THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT MUKONO

CIVIL APPEAL NO 69 OF 2020

(ARISING FROM MUKONO CIVIL SUIT NO. 009 OF 2013 OF THE CHIEF MAGISTRATE'S COURT OF MUKONO AT KAYUNGA)

KATENDE MUHAMED ..... APPELLANT

VERSUS

1. **NAALI SIRAJE**
2. **SEMUKAAYA MUHAMUDO**
3. **SEMAKULA MOSES**
4. **MUKASA JAMIRU**
5. **NAJJA**
6. **NAMUSISI NANVUMA MADINA .....RESPONDENTS**

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

1. This appeal arose from the judgment and orders of Her Worship Akello Irene, the trial Magistrate Grade 1 of Mukono Chief Magistrate's Court at Kayunga dated 27th October, 2020.

Background

2. The Respondents / Plaintiffs filed Civil Suit No. 009 of 2013 against the Appellant / Defendant for a declaration that the suit *kibanja* belongs to the Plaintiffs being their inheritance from the estate of their late father

Mukiibi Abumbakari; eviction order, vacant possession; permanent injunction; general damages and costs of the suit.

3. The Defendant filed a written statement of defence and a counter claim against the Plaintiffs / Counter Defendants which was as well replied to. Judgment was entered by the trial court in favour of the Plaintiffs with the following orders:
   a) The *kibanja* of the late Mukiibi Abumbakari that is situated in Kikwanya now in possession of the Defendant measuring approximately 30 acres in size belongs to the Plaintiffs;
   b) Eviction order against the Defendant and his agents or servants;
   c) Vacant possession of the *kibanja* be given to the Plaintiffs;
   d) Permanent injunction order restraining the Defendant and his agents or servants from further occupation or possession and utilization of the suit *kibanja* measuring approximately 30 acres in size;
   e) General damages of 12,000,000/= (twelve million shillings only) to be paid at the interest rate of 8% till payment in full;
   f) Costs of the suit.

4. The Appellant being dissatisfied with the judgment and above orders of the trial court appealed to this honourable court.

Grounds of Appeal

i. **The learned trial Magistrate erred in law when she held that the matters relating to beneficiary and estate are not affected by**

limitation thereby arriving at a wrong conclusion that the Plaintiffs' suit was not barred by law of limitation;

ii. The learned trial Magistrate erred in law and in fact when she found that the Plaintiffs were rightful beneficiaries of the suit land/*kibanja* under the distribution letter dated 1st/03/1985 thereby over ruling the preliminary point of law that the suit disclosed no cause of action;

iii. The learned trial Magistrate erred in law and in fact when she wrongly found that the distribution schedule dated 1st/03/1985 was genuine and not a forgery;

iv. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching a wrong conclusion that the suit *kibanja* was never distributed during the 1969 distribution and that the same was reserved for the Plaintiffs as their shares;

v. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching a conclusion that the Plaintiffs had never obtained a share from the estate of the late Mukiibi Abumbakari;

vi. The learned trial Magistrate erred in law and in fact when she failed to properly evaluate the evidence on record thereby

reaching a wrong conclusion that the *kibanja* in Kisega formed part of the estate of the late Mukiibi Abumbakari;

vii. The learned trial Magistrate erred in law and in fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong holding that the Defendant's beneficial share from the estate of the late Mukiibi Abumbakari was comprised in the *kibanja* at Kisega;

viii. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record under grounds 2, 3, 4, 5 & 7 of this memorandum of appeal thereby reaching a wrong conclusion and dismissing the Appellant's counter claim;

ix. The learned trial Magistrate erred in law and in fact when she relied on P.I.D.1 which was never exhibited as evidence in proving the Plaintiffs'/Respondents' claims in the suit *kibanja*;

x. The learned trial Magistrate erred in law and fact when she used a facial estimate, unprofessional measurements and without any evidence on record thereby reaching at the wrong conclusion that the suit *kibanja* measure approximately 30 acres;

xi. The learned trial Magistrate erred in law and fact when she failed to take additional evidence from residents and

neighbours who attended the locus visit thereby leaving out vital, credible and reliable evidence from such witnesses thus causing a miscarriage of justice;

xii. **The learned trial Magistrate erred in law and fact when she disregarded physical and visible evidence at locus regarding several portions of the estate of the late Mukiibi Abumbakari disposed of by the Plaintiffs thus arriving at a wrong conclusion that it was the suit property which was never distributed in the year 1969;**

xiii. **The learned trial Magistrate erred in law and fact when she failed to properly apply the principles for award of damages and without any evidence on record when she awarded the Respondents/Plaintiffs highly exorbitant, unreasonable, unproved and unsubstantiated damages with interest.**

5. Both parties filed their written submissions and the Appellant filed submissions in rejoinder. During the hearing of this appeal on 27th September, 2022, the Appellant was represented by Counsel Ramathan Lutaya from M/s LIN Advocates. Counsel Mpiima Jamir Ssenoga from M/s Kiwanuka & Mpiima Advocates appeared for the Respondents.

6. The Appellant in his submissions withdrew the 11th ground of the appeal. First, I am constrained to make a comment on the long, imprecise and repetitive grounds of this appeal. They could have been

condensed to a few grounds. Indeed some grounds were jointly submitted on by counsel. The tendency amongst some advocates to enumerate as many points from a judgment with which they disagree, without caring whether those grounds constitute separate and concise grounds of appeal upon which the appellate court can find its judgment is most unfortunate and should be discouraged.

7. It is a mystery as to why the Appellant did not frame six grounds of appeal only instead of the staggering 13 grounds. Nevertheless, in the interest of justice, this court will in its analysis consider the grounds in the same order as argued by the parties except that the 10th ground will be joined to the 5th and 12th grounds.

Ground 1: The learned trial Magistrate erred in law when she held that the matters relating to beneficiary and estate are not affected by limitation thereby arriving at a wrong conclusion that the Plaintiffs' suit was not barred by law of limitation.

8. The duty of the first Appellate court has been reiterated in numerous cases. It is to re-evaluate and re- appraise the evidence on record and come to its own conclusion. In **Sanyu Lwanga Musoke v. Sam Galiwanga, SCCA No. 48/1995 Justice A. Karokora** (J.S.C as he then was) held that;

> *"...it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while*

bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their veracity..."

9. It was submitted for the Appellant that on page 133 of the record of appeal, the trial Magistrate ruled that the points of law would be disposed of at the end of trial. That while disposing of the preliminary objection, the trial Magistrate in her judgment on page 120 of the record of appeal did not specify the section of the Succession Act which provides that Limitation Act shall not apply to actions grounded on claims of an estate. That there are several laws which the trial Magistrate faulted which all provide for a limitation even in claims arising out of the estate property. That Order 7 rule 11(d) of the Civil Procedure Rules provide that a suit shall be rejected if it's barred by law.

10. Counsel relied on the provisions of section 5 of the Limitation Act which according to him bars any action to be brought after 12 years. (**Badiru Mbazira v. Abasagi Nansubuga [1992-1993] HCB 241**). That Order 7 rule 6 of the Civil Procedure Rules is also instructive on this point.

11. The Appellant's counsel further averred that section 20 of the Limitation Act provides that subject to section 19 (1), no action in respect of any claim to the personal estate of the deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no

action to recover arrears shall be brought after the expiration of six years from the date on which the interest became due.

12. That the suit land or *kibanja* was allocated to the Appellant as his beneficial share from the estate of his late father and he entered upon it sometime in 1969 soon after the distribution. Also that the Plaintiffs/Respondents on the other hand claimed that the suit land was allocated to them as their beneficial share in 1985 as stated in paragraph 5 (b) & (c) of the plaint. That the Plaintiffs / Respondents have since then sat on their right to claim the suit land. That it was 28 years by 2013, when the Plaintiffs brought up this suit for recovery of the suit land.

13. Learned counsel claimed that the law on limitation has several exceptions which are laid down under section 20 of the Limitation Act which have to be listed in the plaint for any party to rely on them. Counsel submitted that the trial Magistrate erred when she found that the Plaintiffs' claim could not be caught by Limitation Act as the law does not provide for such exceptions. That the suit was entirely out of time and thus barred by limitation. He prayed that court finds ground 1 of this appeal in the Appellant's favour.

14. For the Respondent, it was submitted that section 5 of the Limitation Act relied on by the Appellant's counsel does not apply to the instant case that deals with an estate of a deceased person. That it only applies to land held or claimed by people who are alive. Besides, that counsel's

interpretation of section 20 of the Limitation Act is erroneous and ought to be disregarded by this honourable court.

15. That interest or right in an estate of a deceased person accrues from the time of grant of letters of administration. That in the instant case, the right of action accrued to the Respondents in 2014 when they were granted letters of administration to the estate of the Late Mukiibi Abumbakari formerly of Kikwanya Village, Kangulumira Bugerere in Kayunga District and it cannot be rightly concluded that their claim is barred by limitation. (Counsel referred to the case of **Adam Namadowa & 6 others v. Hakim Kawaidha & 3 others, HCCS NO. 100/2012).**

16. Counsel invited this court to ignore the Appellant's first ground of appeal and treat it as a technicality under Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995, since it may if upheld affect the Respondents' right to hold land. (see the case of **Hadadi Mohamed Rajad & 5 Other v. Muzamil Mohamed Rajad & Anor, HCCS No. 188/2015).** Counsel prayed that court is pleased to find that the first ground has no merit.

17. In rejoinder, the Appellant's counsel argued that the issue of limitation is not a mere technicality but a matter of substantive law and it can only be cured by litigating specifically in pleadings the grounds of incapacitation and failure to do so renders the suit barred by limitation.

18. Section 20 of the Limitation Act, Cap. 80 clearly provides for time within which to institute a claim for interest in an estate. It provides thus:

*"20. **Limitation of actions claiming personal estate of a deceased person.***

Subject to section 19 (1), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy or damages in respect of those arrears shall be brought after the expiration of six years from the date on which the interest became due."

19. The exceptions to this limitation are found in section 19 of the Limitation Act. Section 19 (1) of the Act states that:

*"19. **Limitation of actions in respect of trust property.***

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of the trust property in the possession of the trustee, or previously received by the trustee and converted to his or her use."

20. Other than being the children of the late Mukiibi, this court takes recognition of the fact that the relationship between the Appellant and the Respondents is a unique one. As per the record of appeal, the Appellant was chosen to be the customary heir of their deceased father

in 1969, a year after his death and the Appellant, being the heir became the personal representative of his father from 1969 which means he was entrusted with the duty to oversee the deceased's estate for his benefit and for the benefit of the other beneficiaries.

21. Section 25 of the Succession Act, Cap. 162 is to the effect that:

> *"25.* ***Devolution of property of a deceased dying intestate*** *All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this Act."*

22. This provision of the Succession Act clearly falls within the exception in section 19 of the Limitation Act as the Succession Act recognizes a personal representative as a trustee for the purposes of holding in trust property in an intestate estate. It is not in dispute that the late Mukiibi died intestate after which the Appellant was chosen to be his heir.

23. In my judgment, the Appellant being Mukiibi's personal representative held the suit property in trust for the Respondents / Plaintiffs who were all below majority ages at the time of their father's death. I find that this Civil Suit No. 009 of 2013 was not barred by limitation as alleged by the Appellant's counsel. Accordingly, the 1st ground of the appeal fails.

24. **Ground 2: The learned trial Magistrate erred in law and in fact when she found that the Plaintiffs were rightful beneficiaries of the suit land/*kibanja* under the distribution letter dated 1st/03/1985**

thereby over ruling the preliminary point of law that the suit disclosed no cause of action;

25. The Appellant's counsel argued that the Defendant / Appellant raised a preliminary point of law that the plaint discloses no cause of action and should be rejected under the provisions of Order 7 rule 11(a) of the Civil Procedure Rules. That the trial Magistrate erred in law when she totally failed to make a ruling on this matter of the law which had been earlier raised. That the Plaintiffs' / Respondents' rights in the suit land steams from their claims as beneficiaries of the estate of the late Mukiibi Abumbakari (their father) being their beneficial share as stated in paragraph 5 (b) of the plaint.

26. That the 2nd, 3rd, 5th and 6th Plaintiffs / Respondents have no interests in the suit land that would confer onto them a right capable of being violated hence lack of cause of action thus rendering the entire plaint a nullity which should be rejected for failure to disclose a cause of action. That once a plaint discloses no cause of action, it should be rejected and ought to have been rejected by the trial court. That the provisions of Order 7 rule 11(a) provides that such plaint shall be rejected and that this provision is coached in a mandatory way that it gives no discretion to court either to allow an amendment of the plaint or otherwise thus leaving court with no option but to reject the entire plaint. (see **Stanley Kibirige & 9 Ors v. Attorney General Civil Suit No. 866 of 1972).**

27. The Respondents' counsel contended that the 2nd ground of this appeal shows that the learned trial Magistrate made a ruling on the

preliminary point of law that the suit disclosed no cause of action. That it is clearly stated that the point of law was overruled. That the learned trial Magistrate rightly found that the Plaintiffs / Respondents were rightful beneficiaries of the suit *kibanja* under the distribution letter dated 1/03/1985 and it was on that basis that she overruled the Appellant's preliminary point of law that the suit disclosed no cause of action.

28. The Respondents' counsel added that even if it could be taken that the distribution letter dated 1/03/1985 does not name the 2nd, 3rd, 5th and 6th Respondents, that alone could not lead to rejection of the entire plaint as far as the 1st and 6th Respondents are concerned. Counsel prayed that this honourable court finds that the 2nd ground of this appeal is misconceived.

29. When the pleading discloses no cause of action or a case which the court is satisfied will not succeed, it should strike it out and put a summary end to litigation. The relevant provisions in this regard is Order 7 rule 11 (a) or Order 6 rule 30 (1) of the Civil Procedure Rules, S.I 71-1. Order 7 rule 11 (a) provides thus:

> *"The plaint shall be rejected in the following cases-*
> *(a) where it does not disclose a cause of action;*
> .....
> And Order 6 rule 30 (1) of the Civil Procedure Rules provide that:
> ***"30. Striking out pleading.***
> *(1) The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable*

cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just."

30. The criteria to be followed as to whether there is a cause of action is laid out in **Auto Garage v. Motokov (No.3) [1971] E.A 514** at page 519 where Spry, V-P said:

"I think the plaint may disclose a cause of action even though it omits some fact which the rules require it to contain and which must be pleaded before the plaintiff can succeed in the suit. In ***Cottar v. Attorney General of Kenya (1938) 5 E.A.C.A****. 18 it was said by Sir Joseph Sheridan, CJ. that "what is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated". In addition, of course, the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as the person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible."*

31. It is trite law that whether or not there is a cause of action under Order 7 rule 11 of the Civil Procedure Rules or a reasonable cause of action under Order 6 rule 30 of the Civil Procedure Rules, only the plaint can be looked at. In the instant case, the Plaintiffs / Respondents in paragraph 5 of their plaint stated that they are the children of the late Mukiibi Abumbakari who died in 1968 and left behind property. That the Administrator General under Mengo AG-Cause No. 094 of 1970 caused the distribution of the said estate to its rightful beneficiaries and that the Plaintiffs obtained the suit land as their shares. That the Appellant / Defendant who is their elder brother also got his share at Kisega in Kangulumira Sub-County, Kayunga District. Further, that the Plaintiffs after the said distribution took possession of their said *kibanja* but the Defendant hid under the caretaking role and has converted the whole of it to his personal use and that he has denied the Plaintiffs a right to freely utilize their inheritance yet they are all mature.

32. It is clear from the above paragraph of the plaint that the Plaintiffs are the biological children of the late Mukiibi and this entitles them to beneficial shares in his estate. It would be very unjust for this court to disentitle the Respondents from benefiting from their father's estate and vesting the suit land in one child - the Appellant - merely because he has been in its possession from the time he became the customary heir. Upholding this preliminary objection would mean violating the provisions of the Succession Act which entitle the Respondents to benefit from their father's estate. This ground of the appeal is also answered in the negative as the trial Magistrate's decision was correct about the Respondents' entitlement to the estate of their father.

33. **Ground 3: The learned trial Magistrate erred in law and in fact when she wrongly found that the distribution schedule dated 1st/03/1985 was genuine and not a forgery;**

Ground 4: The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching a wrong conclusion that the suit *kibanja* was never distributed during the 1969 distribution and that the same was reserved for the Plaintiffs as their share;

Ground 9: The learned trial Magistrate erred in law and in fact when she relied on P.I.D.1 which was never exhibited as evidence in proving the Plaintiffs'/Respondents' claims in the suit *kibanja*.

34. The Appellant's counsel asserted on these grounds that the Respondents grounded their claim in the lower court on P.I.D.1 & P.I.D (b). That this is a document which was alleged to have been authored by the Kangulumira Sub-County office and addressed to the Administrator General-Kampala. That while making her findings, the trial Magistrate held that the purported distribution schedule marked P.I.D.1 was genuine.

35. That in total disregard of the law on evidence, the trial Magistrate inferred the authenticity of the P.I.D.1 from the letter dated 11 February, 2013 written by Ssebagala Henry Lubwama. That whereas the alleged P.I.D.1 was allegedly written by Ggase John a parish chief and

addressed to the Administrator General, the said Ssebagala (who is an administrative officer) had no locus or capacity to confirm the authenticity.

36. Further, that whereas it was a public document, the office of the addresser ought to have provided a certified copy of the same or the addressee to provide a certified copy in its possession. And that this would have been in strict compliance with the provisions of sections 60, 61, 62, 63 & 64 of the Evidence Act. Counsel further invited this court to note that the letter relied upon dated 11/02/2013 to validate P.I.D.1 was never tendered in court neither as identification nor exhibit and that none of the authors appeared in court to be examined or cross-examined on those documents. That such evidence was nowhere tendered by the Plaintiffs / Respondents neither in their pleadings nor evidence. It is counsel's prayer that court be pleased to find so.

37. It was further contended for the Appellant that whereas the trial court opted to rule in favor of the Respondents / Plaintiffs basing on P.I.D.1 as being the lawful owners of the suit land, it erred in fact when it failed to evaluate the evidence and contents of P.I.D.1 which if it did, it would have found out that actually several of the Respondents to wit 2nd, 3rd, 5th, and 6th were all not mentioned in the purported P.I.D.1 as beneficiaries to the suit land and thus the only conclusion would be that the above Plaintiffs / Respondents had no cause of action and to a bigger extent that the said P.I.D.1 was fabrication, concoction and a forgery as it only focused on the 1st & 4th Respondents.

38. That P.W.4 further stated in cross examination that she left home because of the unfavorable conditions but she was never chased by the Appellant. And that P.W.1 in his evidence in-chief confirmed that he was never mentioned in the said P.I.D.1, neither as a beneficiary to the entire Kyamunda Abumbakari's estate nor as a beneficiary of the particular suit land. That unfortunately. P.W.1 claims the suit land as his beneficial share. In addition, that according to P.W.5, who is the 1st Plaintiff / Respondent, the suit land was distributed to all of them but the Appellant took all of it again.

39. Further, that according to P.W.5 in cross-examination, he maintained that their suit is grounded on P.I.D.1. That according to that document, the alleged suit land was allocated to 7 persons whereof he names Kibombo, Jaliya, Nalweyiso and Halima who have been to court over the suit property. That he also mentioned that Nasibu Sebaku and Mukasa Jamil know about the case but they chose not to come to court.

40. Further, the Appellant's counsel submitted that the trial Magistrate stated that the Plaintiffs / Respondents did not obtain a share of the estate property because they were young. That whereas this was not anywhere in evidence, it is also a misevaluation of the evidence on record to the injustice of the Appellant. Besides, that whereas the trial court conducted locus visit, this conclusion was contrary and inconsistent with its finding at locus. That page 169 of the record of appeal shows the sketch taken by the trial court at locus where all the Plaintiffs including other beneficiaries to the estate of the late Mukiibi Abumbakari got shares of approximately 10 meters x 35 meters. The

Appellant's counsel claimed that this evidence from the locus relating to shares of the Respondents actually corroborates that of D.W.4, D.W.3, D.W.5 & D.W.6.

41. It was averred for the Respondents on the 3rd, 4th and 9th grounds that the learned trial Magistrate properly applied the law and rightly resolved the issues before the lower court. That the Appellant led no evidence whatsoever in the lower court to prove that the distribution schedule of 1985 was a forgery. That forgery is an allegation that must be strictly proved using not only ordinary evidence but also expert evidence. That none of this evidence was led by the Appellant in the lower court and he cannot come to the Appellate court condemning the trial Magistrate. That the burden to prove the alleged forgery squarely laid on the Appellant who failed to discharge it.

42. Counsel further argued that the learned trial Magistrate properly evaluated the evidence on record and reached a right conclusion that the suit *kibanja* was never distributed during the 1969 distribution as alleged by the Appellant and that it was reserved for the Respondents as their shares. That although it was the Appellant's evidence in the lower court that he was installed as heir to his father, the late Mukiibi Abumbakari in 1969 after the final funeral rites and that he was given the disputed land as his share, also that the rest of his young brothers and sisters had their property given to their mothers, he adduced no documentary evidence to that effect.

43. On the 9th ground of appeal, the Respondents' learned counsel contended that the Magistrate's reliance on P.I.D.1 that was never exhibited as evidence in proving the Respondents' claims is immaterial since it never occasioned any injustice to the Appellant. Counsel prayed that this honourable court answers the three grounds in the negative.

44. I have perused the record of appeal. Paragraph 10 of the amended written statement of defence states that the distribution schedule dated 1st March, 1985 on the face of it is a complete forgery, concoction by the Plaintiffs, nullity, unenforceable with no legal effect. Being the party who was alleging the forgery, the particulars of the forgery were not brought out and proved to the satisfaction of the trial court. To be specific, the long Appellant's testimony contained in pages 157 to 161 of the record of appeal does not anywhere mention that the said distribution document was forged. In other words, when the said document was tendered in by the Plaintiffs / Respondents, it was not challenged by the Defendant / Appellant on ground of forgery making it to be admitted by the trial court as the Plaintiffs' evidence.

45. In my judgment, the cardinal principle of the law of evidence that he or she who alleges must prove must apply in allegations of forgery like the instant case. This is provided for under section 103 of the Evidence Act, Cap. 6. It was incumbent upon the Appellant / Defendant in this case to prove his allegation of forgery of the distribution schedule to the satisfaction of the trial court. Having failed to do so, he cannot fault the court for admitting it as the Plaintiffs' evidence.

46. Notwithstanding the trial court's admission of the distribution schedule dated 1st March, 1985, I have already noted in the 2nd ground of the appeal that section 27 of the Succession Act entitles the children of the deceased and widow or widower to inherit from their late father or spouse. Whether or not some Respondents are missing in the distribution schedule of 1985 does not in itself take away their entitlement to inherit from their late father.

47. I agree with the Appellant's counsel that the trial Magistrate erred in admitting P.I.D (b) which was never tendered in and admitted in evidence by the Plaintiffs. However, this has not, in my view, occasioned a miscarriage of justice to the Appellant. Its consideration by the trial court was immaterial. These grounds of appeal are jointly dismissed.

48. **Ground 5: The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching a conclusion that the Plaintiffs had never obtained a share from the estate of the late Mukiibi Abumbakari;**

Ground 10: The learned trial Magistrate erred in law and fact when she used a facial estimate, unprofessional measurements and without any evidence on record thereby reaching at the wrong conclusion that the suit *kibanja* measure approximately 30 acres;

Ground 12: The learned trial Magistrate erred in law and in fact when she disregarded physical and visible evidence at locus regarding several portions of the estate of the Late Mukiibi Abubakari disposed of by the Plaintiffs thus arriving at a wrong conclusion that it was the suit property which was never distributed in the year 1969.

49. The Appellant's counsel argued that there is nowhere in evidence that the disputed portion measured approximately 30 acres. That the record does not even show the criteria the trial Magistrate used to reach a conclusion of estimating the suit property as being 30 acres. That there was no use of any measurement or arithmetic formula or figures whatsoever.

50. In addition, the Appellant's counsel argued that the record of appeal shows a template sketch of the suit land without any estimated arithmetic sizes on any side thereof. Also that evidence shows that the 1st Respondent disposed of several pieces of land to 3rd parties including to his siblings which evidence the trial court failed to evaluate.

51. Counsel submitted that there was fundamental failure by the trial court to evaluate these pieces of evidence, failure to corroborate the defence / Appellant's evidence with the locus notice and failure to weigh the Plaintiffs' denials on oath visa via the findings at locus on the distributions.

52. The Respondents' counsel submitted that the learned trial Magistrate properly evaluated the evidence on record and found that the Respondents had never obtained a share from their late father's estate. That she further reached a right conclusion that the suit property was never distributed in 1969 and that whatever conclusions the trial Magistrate made on these issues never occasioned any miscarriage of justice to the Appellant. Counsel invited court to find no merit in these grounds.

53. As to the 10th ground of the appeal, having looked at the record of appeal, I find no record of any evidence showing how the trial court reached a conclusion of estimating the suit land to be 30 acres. In fact, the sketch that was drawn during locus does not even show such estimation. This court is in agreement with the submission of the Appellant's counsel that in the absence of any clear criteria used by the trial court to reach such a conclusion, such estimation becomes erroneous and I find so.

54. Considering the 5th and 12th grounds of appeal, P.W.1 testified at page 135 of the record of appeal that the Appellant stole from them their father's property. That though the Defendant is their heir, he got the same portion and that he has never given them any of their share of their late father's property. That he sued the Defendant because he is in charge of the property where they have shares. He further stated that the Defendant chased their mother out of the suit land after their father's death. That he believes the properties of his late father was not distributed because he never got his shares.

55. P.W.3 testified that his mother was chased away from the suit land by the heir of his father's estate. That the suit land is theirs which is being occupied by the heir. That the suit land was bought for their mother though it belonged to their father and that it wasn't distributed to anybody. P.W.4 who is one of the widows testified for the Plaintiffs that she decided to leave because of unfavorable conditions. That she was forced to leave her home by the Appellant who took away her mattress and yet she got married on the suit land where she begot her children from. Further, P.W.5 who acknowledges the Appellant as their father's heir gave evidence to the effect that the land was divided to all of them but the Appellant took over all of it again. That he has never sold any land at Kikwanya and Kigombo.

56. On the other hand, D.W.1 testified at page 149 of the lower court record that the 1st Respondent got his share and sold it to the late Kibombo. In cross examination at page 151, D.W.1 stated that he did not know for how long the Appellant has been on the suit land. D.W.2 also testified that he bought land from the 1st Plaintiff / Respondent which was his share from his father's estate.

57. D.W.3 testified that the land was distributed to them in 1969. That the young children were given their shares through their mothers. That Mutibwa who was staying in the suit land left with her children a year after the death of the late Mukiibi when the Defendant / Appellant went to stay in the land. And that the Appellant took over the house. That the Plaintiffs sold off their shares that were given to their mothers 20 years ago and that they sold to themselves.

58. The Appellant who testified as D.W.4 testified that Mutibwa the mother of the 2nd, 3rd, 6th Respondents and another stayed on the suit property. That every mother got the portion of their children wherefrom others sold their shares when they grew up. That he started staying on the suit land in 1969 when he was chosen as the heir and that Mulibwa was also staying there. Also that while staying in that house, he was sleeping in the sitting room while she was sleeping in the bedroom. That the property was shared in 1989. In cross examination at page 160, D.W.4 stated that he was given a *kibanja* and a house to benefit in it alone.

59. From the above testimonies there is overwhelming evidence that points to the fact that the 2nd, 3rd and 6th Respondents' mother left her house which was on the suit land having been occupied by the Appellant who also admits the same in his testimony moreover he claimed the *kibanja* and the house was given to him to benefit from alone. Even if the 2nd, 3rd and 6th Respondents were given their shares through their mothers since they were still minors, evidence clearly shows that she left with them leaving the land and house behind in possession of the Appellant.

60. As to whether the 1st Plaintiff / Respondent got his share and sold it off is not clear in the defence evidence. I find D.W.5 whose testimony seems to corroborate D.W.1's testimony so contradictory whereby, at first she stated that her late husband told her that the land on which they are, he got it from his late father's estate. Then later she testified that the 1st Plaintiff sold land once to her husband. Again she stated

that the 1st Respondent sold to them 2 portions. D.W.5's evidence was too contradictory and is unbelievable. There is also no evidence of the distribution which was claimed to have been done in 1969 and there is as well no evidence that proves that the rest of the Respondents sold off their shares as alleged in the defence evidence.

61. From the analysis of the evidence on record, I find that the Appellant is in possession of the Respondents' shares. Some of the beneficiaries left with their mother when they were still young after the Appellant made entry into their mother's matrimonial house which is on the suit land. The 5th and 12th grounds of this appeal are hereby dismissed.

62. **Ground 6: The learned trial Magistrate erred in law and in fact when she failed to properly evaluate the evidence on record thereby reaching a wrong conclusion that the *kibanja* in Kisega formed part of the estate of the late Mukiibi Abumbakari;**

Ground 7: The learned trial Magistrate erred in law and in fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong holding that the Defendant's beneficial share from the estate of the late Mukiibi Abumbakari was comprised in the *kibanja* at Kisega;

Ground 8: The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record under grounds 2, 3, 4, 5 & 7 of this memorandum of appeal thereby

reaching a wrong conclusion and dismissing the Appellant's counter claim;

63. Counsel argued for the Appellant that the Appellant in his pleadings set up a counter claim where he stated that the *kibanja* in Kisega was not a property of the late Mukiibi. That it was for his wife Nabayego and that the Defendant could not have gotten a share thereat and that his share was actually the suit *kibanja*.

64. That in her cross examination, P.W.4 who was the wife to the late Abumbakari testified that the land in Kisega was occupied by a one Nanjego who she said was her co-wife. That she stated that Nanjego was the Appellant's mother but she did not know Naava Mariam. That after alleging that the land in Kisega was bought by her late husband during examination in-chief, P.W.4 was quick to deny that she had ever seen the agreement of purchase or sale of the said *kibanja*.

65. Counsel claimed that D.W.3 stated that the land in Kisega is not part of the estate of the late Mukiibi. That D.W.3 confirmed that his mother was Mariam Naava who used to reside at the suit land in Kikwanya with the late Mukiibi before she shifted to Luweero. That he confirmed that the land at Kisega was for his step-mother and that he is neither a beneficiary nor did it form part of the estate of the late Mukiibi.

66. That the trial Magistrate had a misdirection on the above evidence thereby holding that the mother of D.W.3 was the Appellant's mother

and that the land at Kisega formed part of the estate yet there was no evidence that the said land was bought by the late Mukiibi.

67. The Respondents' submission on these grounds was that the learned trial Magistrate properly evaluated the evidence on record before reaching her right conclusions and at no stage misdirected herself on the facts, the law and evidence as alleged by the Appellant. That the trial Magistrate rightly found that the *kibanja* at Kisega, Kangulumira formed part of the estate of the late Mukiibi Abumbakari and it is the beneficial share of the Appellant and children from his mother. Counsel prayed that this honourable court finds that there was no fundamental irregularity in the trial and answers these grounds in the negative and finds no merit in ordering a retrial before another judicial officer.

68. According to the distribution schedule dated 1st March, 1985 which was admitted as the Respondents' evidence, the Appellant and his 3 sisters were distributed the *kibanja* at Kisega. The Appellant, D.W.4, testified that the land at Kisega was for the mother of Amina where they are staying and that he was not given land there.

69. P.W.4 one of the widows whose evidence is more believable in my view testified that the Appellant's mother Nanjego was in the land at Kisega. She didn't know Mariam Nava whom the Appellant claimed to be his biological mother. This implies that whether she was his biological mother or not, the said Nanjego took care of the Appellant at Kisega as her own child during her stay with his father the late Mukiibi.

70. As to whether or not the land at Kisega belonged to only Nanjego and not for the late Mukiibi's is in my view curable within the meaning of a family land under section 38A of the Land Act, Cap. 227 as amended which provides thus:

> *"In this section— "family land" means land—*
>
> *(a) on which is situated the ordinary residence of a family;*
>
> *(b) on which is situated the ordinary residence of the family and from which the family derives sustenance;*
>
> *(c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or LAND ACT, 1998 (incorporating The Land (Amendment) Acts, 2004 and 2010) Page 43 of 77;*
>
> *(d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family."*

71. Since it is not in dispute that Nanjego and the late Mukiibi during their life time lived together in Kisega with their children who included the Appellant, the said land in my view forms part of a family land within the meaning of the above provision of the Land Act. In any case, if the land at Kisega does not form part of the late Mukiibi's estate, then one wonders why Nanjego's children who are also Mukiibi's children were not given shares in their father's estate and are not claiming the same. Therefore, I hold that the land at Kisega forms part of Mukiibi's estate to which the Appellant and his other sisters who were living there at the time of his death are entitled. The 6th, 7th and 8th grounds of appeal are disallowed.

72. **Ground 13: The learned trial Magistrate erred in law and fact when she failed to properly apply the principles for award of damages and without any evidence on record when she awarded the Respondents/Plaintiffs highly exorbitant, unreasonable, unproved and unsubstantiated damages with interest.**

73. The Appellant's counsel submitted that general damages are awarded to put back the wronged party in a position he would have been before such injury or unlawful act was committed. That in the instant case even if the Respondents had succeeded, they did not lead any evidence to warrant the award of such damages and that there was no guidance by the trial court on the reasons as to why it concluded by awarding a whopping UGX. 12,000,000/= in damages.

74. Furthermore, that the trial court awarded 8% interest on the general damages yet the Respondents never claimed for the same. That it is trite law that the parties are bound by their pleadings. Counsel prayed that this court be pleased to find the above award and the interest thereunder irregular and sets them aside thereby allowing the 13th ground of appeal.

75. The Respondents' counsel argued on the 13th ground of the appeal that the trial Magistrate properly applied the principles for award of damages and indeed awarded the Respondents UGX. 12,000,000/= as general damages plus interest at the court rate of 8% till payment in full. That among the prayers that the Respondents made in their plaint is

any other relief that the honourable court deems fit which may include interest. Counsel prayed that the appeal is dismissed with costs.

76. A successful party may be awarded general damages for any discomfort suffered as the result of the wrongful action of the losing party. It is the principle of the law that general damages are compensatory in nature. In the case of **Luzinda v. Ssekamatte & 3 Others, (Civil suit -2017/366 [2020] UGHCCD 20 (13 March 2020),** Justice Musa Ssekaana held that:

> *"As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the Defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the Defendant's actions. "*

77. In the present case, the Appellant has been interfering with the Respondents' quiet possession of the suit land and house thereon being their beneficial shares since 1969 when he was appointed the heir of his father. This is a very long time and the Respondents ought to be compensated for this discomfort caused and for depriving them from use of their land and house. Therefore, in the circumstances of this case, I find that an award of general damages of UGX. 12,000,000/= to the Respondents was appropriate.

78. In a nutshell, I find no merits in this appeal and accordingly dismiss it and rule that

(a) the Respondents are the rightful owners of the suit *kibanja* situate at Kiwanya now in possession of the Appellant being their beneficial shares from the estate of their late father Mukiibi Abumbaraki;

(b) the house which is in possession of the Appellant previously being occupied by Mrs. Mutibwa is hereby specifically declared to belong to the children of Mutibwa who is one of the widows of the late Mukiibi Abumbakari;

(c) the Appellant's beneficial share of Mukiibi's estate is in the land at Kisega.

79. This court further orders that:

(a) vacant possession doth issue against the Appellant and it should be effected in accordance with the law and directives on eviction;

(b) a permanent injunction doth issue against the Appellant, his agents or workmen, relatives, successors in title or those deriving survival from him from interfering with the Respondents' quiet possession and use of the suit *kibanja* and the house thereon;

(c) an award of general damages of UGX. 12,000,000/= to the Respondents;

(d) costs of this appeal and that of the lower court are awarded to the Respondents.

I so order accordingly.

This judgment is delivered this 2nd day of March, 2023 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Ramathan Lutaya from M/s LIN Advocates, for the Appellant;

(2) Counsel Namusoke Jacqueline from M/s Kiwanuka & Mpiima Advocates, for the Respondents;

(3) Mr. Narima Siraje, the 1st Respondent;

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