IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
Coram: Madrama, Mulyagonja, Mugenyi, JJA
CIVIL APPEAL NO. 011 OF 2019

BETWEEN

1. JANE MAGANGO
2. KABUYE SAMUEL } **::::::::::::::::::::::::::::::::::::APPELLANTS**
3. SOLOME KAGGWA

AND

WAMALA KALIBALA WILLIAM ::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the Judgment of Mr. Justice Andrew Bashaija, J., dated 12th October 2018 in High Court Civil Appeal No. 125 of 2016)

JUDGMENT OF IRENE MULYAGONJA, JA

Introduction

This is a second appeal from the judgment of the High Court, Land Division, in which the appellate judge upheld the decision of the trial magistrate that the respondent is the lawful owner of the land in dispute. He also upheld the decision that the appellants are trespassers on the land in dispute and awarded the respondent general damages of UGX 1,000,000/=, but set aside the order of the trial magistrate to pay him mesne profits of UGX 2,000,000/=. He awarded the respondent ¾ of the taxed costs in the appeal as well as the costs in the trial court.

Background

The facts that led to the dispute which were accepted by the trial judge were that the land known as Kibuga Block 24 Plots 1042 and 1193 at

Lungujja, Kampala formerly Plot 165, belonged to the respondent's grandfather, Yolamu Sepuya. That during his lifetime, Yolamu Sepuya sub-divided the land into three pieces and gave it to his three offspring, one of who was Isirairi (Israel) Kalibala, the respondent's father. It was the respondent's case that his grandfather Sepuya, brought one Costa Wanyana to take care of the land on behalf of Israel Kalibala, the respondent's father. Further, that Wanyana stayed on the land and carried on her business selling alcohol but she did not have any biological children. And that she did not pay any rent *(busuulu)* to the landlord while she was in occupation of the land, but when she died in 1986, she was buried on the land. After her death, Wanyana's house was let to Muzanganda Club, and later the 1st appellant rented it. Upon the demise of the respondent's father in 1989, the respondent inherited the land and was later registered as proprietor thereof.

However, in 1993 the 2nd and 3rd appellants entered onto the land claiming to have interests therein as the grandchildren of the late Wanyana. The respondent asked them to vacate the land but in vain. He then filed a suit against them in the Chief Magistrates Court at Mengo for a declaration that he is the registered proprietor of the land. He further prayed for an eviction order against the appellants, *mesne* profits and general damages, as well as costs of the suit.

The trial Magistrate found for the respondent and ordered the eviction of the appellants from the land. He also ordered them to pay *mesne* profits of UGX 2,000,000/= (Two million Shillings) "from the date that the trespass commenced until they vacate the land." He further ordered that the appellants pay general damages of UGX. 1,000,000/= to the respondent as well as the costs of the suit. Being dissatisfied with the decision of the trial magistrate, the appellants lodged an appeal in the High Court, but the court

upheld the decision of the trial magistrate and his orders as I have stated above.

The appellants were dissatisfied with the decision of the High Court and brought this appeal stating the following grounds:

1. The learned appellate judge erred in law when he failed to properly apply the law on holders of *kibanja* and/or bonafide occupants of land thereby reaching a wrong decision.
2. The learned appellate judge erred in law when he upheld the trial court's findings that the appellants were trespassers on the suit land.
3. The learned appellate judge erred in law when he failed to find or decide that the respondent's suit was barred by the Limitation Act, Cap 80.
4. The learned appellate Judge erred in law when he upheld the award of general damages of UGX 1,000,000/= to the respondent which was unjustified and excessive.

The appellants proposed that this court allows the appeal with a declaration that the 2nd and 3rd appellants are lawful *kibanja* holders and/or lawful or bonafide occupants of the suit land and that they are not trespassers thereon. They also prayed for the costs of the appeal. The respondent opposed the appeal.

Representation

At the hearing of the appeal on 6th September 2021, the appellants were represented by learned counsel, Mr. Elijah Wante. The respondent was also represented by learned counsel, Ms Zawedde Lukwago. Both parties

filed written submissions as directed by court, on 3rd September 2021. The appellants filed a rejoinder dated the same day. This appeal was therefore disposed of on the basis of written arguments only.

Duty of the Court

The duty of this court on a second appeal from the High Court as an appellate court is stated in rule 31 (2) of the Rules of this Court. The court shall have the power to reappraise the inferences of fact drawn by the trial court, but it shall not have the discretion to hear additional evidence. Section 72 of the Civil Procedure Act provides for it in the following terms:

> **"(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—**
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> **(a) the decision is contrary to law or to some usage having the force of law;**
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> **(b) the decision has failed to determine some material issue of law or usage having the force of law;**
>
> **(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits."**

In **Henry Kifamunte v. Uganda; Criminal Appeal No. 10 of 1997**, the Supreme Court relied on the decision of the East Africa Court of Appeal, in **R v. Hassan bin Said (1942) 9 EACA 62,** to explain the limits of the jurisdiction of a second appellate court and held as follows:

> *"On a second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have come to the same conclusions;*

it can only interfere where it considers that there was no evidence to support that finding of fact, this being a question of law."

The second appellate court must therefore be circumspect in its interventions; it will only interfere where the facts established by the trial court and the first appellate court are not supported by law because that then becomes a finding on the law. I am guided by that interpretation of the law that binds this court on a second appeal and will observe it.

Determination of the appeal

The appellants' appeal is premised on the complaint that when he upheld almost all the findings and the final decision of the trial court, the 1st appellate judge erred in law. I will therefore in this appeal consider the concepts of law that the 1st appellate judge dealt with, vis-à-vis the evidence as he accepted it, in order to establish whether his findings on it were supported by the law. I will consider the submissions of counsel under each of the grounds of appeal before I dispose of them.

Ground 1

This was the complaint that the trial judge erred in law when he failed to apply the law that relates to the holders of *bibanja* and/or lawful and bonafide occupants of land.

Submissions of Counsel

In this regard, counsel for the appellant submitted that a *"lawful occupant"* is defined in section 29 (1) (b) of the Land Act as a person who entered the land with the consent of the registered owner, and it includes a purchaser. Further that Costa Wanyana, who the appellants claimed was their grandmother, entered onto the land with the consent of Yolamu Sepuya,

the respondent's grandfather. And that when the latter died, he left her on the land which she occupied with the full knowledge of Isirairi Kalibala, the respondent's father from whom the respondent derived his interest.

Counsel for the appellant went on to submit that Costa Wanyana purchased or acquired the land and constructed a house thereon and sold local brew till she died in April 1986. He further submitted that she and some of her relatives were buried on the land. He contended that Costa Wanyana was therefore a lawful occupant, and so were her successors, the appellants.

Counsel further submitted that by virtue of the same facts, the appellants are bonafide occupants of the land pursuant to section 29 (2) of the land Act. He went on to explain that Costa Wanyana came onto the land in the 1940s and she acquired or purchased the land *(kibanja)* from Yolamu Sepuya, the respondent's grandfather in the 1950s. That by the time she passed on in 1986, she had utilized and developed the land and constructed a house in which she lived with her niece, Leonora Namisango. Further, that because the respondent's grandfather and father did not challenge her occupation and development of the land, she qualified to be adjudged a bonafide occupant. He explained that it was only after the respondent inherited the land that he lodged a complaint with the Local Council Court (LC Court) and thereafter the Magistrates Court. -+He detailed the evidence that he relied upon, as he understood it, from the record of appeal.

The appellants' counsel went on to submit that section 29(5) of the Land Act provides that a person who has purchased or otherwise acquired the interest of another who qualifies as a bonafide occupant under that provisions shall be taken to be a bonafide occupant. That as a result of

this provision, the 2nd and 3rd appellants are bonafide occupants of the land in dispute. He added that though the two may not have a legal interest in the land, they are beneficial owners thereof with an equitable interest. He relied on the principles in equity as they were stated in **Walsh v Lonsdale (1882) 21 Ch.D 9**; where the court held that equity would regard that as done which ought to be done, and so the lease in that case was effective in the absence of the formality of creating it.

In reply, counsel for the respondent submitted that a clear scrutiny of the evidence before the court shows that the appellants fulfilled none of the conditions that are required of a lawful occupant or a bona fide occupant because the late Costa Wanyana did not have any interest in the land in dispute. She referred to the testimony of PW1 who said that Costa Wanyana was brought onto the land as a caretaker and never owned any *kibanja*. The same witness testified that she was buried on the land because she had no known relatives.

Counsel for the respondent also referred to the testimony of DW3 who confirmed that Costa was invited to the land by Israel Kalibala, the respondent's father. She further submitted that all the evidence on record leads to the conclusion that Costa did not have any interest in the land in dispute. She therefore did not qualify as either a *kibanja* holder, or a lawful or bona fide occupant. She referred us to the provisions of section 29 (2) of the Land Act and emphasised that the evidence on the record adduced by the appellant fell short of what is required to prove that one is a bona fide occupant of land.

The respondent's counsel went on to submit that the evidence adduced by the appellants at the trial could not be relied upon because it was full of

hearsay on top of being very inconsistent and contradictory. That for those reasons it could not establish the interests alleged by the appellants.

She added that the thrust of the appellants' submissions was that they inherited the interest in the land from the late Costa Wanyana, however they failed to adduce any substantive evidence to show how she acquired the land. That all the evidence that they adduced was based on mere allegations. Counsel further contended that although DW2 testified that they were sale agreements between the late Wanyana and the respondent, none were adduced as evidence in court. She pointed out that the testimony of DW2 that he knew their late mother destroyed the agreements because she was mentally ill was evidence of the weakest kind because the witness failed to adduce evidence that their mother was mentally ill. Neither did the witness adduce evidence to prove that they had authority to administer the estate of Leonorah Namisango Lwanga, their mother. She emphasised that the appellant's evidence was not only weak but also very contradictory. That for example while DW4 stated that Costa Wanyana entered upon the suit land as a tenant, other witnesses testified that she was brought upon the land. That it was therefore clear that the appellants had no legal interest in the suit land and court should declare them trespassers.

Counsel further submitted that the appellants failed to lead evidence to prove that Leonorah Namisango was related to them. Further, there was no evidence to prove how she inherited the estate. That as a result the appellate judge found no reason to defer from the findings of the trial magistrate on this issue.

Counsel went on to point out that there was also the evidence of PW1 who stated that Costa Wanyana from whom the appellants allegedly claimed

their interest had no child. And that the appellants were not from the *Nsenene* clan but from the *Ngeye* clan. She also drew it to our attention that there was evidence that the house on the land was built by the respondent's father. She concluded that the learned the 1st appellate judge of the High Court correctly evaluated the evidence of the appellants and concluded that they seemed to rely more on position and existence of graves on the land as evidence of *kibanja* ownership than anything else. She prayed that this ground be decided in the negative.

In rejoinder counsel for the appellant submitted that the evidence on record at the trial showed that the late Wanyana, the appellants' grandmother came onto the suit land sometime in the 1940s and purchased or acquired a *kibanja* from the late Sepuya, the respondents grandfather in the 1950s and she lived there until she died around April 1986. That she utilised the land and constructed a house where she lived with her niece Leonorah Namisango, the appellants' mother. He emphasised that Costa Wanyana and Namisango occupied and utilised and developed the land unchallenged by the former registered owners, the late Yolamu Sepuya and late Israel Kalibala. That it was only after the respondent became the registered proprietor that he challenged the appellants' ownership and peaceful occupation and enjoyment of the suit land. He concluded that the appellants and their predecessors occupied the land for about 70 years unchallenged by the former registered owners thereof and therefore qualify as bona fide occupants of the land under section 29 (2) (a) of the Land Act.

The appellants' counsel also referred us to section 29 (5) of the Land Act for the proposition that any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant

under this provision shall be taken to be a bona fide occupant for the purposes of the Act. That the appellants are therefore bonafide occupants under this provision having derived their interest in the land from the late Leonorah Namisango Lwanga. And that even though the appellants had no legal interest they have a beneficial and or equitable interest in the *kibanja*.

Resolution of Ground 1

Ground 1 preferred by the appellants in this court was a replica of Ground 1 in the first appellate court where they complained that the learned trial magistrate erred in law and fact when he failed to properly apply the law on *kibanja* holders and/or lawful and bonafide occupants of the land to the facts. That as a result, he arrived at a wrong decision.

It is my view that the principles of law that need to be examined in relation to the evidence in ground 1 are as follows:

i) Whether the evidence on record was sufficient to prove that the appellants or their predecessors had a *kibanja* interest in the land in dispute; and if not,

ii) Whether the evidence was sufficient to prove that the appellants or their predecessors were lawful or bonafide occupants of the land.

The law that is the crux of these principles is section 29 of the Land Act. Starting with the question whether the appellants held a *kibanja* on the land in dispute, the Land Act does not define what a *"kibanja"* is. Neither does the Constitution of Uganda, in spite of the historical and controversial position of this practice of holding land in Buganda. What is clear is that it is a formal system of holding land under Buganda customary law.

"Mailo," which is the system under which the respondent claims his interest on the other hand, is a form of tenure recognised and provided for by Article 273 of the Constitution. Section 3 (4) of the Land Act describes it as follows:

> **(4) Mailo tenure is a form of tenure deriving its legality from the Constitution and its incidents from the written law which—**
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> **(a) involves the holding of registered land in perpetuity;**
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> **(b) permits the separation of ownership of land from the ownership of developments on land made by a lawful or bona fide occupant; and**
>
> **(c) enables the holder, subject to the customary and statutory rights of those persons lawful or bona fide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all the powers of ownership of the owner of land held of a freehold title set out in subsections (2) and (3) and subject to the same possibility of conditions, restrictions and limitations, positive or negative in their application, as are referred to in those subsections.**
>
> **(*My Emphasis*)**

The rights of customary owners on mailo land, whose name has been long established as *"kibanja"* or *"bibanja"* holders are therefore recognised and protected by the law and this has its origins in Article 237 of the Constitution which provides in clause 4 thereof that:

> **"(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."**

It is the position of the law that the rights of *bibanja* holders are based on customary law in Buganda, and when it was still applicable, the Busulu

and Envujjo Law. It must therefore be ascertained from the evidence on the record, whether the appellants indeed acquired a *kibanja* interest in the land in dispute

The main witness with regard to the ownership of the land was the respondent, Wamala Kalibala William. His testimony in-chief was contained in a written statement dated 9th November 2015. He stated that the land in dispute belonged to his grandfather, Sepuya Yolamu, and was formerly Blok 24 Plot 165. That the said Sepuya distributed this land among his offspring during his lifetime and he subsequently became the owner of Kibuga Block 24 Plots 1042 and 1194 at Lungujja, having inherited it from his father, Isreal Kalibala, the son of Yolamu Sepuya. He was registered as proprietor on 22nd May 1989.

The respondent further stated that Costa Wanyana was a caretaker of the land when he was a child. Further, that she did not have any children but she sold local brew, *"mwenge muganda."* That she later formed a Club called Muzanganda after which she requested him to sell a portion of land to the Club. That as a result, he sold a portion of his land neighbouring the land in dispute to the Club. He further stated that because she did not have any relatives, when she died, Costa Wanyana was buried on the land in dispute. And that after her death the Club continued operating on the adjoining land and he had never interfered with their possession thereof.

The respondent asserted that the late Costa Wanyana never purchased land from his late grandfather. But after her death, her relatives entered onto the suit land claiming as such. That they did not pay any rent to him and he demanded that they vacate the land but they did not do so. Further that when they failed to settle the matter amicably, he took it up with the LC1 of Lungujja, Wakaliga Zone 7 and informed them that he was the

registered proprietor of the land. He went on to state that though the LCs convened a meeting with all the parties, the appellants refused to recognise him as the registered proprietor of the land. They insisted that they would not vacate the land or pay ground rent to anyone.

He further stated that subsequent to the report to the LC1, in December 2013, the appellants reported the matter to the RDC of the area. They also constructed a perimeter wall around the land in dispute without his consent, barring him from access to the land. He asserted that the appellants did not have any agreements to prove ownership; neither did they have any receipts for *busuulu* in respect of the land. Finally, that they occasioned loss to him when they prevented him from developing his land.

During cross-examination, the respondent stated the he acquired a title to the land in 2000. That when he took on the plot measuring 30 decimals, Costa Wanyana was the caretaker and she cultivated crops and stayed on the land. The respondent explained that the house on the land belonged to his grandfather, Yolamu Sepuya, and Wanyana the caretaker occupied the house. And that although Wanyana was a member of his clan, she was not his relative. He denied that Wanyana had a *kibanja* on the land; neither was she a bonafide occupant thereof.

The respondent asserted that the land in dispute is his land because he has a certificate of title to it. That though Costa Wanyana was buried on the land, this happened during the war. Further that he did not know the 2nd and 3rd appellants as relatives of Wanyana because he was never told anything to that effect. He therefore sued the appellants for an order to evict them from his land. He explained that his father and grandfather did not evict Costa Wanyana from the land because it was his grandfather that brought her there to stay with him. But since the land was given to him,

he wanted them evicted though Costa Wanyana was on the land since 1950.

In cross examination, the respondent confirmed that the late Wanyana approached him to sell a portion of his land to Muzanganda Club. He explained that Wanyana approached him with one Ponsiano Kizito, but he could not recall when this happened. But he confirmed that he did sell part of his land to the Club and subdivided it and processes a certificate of title for them. He explained that the 2nd and 3rd appellants were not in occupation of the land but they were brought onto it by the 1st appellant, Magango Jane. Further that there was a small house, banana plantation and a graveyard on the land, but the small house was built by his grandfather.

Najjemba Edith was PW2 at the trial. She too signed a written statement on 9th November 2015 in which she stated that she was the LC1 Secretary Lungujja Wakaliga Zone 7. She too testified about Muzanganda Club, formed by Costa Wanyana, which bought a piece of land for its premises from the respondent. And that after this, Costa moved and operated her business on that land, though she still slept in the house on the land in dispute. Further that the late Wanyana died in 1995 and was buried on that land.

PW2 further stated that after her death, Magango (the man) who was her employee continued operating Wanyana's business of selling local brew. He later moved members of his family to her house. That thereafter, Magango died and left his wife Jane and her children in the house. Further that in February 2011, the respondent approached the LC1 Office and introduced himself as the registered proprietor of the land in dispute. He showed them proof of a certificate of title and informed them that he had

on several occasions introduced himself to the appellants but they did not recognise him. He therefore requested the LC officials to assist him cause them to leave his land.

PW2 further stated the in 2012, she convened a meeting to find a solution to this impasse which the parties attended. She produced a copy of the minutes as Annexed to her statement. She went on to state that in that meeting, the defendants refused to pay rent to the respondent because they claimed they did not know him. That since the LC officials failed to settle the matter, the appellants' turned to the RDC for a solution.

When she was cross examined, PW2 stated the Costa Wanyana was caretaker of the land in dispute; she had no document at all to show that she was the owner and did not pay any rent. She also explained that the land that was bought by Muzanganda Club was now separate from the land in dispute. And that Wanyana did not have relatives but they came up later to claim the land in dispute. Further that Leonora Namisango was the heiress to Wanyana but it was another person who came to claim ownership of the land. She also explained that as the LC Officials in the area, they were looking for a person who had documents that could prove ownership. Further that the owner of the land did not know that Costa and her relative Biramuli died and were buried on the land.

PW2 also explained that after Magango died, it was difficult for them as LC Officials to send Magango Jane and her family off the land because her husband was buried on the land. And that as LC Officials, they held a meeting in 2011 in which they found that Kalibala Willaim was the owner of the land. Further that the occupants on the land were there as a result of Costa Wanyana being a caretaker thereof. That after this meeting, the appellants took the matter to the office of the RDC, who directed them to

fence off the land. She explained that she saw the RDC's letter dated 7th October 2013, advising that *bibanja* holders should not be sent off the land since as an office, they did not have a problem with them. The minutes of the LC Meeting were admitted in evidence as **ExhP1.**

Kimbowa Juliet (PW3) in her written statement dated 9th November 2015 stated that she was a resident of Lungujja, Wakaliga in Rubaga Division and a cousin of the respondent, the son of her uncle Kalibala Israel. That after their grandfather died, his land was subdivided into portions for their parents and the respondent's father got the portion in dispute. She stated the Costa Wanyana was brought onto the land in dispute by their grandfather as a caretaker thereof, and it was he that gave her the small house on the land to live in. Further that Costa sold local brew and she decided to form a Club called Muzanganda.

PW3 explained that it was her mother, Mirika Kalanzi, who kept the title to the land in dispute. And that late Wanyana requested her to ask William Kalibala to sell some of the land to the Club. The respondent agreed to do so and Wanyana decided to carry on her business on this piece of land. Further, that when she died, she was buried on the land since she did not have any children. That the Club remained in occupation of its portion of land and the William Kalibala did not interfere with it. Finally, that the defendants in the suit, including the appellants here, later constructed a wall fence around the land by force without the consent of the respondent.

When she was cross examined, PW3 explained that the land in dispute is what remained after the respondent sold off part of his portion to the Club. That she had never seen any of Wanyana's relatives on the land but she used to see the drunkards from the Club. That the late Wanyana had no relatives and she did not know Leonora Namisango. And that when she

passed on, the Club members chose a person as caretaker for her home where she lived on Israel Kalibala's land. She further explained that the defendants/now appellants, used force when they put up a perimeter wall because they employed armed men dressed in green uniforms while they were doing so. That she thought they were Army men because they were dressed in green uniforms.

In further cross examination she stated that when the respondent sold off part of his land to the Club, Costa Wanyana called him to come and sign the agreement. That though Muzanganda Club appointed a caretaker for house, the respondent was still the owner of the land. And that Costa had no power or ownership over the land so she only signed as a witness when the Club purchased the land. Further that her grandfather could not have sold land which he had already given away to Israel Kalibala. She also explained that the members of Muzanganda Club chose one of their own members as caretaker of Wanyana's home. She also explained that the land had a permanent brick house, a tap and a tree on it.

With regard to the acquisition of their interest in the land in dispute, the 2nd appellant, Kabuye Samuel (DW1) stated in his written statement dated 23rd September 2015, at page 112 of the record, that he was a resident of Baale Bugerere in Kayunga District. That the land comprised in Block 24 Plot 165 was at one time the *kibanja* of Costa Wanyana who lived thereon with his mother, Leonora Lwanga Namisango. That he was also aware that his grandmother and his mother entered the land in the 1940s and lived on it with Yolamu Sepuya. And that during her lifetime, Costa Wanyana bought a *kibanja* from Sepuya on which she constructed a house and lived with his mother, her niece, Leonora Namisango, and sold local brew. That the patrons of Wanyana's club formed another club called Muzanganda

Social Club, and Costa Wanyana gave them part of her *kibanja* as their premises.

Kabuye Samuel went on to state that sometime in 1985, Costa Wanyana and Leo Sempagala, brother to Wanayana and father to Namisango, died and were both buried on the said *kibanja*. That however, the late Costa Wanyana had no biological offspring and died intestate. But after her death, Namisango Leonora was installed as her customary heir and sole beneficiary to her estate. Further that it was after the death of Costa Wanyana that his mother, Namisango developed a mental illness, proved by a letter (Annex B to his statement) dated 19th November 2015, from Mulago National Referral Hospital, addressed to "Whom it may concern" and signed for a Senior Consultant Psychiatrist. It was stated in the letter that Namisango Leonora was treated for a psychotic illness since August 2014 but was at the time fairly stable but should continue taking her medication indicated in the letter.

Kabuye further stated that when his mother suffered the illness, he and his sister Salome Kaggwa, 2nd appellant and DW2 at the trial, decided to rent the house to Muzanganda Social Club. That the Club held the house till it was handed back to his mother, Namisango, by a letter (in Luganda,) dated 27th September 1993. The same letter was attached to the statement of Mugalula Mwebe Rogers, at page 131 of the record, and its translation into English appeared at page 132. He went on to state that since she was mentally ill, he decided to rent the house on the land to Magango Jane, the 1st appellant, in order to get money to cater for his mother's expenses. That by the time of the suit, the 1st appellant was still in occupation of the house.

Kabuya further asserted that at all material times, neither the respondent, nor his relatives protested the late Costa Wanyana's nor Leonora Namisango's interest in the *kibanja*, till 2011, when he received a letter dated 20th July 2011 from the Local authority of Lungujja Wakaliga Zone 7 requesting him and the 1st appellant to leave the house or present evidence of ownership.

Kabuye went on to state that he was aware that Leonora Namisango lost the documents relating to acquisition of the *kibanja* from Sepuya when she was mentally ill and senile. That the respondent has since then threatened to evict them from it and brought several prospective buyers to buy it, in spite of their unregistered interest therein dating back to the 1950s. He asserted that Costa Wanyana had a *kibanja* interest in the land in dispute which his mother, Leonora Lwanga Namisango is entitled to as a beneficiary.

During cross examination, Kabuye confirmed that he is a resident of Bbale in Bugerere, Kayunga District. That he knows the respondent as the owner of the land since 2011 when they had a case before the LC1 court, where he sued Salome Kaggwa, 3rd appellant, and he for removal of the cemetery from the land. That Magango Jane (1st appellant) is a tenant in the house that was left by their grandmother Costa Wanyana, which his mother Namisango inherited. He further explained that Sepuya was the father of the respondent who sold the *kibanja* to his grandmother. That he was informed so by his grandmother, Wanyana, but he did not see the agreement by which she acquired the *kibanja*. That his grandmother informed him that she purchased the *kibanja* in 1950, when he was 15 years old. Further that though he lived in Busega, every week he travelled to Lungujja to take food to his grandmother and her brother Leo

Ssempagala. He concluded that his mother was still alive and resident in Busega but mentally ill.

In further cross examination, Kabuye stated that his grandmother died in 1986, childless. That she lived on the suit land with Ssempagala, her brother but left the land to his mother Leonora. That in addition, his grandmother left a will which was read to them after the funeral by one of the patrons of Muzanganda Club, their guardians. And that it was the patrons of this Club that kept the will in which his mother was stated to be the heir to the estate of his grandmother, Costa Wanyana. That however, neither his mother nor any other person obtained letters of administration to the estate of Wanyana. He further explained that his mother got mentally ill in 1986. That they took her to Mulago Hospital for treatment.

Kabuye also stated that it was the respondent's father, Isreal Kalibala, who brought the deceased Wanayana onto the land in the 1940s to take care of it. That however, she bought her own land, a *kibanja*. That the respondent's father attended the funeral of Wanyana and he was introduced to him as their landlord. However, he did not know whether he was still alive.

He went on to state that he continued to use the land when his mother became mentally ill without paying *busulu* because the landlord did not demand for it. He insisted that his late grandmother left a *kibanja* and his relatives were buried on it, which was proof that it was their *kibanja*. And that when the war ended in 1986, they continued to bury their dead on it and the respondent and his family are still neighbours on the adjacent land, though the respondent does not reside there. He further explained that when his grandmother died in 1986, he was 22 years old. And that

his mother, Leonora Namisango Lwanga, while mentally ill burnt the documents relating to ownership of the *kibanja*. And that though the guardians handed over the documents to his mother, he did not see the agreement for purchase of the *kibanja*.

With regard to previous resolutions of the dispute over the land, he explained that since the LC1 Court did not resolve the dispute, the RCC/RDC decided the matter. The RCC ordered that the respondent should recognise their interest as *kibanja* holders. That they are therefore willing to pay rent to him and remain on the land as *kibanja* holders.

The written statement of the 3rd appellant, Kaggwa Solome, DW2 in the trial court was not much different from that of the 2nd appellant. She too claimed to be the daughter of Leonora Namisango. She insisted that her grandmother, Costa Wanayana owned a *kibanja*, the subject of this dispute. That the documents relating to her acquisition were lost, as stated by her brother Kabuye and the respondent was trying to disentitle them by evicting them from land, which they let to the 1st appellant on behalf of their mother who was mentally ill.

In cross examination, she confirmed that she does not reside on the land but resides in Busega, Kabale, Rubaga Division. That the 1st appellant is a tenant in their grandmother's house on the land in dispute. Further that it was the 1st appellant who informed them about the respondent's claim when he sought to evict her from the land. She too explained that Costa Wanyana gave part of her *kibanja* to Muzanganda Club in 1985, where they used to meet as a *"drinking group."* She confirmed that Mr Magango, the 1st appellant's husband was employed by their late grandmother, Costa Wanyana. That after her death, Mr Magango and his wife occupied the

house on the land, for which the former paid rent to her brother, Samuel Kabuye.

The 3rd appellant also explained that the 4th Defendant in the trial court, Mugalula was her maternal uncle. It is noted that the 4th Defendant was not a party to the appeal in the High Court though he testified in the trial court because he died thereafter. The 3rd appellant also claimed that her grandmother died testate but she did not see the will, though it was read to them by Muzanganda drinking group who kept it thereafter. Further that this group handed over the house on the land to her mother, Leonora Namisango with the estate of Costa Wanyana. She identified the letter, marked by the court at ID1 and read it to court. It was never admitted in evidence.

The 3rd appellant also claimed that the house on the land was built by her grandmother, Wanyana, as she informed them in 1985. Further that she informed them that she bought the *kibanja* on which the house stood in 1950. She explained that Muzanganda Club gave the documents relating to the purchase of the *kibanja* to her mother, Leonora Namisango at the funeral rites. That she did not see the documents because her mother burnt them due to her mental illness. Further, that one Uncle Kiwanuka was the person who told them that Namisango burnt the documents relating to acquisition of the *kibanja*.

The 3rd appellant also explained that Muzanganda club handed over the house to her family when they moved to the portion of the *kibanja* which her grandmother gave to them. Further that Muzanganda bought that portion of the land from Kalibala, according to the LCs of the area. She further explained that Muzanganda hired the house in 1987 after the

death of her grandmother. That Muzanganda sometimes paid rent to her mother but due to her mental illness, she sometimes burnt the money.

In re-examination, the 3rd appellant stated that her grandmother, Wanyana, died without any offspring. Further that in 1982, she came to know the respondent as their landlord. She too stated that she was willing to pay *busuulu* to William Kalibala as the landlord and retain the *kibanja.* Further that the request that Kalibala made to them in a letter was that they should remove their burial grounds from the land. She insisted that this was not correct because Sepuya, his grandfather witnessed the burial of their family members on the land but did not object to it.

Charles Kamwanga (Kamoga) Busulwa was DW3 at the trial court. He stated in his written statement dated 23rd November 2015 that he was 90 years old at the time. He confirmed what the 2nd and 3rd appellants stated but added that Sepuya Yolamu bought the land in dispute in the 1940s. He brought Costa Wanyana to the land in the 1940s and she built a house in which she sold local brew.

In cross examination, he stated that what he was sure of was that Yolamu Sepuya brought Costa Wanyana to the land as a caretaker. He explained that at the time of his testimony, part of the land was occupied and used by Muzanganda Club while part was occupied by Costa Wanyana's people. That Costa Wanyana had no children but Namisango, her niece was appointed her heir. In re-examination he stated that he did not know whether Wanayana bought a *kibanja.* All he knew was that she continued to live on the land till she died and was buried on it, together with other members of her family.

The testimony of DW4, Mugalula Mwebe Rogers, the 4th plaintiff, made no difference. He was also not sure whether Wanyana bought a *kibanja,*

though she used to say she did so, because he did not see any documents in that regard. However, he confirmed that Wanyana came onto the land in the 1940s and used to tell them, when he lived with her, that she purchased the *kibanja* from Yolamu Sepuya. Further that the fact that Wanyana's relatives were buried on the land was proof that she owned a *kibanja* on the land in dispute because under the customs of the Baganda, it was not lawful and it would not be allowed for one to bury relatives on land that lawfully belonged to another person.

That being the evidence relating to ownership of the land, the appellant's complaint is in respect of the first appellate judge's findings at pages 20-21 of the record of appeal as follows:

> *"After carefully evaluating the evidence afresh, this court finds that the trial court properly applied the law on bona fide and lawful occupants. The appellants failed to present credible evidence to prove that their parents were indeed kibanja owners of the suit land. In almost all their respective testimonies, they dwelt on matters they either believed or were told by others but there was no cogent evidence to establish that the kibanja belongs to them or their parents.*
>
> *The appellants seem to rely more on possession and existence of graves on the suit land as evidence of kibanja ownership than anything else. These, however, could not be sufficient proof given that the respondent led evidence to show that the appellants' parents and grandparents were on the land as caretakers and that at some point the late Costa Wanyana was buried on the suit land because she did not have known relatives. This court therefore upholds the findings of the trial court, at page 13 and fourteen (supra) and for those reasons I find no merit in ground 1."*

It is observed that the 1st appellate judge made his findings about the appellants' claims that there are holders of a *kibanja* or lawful and bona fide occupants all in the same two paragraphs of his judgment. He did not consider the three concepts separately as they related to the evidence on record. It is important to note that each of the legal concepts has a specific

definition under the law. I will therefore consider the evidence above as it relates to each of the three concepts separately in order to establish whether the appellants established a claim to the land as either holders of a *kibanja* inherited from Costa Wanyana, or whether they inherited the land from her as a bona fide or a lawful occupant thereof.

Starting with the claim as holders of a *kibanja*, which is recognised as a "customary system" of holding land in Buganda, section 1 (l) of the Land Act defines *"customary tenure"* as a system of 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 of the Act. Section 3 of the Land Act then provides for the incidents and forms of tenure and customary tenure is defined in subsection (1) as follows:

(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.

This Court considered a similar question to that in the instant case in **Ndimwibo Sande & 3 Others v Allen Peace Ampaire, Civil Appeal No 65 of 2011**, and relying on the decision of the Supreme Court in the oft cited case on that point, **Kampala District Land Board & George Mutale v. Venansio Babweyaka & Others, Supreme Court Civil Appeal No. 2 of 2007,** among others, this court found and held as follows:

> *"However, the question as to whether the suit land was in fact a Kibanja or whether any of the parties held a Kibanja interest in the suit land was never resolved by any of the lower courts. The trial court should have ascertained whether or not indeed, the suit property was a Kibanja holding or not. A 'Kibanja' is a form of customary tenure. A 'Kibanja' holder is a customary tenant.*
>
> *While dealing with a similar issue, this court in the case of* ***Isaaya Kalya and 2 Others Versus Moses Macekenyu Ikagobya (Civil Appeal No. 82 Of 2012)*** *(Unreported) held as follows of (sic) that: -*
>
> > *"Customary tenure is defined in the Section 1 (1) of the Land Act as follows; -*
> >
> > *"Customary tenure is a system of land regulated by customary rules which are limited in their operation to a particular description or class of persons which are described in Section 3"*
>
> *The Supreme Court in Kampala District Land Board and George Mutale Vs Venansio Babweyaka and others Supreme Court Civil Appeal No. 2 of 2007 held that customary tenancy must be proved.*
>
> *In that case Odoki, CJ who wrote the lead judgment held as follows;*
>
> > *"I am in agreement with the learned justice of appeal that the respondents failed to establish that they were occupying the suit land under customary tenure. There was no evidence to show under what kind of custom or practice 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 that case the Supreme Court held that the respondents therein were not customary tenants but were in fact bona fide occupants clearly making a distinction between the two kinds of land tenure.*

No evidence was provided whatsoever by any of the parties in this case at the trial to prove that any one of them held the suit land under customary tenure. Not everyone who says "I am a 'Kibanja' holder or customary tenant" is in fact and in law one. That fact requires proof."

This court had earlier considered the question of the rights of holders of *bibanja* interests on registered or titled land in **John Busuulwa v. John Kityo, Muhamad Lubuuka & Sali, Civil Appeal No. 112 of 2003**. In that case, the respondents proved the acquisition of their interests by payment of the traditional *kanzu*, or money in lieu thereof, issuance of *busuulu* tickets to them when they paid the rent for the land to the landlord though they had lost them during the NRA War, and clear evidence about the neighbouring land and who owned and occupied it, as tenants of the same landlord. As a result, contrary to the findings of the trial magistrate, and upholding the decision of the 1st appellate judge, this court held as follows:

"There is thus no doubt that the evidence as to how the respondents came to acquire their respective Bibanja was impeccable. Therefore, since the appellant acquired his certificate of title to the land in February 1988, he indeed acquired it subject to the respondent's Bibanja."

It is clear from the evidence that I have set out above that no proof of any custom of acquiring a *kibanja* was led by the appellants to show that Costa Wanyana indeed acquired an interest in the land as such from the former registered proprietor, Yolamu Sepuya. Neither did the appellants produce any evidence that *busuulu* or rent was ever paid in respect of the land, which they claimed was acquired as a *kibanja* in the 1950s before that system of holding land was abolished by the Land Reform Decree.

Therefore, though he did not distinguish the various interest in the land in issue, the first appellate judge made no error when he found and held that the appellants failed to prove before the trial court that their alleged predecessor in title held a *kibanja*, and I find so.

27

It must now be determined on the basis of the same evidence whether the appellants were bona fide or lawful occupants of the land in dispute. Section 29 of the Land Act has a very comprehensive definition of lawful and bona fide occupants. Starting with the lawful occupant, subsection 1 thereof provides as follows:

(1) "Lawful occupant" means—

(a) a person occupying land by virtue of the repealed—

(i) Busuulu and Envujjo Law of 1928;

(ii) Toro Landlord and Tenant Law of 1937;

(iii) Ankole Landlord and Tenant Law of 1937;

(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or

(c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

The evidence on record did not show that the appellant or Costa Wanyana, under whom they claimed fell under the category of persons described in clause (a) above. It was also not proved that Costa Wanyana purchased land from the registered proprietor or his predecessors in title. What was proved was that through Costa Wanyana, Muzanganda Club purchased a portion of the respondent's land from him. He admitted so and stated that he had since given them title to the land and he had not interfered with their occupation at all.

There was also evidence both from the appellants and the respondent that Costa Wanyana lived on the land during the lifetime of Yolamu Sepuya. That she was brought onto the land as a caretaker by the said Sepuya. There is also testimony to the effect that Yolamu Sepuya gave away his land to his offspring before his death, while Costa Wanyana was still resident thereon. He therefore could have not given the land to when he

had already distributed it to his various offspring. Had that not been the case, late Wanyana would not have approached the respondent when she wanted her Club, Muzanganda, to purchase a portion of the land for their business from him.

I therefore find that her license to stay on the land was limited to being a caretaker thereof. Late Wanyana did not thereby acquire rights in perpetuity to the land and she occupied the house thereon, as a courtesy of the former registered proprietors thereof.

It has already been established that Costa Wanyana did not acquire a customary interest in the land as a *kibanja* holder. Therefore, she clearly did not fall under the category of persons envisaged under clause (c) of section 29(1) of the Land Act. The 1st appellate judge therefore correctly found that the appellants' claims could not be upheld on the basis that their predecessor in title, who they claimed to have bequeathed the land to their mother Leonora Namisango, then mentally ill and whom they claimed to represent, was a lawful occupant of the land.

Indeed, Leonora Namisango was not before the court and the appellants had nothing to prove that they staked their claim on her behalf. Neither was evidence brought to prove that she lawfully obtained a bequest of the land from Costa Wanayna, nor were the second and third appellants occupants for they were residents of Baale in Bugerere and Busega, not Lungujja where the land in dispute was located. The 1st appellant claimed under the 2nd and 3rd appellants. However, they had no title to pass on to her so she occupied the land unlawfully under them. The Local Council Secretary, Najjemba Edith (PW3) admitted in her testimony that they did not evict the 1st appellant from the land for they felt sorry for her, having lost her husband who was buried on the land, and children with whom

she occupied the house that was previously occupied by Costa Wanyana, through her late husband, an employee of the late Costa Wanyana in Muzanganda Club.

The evidence about how Leonora Namisango acquired the land as a beneficiary was far from credible. It could have only been a group of *"drunkards"* in a club selling local brew that could have had the audacity to proclaim that there was a will and that she was a beneficiary to the land, without any documents to prove it. The evidence that Leonora Namisango was mentally ill and burnt the documents that were given to her by the members of the Club was also far from credible. While both the 2nd and 3rd appellant claimed that she became mentally ill soon after the land was handed over to her by members of Muzanganda Club, or when she was appointed as the customary heir of Costa Wanyana by the same members of the Club, *"the guardians,"* in 1986, the only medical evidence that was produced about her illness was not even admitted in evidence by the trial court. The letter dated 27th September 1993 remained on the record as ID1. No one was called present it to the court as a document that truly originated from Mulago Hospital.

Going on to the question whether the appellants were bonafide occupants of the land in dispute, section 29 (2) of the land Act defines that concept 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**
>
> **...**

Tkor.

(4) ***For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section.***

(5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.

{My Emphasis}

Section 29 (2) (a) above seemed to give the impression that the late Costa Wanyana occupied the land unchallenged by the former registered proprietors for more than 12 years because there was evidence adduced by the appellants that she came onto the land through Yolamu Sepuya in the 1940s and purchased a *kibanja* in the 1950s from the same Sepuya. The latter was proved to be untrue.

The only fact that appeared to be true on the basis of the evidence on record was that Yolamu Sepuya brought Costa Wanyana onto the land in the 1940s. However, it was also in evidence, (through PW1 and PW2) that Costa was brought onto the land by the registered proprietor thereof at the time as a *caretaker* thereof. This was confirmed by DW3, Charles Kamoga or Kamwanga Busulwa in his statement dated 23rd November 2015, at page 126 of the record. In cross examination about how she came onto the land, DW3 stated, at page 67 of the record, that what he was sure of was that Yolamu Sepuya brought Costa Wanyana to care for his land. In further cross-examination, page 68 of the record, he stated that:

> *"Sepuya Yolamu bought 4 acres of land from Mr Segoma Joseph. Sepuya Yolamu brought Costa Wanyana to care take the whole 4 acres of land."*

DW3 then went on to stated that the late Wanyana's *kibanja* was 0.15 and 0.25 decimals, but he did not know whether Yolamu Sepuya gave it to her as a gift, or whether late Wanyana bought it, because she constructed a house on it.

Charles Kamoga Busulwa was the oldest witness that testified in the case; he was 91 years old on the day he was cross-examined. He explained that he came to Lungujja when he was 10 years old and was 16 years old when Sepuya bought the four acres of land from Segoma. This testimony was not assailed in re-examination. The only other witness giving testimony apart from the 2nd and 3rd appellants was DW4, Mugalula Mwebe Rogers. He was one of the defendants in the suit. He denied that his aunt, Costa Wanyana came to the land as a caretaker for Yolamu Sepuya. However, though he confirmed that she used the house on the land with the permission of Sepuya to carry on her business, and that she used to tell them that she bought a *kibanja* from Sepuya, he did not see any sale agreement to that effect. His further claim seemed to be that she was not a caretaker because she and other relatives were buried on the same land without any opposition from Sepuya during his lifetime. The testimony of this witness about acquisition of the land by Costa Wanyana was also not credible. The rest of the defendants/now appellants, in my view, all failed to prove purchase or other lawful acquisition of the land by Costa Wanyana. It then becomes clear that she only came onto the land as a caretaker thereof.

Section 29 (4) of the Land Act provides that *"For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section."* There being no cogent evidence to prove that Costa Wanyana bought or was given

the land as a gift, Wanyana did not fall under the categories of persons recognised in section 29 (2) of the Land Act as bona fide occupants.

In conclusion therefore, ground 1 of the appeal fails.

Ground 2

In this ground, the appellants complained that the 1st appellate judge erred when he upheld the finding of the trial court that the appellants were trespassers on the land in dispute.

Submissions of Counsel

Counsel for the appellant submitted that trespass to land occurs when a person makes an unauthorised entry upon another's land and thereby interferes with that person's lawful possession of the land. He relied on the decision of the Supreme Court in **Justine E. M. N. Lutaaya v Stirling Civil Engineering Company, Civil Appeal No. 11 of 2002** to support his submission. He further submitted that the appellants were in lawful possession of the land because they inherited it from their late grandmother Costa Wanyana.

He went on to submit that the 2nd and 3rd appellants' mother Leonora Namisango Lwanga inherited the land in dispute from Costa Wanyana upon her death. That the latter purchased the land from Yolamu Sepuya, grandfather to the respondent and after the death of Wanyana, Leonora Namisango became mentally ill and burnt the documents in respect of the transaction. That the trial magistrate held that the appellants were trespassers because they did not produce documents to show that their grandmother purchased the land as evidence that she owned a *kibanja*, and the appellate judge upheld the finding.

Counsel finally submitted that the appellate judge and trial magistrate erred in law in making such findings because the appellants produced other evidence to prove that they and their predecessors in title were lawful or bona fide occupants of the land under section 29 of the Land Act and therefore not trespassers thereon. He added that it is not always necessary to produce documentary evidence to prove ownership of land under section 29 of the Land Act, but ownership or occupation can be proved by other credible evidence adduced through witnesses.

In reply, counsel for the respondent submitted that the appellant failed to adduce evidence to prove their legal interest in the land, and considering the nature of the evidence that they led, the only rightful and reasonable conclusion that the two courts below could reach on the matter was the fact that the appellants were trespassers on the land in dispute. The respondent's counsel also referred us to the decision in **Justine JMN Lutaaya** (supra) for the definition of a trespasser.

She went on to submit that the trial magistrate correctly held, at page 37 of the record, that the 2nd and 3rd defendants/appellants had no claim or right or interest in the suit *kibanja* and they could not vaguely claim that they obtained authority to own the same from Leonora Namisango, claimed to have inherited it from Costa Wanyana, without any proof. That the learned appellate judge therefore reached the correct decision after evaluating the evidence on this point.

In rejoinder, the appellant's counsel submitted that the appellants and their predecessors entered, occupied and utilized and developed the land for a period of almost 70 years with the knowledge and consent of the former registered owners, the respondent's predecessors in title. That no evidence was adduced to show that the respondent's late grandfather,

Yolamu Sepuya or his father Israel Kalibala ever tried to evict Costa Wanyana or her successors or the appellants as trespassers or otherwise from the land in dispute. That the appellants and their predecessors were recognised by the respondent's predecessors as lawful and bona fide occupants of the land.

Counsel then contended that Costa Wanayana and her successors including the appellants had or have an equitable interest in the land in dispute. That Wanayana was not merely a caretaker of the land, as alleged by the respondent, because he did not adduce any evidence at the trial to prove that she was indeed just a caretaker, save for mere allegations to that effect intended to justify the eviction of persons who had occupied the land for almost 70 years.

Resolution of Ground 2

The complete statement of Mulenga, JSC (RIP) on the tort of trespass to land in **Justine JMN Lutaaya v Stirling Engineering & Construction Co.** (supra) was as follows:

> *"Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a landowner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land. During the subsistence of the lease, it is the lessee in possession, who has the capacity to sue in respect of trespass to that land. An exception is that where the trespass results in damage to the reversionary interest, the landowner would have the capacity to sue in respect of that damage. Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise*

the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land.

For purposes of the rule, however, possession does not mean physical occupation. The slightest amount of possession suffices."

The learned judge went on to state, on authority of the decision of the East Africa Court of Appeal in **Moya Drift Farm Ltd v. Theuri (1973) E.A. 114,** that unless there is any other person lawfully in possession, such as a tenant, the certificate of title held under section 56 of the Registration of Titles Act (RTA) carries with it legal possession. He then affirmed that the import of the decision in **Moya Drift Farm** (supra) is that in the absence of any other person having lawful possession, the legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser.

In the case now before court, the appellants did not prove that they had any lawful claim to the land. The person through whom they claimed, Leaonora Namisango, was neither in occupation of the land, nor a holder of any instrument testifying to her ownership of the same as a successor in title to Costa Wanyana. She did not testify, ostensibly because she was mentally ill. The 2nd and 3rd appellants claimed to be her offspring, a fact which too was never proved. The land was occupied by the 1st appellant who came onto it through her husband, now deceased, an employee of Costa Wanayana in her Club.

The 2nd and 3rd appellants testified that they entered into an arrangement to let the house on the land to the 1st appellant in order to get money to care for their sick mother, Leonora Namisango. The 1st appellant who came

onto the land through her deceased husband Magango, an employee of the late Costa Nanteza, also had no lawful claim, save that her husband died in the house that Costa occupied and was buried on the land in dispute. She did not testify.

It was therefore proved by the respondent that the 2nd and 3rd appellants who did not prove that they derived any lawful title to the land came onto the land after the death of Costa Wanyana. The 2nd and 3rd appellants also admitted that they did not reside on the land in dispute, but were collecting rent from the 1st appellant who remained in the house that was occupied by Wanyana before her death.

On the other hand, the respondent also proved that he was the registered proprietor of the land which he inherited from his father, Israel Kalibala. He produced a certificate of title in his names, admitted in evidence as **ExhP1**. It was also his testimony that the 1st appellant brought the 2nd and 3rd appellants onto the land after the death of Costa Wanyana. It was also in evidence (PW2, at page 52 of the record) that though they did not have any lawful claim to the land, the 2nd and 3rd appellants relied on a letter issued by the Resident District Commissioner to construct a perimeter wall around the land to deny the respondent access to it.

In cross examination, PW3 stated that when they constructed the perimeter wall around the land, the appellants employed force. The builders were under guard by men in green uniforms who she thought were army men and they were armed. PW3, Edith Najjemba confirmed this in her statement when she stated that after the 2nd and 3rd appellants reported their grievance to the RDC, they used force to construct a perimeter wall over the land in dispute.

In view of the facts on record, the respondent was the undisputed owner of the land. Wanyana Costa was a caretaker thereof. The appellants were therefore in occupation thereof as trespassers for they had no lawful nexus to Costa Wanyana and therefore no legal rights to the land flowing from her at all. Ground 2 of the appeal therefore also fails.

Ground 3

The appellant's complaint in this ground was that the judge erred when he failed to find that the respondent's suit was barred by the Limitation Act.

Submissions of Counsel

The appellant's counsel submitted that the 2nd and 3rd appellants took over the suit property on behalf of their mother in 1986 after the death of their grandmother, Costa Wanyana; and that the respondent acknowledged this in paragraph 16 of his written statement. He further submitted that the respondent stated that he was registered as proprietor of the land in dispute on 22nd May 1989 and then filed the suit against the appellants in 2015. Counsel contended that the respondent ought to have brought the suit before the expiry of 12 years, not 26 years later. That as a result, the respondent's suit was barred by the Limitation Act and the judge and the trial magistrate before him should have found so.

In reply, counsel for the respondent submitted that the issue of limitation was neither raised at the trial nor in the grounds of appeal before the High Court. That the appellants are bound by their pleadings and it was too late for them to raise it after they filed their memorandum of appeal. Counsel relied upon Order 43 rule 2 of the Civil Procedure Rules to support her argument that the appellant should not urge or be heard on any ground

or objection not set forth in the memorandum of appeal. We were referred to the decision in **Tifu Lukwago v Samwiri Mudde & Another, Supreme Court Civil Appeal No 13 of 1996,** to support her submission.

She went on to submit that it was unfair for the appellants to blame the first appellate judge for something that was never considered relevant by the appellants in the first instance yet they have always been represented by the same lawyer right from the trial. She added that the appellants were now on a fishing expedition to cling to what was not rightfully theirs using the courts of law. She cautioned that this court should not be tricked into fulfilling the appellant's selfish endeavours.

The respondent's counsel went on to submit that trespass is a continuing tort, as it was held in **Justine JMN Lutaya** (supra). Further that proof of such continuous occupation is sufficient proof of trespass, even if the date it commenced is not proved. She referred us to the evidence of the respondent, at page 48 of the record of appeal, where he stated that the appellants were in possession and they refused to vacate the land. She concluded that it was this continuous occupation of the land that gave the respondent the right to file the suit without being affected by the limitation period and so ground 3 of the appeal ought to be dismissed.

Resolution of ground 3

The respondent's counsel contended that the defence of limitation could not be brought at first instance in this court. She relied on Order 43 rule 2 CPR. I note that this was not the correct provision to rely upon in this court. Instead, this court would refer to the provisions of rule 102 (a) of the Rules of this Court which provides that:

At the hearing of an appeal in the court—

(a) no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these Rules;

I think that the respondent's counsel's argument on this matter was misplaced. The appellants *did* state in paragraph 3 of their memorandum of appeal that the learned appellate judge erred when he failed to find or decide that the respondent's suit was barred by limitation. However, it is true that the issue of limitation was never raised in the High Court; neither was it raised in the trial court.

The Supreme Court had occasion to consider a similar situation in **Tifu Lukwago v. Samwiri Mudde, Civil Appeal No. 13 of 1996; [1998] UGSC 9.** Mulenga, JSC who wrote the lead judgment had this to say about instances in which a new point that was not canvassed in the lower court it brought up on appeal:

> *"It is an established practice however that, on appeal, a party is not entitled to raise a new point which was not considered in the trial Court except with leave of the appellate Court. And the Courts have consistently held that such leave would be granted only if the Court is satisfied beyond reasonable doubt that if the facts had been fully investigated they would have supported the new point."*

The appellant did not seek the leave of this court to bring up this issue. But the court in **Tifu Lukwago** (supra) referred to the decision in **Tanganyika Framers v. Unyamwezi [1960] EA 620** where Gould Ag V.P referring to the submissions of counsel where the question was raised stated thus:

> *"The objection to this submission is that it raised a question which was never in the contemplation of the parties in the court below. It was not*

argued there nor was it ever mentioned in the correspondence between the parties. An appeal court has discretion to allow a new point to be taken on appeal but it will permit such course only when it is assured that full justice can be done to the parties."

I formed the opinion while reviewing the evidence that was adduced before the trial court that it was sufficient to dispose of this question though it was not brought up in that court and the first appellate court. It is therefore in the interests of justice that this court exercises it discretion to dispose of the matter, since it is a point law that concerned the jurisdiction of the court to entertain the suit in the first place. In addition, the objection if successfully proved before the lower court could have disposed of the whole suit. I will therefore consider it.

Section 5 of the Limitation Act provides for the limitation of actions to recover land as follows:

> **No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.**

The plaint in the suit filed in the Chief Magistrates Court at Mengo shows that it was received on 4th February 2015. But before that, the respondent had been to two other fora with the appellants over the land, viz: the LC1 of Lungujja in February 2011, as it was stated by Najjemba Edith (PW3), then Secretary to the LC1 of Lungujja Wakaliga Zone 7; and the Resident District Commissioner's Officer, Zaina Muwonge, as it was confirmed by the same witness in cross examination.

The respondent's claim was that he began to pursue an eviction of the appellants from the land after he was registered as proprietor thereof on 22nd May 1989. The respondent claimed that he was aware of the

occupation of the land by Costa Wanyana as a caretaker thereof who was brought onto the land by his grandfather. That it was after her death in 1995 that the appellants, whom he did not know as her relatives, came onto the land. That since then, he had been trying to get them to leave the land but in vain.

There is no doubt that the respondent was registered as proprietor of the land in dispute in 1989. He had no legal rights to the land until then and so could not stake his claim to it since he was not in occupation thereof. Thereafter, he tried to remove the appellants from the land by peaceful means but the appellants did not recognise him as the lawful owner thereof. Instead, they took steps to entrench themselves on the land which resulted in the Resident District Commissioner directing that a perimeter wall be built around the land to protect it since they were customary owners thereof having inherited a *kibanja* from Costa Wanyana.

The appellants then physically entered onto the land and forcefully constructed a perimeter wall around it denying the appellant any access to his land and the desire for the development thereof. The appellants, as well as Edith Najjemba stated that Costa Wanyana passed away in 1985 or 1986, not 1995 as the respondent claimed in his written statement before the court. The period between the time that the respondent became the registered owner, on 22nd May 1989, and the date that he filed the suit in the Magistrates Court, 4th February 2015, was therefore about 26 years. The appellants who had no right at all to the land continued to occupy it in spite of prior efforts to have them vacate it through the Local Council Officials in the area.

It is trite law that trespass is a continuing tort as it was held by the Supreme Court in **Justine EMN Lutaaya** (supra). Therefore, for as long as

the appellants continued to defy the respondent's attempts to leave his land, the tort of trespass continued and he could bring an action against them to evict them therefrom any time while they were still in occupation thereof.

Ground 3 of the appeal therefore also must fail.

Ground 4

In ground 4, the appellants complained that the 1st appellate judge erred in law when he upheld the award of damages of UGX One million to the respondent, which was unjustified and excessive.

In his submissions, counsel for the appellants argued that the award was exorbitant, unjustified and untenable under the law. Further that the judge did not indicate how he arrived at the general damages that he upheld. He referred us to the decision in **Uganda Revenue Authority v. Wanume David Kitamirike, Court of Appeal Civil Appeal No. 43 of 2020 [2012]1 ULR 219,** where it was held that the general damages that are awarded by the court are at large. That they are compensatory in nature and should offer some satisfaction to the injured party; they focus on the conduct of the defendant in causing injury that is being compensated for. He concluded that the award of UGX 1,000,000 was excessive. He prayed that the appeal be allowed.

For the respondent, counsel drew it to our attention that the tort of trespass was proved against the appellants. That as a result the respondent was clearly entitled to damages for the inconvenience caused to him and the award of UGX 1,000,000 could not be considered excessive considering the time that he appellants had unlawfully occupied the land without any colour of right. That it follows that the award was actually less

than the damage suffered by the respondent in the circumstances and it was lenient and in favour of the appellants. She prayed that this court finds so and awards a more reasonable or proportionate amount to the kind of damage that was suffered by the respondent since 1986 when the appellants began to trespass on the land, to the date that they vacate it. She prayed that the whole of the appeal be dismissed.

Resolution of Ground 4

The trial magistrate did not specify the amount of time that the trespass on the land had continued. His decision to award UGX 1,000,000 was based on the principle that the respondent suffered inconvenience caused by the unlawful acts of the appellant in restraining him from developing or dealing with the land as he desired. He added that general damages are in the discretion of the court as the law will presume to be the natural and probable consequence of the acts and omissions complained of. The 1st appellant judge upheld the award of the trial magistrate on the basis that whenever trespass is proved damage is proved. And that trespass is actionable *per se* with or without proof of damage. The appellants now claim that the award was excessive and unjustified while the respondent claims that it was too low and ought to be augmented by this court.

The principles upon which an appellate court may interfere with the discretion of the trial court in the award of damages were re-sated by this court in **Omnyokol Akol Johnson v. Attorney General, Civil Appeal No. 71 of 2010 [2012] UGCA 15**, as follows:

> *"Award of damages is an exercise of discretionary powers of the trial court. Usually an appellate court is reluctant to interfere with such awards because it is considered imprudent to substitute the appellate court's own opinion with that of the trial court. The exercise of discretion should be done with care and on principles that have been laid down.*

However, there are two settled areas where an appellate court will interfere with the exercise of discretion. The first is where the trial court acted on wrong principles and the second is where the amount awarded is manifestly excessive or manifestly low that a misapplication of a wrong principle is inferred."

In the instant case, the respondent prayed for the award of mesne profits and general damages in the lower court. The trial magistrate awarded UGX 2,000,000 as mesne profits and UGX 1,000,000 as general damages. The 1st appellate judge found that the mesne profits were not proved to the standard required. He however upheld the award of the general damages.

The appellants now claim that the award was excessive but they did not indicate why they came to that conclusion, either on the basis of the law or the facts of the case, supported by authority of what has been awarded by the courts in similar cases, to justify their complaint. This court therefore has no basis upon which it can interfere in the award of general damages made by the two courts below.

The respondent did not cross appeal against this award but his advocate raised his complaint that the amount was too low in his submissions. She did not present any facts, law or authority to justify interference by this court. This court again has no basis whatsoever to interfere with the award of the trial court, as it was upheld by the 1st appellate court.

In the circumstances therefore, ground 4 of the appeal also fails.

In conclusion, this appeal substantially fails on all grounds and I would order that it be dismissed with costs to the respondent in the appeal, and that the orders of the 1st appellate court are upheld. For the avoidance of doubt, I would further order that:

1. The appellants who are trespassers on the land comprised in **Kibuga Block 24 Plots 1042 and 1193, at Lungujja,** shall hand over vacant possession of the land to the respondent, the registered proprietor thereof, forthwith.
2. In the event that they fail to do so within 60 days of the date of this order, they shall be evicted therefrom.

Dated at Kampala this 12th day of July 2022.

Irene Mulyagonja

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

CIVIL APPEAL NO 011 OF 2019

1. **JANE MAGANGO}**
2. **KABUYE SAMUEL}**
3. **SOLOME KAGGWA} ..... APPELLANTS**

VERSUS

WAMALA KALIBALA WILLIAM} .....RESPONDENT

(Appeal against the judgment of Mr. Justice Andrew Bashaija, J dated 12th October 2018 in High Court Civil Appeal No 125 of 2016)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Irene Esther Mulyagonja, JA.

I agree with her that the appeal substantially fails on all grounds and should be dismissed for the reasons she set out the judgment.

I wish only to add a few words on the etymology of the use of the term *"customary tenure"* or *customary ownership* under the law because of the often-interchangeable use of the term *kibanja* used to describe an interest existing under Mailo land as if it were a customary interest. While the term is used with reference to specific tenure under the Land Act Cap 227, the term customary ownership ought to be avoided when dealing with or describing lawful occupants recognised under article 237 of the Constitution. This is because the Constitution gives a separate definition and status for customary tenant from that of lawful occupant to avoid using the word customary owner for a *kibanja owner* or *lawful occupant.*

The Constitution of the Republic of Uganda under Article 237 (3) thereof provides that land in Uganda shall be owned in accordance with the following land tenure systems:

(a) customary;
(b) Freehold;
(c) Mailo; and
(d) leasehold

Lawful occupancy or bona fide occupancy can only exist within a registered land. Firstly, the terms lawful or bona fide occupants are provided for under article 237 (8) of the Constitution of the Republic of Uganda which provide that:

> "Upon the coming into force of this Constitution and until Parliament enacts an appropriate law under clause (9) of this article, the lawful or bona fide occupants of Mailo land, Freehold or leasehold land shall enjoy security of occupancy on the land."

The Constitution of the Republic of Uganda 1995 recognises lawful occupancy as occupants of *inter alia* Mailo land. The Kibanja interest is such an occupancy which is recognised under the Mailo land tenure. Mailo Land Tenure is specifically defined under section 29 of the Land Act Cap 229 which also regulates the relationship between the lawful or bona fide occupants of Mailo land and the landlord or registered owner of Mailo land.

The Land Act defines the term "lawful occupant" section 29 to mean:

> "29. Meaning of "lawful occupant" and "bona fide occupant".
>
> (1) "Lawful occupant" means—
>
> (a) a person occupying land by virtue of the repealed—
>
> (i) Busuulu and Envujjo Law of 1928;
>
> (ii) Toro Landlord and Tenant Law of 1937;
>
> (iii) Ankole Landlord and Tenant Law of 1937;

(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or

(c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

The kibanja ownership was created under the repealed Busulu and Envujjo Law of 1928. The Kibanja interest is traceable over the years to the origin which is the repealed law of 1928. Secondly, because its origin is a written law, just like Mailo Land, it is governed by written law and not customs save for using the word "Kibanja" used to describe the interest. A customary tenant is separately defined under section 29 (1) (c) of the Land Act. This has to be read in conjunction with the definition of customary tenure under section 3 (1) of the Land Act which defines it as:

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.

What should be highlighted is the fact that the tenure is based on unwritten norms which have to be proved in court. Secondly, the customary tenure is held in perpetuity while there is no similar provision covering a lawful occupancy in terms of interests in perpetuity. Specifically, Mailo land is defined to be land that is *inter alia* held in perpetuity and which allows separation of ownership of land from ownership of developments made by a lawful occupant (i.e. Kibanja Owner). Mailo land is defined by section 3 (4) of the Land Act to mean:

> (4) Mailo 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;
>
> (b) permits the separation of ownership of land from the ownership of developments on land made by a lawful or bona fide occupant; and
>
> (c) enables the holder, subject to the customary and statutory rights of those persons lawful or bona fide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all the powers of ownership of the owner of land held of a freehold title set out in subsections (2) and (3) and subject to the same possibility of conditions, restrictions and limitations, positive or negative in their application, as are referred to in those subsections.

Both Mailo land and lawful occupancy which are respectively defined above derive their legality from the Constitution and the written law. Under section 14 of the Judicature Act, customary law is only applicable where the written law does not apply. Section 14 of the Judicature Act as far as is relevant provides that:

> 14. Jurisdiction of the High Court.
>
> (1) The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.
>
> (2) Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised—

(a) in conformity with the written law, including any law in force immediately before the commencement of this Act;

(b) subject to any written law and insofar as the written law does not extend or apply, in conformity with—

(i) the common law and the doctrines of equity;

(ii) any established and current custom or usage; and

While customary tenure is also provided for and recognised by the written law, the actual norms are unwritten and have to be proved for purposes of recognition of rights under customary land tenure. On the other hand, the written laws affecting kibanja interest include the repealed Busulu and Envujjo laws from which the rights of the Kibanja owner are derived. Secondly, the kibanja interest is recognised separately in the Constitution and the Land Act as lawful occupancy of Mailo land rather than a customary tenure which is held in perpetuity. The existence of a kibanja interest is a matter of evidence which can be adduced for instance to prove the historical payment of busulu (or rent) under the repealed Busulu and Envujjo laws.

In the premises the appellants did not prove their kibanja interest and in the very best they proved a licence which cannot prevail against the registered owner under section 29 of the Land Act. In conclusion, I agree that the appeal should fail for the reasons and with the orders proposed by Hon. Lady Justice Irene Mulyagonja, JA and I have nothing useful to add. Since Hon. Lady Justice Monica K. Mugenyi, JA agrees, the following orders issue:

1. The appeal substantially fails on all grounds and is dismissed with costs to the respondent in the appeal, and the orders of the 1st appellate court are upheld with the further orders that:

2. The Appellants who are trespassers on the land comprised in Kibuga Block 24 Plots 1042 and 1193, at Lungujja, shall hand over vacant possession of the land to the respondent, the registered proprietor thereof, forthwith.

3. In the event that the appellants fail to do so within 60 days of the date of this order, they shall be evicted therefrom.

Dated at Kampala the 12th day of July 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 11 OF 2019

1. **JANE MAGANGO**
2. **SAMUEL KABUYE**
3. **SOLOME KAGGWA** ..... **APPELLANTS**

VERSUS

WAMALA KALIBBALA WILLIAM ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Uganda (Bashaija, J) in Civil Appeal No. 125 of 2016)

JUDGMENT OF MONICA K. MUGENYI, JA

1. I have had the benefit of reading in draft the lead judgment of my sister, Hon. Lady Justice Irene Mulyagonja in this Appeal. I agree with the conclusion that the Appeal fails. I do, nonetheless, deem it necessary to illuminate the following additional observations with regard to *Grounds 1* and *2* of the Appeal, which I shall address concurrently. Those grounds of appeal read as follows:

    I. *The learned trial judge erred in law when he failed to properly apply the law on holders of kibanja and/ or bonafide occupants of land thereby reaching a wrong decision.*
    II. *The learned appellate judge erred in law when he upheld the trial court's findings that the appellants were trespassers on the suit land.*

2. The factual background to the Appeal, as well as the summation of the parties' respective cases and legal representations are well articulated in the lead judgment, and shall not be reproduced in detail here.

3. I am in complete agreement with the conclusion in the lead judgment that Jane Magano, Samuel Kabuye and Solome Kaggwa ('the Appellants') are neither lawful nor bona fide occupants of the land described in Kibuga Block 24 plots 1042 and 1193 (formerly plot 165) at Lungujja ('the suit land'). Both types of occupancy are defined in section 29(1) and (2) of the Land Act, Cap. 227 as follows:

> **(1) "Lawful occupant" means —**
>
> **(a) a person occupying land by virtue of the repealed —**
>
> **(i) Busuulu and Envujjo Law of 1928;**
>
> **(ii) Toro Landlord and Tenant Law of 1937;**
>
> **(iii) Ankole Landlord and Tenant Law of 1937;**
>
> **(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or**

(c) **a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.**

(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.**

4. As quite correctly observed in the lead judgment, the evidence on record would not support the proposition that the Appellants occupied the suit land under the now repealed laws cited in section 29(1)(a) of the Land Act. There is no evidence either that they had been settled onto the land by either the government or an agent thereof so as to correspond to a bona fide occupant as envisaged under section 29(2)(b) of the same Act.

5. There is however evidence that Costa Wanyana, their supposed predecessor in title, did enter onto the suit land in the 1940s with the consent of Yolamu Sepuya, the then recognized owner of the land, and did indeed utilize the said land unchallenged by him well before the promulgation of the 1995 Constitution. Sepuya's immediate successor in title, his son Israel Kalibbala, did not challenge Costa Wanyana's occupation or utilization of the suit land either until his death in 1989. It is from Israel Kalibbala that the present Respondent, William Kalibbala Wamala, derives his right of claim to the suit land.

6. Therefore, although as observed in the lead judgment there is insufficient evidence that Costa Wanyana was either gifted the suit land or purchased it, she would nonetheless have qualified as a lawful and/ or bona fide occupant under section 29(1)(b) and (2)(a) of the Land Act respectively, but for the succinct provisions of section 29(4) thereof. That provision negates any claim to lawful or bona fide occupancy where a person occupies land '**on the basis of a licence from the registered owner**.'

7. *Black's Law Dictionary*[1] defines a license as '**an authority to do a particular act, or series of acts, upon another's land, land without possessing any estate therein**.' The *Oxford Dictionary of Law*[2] further expounds the notion of a license in real estate as follows:

> Permission to enter or occupy a person's land for an agreed purpose. A license does not usually confer a right to exclusive possession of the land, nor any estate or interest in it: it is a personal arrangement between the licensor and the licensee. A *bare license* (ie gratuitous permission to enter or occupy the licensor's land) can be revoked at any time and cannot be assigned by the licensee to a third party. A *contractual license* cannot be revoked during the period the parties intended it to last. Neither type is by itself binding on third parties acquiring the land from the licensor. However, if the license is coupled with a grant of property or of an interest in land, the license may be irrevocable and binding on the licensor's successors in title.

8. It thus becomes abundantly clear that, as a person that was only invited onto the suit land as a caretaker, Ms. Wanyana was a licensee thereon; specifically, a bare licensee. Consequently, she would have no recourse to lawful or bona fide occupancy as the basis for her interest in the suit land.

9. As a bare licensee, Ms. Wanyana neither acquired any estate or interest in the land nor the right to exclusive possession of the suit land. Neither, in any event, would the license have been binding on either Israel Kalibbala who acquired the suit land from Yolamu Sepuya, the licensor, or Kalibbala's successor in title, the present Respondent. The contours of her interest in the suit land could not be stated any better than it was in the *Oxford Dictionary of Law's* definition of a bare licensee as follows:

> A person who uses or occupies land by permission of the owner but has no legal or equitable interest in it. Such permission is personal to him; thus he cannot transfer it. He cannot enforce it against a third party who acquires the land from the owner. His permission can be brought to an end at any time and he must leave the property with "all reasonable speed." If he does not do so he becomes a trespasser.[3]

10. Drawing inspiration from the foregoing legal resource, I am satisfied that Ms. Wanyana possessed no legal or equitable interest in the present suit land, and could not transfer

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[1] 8th Edition, 2004, p. 938.
[2] 7th Edition, 2009, pp. 325, 326.
[3] Ibid. at p. 54

her license in the land to third parties such as Leonorah Namisango Lwanga or her purported successors in title – the Second and Third Appellants. Accordingly, any lawful or bona fide occupancy having been discounted, they had no right of claim as against the Respondent. It would follow then that the First Appellant whose tenancy was at the pleasure of the Second and Third Appellants similarly had no right of claim as against the Respondent.

11. In any event, in so far as a bare licensee cannot legally enforce his/ her license as against a third party to whom the licensor transfers the land, Ms. Wanyana's license to occupy the suit land would have been unenforceable as against the Respondent who acquired proprietary interest therein from its owner. Finally, the Appellants having declined to respect the Respondent's right to and desire for quiet possession thereof, they were correctly adjudged to be trespassers on the suit land.

12. In the result, albeit for slightly different reasons, I do respectfully abide the conclusion in the lead Judgment that this Appeal be dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Kampala this 2nd day of July, 2022.

Monica K. Mugenyi
JUSTICE OF APPEAL