THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT 01 – CV – LD – CA – NO. 0018 OF 2020

(ARISING FROM 00 CV –CS LD NO. 001 OF 2018)

1. **BWAMBALE MBALE HENRY**
2. **BIIRA GRACE :: APPELLANTS / CROSS RESPONDENTS**

VERSUS

1. **BALUKU SIMON**
2. **KIIZA KYUMA KYAYESU**
3. **BWAMBALE YOKASI :::::::::::::::::::::::::::: RESPONDENTS / CROSS APPELLANTS**

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The Appellants and cross Appellants both appealed against the judgment of His Worship Karakire Edgar, Magistrate Grade One under the Chief Magistrate's Court of Kasese, delivered on the 10th day of July 2020 in Kas-00-CV-CS-LD No. 200001 of 2018 seeking orders to set aside the judgment of the lower court and to declare the Appellants the owners of the suit land and all the remedies sought in the plaint and for an order to have the judgment of the lower Court corrected in line with the grounds of the cross appeal by the cross Appellant/Respondents.

Background:

The brief background as may be discerned from the pleadings is that the Appellants per the first plaint, filed Civil Suit No. 01 of 2018 seeking a permanent injunction, general damages and costs of the suit arising from private nuisance. The claim was purely of private nuisance. The Appellants later filed an amended plaint in which they sought a permanent injunction restraining the 1st Defendant from any further trespass to the suit land, an order of eviction, general damages and costs arising from trespass, private nuisance and fraud.

The Appellants contended that on 4th January 2008 and 9th February 2009, they respectively purchased plots of land situate at Kidodo Cell, Railway Ward, Central Division Kasese Municipality in the presence of the local leaders. That according to the purchase agreements, the Appellants' land neighbored with a road (now Mutanywana Road) in the north. That the Appellants assumed possession of their respective plots but reserved a reasonable portion of the land between them and Mutanywana Road to ensure compliance with Municipality Council planning requirements.

That around October 2009, the 1st Respondent forcefully started to construct a foundation for a building on the portion of the land that the Appellants had reserved for future compliance with Municipality Council planning requirements thereby blocking and interfering with the Appellants' access to their respective plots. That the Appellants made complaints to the relevant authorities and on 3rd January 2012, Kasese Municipal Council (KMC) issued an enforcement notice which was served upon the 1st Respondent who turned violent and assaulted the KMC official. That in April 2012, the 1st Respondent resumed his construction amidst protest from the Appellants. The Appellants further contended that the claims by the 1st Respondent that he purchased the suit land from the 2nd and 3rd

Respondents on 20th March 2009 and 20th February 2015 are unknown and disputed by the Appellants. That the acts of the Respondents constitute a tort of fraud, trespass and private nuisance and thus asked court to make judgment in their favour.

The Respondents/cross Appellants on the other hand contended that the Appellants did not buy their respective plots from any of the Respondents and neither were the Respondents present at the time of purchase. That it was vivid from the purchase agreements that the Appellants bought 50ft by 100ft which they occupied and none of the Respondents ever entered unto the same. That in the north of the plots owned by the Appellants were plots for the 2nd and 3rd Respondents measuring approximately 65ft each and not Mutanywana Road.

That Mutanywana Road cut into the 2nd Respondents land leaving a stretch of approximately 50ft by 100ft on the lower side which shared a boundary with the land for the 3rd Respondent which is the land the 2nd Respondent sold to the 1st Respondent on 20th March 2009. That the Appellants acquired interest from people who claimed their interests through the 3rd Respondent and the pieces of land sold to those from where the Appellants acquired their interests, did not share any boundary with the 2nd Respondent, but it neighbored that of the 3rd Respondent who also sold his portion that bordered with that of the Appellants to the 1st Respondent on 20th February 2015. That the Appellants could not have reserved land measuring 65ft by 100ft for future compliance with the Council requirements, yet the land did not belong to them.

That the 1st Respondent had a right to use what he had rightly bought from the 2nd and 3rd Respondents and denied any forceful entry unto the suit land. The 1st Respondent also contended that the enforcement notice was about blocking access to the Appellants. That the Respondents did not claim any interest in the 50ft by

100ft land which was purchased by the Appellants. That Kikwe James and Kyakimwa Rosi could not have transferred interest in land which they did not own, but could only transfer interest in land measuring 50ft by 100ft which they acquired from the 3rd Respondent. The Respondents thus asked court to dismiss the suit with costs.

At the end of the trial, the trial Magistrate dismissed the Appellants' suit with no orders as to costs on the 10th of July 2020. The plaintiffs and the Defendants being aggrieved by the decision of court filed an appeal and cross appeal and framed the following grounds for determination by this court:

Grounds for the Appellant:

1. The learned Trial Magistrate erred in law and in fact when he held that the suit land was never part of the plots which the Appellants purchased thereby causing a miscarriage of justice.
2. The learned Trial Magistrate erred in law and fact when having properly found that the Respondents' evidence fell short of proof of owning an interest in the suit land, he held that the 1st Respondent cannot be declared a trespasser on the suit land.
3. The learned Trial Magistrate erred in law and in fact when he failed in his duty to determine and declare the rightful owner of the suit land.
4. The learned Trial Magistrate erred in law and in fact when he held that the Appellants have failed in their duty to prove their case on the balance of probabilities.
5. The Learned Trial Magistrate erred in law and fact when he misconceived the law and declined to order the eviction of the 1st Respondent from the suit land thereby condoning an illegality.

6. The learned Trial Magistrate erred in law when he held that no damages were asked for in regard to private nuisance thereby causing a miscarriage of justice.

Grounds for the Cross Appeal:

1. The learned Trial Magistrate erred in law and fact when he failed to determine the preliminary points of law raised in the cross Appellants' submissions.
2. The learned Trial Magistrate erred in law and fact when he shifted the burden of proof upon the cross Appellants to prove that their title or interest was unimpeachable.
3. The learned Trial Magistrate erred in law and fact when he held that the Defendant's evidence was tainted with inconsistencies and contradictions.
4. The learned Trial Magistrate erred in law and fact when he made the order on matters that had not been pleaded by the cross Respondents in their pleadings.
5. The learned Trial Magistrate erred in law and fact when he failed to award costs of the suit to the cross Appellants.

Representation:

Mr**. Mishele Godfrey** of **M/s Bagyenda& Co. Advocates** represented the Appellants/cross Respondents and **Mr. Sibendire Godfrey of M/s SibendireTayebwa & Co. Advocates** represented the Respondents/Cross Appellants. Both parties filed written submissions in support and objection of the grounds of appeal and cross appeal which I have considered.

Duty of this Court:

As the first appellate court, the duty of this court is to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming my own conclusions. ***(See: Father Nanensio Begumisa& 3 others vs. Eric Tiberaga SCCA 17 OF 2000 [2004]***

KALR 236). The first appellate court does re-evaluation of evidence on record of the trial court as a whole weighing each party's evidence, keeping in mind that an appellate court, unlike the trial Magistrate had no chance of seeing and hearing the witnesses while they testified, therefore this court had no benefit of assessing the demeanor of the witnesses. ***(See: Uganda Breweries v Uganda Railways Corporation 2002 E.A)***

CONSIDERATION OF THE APPEAL:

I will begin with the first ground in the cross appeal since the same has an effect on all the grounds framed for determination by the Appellants. The cross Appellant faulted the trial Magistrate for failure to strikeout the amended plaint since the same introduced a new cause of action different from the one pleaded in the first plaint. The ground was framed thus:

The learned trial Magistrate erred in law and fact when he failed to determine the preliminary points of law raised by the cross Appellant's submissions.

It was submitted for the Appellant/cross Respondent that the trial Magistrate pronounced himself on the said point of law in his judgment at page 2 where he held that: *"by his written submissions, counsel for the Defendants sought by way of preliminary point of law to raise issue with the amendment of pleadings by the plaintiffs, which controversy in my opinion had already been heard and determined and concluded in (MA NO. 010 of 2010). In my judgment therefore I do not dwell onto the merits of the point of law nor the grounds upon which it was ultimately determined. Instead I ignore it and delve immediately into the first issue as agreed upon by the parties at the scheduling of this case"*. Counsel submitted that the trial Magistrate disposed of the said issue in his judgment which was in any case res-judicata since it was heard and concluded by court in MA. No. 10 of

2018 and the trial Magistrate was barred by section 7 of the Civil Procedure Act from considering the same. That after leave was granted in M.A No. 10 of 2018 to amend the plaint, the cross Appellants filed an amended defense and did not raise the said issue neither was an appeal preferred against the ruling of court where the Appellants/cross Respondents were granted leave to amend. Learned Counsel argued that this ground was misconceived and misplaced and thus prayed that the same should fail. In response, counsel for the cross Appellant purported to withdrew the ground of appeal in these terms – *"We humbly withdraw this ground of the cross appeal"*.

It is my considered view that a memorandum of appeal is a pleading like a plaint and defense. It details the objection of the Appellant to the decision of court requiring the opposite party to disapprove such objection. Therefore where an appeal is filed and a memorandum of appeal is served on the opposite party, an Appellant cannot not amend the same or purport to withdraw any ground of appeal save with leave of court. In this case, the cross Appellant filed a memorandum of appeal and served it upon the cross Respondents who responded to the same. The cross Appellant could not withdraw the ground after the cross Respondents submitting on the same without leave of court. Therefore since leave was not sought, I will proceed to consider the same.

I have perused the record of the lower Court and found Misc. Application No. 10 of 2018 filed by the Appellants seeking leave to amend the plaint. There is an affidavit in reply by the Respondents in which among others it was contended by the cross Appellants that the amendment introduced a new cause of action and submissions were made to that effect. A ruling was delivered on the said application by Her Worship Agwero Catherine, the Chief Magistrate of Kasesein which she overruled the objection raised by the cross Appellant and granted the

Appellants leave to amend the plaint and add a cause of action in addition to the one pleaded in the first plaint. The Appellants filed an amended plaint and served it upon the Respondents who also filed an amended written statement of defense and never raised this issue as a point of law that the Respondents intended to raise during hearing. It is thus plausibly interpreted that the Respondents subscribed to the amendment and the jurisdiction of court to hear the case. The Respondents also did not appeal against the ruling of the Chief Magistrate granting the Appellants leave to amend and add an additional new cause of action. The Respondents also went ahead and proceeded with the hearing of the suit on the basis of an amended plaint and never raised any objection over the same. They cannot be permitted to dispute the same on appeal.

I am therefore in agreement with the submissions of learned counsel for the Appellants/cross Respondents that the trial Magistrate rightly pronounced himself on the same. He had no powers and jurisdiction to question a previous ruling delivered by a competent court. The proper court, to do so would have been an appellate court. The learned trial Magistrate could not question the decision of the chief Magistrate granting leave. Doing so would amount to him sitting as an appellate court to question the decision of the same court. This ground and point of has no merit and it fails.

Grounds 1, 2, 3 and 4 of appeal relate to ownership of the suit land. I shall therefore resolve them together.

<u>Grounds 1, 2, 3 and 4</u>:

1. ***That the learned trial Magistrate erred in law and fact when he held that the suit land was never part of the plots which the Appellants purchased and thereby causing a miscarriage of justice.***

2. ***That the learned trial Magistrate erred in law and in fact when having properly found that the Respondents' evidence fell short of proof of owning an interest in the suit land, he held that the 1st Respondent cannot be declared a trespasser on the suit land.***
3. ***That the trial Magistrate erred in law and in fact when he failed in his duty to determine and declare the rightful owner of the suit land.***
4. ***That the learned trial Magistrate erred in law and fact when he held that the Appellants have failed in their duty to prove their case on a balance of probabilities***

Submissions of the Appellants:

Counsel for the Appellants submitted in regard to **ground one** of appeal that, during the course of hearing in the trial court, PW1 Bwambale Henry and PW2 Biira Grace's evidence was that they purchased their plots with defined boundaries with *Mutanywana Road* as one of the boundaries and their respective agreements of purchase were tendered in court and exhibited as PEX 1 and PEX. That this evidence to counsel was corroborated by the evidence of PW3 Kyakimwa Rose, the vendor that sold the said plot of land to the 1st Appellant. That the Appellants having neighbored the said road, they left a reasonable portion of their plots undeveloped and treated it as a reserve for future expansion of *Mutanywana Road*. That the persons who sold the suit land to the Appellants had also warned them to leave some land for purposes of expansion of the Road. That to the Appellants' shock and without their consent, in September 2009, the 1st Respondent came on the reserved land and started to build. That the Appellants complained to the urban authorities in objection to the 1st Respondent's Act and a copy of the compliant as exhibited as PEX2.

That following the complaint, an enforcement notice was issued directing the 1st Respondent to cease his developments on the suit land and a copy of the same was exhibited as PEX4. That this fact was corroborated by PW4 Ngununu Phlavia the wife to the 1stRespondent and PW5, Kabwenda Aloni, the Kasese Municipal Enforcement Officer who served the notice. That the 1st Respondent remained defiant and continued with his illegal construction thereby blocking the Appellants free access to Mutanywana Road. The Defendants' line of argument that the Appellants bought land measuring 50ft by 100ft per PEX1 and PEX3 was clarified by PW6, Thembo Eric, an immediate neigbour to the suit land and son to the 3rd Respondent who confirmed that his plot in the same area run down up to the road and that it was the suit land that was unique in the area. That he also confirmed that the 1st Respondent's building is on the appelants' land and that this was further supported by the survey drawings which indicate that the Appellants' buildings were a block on the left with no access to Mutanywana Road.

Learned counsel further argued that the trial Magistrate rightly cited and relied upon the decision of ***Ojwanga Vs. Wilson Bagonza CACA No. 25 of 2002***, where it was observed that *"for one to claim an interest in land, he or she must show that he or she acquired an interest or title from someone who previously had an interest or title thereon. To prove his good title therefore, the Defendant was expected to show that he acquired his piece of land from people whose own title or interest was unimpeachable"*. That this was not proved by the 1st Defendant per the evidence on record and the trial Magistrate rightly found that the 1st Defendant's purchase was tainted with irregularities. That having found so, the trial Magistrate should have upheld the purchase by the Appellants since they were never questioned nor were they in issue as was observed by the trial Magistrate but that he went off the tangent when he observed that the plaintiff failed to prove that the

suit land is owned by them as it was not part of the plots they bought on 4th January 2008 and 9th February 2009 respectively. Counsel added that the Appellants' purchase agreements had clear boundaries which included Mutanywana Road and since the same were not in question per the finding of the trial Magistrate, he would have proceeded to declare that the suit land belongs to the Appellants.

For **ground two,** Counsel reiterated his submission in ground one and added that the Appellant adduced enough evidence to prove that the suit land was part of the land they purchased. That the Respondents failed to justify the 1st Respondents possession and ownership of the suit land since the purchases were found to be in controversy, full of irregularities and defeated by the doctrine of notice. That even if the Appellants had not developed the disputed land for reasons indicated in their evidence that it was for future road expansion, it still formed part of their land and the 1st Respondent was a trespasser to the same per the decision of the Supreme Court in ***Justine EMN Lutaya Vs Stiling Civil EnginneringCo. Ltd, SSCA No. 11 of 2022*** that defines what constitutes trespass. This was because the Appellants were in possession of the suit land and never authorized the construction of buildings on the disputed land by the 1st Respondent.

In his submission in respect to **ground 3** of the appeal, learned counsel submitted that, this case involved a land dispute between the Appellants and the Respondents and one of the issues for determination in the trial court was - who is the rightful owner of the suit land? That the learned trial Magistrate failed to resolve this issue and that this error on the part of the trial Magistrate, may stand to explain why this appeal involves a cross appeal from the Respondents meaning that both parties went unsatisfied. Further that, throughout his judgment, the trial Magistrate carefully evaluated the evidence and even cited the governing principles derived from the authorities of **Ojwang V. Wilson Bagonza (supra), IbagaTaratizion V.**

Tarakpe (supra), Sir John Bagaire V. AusiMatovu CACA No. 07 of 1996, and NabanobaDesiranta& Anor V. Kayiwa Joseph & Anor HCCS No. 496 of 2005, which authorities, to counsel, the learned trial Magistrate disregarded in his final findings.

Counsel faulted the trial Magistrate for finding that the Defendants' evidence fell short of proof of the 1st Defendant's claim of owning or holding an interest in the suit land and then on the other hand also holding that the plaintiffs did not prove that the suit land is owned by them since it was never part of the plots which they purchased. That the learned trail Magistrate left the issue of ownership hanging which was in breach of a duty he was supposed to discharge and a diversion from what the parties expected of him. Counsel thus asked court to allow this ground of appeal.

In respect to **ground 4**, counsel for the Appellants argued that the Appellants discharged their burden of proof as is required in civil cases. Counsel referred to **Collins Dictionary of law W.J. Stewart, 2006**, where the term "*balance of probabilities*" *was explained thus: "the standard of proof in civil cases demands that the case that is more probable should succeed*. *This is the kind of decision represented by the scale of justice. That the court weighs the evidence and decides which version is most probably true."* Learned counsel contended that the Appellants were able to prove ownership of the suit property through the purchase agreements that described the neighbor on the land to include Mutanywana Road and these agreements were not in issue or question by the trial Magistrate and therefore the said land belonged to the plaintiffs.

Counsel also contended that the Appellants led evidence of PW5 who confirmed that an enforcement notice was affected upon the 1st Respondent requiring him to demolish his illegal structure until he gets an approved plan and the evidence of

PW6 an immediate neigbour who confirmed that the Appellants' plots like his touched the road. That the Appellants also through the locus visit showed court the unique design of the suit land contrary to the common set up of the area where all plots run up to the road and the survey drawings which are on record which obstructed the Appellants access to the road. That after evaluation, the trial Magistrate believe the evidence of the Appellants and this is reflected in his judgment; however he failed in his duty when he held that the Appellants failed to discharge their duty contrary to his own evaluation of evidence and to the finding that the 1st Respodent's purchase was attained with irregularities. Counsel therefore submitted that the Appellants discharged their duty to the required standard and that this ground of appeal should be allowed.

Submissions for the Respondent:

In response to **ground 1, learned** counsel for the Respondents contended that the trial Magistrate did not err in finding that the suit land never formed part of the land owned by the Appellants. To counsel this ground tends to shift the burden of proof on to the Respondents and yet the burden of proof in all civil matters lies upon the party who wishes to be believed by the court, which to counsel is the Appellant.

Counsel for the Respondent referred court to all the evidence presented by the witnesses and submitted that, the Appellants' evidence presented by PW1 Bwambale Henry and PW2 Biira Grace is that the plots they bought were 50ft by 100ft and that no evidence was presented to show that the 1st Respondent trespassed on the said 50ft by 100ft. That the Appellants complained that the 1st Respondent was building in the road reserve and not about ownership of their land. Counsel also submitted that the authenticity of the Appellants' agreements was questionable since they had a witness who signed using a position that did not

exist. That they were made after 2010 after Kasese had become a municipality and they were only back-dated to defeat the 1st Respondent's interest. It was counsel's further submission that the fact that the Appellants brought a private nuisance claim against the Respondents meant that they were not sure that they owned the suit land.

Counsel also invited court to the evidence of PW3 Kyakimwa Rose, PW4 Ngununu Flavia and PW5 Kabweenda Aloni and submitted that the Appellants acquired their land from persons who bought from the 3rd Defendant/Respondent. That the 3rd Respondent told court that he did not own land that touched the road and that the land between his and the road belonged to Masereka John Fosi and Nyakabugho, which is the same land that the 1st Respondent bought from the 2nd Respondent.

In corroboration, counsel referred to the Appellants' sale agreements exhibited as PEX1 and PEX3 which show the measurements of the Appellants' land as 50ft by 100ft and yet evidence shows an extra 65ft from the 100 ft to the road. Counsel submitted that there were existent boundaries being trees and *ruyenje* as stated by the witnesses which separated the Appellants land from the suit land.

Counsel further referred to the evidence of the Defendants where DW1 Baluku Simon informed court of how he acquired the suit land from Kiiza Kyuma Kyayesu who also bought it from Masereka John Fosi. That there was distance between the road and the Appellants' plots which land he bought and that the land owned by the plaintiffs was still intact. Counsel also referred to the evidence of DW3 Kabugho Paulina, DW4 Kiiza Kyumakyayesu and PW6 Thembo Eric which referred to the same facts as stated above and in addition, to counsel, this offered corroboration to the evidence of the 1st Defendant and the other Defendants. That the evidence of Thembo Erica indicates that he did not know whether the part of

the suit land belonged to the 3rd Respondent who he bought from. He also stated that there were boundaries behind the suit land separating the Appellants land. That the land the Appellants bought measured 50ft by 100ft and that an extra 65ft exists between the Appellant's land and the road reserve and that the Appellants cannot claim to have purchased 165ft each instead of 100ft and also that the fact that the Appellants did not inquire about the previous owners of the suit land, which information was available, meant that they did not buy the suit land. It was counsel's conclusion that the learned trial Magistrate rightly held that the Appellants were not the lawful owners of the suit land.

On **ground 2** of the appeal, counsel submitted that, the appeal cannot be sustained on findings of a learned trail Magistrate that have no basis in law whereby the learned trial Magistrate tried to shift the burden of proof from the Appellants to the Respondents. That the burden of proof was upon the Appellants to prove ownership of the suit land and anything else, which failure was on the Appellants. That counsel for the Appellants should have concentrated on failure to prove their case in the lower court than concentrate on the findings of the trial Magistrate who shifted the burden of proof or the 1st Respondent's failure to prove their ownership of the suit land. Counsel referred to the case of **Oketha Dafala V. The Attorney General, (holden at ARUA High court) Civil suit No. 0069 of 2004**, where it was held that, according to section 103 of the Evidence Act, the burden of proof as to any particular fact lies upon the person who wishes the court to believe in its existence, unless it is provided by any law that proof shall be on any particular person. Counsel also relied on the case of **Jovelyn Barugahare V Attorney General S.C.C.A No. 28 of 1993** which is to the same effect.

In response to **ground 3**, learned counsel argued that the trial Magistrate rightly found that the Appellants failed to discharge their duty as regards ownership to the

required standard. That the burden of proof rested on the Appellants and not the Respondents and that the submissions of counsel and the authorities cited seek to shift the burden which is illegal. That the Appellants failed to prove their case on the balance of probabilities and the trial Magistrate rightly found so.

In response to **ground 4**, learned counsel reiterated his submissions on ground one and two and added that the fact that the complaint against the 1st Respondent as confirmed by PW5 was about lack of a building plan, was clear evidence that the suit land did not belong to the Appellants. That the Respondents had no duty to prove anything. That a failed defense cannot be a basis for winning a suit otherwise undefended suits would never be lost or formal proof would not be necessary. Counsel asked court to dismiss this ground.

COURT'S RESOLUTION OF GROUNDS 1, 2, 3 AND 4:

The fundamental point of contestation at the heart of this appeal is about ownership of the suit land. Both the Appellants and the 1st Respondent claimed ownership of the same and presented both oral and documentary evidence to back up their claims.

The learned trial Magistrate in resolving the issue of ownership of the suit land framed the **First Issue** as: *w**ho is the rightful owner of the suit land?*** He relied on the case of ***Ojwag Vs. Wilson Bagonza CACA No. 25 of 2002*** where it was observed that *for one to claim an interest in the land, he or she must show that he/she acquired an interest or title from someone who previously had an interest or title thereon*. He went ahead and evaluated the evidence and found inter-alia, that the defendants' evidence was tainted with several inconsistencies and contradictions and found that the 1st Defendant's evidence fell short of proof of holding an interest in the suit land. He also went ahead and observed that the

plaintiff failed in their duty to prove their case on the balance of probability and dismissed the case. Further in relation to the **Second Issue** which was - ***whether the 1st Defendant is a trespasser on the suit land***, the trial Magistrate observed that the 1st Defendant could not be declared a trespasser on the suit land for reason that the suit land is not owned by the plaintiff.

Therefore the question of ownership was not determined by the trial court and thus remained hanging. I will therefore make a sober re-evaluation of the evidence on record and make a determination as to who of the parties is the owner of the suit land.

The starting point is the burden of proof. There seems to be contestation on who had the burden of proof in this case. Section 101 of the Evidence Act in providing for the burden of proof states that:

> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Section 102 of the Evidence Act in providing for on who burden of proof lies, states that: *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side*.

Section 103 of the Evidence Act provides for the burden of proof as to particular fact and states as follows:

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The general rule is that the one who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side.

The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities. ***(See BahirirweGetrude Vs. Tukore David & 2others, Land Claim No. 32 of 2018& Section 100 and 102 of the Evidence Act).***The position was exposited in the case of ***Miller V Minister of Pensions [1947]2 ALL E R 372 Lord Denning stated that;*** *"That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not."*

The plaintiffs had the burden to prove that the suit land is theirs and that the 1st Defendant is a trespasser. To discharge this burden, they had a duty to lead evidence that waters down the 1st Defendant's claim of ownership of the suit land.

The plaintiffs' contended that they were owners of the suit land which they acquired by way of purchase and adduced agreements which were admitted as PEX1 and PEX3 respectively. That in their respective agreements, it was indicated that their pieces of land neighboured Mutanywana Road which included the suit land. In cross examination PW1 (Bwambale Henry) stated that the land was not measured though measurements were indicated in the agreement being 100ft by 50ft. He further indicated in cross examination that the trespass was not on the

entire land but on the portion neigboiringthe road which was approximately 40ft by 50ft. That if his land was measured and it was 50ft by 100ft, that he would still have a claim since the 1st Defendant is within the boundaries of the land he bought.

That he knew since 2009 that the agreement had measurements and he was a degree holder. That he just signed without knowledge that there were measurements. That for him he bought land basing on the boundaries and not the measurements. That he did not know that the suit land belonged to Rosemary Kyalima and did not know the person who sold the land to Rosemary Kyalima. That Rosemay did not give her proof of ownership of the suit land and he was not aware when Kasese became a municipality but had knowledge that Baluku Didas was the area Councillor. In re-exam he stated that he was using the entire land up to the road.

PW2 (Biira Grace) also stated in cross examination that the land was not measured but they just estimated. That she did not know the exact size of the land and that for her she bought the land per the boundaries in the agreement. That the 1st Defendant built on his land and in the road reserve and the trespass on his portion was about 25ft. That he did not know how Kikwe James acquired the land he sold to him. That he knew the boundaries and even if the measurements were right, he would still have a claim against the 1st Defendant. In re-exam he stated that the land was not measured but estimates were made.

The Appellants evidence was corroborated with that of PW3, Kyakimwa Rosi, who in examination in chief confirmed that in 2009, she became sick and sold her plot along Mutanywana Road near Bosi Gardens and it was on 9th February 2009.That she sold the same to the 1st Appellant and the boundary on the north was a road. That she also purchased the same plot from Bwambale Yokasi in 2007 and utilised the same without any claim including the 3rd Defendant. That the land was

estimated but no measurements were done at the time of making the agreement. That she left when she had warned the 1st plaintiff that she had an obligation to leave a reasonable pieces of land for future urban development of the road commonly known as a road reserve.

In cross examination she confirmed that it is the 3rd Defendant who had sold her the suit land and it is the same land he sold to the 1st Appellant. That she knew Nyakabugho but was not aware whether he had land in the area. That she did not know Masereka but the 3rd Defendant's land reached the road. That she lost the agreement where she bought the same from and she could not explain why the measurements were indicated in the agreement. That if the 1st plaintiff's land was measured, it would reach the road. In re-exam she confirmed the land she sold to the 1stplaintiff reached the road. That the purpose of the reyenje was to protect the land from animals.

PW4 Ngununu Phlavia she stated in chief that she was a wife to the 1st plaintiff and witnessed the purchase agreement. That measurements were merely estimated but the boundaries of the land were well settled. That it was after 7 months of peaceful possession of the suit land that the 1st Defendant entered the suit land and dug a construction trench. In cross examination she stated that she know how to read and write and she read the agreement between KyalimwaRosi and her husband. That the agreement read a plot of 50ft by 100ft. That there is a ruyenje at the end of their land towards the road but she did know the person who planted it. That it is about 40-45ft from the Ruyenje to reach the road. That the land the parties were fighting for was one from the Ruyenje to the road. That there was an old tree demarcating the land and they found it there and there is a wall fence separating their land with that of the 1st Defendant. In re-exam she stated that the land was not measured and the ruyenje was not used for demarcation and that the fence was constructed after.

PW5 (Kabwenda Aloni) the enforcement officer stated in chief that in 2012, he together with his fellow colleague and police went to the suit land to enforce the notice against the 1st Defendant. That the 1st Defendant and his work men attacked them and he sustained injuries. In cross examination he stated that the complaint that was lodged by the 2nd Appellant was that Baluku Simon was constructing in the road reserve and blocking their access road. That it was not indicated in the notice that someone was constructing in the road reserve. That the notice was about carrying out illegal developments without Council's approval. That the offence was building without a plan and with Murram. The plaintiff closed their case on 25th January 2019.

Later PW6 was introduced as a last witness on 1st November 2019. He stated in his examination in chief that he is a neighbour of the suit land in the east. That on 23rdMay 2007, he purchased a neighbouring plot from Bwambale Yokasi, the 3rd Defendant and an agreement was made to that effect. That at the time of purchase, his plot and the neighbouring plots ran from south down touching MutanywanaRoad which was already existent. That after two or three months, the 3rd Defendant sold the neighbouring plot on the left to Muhindo Sarapio whose plot also runs down up to the road and that Muhindo is still a neigbor.That it is the 1stdefenadant's plot which is unique in the area. He also denied purchasing land from MbambuPolina as she was a witness when he was buying his plot.

That the vendor told him that he had measured the plot but it was more than 50ft by 100ft. That he had never measured his land. That the 1st Defendant's house neighbours his. That he first built a house at the back and added the one in front. That originally he had a plan to build in front. That he knew Nyakabugho as a witness in his agreement and he had never bought land from him. That he did not know Kyuma Kyayesu and there were no L.C's in 2007. That a phone number

starting with 0778 was written on the agreement and there were old trees behind the suit land indicating the boundary. That he did not know who they were separating but he found them there. That there were no boundaries. That he did not know whether the front part belonged to someone who sold him the suit land. In re-exam he confirmed that he never measured his land.

The defence on the other hand relied on the evidence of DW1 (Baluku Simon) who testified as DW1 who stated in chief that the suit measures 65ft on one side and 60ft and 100ft and shares boundaries with the plaintiff on the lower side, Erica Mukongotsa on the other side and Saidaton the other side and Munywaba road on the upper side. That he acquired the suit land by way of purchase from Kiiza Kyumakyayesu and Bwambale Yokasi. That on 20/3/2009, he bought land measuring 50ft by 100ft from Kyumakyayesu at a costs of Ugx 700,000/=. That the said portion neighbours Yakasi (3rd Defendant) on the lower side, a road on the upper side, Saidat and Erica on either sides. That further on 20/02/2015, he also bought land measuring 96ft from Bwambale Yokasi and the plaintiffs are neighbours on the lower side.

That Kyumakyayesu gave him an agreement which showed that he bought that piece of land from Masereka John Fosi and it was clear that the land on which the road was constructed was Masereka John Fosi's. That the road split John Fosi's land leaving his land on the lower side that shared a boundary with Bwambale Yokasi and it is the land that John Fosi sold to Kiiza Kyumakyayesu which is the same land that Kiiza sold to him. That it was clear that Bwambale Yokasi's land on which the plaintiff bought did not at all touch the road as there is a distance of not less than 60ft from the plaintiff's land to the road and it is the land he bought. That after purchase, he embarked on the development of his plot and the plaintiffs complained that he was blocking a way to their plots and they never complained

that they were the owners of the same and that this explained why the first case was about private nuisance.

In cross examination he indicated that the plot was 65ft by 100ft. That the plot was horizontal not vertical. That other plots around were vertical but there are others which are horizontal. That by the time he bought, people were not there. That among the neighbours he knew Yokasi and that he looked for him and could not find him. That the road was constructed in 2002 on John Fosi's land and that it is Fosi's wife who told him that. That John Fosi sold around 2005 and that he was staying on the land by the time he filed his written statement of defence. That the plaintiff's agreements indicated that the neighbour on the upper part was a road yet the neighbours in the agreement did not match those on ground. In re-exam, he stated that he was informed by an old lady Nyakabugho that John Fosi and her land were split by the road.

DW2, Bwambale Yokasi corroborated the evidence of DW1 and he stated in chief that he was the former owner of land currently occupied by the plaintiffs' plots of 50ft by 100ft and that of Erica Mukongotsa, Wayita and Sarapio. That he owned four acres of the land before Mutanywana was created and the said land shared boundaries with peter Nyakabugho and Masereka John Fosi on the upper part, Saidati's father on the one side, Nyabahasa on the other side and Jamal's father on the lower part. That when Mutanywana road was created, it cut into the pieces of land owned by Nyakabugho and the late Masereka John Fosi leaving parts of their land on the lower part of the roadneigbouringhis piece of land on the upper part.

That he sold 50ft by 100ft plot to one Akiiki in 2007 and gave 50ft by 100ft to Kyakimwa Rose mary who is his maternal aunt. That he later learnt that Akiiki sold her plot to the late Kikwe James who also sold to the 2nd plaintiff. That the plot given to Kyakimwa Rosemary was sold to the 1st plaintiff. That at no one time

did he own land that reached Mutanywana road and thus would not transfer any land to any one that touched the road because the owners of the land that was cut by the road leaving part on the upper part were Nyakabugho and Masereka John Fosi and that his land was clearly demarcated and the demarcations still exist. That he sold one plot to Sarapio who later bought another from Nyakabugho.

In cross examination he stated that he did not recall when the road was created. That he had never owned land reaching the road and his did not reach the road. That he is the one who sold land to Erica but did not recall when he did so but it was during the war with ADF. That he made an agreement for him and it was for shs 400,000/=. That Peter Bwambale the village elder signed on the agreement. That Nyakabugho was also present and signed as well as Mbamba Paulina. That Mbwa Julius was not present. That the agreement he wrote to Erica was read back to him and he confirmed the contents. He disputed the agreement presented and stated that in the agreement they made, they indicated the neighbours. He also indicated that he is the one who sold land to Sarapio and he made for him an agreement and sold to Simon recently. That Erica and Sarapio have ever bought land from Nyakabugho. That he knew that very well because Erica was his nephew. That Nyakabungho'sland was split by the road and she sold the remaining part to Erica and Sarapio because they wanted to access the Road. That his land neighboured Nyakabungho's before it was split by the road.

DW3, Mambu Polina alias Nyakabugho testified in chief that he owed land in Kidodo Cell. That his land neigboredwith Bwambale Yokasi and Masereka John Fosi. That Bwambale Yokasi's land was on the lower side of his land while that of Masereka John Fosi was on the side in the east. That when Munywana road was constructed, it cut through his land and that of Masereka John Fosi and one of Thata Bumakali who was a neighbour to John Fosi in the east leaving part of their

land on the lower side of the road neigbouringBwambaleYokasi. That while he was still there, Bwambale Yokasi sold two plots neigbouringhis land to Sarapio and Erica. That because Sarapio and Erica did not access the road, they requested him to sell his land adjacent to their plots that they had bought from Bwambale Yokasi so that they can access the road which he did. That part of Masereka John Fosi's land that remained on the lower side of the road was bought by Kyumakyayesu. That Bwambale Yokasi never had any land that touched the road. That it was him and John Fosi as well as Thatha Bumbakali who had land that remained on the lower side and which touched the road.

In cross examination he stated that he did not recall when the road split his land but he kept using his land around the road. That he did not recall when he sold his land to Erica and Sarapio though he made agreements for them. That when the 3rd Defendant sold land to Sarapio, he was present and signed in the agreement. That he was not present when Erica bought land. That the 3rd Defendant sold first before he sold his. That he was present when Sarapio bought from the 3rd and he witnessed the agreement. In re-exam, he stated that the road split their land and they later sold it. That his land reached that of the 3rd Defendant though his was not affected by the road and his was thus not split. That it was his land that he sold to Sarapio and Erica so that they can access the road. That John Fosi was also affected by the road like his and he sold part of his to Kyumakyayesu. That if there is an agreement that Yokasi sold to Erica and Sarapio reaching the road, then that would be a lie because there was his land before the road.

DW4, Kiiza Kyumakyayesu testified in chief that on the 2nd day of November 2005, he purchased a plot measuring 50ft by 100ft from Masereka John Fosi at a cost of Ugx 80,000/=. That the neighbours of that plot were Bwambale Yokasi on the lower side, the road on the upper part, Tata Bumbakalion one side and

Nyakabughoon the other side. That this is the plot he sold to the 1st Respondent on 20thMarch 2009. That he gave the agreement from where he acquired the suit land from to the 1st Defendant and that the road was constructed in Fosi's land. That the land he bought had never belonged to Bwambale Yokasi but for Masereka Fosi from whom he bought, reached the road. That he gave an option to the people behind him who did not reach the road to buy his land so that they can access the road and that the 1st plaintiff told him that people in Kamapla stay behind. That however others like Sarapio bought from Bwambale Yokasi and Nyakabugho to access the road.

In cross examination he indicated that he did not know how Fosi acquired the suit land. That by the time he bought the plaintiffs were not in possession of the land and the area chairperson was present when he was buying. That the road passed through around 2002 and he was not there at the time. That he knew the road split the land since there were still boundary marks on the land and the he bought land on the lower side. That he heard from other people that the road split the land. That when he sold the land to the 1st Defendant, the plaintiffs were already on the neighbouring land though they were not present when selling. That he called the area chairman and he was Kikoma. That the chairman did not sign but gave him someone to sign for him. That after buying he went somewhere else and only came back to sell the suit land. That he did not witness the agreement between BwambaleYokasi and Sarapio or Nyakabugho. That they bought before he came to the place because he found them as neigbours. In re exam he stated that he saw Fosi physically and he sold him the suit land and is the one who sold the upper part.

Analysis of the Evidence:

The Appellant's claim of the suit land was pegged on their respective purchase agreements which were exhibited as PEX1 and PXE3 respectively. They contended that in the purchase agreements, Mutanywana road as indicated as a neighbour to their respective pieces of land including the suit land. They also indicated that the measurements indicated in their respective agreements were merely estimated but the measurements were not taken out. This was also supported by the evidence of PW3 who sold land to the 1st Appellant and PW4, the wife of the 1st Appellant who all stated the measurements were merely assumed.

In the said agreements, it is indicated thus: *"Agreement for sale of a plot 100 feet by 50 feet"*. The land that both Appellants were buying were plots of 100ft by 50ft. There is nothing in the agreements to suggest that the measurements were approximated. The approximation came in the oral evidence of the plaintiff's witnesses. The question would therefore be, whether the said oral evidence can be relied upon to add to or to vary the contents of the agreement.

It is settled law as provided for under Section 92 of the Evidence Act that oral evidence cannot be used to add to, vary or contradict a written instrument. This position has been affirmed in a number of decisions. In **Golf View Inn (U) Ltd Vs. Barclays Bank (U) Ltd, High Court Civil Suit No. 358 of 2009,** the Hon. Lady Justice Hellen Obura (High Court Judge as she then was) observed at page 10 and 11 thus: *"From the above legal principles, it is clear that once parties have executed agreements, they are bound by them and evidence of the terms of the agreement should be obtained from the agreement itself and no extrinsic evidence shall be admitted or if admitted, shall be relied upon to contradict, add to, vary or subtract from the terms of the contract except where there is fraud, duress, illegality lack of consideration, lack of capacity to execute the contract"*. Further in ***Sine pay (u) Ltd Vs. Sarah Kagoro & Anor, Civil Suit No, 0548 of 2004,***

Bamwine J (High Court Judge as he then was) observed that: "*The parole evidence rule is to the effect that evidence cannot be admitted (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, it means that where a contract has been reduced to writing, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, that is, not contained in it.*" The said rule has exceptions which are provided for under Section 92 of the Evidence Act. However the facts of this case do not fall under any of the exceptions under section 92. Therefore applying the said rule evidence commonly known as the Parole Evidence Rule, the oral evidence as to the estimation of the measurements could not be admitted or relied upon to vary the contents of the written agreements. I thus conclude that the Appellants' plots of land that they bought measured 100ft by 50ft. Upon my evaluation of the evidence on record, I find that the Appellants did not adduce evidence to prove that the suit land fell within their plots of 100ft by 50ft which they bought and I thus conclude that the suit land fell outside of the plots of 100ft by 50ft which the Appellants had bought.

The Appellants raised a second line of argument that in their agreements, it was indicated that the land neighbored with a road referring to Mutanywana road. PW3 from whom they bought asserted that she had purchased this land from the 3rd Defendant, which she later sold, and that in the north was a road as the boundary mark; that the her purchase agreement from the 3rd Defendant had got lost. However, it was the evidence of the 3rd Defendant who testified as DW2, that the land sold to PW3 did not reach the road and that his land did not reach the road. That before the road was the land of Masereka John Fosi. DW2's evidence was not challenged in cross examination. He was consistent about his land not reaching the road.

My evaluation of the evidence leads me to the conclusion that the land that PW3 acquired from DW2 did not reach the road and thus PW3 could not sell land to the 1st Appellant that she did not own. Therefore, the 1st Appellant cannot claim an interest in the suit land as the person from whom he acquired had no title to the said Suitland.

The Appellant's claim over the suit land is further attenuated by the evidence of DW4. DW4 stated in examination in chief that he acquired the suit land measuring 50ft by 100ft from Masereka John Fosi on 2ndNovember 2005 and that it is the same land that he sold to the 1st Respondent on 20th March 2009. DW4 stated that at the time he sold to the 1st Respondent, the Plaintiffs were already occupying the neighbouring land. Thus the 1st Respondent's interest accrued from DW4 whose evidence was neither challenged nor controverted by the Appellants. Therefore going by DW4's evidence, it would mean that by the time the Appellants bought their respective portions in 2009, the land that extended to the road belonged to DW4 and not to those who sold to the Appellants.

It is also observed that the conduct of the Appellants made their claim to the suit land uncertain as to whether they claimed its ownership or its being a road reserve. They first claimed per the complaint made to Kasese Town Council that the 1st Respondent had built in the road reserve along Mutanywana road blocking access to their plots. This was confirmed by PW5 who in cross examination stated that the complaint by the Appellants was about the 1st Respondent constructing in the road reserve. The appellants later filed a suit asserting ownership, private nuisance and trespass.

The Respondent also objected to the Appellants' agreements as being an afterthought and that the same were generated with the sole intent of enabling the Appellants to create an interest over the suit land. The vivid objection was that one

of the witnesses who signed as No. 12 on PEX1 and also on PEX3 made a representation that he was a Municipal Councilor yet Kasese was given a municipality status in 2010 after the agreement in issue had been made. This was confirmed by PW5 who stated that he was working with Kasese Town Council before it was made a municipality and that by 2009 Kasese had not became a municipality. This fact was not explained away by the Appellants thus it is plausible to conclude that the agreements relied upon by the Appellants were made after the dispute had arisen to create an interest over the suit land.

On the other hand, the 1st Respondent led evidence that he bought the first portion of the suit land from DW4 on 20th March 2009. That DW4 handed over to him an agreement where he acquired the said portion from on 2nd November 2009 from Masereka John Fosi at an agreed consideration of Ugx 80,000. This evidence was corroborated by DW4 and DW2. He also stated that he acquired the 2nd portion from BwambaleYokasi (DW2) on 20/2/2015 and this fact was confirmed by DW2 the previous owner that after selling land, he retained a small area which he sold to the DW1 on 20th February 2015. This evidence was corroborated by that of DW3, Mambu Polina alias Nyakabugho, who testified that he owned land in the area reaching the road and sold same to Erica and Sarapio to access the road and that the DW2's didn't reach the road. This evidence was not in my view discredited to lower its weight.

In resolving **ground 3,** I agree that the trial Magistrate erred in law and in fact when he failed in his duty to determine and declare the rightful owner of the suit land.

Following a careful re-evaluation of the evidence, I agree with the findings of the trial Magistrate that the Appellants failed to prove their claim of ownership of the suit land. I find that the case of the Respondents was more credible and believable

than that of the Appellants. The 1st Respondent led sufficient evidence regarding ownership of the suit land and established proper title to the same and thus should have been declared owner of the suit land. I agree with the findings of the trial Magistrate that the Appellants failed to prove their claim of ownership of the suit land on the balance of probabilities and thus grounds 1, 2 and 4 fail. I find that the 1st Respondent is the rightful owner of the suit land and is a not a trespasser.

Ground 5:

That the learned trial Magistrate erred in law and fact when he misconceived the law and declined to order the eviction of the 1st Respondent from the suit land thereby condoning an illegality.

Learned counsel for the Appellants submitted that, the trial Magistrate having found that the 1st Respondent had no interest in the suit land, he would have proceeded to order for his eviction from the same. That even if court was to take the view that the same was in a road reserve, the 1st Respondent was not an agent of the roads authority or Municipal Council to continue his occupancy of the suit land. That the activities of the 1st Respondent were long condemned by the Municipal Council in 2012 per the enforcement notice on record and no evidence was led by the 1st Respondent to prove that this status changed.

Further, that the trial Magistrate rightly observed in his judgment that upon visit to locus in quo, he found a discharge of sewerage from the 1st Defendants land into that of the plaintiffs' property and that the continued discharge and release of waste rendered the enjoyment of their property unconformable. That the trial Magistrate also noted that the Appellants were subjected to suffering as a result of obstruction caused by the 1st Respondent's illegal building and thus making the enjoyment of their property uncomfortable. That the trial Magistrate should have invoked the

inherent powers granted under section 98 of the Civil Procedure Act to order for the eviction of the 1st Respondent from suit land since his occupancy was illegal and this illegality should not have been condoned by the decision in Makula International ***Ltd Vs. H.E Cardinal NsubugaWamala& Anor (1982) HCB 11.***

That the trial Magistrate erroneously relied on the Roads Act which was not applicable to the facts of the case. He maintained that the trial Magistrate thus erred in not ordering for the eviction of the 1st Respondent from the suit land.

In response, learned counsel for the Respondents argued that the trial court could not order for eviction after the plaintiffs failing to prove their claim of ownership of the suit land. That the enforcement notice was not about constructing in a road reserve but constructing without an approved plan and building using murram. He submitted that this ground was a waste of court precious time and the same should fail.

COURT'S RESOLUTION OF GROUND 5:

I have extensively considered the submissions of both counsel on this issue. I believe the resolution of the 1st, 2nd, 3rd and 4th grounds substantially disposes of this ground. To be more specific, having found that the suit land belonged to the 1st Respondent, I find no error of law or fact commited by the trial Magistrate in declining to order eviction of the 1st Respondent from the suit land. Secondly, the trial Magistrate in his findings, held that the Appellants failed to prove their case on the balance of probabilities and as such he could not grant an order of eviction at the instance of the Appellants who had no claim over the suit land. The trial Magistrate in my view rightly declined to grant an order of eviction and thus I find no merit in this ground and the same fails.

Ground 6*:*

That the learned trial Magistrate erred in law and in fact when he held that no damages were asked for in regard to private nuisance thereby causing a miscarriage of justice.

Learned counsel for the Appellants submitted that, the trial Magistrate observed at page 6 of his judgment that: "***I did find the 1st Defendant culpable for committing a nuisance upon the plaintiffs' lands and for this I order that he ceases to continue doing so. No damages special or otherwise were asked for or argued in favour of the plaintiffs in regard to this private nuisance and I also hesitate to grant the same"***

The basis of the trial magistrate denying damages to the plaintiffs for the private nuisance was because the same were not pleaded and proved. Learned counsel submitted that the amended plaint contained particulars of general damages and the Appellants also indicated in their submissions that they sought to recover general damages of Ugx 6,000,0000/= for each plaintiff for the nuisance committed by the 1st Respondent. Counsel thus argued that the trial Magistrate erred when he declined to grant general damages to the Appellants.

In response, counsel for the Respondents submitted that there is no paragraph in the pleadings mentioning particulars of private nuisance as regards disposal of sewage. That in the particulars of the private nuisance the Appellants pleaded the particulars as: (a) forceful entry by the 1st Defendant upon the suit land and constructing permanent buildings thereon amidst protests by the plaintiffs, (b) deliberate refusal to honour and comply with the enforcement notice from the Town Clerk, Kasese Municipal Council. Further that even in the particulars of damages, the Appellants did not state sewage disposal into their land as the nuisance. Counsel thus submitted that the trial Magistrate rightly observed that the Appellants were not entitled to damages in respect of the private nuisance because it was not pleaded and he relied on the decision of ***Strons vs. Hutchinson (1905)***

AC 515 where it was held that *general damages are the direct natural or probable consequence of the fact complained of*. That the Appellants did not complain of sewege disposal in their land as such they were not entitled to general damages.

COURT'S RESOLUTION OF GROUND 6:

The Black's Ditionary8th Edition at page 3386, defines nuisance as ***a condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property; esp., a nontransitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highway***.

It also defines private nuisance as ***a condition that interferes with a person's enjoyment of property; esp., a structure or other condition erected or put on nearby land, creating or continuing an invasion of the actor's land and amounting to a trespass to it. The condition constitutes a tort for which the adversely affected person may recover damages or obtain an injunction***.

It should be noted that not every action done by a person that interferes with the neigbours enjoyment of his or her land constitutes actionable nuisance. The act must be that which interferes with a neigbours enjoyment of his land. This position was stated by the Hon. Lady Justice Hanriet Walayo in ***Lukanga Muhammed Vs. Musa Juko, Civil Appeal No. 42 of 2016*** refering to the position in ***Bulen & Leake & Jacobs on Precedents and pleadings Sweet and Maxwell, 1990 at page 700 and 701*** where the authors observed thus:

"Nuisance is concerned with conditions and activities which interfere with the use or enjoyment of land and that courts must balance the competing interests of neighboring land owners and adjust their respective rights and privileges"

The learned Judge also quoted the position in an article by ***Stimmel, Stimmel and Smith Law Office found at hhp://stimmel-law.com*** where he states thus:

"a landowner is relieved from liability for injuries caused to adjoining owner if the land owner makes a "reasonable use" of his/her property. However, the rule which allows a person to use his/her own property in such a manner to cause injury to another's property without any liability will be limited and is carefully defined in the courts and by statute. A land owner's use of his/her property becomes unreasonable and unlawful if it constitutes an appropriation of the adjoining land if it deprives the reasonable enjoyment of the adjoining owner of his/her property to a material degree (Brownsey Vs. General Printing Ink Corp., 118 N.J.L 505 (Sup. ct. 1937)."

Therefore a private nuisance became actionable if it has the effect of depriving the adjoining owner of use of his land or it it deprives the owner of his or her reasonable enjoyment of his property to a material degree.

The Appellants filed a claim for private nuisance against the 1st Respondent and the trial Magistrate in his finding agreed with them that the actions of the 1st Respondent to wit; discharge of sewage in their land constituted a private nuisance and ordered him to cease; and declined to order an award of damages because the Appellants never pleaded the same.

A party seeking an award of general damages must plead the same in his or her pleadings and must lead evidence to prove the same. Although the grant of general damages is discretionary, there must be evidence on record on which the trial relies to exercise the discretion to grant or not to grant. In terms of the quantum, there is no universal threshold but the trial court must asses all the facts holistically and make an independent determination as to what it considers reasonable for purposes

of putting the losing party to the position he or she was in before the act complained of. (See **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305).**

In the amended plaint, the Appellant sought to recover general damages for private nuisance caused by 1st Respondent. In the particulars of general damages, the Appellants indicated in paragraph 6(7) that; "**Demand to voluntarily clear the nuisance and the quit/notice of intention to sue was effectively served upon the Defendant on 22nd December 2017 but he remained adamant and stubbornly ignored the same."**

In my view that paragraph contains the Appellants' averment as regards private nuisance for which they sought to recover general damages. Although the type or form of nuisance was not clearly stated, the same came up in evidence. PW1 (Bwambale Henry) in his examination in chief under paragraph 20 stated that: "*That as a result of the Defendant's activities, I have been unjustly deprived of a right to access and enjoy my plot and dirty water from the 1st Defendant's bath rooms has always flown out into my court yard and bad smell from the toilets has caused a lot of untold discomfort to me and my family"*. He was not cross examined by the Respondents' counsel about this fact; as such the same was not contested. This evidence was corroborated by that of PW2 (Biira Grace) under paragraph 21 of his witness statement. PW5 (NgunguPhlavia) added in chief under paragraph 18 of his witness statement that: "*That the 1st Defendant already constructed a house and bath rooms whose dirty water flows o our yard and the bad smell from the toilets has subjected me and my family to untold discomfort and we are in danger of catching diseases on addition to denying us access to our home and pour construction materials."* The evidence of PW2 and PW5 was not challenged in cross examination and thus this court believes their evidence was truthful.

The trial Magistrate in his observations at locus, observed that there was dirty water coming from the 1st Respondent's property to the Appellant's land.

In my view the evidence on record ably proves the Appellants' claim of the private nuisance by 1st Respondent. I therefore agree with the findings of the trial Magistrate that the 1st Respondent's acts to wit; releasing dirty water (sewage) into the Appellants' land constituted actionable private nuisance.

The Appellant averred that the alleged nuisance caused them discomfort in enjoyment of their respective pieces of land. In my view, the 1st Respondent's acts constituted actionable private trespass because it had the effect of affecting the Appellants of the use of their land to a degree beyond what is reasonable. They were as such entitled to compensation for such inconvenience by way of award of damages and the trial Magistrate should have awarded the same. I thus agree with the Appellants that the trial Magistrate erred in law when he failed to award general damages on the basis that the same were not pleaded and proved.

The second limb of this ground is in relation to the quantum of damages that they are entitled to. I believe guidance on this can be sought from the previous decisions of court where awards were made in respect of private nuisance. In **Lukanga Muhammed Vs Musa Juuko, Civil Appeal No. 42 of 2016,** a wall collapsed as a result of failure to fix gutters by the Respondent (a neighbor). Court found that the Respondent contributed to that damage and awarded the Appellant 1,000,000/= as damages. The Appellants had prayed for 6,000,000 each, though they never advanced any reason for asking for such amounts. I believe a sum of Ugx 600,000/= (Six Hundred Thousand Shillings) for each of the appellants would be commensurate for the loss or injury caused to the Appellants. The effect in my view was not so adverse as no evidence was adduced as to the extent of the effect

or the injury cause by such discharge. I thus award general damages of Ugx 1,200,000/= to the Appellants.Therefore Ground 6 succeeds.

CONSIDERATION OF THE CROSS APPEAL:

I will determine Grounds 2, 3, and 4 together since they relate to the purchases and ownership of the suit land; and grounds 5 and 6 separately.

Grounds 2, 3 and 4:

2. That the learnt trial Magistrate erred in law and fact when he shifted the burden of proof upon the cross Appellants to prove that their title or interest was unimpeachable.

3. That the learned trial Magistrate erred in law and fact when he held that the 1st Defendant's purchase were tainted by dispute and controversy.

4. That the learned trial Magistrate erred in law and fact when he held that the Defendant's evidence was tainted by inconsistencies and contradictions.

<u>Submissions of the Cross Appellant</u>:

Counsel submitted in respect of **ground 2** of the cross appeal that the approach for evaluation of evidence taken by the trial Magistrate of requiring the Respondents to prove their defense first was erroneous. To support his assertion, he cited the case of ***Oyoo Francis Vs. Olanya, Civil Appeal No. 5 of 2017*** where it was held interalia that: *"The party who bears the burden must produce the evidence to satisfy it, or his or her case is lost."* Learned counsel added that the person who had that duty was the plaintiff and not the Defendant and faulted the approach by the learned trial Magistrate.

On **Ground 3** counsel submitted that the 1st cross Appellant's purchase of the suit land was not tainted by disputes and controversy. That as rightly observed by the trial Magistrate, the suit land did not affect the 50ft by 100ft plots owned by the two Cross Respondents. That the evidence of the 1st Cross Appellant's case was well corroborated with the evidence of all defense witnesses and the disputes and controversy if any, they did not affect his title to the suit land. He thus faulted the trial Magistrate's observations to that effect.

Counsel submitted on **Ground 4 learned** counsel started by inviting court to the decision of ***Adam Baale & 2others Vs. Willy Okumu, Civil Appeal No. 21 of 2005*** about contradictions where it was held that; "*the law relating to contradictions and inconsistencies is well settled and that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If, however they are minor and capable of innocent explanation, they will normally not have that effect.*"

Counsel submitted that as relates to the inconsistencies and contradictions in the Respondents evidence, the trial Magistrate noted in his ruling at page 4 that; "*in addition, I observe that the evidence for the Defendant was severally tainted with inconsistencies and contradictions. For instance, in their WSD, it was pleaded that Mutanywana Road cut into the 2nd Defendant's land leaving a portion on the lower side. However the 2nd Defendant in his evidence in chief stated that Mutanywana Road had split John Fosi's land into two. This was confusing as it became unclear whose land was affected by the road. Similarly, the 3rd Defendant claimed that he did not own any land which touched Mutanywana road. Interestingly, PW6 testified that the 3rd Defendant sold him all his land and that part of it does touch the road…these facts leave a lot of doubt in the evidence given for the defense and bring into question the 1st Defendant's title to the suit land.*"

Learned Counsel submitted that the contradictions referred to by the trial Magistrate did not exist and that if they did they were minor and did not not go to the root of the matter. That there was enough evidence on record which proved that there was no deliberate untruthfulness by the 2nd Defendant intended to mislead the court, firstly, it was admitted by PW3 and PW4 during cross examination that the 3rd Respondent's land ended at a *ruyenje* which separated it from the road and secondly PW3 who sold the land to the 1st Appellant confirmed that the land ended at the *ruyenje*. That the inconsistencies had no bearing on the question of ownership of the suit land that court was tasked to investigate and they would have been disregarded by the trial Magistrate.

Submissions of the cross Respondent:

In response to **ground 2**, learned counsel argued that the approach adopted by the trial Magistrate was bonafide. He quoted the decision of ***Ojwanga Vs. Wilson Bagonza, CACA No. 25 of 2002*** where it was held that; "*.to prove a good title therefore, the Defendant was expected to show that he acquired his piece of land from people whose own title or interest was unimpeachable*" That the implication of the decision is that under Section 101 and 105 of the evidence Act, since the cross Appellant claimed to be a bonafide purchaser, he had the burden to prove the same. That the burden is not static and rested only on the Cross Respondents. He thus prayed that the ground fails.

In response to **ground 3** of the cross appeal, Learned counsel for the Cross Respondents submitted that the 1st Cross Appellant's purchase was very controversial in the sense that he purported to buy land which had been ealier acquired by the cross Respondents. That the 1st Cross Appellant did not make reasonable inquiry prior to purchase of the suit land and that the only way the Cross Respondents would access their land was through the suit land. That with

full knowledge of the Cross Respondents' protest, the 1st Cross Appellant went ahead and purported to purchase another neighboring land with full knowledge of the Cross Respondents' claim of ownership. That these controversies were visible in evidence and the trial Magistrate rightly observed the same.

In response to **ground 4**, counsel for the Cross Respondents/Appellants submitted that the contradictions noted by the trial Magistrate were in the pleadings and evidence adduced. That this was a grave departure from the pleadings to which the 2nd Defendant was bound and the learned trial Magistrate rightly held so because they same were clearly visible.

COURT'S RESOLUTION OF GROUNDS 2, 3 & 4 OF CROSS APPEAL:

Ground 2: ***The learned Trial Magistrate erred in law and fact when he shifted the burden of proof upon the cross Appellants to prove that their title or interest was unimpeachable.***

The cross Appellant's contention in the first ground is in relation to the burden of proof. The Appellant asserted that the said burden lay on the Appellants/Cross Respondent while the Cross Respondent contended that it lay on both parties. In my view this controversy is not new in the legal discourse. There is considerable jurisprudence on this issue with clear guidance on who bears the burden of proof in civil matters and the standard required. It is not a venture into a limbo of uncertainty or on a journey to invent new legal principles. In ***Kamo Enterprises Limited Vs. Keystalline Salt Limited, Civil Appeal No. 08 of 2015*** the Supreme Court in the lead Judgment of Mwondha (JSC) it was observed thus:

> ***"In my view, counsel seems to be mistaking legal burden of proof with evidential burden of proof. Legal burden of proof is a burden fixed by law and is a fixed burden of proof (See***

Cross & Tapper on Evidence-8th Edition at page 121). In civil cases, the standard is on a balance of robabilities.

On the other hand, evidential burden of proof is the burden of adducing evidence to prove a fact in one's favour. While the evidential burden keeps shifting, the legal burden never shifts. (See Phipson Law of Evidence, 14th Edition).

Section 103 of the Evidence Act, Cap 6 provides:

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In this case, once the respondent adduced evidence showing that it supplied goods to the appellant, the burden shifted to the appellant to prove that it actually paid for the goods and it was not enough to simply state that the invoice indicated the terms of payment to be advance and not credit."

It is thus deducible from the above decision that *burden of proof* contains two components or aspects, that is, the *legal burden of proof* and the e*vidential burden of proof*. The legal burden is that imposed by law on a given party and it does not shift while the evidential burden keeps shifting depending on the allegations or facts presented by a party to a suit. In civil cases, the legal burden lies upon the plaintiff. The plaintiff must lead evidence to prove his or her claim and a decision must be arrived at based on the strength of the plaintiff's case and not on the weakness of the defense. If the evidence adduced by the plaintiff is too weak to prove his or her claim against the Defendant, the case fails no matter the

weaknesses in the Defendants evidence. Thus the legal burden does not shift. Where there is a counter claim in which the Defendant now becomes the Counter plaintiff, the legal burden to prove the counter claim lies on the counter claimant to prove the counter claim put forward. However, the evidential burden keeps shifting depending on the facts or allegations put forward by a party to a suit.

It is also my view that in civil cases, court must weigh the evidence of both the plaintiff and the Defendant before reaching a final decision. The manner adopted in evaluating evidence does not matter as long as there is not alteration of the legal burden in the final analysis.

In ***Oyoo Francis Vs. Olanya, Civil Appeal No. 5 of 2017,*** Hon. Justice Stephen Mubiru stated as follows:

> ***"****It is trite that there is no particular format required in the evaluation of evidence. The task may be carried out in different ways depending on the circumstances of each case since judgment writing is a matter of style by individual judicial officers. A Judgment will be valid once it is the court's final determination of the rights and obligations of the parties based on the evidence adduced and gives reasons or grounds for the decision* ***(see British American Tobacco (U) Ltd v. Mwijakubi and four others, S.C. Civil Appeal No. 1 of 2012; Bahemuka Patrick and another v. Uganda S.C. Criminal Appeal No. 1 of 1999 and TumwineEnock v. Uganda S.C. Criminal Appeal No. 11 of 2004).***
>
> *The question as to whether the appellant discharged the burden of proof on a balance of probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and / or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two*

versions is the more probable. The enquiry is two-fold: there has to be a finding on credibility of the witnesses; and there has to be balancing of the probabilities.

The party who bears the burden must produce evidence to satisfy it, or his or her case is lost. The probabilities must be high enough to warrant a definite inference that the allegations are true. In a civil suit, when the evidence establishes conflicting versions of equal degrees of probability, where the probabilities are equal so that the choice between them is a mere matter of conjecture, the burden of proof is not discharged ***(see Richard Evans and Co. Ltd v. Astley, [19U] A.C. 674 at 687****). The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied* ***(see Bradshaw v. McEwans Pty Ltd, (1959) I0I C.L.R. 298 at 305****). The law does not authorise court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others."*

In this case, the trial Magistrate evaluated the evidence of the Defendant/cross Appellant as to his claim of ownership of the suit land and rightly cited the decision of ***Ojwang Vs. Wilson Bagonza, Civil Appeal No. 25 of 2002.*** He pointed out the inconsistencies in the evidence of the Defendant and also evaluated the evidence of the cross Respondents and in his conclusion, he stated that:

"*In my final summation, the plaintiff's do not prove that the suit land is owned by them since it was never part of the plots they bought on 4th January 2008 and 9th February 2009 respectively. In Civil suit it is the plaintiff's duty to prove their case on the balance of probability. I find they have failed in this duty."*

Therefore in my view, it was a question of style. The trial Magistrate did not shift the legal burden. Further, when the trial Magistrate did the analysis that led him to the conclusion that the defendants's evidence fell short of proof of the 1st Defendant's claim of owning or holding an interest in the suit land, he was dealing with the evidential burden of the defendants, based on the facts that had been put forward by the defendants. However, the trial Magistrate's said analysis and conclusion, that the defendants's evidence fell short of proof of the 1st Defendant's claim of owning or holding an interest in the suit land, were erroneous in my view. The trial Magistrate in reacing the conclusion that the defendants's evidence fell short of proof of the 1st Defendant's claim of owning or holding an interest in the suit land, appered to have limited himself only to the evidence of the 2nd defendant, the 3rd Defendant and PW6, and only to a limited analysis of their evidence. I found under Ground 3 of the appeal (***The trial Magistrate erred in law and in fact when he failed in his duty to determine and declare the rightful owner of the suit land),*** that there was sufficient evidence to prove that the 1st counter claimant rightly bought the suit land from Kyumakyayesu who had a legitimate unimpeachable claim. I therefore find no merit in the second ground herein and it therefore fails.

Grounds 3 and 4:

3. That the learned trial Magistrate erred in law and fact when he held that the 1st Defendant's purchase were tainted by dispute and controversy.

4. That the learned trial Magistrate erred in law and fact when he held that the Defendant's evidence was tainted by inconsistencies and contradictions.

I have considered the judgment of the trial Magistrate and the inconsistencies pointed out. The trial Magistrate pointed out at page 4 thus; "*In addition, I observe*

that the evidence for the Defendant was severally tainted with inconsistencies and contradictions. For instance, in their WSD, it was pleaded that Mutanywana Road cut into the 2nd Defendant's land leaving a portion on the lower side. However the 2nd Defendant in his evidence in chief stated that Mutanywana Road had split John Fosi's land into two. This was confusing at it became unclear whose land was affected by the road. Similarly, the 3rd Defendant claimed that he did not own any land which touched Mutanywana road. Interestingly, PW6 testified that the 3rd Defendant sold him all his land and that part of it does touch the road…these facts leave a lot of doubt in the evidence given for the defense and bring into question the 1st Defendant's title to the suit land."

I have perused the written statement of defense pointed out by the trial Magistrate. Indeed in paragraph 5(d) of the written statement of defense, the Defendant contended thus; "*The Defendants shall aver and contend that Mutanywana road cut into the 2nd Defendant's land leaving a stretch of approximately 50ft by 100ft on the lower side which shared a boundary with land owned by the 3rd Defendant. It is this piece of land that the 2nd Defendant sold to the 1st Defendant on 20th March 2009"*. In their evidence all the defense witnesses testified that the road cut through land belonging to a one **Masereka John Fosi** from whom the 2nd Defendant acquired land in 2005 which he later sold to the 1st Defendant.

The trial Magistrate also observed that the 3rd Defendant did not own any land touching the road, however PW6 testified that the 3rd Defendant sold him land touching the road and declared the 3rd Defendant to be a liar.

The law regarding contradiction of evidence as stated in ***Adam Baale & 2 others Vs. Willy Okumu, Civil Appeal No. 21 of 2005*** is to the effect that if they are major, they can have the effect of causing the evidence to be rejected and if they

are minor, explained away, or do not go to the root of the matter, they can be ignored.

I found the contradictions to be minor. The contradictions relating to whose land was split by the road is minor. It was the same land that changed hands but it originated from **Masereka John Fosi.**

Regarding PW6, the appellants seem to rely on his evidence to assert that all the plots in the area reached the road and the unique one was the one in dispute to insinuate that the suit land is theirs. I have observed that PW6 was introduced as a witness at the very end of the court proceedings, under circumstances which are not clear from the court record, after the Plaintiffs had closed their case and after the Defendats had already led 4 witnesses; his witness statement was filed in court in 2019 when the others were filed in 2018. In my view this witness was irregularly introduced by the appellants to fill gaps in their case after hearing the evidence of the Respondents. No leave was sought by the appellants to introduce this witness and court never stated the reasons why it admitted such a witness at a very late stage in the proceedings. The evidence of this witness appears to have been brought as an afterthought and it cannot be used to discredit the evidence of the Respondents or the other evidence on record.

In conclusion, the evidence of the Defendants had some contradictions and inconsistencies although the trial Magistrate did not carefully evaluate them in relation to the question of ownership of the suit land by the 1st Appellant and I find them minor. They did not justify the rather firm conclusions that the 1st Defendant's purchases were tainted by dispute and controversy and that the Defendant's evidence was tainted by inconsistencies and contradictions. Therefore grounds 3 and 4 succeed.

Ground 5:

That the learned trial Magistrate erred in law and fact when he made orders on matters that had not been pleaded by the cross Respondents in their pleadings.

Counsel for the cross Appellant submitted that the findings of the learned trial Magistrate that the 1st cross Appellant committed a private nuisance by way of discharge of sewage into the Appellants' piece of land was a complete departure from the cross Respondents Pleadings. That the facts as to the discharge of sewage was not pleaded and the trial Magistrate wrongly relied on such fact in his final finding that the cross Appellant committed a tort of private nuisance.

In response counsel for the cross Respondent submitted that this fact was pleaded and the trial Magistrate rightly arrived at the finding that the 1st cross Appellant committed a tort of private nuisance on the cross Respondent's land.

Consideration of ground 5:

My analysis and resolution of ground 5 of the appeal substantially disposes of this ground and the same fails.

Ground 6:

That the learned trial Magistrate erred in law and fact when he failed to award the costs of the suit to the cross Appellants.

Counsel for the cross Appellant referred court to the case of **DerramNanji Dattani V. Haridas Kaildas 16 EACA 35** where it was held that a successful Defendant can only be deprived of costs when it is shown that his conduct prior to or during the course of the suit has led to litigation which, but for his own conduct might have been averted. That the conduct of the cross Appellants demonstrated

good conduct and the trial Magistrate having ruled in their favor, ought to have awarded the Respondents costs of the suit.

In response, it was submitted that the principle on award of costs is provided by section 27(1) of the Civil Procedure Act cap 71, which is to the effect that costs are incidental to all suits and are awarded at the discretion of the court. Counsel found no fault in the trial Magistrate not awarding the cross Appellants costs.

The trial Magistrate on the dismissed the plaintiffs case and ordered that each party bears its own costs.

COURT'S RESOLUTION OF GROUND 6:

Under Section 27 (2) of the Civil Procedure Act, costs of any action, cause or matter follow the event unless Court for good cause orders otherwise.

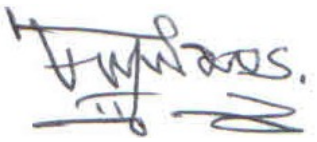
In **Kiska Limited V. Vittorio Angelis [1968] EACA 7**, it was held that a successful Defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit has led to litigation which but for his own conduct might have been averted.

The Appellants succeeded in their claim against the Respondent as regards private nuisance although they failed on other grounds. It is my view and finding that if the cross Appellant/1st Respondent had not committed the alleged nuisance, this case should have been partially avoided. It was his illegal acts that partially led to this case. I therefore agree with the findings of the trial Magistrate that each party should bear their own costs. This ground therefore fails.

Therefore the appeal and cross appeal partially succeed and I make the following orders:

1. **The judgment of the trial Magistrate is set aside and substituted with this judgment**
2. **The 1st Respondent is the rightful owner of the suit land.**
3. **The Appellants are award general damages of 1,600,000/= (One Million Six Hundred Thousand Shillings) for the private nuisance occasioned to them to be paid by the 1st Respondent personally.**
4. **The 1st Respondent/cross Appellant should cease the alleged acts constituting nuisance on the Appellants land with immediate effect.**
5. **That in the interests of harmony and the fact that both appeal and cross appeal partially succeeded, I order that each party bears their own costs.**

I so order



Vincent Wagona

High Court Judge

FORT-PORTAL

27.01.2023