THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

CIVIL APPEAL NO. 011 OF 2018

(ARISING FROM MUKONO CIVIL SUIT NO. 0048 OF 2015, MUKONO CHIEF MAGISTRATE'S COURT AT LUGAZI)

SALONGO KIVUMBI LIVINGSTONE :::::::::::::::::::::::::::: APPELLANT

VERSUS

KALEMBA KAKYAMA :: RESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

Background

1. This is an appeal from the judgment of the Magistrate Grade 1 of Mukono Chief Magistrate's Court at Lugazi delivered by His Worship George Obong. The Appellant who was the Plaintiff in Civil Suit No. 48 of 2015, instituted the suit against the Respondent on 16th October, 2015, seeking for a declaration that the Plaintiff is the rightful owner of the suit *kibanja*; that the defendant's acts constituted trespass on the suit *kibanja*; an order of vacant possession; a permanent injunction restraining the Defendant and his agents from further trespass and general and special damages; mesne profits and costs of the suit.

2. The Plaintiff claimed to have inherited the suit *kibanja* from his late father Yonathan Kabogoza in 1954. The plaintiff stated that since then

he has been utilizing the land for cultivating bananas, coffee trees, cassava, sweet potatoes among other seasonal crops and his residential house is on the land where he stays with his family to-date. About June, 2015, the Defendant unlawfully entered upon the Plaintiff's *kibanja* and cut down his Muwafu tree into timber without his consent. That the Defendant further destroyed the Plaintiff's crops from the suit land including the coffee, banana plantation, ovacado trees among others, hence this suit.

3. On 6th November, 2015, the Defendant filed a written statement of defence denying the allegations and contended that the suit land was purchased by his parents the late Arajab Kakyama and Mrs. Idah Mboowa from Edita Ssekatawa (now late) and that it is currently registered in his mother's name as its proprietor. That the land had 3 bibanja holders namely; Nalima, the late Bigaju and the late Nsubuga, who were all compensated and it became squatter free.

4. The learned trial Magistrate delivered a judgment in favour of the Defendant (Respondent) on 27th September, 2018, dismissing the suit with costs to the Defendant. The Appellant being dissatisfied with the judgement of His Worship Obong George, filed this appeal. The amended Memorandum of Appeal filed on 23rd March, 2022 contains the following grounds:

    i. **The learned trial Magistrate erred in law and fact when he failed to conduct a visit to the *locus in quo* at the close of the hearing thereby occasioning a miscarriage of justice;**

ii. **The learned trial Magistrate erred in law and fact when he wrongly made a finding that the Appellant held no *kibanja* interest on the suit land;**

iii. **The learned trial Magistrate erred in law and fact when he held that the Respondent is not a trespasser on the suit *kibanja* without evidence to support the findings;**

iv. **The learned trial Magistrate erred in law and fact when he dismissed the Appellant's case after failing to evaluate the entire evidence on court record which occasioned a miscarriage of justice;**

v. **The learned trial Magistrate erred in law and fact when he failed to appreciate the conflicting interest of the Appellant and Respondent on the suit land thereby making a wrong conclusion that the Appellant has no *kibanja* on the suit land.**

5. The 6th ground contains the Appellant's prayers, which are as follows:
   (a) That the judgement and decree of the lower court be set aside;
   (b) That the Appellant be declared owner of the suit *kibanja* and the Respondent be declared a trespasser;
   (c) An eviction order against the Respondent;

(d) That the Appellant's appeal be allowed with costs in this court and the lower court.

6. During the hearing of this appeal on 2nd December, 2022, the Appellant was represented by Counsel Kakeeto Denis from M/s Denis Kakeeto Advocates. The Respondent was represented by Counsel Zahura Shamim from M/s Zahura & Co. Advocates.

7. This court will determine the 1st ground separately and the 2nd, 3rd, 4th and 5th grounds jointly, because all their resolutions lead to the same conclusion. As the first appellate court, this court is required to re-evaluate all the evidence that was available before the trial court and make its own inferences on all issues of law and fact. In **Fr. Narcensio Begumisa & Others v. Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002**, Justice Mulenga stated the principle as follows:

> *"The legal obligation on a first appellate court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions".*

Ground 1.

The learned trial Magistrate erred in law and facts when he failed to conduct a visit to the *locus in quo* at the close of the hearing thereby occasioning a miscarriage of justice;

8. Citing the cases of **Bongole Geofrey & 4 others v. Agnes Nakiwala, CA No. 0076/2015** and **Odongo Ochama Hussein v. Abdul Rajab, CA NO. 119/2018**, it was submitted for the Appellant that *locus in quo* is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and testing the evidence in those points only.

9. That in the witness statement of Wasswa Peter, the witness stated that his father was called Muwonge Bonny and that the route to their home was going through Kakyama's land. That he stated that Kakyama blocked the road and made for them another road which they use up to-date on the boundary of his *kibanja* which is between the disputed *kibanja* and Kanyama's *kibanja*. That while making the road, he left the disputed portion on Kivumbi's side as part of his *kibanja* and he was the one who owned it and who was using it.

10. Furthermore, that as per witness statement of Kubiita Aida, she testified that Muwonge Bonny who was also their neighbour passing in a path near Kakyama's home which Kakyama did not like because of having local brews. That Kakyama made for him a route on the

bordering of the *kibanja* leaving the disputed portion on their side and that the road is present to-date.

11. That also the witness statement of the Appellant mentions the road. That this would have interested the trial Magistrate to visit the *locus* to establish the side of the suit *kibanja* vis-a-vis the road to Muwonge's home and the Defendant's land in question. That failure to do so made the trial Magistrate's judgment short of evidence on *locus*.

12. The Appellant's counsel concluded on the 1st ground that the learned trial Magistrate misdirected himself when he failed to conduct a visit to the *locus in quo* at the close of the hearing thereby occasioning a miscarriage of justice yet there were contradictions between the parties. These warranted the court to carry out *locus in quo* to understand the evidence better although it's not mandatory.

13. The Respondent's counsel on the other hand submitted that Mr. Sekatawa, counsel for the Plaintiff (now Appellant) stated before the trial court that they fixed this case today to pave a way forward following the locus visit by court. That when locus was visited, the parties agreed on the same position. That at the initial stage of the proceedings in Civil Suit No. 48 of 2015, court made a *locus* visit and it duly witnessed all that was on the land. That there was nothing that necessitated the trial Magistrate to go back there after hearing the witnesses.

14. That it is trite law that *locus* visit can be done either at the beginning of the trial of the matter or at the end of the trial and it is not a mandatory requirement that even after court has visited *locus* at the beginning of the trial, it has to revisit again at the end of the trial. Counsel prayed that the 1st ground of the appeal fails.

15. In rejoinder, the Appellant's counsel argued that other than the statement made by the Plaintiff's counsel on locus visit, there are no more of proceedings / minutes of the said *locus* visit as required by law in Practice Direction No. 1 of 2007. That the trial court should have endeavoured to record the proceeding of the locus visit at the conclusion of the trial, hence there was an error as to a matter of procedure and improper admission of evidence which resulted in miscarriage of justice.

16. The Appellant's counsel further submitted that the trial court should have endeavoured to visit *locus* after hearing the oral evidence of the witnesses to ascertain what was on ground and specifically to identify the boundaries of the Appellant and the Respondent, since the issue in question was in regard to neighbourhood. That the learned trial Magistrate erred when he failed to conduct a visit to the *locus in quo* at the close of the hearing thereby occasioning a miscarriage of justice.

Court's consideration.

17. Civil trials including land litigation are general guided by Order 18 of the Civil Procedure Rules, S.I 71-1, which prescribes the

procedure for conducting and hearing of civil suits. Order 18 rules 4 and 5 of the Civil Procedure Rules, require evidence of witnesses to be taken orally in open court in the presence of and under the personal direction and superintendence of the judicial officer. The rules provide as follows:

> *"4. The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.*
>
> *5. The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge."*

18. Pursuant to the above provision, it is clear that adjudication shall be made on evidence taken in court. In **Opio v. Onyai (Civil Appeal No. 39 of 2014) [2016] UGHCLD 35**, Justice Stephen Mubiru held at pages 5 to 6 that:

> *"Since the adjudication and final decision of the suit should be made on basis of evidence taken in Court, the visit to a locus in quo must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only".*

19. Order 18 rule 14 of the Civil Procedure Rules, S.I 71-1 provides thus:

"The court may at any stage of a suit inspect any property or thing concerning which any question may arise."

The word "may" is construed as giving discretionary powers to court to inspect any property or thing concerning which a question may arise. This includes inspection of the locus in quo. Therefore, I hold that visitation of the locus in quo is at the discretion of the court and not mandatory. The court has to be guided by the evidence and nature of the dispute before it before deciding whether to visit the locus in quo or not. The visit is meant to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to the land. Such a conflict can be resolved by visualizing the object, the scene of the incident or the property in issue.

20. The purpose of *locus in quo* was stated in the case of **William Mukasa v. Uganda [1964] E.A 696 at page 700**, by Sir Udo Udoma, C.J. (as he then was) as follows:

"A view of a locus in quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or a map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view, a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."

21. Basing on the above authority, if the court deems it necessary to conduct *locus in quo*, the visit has to be made with a clear focus on what it is that the court intends to see or the parties and their witnesses intend to show the court, which evidence is to be tested at the inspection. Since the purpose of *locus* proceedings is to enable court check on the evidence already given by the witnesses in court, the most appropriate stage at which to conduct it is where both parties to the case and all their witnesses have already testified and closed their case. *Locus* visit at the beginning of the trial may not achieve the purpose for which it is meant.

22. In the instant case, other than the statement made by the then Plaintiff's counsel Mr. Sekatawa regarding visit to the land, there is no lower court record by the trial Magistrate indicating that he visited *locus* in this case. If he indeed visited the land, then the proceedings did not fulfill the purpose for which *locus in quo* is meant. The trial Magistrate could have been able to merely observe the disputed land since at that point in time, neither the parties nor their witnesses had testified for the trial court to confirm their evidence at the *locus* in quo.

23. Having held that *locus* proceeding is not mandatory and noting the agreed facts of this case, the main consideration was for the Appellant to adduce conclusive evidence to prove that he is the *kibanja* holder of the suit land since there was no dispute that the Respondent's mother was the legally registered proprietor of the land. After visiting and observing the suit land at the commencement of the trial, the trial Magistrate could have found it unnecessary to conduct *locus*

proceeding at the close of the parties' case, which failure in my judgment, did not occasion a miscarriage of justice. Accordingly, the first ground of the appeal fails.

Ground 2

The learned trial Magistrate erred in law and facts when he wrongly made a finding that the Appellant held no *kibanja* interest on the suit land;

Ground 3

The learned trial Magistrate erred in law and facts when he held that the Respondent is not a trespasser on the suit *kibanja* without evidence to support the findings;

Ground 4

The learned trial Magistrate erred in law and fact when he dismissed the Appellant's case after failing to evaluate the entire evidence on court record which occasioned a miscarriage of justice; and

Ground 5

The learned trial Magistrate erred in law and fact when he failed to appreciate the conflicting interest of the Appellant and Respondent on the suit land thereby making a wrong conclusion that the Appellant has no *kibanja* on the suit land.

24. The Appellant's counsel argued on the 2nd ground that in his witness statement, the Appellant elaborated how he got the *kibanja* in the year 1954, that his father bought the suit *kibanja* for him from Edita Ssekatawa. That he lost his purchase agreement in the year 1979 when he was invaded at home and his property including some important documents were stolen and that he reported the matter at Ngogwe Police Post. That he was introduced to the said Edita Ssekatawa and he was paying Busulu to her for the *kibanja*. That this was the same evidence from other witnesses. That Kubiita Aida fortified the *kibanja* ownership.

25. Counsel averred that the Respondent testified that he did not plant the crops, that the coffee plants were there when the land was bought. That during re-examination of D.W.3, she said when the Plaintiff planted the crops, he did not get her consent. That this points as to who planted the coffee trees. That as confirmed by D.W.3, the coffee trees were found on the *kibanja* ownership by the Appellant at the time of the purchase. That the Appellant's efforts were all futile when he decided to repossess the land.

26. Furthermore, the Appellant's counsel stated that during cross examination of Idah Mboowa, she stated that her husband got the certificate of title in 1995. The Appellant's counsel submitted that that does not take away the Appellant's *kibanja* interest in the suit land. That the Appellant is the lawful owner of the suit land which he is in possession of. That the learned trial Magistrate misdirected himself

when he made a finding that the Appellant held no *kibanja* interest on the suit land.

27. On the 3rd ground of the appeal, learned counsel averred for the Appellant that the Appellant is the owner of the suit *kibanja* on which he is in possession planting, cultivating and harvesting from it as elaborated in the 2nd ground of the appeal. That the Appellant / Plaintiff in his witness statement stated that around June, 2015, the Respondent / Defendant entered upon his *kibanja* and cut his big mature Muwafu tree into timber and that on or about 12th September, 2015, the Defendant still brought prisoners from Ngogwe Prison and on his instructions and directions, they entered upon the Appellant's *kibanja* and cut down all his coffee trees numbering 120, banana plantation and avocado trees.

28. That P.W.3 in his witness statement testified that he had never seen Kakyama Kalemba or anybody in their family including the widow using the disputed acre and that he grew up seeing the Appellant using the disputed portion of land cultivating, growing coffee trees and Mawafu. That they used to get fruits from the Muwafu tree which was for Muzeeyi Kivumbi.

29. That during cross examination, the Respondent stated that he instructed the person to cut the Muwafu tree and he was present when it was cut. Further, that he cut the coffee and bananas. That the Respondent's mother acknowledged that she was aware of the tree which was cut and that she ordered the Defendant to cut it. That all

these clearly establish that the Respondent trespassed on the Appellant's suit *kibanja* which he never denied.

30. The Appellant's counsel contended that in his judgement, the learned trial Magistrate stated that the Respondent's mother was the registered proprietor of the land part of which is the subject of the suit and that he has already found that the Plaintiff had no legal interest on that portion of land. Learned counsel concluded on the 3rd ground of the appeal that the learned trial Magistrate erred in law and fact when he held that the Respondent was not a trespasser on the suit *kibanja* simply because his mother is the registered proprietor of the suit land.

31. On the 4th and 5th grounds of the appeal, it was contended for the Appellant that the learned trial Magistrate stated in his judgment that the Plaintiff failed to explain why he was not compensated yet the 3 tenants were compensated which made him doubt the Plaintiff's claim that he has been a tenant on the land since 1980 and instead believed that the Plaintiff entered the suit land as a neighbour when the widow moved to Makindye.

32. That during cross examination of Idah Mboowa, she acknowledged knowing the Appellant since 1980 and she claims she stopped him from using the land in 1990 and that she acknowledged that the Appellant started planting some crops in 1990s. That Idah stated that her husband never had any dispute with the Respondent over the suit land.

33. That the Respondent's mother in her witness statement stated that they were 3 tenants who were compensated and she claimed that the suit *kibanja* was for the late Nsubuga yet she had clearly acknowledged in her cross examination that in 1990s she stopped the Appellant from using the land and that why would she stop someone who was using the land of a tenant (Nsubuga) who she acknowledged was a tenant if indeed the *kibanja* in question belonged to him? That in re-examination, she clearly stated that she found the coffee trees on the land.

34. That the Respondent during his cross examination also acknowledged that he neither planted the crops nor the coffee and that all the plants were there when the land was bought. That he further acknowledged that when they came on the suit land, they found when the Appellant was harvesting the coffee, the avocado trees and that the Muwafu tree was used by everyone in the community. That all these contradict with their claim that the suit *kibanja* belonged to the late Nsubuga yet they acknowledged that the Appellant was using the same and was harvesting the plantations thereon.

35. That all the above clearly collaborates that the learned trial Magistrate failed to evaluate the entire evidence on court record and also failed to appreciate the conflicting interests of the Appellant and Respondent on the suit land thereby making a wrong conclusion that the Appellant had no *kibanja* on the suit land which occasioned a miscarriage of justice.

36. The Appellant's counsel contended that evidence must be considered on each contentious point in the trial on the balance of probabilities for the correct decision to be made. That the learned trial Magistrate only considered the story of the Respondent without drawing his attention on the evidence of the Appellant thus failing to consider the balance of probability and hence occasioning a miscarriage of justice.

37. It is the Appellant's prayer that this court makes the following orders:

(a) that the judgement and decree of the lower court be set aside;

(b) that the Appellant be declared the owner of the suit *kibanja* and the Respondent a trespasser;

(c) eviction orders against the Respondent;

(d) that the Appellant's appeal be allowed with costs in the High Court and the court below.

38. The Respondent's counsel argued on the 2nd ground of the appeal that during cross examination on the 29th August 2017, the Appellant stated that even up to now he pays Busuulu to the heir of Edita Sekatawa and that if he was given the chance, he could bring the tickets. That the Appellant was availed an opportunity to produce the said Busuulu tickets but he failed to do so. That Mr. Ssekatawa who was counsel for the Appellant then requested for an adjournment to enable the Appellant produce the Busuulu tickets which adjournment was granted but the case went up to the end without the Appellant or

through any of his witnesses producing any Busuulu tickets as he had undertaken.

39. Additionally, counsel averred that P.W.2 in his statement during cross examination stated that he saw some Busuulu tickets but did not have a copy with him at that moment and the same was never produced before court. That P.W.3 during cross examination on the 29th November, 2017, stated that he has never looked at any document to prove that the *kibanja* belongs to the Appellant.

40. That on the other hand, Idah Mboowa in her statement during cross examination testified that she bought the land in 1980 and that her husband got the certificate of title in 1995. That before her husband died, the plaintiff was not using the land. That the *kibanja* was for Nsubuga which they took over after compensating him then he left. That she knew of the tree that was cut and that she was the one who ordered the Defendant to cut it from her land. That the coffee trees were her plants.

41. The Respondent's counsel further submitted that according to D.W.1, the Plaintiff cultivated the land when his father died. And after his mother left for Makindye, the Plaintiff encroached on the suit land around 2009 when Mzee died in 2008. That the Plaintiff was telling lies that they used the land for 46 years.

42. That additionally, according to the record of proceeding in particular the judgement at page 24, His Worship George Obong when

handling issue one, stated that the Plaintiff's *kibanja* claim is not supported by any strong evidence that it ever existed. That the trial Magistrate found it unsafe to find the Plaintiff having any *kibanja* interest on the land that belongs to the Defendant's mother.

43. That when handling the 2nd issue, the trial Magistrate stated that evidence available indicated that the Defendant's mother is the registered proprietor of the land part of which was the subject of the suit and that he had already found that the Plaintiff has no trust interest on that portion of land. Learned counsel concluded on the 2nd ground that the learned trial Magistrate correctly made a finding that the Appellant held no *kibanja* interest on the suit land.

44. The Respondent's counsel submitted on the 3rd ground of the appeal that among the agreed facts was that, Kakyama's wife is the title holder of the suit land. That the trial Magistrate in his judgment also stated that evidence available indicates that the Defendant's mother is the registered proprietor of the land part of which is the subject of this suit. That there was clear evidence that the registered proprietor instructed the Defendant to enter upon the land and clear it as she had reposed it from the Plaintiff who encroached on it. That he further stated that the Defendant cannot by any stretch of imagination be called a trespasser.

45. The Respondent's counsel averred that the learned trial Magistrate properly directed himself when he found that the Defendant (now Respondent) is not a trespasser since his mother is the registered

proprietor of the suit land and he entered the said land under the authority of his mother the registered proprietor of the land. Counsel prayed that the 3rd ground of the appeal fails. The Respondent's counsel further prayed that the judgement and decree of the trial court be upheld and the appeal is dismissed with costs to the Respondent.

46. In rejoinder to the 2nd ground of the appeal, the Appellant's counsel submitted that the Respondent acknowledged that the plantations on the suit *kibanja* belongs to the Appellant. That this clearly collaborates the Appellant's statement that he was using the land for the past 46 years and the Respondent's claims that he started using the same in 2009 are false.

47. That although the Respondent claimed that the Appellant was to produce the busuulu tickets, it is not on record that he was required to produce the same by court or the Respondent and he failed to do so. That the Appellant clearly stated that he could bring the busuulu tickets if required to but that the suit was never adjourned for him to produce them hence the Respondent's assumptions of adjourning to produce busuulu tickets are false.

48. On ground 3 of the appeal, the Appellant's counsel re-joined that the Appellant has an equitable interest in the suit land and the Respondent's mother being the registered proprietor of the suit land does not give the Respondent the right to enter on the Appellant's suit land without permission. That this clearly establishes that the Respondent trespassed on the Appellant's suit *kibanja* and that he never denied the same.

Court's consideration

49. It is trite law that a certificate of title is conclusive evidence of ownership of registered land where the title is not obtained by fraud. Section 59 of the Registration of Titles Act, Cap 230 states thus:

> *"No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power."*

50. Ordinarily, a person may hold a *kibanja* on a registered land where another person is the legally registered owner. However, where *kibanja* holding is contested by the legally registered owner, the person wishing court to believe his or her *kibanja* interest must adduce evidence to prove existence of such an interest.

51. Section 1 (dd) of the Land Act, Cap. 227 as amended defines "tenant by occupancy" to mean the lawful or *bona fide* occupant declared to be a tenant by occupancy by section 31. Section 29 (1) of

the Land Act which is of great relevance to this appeal defines lawful occupant to mean:

> *(a) a person occupying land by virtue of the repealed*
>
> *(i) Busuulu and Envujjo Law of 1928;*
>
> *(ii) Toro Landlord and Tenant Law of 1937;*
>
> *(iii) Ankole Landlord and Tenant Law of 1937;*
>
> *(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or*
>
> *(c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.*

52. Section 31 (1) of the Land Act is to the effect that a tenant by occupancy on registered land shall enjoy security of occupancy on the land. In paragraph 4 of his witness statement, the Appellant claimed to be a lawful occupant by virtue of being a *kibanja* holder of the disputed land, having inherited the land from his father the late Yonathan Kabogoza in 1954, who purchased the same from one Edita Ssekatawa. That in 1979, he lost the purchase agreement when he was invaded at home by thieves and some of his important documents were stolen. He testified that he reported the matter at Ngogwe Police post. However, the Appellant did not adduce any proof to show that he indeed reported such incident to the police. No police letter or case referenced number showing that the Appellant reported the loss of his land sale agreement was adduced before court. The Appellant never

produced any of the witnesses to the said purchase of the suit land to testify in court and none of his witnesses (including his wife) confirmed having seen the purchase agreement prior to it being stolen.

53. The Appellant further testified that when he was introduced to Edita Ssekatawa, he started paying rent to her for the *kibanja*. That when the Defendant's parents bought legal interest in the suit land in 1980, they never compensated him but also declined to receive payment of busuulu from him. During cross examination at page 8 of the record of appeal, the Appellant testified that even upto that time he was paying busuulu to the heir of the late Edita Ssekatawa and that if given chance, he would bring to court the tickets for the payments. That he didn't know that he would be required to produce them.

54. On that same day, the Appellant's counsel prayed to be given another date for the Appellant to produce the busuulu tickets. I quote counsel's prayer:

> *"RE EXAMINATION*
>
> *Nil*
>
> *Sekatawa: I pray to be given an adjournment to enable the witness produce the busuulu tickets*
>
> *Court: case adjourned to the 12/7/2017 at 2:30pm".*

55. On the 12th July, 2017, the Appellant never adduced any evidence of the busuulu tickets and his counsel instead proceeded to re-examine him leaving out the aspect of tendering in the said busuulu tickets. P.W.3 who testified in cross examination that in 1985 he was

not yet born, stated that he has never looked at any document to prove that the *kibanja* belongs to the Appellant.

56. At paragraph 8 of his witness statement which is on pages 53 to 54 of the record of appeal, the Appellant gave evidence that in 1980s, the Defendant's father complained to Ngogwe Sub-County Local authorities about his stay on and use of the disputed portion of land. That the local authorities headed by its then Chairperson Hajji Serwadda heard the matter and decided in his favour that he had a *kibanja*.

57. D.W.3 Mrs. Mboowa Idah Kakyama in paragraphs 16 and 17 of her witness statement denied the Appellant suing her husband the late Arajab Kakyama and stated that no matter has ever been resolved in that regard. She added that there has never been any local authority decision reached regarding the disputed land. The Appellant neither adduced any document to rebut D.W.3's denial nor produced any of the members of the local authorities who handled the matter to confirm his allegation.

58. In consideration of the fact that the Appellant who was the Plaintiff in the trial court failed to adduce any evidence to prove his equitable interest in the suit land which measurement he even never knew, I hold that the learned trial Magistrate rightly found that the Appellant failed to prove on a balance of probability that he held a *kibanja* interest on the suit land.

59. Trespass to land is a wrong against possession of land. Any unlawful interference with land or building in possession of another is actionable. It occurs when a person directly enters upon another's land without permission or other lawful cause and remains upon the land, places or projects any object upon the land and thereby interferes with another person's lawful possession of that land.

60. Therefore, for the Plaintiff to succeed in a claim for trespass against the Defendant, he or she must prove to court that he or she is in lawful possession of the suit land and that the Defendant has had an unauthorized entry onto the land which interfered with his or her quiet possession and usage of the land.

61. In **Justine E. M. N Lutaaya v. Stirling Civil Eng. Supreme Court Civil Appeal No. 11 of 2002**, the Supreme Court held that:

> *"trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land."*

62. The Appellant in paragraph 10 of his witness statement testified that in or around June, 2015, the Respondent entered upon his *kibanja* and cut his big mature Muwafu tree into timber. That he reported the matter to police and local authorities but in vain. He added in paragraph 11 of the witness statement that again on 12th September, 2015, the Respondent brought prisoners from Ngogwe prison and on his instructions and directions, they entered upon the Appellant's *kibanja*

and cut down all his coffee trees numbering 120, banana plantation and avocado trees.

63. P.W.2 testified in paragraph 5 of his witness statement that the dispute came when the Respondent entered upon the Appellant's *kibanja* in 2015, and cut his Muwafu tree, coffee trees and bananas claiming that the land is owned by his family. When asked whether he witnessed the cutting of the trees, P.W.2 stated that he was not there.

64. The above evidence was rebutted by the Respondent's evidence where he testified as D.W.1 and stated in his witness statement that he was instructed by his biological mother Mrs. Idah Mbowa Kakyama, the registered owner of the suit land to enter on the suit land and cut down a Muwafu tree to get timber to construct a cow shade. Additionally, that on his mother's instructions, he employed prisoners to cut down around 30 coffee trees from the disputed land in order to prepare it for plantation of seasonal crops and that these coffee trees belonged to Mrs. Idah Kakyama and not for the Appellant.

65. D.W.1 further testified that his said mother has on several occasions cut Musizi trees from the disputed land with no protestation from the Appellant. That upon the death of the Respondent's father - late Arajab Kakyama, his mother shifted from Bugga Village where the suit land is situated to her other home in Makindye due to her ailing health.

66. Besides, that due to his mother's absence on the suit land, the Appellant being a neighbor to the land unlawfully started utilizing it wherefrom the Respondent's mother tried on several occasions to stop him but since she wasn't there on a daily basis, the Appellant would take advantage of her absence to continue using the suit land.

67. D.W.1's evidence was corroborated by D.W.3's testimony Mrs. Idah Mboowa Kakyama - the Respondent's mother and the registered proprietor of the suit land, who confirmed having instructed the Respondent to cut down the trees from her land for her personal use and that the trees belonged to her. That she found the coffee trees on the land when they bought it.

68. During cross examination of D.W.3 at page 15 of the record of appeal, she testified that there were mark stones that show their boundaries with that of the Appellant which were illegally removed, but that they placed new ones. She added that the *kibanja* that the Appellant is claiming to belong to him was for Nsubuga (now late), who was compensated by them and who left the land for them. This was supported by the testimony of D.W.2 who stated that his late paternal uncle Nsubuga also known as Ntitinti sold his *kibanja* to the late Kakyama and shifted therefrom to Kyebando in Kawempe Division where he died from in early 1990s.

69. I have already noted above that the trial Magistrate rightly held that the Appellant had no *kibanja* interest in the suit land, having failed to prove that on a balance of probability as required by law. It follows

that the Respondent's mother who is the registered proprietor of the suit land is its rightful owner. And since she is the one who instructed her son the Respondent to enter onto the suit land and cut down trees therefrom, the Respondent cannot be considered a trespasser on the suit land.

70. Pursuant to the foregoing analysis of the record of appeal and having found that the Appellant has no *kibanja* interest in the suit land, I find no merits in this appeal and it is hereby dismissed with the following orders that:

(a) vacant possession doth issue against the Appellant and his agents, workmen, relatives, successors in title or those deriving survival from him which should be executed in accordance with the Constitution (Land Evictions) (Practice) Directions, 2021 and other laws;

(b) a permanent injunction doth issue against the Appellant restraining him, his agents, workmen, relatives, successors in title or those deriving survival from him, from interfering with the Respondent's lawful usage of the suit land having derived his authority from its registered proprietor and rightful owner;

(c) costs of this appeal and that of the lower court are awarded to the Respondent.

I so order accordingly.

This judgment is delivered this ..... 25th day of ..... Oct. ..... 2023 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Kakeeto Denis from M/s Denis Kakeeto Advocates, for the Appellant;

(2) Ms. Pauline Nakavuma, the Court Clerk.