THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT -05 – CV – 008 - 2000.

(Original Civil Suit No 27 of 1996

DAAKA NGANWA :: APPELLANT

VERSUS

1. **PETER EMMANUEL RUKYEMA**
2. **JUSTINE KALEGYESA ::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON MR JUSTICE BASHAIJA K. ANDREW.

JUDGMENT

DAAKA NGANWA *(herein after referred to as "the Appellant")* filed a suit in the Chief Magistrate's Court at Mbarara *(herein after referred to as the "trial court")* on 13/3/1996 seeking, *inter alia,* for orders of eviction against V. RUCHEMAMPUNZI (the Defendant in the original suit and the original Respondent in this appeal) a permanent injunction, general damages for trespass, *mesne* profits, and costs of the suit.

The Respondent filed his defence on 4/4/1996 in which he raised a counterclaim seeking for orders, *inter alia,* for the dismissal of the Appellant's claim, and judgment on the counterclaim, eviction order, a permanent injunction, general damages for trespass, *mesne* profits, and costs of the suit. The trial court decided in favour of the Respondent, hence this appeal.

It should be pointed out at the outset that the current Respondents were substituted as legal representatives for the Defendant in the original suit and the original Respondent in this appeal, V. Ruchemempuzi, who died before the matter could be concluded. They did not actively participate in the suit at the trial or on appeal. For ease of reference the parties will, in this judgment, be referred to simply as "Appellant" and "Respondents" respectively.

Summary of facts.

The Appellant is a registered proprietor of suit land situated at Rwabatooro, Kakiika, Kashari described as ***LRV 1762, Folio 14, Kashari, Block 3, Plot 234,*** approximately 96.6 hectares. He contends that about the year 1990, the Respondents trespassed on a portion of his land, and erected kraals thereon, and used it for grazing cattle. At the trial the Respondents denied all the allegations and raised a defence in which they also claimed that they had a certificate of title for land at Rwabatoro comprised in ***LRV 1803, Folio 11, Block 3, Plot 211*** measuring approximately 23.2 hectares, and that the Appellant obtained a certificate of title for the disputed land fraudulently.

The trial magistrate, Her Worship Julia Acio, who first handled the case and made the following finding on record:

> "***I have read the plaint and written statement of defence of the Defendant and counterclaim. On the very face of it, they seem to be referring to different pieces of plots and blocks and folios. But as per the argument on the ground, the whole thing is impracticable. In my considered view, the second survey was improperly done since it affected land previously surveyed and registered. It is apparent that the affected party the Defendant was not called for the survey. I would for proper conciliation of the paper work and the conflict on the ground created by the second survey and subsequent registration of the Plaintiff's land block 3, plot 211,(sic) order that the same be resurveyed***.
>
> ***It appears that the surveyor not to refuse land to either party mapped whatsoever existed. The whole thing appears mysterious and non -existent because what is reduced on a map must confirm with what is physical on the ground.***
>
> ***This court therefore, orders that a resurvey be carried out and both parties must agree to a team of surveyors to the survey in their presence and of those affected, land to be re-surveyed.***"

(Note: The trial magistrate appears to have made an error in reference to the plot number, in that the Plaintiff's plot is ***Plot No.234****, and not* ***Plot No. 211,*** *which belongs to the Defendant).*

The re-survey results were admitted in evidence as ***Exhibit D2 and D 3*** respectively. The Chief Magistrate, His Worship Ngabirano Precious, who took over and finalized the case, dismissed it.

He found that the Appellant had failed to file a reply to the counterclaim, and had committed fraud. The trial court then ordered, *inter alia,* that the title deed for ***Plot 234*** be rectified and the portion of the Respondents' land which was overlapped by the Appellant's title be restored to the Respondents. Dissatisfied with the decision of trial court, the Appellant filed this appeal and advanced the following grounds:

1. ***The Learned Chief Magistrate erred in law to hold that failure of the appellant to file an answer to a counterclaim was important whereas there was no need for such an answer to be filed.***
2. ***The Learned Chief Magistrate erred in law and misdirected his mind to hold that the counterclaim was legally and properly filed whereas it was obvious it was not.***
3. ***The Learned Chief Magistrate erred in law to proceed to try a case basing on allegations of fraud instead of dismissing the counterclaim for not being properly filed.***
4. ***The Learned Chief Magistrate misdirected his mind both on fact and law on the aspect of Plots 234 and 211 Kashari, Block 3, when it was obvious Plot 211 was a table survey.***
5. ***The learned Chief Magistrate misdirected his mind and failed to define what was Plot No. 211.***
6. ***The learned Chief Magistrate failed to note that the Respondent on the facts was a trespasser on Plot 234 unto which the Respondent had no claim.***

Counsel for the Appellant, Mr. Mwene - Kahima, argued grounds 1, 2 and 3 together, and Mr. Kwizera Denis, Counsel for Respondents, also replied to them simultaneously. Court will follow the same arrangement to resolve the grounds.

Grounds 1, 2 and 3.

It was argued for the Appellant that the Respondents did not pay the requisite fee at the time of filing their defence, and hence the counterclaim did not legally exist, and that there was no need to respond to a legally non-existent counterclaim. Counsel also argued that the allegations of fraud against the Appellant by the Respondents had not been proved as required under the law. To buttressed his argument Counsel cited the cases of ***UNTA Exports Ltd. v. Customas [1970] EA & Margaret Musango v. Francis Musango [1970]) HCB 226; Amama Mbabazi & A'nor v. Musinguzi Garuga James, Election Petition No. 12 of 2012, Ndaula Ronald v. Hajji***

Nadduli Abdul, Election Petition Appeal No. 20 of 2001; Kampala Bottlers Ltd. v. Damanico (U) Ltd., Supreme Court Appeal No. 22 of 1992.

In reply regarding payment of fees, Counsel for the Respondent argued that the issue as presented by Counsel for the Appellant was misdirected, in that the trial court was duly satisfied that the necessary fees had been paid, and there was evidence on court record to that effect. Counsel maintained that, in any case, the trial court is vested with wide power, at any stage of the proceedings, to order a defaulting party to pay appropriate fees and the documents and proceedings relative to them would be as valid as if proper fees had been paid in the first instance. Further, that non- payment of fees is a minor procedural error, which court may ignore. Counsel relied for these propositions on the case of ***Amama Mbabazi & A'nor v. Musinguzi Garuga (supra)***, which cited with approval the earlier case of ***Lawrence Muwanga***.

Counsel for the Respondent maintained that even if the fees had not been paid, which was not the case in the instant case, still the counterclaim had to be considered as it raised pertinent issues that merited determination by the trial court, and that because the Appellant choose not to file a reply to the counterclaim, which he was legally bound to do, he had to suffer the consequences under ***Order 8 r. 18 (5) of the Civil Procedure Rules (CPR).***

The starting point in resolving the grounds is to examine the implications of ***Order 8 r.18 (5) CPR***, which provides for replies to counterclaims. It states:

> ***"Except that this sub-rule shall not apply to a reply to a counterclaim and unless a plaintiff files a reply to a counterclaim within the time fixed by or in accordance with these rules, the statement of facts contained in the counterclaim shall, at the expiration of the time fixed be deemed to be admitted, but the court may at any subsequent time give leave to the Plaintiff to file a reply***."

The Appellant's contention is not that he was never served with the defence and a counterclaim, but rather that he needed not to file a reply to what he considered to be a non- existent counterclaim. With due respect to the Appellant, by not filing a reply to the counterclaim he took an unreserved risk by basing on the presumption that fees had not been paid. It was more so in event the court would find, as indeed it did in this case, that fees had in fact been duly paid. The

risk got further compounded by the fact that the Appellant did not seek leave of court to file a reply to counterclaim out of time. Under the circumstances the provisions of ***Order 8 r.18 (5) CPR*** applied with full force, and the Appellant was deemed to have admitted the statements as pleaded in the counterclaim.

The proper recourse would have been for the Appellant to file a reply to counterclaim, and raise the issue of non- payment of fees at the commencement of the trial, and if court found for him, it would wholly dismiss the counterclaim. As it were, the Appellant boxed himself into a corner by not filing a reply; with the inevitable consequence that he was deemed to have duly admitted the statements in the counterclaim.

Apart from the above, an in-depth reading of the trial court's judgment demonstrates yet another added dimension that constituted basis for court's decision which, in my view, deserves special attention. The court observed as follows:

> ***"Accordingly, all statements of fact contained in paragraph 7 to 16 of the Defendant's counterclaim are deemed to have been admitted by the Plaintiff and this would entitle the Defendant to judgment on the counterclaim. <u>But before I enter judgment, this being a land dispute it would be in the interest of justice to critically examine the evidence on record as a whole to determine the parties respective rights vivas-vis the portion of land in dispute"</u>***. *(Emphasis mine).*

The above extract, invariably, implies that the trial court's decision was not only based on the presumed admission by the Appellant of facts in the counterclaim, but also upon the evaluation of the evidence as a whole. Therefore, Ground 1 of the appeal fails.

Ground 2 of appeal raises the issue of the legality of the counterclaim based on the non - payment of the requisite fees. However, it would seem clearly that the trial court was much alive to the issue. In its judgment (on page 10, the last three lines, paragraph 4) the trial court stated as follows:

"***As to the Defendant's counterclaim, the Plaintiff's counsel in his submission alleged that fees therefore was not paid and that the same ought to be struck out….***

Although no proof was furnished by the Defendant's Counsel on this matter, I have carefully perused the court file and found thereon two stamps bearing different dates in respect of fees payment. A part from the plaint and the counterclaim, there is no other document on court record filed by either party requiring the payment of fees. There is no interlocutory application or anything that required payment of fees other than the plaint and counterclaim. That being the case, and in view of the facts that the record shows two stamps in respect of money bearing different dates, I am of the view that one stamp represents fees for the plaint and the other fees for the counter claim. I therefore find that fess for the counterclaim was paid and the same is upheld."

Counsel for the Appellant particularly raised issue with the above findings, and submitted on appeal, that the trial court should have taken this as proof that, indeed, the counterclaim was not properly before court rather than hazard assumptions based on stamps on the court record.
For their part, Counsel for the Respondents argued on this particular point (on page 2, paragraph 1 of the submissions) that if the Appellant wished to contest the issue of non-payment of fees - which Respondents' Counsel asserted had been paid - it should have been raised as a preliminary point, which would have enabled the trial court to pronounce upon it such that it would be clearly ascertained whether the counterclaim was to be heard or not; but that since this was never done the counterclaim was heard.

From the trial court's record, the issue of non- payment of court fees was raised by Counsel for the Appellant only at the submission stage (on page 2, the first three paragraphs of written submissions dated 10/6/2000). This was, indeed, long after the hearing had been closed; which tends to lend credence to the Respondents' argument above. The foregone aside, the position of the law as it relates to payment of fees is adequately covered under ***Rule 6,*** of the ***Court Fees, Fines and Deposits Rules, SI 41-2,*** which stipulates that:

> ***"No document in respect whereof a fee is payable shall be used in any legal proceedings', unless it shall be initiated as a foresaid or unless the court shall be otherwise satisfied that proper fees in respect thereof have been paid;***
> ***provided that if any document is through mistake or inadvertence received, filed and or used in any court without the proper fees in respect thereof having been paid, the Court may if it thinks fit, Order that such fees as it may direct be paid on such document and upon such fees being paid the document and every proceeding relating thereto shall be as valid as if the proper fees had been paid in the first instance.***

The clear import of the Rule is that court is seized with wide discretion to order for payment at any stage of the proceedings where it finds that fees were not paid, and if fees are paid the document and/ or any proceedings relating thereto shall be as valid as if the proper fees had been paid in the first instance. Expounding on this Rule the case of ***Amama Mbabazi & A'nor v. Musinguzi Garuga James, Civil Appeal, No. 12 of 2002*** (quoting Tsekooko JSC), held that:

> "***Tsekooko JSC agreeing with that view stated on appeal to the Supreme Court a comment which his four other colleagues agreed that all the circumstances of any particular case must be weighed before ordering the defaulting party to pay fees in terms of the provisions of Rule 6 of the Court Fees Rules. Such an order is done in the interest of justice and must be done judiciously***."

The derivative *ratio decidendi* in the above holding is that even without the trial court finding on fees as it did, this court as an appellate court is seized with the necessary discretion, where it finds that fees had not been paid, to order for payment of the appropriate fees, and the proceedings relating to the counterclaim would be validated. On basis of these findings, the counterclaim in the instant case was properly filed, and the trial court was justified in proceeding to determine it in the manner it did. In addition, the trial court was right in its finding of fact as regards fees payment. Ground 2 of the appeal fails.

Ground 3 of the appeal only introduces an additional issue of fraud. The Appellant faults the trial court for having proceeded to try a case, instead of dismissing it, for basing on allegations of fraud which were not proved. Counsel for the Appellant relied on the case of **Kampala *Bottlers Ltd v Damanico (U) Ltd, Supreme Court Civil Appeal No. 22of 1992,*** where Justice Wambuzi C.J, held that:

"***Fraud must be proved strictly, the burden being heavier than that on the balance of probability***."

In response, Mr. Kwizera argued that the Respondents adduced evidence of several witnesses which sufficiently proved the issue of fraud, in that the Respondents had been in occupation of the suit land since 1973, and had visible developments on the land such as houses, a kraal, water wells and a perimeter fence along the suit land. They were chased away from the suit land in 1982, but that they returned in 1986 and took back possession of the land up to date. The Appellant got registered for the initial five years in 1989, and for a full term in 1995. His survey mark stones were superimposed on top of those belonging to the Respondents - a fact which was put to the Appellant's surveyors, but they ignored it. By the time the Appellant got his title in 1989, the Respondents had returned to the land 1986 and were in occupation.

The position of the law as it relates to fraud is well settled. In ***Fredrick J. K Zaabwe v. Orient Bank & 5 S.C Civ. Appeal No. 4 of 2006,*** (at page 28 of the lead judgment) Justice Katureebe JSC, relied on the definition of fraud in ***Black's Law Dictionary, (6th Ed) page 660*** as follows:

"***An intentional perversion of truth for purposes of including another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination or by 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… A generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestion or by suppression of truth and includes all surprise, trick, cunning dissembling and any unfair way by which another is cheated. "Bad faith" and fraud are synonymous and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness etc.***

As distinguished from negligence, it is always positive intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to

deceive whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo by speech, or by silence by word of mouth or by look or gesture".

The above extensive definition, in my view, largely encapsulates all the aspects of what constitutes fraud. Further, in the case of ***Kampala Battlers Ltd v. Damanico (U) Ltd. (supra)*** Wambuzi, CJ **(**at page 5 of his judgment) quoting the trial judge on the definition of fraud that stated that:

"It is well established that fraud means actual fraud or some act of dishonesty."

The trial judge in that case had relied on the case of ***Waimiha Saw Milling Co. Ltd v. Waione Timba Co. Ltd (1926) AC 101 at page 106,*** quoting Lord Buchmaster that: ***"Now fraud implies some act of dishonesty".***

It is also settled that fraud must be attributed to the transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of it.

In order to gauge the extent to which the test in the above authorities would be applicable to the instant case; it is called for to examine the particulars of fraud as they were pleaded by the Respondent in the counterclaim. They are as follows:

"13.

(a) Colluding with some members/agents of the land commission to deny and defeat the Defendant's application for full terms lease of the land in dispute through a purported subsequent rectified survey and registration.

(b) Misrepresentation on the application as if the land he was applying for was available for leasing when he had prior knowledge that the same had been registered in the names of the Defendant and that the initial lease thereby granted to the Defendant was

still running purportedly to defeat his legal interest therein by such subsequent registration.

(c) Colluding with some agents of the land office and bring land which was already subject of the registration of Titles Act, again under the same Act with the prime intention of defeating the defendants legal title thereto.

(d) Secretly stealthily applying for leasing the land and subsequently causing a re-inspection and re-survey thereof without the knowledge of the Defendant and other neighbors to the land purposely to obtain registration of the land knowingly and purposely to defeat the Defendants interest."

The question becomes whether or not the Respondents sufficiently proved the fraud as pleaded above. It would appear clearly that the answer is in the affirmative based on the uncontroverted testimonies of DW1 V. Ruchemampunzi, DW2 Serestine Bangirana, DW3Mwebaze Robert, DW5 Byanyaga Cosia, PW9 Busulwa and PW8 Okiringi. These witnesses testified with clarity that the Respondents had been in occupation of the suit land since 1973, and had visible developments thereon. They were chased away from the suit land in 1982, but returned in 1986 and took back possession of the land up to date. Therefore, for the Appellant to have proceeded to obtain registration of the suit land for initial five years in 1989, and a full term in 1995; have his survey mark stones planted on top of those belonging to the Respondents, while well aware of all these facts was, in my view, nothing short of fraud.

My view above is fortified by the authority of ***Matovu & 2 O'rs v. Senuin & A' nor (1979) HCB 174,*** which was also relied upon by the trial court to the effect that:

"If a person procures registration to defeat an unregistered interest on the part of another person of which he is proved to have knowledge, then such a person is guilty of fraud.

This is a true and correct statement of the law, which has been reiterated in a number of decided cases. See ***Horizon Coaches Ltd. V Edward Rurangaranga, S.C.C.S No.14 of 2009,*** where the Supreme Court held that the appellant should have taken stock of the respondent's occupation of the suit land since 1982, and that proceeding to procure a title in those circumstances amounted to a move to defeat the unregistered interest of the respondent, hence fraud.

Doubtless the registration of the suit land in the instant case was done by the Appellant knowingly, and with the intention of defeating the existing interest of the Respondents. The trial court was quite justified in its finding that fraud was duly proved as pleaded, and as having been committed by the Appellant.

It is called for to re-evaluate the evidence on the issue to demonstrate further acts of fraud which were committed and perpetuated by the Appellant as found by the trial court, and how they have a profound bearing on the entire case. The facts as could be established from the pleadings and evidence before the trial court are that there was a joint survey ordered by court, which led to a Survey Report dated 23/3/98, *Exhibit D2* and Survey Print *Exhibit D3,* carried out by one Nsamba Herbert, stating that 54.62 hectares of the Respondents' land was overlapped by the Appellant's title. The Respondents' title for the initial five years from 1/8/89 known as ***LRV 1803 Folio 11, Kashari Block 3, Plot 211*** land at Rwabatoro covered approximately 23.2 hectares, whereas that of the Appellant, known as ***LRV 2406, Folio 20, Kahsari Block 3, Plot 234*** land at Rwabatoro extended to a full term from 1/4/1994 covered approximately 96.9 hectares.

A re-survey was done on 10/2/92 by Busulwa (PW9) on instructions of Commissioner for Surveys and Mappings, according to evidence of PW8 Okiringi Pascal, (on page 21 of the proceedings) who supervised Busulwa (PW9). It was completed on 20/10/93, and there are letters to that effect which were admitted in evidence as *Exhibit P. 2 and P. 3*. The effect of the re-survey was that the land of the Respondents as comprised in ***Plot 211*** was dramatically reduced in size as other plots of land were created i.e. ***Plot 303*** for one Kabarasi and ***Plot 304*** for one Rev. Kashanku, and the Respondents were left with only approximately 2.56 hectares, according to PW9 Busulwa (on page 30 second last paragraph of the proceedings).

The arguments of both the Appellant and the Respondents converge on the point that the dispute is as regards ***Plot 234;*** for the reason that the Appellant sued in court seeking remedies for trespass committed by the Respondents on ***Plot 234,*** and the Respondents filed a counterclaim that the Appellant had obtained his title for the said plot of land, with full knowledge that the Respondents had existing interest in the land which he included his title.

The evidence of the Appellant is that the land was purchased by his mother, one Gertrude Nganwa, from one Kamuhanda in 1978. However, it is noted that the said purchase was not proved before the trial court by any documentary evidence. The Respondents' evidence, on the

other hand, was that they started to use the land in 1973 grazing cattle together with the said Kamuhanda. The land status was *"Karandaranda"* (Public Land), and that when Kamuhanda migrated he left the Respondents there, who then applied for the land from the Sub - County Chief in 1977 through the Parish Chief.

The Sub -County Chief then invited people who included Mrs. Gertrude Nganwa, Kamuhanda, Bangirana, Rubarihi, Rwabyooma, Janet Kabitooma and others, who were the immediate neighbours, and that Kamuhanda did not object to the Sub - County Chief granting the land to the Respondents. Boundary marks of *"Oruyenje"* were planted, and the Respondents built a house, kraal, and dug cattle well. In 1977, they applied for the land to be brought under the operation of the ***Registration of Titles Act.***

The above facts vividly shed light on how each of the respective parties acquired their land before applying to bring the land under the operation of the ***Registration of Titles Act.*** Of crucial importance, though, is the fact that there is ample well corroborated evidence to the effect that the Respondents acquired the suit land. Even PWI, William Nganwa's testimony succinctly reinforced the view that Respondents were grazing on the land before 1990. At page 4 of the proceedings, PW1 stated as follows:

> "***All of a sudden, we began to see the defendant come to the land. In the 1980's he brought his cows, after sometime he started to set up a kraal. That (sic) he grazes on our land, waters them on our land. That (sic) he occupies about 54 acres and has cut down fences.***"

In my view, this was sufficient proof that by the time the Appellant applied for the initial lease for five years, which includes the disputed land, he was acutely aware of the presence of the Respondents and interest in the suit land.

Another point to consider is the *Lease Agreement* attached to the certificate of title, which includes a condition in paragraph 3 to the effect that:

> "***That compensation to customary tenancy, if any on the said land, shall be by the lessee to the satisfaction of the lessor.***"

I have not come across any evidence to suggest that the Respondents were ever compensated. The Appellant very well knew that the Respondents had user interest of part of the land over which he was processing a leasehold certificate of title. The failure to take any step to pay the

necessary compensation would inevitably negate any Appellant's effort to brand the Respondents as trespassers; which was the basis of his entire claim. In addition, the failure to effect compensation of the tenants placed the Appellant in breach of a fundamental term of the *Lease Agreement*, which conditionally entitled him to the leasehold in the first place. It follows that the Appellant was dishonest in the disclosure of facts in the process of obtaining the title. This is not to mention the validity of a title obtained by placing mark-stones on top of pre-existing ones, regardless of whether or not the original ones related to a table survey.

There is also need to emphasise the first trial magistrate's (Her Worship Julia Acio) observations that whereas certificates of title existed, the facts on the ground needed to be verified. Certainly, land being immovable property, it could be viewed and ascertained as against the documentary titles. Since the Appellant had sued the Respondents in trespass to land, logically it meant that the disputed land was known; and the disputed land being in ***Plot 234***, the Appellant was in no doubt aware that he had included land which was being used by the Respondents when processing his title, which makes fraud and the allegations that he was dishonest credible.

Reading from paragraph 9 of the Written Statement of Defence, Annexture "BB", it is understood that by 1990, there existed a land dispute between one Nganwa Henry and the Respondents over the suit land, which was entertained by Kakiika LC III Court under ***Case No. 7 of 1999***, and was decided in favour of the Respondents. An appeal was lodged in the Chief Magistrate's Court at Mbarara vide ***Case No. 44 of 1990,*** which ruled that the LC III Court lacked the necessary jurisdiction to deal with titled land, and ordered for a re-trial before a competent court. This again raises questions as to why the Appellant could not await the outcome of the dispute before proceeding to obtain a certificate of title over the disputed land.

The Appellant had applied for the initial lease in 1989 and full term in 1995, by which period he well knew of the Respondents' user rights, and occupation on part of ***Plot 234.*** When this is viewed against the evidence of PWI, William Nganwa, that in the 1980's before the initial five years lease was granted to the Appellant, the Respondents had started the purported trespass, then the Appellant's claim that the Respondents only came to ***Plot 234*** after a certificate of title was issued becomes absolutely untenable. Ground 3 of the appeal lacks merit, and it is disallowed.

Ground 4 and 5.

These grounds were also argued together. Counsel for the Appellant in his submission disputed the Respondents' claim that they could have applied to be registered proprietors of ***Plot 211*** in 1983 when it is alleged that by that time they had been chased away as a "Banyarwanda", and had not returned. In a similar stance, Counsel disputed the claim that the Respondents could have been present at the inspection of the land in 1983, because they had been chased away, and could not be present in Mbarara at the same time. Counsel concluded his argument on this point that the survey to create ***Plot 211*** was merely a table survey.

In reply, Counsel for the Respondents argued that the facts as they relate to ***Plot 211*** and the rectified survey were irrelevant in resolving the dispute at hand. Further, that following the re-survey ordered by court, ***Plot 211*** was not in dispute; because the initial mapping of ***Plot 211*** had been placed on the plots of Rev. Kashanku and Kabarasi; over whose land the Respondents had no claim. That the survey ordered by court only showed that the disputed land related to ***Plot 234*** and that it measured 54.62 hectares.

Resolving the above arguments once again calls for a re- evaluation of the evidence on those particular points. I will start with one that the survey of ***Plot 211*** was a mere table survey. I fail to find the basis for this argument because table surveys are ordinarily as recognized surveys as any other, and there would be absolutely nothing wrong even if ***Plot 211*** had been one such. In any event, an initial five-year lease was granted on basis of the so-called table survey. Okiring (PW 8) and Busulwa (PW9), testified that the Respondents were granted the land comprised in ***Plot 211*** measuring approximately 23.2 hectares for the initial five years on 21/11/89, which would expire on 21/11/1994. PW 9 clarified (on page 31 of the proceedings, paragraph I) that he carried out the survey, and that ***Plot 211*** was not in dispute after survey. PW9 was emphatic that he did not survey the part of the land in dispute. It follows that the disputed land was in ***Plot 234*** whose survey had overlapped the Respondent's land, and not in ***Plot 211***. This makes the issue raised about a table quite irrelevant.

Regarding the issue of whether or not the Respondents were chased away in 1982, there seems to be no dispute on the matter. However, I fail to find the relevance of the point given that the contention in the instant case relates to trespass to land, which has already been pronounced upon. From the evidence of the re-survey ordered by court, which was admitted through *Exhibits D2 and D3*, the dispute clearly lies on ***Plot 234,*** and the trial court properly directed

itself on the issue. Grounds 4 and 5 of the appeal lack merit and accordingly fail. The findings in Ground 3, 4 and 5 also wholly dispose of Ground No. 6 of the appeal; which also fails.

Before taking leave of this matter, there is need to comment on evidence, especially of DW2 (on page 35 of the proceedings). He stated as follows:

> "***In 1986, the Defendant returned and went back to the said land. The Plaintiff left the place and disappeared up to now he has never returned***."

It is noted that the Appellant in this case is one ***"JOHN DRAKE NGANWA",*** who never testified in court. The Power of Attorney on court file dated 20/6/1996 donated to one ***Jean Bwijwire Musoke***, shows the said ***John Drake Nganwa's*** address as "***239, Victoria Park Road, London E9 7 HD"***, and the Instrument was done before a one "***KEVIN M. F Danagher, Notary Public London (Newham) England UK"***

If it be true that the Appellant left the suit land in 1986 and has since never returned, questions abound as to who actually signed the lease on 8/9/1995 for ***Plot 234*** for the initial five years and the subsequent *Lease Agreement* for a full term. If the Appellant signed it from the United Kingdom where he is said to stay, then ***William Nganwa*** of ***Mulago Hospital, Kampala***, would not be a competent witness in presence of whom the *Lease Agreement* would be executed; which calls into question the validity of the Appellant's lease itself. However, since this issue is not one of the grounds in this appeal, this court is reluctant to pronounce upon it.

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BASHAIJA K. ANDREW
JUDGE
16/11/2012.