THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Egonda-Ntende, Mulyagonja & Mugenyi, JJA

CIVIL APPEAL NO 74 OF 2015

BETWEEN

BANURA GRACE ISOKE ::APPELLANT

AND

1. DEZZY NYANJURA
2. KALUSHA ABDHALLAH FRANK
3. BAGUMA ANTHONY
4. TEBEZINDA M. DERRICK
5. KIZITO MUHUMUZA

::::::::::::::::::::::::RESPONDENTS

{Appeal from the judgment of Murangira, J delivered at Kampala on 12th May 2014 in High Court Civil Suit No. 310 of 2008}

JUDGMENT OF IRENE MULYAGONJA, JA

Introduction

The appellant brought this appeal against the judgment of the High Court in which it was declared that the defendants are the rightful owners of a *kibanja* on land registered as Block 15 Plot 217 at Kibuli in Kampala District. It was further ordered that the certificate of title in the appellant's name be cancelled, and that the interest in the land reverts to the former registered proprietor thereof.

Background

The background to the appeal was that the appellant is the widow of Kasimu Isoke Araali, who was the registered proprietor of the land in

dispute before his death. She is also the Administrator of his estate by virtue of letters of administration granted to her by the High Court at Kampala in Administration Cause No 557 of 2008. The respondents are her husband's relatives, being the wife and sons of his uncle, Damiano Mululi Matovu, and the occupants of the land in dispute.

In 2008, the appellant brought a suit against the respondents in the High Court for trespass. She claimed that after her husband's death in 2007, the respondents entered upon the land without her consent, planted crops thereon and put up temporary structures for themselves, and other developments. That when she discovered their unlawful occupation, she demanded for vacant possession but it was resisted. She then informed the Administrator General who tried to stop them from further developing the land but in vain. The appellant further claimed that Damiano Matovu Mululi was a caretaker of the land in dispute, having been invited by Demetiria Zaituni Nsungwa, his sister, to live on it after the demise of their mother.

The appellant thus claims that the respondents wrongfully applied for Letters of Administration to the estate of Damiano Matovu, including the land in dispute, upon which she placed a caveat on the application and filed this suit. She prayed that the respondents be declared trespassers and that an order be issued to evict them.

The respondents on the other hand claimed an interest in the land as a *kibanja*, having been resident on it for a long time before the appellant sought to evict them. They thus filed a counterclaim in which they claimed to be lawful and/or bona fide occupants of the land. They also claimed they were entitled to Letters of Administration in the estate of the late Damiano Matovu and asserted that the Letters of

Administration held by the appellant in her husband's estate were obtained fraudulently.

The trial judge dismissed the appellant's suit and entered judgment and the orders that the respondent sought in the counterclaim. The appellant now appeals to this court on the following grounds:

1. The learned appellate judge (sic) erred in fact and law when he did not properly evaluate the evidence on record and came to the wrong conclusion that the acquisition of the suit land by the late Araali Isoke was fraudulent.
2. The learned appellate judge (sic) erred in law when he held that the respondents had *kibanja* interest in the suit land whereas not.
3. The learned appellate judge (sic) erred in law and fact when he dismissed the suit and allowed the counterclaim.
4. The learned appellate judge (sic) erred in law when he ordered the appellant to pay the costs of the suit.

The appellant proposed that this court sets aside the orders of the trial court, declares her the owner of the land in dispute, grants an order for vacant possession in her favour with costs of this appeal and in the court below. The respondents opposed the appeal.

At the hearing of the appeal on 27th November 2023, the appellant was represented by Mr David Mushabe. The respondents were represented by Mr Dominic Twinamatsiko.

The parties filed written submissions before the hearing as directed by court. They each prayed that their written arguments be considered in resolving the appeal and their prayers were granted.

Analysis and Determination

The duty of this court as a first appellate court is set out in rule 30 (1) of the Court of Appeal Rules, SI 13-10. It is to reappraise the whole of the evidence adduced before the trial court and come to its own findings on the facts and the law. To that end, I carefully perused the record that was set before us and considered the submissions of counsel for both parties as well as the authorities referred to.

I noted that counsel for the appellant framed three issues from the grounds of appeal above as follows: i) whether the respondents have any protectable rights/interest in the suit land; ii) whether the respondents are trespassers on the suit land and iii) whether the appellant is entitled to the remedies claimed. Counsel then went on to address ground 2, which he named ground 1. He created a new ground of appeal which he framed as: *"Whether the defendants/respondents are trespassers on the suit land."* Interestingly, in his submissions he addressed it as ground 1, but in the memorandum of appeal ground 1 was a complaint that the trial judge erred when he held that the appellant's title to the land in dispute was void for fraud. In his submissions, counsel for the appellant addressed it as ground 4.

The respondent's Advocate adopted the conferencing notes that were filed in court on 14th October 2015 as his submissions in the appeal. The issues framed by the appellant's counsel were followed to address the grounds of appeal but counsel for the respondents added a fourth issue: *Whether there was fraud on the appellant's part in acquiring the suit land.*

I think that the manner in which counsel for the appellant framed his arguments as issues caused confusion in the order in which he

presented his arguments. I will therefore not consider the appeal according to the issues he framed; neither will I follow the order of the grounds in his submission. I will instead do so in the ordinary manner by addressing the two substantive grounds of appeal, 1 and 2. I will only address the two because the resolution of ground 3 will depend on my findings and decision on the first two grounds. The answer to ground 4 will depend on the overall result of the appeal. The submissions of counsel, where relevant, are reflected immediately before addressing each of the grounds of appeal.

Ground 1

The appellant's complaint in this ground was that the trial judge erred both in fact and law when he found that Kasimu Isoke's acquisition of the land in dispute was fraudulent.

Submissions of counsel

Counsel for the appellant submitted that the trial judge erred when he concluded that the transaction and certificate of title in favour of the appellant and her husband were tainted with fraud. He explained that the respondents argued that the appellant acquired the title through fraud by concealing the fact that Damiano Mululi Matovu was in occupation thereof. He referred to the evidence of PW2 who related how Kasimu Isoke came to buy the land from Badru Kakungulu.

Counsel further submitted that the trial judge did not visit the *locus in quo* or consider the meeting that was held by the Deputy Resident District Commissioner (RDC), which severely crippled or hampered appropriate analysis of the evidence and resulted in wrong findings. He went on to submit that section 59 of the Registration of Titles Act (the RTA) provides that a certificate of title shall be conclusive evidence of

title. He relied on **Kampala Bottlers Ltd v. Damanico (U) Ltd, SCCA No 22 of 1992**, where it was held that fraud must be attributed to the transferee either directly or indirectly by necessary implication, to support his submission. He further submitted that the evidence adduced by the respondents did not prove that Kasimu Isoke or the appellant were guilty of fraud or that they must have known about fraudulent acts by somebody else and taken advantage of them. And that therefore, the trial judge erred when he concluded that the registration of Kasimu Isoke without disclosing to Badru Kagungulu or his lawful agents that the respondents were on the land amounted to fraud.

Counsel further submitted that it was in evidence that while the land was still in the form of a *kibanja*, Zaituni Nsungwa surrendered her interest to Kasimu Isoke. That the latter bought the land from Badru Kakungulu who was the mailo owner, as shown in **PE1**, a memorandum of acknowledgment or receipt of the purchase price by Badru Kakungulu. He further pointed out that in the process of the appellant's application for Letters of Administration to her husband's estate, all the respondents attended one of the meetings with the Administrator General, but they did not object to her obtaining the grant.

Counsel then concluded that the trial judge's findings of fraud by simply examining features of the certificate of title was farfetched because neither the appellant nor Kasimu Isoke was an employee of the Registry of Titles. That if there were errors in the details on registration, the registered proprietor had no control over them. He prayed that this ground be resolved in favour of the appellant.

In reply, counsel for the respondent referred to Black's Law Dictionary, 6th Edition, for the definition of *"fraud,"* as an intentional perversion of

truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right, or a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another, so that he shall act upon it to his legal injury.

He went on to submit that in the instant case the appellant obtained title without disclosing any encumbrances on the suit land. That she was clearly aware that the late Matovu Damiano and his family, the respondents, were in occupation of the *kibanja*. The fact the she did not disclose this was an omission that was calculated to deceive and amounted to suppression of the truth and to a fraudulent act in itself. He argued that the full plan of fraud was revealed by the appellant placing a caveat on the respondent's application for Letters of Administration, which blocked the due process of law and curtailed the respondents' access to their late father's estate. That the respondent's lack of a grant was then used by the appellant to further her intentions of depriving the respondents of their interest in the *kibanja,* and to leave them destitute. He prayed that this court upholds the decision of the trial judge on this point.

Resolution of Ground 1

The Joint Scheduling Memorandum, at page 36 of the record, showed that it was an undisputed fact that the appellant was not only the widow of Kasimu Isoke Araali, but also the registered proprietor of the land known as Kibuga Block 15 Plot 217 at Kibuli. It was also an undisputed fact that the respondents were in occupation of the land. Everything else alleged by the appellant in the plaint had to be proved.

On the other hand, the respondents raised allegations in their counterclaim that the registration of Kasimu Isoke as proprietor was procured with fraud. Pursuant to Order 6 rule 3 of the Civil Procedure Rules (CPR) the respondents stated the particulars of fraud as follows:

> *8. The plaintiff has continued to administer the estate of the late Kasimu Isoke Araali forming land comprised in Kibuga Block 15 Plot 217 at Kibuli which land the late Kasimu Isoke Araali acquired fraudulently having failed to ascertain this fraud and correct it;*
>
> ***Particulars of fraud by the late Kasimu Isoke Araali and Plaintiff***
>
> *a) Procuring registration of title to Kibuga Block 15 Plot 217 land at Kibuli without disclosing a prior unregistered interest thereon of kibanja by the late Damiano Matovu Mululi and the defendants.*
>
> *b) Taking express notice of an occupied old house in the middle of the kibanja Block 15 Plot 217 land at Kibuli; in the process of acquiring registration of same land and ignoring to inquire into the claims by the said ancient house's occupants in the whole plot.*
>
> *c) Plaintiff's act of entering into a written document dated 19th May 2007 with the Defendant requesting for and acknowledging receipt of a piece of land from suit land from defendants who allowed her to build a two roomed toilet, well aware of her would be inherent superior rights upon the suit land than defendant.*
>
> d) *Failure to give due statutory recognition of kibanja holder's interest in Kibuga Block 15 Plot 217.*

The appellant made no specific response to the counterclaim, though she responded to the facts stated therein in the written statement of defence. In her reply she stated that the late Damiano Matovu was only a caretaker of the land and not the owner and when he died he was buried in Entebbe on his own land. That at the time Kasimu Isoke bought the land Damiano Mululi Matovu lived in Nsambya but the

respondents/defendants entered onto the land on 4th May 2007 and illegally built a new house which was mentioned in the WSD. Further, that the old structures on the land belonged to the plaintiff's late husband and the plaintiff's late children were buried on the burial/suit land. The trial judge found that the appellant responded to the alleged fraud and the respondents did not complain about it.

In order for it to vitiate the title of the registered proprietor, fraud must be imputed upon him or her as it was held in **Zzabwe Frederick v. Orient Bank Ltd & 5 Others, Supreme Court Civil Appeal No 2 of 2006** in which the court cited the decision in **Kampala Bottlers Ltd v. Damanico (U) Ltd, SCCA No 22 of 1992** with approval, at page 7 of the opinion of Wambuzi, CJ, for the dicta that:

> *"... fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."*

It was further held that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.

The facts that the appellant relied upon to prove that her predecessor in title and husband, acquired the mailo interest in the land in dispute, and therefore the certificate of title thereto, in compliance with the law were in the testimonies of three witnesses: the appellant Banura Grace Isoke (PW1) Dementiria Zaituni Nsungwa (PW2) and John Towet (PW4). I reviewed their testimonies carefully in order to establish whether any fraudulent act could be attributed to Kasimu Isoke in the process of acquiring title.

Banura Grace gave her testimony in chief in a written statement dated 2nd April 2010 and it was admitted onto the record. She stated that she got married to Kasimu Isoke in 1979 and that by 1985, they had accumulated savings for development. When Demetiria Zaituni Nsungwa, an aunt to her husband, informed them about the sale of land in Kibuli, they welcomed the idea. She stated that Zaituni Nsungwa informed them it was her land which her father, Salongo Gabunga, held as a *kibanja* and gave her before his death. She also informed them that she gave Kasimu Isoke the opportunity to buy off her interest because she did not want a stranger to do so, her mother having been buried on the land.

She further testified that on 12th March 1985, her husband, Zaituni Nsungwa and she went to Haji Badru Kakungulu, the registered proprietor of the mailo land, and paid shs 200,000/ for it. Badru Kakungulu acknowledged receipt of the money in a memorandum which was attached to the statement as **PE1**. That after this, Kasimu Isoke, Matovu and Zaituni Nsungwa, together with Local Council officials who included John Towet (PW4) witnessed the survey of the land to demarcate the Plot which is now in dispute. That a transfer was executed by Badru Kakungulu in favour of Kasimu Isoke and the land was subsequently transferred into his name.

The appellant further stated that after purchasing the land, it was agreed that Damiano Matovu would continue to occupy it as caretaker, since he was a trusted relative and he lived in the house thereon. And that when Kasimu Isoke died on 17th October 1987, she obtained Letters of Administration and was registered as Administrator of his estate. She pointed out that there was no conflict about ownership of the land until Damiano Matovu died in 2007. It was then that the 1st respondent entered upon the land with her sons, having come to make

arrangements for his burial, but they did not leave though Damiano Matovu was buried in Entebbe. They instead laid claim to the land and built new structures thereon and planted crops, and her efforts to deter them through the office of the Administrator General were futile.

Grace Banura's testimony was not shaken in cross examination but she explained that Nsungwa was her husband's maternal aunt being a sister to Damiano Matovu, his maternal uncle. That the 1st respondent came onto the land in 2007 after Matovu's death and Matovu was buried in Entebbe.

Zaituni Nsungwa testified as PW2 and her written statement signed on 22nd April 2010 was admitted as her testimony in chief. She stated that she acquired the land in dispute in 1967 from her father, Salongo Gabunga, when he distributed his property among his offspring. That he gave her the land in Kibuli where her mother resided so that she could take care of her. Her brothers, Damiano Mululi Matovu and Kaggwa were given seven (7) acres of land in Entebbe. And that when her father died in 1967, he was buried on the land in Entebbe and at the last funeral rites, the clan leader read his will to the family, in which it was confirmed that he gave her the *kibanja* at Kibuli.

She went on to state that by the time her father died in 1967, Damiano Matovu had not yet married Dezzy Nyanjura, the 1st respondent. That she learnt about Nyanjura's relationship with her brother in 1968 when she brought her son, Kalusha Abdhallah, to their mother to give him a name. She added that after she got married in 1969, she was still able to take care of her mother who remained on the *kibanja*. That she also built a two bedroomed house thereon and continued to pay *busulu* in her names to the landlord, and she took care of her mother till she died in 1975. She was buried on the same *kibanja*.

Nsungwa further stated that two years after her mother's death, she asked Damiano Matovu, who then resided in rented accommodation in Nsambya to move to Kibuli and take care of the *kibaja*. That she did so because she thought her brother should not continue living in rented accommodation when there was an empty house in Kibuli. She explained that Damiano Matovu at first resisted this but she sent Vincent Mukasa (PW3) and one Salongo Ekudo to persuade him and he agreed to move to Kibuli. She added that Matovu moved with members of his family but after a short while, misunderstandings arose between him and Dezzy Nyanjura and they separated. Nyanjura then moved to and settled in Nsambya and Damiano Matovu got another wife called Asimwe, who bore him four children.

She went on to state that in 1985, Badru Kakungulu asked all occupants with *bibanja* on his land to buy off the mailo interest. He also put up the land for sale on the open market. She asked her brother, Damiano Matovu, to buy the land but he did not have money to do so. Because she did not want a stranger to buy it, she asked her son/nephew, Kasimu Isoke Araali to do so and he agreed. She confirmed Grace Banura's testimony about the transaction in which the land was bought as well as the people who were present. She also confirmed that when her brother died on 4th May 2007, he was buried in Entebbe but Nyanjura stayed on in Kibuli and was still resident at the time she signed her statement. She further disclosed that Damiano Matovu, in trust, kept all the documents relating to the land, including the land title, their father's will and the receipts for *busulu*, but that when he died the documents he left in the house were all stolen.

Nsungwa's testimony was not shaken in cross examination. The court asked her some questions and she confirmed that when Damiano Matovu returned to Kibuli, he returned with a wife, then Dezzy

Nyanjura, and their children. That at the time, she was resident in the neighbourhood with her husband and the 1st and 5th respondents built houses on the land in 2007.

The testimony of PW4, John Towet, in his written statement dated 22nd April 2010 corroborated the evidence of Zaituni Nsungwa about the transaction in which Kasimu Isoke bought the land. Towet stated that he served as Secretary for Defence LC1 in Kibuli between 1986 to the time he testified in the case and he witnessed the survey and subdivision of the land by Kakungulu's agents before it was transferred to Kasimu Isoke. He explained that this was all done in Damiano Matovu's presence, who informed him that the land belonged to his sister Zaituni, and he was a caretaker thereof.

He confirmed that, Damiano Matovu continued to live on the land even after it was transferred into Isoke's name and he did not complain. He also confirmed that the 1st respondent and her offspring moved onto the land in May 2007 after Matovu's death to prepare for his burial, but they did not leave and began to lay claims to the land. In cross examination, Towet stated that Damiano Matovu was his friend and as Defence Secretary at the time, he knew where he resided. That at the time that he died Matovu lived with only one of his sons. And that since his death, there was his old woman and his sons on the land. That he died in 2007 and he was informed that Damiano was buried in Entebbe on his land.

On the other hand, in her written statement dated 30th April 2010, Nyanjura stated that she got married to Damiano Matovu in 1967 and thereafter, they resided on the land in dispute. That she and her husband put up structures on the *kibanja* which he inherited from his parents and they resided on it till he died in 2007. She admitted that

they were away from the *kibanja* for a time, but only for business purposes because they had a shop in Nsambya. She explained that during her husband's lifetime, no body made any claims to the *kibanja*. That it was only after he died that the appellant laid claim to it as her husband's property.

She asserted that her husband never transferred his interest to any one and Kasimu Isoke was known to her as his distant relative who lived in Mengo. He never claimed an interest during Matovu's lifetime till his widow appeared in 2007 to claim that Kasimu Isoke was the lawful owner thereof. She contended that Isoke could not have bought the *kibanja* because at all material times they lived on it. That they did not receive any offer from the landlord to purchase the mailo interest yet they ought to have had the first opportunity to do before he offered it to others. She denied that Damiano Matovu was only a caretaker and that Zaituni Nsungwa's father gave her the *kibanja* as a gift.

She further explained that the land has a grave yard where her mother in law, Kabyonga, father in law Mali, her brothers in law and other relatives were buried. She asserted that the land belongs to her and her offspring, having inherited it from her husband who was a bona fide occupant thereof. Attached to her statement was a document in Luganda with no translation into English, said to be an agreement wherein Damiano Matovu sent one Kevina away from the land in 1984.

In cross examination, Dezzy Nyanjura stated that because his wife was mentally ill, her father in law was taken to his brother's land in Entebbe. That he died in Entebbe and was buried on his brother's land. She also explained that they had a shop in Nsambya but at times she went back to Kibuli to take care of their home on the land in dispute and that her marriage to Matovu continued till his death. She admitted that Badru

Kakungulu was the registered proprietor of the land on which the *kibanja* was situated but she did not know whether her husband paid *busulu* or not, but that he must have paid. She also explained that at the time Matovu died, she was present at Case Clinic where she and her offspring took care of him. Contrary to her testimony in chief, she stated that Matovu was buried in Entebbe on his land which he bought, with his own money. Further that the family had burial grounds in Entebbe as well where other members of the family were buried.

She admitted that Kasimu Isoke Araali was related to her husband but his father lived in Kakoba in Mbarara. He therefore did not have a *kibanja* on the land in dispute. That she did not know whether Isoke was the registered proprietor of the land. Further, that though she was summoned to the Administrator General's office to resolve the dispute, it was never resolved. And though she signed the Minutes of that meeting, she did not understand what was stated in them and she did not agree to anything at the meeting. She admitted that her offspring built a house on the land in 2002 and there were tenants in it. She also explained that they did not obtain letters of Administration to Damiano Matovu's estate.

Nyanjura's testimony emphasised the fact that she claimed an interest in a *kibanja*, not the mailo interest that the appellant claims. She denied that Salongo Gabunga gave a *kibanja* to Zaituni Nsungwa but according to Nsungwa, her father gave her the land before he died in 1967, yet her brother brought Nyanjura to Kibuli for the first time in 1968 so that her mother gives her son a name. She said nothing about Salongo Gabunga, save that he was taken to his brother's land in Entebbe because his wife was mentally ill, and that is where he died.

Nyanjura also raises a legal point, in respect of which counsel for the respondents offered no submissions, that as occupants of a *kibanja*, they were entitled to first refusal before Kasimu Isoke was allowed to buy the mailo interest from Badru Kakungulu. The assertion arises out of section 35 of the Land Act, 1997 which follows upon the provisions for transactions by tenants by occupancy in section 34 of the Act. Section 35, no doubt relates to the rights of tenants by occupancy and it provides as follows:

> **35. Option to purchase.**
>
> **(1) A tenant by occupancy who wishes to assign the tenancy shall, subject to this section, give the first option of taking the assignment of the tenancy to the owner of the land.**
>
> **(2) The owner of land who wishes to sell the reversionary interest in the land shall, subject to this section, give the first option of buying that interest to the tenant by occupancy.**
>
> **(3) Any offer made under this section shall be on a willing buyer willing seller basis.**

It is not clear whether Damino Matovu was a tenant by occupancy or the owner of a *kibanja* but that is the subject of ground 2 of the appeal. However, the uncontested evidence on the record about the status of the land before the appellant's husband bought it was in paragraph 12 of Zaituni Nsungwa's testimony, at page 35 of the Supplementary Record of Appeal. Nsungwa stated that in 1985, Badru Kakungu told all *bibanja* holders on his land to buy off their interest and he put it up for sale on the open market. The questions which then arise are: what interest did Badru Kakungulu hold in the land in 1985? Was he a mailo owner, and if so was he selling off the reversion to a person with a *kibanja*, as Nsugwa asserted? Further to that, the question arises about the nature of the interest that Kasimu Isoke acquired, if he did buy from Kakungulu at that time.

It will be recalled that in 1975, the Land Reform Decree ("the LRD" or "the Decree") was promulgated. By virtue of section 1 (1) thereof, all land in Uganda was declared public land to be administered by the Uganda Land Commission according to the Public Lands Act of 1969, subject to any modifications that would be necessary to bring the Act into conformity with the Decree. Section 2 (1) of the Decree then abolished mailo land in the following terms:

> **2 (1) There shall be no interest in land other than land held by the Commission which is greater than a leasehold, and accordingly, all freeholds in land and any absolute ownership, including mailo ownership, existing immediately before the commencement of this Decree are hereby converted into leaseholds.**

However, holdings on mailo land under the Busulu and Envujo Law and holdings under the freehold systems created by the Ankole Toro Landlord and Tenant Laws were not converted into sub-leases. It appears to me that it is for that reason that section 3 of the Decree provided that:

> **(1) The system of occupying public land under customary tenure may continue and no holder of customary tenure shall be terminated in his holding except under terms and conditions imposed by the Commission, including the payment of compensation, and approved by the Minister having regard to the zoning schemes, if any, affecting the land so occupied, and accordingly, the Public Lands Act shall be construed as if subsection (2) of section 24 thereof has been deleted therefrom.**
>
> **(2) For the avoidance of doubt, *customary occupation of public land shall, notwithstanding anything contained in any other written law, be only at sufferance and a lease of any such land may be granted by the Commission to any person*, including the holder of the tenure, in accordance with this Decree.**
>
> *{Emphasis added}*

By virtue of section 3 (3) of the Decree, tenancies on land held immediately before the commencement of the Decree subject to the

Busulu and Envujo Law, and the Ankole and Toro Landlord and Tenant Laws were allowed to continue, but subject to the conversion of any such tenancy into customary tenure on public land, without the payment of busulu, envujo or the customary rent required by the Ankole and Toro Landlord and Tenant Laws. The application of the Busulu and Envujo Law, Ankole and Toro Landlord and Tenant Laws, were then brought to an end by of section 3 (4) of the Decree.

It is important to note that section 5 (1) of the Decree prohibited the occupation of land under customary tenure, except with permission as follows:

> **5(1) With effect from the commencement of this Decree, *no person may occupy public land by customary tenure except with the permission in writing of the prescribed authority which permission shall not be unreasonably withheld*:**
>
> **Provided that the Commission may, by statutory order, specify areas which may be occupied by free temporary licence which shall be valid from year to year until revoked.**
>
> *{Emphasis added}*

With respect to the particular land in dispute, it is also pertinent to note that before the coming into force of the Decree, section 24 of the Public Lands Act specifically prohibited customary tenure on land in urban areas in the following terms:

> **24(1) subject to the provisions of subsection (5) of this Section it shall be lawful for persons holding by customary tenure to occupy without grant, lease or licence from the controlling authority unalienated public land vested in the Commission, if**
>
> **(a) the land is not in an urban area,**
> **(b) no tenancy or other right has been created over it.**

The land in dispute was described in the plaint as Block 15 Plot 217, land at Kitoro Zone, Kibuli in Kampala District. There is no doubt that

it is land in an urban area. The prohibition in section 24 (1) of the Public Lands Act meant that the land, if it was indeed held under customary tenure, ceased to be held as such on the coming into force of the Act on 28th March 1969, the date when it commenced.

In **Kampala District Land Board & George Mutale v. Venansio Babweyaka, Supreme Court Civil Appeal No. 01 of 2007,** the Supreme Court considered an appeal in a dispute where the respondents challenged the title issued by the Board to the 2nd appellant. The respondents challenged the grant because they claimed an interest in the land as customary tenants or bona fide occupants, having acquired their interest as far back as 1970. The court, Odoki, CJ, at page 13 of his opinion, with which the rest of the court agreed, analysed the facts and the provisions reproduced above and came to the finding that:

> *"Under the Land Reform Regulations 1976, any person wishing to obtain permission to occupy public land by customary tenure had to apply to the Sub County Chief in charge of the area where the land was situated. After processing the application, it had to be sent to the Sub-county Land Committee for approval.*
>
> *The question is whether the respondents did acquire the customary ownership following the enactment of the Land Reform Decree. The answer to this question appears to be in the negative. Restrictions on acquisition of customary tenure under the Public Lands Act seem to have continued as the law continued to govern all types of public land including customary tenure subject to the provisions of the Decree. In order to acquire fresh customary tenure one had to apply to the prescribed authorities and receive approval of his or her application. There was no evidence that such prescribed authorities existed nor that the respondents or their predecessors acquired fresh customary tenure in accordance with the Land Reform Decree. I would therefore hold that the respondents could not have legally acquired customary tenure in an urban area of Kampala City prior to the enactment of the Land Act 1998."*

The respondents in this case claim to have acquired their customary interest in the land as beneficiaries to the estate of Damiano Matovu when he died on 4th May 2007. There is no evidence that Damiano Matovu applied to any authority for approval to continue holding the land as a *kibanja*, known to be customary tenure. Even then, they could not have acquired an interest in a *kibanja* in 2007 because the interest, if it existed in the first place was prohibited by section 24 (1) of the Public Lands Act. As to whether they acquired any other interest in the land is the subject of the 2nd ground of appeal and I will dispose of it then.

Nonetheless, the appellant claims her husband bought the mailo interest in the land from Badru Kakungulu on 12th March 1985, as it is shown in the memorandum (**PE1**), where the latter acknowledged receipt of the purchase price for land known as Plot 217 at Kibuli.

Given the law as it stood in 1985, Badru Kakungulu's interest in the land had by virtue of section 2 (1) of the Land Reform Decree been converted into a lease from the Commission. If Damiano Matovu or Zaituni Nsungwa, had any interest in the land as a *kibanja* inherited from their father and recognised by Badru Kakungulu, that interest was extinguished by section 24 (1) of the Public Lands Act, 1969 and its expiry confirmed by section 5 (1) of the Land Reform Decree. They could not have held customary tenure in an urban area at the time and neither of them had any interest to pass on to Kasimu Isoke. Neither could they authorise Badru Kakungulu to dispose of an interest in land that they did not own

As to whether Badru Kakungulu could transfer his interest in the land as a lessee on conversion to Kasimu Isoke, section 10 of the Land Reform Decree provided that:

10. A lessee on conversion may, with the consent in writing of the Commission, transfer the whole of his lease for value.

It was therefore still lawful under the Decree for Kakungulu, with the consent of the Commission in writing, to transfer his interest in the land for valuable consideration. Though there was no evidence that the Commission gave its consent to the transfer, it has been established that Kasimu Isoke paid two hundred thousand shillings to Badru Kakungulu, upon which he signed an instrument to transfer the land to him. The absence or presence of the consent of the Commission would have been an issue, but the respondents did not challenge the transfer under provisions of the Land Reform Decree. They instead chose to challenge the appellant's title on the basis of section 77 of the RTA which provides that, *"Any certificate of title, entry, removal of incumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud."*

As it will become apparent later on in this judgment, there was insufficient evidence to determine the exact documents that were lodged in the Registry of Titles to facilitate the transfer of the land to Kasimu Isoke. In the absence of pleadings and evidence on either side under the Decree, and in the face of the respondents' admission that the appellant was the registered proprietor of the land in dispute, I could not establish whether the parties to the transaction fully complied with the requirements of section 10 of the LRD.

As to whether fraud was committed during the transaction, as the trial judge found, it is the legal position that not only must fraud be specifically pleaded but it must also be strictly proved. The respondents' claim was that their interest in the land was an unregistered one, a *kibanja*. That the appellant and her husband had to disclose their interest to Badru Kakungu, before he could lawfully

transfer his interest to Kasimu Isoke. However, counsel for the appellant did not state any provision of the law to support this contention. Neither have I found any but in that regard, the trial judge found that there was fraud when he held, at page 51 of his judgment (page 157 of the record of appeal) that:

> *"The above definition of fraud brings out the elements of fraud. In the instant suit, the evidence on record clearly shows that the late Kasimu Isoke Araali and later the plaintiff got registered on the certificate of title of the suit land with full knowledge that Damiano Matovu Mululi and the defendants were in occupation of the suit land. The former got registered on the certificate of title of the suit land without disclosing to Badru Kakungulu or his lawful agents, the incumbrances on the suit land.*
>
> *The fact that the late Kasimu Isoke Araali and the plaintiff never disclosed the presence of the defendants on the suit land for a long time to the former landlord was an omission calculated to deceive the said landlord and that failure or refusal or/and neglect to that effect amounted to suppression of the truth by silence and it was a fraudulent act itself. In the case of* ***Edward Rurangaranga versus Mbarara Municipality, Sharif Abdulla and Mohammed Ahamed, Civil Appeal No 10 of 1996****, Supreme Court of Uganda, it was held that:*
>
> > *'Appellant was not innocent in the acquisition of the plot, he knew that the plot had been developed to near completion but told a lie when he was applying for it that there was only a pile of stones, sand and excavation of foundation which clearly shows dishonesty and fraud on his part when there was already (an) existing building on the plot. Secondly, he made an application for registration which to his knowledge was based on an unauthorised grant."*

The trial judge then opined that the decision in that case supported the respondents' contention that there was fraud in the process. That by application of the dicta in the decision above, fault would be found in the actions of Kasimu Isoke to the extent that his registration as proprietor in the presence of the respondents' *kibanja* on the land in dispute was dishonest and thus amounted to fraud.

However, I am of the view that the facts in **Rurangaranga's** case can be distinguished from those in the instant case. The competing interests in **Rurangaranga's** case were between two lessees of land in an urban area, not lessees and an alleged customary tenant on land in an urban area. Badru Kakungulu could have lawfully transferred his interest in the land as a lessee on conversion to Kasimu Isoke, even in the presence of Damiano Matovu on the land because the land was in an urban area. Matovu's interest, if any, had been extinguished by the Land Reform Decree, he became a tenant at sufferance.

Kasimu Isoke's transfer, and the subsequent transfer to the appellant as administrator of his estate, are in my opinion, protected by section 136 of the RTA which provides as follows:

> **136. Purchaser from registered proprietor not to be affected by notice.**
>
> ***Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land,*** **lease or mortgage shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, *or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.***
>
> *{Emphasis added}*

I therefore find that the trial judge erred when he did not address his mind to the relevant laws that applied to the transaction in dispute at the time. Having omitted to do so he erred when he found that the registration of Kasim Isoke as proprietor was tainted with fraud.

In addition to the findings above, I observed that the trial judge found more reasons to declare fraud on the part of the appellant and her predecessor in title. Relying on the contents of Annexure "A" to the plaint, at page 53 of his judgment he found and held that:

> *"Furthermore, the plaintiff in her plaint, paragraph 4 (a) relied on a certificate of title, Block 15 Plot 217 (annexure 'A' to the plaint) to prove ownership of the suit land. The suit land is described as 'Freehold' land, which is cancelled and the words 'Private Mailo' are typed on top and the one who effected the change did not countersign on the cancellation area of the said certificate of title. Again, the applicant/proprietor the one (sic) Kasimu Isoke Araali did not indicate any easements, rights, etc., appurtenant to the suit land as required on the said certificate of title. Yet the late Damiano Matovu Mululi and his family (defendant) occupied the suit land since 1975, which according to the evidence on record was a fact within his knowledge. The forestasted omissions on the said certificate of title amounted to dishonesty by Kasimu Isoke Araali and the plaintiff."*

With due respect to the learned judge, he appears to have misdirected himself about what amounts to easements, rights or appurtenances that ought to be registered on a certificate of title, when he found as he did. I say so because section 1 (i) of the RTA describes the word *"land"* as follows:

> **"land" includes messuages, tenements and hereditaments corporeal or incorporeal; and in every certificate of title, transfer and lease issued or made under this Act, "land" also includes all easements and appurtenances appertaining to the land described therein or reputed to be part of that land or appurtenant to it;**

Section 65 of the RTA then goes on to provide for easements that are recognised as encumbrances as follows:

> **65. Easements existing under deed or writing to be noticed as incumbrances.**
>
> **Notwithstanding the reservation in section 64 of any easements subsisting over or upon or affecting any land comprised in any**

certificate of title, the registrar shall specify upon any future certificate of the land and the duplicate of the certificate as an incumbrance affecting the land any subsisting easement over or upon or affecting the land which appears to have been created by any deed or writing.

The rights of an occupant of a *kibanja* on mailo land, or a bona fide occupant for that matter, are clearly not easements. Neither are they registrable as tenements because section 99 of the RTA shows that the rights that can be created as easements on a parcel of land relate to carriage ways, also described as roads, over registered land. Section 100 of the RTA then provides for registration of easements as follows:

100. Memorial of easements to be registered.

A memorial of any transfer or lease creating any easement over or upon or affecting any land under the operation of this Act shall be entered upon the folium of the Register Book constituted by the existing certificate of title of that land in addition to any other entry concerning that instrument required by this Act.

In this regard therefore, the trial judge strayed into an area that was never in dispute in the suit, because nowhere in the particulars of fraud or in their evidence did the respondents claim that their occupation of the land ought to have been registered. They instead asserted and maintained that it was a valid unregistered interest.

The trial judge went on to find that there were contradictions between the contents of the certificate of title attached to the appellant's witness statement marked **PE9**, at pages 16-19 of the Supplementary Record of Appeal, and Annexure "A" to the plaint. Annexure "A" to the plaint was not included in the record of appeal. However, the trial judge found and held that:

"In comparison, Annexure "A" to the plaint and Annexure "PE9" to the plaintiff's witness statement; which are supposed to be the same are contradictory to each other for the reasons I have given hereinabove in

this judgment. It is therefore, my conclusion that these two copies of the certificate of title in respect of the same suit land, to say the least, must be a forgery."

The trial judge also questioned the contents of **PE2**, the transfer form that was attached to the appellant's witness statement, specifically the purchase price named therein, compared to what was stated in the acknowledgment of receipt of payment issued to Kasimu Isoke by Badru Kakungulu. He came to the conclusion that the difference in the purchase price between the two meant that the parties intention was to defraud the Government of taxes or that they were fraudulent. He then concluded his analysis of the evidence thus:

"Owing, therefore, to all the forestasted errors/omissions, it is clear that the transaction between PW2, Kasimu Isoke Araaali and Badru Kakungulu, if it was there at all, was not genuine. Therefore, the plaintiff's certificate of title is tinted (sic) with fraud."

It was never pleaded in the Counterclaim that the certificate of title that the plaintiff relied upon to prove her case was a forgery. Neither was any evidence adduced to prove that fact. Instead, at the beginning of the proceedings, at page 36 of the record, in their Joint Scheduling Memorandum the parties stated that the facts that were not in dispute were that the appellant was the widow and Administrator of the estate of the late Kasimu Isoke Araali. It was also not in dispute that she was the registered proprietor of the land in dispute.

Section 57 of the Evidence Act provides for the admission of facts in legal proceedings as follows:

57. Facts admitted need not be proved.

No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they

are deemed to have admitted by their pleadings; *except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.*

{Emphasis added}

I observed that the copies of the certificate of title that the trial judge analysed as well as the transfer form said to have been used to register Kasimu Isoke as proprietor all appeared to be Photostat copies. So was the copy of the Letters of Administration granted to the appellant. These crucial documents that the court relied upon in its analysis were never certified as true copies of their originals in the Registry of Titles. Neither were they challenged by the respondents and their Advocates who were content to admit that the appellant *was* the registered proprietor of the land.

The trial judge could have availed himself of the provisions of section 57 of the Evidence Act to call for evidence from the Land Registry to establish whether the instruments that were before him were consistent with what was on file. but he did not do so. He instead came to findings about fraud on the part of the appellant contrary to the pleadings and the evidence that was adduced. This was especially prejudicial to the appellant's case. Having admitted crucial facts in the case, the respondents were estopped from denying her title to the land because section 59 of the RTA provides that a certificate of titles is conclusive evidence of title as follows:

59. Certificate to be conclusive evidence of title.

No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall

be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.

The trial judge therefore erred in fact and law when he cancelled the appellant's certificate of title without any proof of fraud against her. Ground 1 of the appeal therefore succeeds.

Ground 2

Counsel for both parties addressed this ground as an issue to establish whether the respondents had any interest in the land that could be protected. However, ground 2 was specifically that the trial judge erred in law when he held that the respondents had an interest in the land as a *kibanja,* whereas not.

Submissions of counsel

Counsel for the appellant submitted that Damiano Matovu was not a lawful occupant of the land under section 29 (1) of the Land Act. That Kasimu Isoke purchased the land in the form of a *kibanja* from Zaituni Nsungwa, daughter of Salongo Gabunga. Further, that Kasimu Isoke also purchased the legal interest in the land from Badru Kakungulu, and therefore the two interests merged. He added that it was an act of kindness on the part of Kasimu Isoke when he allowed Damiano Matovu to continue occupying the land after he bought it because he was sickly and needed to be near the hospital and was also in a position to act as caretaker thereof.

He further challenged the respondent's claim to a *kibanja* because they failed to prove that they occupied it under customary law. He referred to section 1 (1) of the Land Act for the definition of *"customary tenure"*

and the decision of the Supreme Court in **Kampala District Land Board & George Mutale v. Venansio Babweyaka, Civil Appeal No 01 of 2007**, where it was held that customary tenure must be proved as a kind of custom or practice under which land is occupied and regulated by a particular group or class of persons in an area.

He went on to submit that the land in dispute was given to Zaituni Nsungwa while Damiano Matovu was given land in Entebbe where he was buried on his death. That the latter left no will to show that the land in dispute was his property; neither did the respondents adduce evidence to that effect. Further, that Damaino Matovu did not purchase the *kibanja* from Zaituini Nsungwa, neither did he pay any *busulu* whatsoever to Badru Kakungulu, and there was incontrovertible evidence to that effect. And that at the meeting at the Administrator General's office, the respondents did not object to the appellant's application for Letters of Administration in respect of the land in the estate of Kasim Isoke.

Counsel for the appellant finally submitted the Zaituni Nsungwa invited Damiano Matovu, her brother, to take care of her *kibanja* before she sold it to Kasim Isoke, in his presence, after Damiano failed to pay for it. That she freely transferred her interest to Kasim Isoke who bought it from Badru Kakungulu and became registered as proprietor. That the respondents could not claim more than what Damiano Matovu held in Entebbe.

In reply, counsel for the respondents submitted that the facts on the record show that Damiano Matovu held a *kibanja* on the land. That the fact that he lived on it for over 12 years before the coming into force of the Constitution of Uganda in 1995 and that he built several properties

thereon, including the matrimonial home and burial grounds, without any protest from Zaituni Nsungwa proved that he had a *kibanja*.

Counsel went on to submit that the law recognises Damiano Matovu as a *kibanja* holder in Articles 26 and 237 of the Constitution, as well as sections 29 (1) and (2) and 31(1) of the Land Act. He explained that Damiano Matovu was a tenant by occupancy under section 31 of the Land Act and should be treated as such for he held a *kibanja*.

Counsel further submitted that the evidence shows that the respondents are beneficiaries to the estate of the late Damiano Matovu because the 1st respondent was his widow having gotten married to him in 1967. He referred to section 2 (w) of the Succession Act which defines the word *"wife"* as *"a person who at the time of the interstate's death was validly married to the deceased according to the laws of Uganda."* That this was an undisputed fact because it was never challenged by the appellant. He added that by virtue of sections 25, 26 and 27 of the Succession Act, the respondents were entitled to Damiano Matovu's property. That they did not have to obtain letters of administration before they could bring an action to recover his property. He relied on the decision in **Israel Kabwa v. Martin Banoba Musiga, Supreme Court Civil Appeal No 52 of 1995** to support his submission.

Resolution of Ground 2

I observed that the appellant's complaint in ground 2 of the appeal was a result of the trial judge's finding at pages 40 to 41 of his judgment (pages 156-157 of the record) as follows:

> *"The evidence of the plaintiff's witnesses in cross-examination and the defendants' witnesses evidence clearly shows that the defendants and their late father, Damiano Matovu Muluri lived on the suit land undisturbed since 1975 until the plaintiff filed the suit against them in*

2008. It is clear from the evidence of both parties that the defendant and their late father, Damiano Matovu Muluri have serious developments on the suit land. It is also clear that the defendants have lived on the suit land for over thirty-nine (39) years now and for about twenty (20) years before the coming into force of the Constitution of the Republic of Uganda, 1995. The law, there recognises the defendants' stay and interests on the suit land as bibanja holders who enjoy security of tenure, in accordance with Article 26 and 237 (8) of the Constitution of the Republic of Uganda, 1995, as well as sections 29 (1) and (2) and 31 (1) of the Land Act, Cap 227 as amended."

The implication of the excerpt above is that once one holds land for a long time and develops it, he/she automatically becomes the owner of a *kibanja*. The decision also implies that an interest is a *kibanja* is the equivalent of a bona fide occupancy and a lawful occupancy.

I accept the submission of counsel for the appellant, based on the decision of this court in **Ndimwibo & Others** (supra) that a *kibanja* is one of the methods of holding land under customary tenure. *"Customary tenure"* is also defined in section 1 (l) of the Land Act *as "a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which are described in section 3;"* Section 3 (1) of the Act then sets out the various incidents of customary tenure 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.

In **Kampala District Land Board v. Venansio Babweyaka & Others** (supra) the Supreme Court cited a decision of the East Africa Court of Appeal with approval and held that:

> *"It is well established that where African customary law is neither well known nor documented, it must be established for the Courts' guidance by the party intending to rely on it. It is also trite law that as a matter of practice and convenience in civil cases relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties. In* ***Ernest Kinyanjui Kimani v. Muira Gikanga [1965] E.A. 735,*** *Duffus J. A. said at page 789:*
>
> > ***'As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative text books on the subject or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.'"***

In order to prove that she had an interest in the land, PW2 said she held the land as a *kibanja* that was given to her by her late father before he died. She claimed to have paid *busulu* to Badru Kakungulu the former registered proprietor, but she did not produce receipts to prove it. She said they were stolen from her brother's house after he died.

The respondents claimed title to the same land as a *kibanja*, both in their WSD and Counterclaim. They followed this up with assertions in

their testimonies that they were beneficiaries to the estate of their husband and father, who inherited a *kibanja* from his parents. In cross examination counsel for the appellant asked the 1st respondent whether Damiano Matovu paid any *busulu* to Badru Kakungulu. Her response was, *"I don't know whether my husband was paying any busulu or not. But he must have been paying the same to the landlord."* Counsel for the respondent asked her about this again in re-examination and she responded thus, at page 96 of the record:

> *"On the suit land, we planted mangoes, palm trees, fencing the entire kibanja with iron sheets, trees. Kakungulu has never complained to us that we are not paying their ground rent/ busulu."*

Anthony Baguma (DW3) also stated in cross examination, at page 103 of the record, that he does not know whether his father paid *busulu* for his *kibanja*.

There is no doubt that the trial judge found that the respondents were the holders of a *kibanja* interest on the land in dispute, having inherited it from Damiano Matovu, who in turn inherited it from his father Gabunga who, according to Zaituni Nsungwa, died in 1967. About the payment of *busulu*, which under the Busulu and Envujo Law signified that one was a customary owner of a *kibanja*, the trial judge held thus:

> *"Counsel for the plaintiff in his submissions, submitted that as concerns the claimed kibanja interest on the suit land, that the evidence was led showing that the defendants had not paid any busulu for the kibanja, and that thus they are not recognised by the registered proprietor of the suit land. It is important to note that, that submission is not valid. The Busulu and Envujjo were abolished under the 1975 Land Reform Decree. Thus the late Damiano Matovu Mululi who occupied the land effective from 1975 up to the time of his death in 2007 was not required to pay the Busulu to the land owner. In any case, there was no evidence led by the plaintiff to show that the busuulu was demanded from the late Damiano Matovu Mululi by the landlord and he failed to pay the same.*

The late Damiano Matovu Mululi occupied the suit land on the strength of the interest of his late father, Salongo Gabunga enjoyed on the suit land. This is evidenced by the evidence of PW2 Zaituni Nsungwa when she testified that the busuulu for the suit kibanja was paid by late Salongo Gabunga to Badru Kakungulu (the former owner of the land) under the 1928 Busulu and Envujjo Law. PW2 failed to prove that she ever paid any busuulu to the said landlord of the suit land. The assertion by PW1 and PW2 that the latter is the one who sold the suit kibanja to the late Kasimu Isoke, with the production of the sale agreement leaves a lot to be desired."

The findings of the trial judge in this excerpt recognised the fact that neither of the witnesses on both sided proved that *busulu* was ever paid to the landlord. With due respect, the statement flies in the face of his finding, at pages 11 of the judgment, that the law recognises the respondents' stay and interests on the land as *bibanja* holders. It also negates the findings at pages 40-41 of his judgment that because the respondents and their father Damiano Matovu lived on the land undisturbed since 1975 for over 39 years and had serious developments on it, the law recognised their occupation of the land and the developments as *"bibanja holders."*

It is now trite law that in Buganda, a *kibanja* is a holding over land under customary law. The relationship between people that acquired land from mailo owners and the mailo owners in Buganda before the abolition of the Busulu and Envujo Law by the Land Reform Decree were regulated by that law. However, before they could come under the Busulu and Envujo Law, they must have acquired their *kibanja* on the land pursuant to the rules and procedures that were recognised under customary law in the area. In the absence of such evidence, proof that they paid *busulu* to the landlord would be sufficient to prove that they indeed held a *kibanja* on a particular piece of land under customary law.

The need to prove that custom applied to a particular land holding was emphasised by this court in **Balamu Bwetegaine Kiiza & Isma Rubona v. Zephania Kadooba, Civil Appeal No 59 Of 2009**, an appeal in which the High Court had validated the decision of the Land Tribunal that the respondent held a customary interest in land in Butema and Buhanuka Parishes in Hoima District, without the necessary proof of customary law. On reversing the decision of the lower court, this court found and held thus:

> *"Therefore, without proof of that custom we do not agree with the finding of the Land Tribunal and the first appellate Court, that LCs and Bataka can grant customary land tenure. We also disagree with the finding that as a general rule when one occupies or develops land then ipso facto, a customary interest is created. The effect of that holding is that no matter how one comes to the land, as long as one develops it, a customary interest is acquired. Even trespassers would then acquire interest on property which they otherwise shouldn't. In any event this was not proven in evidence and, as a general proposition of customary law, would be unacceptable. It is clear from the authorities above that customary law must be accurately and definitely established and sweeping generalities will not do under this test.*
>
> *Native custom must be proved in evidence and cannot be obtained from the Court's assessors or supplied from the knowledge of the trial Judge [see: R v Ndembera s/o Mwandawale (1947)14 EACA 85). However, it seems to be the case here as the Land Tribunal held that this was common practice in Bunyoro without any proof from the respondent, which burden lay upon him to accurately and definitely prove. In this regard the respondent did not in law discharge the required standard of proof as no experts were brought to guide the Court on any existing customs relating to land nor were any scholarly materials of customary land law in Bunyoro referred to. In this regard, the appellate Court in reaching its findings did not apply the principles required of the first appellate Court to review and reconsider the evidence and materials before it on this ground.*
>
> *We therefore find that the appellate Court erred in upholding the finding that when the Bataka gave the respondent the suit land in 2000 that amounted to a customary tenure as there is no evidence to support that finding of fact."*

The Supreme Court came to the same conclusion over the land in dispute in **Kampala District Land Board v Venansio Babweyaka** (supra) when it observed that no expert in customary land tenure was called and the courts below relied on the evidence adduced by the parties. The evidence adduced was inconsistent, contradictory and inconclusive in establishing a system of customary tenure over the suit property. The court then identified the interest claimed in the land as a bona fide occupancy of the land under the Land Act.

In the instant case, not only did the warring parties in the same family fail to prove that the land was held under customary law by Salongo Gabunga from whom Zaituni Nsungwa and Damiano Matovu claimed their interest by producing receipts of payment of *busulu*, they also did not call any evidence to prove how Salongo Gabunga came to occupy the land as a *kibanja* on Badru Kakungulu's mailo land. I would therefore find that the trial judge erred in law and fact when he held that the respondents inherited and held a *kibanja* on the land in dispute.

Ground 2 of the appeal therefore succeeds.

Ground 3

The appellant's complaint in ground 3 was that the trial judge erred both in law and fact when he dismissed her suit and allowed the counterclaim. Implied in this is that the judge did not find evidence to support the appellant's claim that the respondents were trespassers on her land. He instead found that they were lawful beneficiaries to a *kibanja* on the land, as a result of which he cancelled the appellant's title for fraud, dismissed her claim in trespass and entered judgment for the respondents on their counterclaim.

It has already been established that the trial judge erred when he found that the respondents held a *kibanja* on the land and that the registration of the appellant's predecessor in title as proprietor was tainted with fraud. What now remains to be established is whether the respondents trespassed upon the land in dispute, and if not, whether they had any other valid claim to it.

Submissions of Counsel

Counsel for the appellant submitted that because Damiano Matovu had neither a legal nor an equitable interest in the land to pass on to the respondents, they are just trespassers on it. He referred to the definition of *"trespass"* in Black's Law Dictionary, 6th Edition, as the unauthorised and direct breach of boundaries of another's land and a wrong against one who has a right to possession.

He went on to refer to **Nyanzi Evaristo & Others v Mukasa Silver, Court of Appeal Civil Appeal No. 55 of 2014**, where it was held that in order to prove trespass, it is incumbent upon the claimant to prove that the disputed land belongs to him and the one alleged to trespass entered upon it, and that such entry was unlawful in that it was without the permission of the owner, or that the one alleged to trespass had no right or interest in the land.

Counsel went on to submit that the evidence on the record showed that the land in dispute belonged to Kasimu Isoke. That the respondents entered upon the land and their entry was unlawful because they had no claim of right or interest. He further submitted that the respondents ejected the appellant from the land when they demolished a building thereon and erected another one without her permission, which was a

direct breach of the boundaries of her land because Kasimu Isoke held a certificate of title over it.

Counsel further submitted that the forceful entry and possession of the land by the respondents is a wrong against the beneficiaries of Kasimu Isoke's estate who have a right to possession. That the trespass was uninterrupted or unbroken and was continuous over years. He referred to section 92 (2) of the RTA, which provides that upon registration of a transfer the estate and interest of the proprietor set forth in the instrument passes on to the transferee who becomes the proprietor thereof, subject to and liable for all the same requirements and liabilities to which he or she would have been subject and liable if he or she had been the former proprietor.

He asserted that as the registered proprietor of the land, the appellant could not arbitrarily be forced off the land. That the respondents could not deny the appellant and her offspring their rights to the land without following the law. He added that until his death, Damiano Matovu did not challenge Kasimu Isoke's title to the land. He prayed that the appeal be allowed on this point.

In reply, counsel for the respondents submitted that the respondents are entitled to possession of the land in dispute as the owners of a *kibanja*; they cannot be said to be trespassers. However, that issue has already been resolved in favour of the appellant. Counsel for the respondents went on to submit that the interests of his clients are supported by the evidence that there was no adverse claim to the land until the demise of Damiano Matovu. That it was therefore surprising that the appellant claims that the respondents are trespassers on the land. He asserted that the respondents cannot be evicted from the land because they lived on it peacefully and with the knowledge of the former

registered proprietor until the appellant filed this suit. He prayed that this court so finds.

Resolution of Ground 3

In order to resolve the question whether the respondents are trespassers on the land in dispute, it is important to establish: i) whether Damiano Matovu had any interest in the land in dispute, other than a *kibanja*, before his death; and if so, ii) whether the respondents had a valid claim to such interest as beneficiaries to his estate. It will therefore be necessary to clearly establish how the respondents came onto the land. This will then determine whether the trial judge came to the correct decision that they are not trespassers on the land.

Issue 1

There is no doubt that Damiano Matovu was resident on the land by the time he died in 2007, though he was buried in Entebbe. According to Zaituni Nsungwa, he had been resident on the land since 1975 when she invited him back to live in the house thereon after their mother's death. It is not clear whether the 1st respondent was also resident on the land at the time of his death but that may not affect her interest because the appellant did not challenge her status as Damiano Matovu's wife.

According to the evidence adduced by the respondents Damiano Matovu died on 4th March 2007. But before his death, according to DW3 and DW4, he not only planted trees on the land but he also built up to 4 structures on it. His occupation was not challenged by the registered proprietor from 1985 when her husband acquired his interest in the land as a lease on conversion from Badru Kakungulu to his death in 2007, a period of 22 years. The appellant stated that she deemed it

necessary to challenge the respondents' occupation because they began to put up buildings after Daminaio Matovu's death, who she said was merely a caretaker of the land. She reported this to the Administrator General in 2008 but nothing was done to stop them. She subsequently obtained letters of administration and was registered on the title as administrator of the estate of the Kasimu Isoke.

Damiano Matovu and Zaituni Nsungwa both claimed an interest in the land as the offspring of Salongo Gabunga. They did not get letters of administration to his estate but there is no contest that he occupied the land before them, probably as a customary tenant. There appears to be no difference in their interest in the land as offspring of the same parent but Nsugwa claimed to have invited Matovu to occupy the land after their mother's death. The appellant and her husband allowed him to continue occupying it after they bought from Badru Kakungulu. With the acquiescence of Kasimu Isoke, I would find that Damiano Matovu's occupation of the land was lawful.

The law applicable to the land in dispute at the time that Damiano Matovu died was the Land Act, 1997 enacted pursuant to Article 237 (9) of the Constitution of Uganda. Article 237 (8) of the Constitution provided that upon its coming into force and until Parliament enacts an appropriate law under clause (9) thereof, the lawful or bona fide occupants of mailo land, freehold or leasehold land, whose occupation of registered land was at the sufferance of the registered proprietors and the Commission, would enjoy security of occupancy on the land. The Constitution did not define lawful and bona fide occupants, but in 1997 when the Land Act was enacted, it created a new term to describe occupants of mailo, freehold or leasehold land as *"tenants by occupancy."* Such tenants were defined in section 1 (dd) of the Act to be the *"lawful or bona fide occupant declared to be a tenant by occupancy*

by section 31." Their rights were set out in section 31 of the Act which partly provides as follows:

> **31. Tenant by occupancy.**
>
> **(1) A tenant by occupancy on registered land shall enjoy security of occupancy on the land.**
>
> **(2) The tenant by occupancy referred to in subsection (1) shall be deemed to be a tenant of the registered owner to be known as a tenant by occupancy, subject to such terms and conditions as are set out in this Act or as may be prescribed.**
>
> **(3) The tenant by occupancy *shall pay to the registered owner an annual nominal ground rent as shall be determined by the board*.**
>
> *{Emphasis added}*

Due to the fact that he was resident on the land before the coming into force of the Constitution in 1995, Damiano Matovu qualified as a tenant by occupancy on the appellant's land. However, he was meant to pay a nominal annual ground rent to the registered owner of the mailo land, which was to be determined by the Board. I would therefore find that Damiano Matovu was a tenant by occupancy from who rent was never demanded by Badru Kakungulu, under section 31 of the Land Act.

The other possible description that can be given to Damiano Matovu is that of a bona fide occupant. Such tenants are defined by section 29 (2) of the Land Act as follows:

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

According to the evidence on the record, Kasimu Isoke bought land from a mailo owner, Badru Kakungulu, in 1985. The latter signed a transfer

in his favour and he was subsequently registered as proprietor thereof, a fact that was unequivocally admitted by the respondents. Section 62 (2) of the Registration of Titles Act provides that:

> **(2) Upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument or which he or she is entitled or able to transfer or dispose of under any power, with all rights, powers and privileges belonging or appertaining thereto, shall pass to the transferee; and the transferee shall thereupon become the proprietor thereof, and while continuing as such shall be subject to and liable for all the same requirements and liabilities to which he or she would have been subject and liable if he or she had been the former proprietor or the original lessee or mortgagee.**

I understand the provision above to mean that Kasimu Isoke bought the land from Badru Kakungulu with the full knowledge that Damiano Matovu was an occupant thereof. According to the appellant it was agreed between her husband and Damiano Matovu, who was a trusted relative, that he would continue to occupy the land as a caretaker. When Kasimu Isoke bought the land in 1985, Damiano Matovu had been resident on it and unchallenged by Badru Kakungulu and his agents since 1975, a period of 10 years. He continued to occupy the land till the promulgation of the Constitution in 1995. Damiano Matovu had therefore been in occupation, utilization and development of the land in dispute for about 20 years before the promulgation of the Constitution.

I would therefore find that Damiano Matovu was also a bona fide occupant of the land in dispute and his occupation thereof was protected by section 31 (1) of the Land Act.

Issue 2

The respondents claim they are entitled to Damiano Matovu's interest in the land as beneficiaries to his estate. In that regard, section 34 of

the Land Act provides that a tenancy by occupancy may be inherited. Although he neither paid rent to the mailo owner, nor obtained a certificate of occupancy for the land, in my opinion this would not prejudice the rights of the beneficiaries to his estate to inherit his interest because the payment of rent is not mandatory. I say so because though section 31 (3) of the Land Act, as amended by the Land (Amendment) Act 2010, provides that the tenant by occupancy **shall** pay an annual ground rent as shall with the approval of the Minister, be determined by the Board. Enforcement of payment is at the instance and demand of the land owner, pursuant to section 31 (6) of the Land Act, as amended by section 14 (c) of the Land (Amendment) Act of 2004and 2010, which provides as follows:

> **(6) If a tenant by occupancy fails to pay the approved ground rent for a period exceeding *one year*, the registered owner *may* give a notice in the prescribed form to the tenant requiring him or her to show cause why the tenancy should not be terminated for non-payment of rent and shall send a copy of the notice to the committee.**

Since payment of rent is mandatory, the tenant by occupancy may be evicted for non-payment thereof pursuant to the provisions of section 32A of the Land Act brought about by the Land (Amendment) Act 2010, which provides as follows:

> **(1) A lawful or bona fide occupant shall not be evicted from registered land except upon an order of eviction issued by a court and only for non-payment of the annual nominal ground rent.**
>
> **(2) A court shall, before making an order of eviction under this section, take into consideration the matters specified in section 32(1).**
>
> **(3) When making an order for eviction, the court shall state in the order, the date, being not less than six months after the date of the order, by which the person to be evicted shall vacate the land**

and may grant any other order as to expenses, damages, compensation or any other matter as the court thinks fit.

(4) For purposes of this section, the word "court" shall mean a court presided over by a Magistrate Grade 1 or a Chief Magistrate as the case may be, and reference to the Land Tribunal in this Act and amendments thereto shall be interpreted accordingly.

However, the provisions for establishing the ground rent payable are onerous; they are hardly ever enforced by registered owners. It is also noteworthy that there is no incentive on their part to establish the quantum of ground rent payable because section 14 (3c) of the Land (Amendment) Act 2004, which substituted section 31 (3) of the Act defines nominal ground rent as follows:

(3c) For purposes of this section, nominal ground rent shall mean reasonable ground rent—

(i) taking into consideration the circumstances of each case; and

(ii) in any case, of a non-commercial nature";

In view of the imponderables related to the enforcement of payment of the rent, tenants by occupancy continue to enjoy the benefit of staying on registered land free of let or hindrance. On the other hand, registered land owners, in most cases, do not enforce the payment of rent, let alone have them lawfully evicted due to the fact that court process do not lend themselves to quick and expeditious results. They thus resort to eviction of tenants in defiance of the provisions of section 32A of the Land Act.

Going back to the appellant's quest to evict the respondents in this case through legal action on the ground that they are trespassers on her land, the Supreme Court in **Justine E M Lutaaya v. Stirling Civil Engineering Co. Ltd, Civil Appeal No. 11 of 2002**, at page 7 of the opinion of Mulenga, JSC, set out a comprehensive definition of what amounts to trespass to land as follows:

"Trespass to land occurs when a person makes an unauthorized 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 court further held, on authority of the decision of the East Africa Court of Appeal in **Moya Drift Farm Ltd v. Theuri (1973) E.A. 114**, that a person holding a certificate of title has, by virtue of that title, legal possession, and can sue in trespass.

It was therefore not correct for the trial judge to hold, as he did at page 49 of his judgment, that trespass to land occurs where a person enters upon another person's land or remains upon that land without permission of the owner. The appellant had a right to bring an action in trespass as the registered proprietor of the land, on the basis that she holds a certificate of title thereto.

As to whether the respondents are trespassers, it has been established that by virtue of the fact that they could inherit Damiano Matovu's

interest in the land, they have an interest in it as beneficiaries to his estate as a bona fide occupant of the land. There is also no contest about the fact the before his death, Damiano Matovu built some structures on the land. There was also an old house that his sons occupied and another that he allowed them to build on the land.

If they were not already resident on the land before his death, as the appellant claims, the respondents entered the land in order to occupy and use the assets that the deceased left thereon as beneficiaries to his estate. They had rights to enter upon the land and use it in the same manner that their husband and father did. The question whether the 1st respondent is entitled to claim as a beneficiary would be the subject of the application for letters of administration by some of the respondents that is still pending the decision of the High Court.

I would therefore find that the trial judge made no error when he held that the respondents are not trespassers on the land in dispute, but he erred when he wholly dismissed the appellant's suit on the ground that her certificate of title was tainted with fraud.

Remedies

The appellant prayed that this court grants the following remedies in her favour: i) The orders of the High Court be set aside; ii) A declaration that she is the owner of the land in dispute; iii) An order for vacant possession of the land, and iv) The respondents pay the costs of this appeal and in the court below. I addressed them in the same order.

With regard to the prayer to set aside the orders of the lower court that there was fraud on Kasimu Isoke's part when he acquired his interest, the alleged fraud was not proved against the appellant or her predecessor in title. The trial judge therefore had no legal basis upon

which to cancel the appellant's certificate of title to the land. The order of the lower court cancelling the certificate of title for block 15 Plot 217 at Kibuli should be set aside.

As to whether this court can grant an order for vacant possession, it has been established that the respondents, or some of them are entitled to inherit Damiano Matovu's interest in the land for he was a bona fide occupant thereof. It is therefore not possible for this court to grant an order against the respondents to vacate the land. The appellant can only gain vacant possession after compensating them for the developments thereon, as it is required by Article 26 of the Constitution and section 37 of the Land Act, which provides for abandonment and termination of the occupancy. In particular, subsection (4) thereof provides as follows:

> **(4) Where the tenant by occupancy is compelled to vacate the land by reason of the fact that his or her building has been condemned or demolished by order of a body or authority authorised to do so under any enactment, then where the occupancy is in respect of land in an urban area—**
>
> > **(a) the occupant's right of occupancy shall not be taken to have been extinguished;**
> >
> > **(b) if development is not possible, owing to planning or building restrictions under any law, the occupant is entitled to assign his or her right of occupancy giving the registered owner the first option;**
> >
> > **(c) the registered owner shall have the right with the approval of the board to acquire the right of occupancy upon payment to the occupant of compensation for the right of occupancy and any development of the land, determined by a valuer appointed by the Government.**

Pursuant to clause (c) above, the parties would have the land valued upon approval of the board upon which the appellant would pay the respondents what is due to them, upon which they would exit.

Finally, with regard to costs, the appeal has partially succeeded in that the orders of the trial judge to cancel the appellant's title cannot stand. However, it is also evident that the dispute was between members of the same family who need to agree that each of them has a definite and distinguishable legal interest in the land in dispute. The trial judge therefore erred when he held that the costs of the suit in the court below would be borne by the appellant alone.

For those reasons, I would enter the following declarations and orders:

a) The appellant is the lawful registered proprietor of the mailo interest in the land known as Kibuga Block 15 Plot 217 at Kibuli in the City of Kampala;
b) The respondents, or some of them, subject to the decision of the High Court on the grant of letters of administration to the estate of Damiano Mululi Matovu, are beneficiaries to his interest in the land as bona fide occupants thereof;
c) The caveat that was lodged by the appellant to stop the respondent's application for letters of administration is hereby vacated; and
d) The parties to this appeal shall each bear their own costs in the appeal and in the court below.

Dated at Kampala this 2nd day of February 2024.

Irene Mulyagonja
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Mulyagonja and Mugenyi, JJA)

Civil Appeal No. 74 of 2015

(Arising from HCCS No. 310 of 2008 at Kampala)

BETWEEN

Banura Grace Isoke==========Appellant

AND

Dezzy Nyanjura==========Respondent No.1

Kalusha Abdhallah Frank========== Respondent No.2

Baguma Henry==========Respondent No.3

Tebezinda M Derrick========== Respondent No.4

Kizito Muhumuza========== Respondent No.5

(*Appeal from the Judgment of Murangira, J., delivered at Kampala on the 12th May 2014)*

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

[1] I have had the opportunity to read in draft the judgment of my sister, Mulyagonja, JA. I agree with it and have nothing useful to add.

[2] As Mugenyi, JA, also agrees, this appeal is allowed in part with the orders proposed by Mulyagonja, JA.

Signed, dated and delivered at Kampala this 2nd day of February 2024

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

(Coram: Egonda-Ntende, Mulyagonja & Mugenyi, JJA)

CIVIL APPEAL NO. 74 OF 2015

(Appeal from the High Court (Murangira, J) in Civil Suit No. 310 of 2008)

BANURA GRACE ISOKE ..... APPELLANT

VERSUS

1. **DEZZY NYANJURA**
2. **KALUSHA ABDHALLAH FRANK**
3. **BAGUMA ANTHONY** ..... **RESPONDENTS**
4. **REBEZINDA M. DERRICK**
5. **KIZITO MUHUMUZA**

JUDGMENT OF MONICA K. MUGENYI, JCC

1. I have had the benefit of reading in draft the judgment of my sister, Mulyagonja, JA.

2. I agree with her that this Appeal ought to partially succeed for the reasons she has advanced, and I abide the final orders proposed.

Dated and delivered at Kampala this ...2nd..... day of ...February....., 2024.

Monica K. Mugenyi
Justice of Appeal