freehold title, he said he was planting trees and seasonal crops and in addition, keeping some livestock on it. The facts about how he came onto the land are clearly set out in the judgment of my learned and honourable sister, Musoke, JA, at page 4 of her judgment. I need not dwell on them any further.

Article 237 (3) of the Constitution of Uganda provides for the different land tenure systems in this country as follows:

> **"(3) Land in Uganda shall be owned in accordance with the following land tenure systems—**
>
> **(a) customary;**
> **(b) freehold;**
> **(c) mailo; and**
> **(d) leasehold.**

Article 237 (4) then goes on to provide for the acquisition of freehold interests in land in the following terms:

> **(4) On the coming into force of this Constitution—**
>
> ***(a) all Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and***
> ***(b) land under customary tenure may be converted to freehold land ownership by registration.***
>
> **(5) Any lease which was granted to a Uganda citizen out of public land may be converted into freehold in accordance with a law which shall be made by Parliament.**
>
> **(6) For the purposes of clause (5) of this article, "public land" includes statutory leases to urban authorities.**

Section 3 (4) of the Land Act then provides that

> **"(2) Freehold tenure is a form of tenure deriving its legality from the Constitution *and its incidents from the written law which*—**

(a) involves the holding of registered land in perpetuity or for a period less than perpetuity which may be fixed by a condition;

(b) ..." ***{My emphasis}***

With regard to the land in the case at hand, it is important that the meaning of paragraph 5 of Article 237 is understood, in relation to section 3 (2) of the land Act.

"Public land" is not defined by the Constitution, though it is referred to in Articles 237 (5) and (6) thereof, in relation to the conversion of land held under customary law, and the conversion into freehold of *"leases that were granted to citizens out of public land,"* including leases granted to urban authorities in that category. It is my view that this was deliberate because public land was abolished by the Land Reform Decree in 1975. It was a creature of the 1962 and 1969 Constitutions and the Public Lands Acts of 1962 and 1969, respectively. It was never restored by the 1995 Constitution.

In view of that fact, I would hold that the Constitution of the Republic of Uganda does not provide for *"public land"* in any of its provisions. It is also my view that this was not a mistake of the Constituent Assembly because Article 237 (1) of the 1995 Constitution very deliberately states that the norm following the promulgation of that Constitution is that:

"(1) Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution."

I am fortified in my decision on that point by the fact that *"public land"* is not defined by the Constitution. Neither is it defined by the Land Act, Cap 227 of the Laws of Uganda, and all the subsequent amendments thereto. However, section 1 (o) of the Land Act defines *"former public land"* as *"land*

previously administered under the Public Lands Act, 1969, prior to the coming into force of the Land Reform Decree, 1975." It is therefore my view that when Parliament referred specifically to *"Any lease which was granted to a Uganda citizen out of public land"*, and not to *a lease granted out of public land*, it gave the impression that the option to apply for the grant of freehold titles for Ugandans who did not already hold customary rights on land was limited to persons that held leases that were granted by the then Land Commission and the then controlling authorities before the coming into force of the Constitution.

Further, pursuant to Article 237 (5) of the Constitution, Parliament enacted the Land Act which came into force in 1998. It is stated to be an Act to provide for the tenure, ownership and management of land; to amend and consolidate the law relating to tenure, ownership and management of land; and to provide for other related or incidental matters.

Section 3 (2) of the Land Act provides for *"freehold"* as one of the forms of tenure in Uganda. It is important that I set out the relevant part of that provision here, and it is follows:

> **"(2) Freehold tenure is a form of tenure deriving its legality from the Constitution *and its incidents from the written law* which—**
>
> **(a) involves the holding of registered land in perpetuity or for a period less than perpetuity which may be fixed by a condition;**
>
> **(b) enables the holder to exercise, subject to the law, full powers of ownership of land, including but not necessarily limited to—**
>
> **(i) using and developing the land for any lawful purpose;**
>
> **(ii) taking and using any and all produce from the land;**
>
> **(iii) entering into any transaction in connection with the land, including but not limited to selling, leasing,**

mortgaging or pledging, subdividing creating rights and interests for other people in the land and creating trusts of the land;

(iv) disposing of the land to any person by will.

(3) For the avoidance of doubt, a freehold title may be created which is subject to conditions, restrictions or limitations which may be positive or negative in their application, applicable to any of the incidents of the tenure."

{My emphasis}

Parliament's enactment of section 3 (1) of the Act that freehold tenure is a form of tenure deriving its legality from the Constitution *"and its incidents from the written law,"* appears to have departed or strayed out of the confines of Article 237 4(b) and 5 of the Constitution. The framers of the Constitution, for whatever reason, appear to have limited the creation of freeholds on land to interests that are held under customary law and leases on former public land that were granted under the Public Lands Act.

However, I am mindful of the fact that it is not for this court sitting as an appellate court to interpret the Constitution. I will therefore apply the law as it stands at present, since Article 241 (c) of the Constitution empowers District Land Boards to deal with matters connected with land in the districts in accordance with laws made by Parliament.

Going forward then, applications for freehold tenure are provided for in section 10 of the Act as follows:

"10. Application for grant of land in freehold.

(1) A person who wishes to be granted a freehold shall apply in the prescribed form to the board.

(2) The application referred to in subsection (1) shall be lodged with the committee."

The provision seems to give *carte blanche* to *"a person who wishes to be granted a freehold"* title over land. However, I observed that the grant of freehold titles under section 10 of the Land Act is not the same as that of grants made under sections 9 and 28 thereof.

Nonetheless, section 11 of the Land Act goes on to provide as follows:

> **"11. Functions of the committee on application for freehold tenure.**
>
> **(1) Upon receipt of an application made under section 9 or 10, the committee shall, subject to this section, exercise in respect of the application all its functions under section 5.**
>
> **(2) The committee shall when exercising the functions set out in section 5(1)(c) consider or take into account the question whether the customary law applicable to the land the subject of an application to which this section applies recognises or provides for individual ownership of land.**
>
> **(3) In respect of an application made under section 9, the committee shall, when exercising the functions set out in section 5(1)(d) record whether the person or persons referred to in that paragraph are prima facie entitled to have their customary tenure converted to freehold tenure and in any case where two or more persons are prima facie entitled to convert their customary tenure to freehold tenure shall record whether they own or are entitled jointly or in common and in the latter case, the share of each.**
>
> **(4) Any person who holds a certificate of customary ownership shall be exempted in respect of that land from the verification described by section 5.**

For the avoidance of doubt, the crucial parts of section 5 of the Land Act said to apply to applications made under both section 9 and 10 of the Act provide as follows:

> **5. Functions of committee on application for certificate of customary ownership.**
>
> **(1) On receipt of an application for a certificate of customary ownership, the committee shall—**

(a) determine, verify and mark the boundaries of all interests in the land which is the subject of the application;

(b) demarcate rights of way and other easements over the land the subject of the application and any adjacent land which benefit or burden or are reputed to benefit or burden any such land or which it considers will be necessary for the more beneficial occupation of any such land in respect of which an application may be granted or any adjacent land;

(c) adjudicate upon and decide in accordance with and applying customary law any question or matter concerning the land referred to it by any person with an interest in land which is the subject of an application or any land adjacent to it, including the question of whether the customary law applicable to the land the subject of the application recognises individual rights to the occupation and use of land and, if so, subject to what conditions and limitations;

(d) record that if any person has, or two or more persons have, exercised rights under customary law over the land the subject of the application that should be recognised as ownership of that land, that person or those persons, as the case may be, shall, prima facie, be entitled to be issued with a certificate of customary ownership and in the case of two or more persons, the shares of each person and the nature of their ownership;

(e) ..." ***{My emphasis}***

The next provision, section 12 of the Land Act, gives the first impression that it does provide the procedure for a person to apply directly for a freehold title in its heading which reads as ***"Procedures for application of freehold tenure."*** However, the body of the section goes on to provide as follows:

"(1) The committee shall, subject to this section, in respect of an application made under section 9 or 10, comply with all the procedures set out in section 6.

(2) Where the applicant is in possession of a certificate of customary ownership—

(a) Section 6(2)(b), (3), (4), (5) shall not apply to the application;

(b) the committee may, when preparing a report on the application to which section 9 applies, make use of any report prepared under section 6(6)(a) but shall, in so doing, have regard to section 11 and whether, in the circumstances of the application, there are any new or additional matters not dealt with in the report submitted under section 6 that should be brought to the attention of the board."

Section 6 of the Act sets out the procedure for applications for certificates of customary ownership. Subsection (6) (a) provides that after considering the application, the Committee shall prepare a report; the terms thereof are specified in that provision. The provision does not seem to be applicable to the case before us because the applicant did not apply for a certificate for customary ownership of land but one for conversion of a customary land holding to freehold tenure.

Nonetheless, from the provisions that I have laid out above, it appears to be the norm rather than the exception in the Land Act, that in all applications for a freehold title in areas where it was allowed to have customary land holdings before the coming into force of the Constitution, the Area Land Committee must consider the rights and interests of any persons holding land under customary law.

Section 13 of the Land Act provides for the functions of the Land Board on an application for freehold tenure. One crucial consideration for a person who wishes to apply for a freehold title over unoccupied land, in the first instance, is section 13 (5) which provides as follows:

"(5) In respect of an application to which section 10 applies, *the board shall charge a fee for the freehold title which shall be prescribed and any such charge at the fair market valuation* shall be set by the board at the level determined by the chief government valuer, and any fee may be paid in one lump sum or in instalments as the board may determine." ***{My emphasis}***

This provision, in my view, sets one mandatory condition for the applicant for a freehold title which must be considered by the Board on an application, in the first instance, under section 10 of the Land Act. The Board must determine the fee to be paid by the applicant based on the fair market value of the land and the applicant must pay the fee in a manner prescribed by the board. This means that the freehold interest granted to an applicant under section 10 of the Act is not free land; the applicant pays the equivalent of a premium based on the value of the land. This makes such applications for freehold titles to land substantially and significantly different from those granted to holders of customary interests in land, and persons holding leaseholds over former public land who apply for freeholds on conversion.

Freeholds on conversion are provided for by section 28 of the Land Act which provides as follows:

28. Conversion of leasehold into freehold.

(1) Any lease which was granted to a Ugandan citizen out of former public land and was subsisting on the coming into force of this Act may be converted into freehold if the board is satisfied that the following conditions have been complied with—

(a) that the leasehold is authentic and genuine;

(b) that there were no customary tenants on the land at the time of acquisition of the lease;

(c) that if there were any customary tenants on the land at the time of acquisition whose tenancy was disclosed, those tenants were duly compensated;

(d) that all development conditions and covenants have been complied with;

(e) that any other conditions imposed by law from time to time have been complied with; and

(f) that the conversion shall be limited to one hundred hectares and that any area in excess of one hundred hectares shall be

converted only if the board has verified it and is satisfied that it is desirable in the public interest that it should be converted into freehold.

(2) Where a lease of land exceeding one hundred hectares is converted into freehold, the owner shall pay the market value as determined by the chief government valuer for the new interest before the conversion becomes effective and the money paid shall become part of the Land Fund.

The provision that is laid out above shows that the Act does not provide any criteria for the Land Committee and the Land Board after it, to consider when an application to obtain a freehold interest in land, in the first instance, is placed before them. The only criteria that are provided for in the Act seem to be those for considering applications by persons or groups holding customary interests in land and leases on former public land. This includes applications made by persons under section 10 for the grant of freeholds in the first instance, or directly over unoccupied land under the control of the District Land Board.

The consideration by the Area Land Committee and the Board after it whether or not there are customary interests in the land covered by the application under section 10 of the Act is crucial so as not to inadvertently disadvantage persons with such interests in land that the applicant claims to be unoccupied. The ascertainment of the value of the land is also crucial because the person applying for a freehold over unoccupied land in the first instance must pay for it. However, at page 48-49 of his judgment, my learned brother Barishaki, JA found and held thus:

> *"... I note that under section 5 (1) (a) and (j) of the Land Act, it is the Area Land Committee that is enjoined to determine, verify and mark the boundaries of all interest in the land which is the subject of the application and advise the Land Board on questions of customary law. There is cogent evidence on record that the Area Land Committee visited the suit land and carried out its duties before recommending that the applicant be issued with a certificate of customary ownership. If Mubende District Land Board was*

Tuhon.

not satisfied about the respondent's customary interests in the land, it reserved the right to reject the Committee's report, which it did not. Secondly, there is no dispute that the suit land previously was public land which belonged to Mubende district and under section 10 of the Land Act, the respondent or anyone else for that matter could have directly applied for a freehold title over it without proving any interest in it. Therefore, I am satisfied that the respondent had a customary interest in the suit land."

It is my opinion that in the matter now before this court, two questions lie for determination in this regard. The first one is whether the Area Land Committee truly ascertained that the respondent was a customary tenant, as my learned brother held. The second is whether the land board properly granted freehold tenure as it would to a person who lodged their application under section 10 of the Land Act, over land that was unoccupied.

There is no contest that the respondent lodged his application as a customary tenant on unoccupied land. The evidence of the proceedings or findings of the Area Land Committee, as well as the respondent's application for the grant of a freehold are on record. The first is the application for the freehold title, Form 4 under the Land Regulations of 2004, which was admitted in evidence in triplicate as **ExhP2, P3** and **P4**. In the three identical forms, at page 96, 97 and 98 of the record of appeal, under *"Claims of occupiers"* the applicant stated thus:

"The piece of land belongs to me. I have been using it for the last 8 years. I therefore want to develop it."

On the reverse side of the Form, under *"Remarks and recommendations of area land committee"* the members inserted the following remarks:

"We have visited the said piece of land. We therefore recommend for its conversion."

The Form was signed by three members of the Land Committee: Mbidde Ruth, Abdu Ndyahika and Sserugunda Lovince Joice.

The evidence of the visit which is a report required to be attached to Form 4 was adduced and admitted in evidence as **ExhP7**. It was addressed to the Senior Land Officer, Mubende District and dated 2nd October 2013. It reads as follows:

> ***"A FIELD REPORT FOR MR BUGINGO'S LAND***
>
> *We the members of Manyogaseka sub-county land committee do hereby report to you that we received application forms from Mr Bugingo Wilfred, a resident of Lwensololo Local Council One, Kiteredde Parish Manyogaseka sub-county, Mubende District. The applicant wants to convert his land from customary tenure to freehold tenure. The said piece of land is ___ acres.*
>
> *The purpose of this is therefore to report to you that we visited the said piece of land in (the) presence of his neighbours and they all agree that the said land belongs to Mr Bugingo Wilfred.*
>
> *The land is being used for cattle keeping, tree planting and cultivation by the one (sic) Bugingo Wilfred. We therefore recommend that Mr Bugingo's application be considered.*
>
> *Yours,*
>
> | *Name* | *Sign* |
> |---|---|
> | *1. Mbidde Ruth* | *signed* |
> | *2. Abu Ndyahuka* | *signed* |
> | *3. .....* | |
> | *4. Sserugunda Lovince Joice* | *signed* |
> | *5. Katumba Benon* | *signed* |
>
> *Members of Manyogaseka Area Land Committee"*

It is curious that the Area Land Committee did not establish the size of the land, not even approximately, that the respondent applied to take on under his freehold title. However, the evidence on record is that it measures approximately 1.5 square miles.

In addition to that, attached to the letter, there was a list of persons that were present during the visit to the area and the inspection of the land by the Committee. Notably, one of his neighbours stated in the survey report, **ExhP5**, Jagwe Willy, was not present at the inspection of the land by the Committee. As a result, this dispute ensued because the appellant claims to have had an interest in the land granted to the respondent by the Land Board, as a customary tenant. His claim is said to have come about when he purchased the interests of his neighbours who claimed to be customary tenants.

Section 1(l) of the Land Act defines customary tenure thus:

> **"(l) 'customary tenure' means a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which are described in section 3;"**

Section 3 of the Act then gives us the criteria of land holdings that would confer customary land rights to the holder under the Act as follows:

> **"3. Incidents of forms of tenure.**
>
> **(1) Customary tenure is a form of tenure—**
>
> **(a) applicable to a specific area of land and a specific description or class of persons;**
>
> **(b) subject to section 27, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;**
>
> **(c) applicable to any persons acquiring land in that area in accordance with those rules;**
>
> **(d) subject to section 27, characterised by local customary regulation;**
>
> **(e) applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land;**
>
> **(f) providing for communal ownership and use of land;**

(g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and

(h) which is owned in perpetuity."

The provision states that some of the criteria are subject to section 27 of the Act. Section 27 of the Act excludes customs that violate the rights of women and children and other vulnerable persons on the land. It is in tandem with Articles 33, 34 and 35 of the Constitution of the Republic of Uganda. There is no dispute between any such persons and the respondent, so these provisions clearly do not apply to this case.

The respondent's claim and application for a freehold title to the land resulted after he occupied it for a period 8 years only; he therefore certainly did not hold it in perpetuity. As a matter of fact, there is no evidence at all on the record that the respondent falls under any of the other categories of persons that are described in section 3 (1) of the Land Act. Clearly therefore, the information in his application under Form 4 of the Land Regulations was neither correct nor true. It seems to me that the members of the Area Land Committee misguided him or colluded with him before and after he lodged his application as a customary tenant. They went ahead to convince the District Land Board in their report, **ExhP7,** that he was indeed a customary tenant who sought to convert his interest into a freehold interest and advised the Board to consider his application as such.

I noted that the question that has been placed before this court in this appeal has been the subject of several appeals before this court in the past. I singled out two of them for emphasis of the result.

In **Dr William Kaberuka & Julius Muhuruzi v. N K Investments and Kampala District Land Board, Court of Appeal Civil Appeal No. 80 of 2008**, the appellants sought to challenge the grant of a lease to the

respondents by the Kampala District Land Board. The lease was over land which they occupied and cultivated crops. They claimed to be customary tenants by virtue of their activities on the land. Following the decision of the Supreme Court in **Kampala District Land Board & George Mutale v. Venansio Babweyaka & Others, Supreme Court Civil Appeal No. 2 of 2007,** this court found and held that:

> *"In this case there was no attempt by the appellants to prove by evidence that they were occupying the land under customary tenure and if so under what kind of custom or practice they occupied the suit land.*
>
> *We do not accept the argument of Mr. Muhimbura that mere cultivation of crops on land constitutes proof of customary tenancy.*
>
> *We therefore find that the appellants were not customary tenants on the suit land."*

In **Balamu Bategaine Kiiza & Isma Rubona v. Zephania Kadooba Kizza, Court of Appeal Civil Appeal No. 59 of 2009,** the point of contention before this court was that the learned judge of the High Court, on a first appeal, erred when he found that the grant of the land in dispute by the Bataka and LC Officials in 2000 and the subsequent settlement and development of it by the respondent amounted to customary tenure and was lawful. This court, consisting of Kasule and Kiryabwire, JJA, and Buteera, JA (as he then was) with regard to the proof of customary law before the Land Tribunal found and held as follows:

> *"Therefore, without proof of that custom we do not agree with the finding of the Land Tribunal and the first appellate Court, that LCs and Bataka can grant customary land tenure. We also disagree with the finding that as a general rule when one occupies or develops land then* ipso facto *a customary interest is created. The effect of that holding is that no matter how one comes to the land, as long as one develops it, a customary interest is acquired. Even trespassers would then acquire interest on property which they otherwise shouldn't. In any event this was not proven in evidence and, as a general proposition of customary law, would be unacceptable. It is clear*

from the authorities above that customary law must be accurately and definitely established and sweeping generalities will not do under this test.

Native custom must be proved in evidence and cannot be obtained from the Court's assessors or supplied from the knowledge of the trial Judge [See R v. Ndembera s/o Mwandawale (1947) 14 EACA 85]. *However, it seems to be the case here as the Land Tribunal held that this was common practice in Bunyoro without any proof from the respondent, which burden lay upon him to accurately and definitely prove. In this regard the respondent did not in law discharge the required standard of proof as no experts were brought to guide the Court on any existing customs relating to land nor were any scholarly materials of customary land law in Bunyoro referred to. In this regard, the appellate Court in reaching its findings did not apply the principles required of the first appellate Court to review and reconsider the evidence and materials before it on this ground.*

We therefore find that the appellate Court erred in upholding the finding that when the Bataka gave the respondent the suit land in 2000 that amounted to a customary tenure as there is no evidence to support that finding of fact."

In the case now before us, the respondent lodged his application before the Area Land Committee. The Committee considered the application as one for conversion of a customary land interest into a freehold. It was therefore incumbent upon the Committee, under the provisions of section 5 (c) of the Land Act, referred to in section 11 thereof as the source of the criteria for their decision, to:

"(c) adjudicate upon and decide in accordance with and applying customary law any question or matter concerning the land referred to it by any person with an interest in land which is the subject of an application or any land adjacent to it, including the question of whether the customary law applicable to the land the subject of the application recognises individual rights to the occupation and use of land and, if so, subject to what conditions and limitations;"

Unfortunately, the Committee did not do so. They, as such committees are often wont to do, in a lackadaisical manner simply went to visit the land in order to establish whether the applicant before them had any activities

going on upon it, as is apparent from their report, **ExhP7**. They were not, even as a preliminary matter, interested in establishing the approximate size of the land under the application; neither were they interested in ensuring that all neighbours concerned about the boundaries of the land were present. I will return to the evidence that was adduced about the work of the Area Land Committee in respect of the contested boundaries of the land in dispute later in this judgment.

It is therefore my carefully considered opinion that section 10 of the Land Act, which appears to give free rein to "a *person who wishes to apply for freehold,"* must be applied when a person who is not a customary tenant or a lessee on former public land applies to the Land Board for the grant of a freehold. The applicant must disclose that he/she is a first time applicant for a freehold, not a customary tenant as the respondent did in this case, for the following reasons:

First and foremost, it is very rare that there will be land that is unoccupied in this country because unoccupied land, even when it has been surveyed and titled attracts squatters. The 1995 Constitution of Uganda recognised this phenomenon and baptised persons who had occupied land before the promulgation of the Constitution in Article 237 (2) as *"bona fide occupants."* The principle is concretised in section 29 (2) of the Land Act which defines a *"bona fide occupant"* as follows:

> **"(2) "Bona fide occupant" means a person who before the coming into force of the Constitution—**
>
> **(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or**
>
> **(b) had been settled on land by the Government or an agent of the Government, which may include a local authority.**

In this case, after the respondent obtained his freehold title without the participation of one of the neighbours to adjacent land, there arose issues that required opening of boundaries to establish whether indeed his title of the new plot, designated as Plot 380 at Lwensololo, did not encroach on the appellant's Plot 43 or subdivisions that had been curved out of it. Plot 43 was existent at the time the respondent lodged his application, purporting to convert his land from a customary holding to freehold.

The appellant testified as DW2 in the lower court. He stated, at pages 481 to 482, and the respondent admitted so, that he bought his land from West Mengo Growers Cooperative Society and it was titled land. That subsequently, he sold part of his land, measuring 2772 acres. That the residue was supposed to be over 400 acres. That he did not know where exactly the said residue was. He explained that the portion of land he sold to a company called Indo Agencies Ltd stretched from Lake Wamala for an area of 2772 acres. However, there was no survey to ascertain the exact dimensions of the residue because the respondent who had gotten a title to adjacent land prevented the appellant's agents from opening the boundaries between his Plot and the new plot over which he obtained a freehold title.

Court took the appellant to task as to where the 2772 acres he sold to Indo Agency Ltd stopped. He stated that he did not know where the land he sold stopped because he did not participate in the survey carried out by the buyers of the land. Further that efforts to carry out the survey after the sale were stopped by the respondent's agents on Plot 380.

During re-examination the appellant states, at page 540 and overleaf, that after he sold the land to the company, it was agreed between them that the company do enter the land and use it until the case before court was concluded. He clarified that the survey for the buyers of his land were not

concluded to curve out the portion that he sold. Further that the company did not get their titles to the land but he gave them his own certificate of title as security. He reiterated that he did not know where the residue was since there was no survey done. Further that he believed the respondent fraudulently included part of the land in Plot 43 in his new plot 380 because he frustrated all efforts by surveyors that he hired to re-open the boundaries of the land to carry out a survey.

Godfrey Lule, DW4, testified that he is the appellant's son employed as an Advocate practicing with a law firm. Further that the appellant retained him as a lawyer in a suit in court in relation to the land, as well as administrator of the land in Plot 43 at Lwensololo. DW4 further stated (at page 888 of the record of appeal in computer print) that the appellant owned a *kibanja* on the land in dispute. That the interest arose from the compensation that the appellant paid to two former occupants of now Plot 380.

At page 586 of the record, DW4 further confirmed that the appellant sold part of his land in Plot 43 to a company called Indo Agencies Ltd, amounting to two thirds of the 5 square miles that he held. About granting possession to that company he stated thus:

> *"Possession has never been fully taken by the purchasers owing to the fact that the boundary on one of the sides of the Plot is not known. Mr Buyondo is still claiming in the High Court suit of Nakawa, at the same time there is a dispute between Mr Bugingo and Mr Jaggwe the 1st defendant in this suit. So possession on the ground is not possible and in any case, there is an interim order."*

At page 594, DW4 went on to explain that the mark stones showing the boundary between Plot 43 and the new Plot 380 were not in place. Further that Plot 43, or part of it was sold before the creation of Plot 380. At page 611, in re-examination, DW4 clarified that the buyers could not obtain

possession because the boundary with Plot 380 was not known and was the subject of a dispute. That the dispute could only be resolved upon the opening of the boundaries subject to a court order that was issued by the Registrar.

DW4 further testified about the boundaries between the old Plot 43 and the new Plot 380 that was adjacent to it. At page 613 and 614, he stated that there was an attempt to open the boundaries but it was not concluded as follows:

> *"The plaintiff's manger in the company of other employees stopped the survey and it was abandoned. It was also at that time that we discovered that there was a title so, we couldn't proceed any further.*
>
> ...
>
> *We had managed to open the boundaries of the other areas. It is only this boundary between now Plot 380 and Plot 43 that was not opened."*

Albert Birungi (DW5) was the District Staff Surveyor for Mubende District Local Government. At page 617-618 of the record he confirmed that he was instructed to open the boundaries between Plot 380 and Plot 43. He stated that the exercise was interrupted and disrupted by people who were making noise and throwing stones. Overleaf page 622, DW5 stated that there were subdivisions carried out on Plot 43, which he earlier confirmed had a common boundary with Plot 380. He confirmed to court that Plot 380 was indeed created after a new survey in the area.

During its meeting to determine whether the respondent was indeed a customary tenant on the land applied for, the Area Land Committee did not consider the interests of the persons who later came up to challenge the respondent's title to the land. The appellant was not present at the meeting and the inspection of the land. In his stead there was Rashid Kalyango who purported to be the manager of his estates with knowledge

of the boundaries of the land. The role that Kalyango played in this application for a freehold title will be further considered later in this judgment; but what is resoundingly clear from the testimony of the appellant is that Kalyango did not have authority to represent him before the Committee, at all.

But what defies an answer in view of the evidence above is this: If the respondent was a bona fide applicant for a freehold title to the land which is now known as Plot 380 at Lwensololo, why did his agents defy the appellant's efforts to open the boundaries of the land after the certificate of title was issued to him. And if Plot 380 did not overlap the existent Plot 43 or the other Plots that arose out of its subdivision, why wasn't the appellant allowed to establish the size of the land that remained after the sale? The denial of the appellant's agents to carry out a survey leaves doubt as to whether or not the new Plot 380 encroached on the appellant's land.

My conclusion from the evidence above is that the Area Land Committee obviously did not carry out its responsibility to establish whether there were customary interests on the land, as is required by sections 5 (c) and 11 of the Land Act. As a result, disputes over the title that had been issued to the respondent continued and spiralled into the various suits referred to by the trial judge in his judgment.

I will next consider the question whether given the fact that the respondent's application was lodged for conversion of a customary land holding into a freehold, Mubende District Land Board properly granted the freehold title to the respondent.

I have already stated above that direct applications for the grant of freehold titles over land which is unoccupied should be lodged under section 10 of the Land Act. There is no doubt that the land comprised in the title that is

now Plot 380 at Lwensololo measures 414.3480 hectares. This is equivalent to 1023.876 acres. It was sometimes in the testimony of witnesses referred to as 1.5 square miles, a sizeable piece of land.

The functions of the Land Board on the grant of a freehold are provided for in section 13 of the Land Act. Subsection (5) thereof in particular provides as follows:

> **"(5) In respect of an application to which section 10 applies, the board shall charge a fee for the freehold title which shall be prescribed and any such charge at the fair market valuation shall be set by the board at the level determined by the chief government valuer, and any fee may be paid in one lump sum or in installments as the board may determine."**

One of the particulars that the appellant set out under the allegations of fraud and illegality was that the respondent obtained a freehold interest over land which measured more than 100 hectares without paying to the Government the full market value of the land. The respondent on his part adduced evidence that he paid all the relevant dues for the grant. The trial judge considered the payment of dues at page 13 of his judgment (page 878 of the record of appeal). He noted and eventually held as follows:

> *"The plaintiff further adduced evidence Exhibit P8 showing that he applied for 500 hectares but that the area surveyed was only 414.348 hectares, and the deed plans were attached. Exhibit P8 also indicates that all dues, except stamp duty had been paid on Exhibit P10; a receipt No 00050350 issued by Mubende District Local Government. The District Land Board further quoting its earlier cited minutes endorsed the conversion in favour of the plaintiff on 18/12/2013. ...; copies of receipts dated 12/09/2013, show that the plaintiff paid the necessary dues to the Controlling Authority at Mubende. He was eventually issued with a certificate of title, Exhibit P1, in his names for the suit land."*

It has already been established that the respondent was not a customary tenant but he applied for the conversion of land held under customary

tenure into freehold tenure. His application was therefore considered under the wrong criteria by the Board when the Area Land Committee led them to believe that the land under consideration was indeed held under customary law. Had it been a genuine conversion of customary tenure into a freehold tenure, section 9 would have properly applied to it. The fees and duties paid by the respondent that were adduced in **ExhP13**, being UGX 30,000/= only, with no premium or payment for the fair market value of the land would have been sufficient.

However, because the respondent's application was in actual fact a direct application for the grant of freehold tenure over land under the control of the District Land Board, not a conversion of a customary holding to freehold tenure as he led the Board to believe, the conditions attaching to section 13 (5) of the Land Act had to apply. Before he could be granted a lease as a direct applicant for freehold tenure on the land, it was necessary for the respondent to make his application as a person who wished to be granted a freehold under section 10 of the Land Act. The District Land Board would have then caused the land to be valued so that the applicant complies with the mandatory provisions of section 13 (5) of the Act. In the absence of such an application, it was not possible for the Land Board to charge the fee for the freehold title prescribed by law *on the basis of the fair market value set by it at the level determined by the Chief Government Valuer.*

It is emphasised that observance of the provisions of section 13 (5) of the Land Act by the Land Board and the applicant is mandatory. The respondent who did not pay the fair market value of the land could not lawfully benefit from a freehold title as a customary tenant would without having the land valued and payment of its value charged by the Land Board. It is my view that the provisions for the grant of freeholds to

customary tenants in the Land Act and the Constitution were deliberately meant to benefit citizens who could not pay for freehold titles or land at its market value. The proceeds derived from such land by the Boards under sections 10 and 28 of the Act were meant to benefit vulnerable people or for compensation, under the Land Fund, as it is stated in section 28 (2) of the Land Act.

I would therefore conclude that the respondent's application for conversion of customary tenure for land that did not qualify as such under section 3 of the Land Act was not a mere irregularity but an illegality. For the same reasons, and with the greatest respect, I am unable to agree with the decision of my learned sister Musoke, JA, at page 12 of her judgment, that the respondent *proceeded properly* when he applied for the grant of a freehold using Form 4 in the Land Regulations of 2004.

I will next consider whether or not the grant of the freehold title to the respondent was done in the absence of fraud. The main contention by the appellant in this regard was that he did not sign Form 4, as one of the owners of land adjacent to what is now Plot 380 registered in the names of the respondent. And that because Rashid Kalyango who purported to signed on his behalf without his knowledge or consent, added to the allegation that the respondent was not a customary tenant on the land amounted to fraud.

Counsel for the appellant submitted before this court that the learned trial judge in his analysis of the facts, at page 883 of the record of appeal, downplayed the significance of the appellant's role in the process of applying for a freehold title, as a neighbour to the applicant. He further submitted that the respondent decided to deal with the appellant's "manager" to fulfil the process of the application for conversion of customary tenure to freehold instead of dealing with the owner over the

land himself. And that when he did so he avoided dealing with the owner of the land and notifying him of his intentions to apply for a freehold title of the land. He thus concluded that the actions of the respondent tainted his freehold title with fraud.

In his judgment, at page 18 thereof, page 883 of the record, the trial judge resolved this question in the following manner:

> *"A cursory look at application forms in Exhibit P2, P3 and P4, indeed shows that each has a provision in item 7 thereof, for "Names of the owners" of adjacent land, but not their signatures. It means that the names could ordinarily be filled in by anybody seized with sufficient information and or knowledge of the material facts required to be filled on the forms. I hasten to add that it is not a mandatory requirement that the registered owner of the adjacent land must personally write his or her names, more so when he or she is not readily available. This inference is fortified by another provision on the same form in Item A, for both the "Names and Signatures" of members of the Area Land Committee. This is markedly different from the provision in Item 7 where only "names of owners" of adjacent land are required to be filled in. This clear distinction is intended to serve a specific purpose for the members of the Area Land Committee to fill in their names and countersign against them. ... If the signatures of the owners of adjacent lands were required, a provision would have been made for that purpose on the forms. In this case only and only owners of the adjacent lands would be required to fill in their names and countersign against them on the forms. That is not the position in this case.*
>
> *I therefore agree with the proposition that PW2 did not sign or purport to sign for the first defendant, but simply filled in the name of his master the owner of the adjacent land to the suit land. That could not by any stretch of the imagination amount to forgery or fraud which ultimately renders the evidence of the handwriting expert's report quite irrelevant to the fact in issue."*

The trial judge eventually holds, at page 19 of his judgment (page 884 of the record) that going by the 1st defendant's evidence, fraud could not be attributable to the plaintiff/respondent, even remotely since he did not fill the name of the 1st defendant (appellant) into the form. He held so because,

in his view, the respondent had no intention to deceive; neither did he have any intention of making a false document with the intent to defraud or deceive. And finally that, section 59 of the Registration of Titles Act (RTA) provides that a certificate of title is conclusive evidence of title and cannot be impeached or defeated by reason of informality or irregularity in the application or the proceedings to bring the land under the Act. That the filing of the Form by the estates manger would fall within the ambit of section 59. And as a result, the respondent's title could not be impeached on that account.

However, as part of his application, the respondent also adduced Form 5 entitled *"Demarcation Form for Certificate of Customary Ownership.* It was admitted as **ExhP5** and it appears in triplicate at pages 99, 100 and 101 of the record of proceedings. I observed that the trial judge did not consider the import of this Form to the respondent's application and the whole of the proceedings, which to me had a crucial question about the boundaries of the land included in the respondent's application alleged to be a conversion of his land held under customary tenure to freehold tenure.

It has already been established that the respondent was never a customary tenant on the land in dispute. It was imputed in the evidence for the respondent that Kalyango Rashid was the manager of the appellant's estates. That in the absence of the appellant, Kalyango filled in Form 4, the application for conversion of a customary land holding to a freehold with title. However, the evidence on record is to the contrary.

With regard to the reason why Kalyango filed Form 5 for the demarcation of land on behalf of the appellant, the respondent stated that his process was made easier because the appellant had already constructed a fence which demarcated his land from the land in dispute. Asked why his neighbour did not sign the forms, he said he could not reach him and *"the*

process had to go on." He then admitted that it was indeed Kalyango who signed Form 5, as well on behalf of Mr Jaggwe. At page 201 of the record, he stated thus:

> *"I remember my manger calling me asking me that it was very difficult to find Mr Jaggwe. I said can't you find any other person. He told me the manager Mr Kajagwe (sic) was there then he wrote his name on his behalf."*

The respondent stated that his other neighbour, Ruth Kamara or Kamala, and he signed Form 5 but the appellant did not because he could not be found. At page 114 (in print) he stated that it was not because it was not necessary for the neighbour with the largest piece of land next to him (Willy Jaggwe) to sign Form 5. That he did not sign it because *"he was not reachable."*

The respondent denied that he deliberately kept the appellant out of the processing of his application for the freehold title. He said he was not responsible for the process and attributed the appellant's absence to the Land Committee which was in charge of the process. He also stated that it was not necessary for the appellant to be present when the Land Committee visited the land. He denied that it was fraudulent for the appellant to be left out of the whole process.

Biryomwisho Dezederio testified as PW6. He was the respondent's Farm or Estates Manager. With regard to the application for the freehold title, at page 373 of the record, he stated thus:

> *"The first one page 3 Mr Bugingo called and told me he wanted to get full ownership of the land and also to open boundaries. He sent me to go and see his neighbour and I found there Mr Kalyango Rashid who signed on behalf of his boss."*

He repeated this in cross-examination, at page 398 of the record, where he stated thus:

"My boss called me and told me he wanted Jaggwe to append his signature on some form so he sent me there to look for Jaggwe unfortunately I didn't find him on his farm I found there his manager Mr Kalyango who appended his signature on behalf of Mr Jaggwe. I also took around the area land committee, the district land board and the cartographer to inspect the land."

The respondent's testimony on this point is at variance with that of his Manager, Biryomwisho or "Biryomumisho". While he states that it was Biryomumisho who told him he could not find the appellant at his farm, Biryomumisho states that it was his boss that told him that Mr Jaggwe could not be found and proposed that any other person present on his farm could sign on his behalf.

The cues that can be taken from the respondent's testimony and cross examination are that he did not care whether the requisite procedures were followed or not. He did not try on his own to reach the appellant in respect of his application for a freehold on neighbouring land; instead he sent his Manager to the appellant's land to get him to sign forms. It appears from PW6's testimony that he went there only once. And it was on that same occasion that he found the appellant absent. He also lets on that it was Kalyango who offered to fill and sign the forms on behalf of Mr Jaggwe, not the other way round.

The respondent appears not to have cared at all who signed the forms. All he cared about was completion of the process and the grant of the title at any cost. He went along with his manager, Biryomumisho, who seems to have been a crony and in cahoots with the alleged Manager of the appellant's land, Rashid Kalyango.

This brings me to the fact that Rashid Kalyango testified for the respondent as PW2, not for the appellant his former employer. He testified that he was an employee of the appellant having been entrusted to look after the land

in his absence and deal with surveyors who were appointed to survey the land with a view to selling off some of it. He asserted that he had a written agreement with the appellant in that regard. Counsel for the respondent tried to have it admitted in evidence but court refused to admit it because it was in *Luganda*. Other documents that he wrote during the pendency of his assignment were therefore admitted in evidence.

During his testimony, counsel for the respondent asked PW2 how he came to know that the respondent occupied the land in dispute. He then explained how he came to fill in forms on behalf of the appellant, at page 265 of the record, where he stated thus:

> *"There was his manager Biryomwisho and he is the same manager we used to be in the same field. They planted trees there and cultivating from there (sic).*
>
> ...
>
> *Where (sic) I was still on plot 43 in 2013, there came Mr. Bugingo's manager called Biryomwisho saying that they had looked for my boss Mr Jaggwe and they were not seeing him. He came with papers applying for their land to be transferred from customary land to freehold land.*
>
> ...
>
> *He told me that they looked for Mr Jaggwe and they couldn't find him and I then told him since I knew the boundaries of our land, I could write Mr Jaggwe's names on the applications on his behalf and he proceeds. And I wrote on the applications the name of my boss Willy Jaggwe."*

PW2 further stated that after he filled the application forms on behalf of Willy Jagwe the Area Land Committee visited the land. That in the absence of the appellant, he moved around the land with the members of the Committee and signed their attendance list. He further testified that the appellant did not have any customary interests in the land and if they said so, they were liars.

Counsel for the respondent cross examined PW2 about his appointment and role as the appellant's Estates Manager. He asked him, at pages 272 to 274 of the record, whether he had any document to show that the appellant appointed him as Estates Manager and authorised him to sign documents on his behalf. The witness produced a police report in respect of a dispute over damage to the property of one Sekyondwa, which was situated on Plot 43. He failed to produce any document, apart from an agreement dated 26 May 2014, in Luganda. He finally admitted that he did not have any agreement with Mr Jagwe to manage his land; neither did he have any powers of attorney donated to him by the appellant in that regard.

Counsel for the appellant then asked PW2 whether it was he that wrote the appellant's name on **ExhP5**, the demarcation form of the area under the application for freehold. The witness stated the he wrote the appellant's name both in the space for his name, as well as the space for his signature. He admitted that the respondent did not authorize him to write his name and signature on **ExhP5**. That he indeed was not a neighbour to the respondent on the adjacent land; that he signed the various documents in relation to the respondent's application over a period of time he did not remember, in 2013. He also admitted that he never showed these documents that he purported to sign on behalf of the appellant to him. That the respondent's manager explained to him that their intention was to convert the land in issue from a customary tenancy to freehold land. Asked whether he supported the application, he said *"Of course I supported it."*

Closer examination of **ExhP5**, which was Form 24 under the Land Regulations of 2004 issued under regulation 28 thereof, revealed that it had a structure that was different from **ExhP2, P3** and **P4**. This Form

appears at pages 99-101 of the record of appeal with copies of it that were filled by the respondent. The pages overleaf pages 99, 100 and 101 bearing the 3 copies of the form had the following remarks:

> *"We the undersigned certify that the boundaries demarcated and shown on the sketch overleaf are correct to the best of our knowledge."*

Below this were spaces designated for the *"customary owners"*, *"owners of neighbouring land"* and *"witnesses"*. Besides customary owner Wilfred Bugingo wrote his name and signed. The owners of neighbouring land were stated to be Bugingo Wilfred, Ruth Kamara and Willy Jagwe. The first two owners placed their signatures at the places designated for their signatures. But in the space for Willy Jagwe's signature, Rashid Kalyango testified (at page 266 of the record in computer print) that he wrote his name and then wrote it again in the space designated for his signature.

Black's Law Dictionary (9th Edition) defines *"signature"* at page 1507 thereof as *"A person's name or mark written by that person or at that person's direction."* Rashid Kalyango admitted in cross examination that Willy Jagwe did not authorise him to sign documents on his behalf. Neither was there any written agreement between him and Mr Jagwe to show that he was his agent or manager in respect of the land known as Plot 43 at Manyogaseka.

The respondent testified that he was aware that Mr Jagwe did not sign this Form but it was signed by Kalyango who was present at the time and did so. In spite of that knowledge, he still submitted it to the Land Committee which proceeded to inspect the land, again in the absence of the appellant, and recommended to the District Land Board that the respondent's application to convert his land from a customary holding to freehold tenure be considered.

Regulation 28 of the Land Regulations provides as follows:

28. Certification of boundaries

(1) The committee, the customary owner, at least one owner of neighbouring land and at least two adult residents of the area present at the time of inspection of the land, shall certify the correctness of the boundaries by signing Form 23 specified in the First Schedule to these Regulations.

(2) The committee, the registered owner or his or her duly appointed representative in the case of tenancy by occupancy, the applicant, at least one owner of neighbouring land and at least two adult residents of the area present at the time of inspection of the land shall certify the correctness of the boundaries by signing Form 24 specified in the First Schedule to these Regulations.

{My Emphasis}

ExhP5 shows that the boundaries were certified by one other resident of the area, Ruth Kamara. The respondent could not validly sign as a resident for he was the applicant; the customary land owner whose land was the subject of the application. Ruth Kamara once again signed as one of the owners of adjacent land, as well as a witness. The other person that signed, I believe as the second person required by the Regulations, was Rashid Kalyango purporting to sign as Willy Jagwe. This was not necessary, in my view, and it came off as a lie that was perpetrated by the respondent when the Form was submitted to support his application. I say so because the respondent testified that he accepted Kalyango's signature because Willy Jagwe was *"not reachable"* and *"the process had to go on."* Therefore, Kalyango wrote his name on the form for him and purported to append his signature as well. This was corroborated by the testimony of Biryomumisho (PW6) who took the Forms to Kalyango and was present when Kalyango at his behest offered and purported to sign for Willy Jagwe.

In addition, the Form that the Committee used in the demarcation of the land was one that ought to be employed where the applicant is either

applying for a certificate of occupancy as a customary tenant, or for the conversion of a customary tenancy to a freehold. The respondent fell in neither of these categories. He applied for a freehold over land that he claimed was vacant and not owned by any person.

It later transpired in the course of his cross-examination that PW2, who was the respondent's key or star witness, filed a suit against the appellant in Mengo Court as Civil Suit 1487 of 2014. Overleaf page 281 and at page 282 of the record, PW2 admitted that at the time he testified against him, he still had a pending suit against Willy Jagwe. That his lawyers in the suit were Lwere Lwanyaga & Co Advocates. In particular, Mr Lwere and Mr Swabur Marzuq were his advocates in the suit where his claim against Willy Jagwe was payment of UGX 35 million for work that he did for him on Plot 43 at Manyogaseka, Mubende. Interestingly, Mr Swabur Marzuk was also counsel for the respondent in this case in the lower court and led Rashid Kalyango as he, unabashed, testified against his former employer.

In further cross examination, Rashid Kalyango denied that he colluded with the respondent to enable him obtain a freehold title on the land in dispute. However, the evidence on record shows that though it was he that was present on the land during the processing of the respondent's application, he kept the whole process hidden from the appellant. He blatantly, even in his testimony in court, supported the respondent until he obtained the freehold title to the land and thereafter testified against his former employer. The appellant only came to know about the grant of the freehold title to the respondent when he went to his land to witness the opening of its boundaries, following a court order.

For those reasons, I came to the conclusion that Rashid Kalyango's conduct amounted to deceit in the processing of the application. Not only did Kalyango keep information related to the work that Willy Jagwe hired

him to do. He also behind his back supported his neighbour, the respondent, to obtain a freehold title over land which was the subject of disputes in the area.

It would therefore not be remiss to reach the conclusion that based on the respondent's previous relationship with Rashid Kalyango, when the latter got into a conflict with the appellant, he was led to the respondent's lawyers, M/s Lwerere Lwanyaga & Co. Advocates. The lawyers who gained access to information about the land from his participation in the respondent's application for the freehold title then influenced him to testify against the appellant in this case.

It is settled law in this jurisdiction that a certificate of title cannot be impeached, neither can a registered proprietor be ejected except for fraud, a principle which is provided for by sections 64 and 176 of the Registration of Titles Act. The former Court of Appeal in **David Sejjaka Nalima v Rebecca Musoke, Civil Appeal No 12 of 1985**, defined fraud as follows:

> *"I think it is well settled that fraud means actual fraud or some act of dishonesty. In Waimiha Sawmilling Co. Ltd v Waione Timber Co. Ltd (1926) AC 101, Lord Buckmaster defined fraud, at page 106, as follows:*
>
> > *'Now, fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v. Mere Roihi (1905) A.C 176, stated, Fraud in these actions i.e. actions seeking to affect a registered title means actual fraud, dishonesty of some sort not what is called constructive fraud – an unfortunate expression and one apt to mislead, but often used for want of a better term to denote transactions that have consequences in equity similar to those which flow from fraud.'"*

The court went on to explain that the fraud imputed must be brought home to the registered proprietor, as it was held in **Assets Co. Ltd. v. Mere Roihi & Others (1905) AC. 176**. There is no doubt in my mind from the evidence on record that the deceitful actions that took place in the

processing of the respondent's title were known to him and he, in his impatience to secure the title, supported and benefited from them.

In relation to the case now before this court, section 77 of the Registration of Titles Act provides as follows:

> **"77. Certificate void for fraud.**
>
> **Any certificate of title, entry, removal of incumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud."**

At the risk of repetition, but for emphasis, the respondent was privy to the fraud through his manager Biryomumisho. He admitted that the signatures placed on the application documents, specifically, Form 5, was necessary because *"the process had to go on"* yet the appellant was *"not reachable."* It is also apparent that the respondent made no real efforts to find the appellant. Instead, through his manager who I would call his agent for the purpose of procuring the signatures, got Rashid Kalyango to sign the demarcation form. The latter then signed as though he was Willy Jagwe. The respondent admitted that he was aware that it was Kalyango that signed the form but he still went ahead to rely on it to secure the grant of a freehold title. I would therefore hold that the respondent's certificate of title is void for fraud and/or that it was wrongfully obtained.

Moreover, section 91 (1) of the Land Act empowers the Registrar, without referring a matter to a court or a district land tribunal, to take such steps as are necessary to give effect to the Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise. Subsection (2) thereof then lists the categories of certificates that the Registrar can deal with under the provision. Under subsection (2) (e) the Registrar is empowered to deal with certificates or instruments that are illegally or wrongfully obtained by

calling for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party. It is my view that the respondent's certificate of title falls under this category.

In the end result, I would conclude that this appeal substantially succeeds. I would order that the Commissioner for Land Registration calls for and cancels the respondent's certificate of title in respect of the land registered in **Freehold Register Volume HQT117 Folio 7** and known as **Block 427 Plot 380 at Lwensololo, Mubende District**. Further that the costs of this appeal be borne by the respondent.

Dated at Kampala this 22nd day of March 2022.

Irene Esther Mulyagonja

JUSTICE OF APPEAL