

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**

**CIVIL SUIT NO. 289 OF 2007**

1. KYEPAKA FRANCIS
2. ALICE NORAH KAKONO.....PLAINTIFFS

**VERSUS**

1. GEORGE RWAKARONGO
2. SERENA TUGUME
3. MRS. MURARI BEERA.....DEFENDANTS

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**JUDGMENT**

The Plaintiffs instituted this suit against the Defendants for eviction, a permanent injunction, general damages for trespass since 2006, punitive damages, interest of 49% on general and punitive damages from the date of cause of action till payment in full, costs of the suit, and any other relief. The Plaintiffs contend that at all material times they were the registered proprietors and beneficiaries of the estate of the late Samwiri Kakono and Kabukuru Paul including the land comprised in LRV 3416 Folio 5, Ranch No. 24 A, Nyabushozi, Mbarara. The Plaintiffs claim that in 1980 the Plaintiffs' predecessors allowed the 1<sup>st</sup> Defendant who is a relative of the 2<sup>nd</sup> Plaintiff to graze his cows on the suit land so that they could multiply and he obtains a livelihood for himself and his children. The 1<sup>st</sup> Defendant was not authorized to develop the land with permanent structures or obtain registrable interest other than that offered. The Plaintiffs also claim that in 2006 or thereabouts the 1<sup>st</sup> Defendant without any iota of right hired out the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contrary to the undertaking between him and the Plaintiffs. He is also alleged to have fenced off a chunk of the suit land thereby maliciously attempting to exclude the Plaintiffs' livestock access to the then grazing areas and purporting to be the lawful owner of the said piece of land.

The Defendants' case was that at all material times they were, and are *bona fide*/lawful occupants of the suit land they have been occupying for over 12 years, or acquired their interest from occupants who occupied the same for a period exceeding 12 years prior to 1995. The 1<sup>st</sup> Defendant claims that his father, the late Bitanuzire together with Kakoro and Kaburuku

were allocated Ranch No. 24 in 1965 which was later registered as a partnership. He claims that without the knowledge of the other partners, Kaburuku and Kakoro registered themselves as proprietors of the said land in 1987 without disclosing Bitanuzire's interest. The 1<sup>st</sup> Defendant subsequently objected to the renewal of the lease raising his claim on the land. In 1996 the Ranches Restructuring Board (RRB) sub divided Ranch 24 into two parts, allocating Ranch 24A to Francis Kyepaka (1<sup>st</sup> Plaintiff), Charles Kakono (husband to the 2<sup>nd</sup> Plaintiff) and George Rwakarongo (1<sup>st</sup> Defendant) and Ranch 24B to squatters. The allocation of Ranch 24A however was subsequently challenged and overturned by the Plaintiffs before Mbarara District Land Board. In 2005 the Plaintiffs had Ranch 24A registered in the names of Francis Kyepaka (1<sup>st</sup> Plaintiff) and Norah Kakono (2<sup>nd</sup> Plaintiff), the latter as administrator of the estate of the late Charles Kakono who had since passed on. It is the Defendants' contention that the registrations of the land in 1987 and 2005 do not take into account the interests of the 1<sup>st</sup> Defendant and his late father.

This case was part heard by Lady Justice Anna Magezi who retired before completing it. At the time I started hearing it, the Plaintiffs' side had closed their case, and the defendant had produced one witness, Ibrahim Koozi DW1. I commenced the proceedings with the examination of Eric Nsheka DW2. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not enter any defence nor did they attend the trial.

After written submissions were filed by both Counsel, court visited the locus in quo. It was agreed by all parties and their Counsel that since taking of evidence was over and submissions had already been filed the purpose of the visit would not be to adduce more evidence but merely to clarify on evidence already adduced during the trial.

### **Agreed Facts**

During the scheduling conference the following facts were agreed on:-

1. Ranch No. 24A comprising of LRV 3416 Folio 5 Nyabushozi Mbarara was mutated off and created from Ranch 24 by the Ranch Restructuring Board in the 1990s.
2. The Plaintiffs are the registered proprietors of the said Ranch No. 24A.

### **Issues for determination**

The following issues were agreed:-

1. Whether the Defendants have any lawful claim and/or interest in the said land, Ranch 24A.
2. Whether the Plaintiffs/Defendants are entitled to the remedies sought.
3. Costs.

## **Resolution of issues**

In his submissions, learned Counsel for the 1<sup>st</sup> Defendant questioned the Plaintiff's interest and claim in the suit. He submitted that by virtue of the 1<sup>st</sup> Defendant qualifying to be a bona fide occupant of the suit land from 1977 to 1995, the Plaintiffs do not have any legal right to bring the suit or no maintainable cause of action. The Plaintiffs' Counsel in reply submitted that the Plaintiffs have a valid cause of action with rights in the suit property, and that their rights were violated by the 1<sup>st</sup> Defendant when he forcefully fenced part of their property denying them access to the water dams.

The matter, as per the 1<sup>st</sup> Defendants Written Statement of Defence (WSD) and Counterclaim, was pleaded as a preliminary point of law (PO). Ideally, it should have been disposed of under Order 6 rule 28 of the Civil Procedure Rules (CPR) before commencing the hearing. That is when Counsel should have raised it before the then presiding Judge. This is for reasons of expediency or to stop proceedings which should not have been brought in the first instance, and to protect parties from the continuance of futile and useless proceedings. For instance, if the court's decision on the point of law substantially disposes of the whole suit there would be no need to proceed with the hearing. However, the matter will be addressed in the spirit of the decision in **Makula International Ltd V Cardinal Nsubuga Wamala & Anor [1982] HCB 11** that a court cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings and admissions made by parties.

The question to address first is whether the plaint discloses a cause of action. A cause of action means every fact which is material to be proved to enable the Plaintiff to succeed. It has been established through case decisions that in order to prove that there is a cause of action, it is necessary for the Plaintiff to establish in the plaint three essential elements, namely that:-

- a) The Plaintiff enjoyed a right;
- b) The right has been violated; and
- c) The Defendant is liable.

If all the three elements are present in the plaint, then a cause of action is disclosed and any defect or omission can be put right by amendment. This is the legal position as held in **Tororo Cement Company V Frokina International Ltd Civil Appeal No. 2 of 2001**; and in **Auto Garage & Ors V Motokov (No. 3) [1971] EA 514**, Spry VP. at p. 519.

In disclosing whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true. See **Attorney General V Oluoch [1972] EA 392, AT 394**. In **Sullivan V Mohamed Osman [1959] EA (CA) (T)**, Windham J A, at p. 24, in the same connection stated that:-

*“The plaint must allege all facts necessary to establish the cause. The fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact was not pleaded and could not be true.”*

In the same spirit of the law Sir Charles Newbold in **Mukisa Biscuit Manufacturing Co V West End [1969] EA 696 at 701** stated that:-

*“A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is extrinsic evidence of judicial discretion.”*

Applying the foregoing authorities and principles to the instant case, the plaint has to show, first, that **the Plaintiff enjoyed a right**. This is shown in paragraph 6 of the plaint where the Plaintiffs claim that they are at all material times the registered proprietors and beneficiaries to the estate Samwiri Kakoro and Paul Kaburuku comprised I LRV 3416 Folio 5 Ranch No. 24A, Nyabushozi, which is the suit property. Secondly, the plaint must show that **the right has been violated**. This is shown in paragraphs 8, 9, 10, and 11 of the plaint which allege that the Defendant, in breach of the Plaintiffs’ trust and generosity, committed various acts of trespass on part of the Plaintiff’s land, including hiring out the suit land, fencing it off and denying the Plaintiffs access to grazing areas and purporting to be the lawful owner of the same. Thirdly, the plaint must show that **the Defendant is liable**. This is shown in paragraphs 8, 9, 10 and 11 of the plaint which allege the Defendant to have committed the acts complained of in the plaint.

In my opinion, the three elements as set out in **Tororo Cement Company V Frokina International Ltd**, and **Auto Garage & Ors V Motokov**, supra, are present in the plaint in the instant case.

I must state that both learned Counsels’ submissions on this issue, for instance on whether or not the Defendant is a bona fide occupant on the suit land, are matters to be proved by way of adducing evidence, which can only be done during the hearing of the case or addressed after analyzing the said evidence. Addressing them at this point as a basis for determining whether or not a cause of action is disclosed in a plaint would tantamount to delving into extrinsic evidence. As indicated by the authorities cited above, one looks at a plaint only to determine whether or not a cause of action has been established by the Plaintiff against the Defendant. In doing this, one assumes that the facts as alleged in the plaint are true. This, I believe, is purely for determining whether or not the plaint discloses a cause of action. As to whether or not the cause of action is eventually proved against the Defendant is an entirely different matter which goes beyond the plaint and can only be determined by analyzing the adduced evidence.

Thus I find that, on the face of the plaint, and without delving into extrinsic evidence or the merits of the case, the Plaintiffs have established a cause of action against the 1<sup>st</sup> Defendant.

**Issue No. 1: Whether the Defendants have any lawful claim and/or interest in the said land, Ranch 24A.**

On this issue the Plaintiffs relied on the evidence of Francis Kyepaka PW1, Norah Kakono PW2 John Kijuko PW3 and Cale Kakono PW4.

Francis Kyepaka PW1 testified that his late father S. Kakoro and the late P. Kaburuku applied for and were allocated Ranch 24 measuring 5.6 square miles. About December 1966 they moved the cattle on the ranch. The late Bitanzire a brother of P. Kaburuku requested to include his cattle until he got another place to graze. He did not shift but his cattle were taken to the ranch in the same year 1966. The ranch was developed by Kaburuku and Bitanzire who constructed water valley dams. Kakoro and Kaburuku the owners of the ranch allowed Bitanzire, Kakono, Nshemereirwe and Francis Kyepaka (PW1) to participate in the venture but the business aborted due to the political environment and no partnership took off. In 1988 the late Kakono applied for extension of the lease but the government stopped legal transactions on the ranch in 1988 and established a Ranch Restructuring Board in 1990. The ranches were divided into two parts. Part A consisting of 3 square miles was retained by the former owners and Part B consisting of 2 square miles was allocated to squatters or landless people. The 1<sup>st</sup> Defendant did not apply for Ranch 24B claiming he was a Rancher since his father's cattle had been on the ranch. He made a claim on the original Ranch 24A. The Restructuring Board allocated the 1<sup>st</sup> Defendant part of Ranch 24 together with Kyepaka and the late Kakono. Kyepaka and Kakono objected to it at the District Land Board which was the controlling authority. In 2001 the Chairman of the District Land Board admitted the erroneous allocation in a letter addressed to the Minister responsible for the Restructuring Board, Exhibit **P2**, but later retracted it. The retraction was however challenged by the Plaintiffs. A lease title to Ranch 24A was subsequently renewed in the names of S. Kakoro and Kaburuku as tenants in common in equal shares. The Plaintiffs eventually got registered on the land as administrators of the estates of the late Kakoro and the late Kaburuku.

Norah Kakono PW2 testified that her father in law, the late Kaburuku co owned the suit land with Samwiri Kakoro, and that her husband, the late Kakono, hosted the 1<sup>st</sup> Defendant as a relative until he would get his land. The Defendant eventually shifted to stay on the suit property on the same piece of land adjacent to their house, but with no claim on the suit property. Before his death in 1997, Kakono had complained that the 1<sup>st</sup> Defendant had been imposed on them as part owner by the Ranch Restructuring Board. Since the death of her husband problems have erupted where the 1<sup>st</sup> Defendant has fenced off and annexed part of the suit land. John Kijuko PW3 and Cale Kakono PW4 testified that the recognized Ranchers

were Samwiri Kakoro and Paul Kaburuku, and that squatters previously on the land were resettled on plot 24B.

It was the contention of the 1<sup>st</sup> Defendant (DW3) that he qualifies as a bona fide occupant under the law. He claims to have derived his interest from his father the late Bitanuzire who had together with Kakoro and Kaburuku utilized the land by grazing their cows on the suit land and eventually occupied or developed it with their families since 1966. He testified that he physically moved to the suit land, the original Ranch 24, in January 1978 after retiring from the Police Force. This was after being invited by his father Bitanuzire and his uncle Kaburuku. There was no objection from Kakoro the father of the 1<sup>st</sup> Plaintiff who was also his (1<sup>st</sup> Defendant) uncle. He first stayed with his "brother", or, to be exact, cousin Kakono, husband of Norah Kakono, the 2<sup>nd</sup> Plaintiff. In 1985 he shifted to where he is now in order to be on his own. The 1<sup>st</sup> Defendant's father, Bitanuzire, died in 1995. He laid claim to this land before the Ranch Restructuring Board before he passed on. His father Bitanuzire, and his uncles Kaburuku and Kakoro together with other people contributed cows to raise the required number so that they could be allocated a ranch. The others were sent out of the ranch and left in 1972 but Bitanuzire, Kakoro and Kaburuku remained. There was no dispute on the land between 1960s and 1990s. The dispute arose when the Ranch Restructuring Board allocated Ranch 24A to Kakono, Kyepaka and Rwakarongo as ranchers. Kyepaka and Kakono raised a dispute that the 1<sup>st</sup> Defendant is not supposed to be a rancher because his late father Bitanuzire was not on the title in respect of the original Ranch No. 24. He testified that his late father had land at Burunga and the ranch which he bequeathed to the children of his second wife. The ranch was bequeathed to the Defendant and his mother. His father had, before he died, expressed surprise to the RRB that he was not included in the first title and was being referred to as a squatter by the RRB. The RRB decided to include him on the side of the ranchers. He contended that Ranch 24A, now comprised in LRV Vol. 3416 Folio 5 was created through the RRB, which allocation was for the benefit of three people, Kakono, Kyepaka and Rwakarongo as ranchers; and that the previous registrations of 1987 and 2005 did not consider his interests as well as that of his late father Bitanuzire.

The Defendant's position was affirmed by the testimony of Ibrahim Koozi DW1, a former herdsman of Kaburuku. He testified that the land was given to Kakoro, Kaburuku and Bitanuzire by Government as farmers or cattle keepers (Baliisa). The Ranch Restructuring Board later divided the land among the occupants, one part to Kyepaka, Kakono and Rwakarongo. He witnessed the late Bitanuzire's will by putting his thumb print on it, where Bitanuzire bequeathed cows and the land in dispute to Rwakarongo. Eric Nsheka DW2 a former Gombolola Chief of Nyakashashara corroborated this in his testimony that he used to levy taxes where they would consider cows, banana plantations, goats and other properties to make the assessments. Kakoro, Kaburuku and Bitanuzire owned Ranch no. 24 and they were taxed as

such. DW3, who said he knew the parties and their deceased parents, did not recollect any dispute on the Ranch until 1994. At that at that time it was only Bitanuzire who was alive. Rwakarongo was complaining that he was a part owner of the Ranch. Nsheka knew Rwakarongo as part owner because they were all living in the compound as one family. He also recollected that there were three Ranchers and 12 squatters. He attended a meeting called by the Central Committee where Bitanuzire revealed that by 1964 Government had required that the three send cows to the land upon which they stocked the Ranch with cows. Bitanuzire was not happy that the title did not include his names. After that the Committee revised the allocation and decided that Bitanuzire was a Rancher. The RRB allocated Ranch 24A consisting of three miles to Kakono, Kyepaka and Rwakarongo. The remaining two miles were given to the squatters as Ranch 24B.

The 1<sup>st</sup> Defendant contends that once evidence was led to the effect that a person had occupied utilized and developed the suit land unchallenged by the registered proprietor or his agent for twelve years or more before the coming into force of the Constitution in 1995, the claim for bona fide occupancy is made out. He claims the status of a bona fide/lawful occupant in his own right as well as through his late father Bitanuzire. However, the Plaintiffs' position is that he is on the land as a licensee and does not enjoy the status of bona fide occupant. They contend that the late Bitanuzire merely requested to include his cattle until he got another place to graze, while his son the 1<sup>st</sup> Defendant was hosted as a relative by Kakono until he would get his land, but with no claim on the suit property. Learned Counsel for the Plaintiffs argued that the 1<sup>st</sup> Defendant and his late father, being licensees, could not have an interest in the land. It was the Plaintiff's case that the late Kakoro (the father of Kyepaka PW1 & 1<sup>st</sup> Plaintiff), and Kaburuku (the father of late Kakono who was husband to Norah Kakono PW2 & 2<sup>nd</sup> Plaintiff) were first allocated the ranch in 1965 under the name Kakoro, Kaburuku & Co. There are minutes of the second meeting of the Ranching Selection Board held on 1<sup>st</sup> April 1965, annexure **A** to the plaint also admitted in evidence as exhibit **D1**. The Plaintiffs argue that the allocation was granted to two individuals Kakoro and Kaburuku and not to a company. It was their argument that, legally, there was neither a company nor a partnership existent at the time. The 1<sup>st</sup> Defendant on the other hand, contends that Ranch 24 was allocated to a company hence the use of the words "& Co" after the two names of Kakoro and Kaburuku. The Defendant's Counsel submitted that this suggested that the ranch was allocated to more than two people.

Witnesses from each side, notably Francis Kyepaka PW1, Norah Kakono PW2, Ibrahim Koozi DW1, and George Rwakarongo DW3, confirm that Bitanuzire, Kaburuku and Kakoro utilized the land by grazing their cows on it since 1966, and that Rwakarongo the 1<sup>st</sup> Defendant eventually moved to the suit land in 1978. Eric Nsheka DW2 and Ibrahim Koozi DW1 also corroborated Rwakarongo's testimony that the original ranch 24 was owned by Kakoro, Kaburuku and

Bitanuzire. The evidence of Kyepaka PW1, Norah Kakono PW2, and George Rwakarongo DW3 is also to the effect that the 1<sup>st</sup> Defendant first stayed with the late Kakono, husband to the 2<sup>nd</sup> Plaintiff and later, in 1985, shifted to his own place on the same suit land where he has lived up to now.

The minutes exhibit **D1** reveal on page 2 that ranches were allocated to successful applicants either as individuals or as companies or as cooperatives. In the case of Ranch 24, those allocated the Ranch were named in minute 9/65 as “Kakoro, Kaburuku & Co.” They were categorized as “company”. As a matter of fact, where allocations were made to individuals, the minutes clearly specified so. The allocation to Kakoro and Kaburuku was clearly categorized as an allocation to a company. This does not augur with the testimonies of PW1 and PW2 that that the allocation was granted to two individuals, Kakoro and Kaburuku. It was the argument of the Plaintiffs, however, and correctly so, that that there was no company in the strict legal sense of the word as neither company nor partnership had been registered to that effect. Learned Counsel for the Plaintiffs accordingly argued that the only logical explanation as to why the minutes of the said meeting read Kakoro, Kaburuku & Co was because they were joint applicants and that this is reflected in the title which was in the names of Kakoro and Kaburuku. On the other hand, the 1<sup>st</sup> Defendant maintains that the word “Company” was used in its ordinary sense and simply a reflection of a group of people who applied for the ranch, and that Bitanuzire was part of the said group of people.

In my opinion, it is implicit from the circumstances of the case that the allocation of ranch 24 by the Ranching Selection Board to Kaburuku & Co as a “company” was not in the legal sense of the word. Indeed, the 1<sup>st</sup> Defendant who maintained there was a company adduced no evidence to show that such legal entity ever existed. The statement of particulars of businessmen exhibit **D2** can only confirm that some attempt was made to formalize the ranching business among Kakoro, Bitanuzire, Kaburuku and three other family members. This cannot establish the existence of a legal entity in form of a company which can only be proved by a certificate of incorporation on due registration of a memorandum and articles of association. The logical inference therefore would be that the allocation was made to a “company” in the sense of the applicants’ description suggesting that they were a group of people, or at least more than one person. This is inferred from the fact that all the applicants who ended their names with the words “& Co” were categorized as a “company”, even where the said words were added after one individual’s name. Similarly, those who were more than one individual even if they did not have the words “& Co” at the end were categorized as “a company”, and so were those who called themselves traders in the plural. Those who were categorized as a “company” in the said minutes were:-

8. Mr. E. Kaikobe & Co.



11. Mr. J. K. Kafamaisho & Mr. P. K. Kanyumunyu.

16. Mr. B. Bitasaine & Co.

20. Y. Matovu & Company.

23. The Ankole United Ranching Co.

**24. Kakoro, Kaburuku & Co.** (emphasis mine).

25. Ankole African Independent Traders.

27. Bitembo & Co.

28. Rutanongibwa & Co.

I find it more probable that the allocation was made to “Kakoro, Kaburuku” and possibly others, that is, as a group of people, but not to Kakoro and Kaburuku as individuals. This becomes more logical and probable when this is tied to the fact that the same minutes required the allocation to be subject to certain conditions, and to the adduced evidence on record that Bitanuzire, Kaburuku and Kakoro each brought cows to the ranch for purposes of being allocated a ranch. The same minutes read that:-

*“these ranch allocations would be subject to the normal conditions of entry and occupation, together with the two years probational or probationary period, as laid down by the Ranching Policy Advisory Board.”*

The said conditions of entry and occupation were brought out in the evidence of George Rwakarongo DW3 who testified that his father Bitanuzire, his uncles Kaburuku and Kakoro and some other people contributed cows to raise the required number of cows to be allocated a ranch. This is supported by the contents of the lease agreement **exhibit P3** clause 4(a) of which required to stock the ranch with a required number of adult cattle. There is undisputed evidence adduced from each side, that other people who had contributed cows to the ranch were sent out of the ranch and left in 1972, but Bitanuzire, Kakoro and Kaburuku each of whom had cows on the ranch remained. Francis Kyepaka PW1, Norah Kakono PW2, and George Rwakarongo DW1 affirm in their testimonies that Bitanuzire, Kaburuku and Kakoro utilized the land by grazing their cows on it since 1966; that Rwakarongo the 1<sup>st</sup> Defendant eventually moved to the suit land in 1978; that he first stayed with the late Kakono, husband to the 2<sup>nd</sup> Plaintiff; and that, later, in 1985, shifted to his own place on the same suit land where he stays up to now. The testimonies of the 1<sup>st</sup> Defendant DW3, Koozi DW1, and Eric Nsheka DW2, are to the effect that his late father Bitanuzire owned the ranch with Kakoro and Kaburuku. In cross examination Eric Nsheka DW2 testified that he knew the ranch and that along the way

government had wanted to send the three (Bitanuzire, Kaburuku and Kakoro) away but the land was returned to them when all of them came with their children at the Gombolola.

I would in that light, bearing all circumstances of the case in mind, agree with learned Counsel for the 1<sup>st</sup> Defendant that the Ranching Selection Board made the allocation to a “company” in the sense of it being a group of people working together for business or commercial purposes as defined in the Advanced Learners Dictionary, and not in the legal sense of a company as defined under the Companies Act.

Other than their testimonies, the Plaintiffs produced no other evidence to support their claim that the 1<sup>st</sup> Defendant was a licensee on the land, or to rebut the contention of the 1<sup>st</sup> Defendant that he was a bona fide/lawful occupant. On the contrary, there is evidence from both sides that the Defendant lived on the land unchallenged between 1978 and 1996. The disputes only started in 1996 after the decision on the RRB. It is not in dispute that the 1<sup>st</sup> Defendant was occupying and utilizing part of the suit land at the time Plaintiffs became registered. It was a finding of this court during the visit of the locus in quo that the part occupied by the 1<sup>st</sup> Defendant. He has developed the part of the ranch he occupies with two permanent houses and a banana plantation. The rest is a grazing area with a cattle dip and a valley dam. His late mother was buried on the same land. This finding of court during the visit to the locus in quo was not freshly adduced evidence. It merely strengthened he adduced evidence on record that the 1<sup>st</sup> Defendant has property on the land including cattle inherited from Bitanuzire and a permanent home. Norah Kakono PW2 in cross examination (pages 40 – 42) stated that she stayed with the 1<sup>st</sup> Defendant from 1978 to 1985. Then he left for the place he was allocated by Norah Kakono’s deceased husband. PW2 testified that Rwakarongo was not restricted to graze his cows on the ranch. Francis Kyepaka PW1 also testified in re examination (page 32) that he was aware that the 1<sup>st</sup> Defendant was building a home on the suit land, and that he was allowed to build by Kakono after the war. The Restructuring Board subsequently allocated the 1<sup>st</sup> Defendant part of Ranch 24 to Kakono and Kyepaka. That is when Kyepaka PW1 and the late Kakono objected to it at the District Land Board which was the controlling authority.

A licensee is a person who is given permission to enter land for some specified purpose(s) that would otherwise amount to trespass. See **Radaic V Smith (1959) 101 CLR 209 at p.222**. This was further explained by Vaughan C J in **Thomas V Sorrell 1098 ER 124 at 1109** that a dispensation of licence properly passes no interest nor alters or transfers property in anything, but only makes an action lawful which without it would have been unlawful.

In my opinion, the conduct of the Plaintiffs, including the late Kakono, regarding the way they related to the 1<sup>st</sup> Defendant and his late father from 1966 to the time of restructuring the ranch by the RRB is inconsistent with their assertion that he is a licensee on the land or that he was

occupying it temporarily. **Black's Law Dictionary 9<sup>th</sup> Edition** defines temporary as "*lasting for a time only; existing or continuing for a limited time.*" There is nothing temporary about the Defendant staying on the land, as he did in this case, since 1978 to the extent of erecting permanent structures and living there unchallenged, at least until the disputes arose in 1996. The Plaintiffs have failed to prove on the balance of probabilities that the Defendant was a mere licensee on the land. The 1<sup>st</sup> Defendant on the other hand has proved on the balance of probabilities that Rwakarongo, and, before that, his father Bitanuzire had unchallenged interests in the land even before the restructuring by the RRB.

I therefore, with respect, do not agree with learned Counsel for the Plaintiffs' submissions that George Rwakarongo was a licensee on the land in respect of which he and his late father claim an interest, and where the 1<sup>st</sup> Defendant has lived and developed.

Section 29(2) of the Land Act, cap 227 defines a bona fide occupant as a person who:-

- (a) Had occupied and utilized or developed any land unchallenged by the registered owner for twelve years or more before the coming into force of the Constitution
- (b) Had been settled on land by the government or an agent of the government which may include a local authority.

Section 31(1) of the same Act provides that a registered proprietor of the land enjoys his/her rights subject to those of the bona fide occupant.

In **Kampala District Land Board & George Mitala V Venancio Babweyaka & 3 Ors. Civil Appeal No. 2 of 2007** (unreported) the Supreme Court held that a person who has been in occupation or possession of the suit land for more than twelve years at the time of coming into force of the 1995 Constitution without any challenge from the registered proprietor was entitled to enjoy its occupancy in accordance with Article 237(8) of the Constitution and section 31 of the Land Act, if the suit land was registered land. Similarly, in **Kampala District Land Board and Chemical Distributors V National Housing and Construction Corporation Civil Appeal No. 2 of 2004**, (unreported) where the respondent had occupied the suit land since 1970 and had used it as a playground for children residing in its adjoining estate, among other uses, and having fenced the land and constructed a toilet on it, the Respondent's claim to bona fide occupancy against the 2<sup>nd</sup> Appellant who had been granted a lease on the same land was upheld by the court of appeal. In his lead judgment in the **Kampala District Land Board & George Mitala V Venancio Babweyaka & 3 Ors, supra**, B J Odoki CJ, referred with approval to what was held in **Kampala District Land Board and Chemical Distributors V National Housing and Construction Corporation, supra** that:-

*"A bona fide occupant was given security of tenure and his interest could not be alienated except as provided by the law. For instance the bona fide occupant could apply*

*for a certificate of occupancy under section 33(1) of the Land Act. A bona fide occupant could apply for a lease under section 38 of the Land Act. While the land occupied by a bona fide occupant could be leased to somebody else, I think the first option would have to be given to the bona fide occupant. As this was not done in this case, the suit land was not available for leasing to the 2<sup>nd</sup> Appellant."*

The right to bona fide occupancy must be actual or real based on an unchallenged right of bona fide occupancy or a right that originates from a bona fide occupant. Bona fide occupancy is an interest created by the 1995 Constitution and the Land Act, cap 227 which came into force on 2<sup>nd</sup> July 2008. The interest disclosed by the 1<sup>st</sup> Defendant in the instant case is that at all material times he was a *bona fide* occupant of the suit land which he has been occupying for over 12 years by 1995, or that he acquired his interest from his late father Bitanuzire whose interest in the land dates back to 1966 when he utilized and developed the land with Kakoro and Kaburuku.

In my opinion, the late Bitanuzire and his son George Rwakarongo each in their own right, have registrable interests in Ranch 24A as bona fide occupants under the Constitution and section 29(2) of the Land Act. The 1<sup>st</sup> Defendant's interest and claim in the land dates back to the claims of his father Bitanuzire who contributed cows with the other two to qualify to be allocated a ranch by Government. The three utilized and developed the ranch by grazing their cows and constructing valley dams. Eventually each brought their children to live on it. Under sections 33(1) or 38 of the Land Act the 1<sup>st</sup> Defendant could legally apply for a certificate of occupancy or a lease. Even if the late Bitanuzire's claims to ranch 24 were found to be not valid, George Rwakarongo would still qualify in his own right as a bona fide occupant under the law as stated above. It could be that even the RRB considered this when it categorised George Rwakarongo as a Rancher with an interest in Ranch 24A as opposed to the squatters who were relocated to Ranch 24B.

I therefore agree with learned Counsel for the Defendant that the spirit of Presidential Notice No. 182 of 1990 which was to resettle all those in occupation of Ranches would clearly include the 1<sup>st</sup> Defendant who had occupied the Ranch since 1978. If the policy or directive could accommodate or address the interests of even squatters who were allocated Ranch 24B curved out of the original Ranch 24, how more so could it not accommodate the claims of the 1<sup>st</sup> Defendant who had occupied and utilized the land for long? The RRB had the power and mandate to reallocate the land. It followed an equitable criteria within the existing legal and constitutional framework. In the end no one was left landless or deprived by the restructuring.

The 1<sup>st</sup> Defendant also contended that the subsequent registration of Ranch 24A in the names of Norah Kakono and Francis Kyepaka after the RRB had allocated the same to Kakono (deceased) Kyepaka and Rwakarongo was tainted with fraud. This was denied by the Plaintiffs

who contended that the renewal of the lease by Mbarara District Land Board was effected after they stated their case to the said Board. PW1 testified that the late Kakono objected to the restructuring at the District Land Board which was the controlling authority. In 2001 the Chairman of the District Land Board admitted the erroneous allocation in a letter addressed to the Minister responsible for the Restructuring Board, Exhibit P2, but later retracted it. The retraction was however challenged by the Plaintiffs. A lease title to Ranch 24A was subsequently renewed in the names of S. Kakoro and Kaburuku as tenants in common in equal shares. The Plaintiffs eventually got registered on the land as administrators of the estates of the late Kakoro and the late Kaburuku.

In **Fredrick Zaabwe V Orient Bank & 5 Ors SCCA No. 04 of 2006**, fraud was defined to include anything calculated to deceive whether by a single act or combination of acts or suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture. In **Kampala District Land Board & George Mitala V Venancio Babweyaka & 3 Ors, supra**, fraud was held to include dishonest dealing in land or sharp practice intended to deprive a person of an interest in land. In **Katarikawe V Katwiremu [1977] HCB 187**, which was quoted with approval in **Kampala District Land Board and Chemical Distributors V National Housing and Construction Corporation, supra**, it was held that though mere knowledge of unregistered interest cannot be imported as fraud, it would amount to fraud where such knowledge is accompanied by wrongful intention to defeat such existing interest. In **J. W. Kazoora V Rukuba, Civil Appeal No. 13 of 1992**, Oder, JSC held that allegations of fraud must be specifically pleaded and proved. The degree of proof of fraud required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must, however, be more than a mere balance of probabilities. In **B. E. A Timber Company V Under Singh Jil [1959] EA 469**, Forbes V. P held, among other things, that fraudulent acts may be inferred from acts intent. In **Kampala Bottlers Ltd V Damaniko (U) Ltd Civil Appeal No. 22 of 1992** (unreported), the Supreme court held that fraud must be attributable either directly or by necessary implication to the transferee, that is, the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. Also see **Hannington Njuki V George William Musisi [1999] KALR 783**.

In **Costa Bwambale & Anor V Yosofati Matte & 3 Ors [2001 - 2005] HCB 76**, the Court of Appeal held that to order for cancellation of title, it had to be proved that the second Appellant had knowledge, actual or constructive about the interests of any of the Respondents and ignored it. It also held that a title issued in bringing land under the operation of the Act cannot be impeached because of irregularities or informalities. Once land has been brought under the operation of the RTA, it cannot be de registered. This is the legal position is provided for under section 59 of the RTA.

The facts of this case are similar in material particulars to those in **S. M Sekabanja V Sajabi & 3 Ors [1983] HCB 54** where the Plaintiff sued the Defendant claiming he was the lawful owner of a plot of land, and for a declaration that he was the lawful owner of the house thereon. In the alternative he sought a declaration that he is a customary tenant in respect of the land and for general damages. The Plaintiff's case was that in 1946 he together with the 1<sup>st</sup> Defendant had purchased a 20 acre piece of land for U. Shs. 2000/=. The Plaintiff allegedly paid 400/= for 4 acres while the more affluent and needful 1<sup>st</sup> Defendant paid U.Shs. 1600/= for the 16 acres. However, apparently for reasons of deep mutual trust the land had been registered in the names of the 1<sup>st</sup> Defendant. Following the registration the Plaintiff erected a brick walled and tile roofed house on his portion of land. Before and after completion of the house the Plaintiff lived there for over 30 years (1952 – 1973) undisturbed till the now contested transfer of the said plots to the 2<sup>nd</sup> Defendant in 1973. Counsel for the Defendant argued that if the Plaintiff had purportedly purchased the four acres, he would have secured title which he did not. He argued that the said conduct was incompatible with conduct expected of a serious buyer. He therefore submitted that for want of title, the Plaintiff was entitled to nothing and so his claims must fail. Kantinti J held that on the balance of probabilities the Plaintiff and his witnesses had proved that the Plaintiff contributed his share of U. Shs. 400/= in the purchase of the land which entitled him to the four acres. The Registrar was directed to cancel the illegal certificate of title and substitute it into the names of the Plaintiff.

In this case the Defendant and his witnesses have proved that his father the late Bitanuzire had contributed to the raising 200 cows so that Kakoro and Kaburuku could be allocated a ranch. After that the 1<sup>st</sup> Defendant settled on the ranch, first putting up with his cousins but later built his own house and put other developments on the land. There is also evidence from both sides that the late Bitanuzire participated in developing the land with the late Kaburuku by constructing valley dams. In his examination in chief, the 1<sup>st</sup> Plaintiff Kyepaka Francis testified on page 11 that that the farm was developed by Kaburuku and Bitanuzire and that they constructed water valley dams and a cattle dip. Despite that the certificate of title that was eventually issued left out Bitanuzire.

Before restructuring, Kyepaka and Kakono had applied to renew the lease which was expiring in 1988. Before the lease could be renewed, Government intervened by putting in place a Ranch Restructuring Board which divided Ranch 24 into two parts, namely Ranch 24A which was allocated to Francis Kyepaka PW1, Kakono (deceased), and George Rwakarongo DW3, after categorizing them as Ranchers. Ranch 24B was allocated to squatters. The 1<sup>st</sup> Plaintiff and the late Kakono bypassed the decision of the RRB and went to the Chairman of Mbarara District Land Board the controlling authority, who wrote to the Minister responsible for Ranch restructuring correcting his earlier letter to the RRB which stated that George Rwakarongo had an interest in Ranch 24. A lease title to Ranch 24A title exhibit **P5** was subsequently renewed in

the names of S. Kakoro and Kaburuku as tenants in common in equal shares. This was after both Kakoro and Kaburuku had passed away. The lease agreement was executed by the 1<sup>st</sup> Plaintiff Francis Kyepaka as administrator of the estate of Samwiri Kakoro (deceased) vide admin. Cause no. 29 of 1990. Francis Kyepaka prominently handled all processes of procuring the lease, including accepting the lease offer on behalf of the deceased Kakoro. Thus he was directly involved in the processing and procurement of the lease where he subsequently got registered as administrator of the estate of the late Samwiri Kakoro. The 2<sup>nd</sup> Plaintiff Norah Kakono also got registered as administrator of the late Kakono son to the late Kaburuku.

It is apparent that the Mbarara District Land Board did not observe principles of natural justice in the when they decided to overturn the allocation made by the RRB. In the RRB restructuring, George Rwakarongo had been allocated Ranch 24A along with Kyepaka and Kakono. The 1<sup>st</sup> Plaintiff together with the late Kakono later raised their objections, not to the RRB, but to the Land Board which was in all prudence expected to implement the decisions of the RRB, just as it did in case of ranch 24B which had been allocated to squatters. In cross examination on page 33 Kyepaka PW1 said he raised a complaint to the Board but did not have written evidence to that effect. This conduct of not raising their objections during the restructuring but rather waiting to overturn it through the Land Board is suspect. As if that was not enough, the decision of the Land Board hinged more on the correspondence written by Kyepaka (exhibit **P4**,) and that of the Chairman to the Board the late Bakashabaruhanga (exhibit **P2**). The 1<sup>st</sup> Defendant was not given a fair hearing before the District Land Board when it left out Rwakarongo from the title. This in effect deprived him of his interest in the land, especially after the RRB had under the ranch restructuring scheme accorded him the status of a Rancher together with Kakono and Kyepaka. This was in violation of the principle of natural justice under the Constitution and the Land Act.

I also find the conduct of the Plaintiffs contradictory regarding the manner in which they selectively challenged and bypassed the restructuring by the Ranch Restructuring Board. It was done only in respect of ranch 24A, and not ranch 24B, yet ranch 24B was also mutated out of the original ranch 24 where their interest springs from. This is reflected in the certificate of title which did not cover ranch 24B though the interests of Kakoro and Kaburuku, in whose names the lease was eventually extended, originally covered both ranch 24A and 24B. In this respect I find the title itself to be a contradiction of the realities on the ground. Since it was purported by the Plaintiffs to be an extension of the 1966 lease, and to have overlooked the RRB's restructuring, then it follows that it should have covered both ranches 24A and 24B which formed the original ranch 24. It should not just have covered only ranch 24A which was a creation of the very decisions of the RRB purportedly objected to by the Plaintiffs. It appears the objection to the decisions of the RRB had ulterior motives which were to oust the 1<sup>st</sup> Defendant Rwakarongo from ranch 24A.

**In Kampala District Land Board and Chemical Distributors V National Housing and Construction Corporation, supra** it was held that:-

*"If a person procures registration to defeat an existing unregistered interest on the part of another person of which he is proved to have knowledge, then such a person is guilty of fraud. Further, a deliberate refusal to follow prescribed procedure or to deceive that the land is available for leasing or to deny the Respondent a fair hearing amounted to fraud.*

*The proper procedures for granting leases over unallocated land were flouted in favour of the second Appellant. On the other hand the Respondent was not given an opportunity to be present during the inspection or to submit objections or to be heard before the lease was granted. There was ample evidence of fraud attributable to both Appellants which defeated the second Appellant's title to the suit land."*

I find that the manner in which the late Bitanuzire was edged out by not having him registered as on the lease certificate exhibit **P5** was fraudulent. There was also fraud regarding the manner in which George Rwakarongo was edged out when renewing the lease in respect of Ranch 24A. The entire process of renewing the lease in the names of Kaburuku and Kakoro was solely handled and executed by the 1<sup>st</sup> Plaintiff Francis Kyepaka. Kakoro and Kaburuku in whose names the lease were eventually extended or procured had by then passed away. He was aware of the interest and claims of the 1<sup>st</sup> Defendant but he apparently suppressed it to his advantage. There was no disclosure to the District Land Board that the 1<sup>st</sup> Defendant was already occupying a third of the ranch as re allocated by the RRB while the two thirds were occupied by the Plaintiffs. There is nothing to show that the 1<sup>st</sup> Defendant was heard by the District Land Board before it granted the lease or that there was any surveying of the land before the grant. This were glaring omissions considering that the lease was being extended or issued under changed circumstances where restructuring in terms of size and ownership of the land had taken place. There is evidence that the RRB listened to all concerned parties including the late Bitanuzire before re allocating ranch 24. The same impartiality was not exhibited by the District Land Board, which, as evidenced by the exhibited correspondence, took into account only the objections of the 1<sup>st</sup> Plaintiff Kyepaka Francis before it issued the lease. This in my opinion, on the authorities cited above, amounts to fraud. It is attributable to the 1<sup>st</sup> Plaintiff who processed the lease. He had vital knowledge about the 1<sup>st</sup> Defendant's claims and occupancy on the now divided ranch 24A which he did not disclose to the Land Board. He hid under the shield of being an administrator of Kakoro's estate and only revealed the information that advanced the Plaintiffs' interests and claims on the land. In my opinion, fraud has been proved to the requisite standards against the 1<sup>st</sup> Plaintiff in as far as the entire process of



registering land comprised in LRV 3416 Folio 5, Ranch No. 24 A Nyabushozi Mbarara is concerned.

Thus, on that basis alone, even if the Plaintiffs' arguments that the allocation was made to two individuals, Kakoro and Kaburuku were to be correct, it would not defeat the interests of the late Bitanuzire and his son the 1<sup>st</sup> Defendant on the land which were created by the Constitution and the Land Act. It would only imply that the registrable interests of Bitanuzire may not have been disclosed to the Selection Board.

## **Issue No. 2: Whether the Plaintiffs/Defendants are entitled to the remedies sought.**

Having found that there was bona fide/lawful occupancy of the 1<sup>st</sup> Defendant on Ranch 24A and that the registrations of the Plaintiffs on the suit property are tainted with fraud, the Plaintiffs' allegations of trespass attributed to the 1<sup>st</sup> Defendant cannot stand as interest in the land. Thus the Plaintiffs are not entitled to the remedies and reliefs prayed for in the plaint and reply to the WSD and counterclaim. Granting the reliefs would render the 1<sup>st</sup> Defendant landless on land he has lived on, developed and utilized for most of his life. This would put him in a position worse than even the original squatters, who were, in my opinion, equitably apportioned a parcel out of the same land. The 1<sup>st</sup> Defendant has a lawful claim to Ranch 24A like the Plaintiffs do, starting from the time their deceased parents or in laws, Kakoro, Kaburuku and Bitanuzire pooled cows together and brought them on the land that qualified them for allocation of Ranch 24. The 1<sup>st</sup> Defendant also claims interest in the Ranch in his own right having occupied and utilized the ranch since 1978. He attained the status of a bona fide/lawful occupant in 1995 since he had by then occupied the land unchallenged for more than 12 years within the meaning of Article 237(8) of the Constitution and section 29(2) of the Land Act. It is also my finding that, contrary to the Plaintiffs' claims, the 1<sup>st</sup> Defendant is not a licensee on the suit land, Ranch 24A. In that respect therefore I find that the 1<sup>st</sup> Defendant is entitled to the remedies sought.

On general damages, the principles set out by the Supreme Court in **Kampala District Land Board & George Mitala V Venansio Babweyana, Civil Appeal No. 2 of 2007**, unreported, Odoki CJ; **Kyagulanyi Coffee Ltd V Steven Tomusange, Civil Appeal No. 9 of 2001**, unreported, Mukasa Kikonyogo DCJ, as she then was; **Mbogo & Anor V Shali [1968] EA 93** are well settled law on award of damages by a trial court. It is trite law that general damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. See **Kiryabwire J in Assist (U) Ltd V Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999**, unreported, at page 35.

In the instant case, the fraudulent transfer of to Ranch 24A now comprised in LRV Vol. 3416 Folio 5 in the names of Francis Kyepaka and Norah Kakono (as administrator of the estate of the

late Charles Kakono) leaving out the interest of George Rwakarongo would ordinarily cause loss, anxiety and inconvenience arising from the deprivation. This would entitle the party whose land is trespassed upon or who is deprived of the interest in the property to general damages. Though the 1<sup>st</sup> Defendant's Counsel did not assist court by quantifying the alleged damages to enable it make an assessment, I would award general damages of Uganda shillings 20,000,000/= considering that this is a fairly developed ranch which is clearly demarcated, titled, and fenced with valley dams and cattle dips.

If I had to find for the Plaintiffs, I would have been required to assess general and special damages. It is trite law that damages must be pleaded and proved. The Plaintiffs allege that the 1<sup>st</sup> Defendant, in breach of the Plaintiffs' trust and generosity, committed various acts of trespass on part of the Plaintiff's land, including hiring out the suit land, fencing it off and denying the Plaintiffs access to grazing areas and purporting to be the lawful owner of the same. However, their Counsel did not assist court by quantifying the alleged damages to enable court make an assessment. However, making the same considerations as in the 1<sup>st</sup> Defendant's case above, I would, if I had found for the Plaintiffs, award them Uganda shillings 20,000,000/= by way of general damages.

The Plaintiff's case therefore, for the reasons given, is dismissed with costs. The 1<sup>st</sup> Defendant's prayers in the counterclaim to the WSD and Counterclaim are accordingly granted as follows:-

- a) The 1<sup>st</sup> Defendant is a lawful/bona fide occupant of the suit land.
- b) The Defendant is lawfully in possession of the suit land or acquired his interest from persons who possessed the land for more than 12 years before the 1995 Constitution and is protected by the law.
- c) The Plaintiffs wrongfully, unlawfully and fraudulently registered the suit land.
- d) The certificate of title to Ranch 24A now comprised in LRV Vol. 3416 Folio 5 in the names of Francis Kyepaka and Norah Kakono (as administrators of the estates of Samwiri Kakoro and Charles Kakono respectively) be cancelled, and a fresh title with the names of Francis Kyepaka, Norah Kakono (as administrator of the estate of the late Charles Kakono) and George Rwakarongo as tenants in common in equal shares be issued.
- e) A permanent injunction is granted against the Plaintiffs restraining, preventing and prohibiting them from alienating, interfering and trespassing upon the 1<sup>st</sup> Defendant's land.
- f) The 1<sup>st</sup> Defendant is awarded general damages of U. Shs. 20,000,000/= for trespass on the suit land.
- g) Interest on (f) at the rate of 20% per annum from the date of judgment till payment in full.

h) The costs of this suit are awarded to the 1<sup>st</sup> Defendant.

**Dated at Kampala** this 27<sup>th</sup> day of January 2012.

Percy Night Tuhaise

**JUDGE.**