THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 0068 OF 2007

1. **SAFINA BAKULIMYA }**
2. **KATONO HAWA }::::::::::::::::::::::::::::::::::::APPELLANTS**

VERSUS

YUSUFU MUSA WAMALA }::::::::::::::::::::::::::::::::::::RESPONDENT

[Appeal from the Judgment of His Worship Mr. Serubuga Charles (Chief Magistrate) dated 6th August 2007, in Iganga Civil Suit No. 029 of 2004.]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The appellants brought this appeal against the judgment of Mr. Serubuga Charles, sitting as the Chief Magistrate at Iganga, in which he found that a piece of land situated at Bukonko village, Bulamagi sub-county in Iganga District was the property of the plaintiff (now "the respondent"). He ordered that a permanent injunction issue to retrain the defendants (now "the appellants") from entering the suit land, and that the appellants pay the costs of the suit.

The respondent's case was that he was the son of Musa Kasolo by his wife Asafuya (Safuya) Kagoya. He claimed to have brought the suit as the attorney or agent of Safuya Kagoya who was then sickly. The appellants were the younger sisters of Safuya Kagoya, all three being the issue of Edirisa Kibwika (deceased). It was the respondent's case that by an agreement dated 24/05/1975, Musa Kasolo bought 6 acres of land at Bukonko, Buwenda, Magogo Parish in Bulamagi sub-county from his father-in-law, Edirisa Kibwika. Further that the purchase price was shs 2,000/- which Musa Kasolo paid in cash. An agreement of sale in Luganda, without a translation into English, was admitted in evidence as **Exh PI**. It was the

respondent's case that after the purchase of the land, Musa Kasolo constructed a house on it and lived there with his wife Safuya and their children, including the respondent.

It was also the respondent's case that Musa Kasolo died intestate in 1991, but none of the beneficiaries to his estate obtained letters of administration thereto. Further that his family remained in occupation of the suit land till 9/04/2004 when one Abu Muyinda (a resident of Bukonko village) led Safina Kayaga, Hawa Katono and Badiru Ssengendo (all siblings of Safuya Kagoya) to the land where they cut down banana plants, picked coffee, uprooted cassava and potatoes and felled trees. Safuya's siblings claimed the land belonged to them. After that they sold part of the land. Safuya Kagoya then authorised the respondent to file this suit to establish her rights to the land.

The appellant's case was that the land in dispute belonged to their father, Edirisa Kibwika; that when Kibwika died, all his offspring inherited the land and they had been in occupation of it since their father's death together with their sister Safuya Kagoya. The appellants claimed that the respondent, a son to their sister Safuya, later started claiming that his father bought the land. It was also the appellant's case that the respondent had never used the suit land and lived elsewhere, i.e. in Nakavule, Iganga. The appellants also claimed that their father was ill for 7 years and died in 1976. That all along they lived on the land, undisturbed. That Safuya Kagoya came to the land to look after their mother who was ill but later, her husband followed her and settled on the land. When the appellant's father died, the respondent started laying claims to the land and asserting that his father bought it. It was also the appellant's case that the respondent's father was buried on a piece of land in Nakavule, Iganga while the appellant's father was buried on the suit land. They thus claimed the land as beneficiaries of Edirisa Kibwika's estate.

The trial magistrate framed three issues for his determination as follows:

i) Whether the late Kibwika sold his land before his death.
ii) Whether the defendants inherited it.
iii) Remedies.

He then found that the late Musa Kasolo bought the suit land from the late Kibwika and ordered that a permanent injunction issue to restrain the defendants/appellants from entering the land, and that they pay the costs of the suit.

The defendants appealed and framed four grounds of appeal as follows:

1. That the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence and as such reached a wrong decision.

2. That the learned trial magistrate erred in law and fact when he decided the case without visiting the *locus in quo* thus arriving at a wrong decision.

3. That the learned trial magistrate erred in law and fact when he relied on an unauthenticated and unproven sale agreement to decide the case in the respondent's favour thus occasioning a miscarriage of justice.

4. The learned trial magistrate erred in law and fact when he ordered a permanent injunction/eviction against the appellants who had lived on the suit land for over 12 years.

In order to expedite the conclusion of the appeal I ordered the parties' advocates to file written submissions. M/s Okalang Law Chambers for the appellants filed written submissions on 15/05/2009. The respondent's advocates, M/s Mangeni Law Chambers filed a reply on 27/05/2009. The appellant's advocates filed a rejoinder on 3/08/2009.

Judgment in the appeal was supposed to be delivered on notice but after perusing all the submissions filed by both counsel, I realised that there was need for additional evidence to enable court reach a just decision in the appeal. One of the main pieces of evidence that had been adduced by the respondent in the lower court was an agreement for purchase of the land in issue written in *Luganda,* which the trial magistrate admitted in evidence as **Exh.P1** with no translation into English. It became a point of contention in the appeal with the appellant's advocates arguing that the trial magistrate should not have relied on it to come to a decision

in favour of the respondent because of the rule that the language of court is English. Since it was already in evidence, though wrongly so, in view of the constitutional requirement for the courts to administer substantive justice without undue regard to technicalities, I ordered that the document be translated into English, after which I admitted the translation into evidence as **Exh.P2,** under the provisions of Order 43 rule 22 (b) Civil Procedure Rules (CPR).

Both advocates in the appeal were notified that court had taken additional evidence and required them to submit their arguments including the additional evidence. Counsel for the appellant filed additional submissions on 19/01/2010 and the submissions were served on the respondent's advocates on the same day. However, it appears that the respondent's advocates chose not to file a reply thereto. In any event, admission of the agreement in evidence was in their client's favour. I therefore proceeded to dispose of the appeal on the basis of their submissions filed earlier.

With regard to the 1st ground of appeal, Mr. Jacob Osilo, counsel for the appellant submitted that the trial magistrate misdirected himself on the plaintiff's cause of action and the proper issues for trial. That the issue whether the late Kibwika sold his land to the respondent's father (Musa Kasolo) before his death did not go to the crux of the claim for which the respondent sought a remedy, i.e. the appellant's laying of false claims on the land in dispute, and his prayer for a declaration that the land belonged to him. Further that all the evidence on record was directed at resolving the issue whether Kibwika sold his land before his death and there was no clear evidence to prove that the appellants made false claims to ownership of the land, or that the land belonged to the respondent. Counsel for the appellants further submitted that no evidence was led to prove how the respondent acquired the land, whether by bequest/ inheritance, or purchase.

Mr. Osilo further submitted that to compound it all, the respondent's mother Safuya Kagoya testified that she was the owner of the land, being the widow of Kibwika and she authorised the respondent to bring the suit on her behalf, a fact which the respondent admitted. Further that the trial magistrate did not address this important issue and instead held that the land belonged to the respondent. He added that the appellants had no control of the proceedings in this regard because they appeared *pro se* and had no knowledge of the rules of procedure. In

his rejoinder to the respondent's submissions, he submitted that in this regard, the court ought to have addressed its mind to the provisions of Order 1 rule 8 of the CPR. He further submitted that the respondent's suit was barred by the Limitation Act

Mr. Osilo further contended that the trial magistrate misdirected himself when he ruled that the appellants breached rule 19 of the Land Tribunals (Procedure) Rules of 2002 when they failed to file a written statement of defence, and that on that ground alone he could have entered judgment against them. He submitted that on the contrary it was the court/tribunal that erred when it failed to reduce the appellant's defence into writing as is required by the Land Tribunals (Procedure) Rules.

In reply, counsel for the respondent submitted that the trial magistrate was correct in his finding that the land belonged to the respondent because of the testimonies given by the appellant's witnesses that the respondent's father came to the land as a squatter. That he followed his wife who had divorced him and stayed on the land. He added that the court should consider the evidence that after he purchased the land, the respondent's father built a semi-permanent house on it and he occupied it with his wife (PW2) and his family. Counsel for the respondent further submitted that the fact that the respondent brought the suit in a representative capacity was a new issue that could not be raised on appeal. He concluded that this court could not address it because it was not raised as a ground in the memorandum of appeal.

With regard to the appellant's failure to file a written statement of defence, counsel for the respondent argued that the trial court did not fail to exercise its duty under rule 19 of the Land Tribunals (Procedure) Rules. Though the appellant's statement in defence was to have been reduced into writing by the tribunal 21 days after they received the plaint, the tribunal did not take this seriously and entered the appellants' denial on record long after the 21 days had expired. That as a result, the absence of a WSD did not influence the trial magistrate's decision to give judgment in favour of the respondent because he merely hinted at it. He did not say that he entered judgment against them because of this fact.

Turning to the 2nd ground of appeal, counsel for the appellants pointed out that both the respondent and the appellants claimed to be in occupation of the land in dispute. He submitted that the trial magistrate or the Land Tribunal ought to have visited the *locus in quo* to clarify its mind on this fact. In reply, Counsel for the respondent submitted that the Land Tribunal visited the *locus in quo* on 17/10/04 and therefore did not find it necessary to go and visit it a second time. He added that the case at hand was not one that required a visit to the *locus in quo* because there was no need for evidence about the boundaries of the land in dispute.

With regard to ground 3 of the appeal, Mr. Osilo submitted that the trial magistrate relied on an unauthenticated agreement to come to the decision that the land belonged to the respondent. He contended that the agreement was suspect because none of the persons who witnessed its execution testified in court. He added that PW1, PW3, PW4 and PW6 all stated that they were not present when it was executed. That when PW4 was cross-examined about the agreement he testified that there was no agreement in respect of the sale. In reply, counsel for the respondent submitted that the respondent was the rightful owner of the suit land as evidenced by the agreement of sale tendered as **Exh.P1** (also **Exh.P2** in English), as well as long usage of it.

With regard to the 4th ground of appeal, Mr. Osilo submitted that the trial magistrate erred when he ordered that a permanent injunction issue against the appellants who had lived on the land in dispute for more than 12 years. Further that the trial magistrate erred in this regard because the permanent injunction was not one of the remedies that the respondent sought in the suit.

In reply, counsel for the respondent submitted that the temporary injunction was properly ordered by the trial magistrate because included in the respondent's prayers was one for any further relief that the court deemed fit to grant. Counsel for the respondent further submitted that the issue of limitation of the action was never a ground of the appeal. He asserted that counsel for the appellant could not argue this additional ground without leave of court because it was not set out in the memorandum of appeal. He further submitted that it could not be raised at this point because it was not canvassed in the trial court.

The duty of the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and coming up with its own decision. The parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law [**Father Narsension Begumisa & Others v. Eric Tibekinga, S.C Civil Appeal No. 17 of 2002 (unreported)**]. I will therefore re-evaluate the evidence on record while taking into considerations the submissions of counsel on each of the grounds of appeal. I will address the grounds of appeal in the same order that they were addressed by the advocates who represented the parties to the appeal.

Grounds 1 and 3

The submissions of counsel with regard ground 1 of appeal raised several questions (issues) of fact and law that have to be decided by this court as follows:

i) Whether the proper issues raised by the pleadings were addressed by the trial court.
ii) Whether the trial magistrate misdirected himself when he ruled that the appellants breached rule 19 of the Land Tribunals (Procedure) Rules and could have properly lost the case for failure to file a WSD.
iii) Whether **Exh.P1** (the sale agreement dated 24/05/75) was a valid agreement of sale of the land in dispute, and if so, whether it was properly admitted into evidence.
iv) Whether the testimonies of PW1, PW3, PW4 and PW6 about Musa Kasolo's purchase of the land were hearsay.
v) Whether the respondent or his mother had the *locus standi* at all to bring this action.

I will now address the sub-issues above in the same order that they appear.

i) Whether the proper issues raised by the pleadings were addressed by the trial court.

Put another way, this question could also be: Was the main issue in the suit whether the appellants laid a wrongful claim to/or trespassed on the land in dispute, or whether the respondent's father, Musa Kasolo purchased the land before his death.

It is pertinent to note that this suit was filed in the Land Tribunal at Iganga. The Tribunal took almost all the evidence but at the beginning of 2007, the file was transferred to the Chief Magistrates' court at Iganga where the hearing of evidence was completed by the Chief Magistrate who thereafter delivered judgment. The Land Tribunal did not frame any issues before it took evidence and this could be because the Land Tribunals (Procedure) Rules did not require Tribunals to do so. As a result, the trial magistrate framed the issues after he completed hearing the evidence adduced by the defendants (now the appellants). This could explain the manner in which the evidence on record, as commenced by the Land Tribunal, focused on the purchase of the land by Musa Kasolo.

Otherwise, Order 15 rule 1(5) of the CPR which governs the proceedings before the Magistrates Court (excluding Grade II Courts in some aspects) provides that at the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance. The court shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. Rule 1 (5) goes on to provide that nothing in rule 1 requires the court to frame and record issues where the defendant at the hearing of the suit makes no defence, or where issue has been joined upon the pleadings.

In this case, the defendants (appellants) made a general denial at the commencement of the hearing. Therefore, even if the tribunal had been inclined to frame issues, it could not have achieved it. I have therefore attempted to resettle the issues as I have stated them above, as required by Order 43 rule 20 of the CPR.

I agree with counsel for the appellant that the trial magistrate erred when he focused on the issue whether the appellant's father sold the land to the respondent's father before he died. I say so because in paragraph 3 of the plaint, it was stated that the respondent had sued the appellants for *"laying false ownership claims against the land in dispute,"* or rather laying false claims of ownership to the land in dispute. I am of the opinion that the main issue should have been whether the defendants laid false claims to the land in dispute. And in order to determine that issue, the trial court would have decided (as a sub-issue) or a separate issue

before that, whether the plaintiff's/respondent's father bought the land in dispute from the appellants' father before his demise.

The other issue that the court should have decided but omitted to do should have resulted from paragraph 7 of the plaint. Paragraph 7 was to the effect that the defendants and others went to the land and destroyed banana plantations, picked some coffee, harvested some potatoes and sold part of it. To my mind that meant there was an issue of trespass which was not addressed by the court. And I am of the opinion that this was a grave omission because the evidence adduced by the respondent pointed to it. Both the respondent and his mother (PW2) testified that the appellants went to the land and claimed it as their own. The respondent added that they destroyed crops thereon. There was counter-evidence on the appellants' side that they had always been in occupation of the land as well. Trespass should definitely have been an issue addressed by the trial magistrate. I therefore agree with the appellant that the trial magistrate misdirected himself on the issues for trial in the suit and this could have led him to reach a wrong decision.

ii) <u>Whether the trial magistrate misdirected himself when he ruled that the appellants breached rule 19 of the Land Tribunals (Procedure) Rules and could have properly lost the case for failure to file a WSD.</u>

In his judgment, the trial magistrate ruled as follows:

> *"I must point out that the defendants only made a general denial to the plaintiff's claim. This was before the tribunal. No written statement of defence was made and served onto the claimant. So* ***Rule 19 of the Land Tribunals (Procedure) Rules, 2002*** *was breached. No answer was made to almost all the allegations in the claim. On that basis alone, the plaintiff was entitled to judgment subject to formal proof."*

The trial magistrate then went on to evaluate the evidence on record; i.e. the sale agreement (though with no translation into English) and the testimonies of all the plaintiff's witnesses. He also evaluated the evidence adduced by the defendants and their witnesses and then

decided that the respondent proved that his father bought the land in dispute and entered judgment for him.

I did not agree that the Land Tribunal failed to reduce the appellant's defence into writing. Having received the summons and plaint on 26/04/2004 (according to the affidavit of Kirunda Charles Kaibanda dated 26/04/2004) the time within which their WSD was supposed to have been filed had expired by the time the parties first appeared in court on 7/06/2004. The record contained a copy of the summons that were served on the defendants. They were dated the 19/04/2004 and headed "Summons/Hearing Notice." They commanded the defendants/appellants to appear before the Land Tribunal at Iganga on the 7/06/2004 for the hearing of the suit.

Rule 19 (1) of the Land Tribunals (Procedure) Rules provides that the defendant may make an oral or a written statement either admitting or denying the allegations or claims, within 21 days from the date of being served with the summons. Rule 19 (2) goes on to provide that were the defendant makes an oral statement of defence the secretary shall reduce it into writing after which rule 19 (3) gives the tribunal the discretion to accept the late filing of a WSD, if the defendant shows that there was reasonable ground for the delay.

The appellants were never required to file a WSD but only to attend the hearing of the case on the 7/06/2004, which they did. I am of the view that it was for that reason that in their discretion, the members of the tribunal had the claim read to them when they appeared. The 1st appellant/defendant then stated: *"I deny the claim because the land belongs to me."* On her part, the 2nd appellant/defendant also stated: *"I deny the claim because the land in dispute belongs to me. The land belonged to our father."* It was therefore an error on the part of the trial magistrate to assume that the appellants should have filed a WSD because contrary to the rules they were never required to do so in this case. For that reason, the respondent could not have received judgment in default of filing a WSD as the trial magistrate proposed. I am also of the opinion that though the defences offered by the appellants were very brief, they were a proper representation of what they tried to lead in their evidence before the trial court. The trial magistrate's decision therefore could not have been influenced by the fact that there was no WSD filed, though he misdirected himself on that point.

iii) <u>Whether Exh.P1 (the sale agreement dated 24/05/75) was a valid agreement of sale of the land in dispute, and if so, whether it was properly admitted into evidence.</u>

There is no doubt that the decision reached by the trial magistrate was influenced by the agreement of sale that was **<u>produced by the respondent. At page 2 of his j</u>**udgement he found as follows:

> *"Even during the trial, the sale agreement was not challenged. … The fact that he was buried on the land was explained in the sale agreement, and this was hardly_rebutted. … I am satisfied that the late Musa Kasolo bought land from the late Kibwika. Due to sickness, he sold it on condition that Kasolo allows burial on the land."*

In his submissions, counsel for the appellants complained that the agreement was not authenticated and it was not properly admitted in evidence. The same complaint constituted ground three of the appeal and I will dispose of it at this point, starting with the aspect of authentication of the agreement.

A contract or agreement has been defined as an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them (Words and Phrases Legally Defined, 3rd Edition, Vol. 1, at page 337-338). In addition, in order to establish a contract, whether it be an express contract or a contract implied by law, there has to be shown a meeting of the minds of the parities, with a definition of the contractual terms reasonably clearly made out with an intention to affect the legal relationship; that is that the agreement that is made is one which is properly to be regarded as being enforceable by the court if one or the other fails to comply with it. There must also be consideration moving in order to establish the contract (Words and Phrases Legally Defined, 3rd Edition, Vol. 1, at page 338).

According to Halsbury's Laws of England, 4th Edition, Vol. 42 para. 27 no action may be brought upon any contract for the sale or disposition of land, or any interest in land, unless the agreement upon which the action is brought, or a memorandum or note of it, is in writing

and signed by the party to be charged, or by some other person authorised by him. This is a re-enactment of s.4 of the Statute of Frauds (1677). However, it has long been the position in Uganda since the decision of the Court of East Africa in the case of **Bennett v. Garvie (1917) 7 E.A.L.R. 48,** where Hamilton, CJ., held that the Statute of Frauds was not a statute of general application in the East Africa Protectorate. Therefore, in the often cited case of **John Katarikawe v. William Katwiremu & Oneziforo Bakampata [1977] H.C.B., 210 at page 213**, Sekandi, J, ruled that the position in this jurisdiction is that a buyer on an oral contract for sale of land is in the same position as a buyer on a written contract, and both are entitled to sue for damages and specific performance in the case of breach, but a buyer on an oral contract is not entitled to specific performance unless he has performed some effective act of part performance, such as taking possession of the land.

In **Ruf (TA) & Co. v. Pauwels [1919] 1 KB 660, at 670,** it was held regarding the suggestion that the words "contract in writing" import a contract made by means of a writing or writings signed by both parties, that a document purporting to be an agreement may be an agreement in writing sufficient to satisfy an Act of Parliament though it is only verified by the signature of one of the parties. From the decisions of the courts above, I came to the conclusion that **Exh.P1** could have been a valid contract for the sale of land. However, it had to be proved that Edirisa Kibwika indeed put his hand to it, or authorised some other person to put his hand on it on his behalf, as is required by law, in order to make the contract effectual against him.

As to whether **Exh.P1** was properly admitted into evidence, the record of proceedings shows that Safuya Kagoya (PW2) produced **Exh.P1** (written in *Luganda*) in court and it was admitted without question by the court. The later translation of the document (**Exh.P2**) shows that it was an agreement for the sale of land by Edirisa Kibwika to Seka (Sheik) Musa Kasolo. The document indicated that it was signed by Edirisa Kibwika in the presence of 11 persons. It was also stated in the document that all of Edirisa Kibwika's offspring were present when the document was executed. The names of the 11 other attesting witnesses were not accompanied with signatures or thumb marks; they appeared to have been placed on the document by the author, Samuel Tenywa. None of the 11 persons, including Samuel Tenywa testified about the document. PW2 who produced it did not verify the signature of the maker

– Edirisa Kibwika. Neither did any of the witnesses who testified on behalf of the respondent.

When she was cross-examined about **Exh.P1**, PW2 responded as follows:

> *"Not all the children of late Edirisa were present though the agreement says so. I am not the one who wrote the agreement. I do not know why some of my sisters did not sign. Sheik Musa Kasolo did not sign the agreement and I cannot tell why since I do not read or write. I do not know whether my mother signed although I was present. I do not know whether my father signed the sale agreement although he was present. I do not know whether the witnesses to the agreement signed on the agreement. I do not know why a postage stamp was put on the purchase agreement. It is Samwiri Tenywa who affixed it on the agreement. That is all."*

S. 66 of the Evidence Act provides for the proof of the signature and handwriting of a person alleged to have signed or written a document produced in evidence. It is there provided that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his or her handwriting. In this case, the respondent did not prove that the handwriting in **Exh.P1** was that of Samwiri Tenywa. Neither did he produce evidence to prove that the late Edirisa Kibwika was the person who affixed the signature alleged to be his on the document. It is clear from the above except from the testimony of PW2 that she did not have the capacity to testify about the contents of the document or its authors because she could neither read nor write.

With regard to attestation, s. 67 of the Evidence Act provides for proof of the execution of a document that is required by law to be attested. Ordinarily, agreements for the sale of land are attested and it was alleged that this one was attested by 11 witnesses. The provisions of s.67 are that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there is an attesting witness alive, and subject to the process of the court and capable of

giving evidence. The respondent testified that three of the attesting witnesses were still living by the time the suit was heard but they were not called to testify.

Still in relation to attestation, Hussein Mulindwa (PW5) testified that he was present when the agreement was executed, but he could not sign as an attesting witness because he was only 15 years old. He further testified that others present when the agreement was made were Yowasi Tenywa, Samwiri Tenywa, Girisomu Kaduyu, Martin Dhamuzungu, Waiswa Luvuta and Kalisiti Walube, but they were all dead by the time he testified. S. 68 of the Evidence Act provides that if no attesting witness can be found, it must be proved that the attestation of one attesting witness, at least, is in his or her handwriting, and that the signature of the person executing the document is in the handwriting of that person. This too was not done. I therefore find that it was not proved that the **Exh.P1** was indeed an agreement for sale of land that had been executed by Kibwika, or written by Tenywa. I therefore agree with the submission on the appellants' behalf that the Land Tribunal erred when it admitted **Exh.P1** in evidence.

iv) <u>Whether the testimonies of PW1, PW3, PW4 and PW6 about Musa Kasolo's purchase of the land amounted to hearsay evidence.</u>

Counsel for the appellant complained that the testimonies of PW1, PW3, PW4 and PW6 about Musa Kasolo's purchase of the land were hearsay because the 4 witnesses were only told about the sale of the land but were not present when the alleged transaction was concluded. PW1 testified that when his father bought the land, residents of the village were present and he named several of them. In cross-examination he stated that he was not present when his father bought the land. He further stated that his mother gave him the purchase agreement to enable him to pursue the suit.

PW3 testified that after Kibwika died, Musa Kasolo entered into possession of the land. He further stated that he did not know whether he bought the land or not, but that he was only told about it by village mates. When he was cross-examined, he stated that he was present when the transaction took place. He later stated that Kibiwka was not around when the land

was sold. When he was questioned by the tribunal in clarification of the contradiction he stated that he was only told about the transaction. The testimony of PW3 was therefore extremely unreliable. He seemed to have been set up to tell a story in favour of the respondent about matters that he knew nothing about or of which he only had scanty information. The testimony of PW4 did not improve the evidence about the sale of the land to Kasolo. He too testified that Kibwika told him that he sold the land to his son in law, Sheik Musa of Nakavule. Though he seemed to know a bit more about the transaction than PW3, he asserted that there was no documentary evidence in respect of the transaction, contrary to the respondent's case that he had a copy of an agreement which he produced in court to advance his claim.

Given this body of evidence on record about the alleged purchase of the land by the respondent's father, I agree that most of it was hearsay and extremely unreliable. The trial magistrate erred when he relied on the testimonies of PW1, PW3, PW4 and PW5 regarding Kibwika's sale of the land to Musa Kasolo. The purported agreement of sale, **Exh.P1,** also raised a lot of doubt because it was not proved to have been executed by Kibwika; neither was it proved to have been written by Samwiri Tenywa or attested to by any the persons named in it. In addition to that, the original of the document was never produced in evidence and no reason was assigned for the failure to do so contrary to the provisions of s. 64 of the Evidence Act. I therefore agree with counsel for the appellants that the trial magistrate erred when he found in favour of the respondent on the basis of **Exh.P1,** and he thereby occasioned a miscarriage of justice.

v) <u>Whether the respondent or his mother had the *locus standi*, at all, to bring this action.</u>

The decision I am required to make in this regard has two limbs. First of all, the respondent claimed to have brought the suit because he and his mother were occupants of the land in dispute, as well as beneficiaries of the estate of the late Musa Kasolo. If that was so, had they the *locus standi* to bring this suit? Secondly, the respondent purported to bring the suit as a representative of Safuya Kagoya, his mother and the widow to Musa Kasolo. If that was so, did he file the suit as is required by law?

Before I proceed, I am obligated to dispose of the submission that was raised by counsel for the respondent that this was an issue that had not been canvassed in the lower court. Counsel submitted that it was not a ground of appeal and therefore could not be argued without leave of court. I will deal with those questions in order to ascertain whether the question of *locus standi* can be entertained by this court.

In **Christine Bitarabeho v. Edward Kakonge, S/C Civil Appeal No. 4 of 2000,** the court re-considered the question whether the trial judge erred in law and fact in not addressing the issue of *locus standi* of the defendant, and in not finding that the plaintiff had brought the suit against the wrong party. The court upheld the decision of Berko, JA. that a new point raised for the first time in a court of last resort ought not to be entertained unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. I must therefore consider whether the pleadings and the evidence on record support the new sub-issue of *locus standi* raised in this appeal.

There is no doubt from the plaint filed by the respondent that he brought the suit in his own behalf. In the plaint he stated that by an agreement of sale (Annex "A") his deceased father, Musa Kasolo, bought the land in 1975 from Edirisa Kibwika, also deceased. In paragraph 6 of the plaint he alluded to his occupation of the land together with other members of his family. He then charged that on 9/04/2004, the appellants (and others not sued) entered onto the land and destroyed as well as harvested crops on it. He prayed that the court declares that the land belongs to him, makes orders as to costs and grants any other relief deemed fit.

However, when he testified before the Land Tribunal, a material fact changed. He maintained all that was in the plaint but also stated that it was actually his mother in occupation of the land when the appellants and others trespassed on it. Further that it was she that authorised him to file the suit. In spite of this, he maintained in cross-examination that the land was his property. In clarification to the tribunal he stated that his mother authorised him to bring the suit because she was sickly. He went on to testify that no letters of administration were obtained in respect of his father's estate.

The testimony of Kagoya (PW2) supported the claim. She testified that she was in occupation of the land being the widow Musa Kasolo who purchased it from her father, Edirisa Kibwika. Hussein Mulindwa (PW5) and Bumali Bamane (PW6) confirmed that her husband built on the land and since 1975/76 she had been in occupation thereof.

The facts pleaded and the evidence adduced by the respondent in the lower court disclosed two causes of action. The first was in trespass; that while the respondent's family was in occupation of the land, the appellants, and others not sued, entered onto it and harvested as well as destroyed crops. The second cause of action was that the respondent alleged to have inherited the land from his late father and therefore was the owner thereof. It is however important to note that the respondent made no specific claim for his mother on whose behalf he claimed to have filed the suit. Nonetheless, I came to the conclusion that both the pleadings and the evidence on record were sufficient to enable this court to dispose of the issue of *locus standi*.

The respondent and/or his family had been in occupation of the land since 1975 and no doubt had interests in it, if nothing else, as bona fide occupants thereof. In order to bring an action in trespass, one must either be in actual or constructive possession of the land, or have title thereto. In **Justine Lutaya v. Stirling Civil Engineering Co. Ltd. Civil Appeal No. 11 of 2002** (unreported), the Supreme Court of Uganda quite exhaustively dealt with the parameters of the tort of trespass to land. Mulenga, JSC had this to say:

> *"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. …"*

I therefore find that both the respondent and his mother Asafuya Kagoya had *locus standi* to bring the suit since they were in actual or constructive possession of the land.

The right to bring the suit could have also arisen by virtue of the respondent and his mother being beneficiaries to the estate of the late Musa Kasolo. The respondent and his mother would then be subject to the rule in s.191 of the Succession Act which provides that:

> **"**Except as hereafter provided, but subject to section 4 of the Administrator General's Act, **no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.**"
>
> **{Emphasis added}**

The respondent testified that no letters of administration had been granted by the time the suit was filed. He however brought the suit claiming to be the owner of the land since he had inherited it from his late father. The provision above would mean that neither the respondent nor his mother had the *locus standi* to establish their rights to the land in any court of law. In **Sekiel Nsindika v. Seperanzi Tindibuhwa [1977] HCB 34**, the respondent who was the daughter of the deceased owner of the land, but was neither in occupation thereof nor in possession of letters of administration brought an action for trespass against the appellant. Allen, J. held that the only person who could properly dispute the ownership or occupation of the deceased's land would be the legal representative of the deceased's estate and/or the occupant of the piece of land. Since the respondent and his mother claimed to be in occupation of the land, they both had the right to bring an action in court for the tort of trespass. However, the trial magistrate completely ignored the claim in trespass by the respondent and went on to rule over his purported ownership of the land. I therefore find that in that regard, the trial magistrate misdirected himself. Neither the respondent nor his mother

had the right to claim ownership without letters of administration or probate to a will of the deceased.

Having established that the respondent could bring the suit as an occupant of the suit property; did he rightly sue on his mother's behalf as he claimed in his testimony? The suit was filed in the Land Tribunal and the Land Tribunals (Procedure) Rules applied to it. The rules made no provision for representative actions but rule 62 thereof provides that where those rules are silent on any matter, the CPR apply with necessary modifications. Order 8 rule 8(1) of the CPR provides that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. The respondent did not obtain leave of the tribunal to sue on behalf of his mother. He therefore could not claim to have sued on her behalf. He brought the suit wholly on his behalf and never as a representative of his mother. Nonetheless, both the land tribunal and the trial magistrate omitted to investigate the cause of action that he had based his claim on and made no decision on it. He therefore appears to have got no remedy by his suit.

Ground 2

As to whether the trial magistrate erred in law and fact when he decided the case without visiting the *locus in quo,* such visits are provided for by rule 28 of the Land Tribunals (Procedure) Rules. The tribunal had the discretion to visit the land in dispute either on the motion of the parties, or on its own motion. Visits to the *locus in quo* are also provided for by Practice Direction No. 1 of 2007, where guideline 3 provides that during the hearing of land disputes the court should take interest in visiting the *locus in quo*, and lays down what should happen when it does so. However, a visit to the land in dispute is not mandatory. The court moves to the *locus in quo* in deserving cases where it needs to verify the evidence that has been given in court, on the ground. It is my view that such visits are necessary to enable the court to determine boundaries of the land in dispute or the special features thereon, especially where this cannot be reasonably achieved by the testimonies of the witnesses in court.

The record showed that the Land Tribunal visited the land in dispute on the 11/10/2004, before the ruling on an application for a temporary injunction was delivered. Though the

record for that application (Miscellaneous Application No. 05/2004) indicates that the visit occurred, there is no consistent record of what transpired. The testimonies of the persons who testified were not recorded. However, the tribunal delivered its ruling based on what they observed at the *locus in quo*, that the applicant (respondent herein) had no crops on the land that faced imminent danger of being destroyed. The tribunal therefore declined to grant him the injunction. When the suit was transferred to the magistrates' court, none of the parties applied to have another visit conducted. I believe the court also did not think it necessary to visit the land in dispute.

As to whether the court reached a wrong decision because the land in dispute was not visited, I am of the view that the court gathered sufficient evidence in court to enable it reach a conclusive decision. The parties each gave evidence about their interests in the land and altogether 11 witnesses testified. There was no dispute about the boundaries of the land and no decision needed to be made on that issue. The parties were in dispute over the ownership of the whole piece of land and that was settled at 6 acres.

Evidence was also adduced about occupation of the land and it appeared from both sides that all the parties each occupied or utilised a portion of the land, which was consistent with the fact that they were related to each other, being the descendants of the late Edirisa Kibwika. I therefore came to the conclusion that the error in the decision of the trial magistrate and the tribunal arose not because of a failure to visit the land in dispute, but from the failure to properly frame the issues and properly evaluate the evidence on record in order to come to a correct decision.

Ground 4

The compliant in this last ground was that the learned trial magistrate erred in law and fact when he ordered a permanent injunction and eviction against the appellants who had lived on the suit land for over 12 years. Two questions arise for decision from this ground. The first is whether the court properly granted a permanent injunction which was not one of the remedies that the respondent sought. The second is whether the issue of limitation of the action can be canvassed in this appeal.

While summarising the cause of action in his judgment, the trial magistrate stated that the suit was in trespass. In spite of that, he discussed evidence that wholly dealt with Musa Kasolo's purchase of the land, completely ignoring the issue of trespass alleged against the appellants. However, at the end of the evaluation of evidence he stated: *"I find for the plaintiff on the balance of probabilities."* To my mind, this meant that he found that the plaintiff was entitled to the declaration that the land belonged to him, as prayed in the plaint. It could also be inferred from that general finding that he found that the appellants trespassed on the land in dispute. His finding was ambiguous and thus confusing but after that the trial magistrate granted the plaintiff/respondent a consequential remedy, a permanent injunction to restrain the defendants and their agents and assignees from entering onto the land.

I am of the opinion that the trial magistrate could have properly made the order for the injunction as a consequence of his findings even in the absence of pleadings. It is provided in s.33 of the Judicature Act that the High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it. This is done so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided. Though the Judicature Act refers specifically to the High Court, I am of the opinion that the duty to ensure that a multiplicity of actions is avoided is also cast on the magistrates' courts. Courts therefore have the discretion to craft remedies to dispose of suits to ensure that substantive justice is administered without undue regard to technicalities.

Turning to the issue of limitation, it was contended by counsel for the appellants that the trial magistrate ignored the fact that the appellants had stayed on the land for more than 12 years when the injunction was ordered against them. On the other hand, counsel for the respondents contended that the question of limitation could not be raised on appeal since it was a new one that had not been canvassed in the trial court. I have already ruled following the decision in **Christine Bitarabeho v. Edward Kakonge** (supra) that that a new point raised for the first time in a court of last resort ought not to be entertained unless the court is

satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.

Review of the evidence that was adduced by the appellants established that they lived on the land since they were born, Safina Bakulimya for 60 years and Hawa Katono for 48 years. Their testimonies were not challenged in cross-examination. The two witnesses who testified on their behalf confirmed this. The appellants established that even in the short run i.e. since 1975/76 when their father Edirisa Kibwika died to the time of the suit, they lived on the land and their occupation was never challenged by the respondent. I therefore find that the evidence on record established that they were in occupation of the land for more than 12 years before the suit was filed against them. The issue of limitation, which is one of both fact and law, can therefore be disposed of by this court.

A further conclusion that I drew from the record with regard to this particular point of law was that the trial magistrate's evaluation of the evidence was flawed. The parties in the suit were all not represented by advocates, which called for more care on his part in evaluating the evidence adduced by both sides. The trial magistrate erred when he failed to evaluate any of the evidence adduced by the appellants regarding their rights to the land. He failed to take cognisance of the important testimony of DW2 that Safuya Kagoya had equal rights to the suit property as both appellants had because she too was a daughter to Edirisa Kibwika.

Though the plaint alluded to trespass on the land in dispute by the appellants that occurred on 9/04/2004, a date within the 12 years allowed to file the suit, the trespass was never proved. Instead the court dwelt on the respondent's alleged ownership of the land which was adverse to the appellants' occupation thereof for more than 12 years.

In **Mohammad B. Kasasa v. Jasphar Buyonga Sirasi Bwogi, C/A Civil Appeal No.42 of 2008**, the court cited with approval the decision **In Re An Application by Mustapha Ramathan, Civil Appeal No.25 of 1996** where Berko, JA., stated:

> *"Statutes of limitations are in their nature strict and inflexible enactments. Their overriding purpose is* ***interest republicae ut sit finis litum,*** *meaning*

that litigation shall be automatically stifled after fixed lengths of time, irrespective of the merits of the particular case. A good illustration can be found in the following statement of Lord Greene M.R in ***Hilton Vs Sutton Steam Laundry [1946] 1 KB 61 at page 81*** *where he said-*

> *"But the statute of limitations is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights."*

As a result, I do find that the respondent's claims for ownership of the land, and therefore the subsequent injunction that was granted in his favour against the appellants was granted long after his rights to bring any action against them had been brought to an end by expiry of time.

In conclusion, this appeal succeeds. The judgment and orders against the appellants dated the 6th August 2007 are set aside with costs to the appellants. The persons entitled as beneficiaries shall deal with the estate of the late Edirisa Kibwika in the ordinary manner, i.e. by taking out letters of administration thereto. Legal claims against the said estate by the respondent (if any) may then be settled against the administrators of the estate.

Irene Mulyagonja Kakooza
JUDGE
15/06/2010