**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA AT MBARARA**
**HCT-05-CV-CA-0042-2021**
**(Arising from BUS-00-CV-CS-0025-2016)**

**1. AMOS BYAMUKAMA**
**2. AZARIA MWESIGYE :::::::::::::::::::::::::::::: APPELLANTS**

**VERSUS**

**JAIRESS KOMPAIRE :::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE:** HON LADY JUSTICE JOYCE KAVUMA

# JUDGMENT

## Introduction.

[1] This is an appeal against the orders and decree of the learned Chief Magistrate sitting at Chief Magistrate's Court of Bushenyi at Bushenyi delivered on 28th/05/2021.

## Background.

[2] The background of this appeal as can be ascertained from the trial court record is that the Respondent sued the Appellants for a declaration that the suit land belonged to her, that the Appellants were trespassers thereon and should be condemned to general and special damages, a permanent injunction and costs of the suit.

The Respondent's case was that she with her late sister Kayongo Edinance acquired the suit land comprised in Kafuro Cell, Kirungu subcounty, Rubirizi District by way of purchase from a one Bagyendera Phekas in 1971. That the

late Bagyendera Phekas being the Respondent's brother and a father of the Appellants exchanged his share in their late father's land/estate a one Kataago Syilah situate at Nyamizi, Bumbaire, Bushenyi for the suit land. That the Respondent together with her late sister settled on the suit land since 1971 uninterrupted and put thereon a number of developments to wit a six bedroomed house, coffee and banana plantations, mature mango trees, eucalyptus trees and other developments. That when her late sister passed on in August 2015, the Respondent obtained letters of administration to administer her estate. That the Appellants, without any colour of right descended destroyed crops on the suit land and were threatening to demolish the house where the Respondent stayed to evict her. That as a result, the Respondent suffered financial loss and inconvenience for which the appellants were liable.

The Appellants' defence was that the land at Kafuro Cell, Kirungu was acquired by their late father Bangyendera Phenekas and neither the Respondent nor her ate sister ever owned or took possession of it.
That the Appellants inherited the suit land from their father and have developments thereon. That their late father never exchanged the suit land with the said Katago Syilah. That the Respondent had fraudulently included the property of their late father while acquiring Letters of Administration for her late sister and none of the sister's property was included.

**[3]** After a full trial, judgment was entered by the learned trial Chief Magistrate in the following terms;

1. *A declaration that the Plaintiff is the rightful owner of the suit land.*
2. *A declaration that the defendants are trespassers.*
3. *A permanent injunction does issue restraining the defendants, their agents or anybody claiming title from them from any further interference with the Plaintiff's quiet possession of the suit land.*
4. *An eviction order does issue against the 1st defendant on the land at Kafuro.*
5. *The defendants to pay the plaintiff general damages of UGX 10,000,000/=.*
6. *The Defendants to pay interest on the general damages at court rate of 8% pa.*
7. *The defendant pay the plaintiff the taxed costs of the suit.*

**[4]** The Appellants, feeling aggrieved with the above orders and declarations of the learned trial Chief Magistrate preferred the instant appeal on **30th August 2021** on the following grounds;

1. **The learned trial Chief Magistrate erred in law and fact when she misconstrued facts and failed to properly evaluate the evidence on record thus coming to a wrong conclusion that the Respondent is the rightful owner of the suit land which caused miscarriage of justice.**
2. **The learned trial Chief Magistrate erred in law and fact when she overruled a preliminary objection on the Respondent's**

introduction of the land at Mirarikye which was a clear departure from her pleadings and hence greatly prejudiced the Appellants.

3. The learned trial Chief Magistrate erred in law and fact when she erroneously relied o the original plaint of the Respondent to construe facts when the same had been amended and abandoned by the Respondent which was irregular and illegal and thus caused a miscarriage of justice.
4. The learned trial Chief Magistrate misdirected herself on the law and facts when she relied on extrinsic irrelevant factors ignoring to rely on the sale agreement marked as DE1 produced by the Appellants in proof of ownership of the suit land, hence arrived at an erroneous decision.
5. The learned trial Chief Magistrate erred in law and fact when she ignored the question of possession of the suit land to determine its ownership and hence came to a wrongful conclusion.
6. The learned trial Chief Magistrate erred in law and fact when she relied on conjecture to make an excessive award of shs. 10,000,000/= as general damages without any cogent evidence to justify an award of the same.

The Appellants prayed that this court allows their appeal, sets aside the judgment, decree and orders made by the learned trial Chief Magistrate,

declare the Appellants the rightful owners of the suit land, a permanent injunction be issued against the Respondent and/or her servants/agents from evicting the Appellants from the suit land or interfering with the suit land and costs of the appeal and those in the trial court.

## Representation.

**[5]** The Appellants were represented by M/s Kamugisha Deus & Co. Advocates while the Respondent was represented by M/s Mugisha, Namutale & Co. Advocates. I considered the written submissions filed by both counsel in coming to my decision.

## The duty of this court.

**[6]** As the first appellate court, this court is duty bound to re-evaluate all the evidence that was available to the trial Chief Magistrate and make its own inferences on all issues of law and fact. The Supreme Court in **Fr. Narcensio Begumisa & Others vs Eric Tibebaaga SCCA no. 17 of 2002**, the learned Mulenga JSC (RIP) explained this principle as follows;

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

*conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In Coglan vs Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) put the matter as follows-*

> *"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong…When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the court of appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom court has not seen."*

*In Pandya vs R (1957) EA 336, the Court of Appeal of Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction. It held that the High Court sitting on an appeal from a Magistrate's court had-*

> *"erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect."*

*The principle behind Pandya vs R (supra) was subsequently stressed in Ruwala vs R (1957) EA 570, but with explanation that it was applicable only where the first appellate court had failed to consider and weigh the evidence. More recently, this court reiterated that principle in Kifamunte Henry vs Uganda, Criminal Appeal No. 10/97 and Bogere Moses and Another vs Uganda, Criminal Appeal No. 1/97. In the latter case, we had this to say-*

> *"What causes concern to us about the judgment, however, is that it is not apparent that the court of appeal subjected the evidence as a whole to scrutiny that it ought to have done. And in particular it is not indicated anywhere in the judgment that the material issues raised in the appeal received the court's due consideration. While we would not attempt to prescribe any format in which a judgment of the court should be written, we think that where a material issue of objection is raised on appeal, the appellant is*

*entitled to receive adjudication on such issue from the appellate court even if the adjudication be handed out in summary form…In our recent decision in Kifamunte Henry vs Uganda we reiterated that it was the duty of the first appellate court to rehear the case on appeal by considering all the materials which were before the trial court and make up its own mind…Needless to say that failure by the first appellate court to evaluate the material evidence as a whole constitutes an error in law."*

I shall proceed to re-evaluate the evidence as the law requires and make my own inferences on all issues of law and fact.

Analysis and decision of court.

Ground 1: The learned trial Chief Magistrate erred in law and fact when she misconstrued facts and failed to properly evaluate the evidence on record thus coming to a wrong conclusion that the Respondent is the rightful owner of the suit land which caused miscarriage of justice.

Ground 5: The learned trial Chief Magistrate erred in law and fact when she ignored the question of possession of the suit land to determine its ownership and hence came to a wrongful conclusion.

**[7]** Counsel for the Appellant submitted on grounds 1 and 5 of the appeal jointly. It was their submission that according to the evidence presented by the Appellants during trial, the suit land located at Mirarikye C belonged to them. That at locus, it was clear that the suit land was located in Mirarikye C

and yet the persons from whom the Respondent claimed to have bought from the suit land stayed in different villages in Mirarikye A and had never owned land in Mirarikye C. that the Respondent's testimony that she was given land by Nathan Bamanyire and his wife Meduius Knarebire in 1962 and the other land that she bought it in 1974 from Grace were an afterthought, a departure from pleadings and not backed by any documentary proof.

On authority of **Adrabo Stanley vs Madira Jimmy HCCS no. 0024 of 2013**, counsel further submitted that the Appellant's possession of the suit land was to be construed as prima facie evidence of ownership.

**[8]** In response, counsel for the Respondent submitted that the learned trial Chief Magistrate judiciously, carefully and properly evaluated the evidence on record and arrived at a right conclusion that the suit land at Kafuro and Mirarikye belonged to the Respondent. That the evidence in relation to ownership of the suit land given by the Plaintiff and her witnesses was never challenged by counsel for the Defendants in cross-examination which meant that it is accepted. Counsel relied on the decision of **Habre International Co. Ltd vs Ebrahim Alarakhia & Others Civil Appeal No. 4 of 1999 (SC)** for this submission.

That DW1 did not offer any reasonable explanation as to how his father acquired the land at Mirarikye. In relation to the land at Kafuro, that DW1's testimony was that his father purchased the suit land in 1971 yet the purchase agreement he tendered in was of 18/3/1972.

## Resolution.

**[9]** The thrust and contention in grounds 1 and 5 as submitted upon by both counsel was in my view on who of the two parties to the instant appeal owned the suit land.
Whereas counsel for the Appellants argued grounds 1 and 5 together, I found ground 2 of the instant appeal interlinked with the first two grounds that I had to resolve the three grounds together.

I further observe that once the above grounds of appeal are resolved, grounds 3 and 4 of the instant appeal will also be resolved as well, as I will be elaborating in this judgment.

**[10]** Before the learned trial Chief Magistrate could resolve the issue of who owned the suit land, she noted at **page 3** of her judgment that counsel for the Appellants raised a preliminary objection to the effect that whereas the Plaintiff sued seeking recovery of one piece of land situate at Kafuro, in her testimony she smuggled in another piece of land found at Mirarikye which she alleged that the Appellants also trespassed upon. This was in substance what the second ground of this appeal contended.
In relation to the preliminary objection, the learned trial Chief Magistrate concluded as follows;

> *"…it is unfortunate that counsel is raising this matter at this stage of submissions while knowing that the Plaintiff is an illiterate and yet unrepresented. The Plaintiff cannot therefore, be expected to respond to these allegations at this*

*point. If this point had been raised during trial, possibly the Plaintiff could have explained herself. Secondly, I believe that the provisions of article 126(2)(e) of the Constitution were designed to carter for such situations as these. The plaintiff who is an illiterate and not represented cannot be closed out of the temple of justice simply because she is not able to articulate matters in accordance with the legal provisions…"*

**[11]** From the above excerpt of the learned trial Chief Magistrate's judgment and conclusions made on preceding pages it is evident that the court heard and made a determination on two pieces of land, these were, land at Mirarikye and Kafuro.

The Plaint as amended and filed on **22nd December 2017** by the Respondent in the trial court stated at **paragraph 5(a)** as follows;

*"(a) The Plaintiff jointly with her sister Kayonjo Ednance (now deceased) acquired the land comprised in Kafuro Cell, Kirugu Subcounty, Rubirizi District (the suit land) from the late Bagyendera Phenekas in 1971."*

It is clear from the above what was the subject matter of the Respondent's pleadings in the trial court. This was land comprised in Kafuro Cell, Kirugu Subcounty, Rubirizi District and not that at Mirakye.

**[12]** It is a settled position of the law that not every inconsistence between the pleadings and evidence adduced during trial constitutes a departure. (**See** Acaa Bilentina vs Okello Micheal (High Court Civil Appeal No. 53 of 2015)). In Waghorn vs Wimpey (George) and Co. [1969] 1 WLR 1764 it was persuasively held that an inconsistence which is a mere variation whose effect is in essence only a modification or development of what is already pleaded is not a departure from pleadings. However, an inconsistence which by its nature introduces something new, separate and distinct is a departure.
It is indeed true as submitted by counsel for the Appellants on the purpose of pleadings. Pleadings are meant to define and deliver with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. (**See** Interfreight Forwarders (U) Ltd vs East African Development Bank (Supreme Court Civil Appeal no. 33 of 1992).

**[13]** Proper description of suit land in pleadings in my view plays two important but more roles. The first being, for a court with limited jurisdiction like a Magistrate Court, the description will help the trial Magistrate ascertain whether or not they have geographical and at times pecuniary jurisdiction to handle a case. Secondly, proper description of the suit land in pleadings will also play the important role of avoiding the making of orders by a court for generalized property which in turn may affect execution of such orders.

Generally speaking, in relation to pleadings, the plaintiff's right or title which he or she claims has been infringed must be stated first, and then the fact of infringement. Thus, in a suit as the instant one, brought on a cause of action premised on trespass, the proper description of the suit land upon which trespass occurred must first be pleaded, and then how the defendant trespassed onto it, and then damages if any. (See **Mogha's Law of Pleadings in India with Precedents, 15th Edition at page 267**).

**[14]** What the Respondent and her witnesses did at trial to lead evidence in relation to another portion of land; which was ultimately followed by the learned trial Chief Magistrate was a sharp departure from what the Respondent had pleaded in her Plaint. This in my view offended **Order 6 rule 7** of the Civil Procedure Rules.
The provision provides that;

> *"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."*

Under the above provision, it is settled that parties are not allowed to depart from their pleadings by raising a new claim which is not founded in pleadings or inconsistent to what is pleaded.

It is a time-honored principle of law that parties are bound by their own pleadings. (See Jani Properties Ltd vs Dar-es-Salaam City Council [1966] EA 281; and Struggle (U) Ltd vs Pan African Insurance Co. Ltd. (1990-91) Karl 46). Therefore, any evidence produced by any of the parties which does not support the pleaded facts or is at the variance with the pleaded facts must be ignored. Parties to a dispute are not therefore allowed, during trial, to depart from pleadings by adducing evidence which is extraneous to the pleadings.

**[15] Order 6 rule 7** was in my considered opinion enacted to safeguard the parties from being taken by surprise as to the nature of the case against them. As remarked by Sir Jack I.H. Jacob in his Article entitled, "***the Present Importance of Pleadings***" first published in **Current Legal Problems (1960)** at **page 174**:

> *"The parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…. Forsake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any enquiry into case before it other than to adjudicate upon the specific matters in dispute which the*

*parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon realm of speculation." [**Emphasis mine**]*

**[16]** In the case beforehand, it was an error for the trial Chief Magistrate to have taken into consideration evidence in relation to another portion of land not the suit land pleaded by the Respondent. Furthermore, it trite that '*ignorantia juris non excusat*', ignorance of the law excuses not, the Respondent's ignorance of this key step in pleadings could not be relied upon by the learned trial Chief Magistrate as a reason to admit such evidence and ultimately make findings on it. Article 126(2)(e) of the Constitution therefore could be brought into aid in the circumstances.

The test to be applied by this court in such circumstances was held by this court in **Acaa Bilentina vs Okello Micheal (supra)**, to be as follows;

*"... Where departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that such evidence is not permitted unless the pleading is appropriately amended. Therefore, in the event of an inconsistency between the pleading and evidence adduced in court, such that the inconsistence is revealed in the course of hearing of evidence, the offending*

*part of the evidence may be rejected or the offending part of the pleading may be struck out on application (see Opika-Opoka v. Munno Newspapers and Another [1988-90] HCB 91 and Lukyamuzi Eriab v. House and Tenant Agencies Limited [1983] HCB 74). However, where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, is likely to give permission to amend the pleading, the other party may be sensible not to raise the point since not every departure will be fatal to the proceedings (see Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634)." [**Emphasis added**]*

The prejudice in this matter lay in the fact that the Appellants not only raised it as an objection in their final submissions but also formulated a ground of appeal in regard to the departure.

It therefore will follow that in my re-appraisal of the evidence from the trial court, in the interest of justice, I will consider only that evidence in relation to land comprised in Kafuro Cell, Kirugu Subcounty, Rubirizi District and not that at Mirakye which was never pleaded.

**[17]** The learned trial Chief Magistrate's conclusion on the evidence before her in relation to the suit land was at **page 13** of her judgment. At that page, she observed as follows;

*"The defendant and his witnesses were non-committal, they were making general statements. They were evasive to the questions. This all pointed to the fact that they were telling deliberate lies. The Plaintiff's witnesses on the other hand were all firm. They seemed certain about whatever they were talking about. Despite the fact that the Plaintiff was unrepresented, her witnesses had the facts of the case on their figure tips. DW3 repeated the same answers during cross examination even when counsel attempted to cross examine her during the locus visit. For those reasons I choose to believe the plaintiff's version and hold that the Plaintiff has discharged the evidential burden by proving that the suit lands belong to her."*

**[18]** In the instant case, the Respondent alleged that she and her sister acquired the suit land by purchase though no agreement was made since at that time there were no agreements for land being made. On the other hand, the Appellants alleged that their late father Fenekansi purchased the suit land from a one Matayo.

As a starting point therefore, this court has to first establish which of the two accounts were correct by establishing the root of the claimed purchase of the suit land.

In **Okullo vs Apiyo HCCA no. 26 of 2016**, it was held by this court as follows;

> *"As regards the claim of acquisition by purchase, when considering the validity of a claimed purchase of unregistered land, the court needs first to establish the root of title. This means identifying, as far back in time as is possible, a proven original owner to use as a point of reference, to commence the chain of ownership which will end with the current owner. Once the root is established, it is then necessary to show an unbroken chain of ownership from the root to the seller…in the alternative, there should be cogent evidence of inheritance under custom."*

According to the trial court record, the following was the evidence of the parties in relation to the suit land;

**PW1 Jairess Kompire** testified in chief that the suit land belonged to her and her elder sister Ednansi. That Nathan Bamanyire together with his wife Medius Kinareberere gave them some part of the land in 1962. That the land was given to them free of charge. That they occupied the suit land by planting a banana plantation, coffee, paw paws, mangoes and trees and even built on it a permanent house. That this was where they were staying. That they took in the 2nd Appellant when he was five years old. That later, they gave him part of the suit land and they called the sub-county committee which planted boundary marks. That she has never given the 1st Appellant any land. That the 2nd Appellant uprooted the boundary marks to the land. That after, he sent his brothers and went to another portion of land and cut down the whole

coffee plantation, avocado trees, mango trees, jack fruit trees, eucalyptus and demolished all houses which were on that land. That the said houses belonged to her and Edinansi. That they destroyed people's gardens who were hiring the land in 2005. That the Appellants started using the land.

In **cross-examination**, it was her testimony that the land at Kafuro did not belong to the Appellants' late father Fenekansi. That it was not true that upon application for letters of administration she had included property belonging to the estate of Fenekensi. That it was not true that the late Fenekensi left the Appellants on the land in Kafuro.

**PW2 Banganba Erick** testified in chief that the appellant occupied the Respondent's land after their paternal aunt had died. That Edinansi and the Respondent are the ones that took care of the 1st Appellant. That the Respondent and her sister purchased the land at Kafuro. That he was the one that constructed a house on the suit land. That the Appellants' father's land was in Kiyanga in Bumbaire. That the Appellants cut coffee, avocado trees, banana plantations, jack fruit trees, mango trees, oranges and other trees. That the suit land was about five acres. That the chairperson LC3 distributed the suit land and gave the Appellants half an acre of it. That after the 1st Appellant got married, the Respondent gave him part of the suit land to stay in with his wife.

In **cross-examination** he testified that the Appellant's late father Fenekansi was his brother. He maintained that the Respondent jointly owned the suit land with her late sister. That he was not aware that his late brother had land in Kafuro.

**PW3 Medius Kinarebere** testified in chief that the suit land belongs to the Respondent. That around the 1970's the Respondent's elder sister called Grace got the suit land and left it with the Respondent after giving her some money in exchange. That the 1st Appellant demolished all the Respondent's houses on the land in Kafuro.

In **cross-examination** she testified that it was not true that the Respondent grabbed the Appellants' late father's land because he never had any land. That the suit land was bought by the Respondent and her sister. That the Appellants grabbed the said land after the death of the Respondent's sister.

**DW1 Amos Byamukama**, the 1st Appellant testified in chief that the Respondent was his paternal aunt. That the Respondent never settled on his late father's land. That the land found in Kafuro B belonged to his late father Fenekansi Banyendera. That the land was vacant, being used for cultivation. That his late father bought the said land in 1971 from Matayo Mukirwa. That he was given the purchase agreement by his late father. That purchase was witnessed by Katono and Kalanzi and the author of the agreement was called Paskal Rwampaka. That he was not present when the agreement was being made.

The agreement and its English translation were admitted by the trial court as **DE1** and **2** respectively. That he was the only one using the suit land.

In **cross-examination** he maintained that he got the purchase agreement for the suit land from his late father.

**DW2 Azaria Mwesigye** the 2nd Appellant testified in chief that he was a brother to the 1st Appellant and the Respondent was their paternal aunt. That the suit land belonged to their late father's estate. That the Respondent stayed on the suit land with her grandchildren.

In **cross-examination** he testified that his late father bought the suit land in 1972 from Matayo. That Kalanzi, Rabison and Katono signed on the purchase agreement and it was authored by Bampata.

**DW3 Francis Rwampembu** testified in chief that the Appellants were his nephews. That the suit land belonged to the Appellant's late father Fenekansi.

**DW4 Nabasa Godfrey** testified in chief that the Respondent was his paternal aunt. That the suit land belonged to the Appellant's late father Fenekansi.

In **cross-examination** he testified that it was the late Fenekansi who bought the suit land. That he did not know how much he bought the land and was not present when the land was being purchased.

The court record indicates that the learned trial Chief Magistrate visited two portions of land. I will limit myself to the locus proceedings in relation to land comprised in Kafuro Cell, Kirugu Subcounty, Rubirizi District.

At the locus in quo, the Respondent showed court the suit land. The 1st Appellant indicated that he had never chased the Respondent from the land comprised in Kafuro Cell, Kirugu Subcounty, Rubirizi District since had never occupied it.

**[19]** It is a settled principle of evidence that 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 those facts exist. (**See Section 101 of the Evidence Act**). It is said that this person has the burden of proof. This is the person whose suit or proceeding would fail if no evidence at all were given on either side. (**See Section 102 of the Evidence Act and Besigye Kiiza vs Museveni Yoweri Kaguta and Anor Supreme Court Election Petition no. 1 of 2001**).

The standard of proof in cases like the instant one is on a balance of probabilities. (**See Miller vs Minister of Pensions [1972] 2 All ER 372**).

The Plaintiffs being desirous of the court giving judgment as to legal rights or liability dependent on the existence of facts which they asserted, must prove that those facts exist.

In **Kirugi and another vs Kabiya and three others [1987] KLR 347**, it was held that:

> *"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."*

The standard of proof is a probabilistic threshold. The plaintiff will satisfy this standard and succeed in his or her claim only if there is, on all the evidence adduced in the case, more than a probability of his or her claim is true.

In **Kaggwa vs Ampire (Civil Appeal 126 of 2019)**, it was held that;

> *"The plaintiff has to succeed only on the strength of his case and not on the weakness of the case set up by the defendant in a suit*

*for declaration of title and possession. That can only be done by adducing sufficient evidence to discharge the onus, irrespective of the question whether the defendants have proved their case or not."* [**Emphasis mine**]

**[20]** From the evidence on the trial court record as I have summarized it above, the Respondent had successfully in the first instance to discharge the initial burden that had been imposed on her by the law in proving that she had purchased the land comprised in Kafuro Cell, Kirugu Subcounty, Rubirizi District with her late sister in the period around 1962 to 1972. She was emphatic on the fact that she and her late sister never executed any agreement for the purchase of this land because at the time, no agreements used to be executed.

I must be emphatic that the initial burden that was imposed upon the Respondent initially was a shifting one. Once she discharged the initial burden which prima facie gave rise to a presumption in her favour, it shifted to the Appellants to adduce evidence to balance out any probabilities of the Respondents' evidence being true.

**[21]** The strength of the Appellant's case lay in the fact that their late father Fenekansi bought the land comprised in Kafuro Cell, Kirugu Subcounty, Rubirizi District (the suit land). To prove this, they relied upon a sale agreement allegedly given to the 1st Appellant by his said late father.

Whereas I note that the learned trial Chief Magistrate admitted the said land purchase agreement during trial even when the Respondent object to it, it was in error.

**[22]** The law on proof of contents of documents is now settled. The contents of documents may either be proved by primary or secondary evidence. (**See Section 60 of the Evidence Act**).

In the above context, primary evidence meant the land purchase agreement itself brought to court for inspection by court and secondary evidence meant a copy thereof.

During trial, what transpired in relation to the land purchase agreement was captured at **pages 17** and **18** of the record of proceedings as follows;

> *"**DW1**…My father bought this land in 1971. I have an agreement of that land. My father bought this land from Matayo Mukirwa. I was given that agreement by my father. I know my father used to sign. That is my father's signature. The witnesses to the agreement are Katono, Kalanzi. The author of the agreement was called Paskal Rwampaka he is deceased. I was not present when that agreement was being made.*
>
> ***Consel Kamugisha**:- I pray we have the document trndered in evidence.*

> ***Plaintiff:-*** *I do not know Matayo so I can't accept that document.*
>
> *Court: Let the agreement be admitted. Purchase agreement dated* ***18/3/1972*** *together with its English translation admitted in evidence and marked de1 a and b respectively (original returned to the owner after comparing with the photocopy on file)."*

**[23]** In relation to **Section 60** of the Evidence Act above and the above excerpt, the learned trial Chief Magistrate appropriately inspected the land purchase agreement. This however was not all. The learned trial Chief Magistrate was required to ascertain whether the said agreement was genuine before admitting it into evidence. Proof therefore had to be given of the either the handwriting, signatures and execution of the said land purchase agreement. This at the discretion of the presiding judicial officer depending entirely on the nature of the document and the circumstances of the case. In **Stamper vs Griffin (1856, 20 Ga 312, 320) (Am)** it was persuasively observed by Benning J as follows;

> *"No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be forgery. A writing, of itself, is evidence of nothing, and therefore is*

*not, unless accompanied by proof of some sort, admissible evidence."[**Emphasis mine**]*

If a document is alleged to be signed by any person as the 1st Appellant in the instant case did as shown in the excerpt of the record I have reproduced herein above, then the signature of the said person must be proved to be in his handwriting in the manner laid down in **Sections 43** and **45** of the Evidence Act. The ordinary mode of proving execution in such circumstances is by calling the executant themselves or someone who saw the executant write, or who knows his handwriting or by a comparison of his signature with his signature on other documents written by him. (**See Sarkar on Evidence, 14th Ed Vol. 1, at page 1002**).

In the instant case the 1st Appellant said at trial and I quote, that, *"I know my father used to sign. That is my father's signature"*. This in my considered opinion did not mean that he knew his late father's signature or handwriting. Therefore, the said agreement was not proved as proof of the fact that the late Fenekansi bought the suit land and it that it belonged to his estate.

On the issue of possession forming part of the fifth ground of appeal as argued by counsel or the Appellants as an indicator of ownership, the law on this is settled. Proof of mere occupancy or possession of unregistered land however long that occupancy and user may have been, without more, is not proof of ownership of such land.

In **Bwetegeine Kiiza and Another vs Kadooba Kiiza (Court of Appeal Civil Appeal No. 59 of 2009)**, it was observed by the Court of appeal as follows;

> *"We also disagree with the finding that as a general rule when one occupies or develops land then ipso facto, a customary interest is created. The effect of that holding is that no matter how one comes to the land, as long as one develops it, a customary interest is acquired. Even trespassers would then acquire interest on property which they otherwise shouldn't."*

**[24]** For the reasons given above, and in agreement with the conclusion of the learned trial Chief Magistrate, it is my finding that the Respondent was able to prove on a balance of probabilities that the suit land belonged to her.

**In the upshot, grounds 1, 3, 4 and 5 have no merit while ground 2 of this appeal succeeds.**

**Ground 6: The learned trial Chief Magistrate erred in law and fact when she relied on conjecture to make an excessive award of shs. 10,000,000/= as general damages without any cogent evidence to justify an award of the same.**

**[25]** Counsel for the Appellants on this ground submitted that the learned trial Chief Magistrate relied on "fanciful thinking and sentiments" to compute and award the Respondent general damages of UGX 10,000,000/=. That the said damages were awarded without lawful justification.

The thrust of counsel for the Respondent's argument was that the award of general damages as it was done in the instant case, was at the discretion of court. That this court should only interfere with the award if it was satisfied that the trial court acted upon wrong principles of law or that the amount was too high or law as to make it entirely erroneous in the estimation of the damages awarded.

**[26]** It is now a settled position of law that in reaching a quantum of general damages, court considers the nature of harm, the value of the subject matter and the economic inconvenience that the injured party might have been put through. It is also the position of the law that general damages are at the discretion of court and their award is not meant to punish the wrong party, but to restore the innocent party to the position he or she would have been had damage not occurred. (**See** Uganda Commercial Bank vs Kigozi [2002] 1 EA 305, Charles Acire vs M. Engonda HCCS No. 143 of 1993 and Kibimba Rice vs Umar Salim SCCA no. 17 of 1992).

Damages are the pecuniary compensation obtainable by success in an action, for a wrong which is either a tort or a breach of contract. (**See** McGregor, Harvey. (1988). *McGregor on damages.* London: Sweet & Maxwell at page 3 and Broome vs Cassel & Co. [1972] A.C. 1027, 1070E per Lord Hailsham L.C.). Damages are not meant to enrich the successful litigant far beyond their actual losses nor should the successful litigant get any less at the expense of their adversary. They are awarded on the principle of "restitutio in integrum."

The learned trial Chief Magistrate in the instant suit before arriving at the quantum of damages stated at **page 17** of her judgment as follows;

> *"For close to 7 years the Plaintiff has been subjected to a lot of suffering and pain as a result of the defendants' conduct for which she deserves to be compensated. She has been denied access and use of her land in Kafuro. For the land in Mirarikye the Plaintiff has been kept at ransom. The Plaintiff told court that at one time she attempted to cut down her own tree but the 1st Defendant stopped her from chopping and even brought police that harassed the old woman and stopped her from chopping that tree. He has been in and out of her house in Mirarikye under the influence and threat of the 1st defendant. She lost her crops and trees that were on the land in kafuro. Because of all this, I award her shs 10,000,000/= in general damages for the suffering, pain and loss mated to her by the defendants."*

**[27]** It is the law that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. (**See** **Crown Beverages Ltd vs Sendu Edward (Supreme Court Civil Appeal No. 01 of 2005 per Order JSC**).

In the instant suit, whereas I find a compelling reason to interfere with the discretion of the learned trial Chief Magistrate in awarding general damages of UGX 10,000,000/= in the matter, I found the sum above to be so high given the damage occasioned. In the premises, I reduce the sum to UGX 5,000,000/=.

Consequently, the trial Court's judgment is upheld in the terms herein stated, this appeal therefore succeeds in part, in the following terms;

1. The learned trial Chief Magistrate erred in law when she considered evidence on an unpleaded piece of land at *Mirarikye.*
2. The Respondent is only entitled to a sum of UGX 5,000,000/= as general damages.
3. I make no orders as to the costs of this appeal in the spirit of fostering family harmony.

I so order.

Dated, delivered and signed at Mbarara this 19th December **2023**.

**Joyce Kavuma**
**Judge**