

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

CIVIL APPEAL NO. 70 OF 2010

(Arising Out Of Civil Suit No. 671 of 2007 Chief Magistrate's Court of Mengo)

- 1. NANTALE TEREZA**
- 2. NAIGA ROSEMARY**
- 3. MASENGERE STEPHEN.....APPELLANTS**

VERSUS

MUGANDAZI LUBEGARESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This was an appeal from the judgment and decree of Her Worship Kavuma Muggaga Magistrate Grade 1 Mengo delivered on 22nd November 2010.

The background to the appeal is that the appellants, who were plaintiffs in the lower court, filed civil suit no. 671/2010 against the respondent. They sought a permanent injunction restraining the respondent from encroaching, trespassing, alienating or building on the plaintiff's kibanja; special damages; interest; and costs of the suit.

The appellants claimed to be the beneficiaries and administrators of the estate of the late Edward Kasozi who owned a kibanja in Mutundwe and made a will bequeathing it to his children and wife. The appellants claim to have lived on the land for over 87 years. They sued the respondent on allegations that he trespassed on their land in 1993, illegally built on it, and destroyed some property. The trial Magistrate found for the respondent and dismissed the appellants' suit.

The Appellants being dissatisfied with the judgment appealed against it on the following grounds:-

- 1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence and thereby reached the wrong decision.***
- 2. The learned Magistrate erred in law and fact when she made the decision based on evidence not adduced before court.***
- 3. The learned Magistrate erred in law and fact when she held that the respondent was a bona fide occupant and that he should stay on the suit land together with the plaintiffs.***

4. *The learned Magistrate erred in law and fact when she ordered that each family should stay where they are entitled to stay without specifying where the appellants and respondents where each entitled to stay.*
5. *The learned trial Magistrate erred in law and fact when she failed to make a decision on trespass and damage occasioned to the appellants' properties.*
6. *The learned Magistrate erred in law and fact when she did not visit the locus to establish the evidence adduced in court so as to make a just decision.*
7. *The learned Magistrate erred in law and fact when she delivered and signed the judgment in her names instead of the learned trial Magistrate.*

At the hearing of this appeal, this court gave time schedules within which Counsel were to file written submissions.

Ground 2: The learned Magistrate erred in law and fact when she made the decision based on evidence not adduced before court.

Ground 3: The learned Magistrate erred in law and fact when she held that the respondent was a bona fide occupant and that he should stay on the suit land together with the plaintiffs.

Learned Counsel for the appellants chose to address grounds 2 and 3 together before addressing ground 1. He referred to paragraphs 3 and 4 of the judgment which was to the effect that Nsamba Kamoga, the defendant's father, had lived on the suit land for many years. He pointed out that DW1 never mentioned whether Kamoga Nsamba lived on the suit kibanja, and that PW1, PW2, PW3 and PW4 all stated that the respondent's father and grandfathers have all never lived on the suit kibanja. He contended that the evidence of PW2 and PW3 indicates that the appellants' family has lived on the suit land for several years and that the 2nd and 3rd appellants' father was born on the suit land in 1923. He maintained that the evidence clearly shows that the appellants' father had lived in the house built on the suit land for many years, and that it was their home rather than the home of the respondent's father or grandfather. He referred to the appellants' witnesses' evidence which indicates that the respondent only came on the suit land in 1993. He argued that therefore the respondent could not be a *bona fide* occupant on the suit kibanja and has no legal right to stay on the land since he had only occupied the land for only two years before the coming into force of the Constitution and has never appealed his being convicted of malicious damage to property shown in exhibit **P3**. He submitted that the trial Magistrate's holding that the defendant's father had lived on the suit land for many years is not borne out of evidence and should be set aside.

In reply, the respondent's Counsel submitted that in answering the issues at the trial the trial Magistrate addressed the wills of Edward Kasozi exhibit **P1**, and that of Irera Makaku Nsamba exhibit **D4**. He contended that the late Edward Kasozi stated in his will that he never owned a kibanja and that this is what the trial Magistrate relied on to make the decision. He submitted that

ground number 2 should therefore fail. On ground number 3, which he stated also covers ground number 4, the respondent's Counsel submitted that the trial Magistrate, having ruled that the plaintiff did not have a kibanja, it would have been erroneous to again relate them to the principle of *bona fide* occupant. He maintained that if their father was just a caretaker, then they were staying on the suit land in that capacity and could therefore not be *bona fide* occupants. He argued that this ground partly succeeds only to the extent that it was wrong for the trial Magistrate to relate the appellants to the principle of *bona fide* occupancy after making a finding that they had no kibanja on the suit land.

The issues that were framed at the trial of this case were whether the plaintiffs owned a kibanja on the suit land, and what remedies were available to the parties. In resolving the two issues the trial Magistrate stated in the judgment that he was guided by the wills of Edward Kasozi exhibit **D4**, and that of Irera Makaku Nsamba, plus the witnesses' evidence on record. The trial Magistrate, after analyzing the said evidence, stated as follows on page 3 of his judgment:-

“Carefully pursuing the evidence on court record, the plaintiffs have not shown or have failed to show how Edward Kasozi acquired the suit kibanja to entitle them to inherit it nor have they showed any evidence, documentary or other words (sic) on how their grandfather Edward Kasozi acquired the suit kibanja other than saying that their grandmother Ziriana Nanyonga told them that he was born there in 1923.

In the same breath the defendant also much as he claims that his great grandfather Irera Makaku bought the kibanja, he does not tell court how, where or when he bought the suit kibanja by way of documentary evidence but what is seemingly clear is that both parties have attachments to the suit kibanja due to their family history. So by way of evidence on court record adduced by parties, ownership of the suit kibanja cannot be proved. That having been the case, court has to be guided by other evidence...exhibits P1 Edward Kasozi's will and exhibit D4 Irera Makaku's will.”

I have perused the court record in relation to the issues framed at the trial. According to paragraphs 4, 5, 6, 7 and 8 of the plaint, the appellants, who were plaintiffs in the lower court, were claiming an interest in the suit kibanja as administrators and beneficiaries of the estate of the late Edward Kasozi. They were also claiming compensation for damages occasioned to the said property by the defendant trespassing on their land. The defendant denies this in his Written Statement of Defense (WSD) and contends that the suit land never belonged to the estate of the late Edward Kasozi who was only a caretaker to the land. The defendant contended that the land belonged to the estate of late Irera Makaku Nsamba, and that he is in occupation of the land with full authority from the beneficial owner of the land.

The will of Irera Nsamba, exhibit **D4**, which was rightly relied on by court, in its english translation, lists the suit property, namely 3.63 acres of land at Mutundwe Kyadondo f6 14691, among his properties. He gave the said land to the clan head (Nsamba) but under the custody of

the heir Antonio Kasozi with the supervision of the Kabaka (King) of Buganda and the clan leadership. On the other hand, in the will of Edward Kasozi, which the trial Magistrate said was uncontested and admitted in evidence as exhibit **P1**, the late Edward Kasozi describes himself as being of Mutundwe. He mentions his property to include a ***“house...this one with the family home”*** which he bequeathed to Tereza Nantale the 1st plaintiff and the other as a ***“let”*** house at Wankuluku. The will further stated that ***“this kibanja”*** at Mutundwe ***“is for the clan, it should not be sold not even the heir has the authority to sell it...Even those I have given permission to construct structures ...if they want to leave they should remove their structures but not sell the kibanja.”***

The contents of the two wills clearly suggest that the land in question was clan land. Exhibit **D4** which is the will of Irera Makaku clearly stated that the two pieces of land at Buwala and Mutundwe were given to the clan head, Nsamba, but under the custody of Antonio Kasozi the heir and son to Irera Makaku. The relevant piece of land in this suit is the Mutundwe land, and this is what this court will focus. In the said will Irera Makaku described himself as Nsamba (clan head) and he was apparently passing on the land to another Nsamba (clan head) though the custodian was his son and heir. At the same time the will of Edward Kasozi exhibit **P1** also apparently referred to a house on land which was stated to be clan land. No one was to sell it though they could build on it. Unlike Irera who specified the land, the late Kasozi merely referred to the suit land as a kibanja in Mutundwe. The only thing he bequeathed was user rights on the kibanja, not the kibanja. He clearly indicated it was for the clan and not to be tampered with. He however stated that some piece of land could be allocated for the construction of an office for the clan head (Nsamba). This corroborates the evidence of that PW1, PW2, PW3 and PW4 who all stated that the appellants’ family has lived on the suit land for several years and that the 2nd and 3rd appellants’ father was born on the suit land in 1923.

There is also evidence from the same witnesses that the respondent’s family never lived on the land, and that the defendant settled there in 1993. The defendant testified as DW1 that the kibanja was the home of his grandfather where he (the grandfather) used to stay when he came to Mengo to attend meetings. He testified that his father lives at Buwanda and he has a kibanja at Buwanda. This would infer that that the defendant’s family had not been living on the land though the defendant’s grandfather would only stay there when attending meetings in Mengo. However the defendant/respondent’s family claim their interest from Irera Makaku who held the land as Nsamba. He passed on the same land to the custody of Antonio Kasozi with the supervision of the Kabaka and the clan leadership. Antonio Kasozi has since also died and his son Joseph Kamoga, who is the defendant’s father, is the head of clan (Nsamba).

The evidence on record would in my opinion suggest that Irera Makaku and his successors in title held the land in question namely 3.63 acres of land at Mutundwe Kyadondo f6 14691, as a clan head, in trust for the clan. This would indicate that this land was clan land in the lineage of Magandazi Joseph from whom both parties trace their lineage. Irera Makaku passed it on to another clan head and his son and heir was only to be a custodian of the same. In the meantime

the family of the late Kasozi, who have evidently lived on the land for a long time, could also only build and cultivate on it but not pass it on as personal property, just like Irera Makaku could not bequeath the land to his sons as personal property. This kibanja interest however was peculiar in that it was just like the larger clan title, not the personal property the late Kasozi though he and his family could exercise user rights on it. It was for the clan. On the other hand, it is evident from the plaintiffs/appellants' evidence that the defendant's father Joseph Kamoga was entitled to have a house for running his official activities as the head of clan, but this portion of land was yet to be demarcated for him by the appellants who had been instructed to do so in the will of Edward Kasozi.

There is evidence that the family of Edward Kasozi has lived on the land for more than 87 years. The trial court however disregarded this evidence and believed the respondent's claim that Kasozi was a caretaker on the land. There is no evidence adduced by the respondents that the late Edward Kasozi was a caretaker on the land. On the contrary, there is evidence of PW2 and PW3 which was not challenged, that the appellants' family has lived on the suit land for several years and that the said Kasozi was born on the suit land in 1923. The appellants have buried some of their family members, namely Ziriana Nanyonga, Katalo Matayo, Natenda and Nabukanya, on the suit kibanja. The same evidence of PW1 and PW2 also indicates that the respondent only came on the suit land in 1993, and he was challenged by the respondents who went as far as having him successfully prosecuted for malicious damage to their property which he had damaged in the course of trying to build on the land. In my opinion, this was far removed from being a *bona fide* occupant on the suit kibanja. There was also no evidence at all from the plaintiffs or the defendants that the defendant's father had lived on the suit land for many years.

The evidence on record indicates that the respondent's interest arises from his late father Joseph Kamoga Nsamba also a member of the same clan. Exhibits **P1** and **D4** indicate the land belonged to the clan. The late Irera, grandfather to the defendant/respondent only held it in trust to the clan and could not claim it as his personal property. The late Edward Kasozi from whom the appellants claimed their interest could also not bequeath it though there is evidence on record that he had lived on the land all his life. In his will exhibit **P1** he only allowed his children to occupy and build on the land, but not sell it, just like he himself had done before them. However he also allowed them to identify a piece of land where the house of the clan leader (Nsamba) could be constructed as his office. In my view, this would have been the piece of land that the defendant should have claimed as long as it was for purposes of running the office of the Nsamba. This would imply that if he encroached on any other piece of land, as he evidently did in this case, he would be trespassing on the appellants' land.

Thus, I would agree with the appellants' Counsel that the respondent could not be a *bona fide* occupant on the land since he had only occupied the land for only two years before the coming into force of the Constitution. He clearly falls outside the provisions of section 29(2) of the Land Act, cap 227 which define a *bona fide* occupant as a person who has occupied land and utilized or developed any land unchallenged by the registered owner or agent for twelve years or more or

had been settled on land by the government. Secondly, the trial Magistrate's holding that the defendant's father lived on the suit kibanja for many years was not borne out by any evidence on record.

Having analyzed the evidence as a whole, I would agree with the trial Magistrate to the extent that the appellants had an interest in the land which belonged to the clan. Neither the appellants nor the respondents could claim the land as personally belonging to their respective families. However, I would add that the appellants enjoyed a kibanja interest on the land for many years.

For reasons that some findings are not borne out by evidence on record, I would partly allow ground 2 of this appeal in relation to the trial Magistrate's findings in three aspects, that is, that the late Edward Kasozi was a caretaker; that the respondent was a *bona fide* occupant on the suit kibanja; and that the defendant's father lived on the suit kibanja for many years. Secondly, for reasons already given above, I would allow ground 3 of the appeal.

Ground 1: The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence and thereby reached the wrong decision.

On this ground, Counsel for the appellant contended that the trial Magistrate erred when he dismissed the appellants' suit after establishing that they were *bona fide* occupants. Counsel argued that since the trial Magistrate had determined the issue of whether the appellants owned a kibanja on the suit land in the affirmative, he should have found for the appellants instead of dismissing the suit against them with costs. He also referred to the evidence of DW1 during examination in chief that Edward Kasozi was caretaker but which evidence was contradicted during cross examination when he said he did not know that Antonio Kasozi appointed Edward Kasozi to caretake the place. He contended that Edward Kasozi could not have been appointed caretaker by Antonio Kasozi when there is evidence that Edward Kasozi was born and lived on the suit kibanja in 1923 long before 1943 when Irera Makaku made his alleged will appointing Antonio Kasozi his heir. He pointed out the evidence of PW1 and PW2 that they have buried their dead on the suit kibanja including Edward Kasozi's mother who was buried there in 1975, and argued that a caretaker cannot bury his dead on a land not his. He argued that Edward Kasozi could not have bequeathed his kibanja to his family to build on if it was not his. He submitted that Edward Kasozi was therefore not a caretaker but a kibanja owner or *bona fide* occupant of the suit kibanja.

Counsel for the appellant also contended that the trial Magistrate erred when he stated that by way of evidence on record the ownership of the kibanja cannot be proved. He referred to the evidence of the appellants' witnesses, namely PW1, PW2, PW3 and PW4 that they lived, cultivated, and buried their dead on the suit land for over 87 years without objection or challenge from anybody. He maintained that this qualified them to be *bona fide* occupants on the land under section 29(2)(a) of the Land Act, cap 227. He referred to the will of Edward Kasozi and its translation, exhibit **P1** where Edward Kasozi described himself as being of Mutundwe, and to the

pleadings which state the details of how the suit kibanja passed through various hands to be eventually held by Edward Kasozi the plaintiff/appellants' father. He maintained that the same will intended that the suit kibanja be owned by his family and their descendants and not the entire Ngabi clan, and that they could build on it but not sell it. He maintained that the same will allowed a house to be constructed on the suit kibanja for Nsamba the clan head for official purposes though this has never been done. On the will of Irera Makaku exhibit **D4**, he submitted that it listed 3.63 acres of land at Mutundwe and 1723.18 acres of land at Buwanda only to be held by the customary heir in custody of the mailo interest for the clan. He argued that this was clearly not Irera Makaku's personal property and he only held it in trust as clan head (Nsamba) for the beneficiary members of the Ngabi clan of Yozefu Magandazi lineage. He argued that he had no right to interfere or challenge the occupation or kibanja interest of Mutundwe land by the appellants. He contended that the respondent cannot claim the land as his private personal property. He further submitted that exhibit **D4** is not a proper will and invited court not to rely on it. He invited court to find that the suit kibanja belongs to the appellants who have a right to occupy the same.

In reply, the respondent's Counsel submitted that the trial Magistrate was guided by the will of the late Irera Makaku Nsambu exhibit **D4** and that of the late Edward Kasozi, exhibit **P1**. He submitted that there is no indication in the will of the late Edward Kasozi that Kasozi owned a kibanja at Mutundwe and hence he could not bequeath what never belonged to him. On the will of Irera Makaku Nsambu exhibit **D4**, Counsel contended that the said will clearly mentioned Antonio Kasozi as the successor to Irera Makaku who inherited the suit kibanja of Mutundwe Kyadondo though the defendant cannot explain how Irera Makaku acquired the suit kibanja. He also referred to the evidence of PW2 that they settled on the suit land so many years ago and that that is where their father was born in 1923. Counsel argued that since Edward Kasozi in his will stated that the land would never be sold as clan land implied that Kasozi had no powers to distribute it as his property much as his descendants were staying there. He submitted that the trial Magistrate highlighted the above aspects of the evidence and properly evaluated it and reached the right decision.

The trial Magistrate on page 4 of his judgment, stated as follows:-

“...it is not contested that the defendant's father was also staying on the same piece of land for years. The above having been the case, I would have no problem in believing the defendant's assumption that actually Edward Kasozi was just a caretaker of the whole suit land.”(emphasis added).

This court has already made a finding that the trial Magistrate's holding that the defendant's father stayed on the same piece of land for years is not borne out by any evidence on record. However I note from the wording of the quoted extract of the judgment (underlined) that the trial Magistrate based himself on the same finding to believe ***“the defendant's assumption that actually Edward Kasozi was just a caretaker of the whole suit land.”***

With respect, it beats reason as to why the defendant's father's staying on the land for many years, which is even not based on any evidence, would lead the trial magistrate to conclude that Edward Kasozi was just a caretaker on the suit land. Besides, though DW1 (the defendant) stated during examination in chief that Edward Kasozi was caretaker (page 11 record of proceedings), he contradicted himself during cross examination when he said he did not know that Antonio Kasozi appointed Edward Kasozi to care take the place and that he was not present when the appointment was made (page 13 record of proceedings). When the evidence is analyzed with other evidence on record, it comes out clearly that Edward Kasozi could not have been appointed caretaker by Antonio Kasozi when it is evident that Edward Kasozi was born and lived on the suit kibanja in 1923 long before 1943 when Irera Makaku made his alleged will appointing Antonio Kasozi his heir. Further, PW1 and PW2 testified that the appellants have buried their dead on the suit kibanja. This includes Edward Kasozi's mother who was buried there in 1975. As argued by the appellants' Counsel, it would be highly unlikely that a caretaker would bury his dead on a land not his, let alone bequeath his kibanja to his family to build on it. I would in that light conclude that Edward Kasozi was not a caretaker of the suit kibanja. He had rights to occupy and build on the suit kibanja though he or his family could not sell it as it was part of the clan land that was overseen by the head of clan the Nsamba.

In making the foregoing finding I appreciated the arguments of learned Counsel for the respondent, which were correct, that that the trial Magistrate was guided by the will of the late Irera Makaku Nsambu exhibit **D4** and that of the late Edward Kasozi, exhibit **P1**. He also rightly argued that that there is no indication in the will of the late Edward Kasozi that Kasozi owned a kibanja at Mutundwe and hence he could not bequeath what never belonged to him. Counsel further correctly contended that the will of Irera Makaku Nsambu exhibit **D4**, clearly mentioned Antonio Kasozi as the successor to Irera Makaku who inherited the suit kibanja of Mutundwe Kyadondo. What he did not mention though is that the land was given to the clan head, Nsamba, but under the custody of Antonio Kasozi the heir and son to Irera Makaku. This means Antonio Kasozi was a mere custodian of the land. The defendant himself as correctly observed by the respondent's Counsel, could not explain how Irera Makaku acquired the suit kibanja. Counsel again correctly argued that since Edward Kasozi in his will stated that the land would never be sold as clan land, it implied that Kasozi had no powers to distribute it as his property much as his descendants were staying there.

The foregoing arguments, though correct, fell short of focusing or addressing the issue raised by this ground of appeal. They did not specifically address Counsel for the appellants' submissions that the trial Magistrate erred when he dismissed the appellants' suit after establishing that they were *bona fide* occupants, or his contention that since the trial Magistrate had determined the issue of whether the appellants owned a kibanja on the suit land in the affirmative, he should have found for the appellants instead of dismissing the suit against them with costs.

The Magistrate on page 4 of his judgment stated that:-

“....Much as the plaintiffs are also entitled to stay on the suit land by virtue of their father Edward Kasozi who was caretaker to the suit land for many years. The above is due to the doctrine of bona fide occupants.”

He concluded his judgment on page 5 as follows:-

“So in conclusion much as the above has been said, the kibanja is for Irera Matayo and is being administered by the Administrator General’s office. So I would dismiss this suit with all its prayers, with costs to the defendants.”

Much as I would differ from Counsel for the appellants’ contention that the trial Magistrate determined the issue of whether the appellants owned a kibanja on the suit land in the affirmative, I would agree with him that, having declared them to be *bona fide* occupants with rights to stay on the suit land, his dismissal of the suit against them was, to say the least, a contradiction. On that basis, I find that the learned trial Magistrate failed to properly evaluate the evidence and thereby reached the wrong decision.

I would allow ground 1 of this appeal.

Ground 5: The learned trial Magistrate erred in law and fact when she failed to make a decision on trespass and damage occasioned to the appellants’ properties.

Counsel for the appellant contended that the trial Magistrate, having made a finding that the appellants were *bona fide* occupants, it was wrong not to have granted a permanent injunction to restrain the respondent from trespassing on the suit kibanja. He argued that as such the respondent can only be part of the said kibanja with the permission of the appellants, otherwise his continued occupation of the same would amount to trespass. He submitted that his act of building, cultivation, and making bricks on the suit kibanja was an act of trespass as held in **Khatibu Bin Mamadi V Issaji Nurbhai 4 Z.L.R 55**. Counsel referred to the evidence of PW1, PW2, and PW3 that none of them gave permission to the respondent to build on the suit kibanja, and that they were forced to demarcate a boundary of a fence to stop the respondent from further trespass but he broke the fence. Counsel submitted that the respondent continued to make bricks and to cultivate on the suit land despite his being prosecuted and convicted of malicious damage to property, and the appellants suffered special and general damages. He prayed this court to grant a permanent injunction against the respondent restraining him from encroaching, trespassing, alienating, residing or building on the appellants’ suit kibanja, and to award damages of U. Shs. 50,000,000/= (fifty million) to the appellants.

The respondent’s Counsel however submitted that the trial Magistrate was right not to make a decision on trespass and damage, because, having decided issue 1 in the negative, trespass could not arise. He also argued that regarding the damaged property, no issue was framed to that effect and that the Magistrate therefore had no power to decide an issue which had not been framed. He

cited **Nairobi City Council V Thabiti Enterprises Ltd [1995 – 98] 2 EA 231(CAK)** to support his position.

In determining this ground of appeal, this court looked at the pleadings before the trial court as well as the adduced evidence to determine the real issues at stake. The plaintiffs/appellants alleged in paragraph 4 of the plaint that their claim was for compensation for damage occasioned to their property, a declaration for a boundary of the lands, general damages and costs of the suit. In paragraphs 5, 6, 7 and 8 of the same plaint, the cause of action was partly stated as follows:-

“e) The defendant claims to have been given a part of the suit land by the said Nsamba his father whereupon he built a house on the kibanja next to the plaintiffs’ houses.

f) On or about the 13th day of January 2003, the Defendant however willfully and unlawfully damaged and removed the fence that had been placed by Tereza Nantale whereupon the plaintiffs had him successfully prosecuted and convicted vide criminal case no. 085 of 2003....

h) The Defendant in total violation of the court order demolished the plaintiffs’ house and started making bricks on the plaintiffs’ land and in an attempt to construct a building thereon.

6) The plaintiffs shall aver that the determination of the boundaries was in their perview as administrators of the estate and the fencing done was a result of the said decision....

7) The plaintiffs shall aver that the estate suffered special damages a (sic) result of the fence that was destroyed by the Defendant to wit....

8) The plaintiffs shall aver that in addition to the destroyed fence, the Defendant demolished a house on the estate land, a huge tree called omusizi, cut down (sic) banana plantation of about 40 stems among other crops for which the plaintiffs have suffered loss and hardship and are thereby entitled to general damages.”

The plaintiff then went on to pray court for a declaration that where the fence was originally placed is the right boundary for the plaintiffs’ part of the suit land, general and special damages, costs, and a permanent injunction restraining the defendant from encroaching, trespassing, alienating or building on the plaintiffs’ kibanja.

In defence the defendant/appellant denied the allegations and, in paragraph 5(i), (ii), (iii) & (iv) of his Written Statement of Defence (WSD) stated as follows:-

“(i) That the suit land has never belonged to the estate of the late EDWARD KASOZI but to the estate of the late IRERA MAKAKU NSAMBA....

(ii) That the late KASOZI EDWARD only permitted the plaintiffs temporary occupation of the land as he had no authority to bequeath the same to the plaintiffs.

(iii) That the defendant is in occupation of the land with full authority from the beneficial owner thereof.

(iv) That the plaintiffs have no authority to demarcate, fence or otherwise sub divide the land without permission from OMUTAKA NSAMBA, the Supreme Head of the Ngabi clan.”

The defendant went on in the WSD to state that the matters concerning barbed wires, poles, nails were finally and conclusively determined in a criminal case and prayed that the suit be dismissed.

It is very clear from the said pleadings that the plaintiffs were alleging encroachment (trespass) on their part of the land by the defendant who however maintained he was properly on the land. I would in that respect agree with the appellants’ Counsel that there was an issue of trespass in this dispute.

In his judgment the trial Magistrate only framed an issue about whether the plaintiffs owned a kibanja on the suit land. In other words, he concentrated only on the proprietary interests of the parties in the suit kibanja without formulating an issue on encroachment (trespass) or even addressing it. Yet this appeared to be a key issue in this matter. It was only fair that Counsel in the matter and/or the trial court should have framed issues that ensured exhaustive disposal of all the disputes at hand. In that regard there was miscarriage of justice by the omission to formulate an issue on whether there was trespass on the suit kibanja. It was the argument of the respondent’s Counsel on this matter that no issue was framed on the damaged property and that the Magistrate therefore had no power to decide an issue which had not been framed. With respect I do not agree with this argument. Much as the issue was not framed during the scheduling conference, court reserves a right to frame an issue not covered for purposes of disposing of all disputes in a matter.

Under section 80 of the Civil Procedure Act, this court as a first appellate court has powers to determine a case finally, or to frame issues and refer them for trial, or to take additional evidence or require such evidence to be taken, or to order a new trial, among others. In that regard, in addition to the issue framed by the trial Magistrate, I deem it proper to frame the following issue for determination, that is:-

“Whether the defendant trespassed on the plaintiff’s land.”

Trespass is a derogation of the rights of a person entitled to possession of immovable property. In order to maintain an action in trespass the person may either be in actual possession or merely have a right to possession at the time of trespass. If a person in actual possession but not in physical possession of the immovable property finds, possession challenged by the occupation of his property by some other person without any right title or claim to the property, it may be that the latter is a trespasser. See **Khatibu Bin Mamadi V Issaji Nurbhai 4 Z.L.R 55.**

There is evidence on record that the defendant built a house on the kibanja next to the plaintiffs' houses. He removed the fence that had been placed by Tereza Nantale as a result of which the plaintiffs had him successfully prosecuted and convicted vide criminal case no. 085 of 2003. PW1, PW2, and PW3 testified that none of them gave permission to the respondent to build on the suit kibanja, and that they were forced to demarcate a boundary of a fence to stop the respondent from further trespass but he broke the fence. There is also evidence that the defendant demolished the plaintiffs' house and started making bricks on the plaintiffs' land in an attempt to construct a building. PW1 gave evidence that she came to the land in 1951 when she married the late Edward Kasozi. PW2 and PW3 testified that they and their father Edward Kasozi were born and grew on the land. PW2 testified that at the time the defendant built their house on the kibanja they had not decided for Nsamba where he should build. The defendant did not deny building or cultivating or making bricks on the land. He gave evidence as DW1 that he was invited by his father to the land and he started cultivating on it and later built a house and started brick making. In cross examination he said his father Kamoga is a clan head and chief administrator of all the land belonging to Ngabi clan and it is not personally his land.

This evidence was not addressed by the trial Magistrate at all, yet it was vital in determining the issue of who had trespassed on whose land. This was vital evidence since the defendant corroborated the plaintiffs' evidence that he built, cultivated and started making bricks on the suit kibanja. Going by his evidence the defendant's claim to the land was that his father invited him to the land. He himself however stated in cross examination that the land was not personally his father's land and he was only its administrator as the clan head. This is in sync with Nsamba Irera's will, exhibit **D4**, which stated the land was being held in custody for the clan. Even the will of Kasozi, exhibit **P1**, corroborates this when it stated that the plaintiffs should not sell the land as it belongs to the clan. When this is analyzed with the plaintiffs' evidence that at the time the defendant built their house on the kibanja they had not decided for Nsamba where he should build, the aspect of the defendant having trespassed on the plaintiffs' part of the land is clearly brought out.

Courts have held that an appellate court has a duty to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind. See **Bogere Moses V U [1996] HCB 5**. On the basis of the foregoing legal provisions and authorities, and having considered the evidence on record, I am of the opinion that there is evidence on record which addresses the issue of trespass which this court has framed, without necessitating the need for a retrial or calling for additional evidence. This evidence in my view disposes of the issue framed by this court that the defendant trespassed on the appellants' piece of the kibanja.

The said evidence analyzed as a whole would imply that the trial Magistrate failed to make a decision on trespass and damage occasioned to the appellants' properties. Consequently, the appellants failed to get a remedy for the defendant's wrongful trespass on the appellants' part of the land.

I would therefore allow ground 5 of this appeal.

I note that the appellant's Counsel prayed this court to grant a permanent injunction against the respondent restraining him from encroaching, trespassing, alienating, residing or building on the appellants' suit kibanja, and to award damages of U. Shs. 50,000,000/= (fifty million) to the appellants.

On the issue of general damages, the principles set out by the Supreme Court in **Kampala District Land Board & George Mitala V Babweyaka, Civil Appeal No. 2 of 2007, unreported**, Odoki CJ, are well settled on the award of damages. Such damages may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Damages must be pleaded and proved. Special damages ought to be proved and properly assessed by court. See **Kizige V Muzakawo Batolewo [1981] HCB 66; A. B. Sindano V AG [1978] HCB 317; Uganda Breweries V Uganda Railways [2001 – 2005] HCB 24.**

The plaintiffs pleaded in paragraph 8 of their plaint that in addition to the destroyed fence, the respondent demolished a house, cut down a musizi tree, banana plantations and other crops on the suit kibanja, and that, the appellants suffered loss, inconvenience, mental anguish and hardship. This was brought out in the evidence of PW1, PW2 and PW3. PW2 and PW3 also gave evidence supporting the pleadings in paragraph 7 of the plaint that special damages of Uganda Shillings 378,000/= (three hundred and seventy eight thousand) were suffered as a result of the respondent's actions. The respondent did not deny this in his evidence, neither is there evidence that he appealed the criminal conviction of malicious damage to property, as revealed in exhibit **P3**, in respect of the same suit kibanja and property. He also did not challenge the plaintiff's claim of Uganda Shillings 378,000/= (three hundred and seventy eight thousand) as special damages against him.

I would, on the basis of the foregoing authorities, and in the given circumstances of this case where there is evidence that a house was demolished, and fences and crops cut down, award the appellants damages of Uganda Shillings 30,000,000/= (thirty million) against the respondent.

Ground 4: The learned Magistrate erred in law and fact when she ordered that each family should stay where they are entitled to stay without specifying where the appellants and respondents where each entitled to stay.

Ground 6: The learned Magistrate erred in law and fact when she did not visit the locus to establish the evidence adduced in court so as to make a just decision.

Learned Counsel for the appellant submitted that the trial Magistrate's discussion on where each family is entitled to stay should not have been made without first visiting the *locus in quo*. Counsel stated that the appellants requested court to visit the *locus* during the scheduling conference and at the closing of the case but the Magistrate did not do it.

Learned Counsel for the respondents however, referring to page 4 paragraph 3 of the record of proceedings, submitted that the *locus* was visited though the Magistrate did not make notes. On ground number 4 which he stated was covered by his submissions on ground number 3, the respondent's Counsel submitted that the trial Magistrate, having ruled that the plaintiff did not have a kibanja, it would have been erroneous to again relate them to the principle of *bona fide* occupant. He maintained that if their father was just a caretaker, then they were staying on the suit land in that capacity and could therefore not be *bona fide* occupants. He argued that this ground partly succeeds only to the extent that it was wrong for the trial Magistrate to relate the appellants to the principle of *bona fide* occupancy after making a finding that they had no kibanja on the suit land.

I have carefully perused the court record. I note from the record of proceedings, pages 3 and 4 that on 2nd June 2009, court adjourned the trial on 8th June 2008 at 2.00 pm for *locus*. There is no record that the said visit actually took place. There is an unsigned handwritten record however that the site was visited on 22nd May 2006 in respect to Application no. 070/2006. A list of developments on the site was made, but this only related to the materials found on the site, namely half baked bricks, raw bricks, mud and firewood. Counsel for the respondent apparently relied on the appellants' Counsel's reference to this visit when he submitted that the *locus* was visited by court. I differ from this argument. The site visit of 22nd May 2006 obviously had nothing to do with the trial as it was clearly conducted in 2006 long before the trial appealed against took off. This court therefore regards it irrelevant in as far as this ground of appeal is concerned. Since there is no record of the site visit talked about in the record of proceedings, this court can only conclude that there was no visit to the *locus* conducted by the trial Magistrate. I would therefore not agree with the respondent's Counsel that the *locus* was visited by the trial Magistrate.

In cases of trespass the trial court may not properly determine the issue in chambers without visiting the *locus in quo* to determine the extent of encroachment and record the testimony of some witnesses. As argued by the appellant's Counsel, the trial court ought to have inquired into the issue of encroachment once it transpired that the respondent was suspected to have encroached on the appellant's kibanja. This was more so since the defendant/respondent was maintaining that he was on the land with the permission of his father who is the clan head (Nsamba). I have analyzed above that the trial Magistrate did not frame a vital issue on whether there was trespass. Had he framed it, he would have seen the need to visit the *locus in quo* to check on the evidence given by witnesses as stated in **Yeseri Waibi V Edisa Lusi Byandala [1982] HCB 28**. In the said **Yeseri Waibi** case court held that the practice of visiting the *locus in quo* is to check on the evidence given by witnesses and not to fill the gap for them or court may run the risk of making himself a witness in the case. Although there is no express provision mandating the trial court to visit the *locus in quo*, it is now a rule of practice that where an issue of encroachment arises in the course of court proceedings, the trial court may not properly determine the issue in chambers without visiting the *locus in quo* to establish the extent of

encroachment and conduct and record the testimony of some witnesses if any at the *locus*. Visiting a *locus in quo* is not mandatory and depends on the circumstances of each case.

In this case however, much as there is no evidence that the *locus* was visited, it is already a finding of this court that there is ample evidence on record indicating trespass by the defendant/respondent on the plaintiffs/appellants' kibanja since the latter were yet to identify a portion of land where the defendant's father as head of clan could build.

On ground 4 of the appeal, which was argued together with ground 6, I am of the opinion that the findings of the trial court at the *locus* would have given deeper insight into the dispute including clearly identifying the boundaries and assessing the trespass. The findings on the boundaries would then have formed the basis of specifying where the appellants and respondents were each entitled to stay. That notwithstanding, the earlier finding of this court is that there is evidence on record that the defendant was making bricks, building and cultivating on the plaintiffs/appellants' kibanja at a time the appellants were yet to demarcate the portion of the land on which to build the clan head's house. This evidence can be relied on to determine that the respondent trespassed on the appellants' kibanja.

Grounds 4 and 6 of appeal are therefore allowed.

Ground 7: The learned Magistrate erred in law and fact when she delivered and signed the judgment in her names instead of the learned trial Magistrate.

The appellants' Counsel submitted on this ground that the judgment was signed by another Magistrate other than the trial Magistrate. The Magistrate signed the judgment in the names of the trial Magistrate instead of counter signing. She also signed the decree in her names instead of the names of the trial Magistrate. Counsel submitted that this was contrary to Order 21 r 3(2) & r 7 of the Civil Procedure Rules. He contended that the said Magistrate ought to have counter signed indicating that it was signed by her in the absence of the trial Magistrate, and that the decree ought to have been prepared as coming up for final disposal before the trial Magistrate instead of the Magistrate who signed it. Counsel submitted that the decree was prepared by the respondent's Counsel without consulting the appellant's Counsel. He submitted that this was an error which ought to be corrected by the appellate court.

In reply, the respondent's Counsel submitted that though the trial Magistrate who delivered the judgment did not sign it, he delivered it himself. He was transferred by the time the bill of costs was filed and the Magistrate who was allocated the file signed it in the presence of both Counsel with their consent. He argued that since the trial Magistrate completed the case, wrote the judgment and delivered it himself, the same cannot be impeached because of being signed by another judicial officer. He cited **Caroline Mboijana, Molly Mboijana & SOS Mboijana V James Mboijana[2001 -2005] HCB 86** to support the position and prayed court to fail this ground of appeal.

Order 21 rule 3(2) of the Civil Procedure Rules (CPR) provides that a judgment pronounced by a Judge other than the Judge by whom it was written shall be dated and countersigned by him or her in open court at the time of pronouncing it. Order 21 rule 7 of the CPR bestows the duty of preparing a draft decree and submitting it for approval to the other parties. If the draft is approved by the parties it is submitted to the Registrar for signing and sealing on satisfaction that it is in accordance with the judgment.

In this case the judgment was delivered but not signed by the trial Magistrate His Worship Kavuma Mugagga. It was eventually signed by another Magistrate who also signed the decree. The decree stated the matter to have come for final disposal before “His Worship Namatta Nsibambi”. In actual fact the matter came for final disposal before His Worship Kavuma Mugagga though it was Her Worship Namatta Nsibambi who signed the judgment after it had been delivered by the trial Magistrate. In my opinion this is an error which can be corrected and it does not prejudice any party to this suit, more so since the decree itself indicates that it was signed in the presence of both Counsel. Court is also enjoined in this regard to administer substantive justice without undue regard to technicalities under Article 126(2)(e) of the Constitution.

In **Caroline Mboijana, Molly Mboijana & SOS Mboijana V James Mboijana**, already cited, though the record of proceedings contained neither a signed judgment nor a handwritten draft of its original, there was an unsigned but dated and typed judgment. There were other overwhelming pieces of evidence proving that the trial Judge had completed the case and written the judgment and delivered it in open court. The Supreme Court did not impeach the judgment and held that the Justices of the Court of Appeal erred in law and in fact in failing to properly re evaluate the evidence when they concluded that there was no judgment delivered by the trial Judge.

I find that in the instant case, just like in the **Mboijana** case there is overwhelming evidence on record that the learned trial Magistrate completed the case and wrote the judgment, though he did not sign it.

Ground 7 of the appeal therefore is not allowed.

In the final result this appeal is allowed, save for ground 2 which was allowed in part, and ground 7 which is not allowed. The judgment and orders of the lower court are set aside and judgment is entered for the appellants as follows:-

- i) An order that the respondent should vacate the appellants’ suit kibanja.
- ii) A permanent injunction is issued against the respondent restraining him from encroaching, trespassing, alienating, residing or building on the appellants’ suit kibanja.
- iii) The respondent shall pay to the appellants Uganda Shillings 378,000/= (three hundred and seventy eight thousand) being special damages.

- iv) The respondent shall pay to the appellants Uganda Shillings 30,000,000/= (thirty million) being general damages for trespass.
- v) The respondent shall pay to the appellants costs of the appeal and in the court below.

It is so ordered.

Dated at Kampala this 25th day of October 2012.

Percy Night Tuhaise

JUDGE.