FAMILY CAUSE NO. 179 OF 2009

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 003 OF 2008

1. **SOPHATIA BEIHI**
2. **NGOBI FRED**
3. **MUTAKA TOM**
4. **JOSEPHINE KAIRU::APPELLANTS**

VERSUS

1. **NANGOBI JANE**
2. **NANGOBI ROSE**
3. **IRENE WAMBI ::: RESPONDENTS**

[Appeal from the Judgment of His Worship Mr. Zansanze Ismail (GI) in Iganga Civil Suit No.0027 of 2005]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The appellants who were the defendants in the suit in the lower court brought this appeal against the judgment and orders of Mr. Zansanze Ismail, sitting as Principle Magistrate Grade I at Iganga, in which he declared that the land in dispute belongs to the plaintiffs (now the respondents). He also ordered that a permanent injunction issue against the appellants restraining them from trespassing on the suit land and that they pay general and special damages to the respondents for trespass as well as the costs of the suit. It was further ordered that the 4th appellant was entitled to a refund of the money she had paid to the 1st, 2nd and 3rd appellants for purchase of the property.

The facts which led to the dispute as deduced from the evidence on record are that the land in dispute, which has several buildings on it and is situated at Magamaga Trading Centre in Mayuge District, was the 1st appellant's property. The respondents are all the daughters of the 1st appellant while the 2nd and 3rd appellants are his sons. Sometime just before Christmas in the year 2000, the 1st appellant summoned his daughters, Rose and Jane to Magamaga so that he could introduce them to the LCs of the area because his health was failing and he was very weak. He also requested them to take him certain commodities which he planned to use while he was "still alive." The 1st and 2nd respondent responded to their fathers request and went to Magamaga. While there, on 15/12/2000 the 1st appellant executed a document in which he "bequeathed" to his daughters a piece of land measuring 60 x 198 feet, now the land in dispute. By a separate document executed on the same day, the 1st appellant "bequeathed" another piece of land measuring 260 x 600 feet to his sons including the 2nd and 3rd appellants.

It was the respondents' case that by the deed dated 15/12/2000 their father had given them the land in dispute and they took possession thereof and constructed tenements thereon. They left their sister Irene Wambi, the 3rd respondent, in occupation thereof to safeguard the land and building. The respondents also claimed that sometime in 2005, the 2nd and 3rd appellants instigated the 1st appellant and together with him sold off the land he had given to the respondents to the 4th appellant. That subsequent to the sale, the 4th appellant evicted the 3rd respondent from the premises thereon. The respondents thus challenged the sale and the 4th appellant's possession of the property in this suit which was originally filed in the Iganga District Land Tribunal but was transferred to the Magistrates Court when the operations of the tribunals were suspended.

The 1st appellant's case was that he did not give away land to the respondents but only left them in occupation as trustees thereof. That subsequently, he withdrew his instructions to the respondents to act as his trustees and sold off the land to the 4th respondent. It was also the 1st appellant's case that he was not duty bound to give land to the respondents because they are women. The 2nd appellant's case was that he owned a part of the land that was sold measuring 60 x 47 feet which he claimed had been given to him by the 1st appellant in 1994. It was also his case that after he got that piece of land he constructed a house on it. He admitted that in 2005, he

and the 1st appellant who owned the rest of the land got together and agreed to sale it to the 4th appellant at a purchase price of shs 10,000,000/=.

The trial magistrate framed three issues for determination, i.e. whether the plaintiffs (the respondents) proved their claim against the defendants (the appellants); whether or not the 4th defendant (appellant) acquired good title to the suit land and whether the plaintiffs were entitled to the remedies claimed. He found for the plaintiffs on all three issues and made the orders that I have mentioned above. The defendants appealed and raised 6 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. The learned trial magistrate erred in law and fact and occasioned a miscarriage of justice when he based his decision on fraud which had neither been specifically pleaded nor proved during the trial.

3. That the trial magistrate erred in law and fact when he failed to visit the locus in quo to verify the evidence of the plaintiffs thereby reaching a wrong decision that the 2nd and 3rd defendants sold the suit premises in connivance with their father.

4. That the trial magistrate misdirected himself and reached a wrong decision by failing to interpret ExP2 and holding that it gave the plaintiffs ownership over the disputed land when the said document was a bequeath (sic) and hence revocable any time.

5. That the trial court erred in law in awarding special and general damages without any proof.

6. That the trial magistrate erred in law and fact when he relied on the plaintiffs' testimony that they acquired the said land from their father (D1) as a gift *inter vivos* thereby arriving at a wrong decision.

The advocates for both parties filed written arguments to expedite disposal of the appeal as was ordered by court. Though they first filed submissions in June 2009, perusal of those submissions showed that there was contention about the interpretation of documents in Luganda that the trial court had admitted in evidence without translations in English and on which the decision in the case turned. Since the trial court erred in this respect, in the interests of justice, I ordered that Mr. Kalera Tonny, then a clerk at this court, render a neutral translation of all the relevant documents from Luganda to English. The translations of all exhibits that has been admitted in evidence by the trial court were then admitted as additional evidence under Order 43 rule 22 (1) (b) of the Civil Procedure Rules. After this was done court ordered both counsel to file another set of submissions taking the translated documents into consideration. M/s Okalang Law Chambers then filed submissions for the appellants on 6/10/2009. Kaggwa-Balisanyuka & Co., Advocates filed a reply for the respondents on 6/11/2009. The appellants' advocates filed a rejoinder on 1/12/2009.

In his submissions Mr. Jacob Osilo who represented the appellants addressed grounds 1, 4 and 6 together and the rest of the grounds separately. In support of grounds 1, 4 and 6 of the appeal, Mr. Osilo argued that the trial magistrate did not evaluate the evidence properly because the evidence adduced by the respondents did not prove trespass on their land. He argued so because they had already been evicted from the land by the time they filed the suit. It was therefore Mr. Osilo's view that the respondents' claim for a permanent injunction had been overtaken by events and was thus misconceived.

Mr. Osilo further argued that the trial magistrate did not properly evaluate the evidence because he relied on the scanty evidence of the respondents that their father gave them the land in dispute by virtue of Ex.P2 and Ex.P1, a letter by which he invited them to Magamaga to hand over the land to them. Mr. Osilo contended that the trial magistrate wrongly interpreted Ex.P2 to be a deed of gift yet it was a will in which the 1st appellant bequeathed the land to the respondents. He contended that the land could not have been a gift *inter vivos* and the trial magistrate wrongly held so because bequests in a will only take effect after the death of the testator. He also challenged the validity of the translation of Ex.P1 and P2 into English which court ordered

because the appellants were not given an opportunity to cross-examine the person who translated the Exhibits.

Mr. Osilo further attacked Ex.P1 because it was a document with no date. It was his view that for that reason it was unreliable and could not be an accurate representation of the transactions over the land in dispute. He further contended that though Ex.P4 was admitted in evidence to show that the 1st appellant halted the sale of the land to the 4th appellant there was no evidence that the 4th appellant received a copy of it before she bought the land. Mr. Osilo thus concluded that the 4th appellant was a bona fide purchaser of the land in dispute without notice of any fraud and therefore grounds 1, 4 and 6 should succeed.

In support of ground 2 of the appeal, Mr. Osilo submitted that under Order 6 rule 3 of the Civil Procedure Rules (CPR) fraud must be specifically pleaded and proved. He contended that the respondents did not plead fraud nor adduce evidence to prove it. That as a result, the trial magistrate erred when he based his decision in favour of the appellants on fraud.

Turning to the third ground of appeal, Mr. Osilo asserted that there were several issues that required verification of evidence at the *locus in quo* such as the contradictions in the testimonies of the 1st respondent and the 2nd appellant about the size of the land in dispute. That while the 1st respondent stated that the land that the 1st appellant gave to his sons was bigger than what he gave to his daughters (64 x 198 feet) the 2nd appellant testified that the appellant gave him land measuring only 60 x 47 feet. That in addition, there were further contradictions about the number of houses on the land. Mr. Osilo concluded that all these contradictions in evidence would have been resolved by the court if the trial magistrate visited the *locus in quo*; that had he done so, he would have reached a different decision.

In support of the 5th ground of appeal, Mr. Osilo contended that the respondents did not produce any evidence to prove that they were evicted from the land or that they suffered any loss from an eviction. Further, that because the respondents failed or omitted to produce a list of properties lost during the eviction, the evidence on record left doubt the about losses that they alleged. Mr.

Osilo further contended that the respondents did not plead special damages nor prove them. That as a result the trial magistrate erred when he awarded them both general and special damages.

In reply to the appellant's submissions on ground 1, Mr. Ngobi argued that the respondents correctly brought a suit in trespass because by the time the 4th appellant evicted the 3rd respondent from her shop on the suit premises she was still in occupation thereof. She thus properly claimed damages for loss and destruction of her property. He concluded that in the circumstances an action in trespass and the claim for a permanent injunction against the appellants were appropriate and not misconceived in law and so the respondent did not have to seek a declaration of ownership of the property.

With regard to grounds 4 and 6 of the appeal, Mr. Ngobi submitted that although Ex.P2 referred to the donation a bequest the trial magistrate correctly interpreted it as a deed by which the 1st appellant gave the land in dispute to the respondents as a gift *inter vivos*. He asserted that the 1st appellant confirmed this in his testimony when he referred to his own action as "giving land" to his daughters. Mr. Ngobi further argued that the respondents gave consideration for the gift by providing necessaries to their father and as a result he could not take away what he had already given them. He further argued that the respondents took possession of the land and built a house on it. Further that the 1st appellant tried to stop the 2nd and 3rd appellants from selling the land to the 4th appellant when he signed Ex.P4 because he realized that the respondents had an interest in it.

It was also Mr. Ngobi's contention that since the 2nd and 3rd appellants sold off the land that the 1st appellant gave them at the same time that he gave the disputed land to the respondents, it was implied that the respondents also had a right to keep their share of the land. He argued that court should take judicial notice of the fact that under the customary law of the Basoga, as is the case in other arrears of Uganda, offspring have a right to acquire a share of their parents' land. Mr. Ngobi thus concluded that the conduct of the 1st appellant in the circumstances was discriminatory of the respondents because they are women and contrary to the provisions of Articles 33, 34 and 35 of the Constitution of Uganda. He added that such treatment was also prohibited by s.27 of the Land Act. Mr. Ngobi then concluded that the trial magistrate properly

evaluated the evidence on record and came to the correct decision that the respondents were the owners of the suit land having acquired it from their father as a gift *inter vivos*.

Turning to ground 2 of the appeal Mr. Ngobi submitted that the finding of the trial magistrate that the 1st, 2nd and 3rd appellants' sale of the land to the 4th appellant was fraudulent should be upheld. He argued so because when the respondents first complained about the sale the 1st appellant wrote Ex.P4 to halt it and that document was widely circulated. He pointed out that the 4th appellant admitted that she heard about this but ignored it and went ahead to pay the balance of the purchase price to the appellants and conclude the sale. Mr. Ngobi argued that this was fraudulent and though fraud was not specifically pleaded in the respondent's claim or framed as an issue, the court could make a finding on it on its own motion based on the evidence that was adduced about the conduct of the parties. He relied on the decisions in **Jabir & Another v. Jabir & Others H/C C/A No. 1/2003** where it was held that even if fraud was not specifically pleaded, on the basis of the conduct of the parties, it would be incumbent on a court of justice to find that there was fraud under s.98 of the Civil Procedure Act and Article 126 (2) (e) of the Constitution.

While arguing ground 3 of the appeal Mr. Ngobi submitted that no injustice was occasioned by the failure of the court to visit the *locus in quo*. He argued that in this case the issues for determination related to a piece of land that was clearly defined and distinct in terms of its boundaries and measurements and that these were known to all the parties to the suit. It was thus Mr. Ngobi's submission that the trial magistrate was right when he changed his mind and left out the visit to the *locus in quo* because none of the parties had applied to court to have such a visit conducted. That in the circumstances the court correctly followed the provisions of Rule 28 (1) of the Land Tribunal Procedure Rules of 2002.

Going on to ground 5, Mr. Ngobi submitted that the trial magistrate properly awarded general damages because the testimony of the 3rd respondent and the photographs that were admitted in evidence as Ex.P1A and P1B proved that she was evicted from her shop and her property scattered and destroyed. He however conceded that the trial magistrate erred when he awarded special damages to the respondents because they were neither pleaded nor proved.

The duty of the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and to come up with its own decision. The parties are entitled to obtain the court's own decision on issues of fact as well as of law. [See and **Father Narsension Begumisa & Others v. Eric Tibekinga, S/C Civil Appeal No. 17 of 2002 (unreported).**] I shall now deal with the arguments raised by counsel in respect of the grounds of appeal. I will address grounds 1, 4 and 6 together since they all relate to the evaluation of evidence and grounds 2, 3 and 5 separately.

Grounds 1, 4 and 6

It was argued for the appellants that the respondents claim for a permanent injunction was misconceived because they had already been evicted from the disputed property by the time they filed the suit. In paragraph 8 of the claim, the respondents claimed that they were in occupation of the disputed land since 2000 when it was given to them by the 1st appellant. That they began to hear about the 2nd and 3rd appellants' plans to sell off the disputed piece land in 2005 after they (appellants 2 and 3) sold off the land that their father had given them in the same area. The respondents complained to the 1st appellant who on 11/12/2005 issued a notice (Ex.P4) to halt the transaction. In spite of that notice, the respondents received an eviction notice from Jinja Associated Advocates who wrote on behalf of the 4th appellant and informed them that she was the new owner of the disputed land. It was then that they filed this suit in the District Land Tribunal on 19/12/2005.

In paragraph 9 of the statement of claim the respondents stated that the 2nd and 3rd appellants threatened and intimidated them on the ground that they were daughters of the 1st appellant and that according to custom, they were not entitled to share in their father's land. They further stated as follows in paragraph 11 of the statement of claim:

> "The plaintiffs shall further aver that the 4th defendant ***<u>has</u>*** no colour of right to evict them from the suit land/premises as they are the bona fide occupants duly protected by the Constitution of Uganda and the Land Act, Cap 227."

The respondents then prayed that a permanent injunction be issued to restrain the appellants and their agents from evicting them from the suit land, and that general damages be awarded to them.

The evidence on record bore this out. By the testimony of the 1st respondent (PW1) the respondents proved that they were in occupation of the suit land through their sister, Irene Wambi. Irene Wambi (PW3) testified that she was evicted from the land by the 4th appellant's agents. She produced photographs (Ex.P1A and P1B) to show that she was so evicted. Though she did not state when she was evicted, it could be inferred from the pleadings that it was after the suit was filed because in the statement of claim, the respondent stated that there were threats of or an impending eviction and it was the reason why they filed the suit. Indeed the record of proceedings shows that on the 27/09/2006, long after the suit was filed, the respondents filed an application for a temporary injunction pending the disposal of the suit before the Land Tribunal. Also that on the same date an *ex parte* order for an injunction was granted to restrain the respondents and their agents from alienating, wasting, damaging or tampering with the suit premises. I therefore find that the respondents' claim in trespass and the prayer for a permanent injunction were in order in the circumstances obtaining at the time of filing the suit and the trial magistrate was therefore correct when he entertained the suit.

Regarding the question whether the 1st appellant gave land to the respondents as a gift *inter visos*, and the contention that the trial magistrate misinterpreted Ex.P2 and thus erred in the evaluation of evidence, I think that these two questions be best resolved by a review of the law on gifts and by examining the contents of Ex.P1 and Ex.P2.

Osborn's Concise Dictionary of Law (Ed. 7th, Sweet and Maxwell) defines a gift as a gratuitous grant or transfer of property. It has also been defined as something that is bestowed voluntarily without compensation. For a valid gift there must be an intention to give and such acts as are necessary to give effect to the intention, either by manual delivery of the chattels or of some token on the part of the subject matter, or by change of possession as would vest possession in the intended donee. It may be by deed. A gift may be made during the life of the donor, i.e. *inter vivos*, or *causa mortis*, i.e. in anticipation or contemplation of death. A gift made during the life

of the donor may be absolute and immediate or effected on the fulfilment of certain conditions. A gift *inter vivos* cannot be revoked.

The apprehension of an individual that his or her life will be ended in the immediate future by a particular illness the person is suffering from or by an imminent known danger which the person faces may cause one to dispose of his property. This is provided for by s.179 (2) of the Succession Act. The phrase "in contemplation of death applies" to a gift of property made by its owner who expects to die shortly, the gift being motivated solely by the thought of his or her demise. Such transfers are considered akin to testamentary dispositions since they are ineffective unless the owner dies but differ in that the owner must die within a reasonable time from the making of the gift. I shall now examine the documents by which the respondents claimed to have received a gift of the land in dispute.

On an unknown date, the 1st appellant wrote to one of his daughters as follows:

> *"Izinga*
> *To my child Jeni Mpindi.*
> *How are you? Well done my child. I have written this letter to request you to come with your sister Rose Nakirya so that I take you to Magamaga to introduce you to the residents of the village and the local authorities/officials because my health has started deteriorating. I can no longer perform domestic work.*
> *The things I requested from you, bring them for my use while I am still alive. These include two bed sheets, two shirts, two trousers, underwear and vest, slippers, size 10, glass case for the hurricane lamp, a mat, dry cells for the radio. Also bring me shs 30,000/=, each of you shs 15,000/= to enable me to get treatment because I am weak now and of very poor health and cannot perform domestic work.*
>
> *Greetings to my grand children.*
> *Good bye, signed: Your father Beihi*

I wish you a merry Christmas and peaceful New Year. God be with you together with the people at home. Amen."

According to the 1st respondent, she and the 2nd respondent went to Magamaga as requested. The 1st appellant, his sons and daughters and elders convened at the suit land. The land was measured and the 1st appellant gave one piece to the female offspring and a bigger piece to the male offspring. On the 15/12/2000, the 1st appellant executed the following document:

"Magamaga Trading Centre
15th June 2000
I, Beihi Sofatiya, I have bequeathed to my daughters a plot located at the tarmac road, neighbouring Mr. Kiribaki Kasani measuring 60 feet in width and 198 feet in length. They should safeguard it.

I am their father, Beihi Sefatiya

In the presence of:
Nseete Samuel ……………signed
Waidha Richard…………..signed
C. Mwenda………………..signed"

Following this, the respondents took possession of the land measuring 60ft. x 198ft. and their brothers took possession of another piece of land measuring 260ft x 600ft., pursuant to another document that was executed on the same day (Ex.P3). The respondents built buildings on the land including tenements. The 3rd respondent lived in one of the tenements and she had a shop in that building. On their part, the 2nd and 3rd appellants sold off the land that was allotted to them.

The trial magistrate found that the donation to the respondents was a gift *inter vivos* and they were entitled to keep it. However, that was an error in view of the fact that the gift preceded Ex.P1 which showed that the 1st appellant gave away the land because he feared that he did not have long to live. This could be inferred from the expression "while I am still alive." Section 179

(1) of the Succession Act provides that a man may dispose of any ***moveable property*** which he could dispose of by will by a gift made in contemplation of death. But it seems that in Uganda, such gifts are limited to moveable property only. In addition, s. 179(3) of the Succession Act provides that a gift made in contemplation of death may be resumed by the donor. Also that such a gift will not take effect if the donor recovers from the illness during which it was made or if he survives the person to whom it was made (s. 179 (4) Succession Act).

As a result, the land could not be a gift in contemplation of death because of s. 179(1) of the Act. But even if it was such a gift it could have been resumed because the 1st appellant did not die. In conclusion, the donation was a bequest and as such it could not take effect until the death of the donor. In this case, the 1st appellant did not die. The respondents could not take benefit of the bequest in those circumstances.

With regard to counsel for the appellant's contention that Ex.P1 was not reliable because it was not dated, it will be noted that though it was not dated, the letter referred to the Christmas season. Indeed the respondents went to Magamaga shortly before Christmas since the alleged donation of land was made on the 15/12/2005, just 9 days before Christmas Day. Ex.P1 was therefore a reliable document and from it, it could be inferred that the respondents answered their father's request to visit him during or before the Christmas season.

As to whether the items that the 1st appellant requested for in his letter would amount to consideration for the land, although the 1st respondent testified that they took those items to him, I am of the view that they could not amount to sufficient consideration for the land. The 1st appellant informed his daughters that he was ill and weak and could no longer work. He requested them to take him clothes and other household commodities that he intended to use "while still alive." From the evidence on record it can only be inferred that his daughters gave him those items because he was their father and they felt they were duty bound to support him during his illness; they gave out of natural love and affection. The respondent's support to their father definitely could not be construed to amount to consideration for the land in dispute.

In conclusion, the 1st appellant was at liberty to change his mind and either give away the land to another by will, as a gift *inter vivos* or sell it for other consideration. But this he could only do so subject to the respondents' usufruct rights as his daughters and to their developments on the land. I therefore find that the trial magistrate erred when he found that the land was given to the respondents as a gift *inter vivos*. Grounds 1, 4 and 6 of the appeal are therefore answered in the positive.

Having found so, it is pertinent to explore Mr. Ngobi's contention that the 1st, 2nd and 3rd appellants' treatment of the respondents over this piece of land was discriminatory and contravened the provisions of Articles 33, 34 and 35 of the Constitution and s.27 of the Land Act. The 1st appellant clearly treated his daughters in a discriminatory manner. Ex.P3 shows that while he gave his sons land measuring 260ft x 600ft, he gave the daughters a smaller piece measuring 60ft x 198 ft. And while the daughters developed the smaller piece of land by building tenements thereon, the sons sold off their bigger piece of land and wasted the proceeds on alcohol. The daughters also developed his piece of land in Namwiwa by building a house in which the 1st appellant admitted their brother was resident at the time of the suit. The respondents showed that they were responsible daughters; when he was ailing the 1st appellant relied on them to support him and they did so. However, the 1st appellant did not seem to think that his sons' behaviour was improper. He instead endorsed their careless behaviour by allowing them to go ahead and sell the piece that he had entrusted to his daughters. In Ex.D3 that discrimination was made very apparent where the 1st appellant wrote:

> *"I had entrusted the responsibility over the house and a plot at Magamaga Central to my daughters Jane Mpindi and Rose Nakirya to take care of them hoping that they will take care of their brothers but I have realised that they have failed to discharge their obligation. My sons continue to suffer. I have today the 10/10/2003 decided to entrust the responsibility over all my property at Magamaga to my sons (Fred, David, Robert and Thomas). Whatever they decide as my sons is what shall be done."*

There was no evidence to show that the 1st appellant had any justifiable reason for recalling his trust in his daughters. Neither was there evidence to show that his sons were suffering. However, in his testimony, the 1st appellant unequivocally stated that he was "not duty bound to give his land" to the respondents because they were *only* daughters. I therefore find that though the 1st appellant's change of heart seems to have been justified by law because the donation of land did not constitute a gift *inter vivos*, the 1st appellant's behaviour contravened the provisions of Articles 33(4) of the Constitution of the Republic of Uganda.

As to whether the 1st appellant's treatment of the respondents contravened the provisions of the Land Act, s. 27 thereof protects the rights of women, children and persons with disability to use of land held under customary law as follows:

> **"Any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally, shall be in accordance with the customs, traditions and practices of the community concerned, except that a decision which denies women or children or persons with a disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void."**

It now has to be established whether the land in dispute is land that was held under customary tenure. S.3 (1) of the Land Act defines customary tenure as a form of tenure that is:

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, S/C Civil Appeal No. 2 of 2007**, it was held that in order to prove that land is held under customary law, the party alleging so has to adduce evidence to prove the customary rules of the area as is inferred in s. 27 (1) (b) of the Land Act. In that case it was held that the respondents had failed to establish that they were occupying the suit land under customary tenure because they adduced no evidence to show under what kind of custom or practice they occupied it and whether that custom had been recognized and regulated by a particular group or class of persons living in the area. Similarly, the respondents in this case did not adduce any evidence to show that the land in disputed was held under any definite customary rules. They are therefore not protected by s.27 of the Land Act.

Nonetheless, the respondents had an interest in the land because they had developments thereon. After they took possession of it they built a house and other tenements without any resistance from their father. I therefore find that the respondents were licensees on the land whose interests had to be protected. This is in line with the provisions of Article 26 of the Constitution which guarantees the right to property. It is also a cardinal principle that no person shall be deprived of property without fair and adequate compensation.

Ground 2

As to whether the trial magistrate properly came to a correct finding that the appellants were guilty of fraud, it is important to first establish what fraud is. Fraud has been defined as "actual fraud or some act of dishonesty." In **Waimiha Saw Milling Co. Ltd. v. Waione Timber Co. Ltd.** [1926] AC 101 at p. 106. Lord Buckmaster said that *'fraud implies some act of dishonesty.'*

The rules of procedure require that where fraud is alleged it must be specifically pleaded and the particulars thereof given in the pleading (**Kampala Bottlers Ltd. v. Damanico (U) Ltd. S/C Civil Appeal No. 22/92**).

It was contended for the appellants that the trial magistrate should not have come to a finding of fraud because it was not pleaded and no evidence was led to prove it. In paragraph 8 of their claim the respondents stated that when they got to know about the impending sale to the 4th appellant, they complained to their father, the 1st appellant. The 1st appellant issued them with a letter (Ex.P4) to halt the sale (Ex.P4). That document which was dated 5/06/2005 and addressed to the LC1 of Magamaga Trading Centre prohibited the intending buyer from paying the balance of the purchase price until all the 1st appellants' offspring had agreed among themselves. Subsequently, the respondents put out a radio announcement on the 2/12/2005 which the 4th appellant admitted that she heard but ignored. She testified that by the time she heard the announcement, she had already paid the full purchase price. However, that averment is not consistent with the rest of the evidence on record.

The 4th appellant testified that she knew the family of Beihi because she was born in and was a resident of Magamaga Trading Centre. She also claimed to have bought the land by an agreement dated 8/12/2005. If that was the case, then she must have bought the land some five days after the respondents put out announcements on radio on 2/12/2005. Moreover, the premises that the appellants sold to the 4th appellant were inhabited by people including the 3rd respondent who had a shop therein. The 4th appellant ought to have been put on notice by the 3rd respondent's occupation and the radio announcements so as to inquire about the 3rd respondent's interest in the suit property. The 4th respondent neglected to heed these warnings signs; she therefore bought subject to the respondents' interests in the land.

I have considered the authorities which counsel for the respondent relied on for the submission that the court may find fraud even where it was not specifically pleaded, especially the case of **Jabir & Another v. Jabir & Others** (supra). I am of the view that the **Jabir case** can be distinguished from the instant case because in that case fraud was pleaded but it was not particularized as is normally done. In addition, evidence had been led in the lower court to prove

the alleged fraud. The court therefore relied on Article 126 (2) (e) of the Constitution and s.98 of the CPA for its finding that in those circumstances it was incumbent upon it to find that fraud was committed.

In **Kampala Bottlers Ltd. v. Damanico (U) Ltd. S/C Civil Appeal No. 22 of 1992,** the court of appeal was of the same view. Although fraud was not particularized in the WSD, court found that fraud was proved though the appellant was not directly implicated in it. The Justices of the Supreme Court were in agreement that not only must fraud be pleaded but it must be strictly proved against the person whose title is sought to be quashed or cancelled. They also reiterated the principle that the burden of proof in cases where fraud is alleged is heavier than on the balance of probabilities generally applied in civil matters.

In the instant case, not only did the respondents omit to plead fraud and particularize it but it is also difficult to ascertain the standard to which the alleged fraud was proved in the lower court. The respondents' claim was that the appellants had trespassed or encroached on and interrupted their quiet enjoyment of the land in dispute and that is what they tried to prove. Though there was some negligence or lapse on the part of the 4th appellant when she failed to inquire and establish whether the respondents had a legal interest in the land, this did not amount to fraud. This is especially so because of my earlier finding that the respondents acquired no absolute legal interest in the land from the 1st appellant. I therefore find that the trial magistrate erred when he ruled that fraud had been proved against the appellants and ground 2 of the appeal succeeds.

Ground 3

While submitting on this ground, counsel for the appellants argued that there were major contradictions in the testimonies of the various witnesses about the size of the land in dispute. It was his view that this necessitated a visit to the *locus in quo* to resolve these contradictions. I am unable to agree with that submission. The land in issue was that land described in Ex.P1 as being located at the tarmac road neighbouring one Kiribaki and Kasani and measuring 60ft. x 198ft. The other piece of land in issue was the land that the 1st appellant gave to his sons by virtue of Ex.P3. It was described as the land between Nabutono Simolo, Isa and Kapaata measuring 260ft

x 600ft. The appellants did not deny the measurements of the 2 pieces of land that the 1st appellant had entrusted to his daughters. Neither did they challenge the size of the piece that the 1st appellants sons are said to have sold. Clearly 260ft x 600ft would give one a larger area of land than 60ft. x 198ft. The matter did not have to be laboured by a visit to the *locus in quo* and the trial court properly dispensed with it. Ground 3 of the appeal therefore fails.

Ground 5

It was contended for the appellants that the respondents did not prove that they suffered any loss due to the eviction from the suit premises and that as a result the trial magistrate erred when he awarded both special and general damages to them. It was conceded by counsel for the respondents that special damages were neither pleaded nor proved and therefore they were wrongly awarded. I shall therefore consider the issue whether the award of general damages was proper.

The trial magistrate considered the issue of damages in a summary manner. Though he found that special and general damages were due to the respondents, he did not name how much they were entitled to under each head. He also took no care to assess the loss during the proceedings. It is always prudent and incumbent upon a trial court to assess damages where they are claimed because failure to do so may lead to the case being remitted to that court to assess damages in the event that the claimant succeeds on appeal.

The basic principle in the assessment and award of damages is *restitutio in integrum;* (**Simeey Tumusiime & 2 Others v. Henry Twinomugabe & Another [1997] HCB, 69**). If the plaintiff has suffered damage that is not too remote, he must, so far as money can do it, be restored to the position he would have been in had that particular damage not occurred. In this respect, property damage presents relatively little controversy as compared with personal injury. Whether the property is damaged or destroyed, the plaintiff is in the first instance entitled to restitution for the loss of its value to him. Usually this loss – the differential in value before and after the accident amounts to the cost of repair or replacement. Otherwise the question then arises whether the plaintiff must be awarded the diminution in value of the property or whether he/she may recover

the greater cost of repairing or replacing it; (John G. Flemming, *The Law of Torts,* 6th Edition; the Black Book Company, at page 222).

The evidence on record shows that the 3rd respondent was evicted from the suit land and that is not denied by the appellants. The 1st respondent also stated that after their father entrusted the land to them, they took possession and constructed a house and tenements thereon. According to the 1st respondent, there was a house on the land in which they were born and a second house that she built jointly with the 2nd respondent, as well as 8 rooms of which the 1st respondent built 6 and their brother built 2 rooms. The 2nd and 3rd respondents agreed that what the 1st appellant stated was true, except that the 3rd respondent added that her property was destroyed during the eviction though she did not prove the value of the damage. The appellants did not deny or challenge the 1st respondent's assertions about the developments that she and 2nd respondent made on the land. There is therefore no doubt that the 1st and 2nd respondents suffered loss when the land and buildings were sold off to the 4th appellant. They must be returned to the position they were in before the property was sold by having the replacement value of their developments paid to them. The question that now has to be resolved is who should pay for 1st respondent's loss and how much?

I have already ruled that the 4th appellant bought the land subject to the respondents' interest therein. Whether they were trustees or tenants at sufferance on the land there is no doubt that they came to be on it with the 1st appellant's permission. The 4th respondent was aware that she bought land that was encumbered because the 3rd respondent was in occupation of one of the buildings at the time she bought. She resisted eviction and was finally, in her words, *"primitively"* evicted from the building and her property destroyed. I find that the 4th appellant ought to have compensated the owners of the buildings before evicting them from the land.

In conclusion, this appeal only partially succeeds. The orders of the trial magistrate are set aside and replaced with the following orders:

a) The 1st and 2nd respondent's buildings on the land shall be valued by a competent registered valuer;

b) The 4th appellant shall pay to the 1st and 2nd respondents the value of the buildings so assessed;

c) The parties shall each bear their advocates costs for this appeal.

Irene Mulyagonja Kakooza

JUDGE

11/02/2010