

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

HCT-06-CV-SC-0095-2014

HAJJI SSEMUGENZI KASULE:.....PLAINTIFF

VERSUS

1. MAGUNDA KIGOZI CHRISTOPHER

2. REGISTRAR OF TITLES MASAKA

3. MASAKA DISTRICT LAND BOARD:.....DEFENDANT

Land Case: Recovery of land, Declaration that the transfer of the land to the 1st defendant was fraudulent and his title thereof be cancelled, permanent injunction, general damages and costs of the suit.

Held: The Plaintiff has proved his claims against all the Defendants and is awarded the reliefs sought.

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE
JUDGMENT

The Plaintiff brought this suit against the three Defendants on the 28th of November 2014 seeking the following reliefs: -

1. A declaration that the plaintiff is the customary owner of the land comprised in in FRV 1285 FOLIO 20 also known as Buddu Block 907 Plot 17 land situate Kyekulula measuring 17.051 hectares
2. An order that the 2nd defendant cancels the certificate of title issued to the 1st defendant in respect of the land comprised in in FRV 1285 FOLIO 20 also known as Buddu Block 907 Plot 17 land situate Kyekulula measuring 17.051 hectares
3. A permanent injunction restraining the 1st defendant, his agents/workers, servants, successors in title and/or any one claiming under him from interfering with the plaintiff's enjoyment and use of the suit land
4. General damages for trespass
5. Costs of the suit.
6. Any other relief that this honourable court deems fit.

BRIEF FACTS.

According to learned counsel for the plaintiff, the brief facts are that the plaintiff was and is in occupation of the land situate at Kirayagoma measuring approximately 20 hectares for over 20 years interrupted and/or alleged by a third party around 2008, applied for free hold offer in respect of the same land which was approved and by minute No. MSK LB 003 (A) 03/09(ii) of 12/3/2009 the 3rd defendant granted a free hold offer to the plaintiff and deed plans were processed in respect of the suit land. However, when he lodged the same with the 2nd defendant for issuance of a Certificate of Title in respect of the said land the same got lost and or misplaced.

That on checking, the Land Registry, the plaintiff was surprised to discover the 1st defendant was issued with a certificate of title in respect of his customary land on 19/10/2012 and on inquiring further, it came to his notice that the 3rd defendant issued the 1st defendant a freehold over the same land. As a result on advise of the lawyers of M/S. Ajujule & Co. Advocates, the plaintiff lodged a caveat on the 1st defendant's certificate of title and filed this instant suit against defendants for cancellation of certificate of title issued to the defendant on account of fraud a declaration that the suit land belongs to the plaintiff, general damages and costs of the suit.

That in this Written Statement of Defence, the 1st defendant denied all the plaintiff's claims and contended that the suit land comprised in FRV 1285 Folio 20 Buddu Block 907 PLOT 17 land situate at Kisseka Sub County, Lwengo District belongs to him and not the plaintiff and by his application the plaintiff applied for land in Kirayangoma different from the suit land and he prayed for the dismissal of the plaintiff's suit with costs.

In reply, learned counsel for the 1st defendant submitted on the brief facts that the 1st defendant is the owner, registered proprietor and in occupation of land comprised in FRV 1285, Folio 20 also known as Buddu Block 907 Plot 17 measuring 17.051 hectares at Kyekuula village, Busubi Parish, Kisekka Sub County, Lwengo District which he occupied since 1977 without any interference from any person as indicated in paragraphs 2-8 of the 1st defendant's witness statement. That in the year 2006, the 1st defendant applied for al lease in respect of the same land and the 3rd defendant, on the 26/5/2006 granted the 1st Defendant a lease for a period of 15 years commencing from 2006. That before the grant of the lease offer, the 1st defendant was in occupation of the same land and had established a mixed farm thereon which he is still operating to the present date and after the grant of the lease, the 1st defendant continued in

occupation of the suit land, carried out further developments on the land without any claim from the Plaintiff.

That later on, the 1st defendant applied for a conversion of the lease hold interest into freehold interest in the same land and inspection of the same land was carried out which confirmed that the 1st Defendant was in occupation and developing the land in question in consequence of which he was given a freehold offer on 13/5/2009 vide MSKLB 36(32)2009 of 12/10/2009 for purposes of converting his leasehold to freehold.

REPRESENTATION

The Plaintiff was represented by learned Counsel Mr. Waduka Maruf and Counsel Wasswa J, while learned counsel Mr. Katumba Chrysostom represented the 1st Defendant.

The 2nd & 3rd defendants filed their respective Written Statements of Defence. The Court directed them to avail certified copies of all the documents related to this case which they had attached to their Written Statements of Defence and the each complied. They however presented no trial bundles and no Witness Statements as evidence in Chief in this case, but Court will consider their respective defences and attached documents.

THE LAW

Before I start addressing myself to resolving the issues in this case, it is pertinent to clearly state the position of the law in hearing and resolving civil cases and the law as far as the duty of the first appellate court.

The burden of proof lies on he who alleges a fact and the standard is on the balance of probabilities, and not beyond reasonable doubt as in criminal case. It is provided for in **Sections 101, 102, and 104 of the Evidence Act** and is discharged on the balance of probabilities. The standard of proof is made if the preposition is more likely to be true than not true.

The standard of proof is satisfied if there is greater than 50% that the preposition is true and not 100%. As per Lord Denning in ***Miller vs Minister of Pension [1947] ALL ER 373***; he simply described it as “*more probable than not.*” This means that errors, omission and irregularities that do not occasion a miscarriage of justice are too minor to prompt the appellate court to overturn a lower court decision. See ***Festo Androa and & Anor vs Uganda SCCA 1/1998.***

It is also the position of the law that in the proof of cases, unless it is required by law, no particular form of evidence (documentary or oral) is required and no particular number of witnesses is required to prove a fact or evidence as per **Section 58 Evidence Act and Section 33 Evidence Act**. A fact under evidence Act means and includes: - (a) Anything, state of thing, or relation of thing capable of being perceived by senses as per **section 2 1(e) (i) Evidence Act**.

The general rule is that he or she 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 in civil suits like the one before me that is required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

In **Miller vs. Minister of Pensions [1947]2 ALL E R 372** Lord Denning stated 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.”*

It is also the position of the law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

Having satisfied myself and taken due recognition of the Law and rules of evidence applicable to civil matters, I will now turn to resolve the issues raised in this case.

ISSUES FOR RESOLUTION

1. Who, between the Plaintiff and the 1st Defendant is the customary owner of land comprised in FRV 1285 Folio 20 Buddu Block 907, Plot 17 land at Kyekulula?
2. Whether or not the 1st Defendant obtained Registration of the land comprised FRV 1285 Folio 20 Buddu Block 907, Plot 17 Land situate at Kyekulula by fraud?
3. Whether the 2nd Defendant acted in abuse of his powers when he issued to the 1st Defendant a Certificate of Title for land comprised in FRV 1285 Folio 20, Buddu Block 907, Plot 17, Land situate at Kyekulula?
4. What remedies are available to the parties?

PRELIMINARY POINT OF LAW

In their Written Submissions, learned counsel for the 1st defendant raised a preliminary objection that the suit is frivolous, vexatious and bad in law as it raises no cause of action against the 1st Defendant reason of which the 1st Defendant would move court to dismiss the suit against the 1st Defendant with costs.

They submitted that for the suit to stand against the 1st Defendant, the Plaintiff must have a cause of action; and relied on the case of ***Auto Garage vs Motokov (1971) EA392***, where cause of action was defined to mean;

- (i) That the right of relief is enjoyed by the plaintiff.
- (ii) That the right was violated and hence damages.
- (iii) That the defendant is liable for the said violation.

Further, that in considering that a Plaintiff discloses a cause of action, it has to be apparent on its face that the plaintiff appears as a person aggrieved by the violation of his rights and that it is the defendant who is liable. That the plaintiff clearly stated that he was and is in occupation of the land situate at Kirayangoma measuring approximately 20 hectares for over 20 years which land is not the suit land as the suit land is a different one from the land which the 1st Defendant is in occupation of. That this in itself is an indicator that the Plaintiff has no right that was infringed on by the 1st Defendant since the Plaintiff in essence is not an owner of the suit land and therefore no right was violated.

That in addition to that, it was the Plaintiff's evidence during cross examination that the land in dispute is situated in Kirayangoma, yet the 1st Defendant occupies land at Kyekulula. That basing on that evidence, it clearly shows that the Plaintiff's land is different from the land owned and occupied by the 1st Defendant and therefore the plaintiff has no cause of action against the 1st Defendant as the 1st Defendant stated the said preliminary objection in the Written Statement of Defence; therefore, in accordance with **Order 7 Rule 11 of the Civil Procedure Rules**, the Plaintiff's Plaintiff lacks a cause of action as against the 1st Defendant.

In resolving this Preliminary Objection, I have carefully analyzed all the pleadings of the Plaintiff and the annexures attached thereto in relation to the submissions of learned counsel for the 1st Defendant as captured above.

Order 4 rule 1 of the Civil Procedure Rules (S1 71-1 (as amended)) stipulates that every suit shall be instituted by presenting a Plaintiff in the court; although

the above does not mean that every suit shall be commenced by way of a Complaint, but implies that where the subject matter and the mode of evidence and the nature of the dispute ordinarily requires specific pleading and proof, the appropriate procedure is a Complaint.

On the other hand, **Order 7 rule 1 of the Civil procedure Rules (S1 71-1 (as amended))** stipulates what to look for in a valid Complaint.

I agree with the case law relied upon by both sides to determine what court should look at in resolving whether the plaintiff had a cause of action at the time of filing the suit. Indeed this was reechoed by the Court of Appeal in the case of **Kapeka Coffee Works Ltd vs. NPART CACA No. 03 of 2000**, where it was held that *“in determining whether a complaint discloses a cause of action, the court must look only at the complaint and its annexures and nowhere else; and in this case, save for the complaint”*.

The elements of a cause of action were discussed in the case of **Auto Garage vs Motokov [1971] E.A 514** to wit;-

1. *That the plaintiff enjoyed a right.*
2. *That the right must have been infringed, and*
3. *That the defendant is liable for the infringement.*

The same elements were stated in the case of **Tororo Cement Co. Ltd vs Frokina International Ltd CA No. 2 of 2001**. It is also settled law that in determining whether the suit discloses a cause of action, the court only considers the Complaint and annexures, if any, without delving into the merits of the suit; as per the cases of **Uganda Telecom Limited vs ZTE Corporation SCCA No. 3 of 2017 and Baku Raphael Obudra and Obiga Kania vs The Attorney General (Constitutional Appeal No.1 of 2003)** relied upon by learned counsel for the plaintiff.

In that regard, I have critically examined the Complaint and annexures as filed by the Plaintiff Company in this case; and I will look at the same in respect of the questions that Court must answer.

1. Whether the Plaintiff enjoyed a right?

In respect of the first issue, a perusal of the Complaint and annexures reveals that the Plaintiff indicated his cause of action as against the 1st defendant based on a claim of customary ownership of land comprised in FRV 1285 Folio 20 at Kyekulula Masaka District measuring approximately 20 hectares.

The Plaintiff in paragraph 5 thereof discloses that the plaintiff has been in occupation of the same for over 20 years uninterrupted/or challenged by any third party claims; and enumerates how he acquired the same. That he applied for grant of freehold in respect of the suit land and when he lodged the said documents for issuance of a certificate of title, he discovered that the 1st defendant was issued with a certificate of title by the 2nd defendant in respect of the said suit land on 19th October 2012.

In paragraph 5,6,7,8, 9, 10, 11, 12, 13, 14 and 14 of the Plaintiff he states the facts giving rise to the cause of action in this case. I have also found that the Plaintiff alleges Fraud and the Particulars of Fraud in paragraph 12 (a), (b), (c) and (d).

In emphasis of the above, the case of ***Kebirungi vs Road Trainers Ltd & 2 Others [2008] HCB 72***, Court held that; *the question whether a plaintiff discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it.*

Bearing the above in mind, it is my finding and decision by merely looking at the Plaintiff and its annexures, I cannot agree with the submissions of learned counsel for the 1st defendant since this is all that the court is required to look at at this point.

1. Whether the right was infringed?

As to whether there was any right infringed, in the case of ***Elly B Mugabi vs Nyanza Textile Industries Ltd [1992- 1993] HCB 227***, Court held that “a cause of action arises when a right of the Plaintiff is affected by the Defendant’s act or omission”.

Order 7 Rule 14 of the Civil Procedure Rules (supra) provides that “where a Plaintiff sues upon a document in his possession or power, he shall produce it in court when the Plaintiff is presented and shall at the same time deliver the document or a copy of it to be filed with the Plaintiff”.

In this case, after I have critically examined the Plaintiff and its annexures, it confirms that the Plaintiff entered the material facts which court should resolve. At this stage, it is clear that the plaintiff is claiming customary interests in land also claimed by the 1st defendant as captured above and he also enumerated his case against the 2nd and 3rd defendants.

It is therefore my finding that at this stage, he is not required to give any further and better particulars other than those laid down in the Plaintiff.

My decision that the Plaintiff's Plaintiff complies with above stated requirement and the Plaintiff has established a cause of action in this case as against the 1st defendant.

2. Whether the Defendant is liable for the infringement?

After resolving the above two as I have, it my finding taht at this point, the Plaintiff and its annexures clearly reveals that the Plaintiff believes taht he enjoyed a right which prompted him to file the current suit.

My decision is that the entire Plaintiff is valid and does not in any way offend **Order 7 rule 1 (e), 11 (a), 14 and Order 30 (1) of the Civil Procedure Rules S.I 71-1.**

This preliminary point of law is therefore overruled.

RESOLUTION OF THE SUBSTANTIVE ISSUES

Issue (1): Who, between the plaintiff and the 1st Defendant is the customary owner of land comprised in FRV 1285 Folio 20 Buddu Block 907, Plot 17 land at Kyekulula?

It was submitted by learned counsel for the plaintiff that it is not in dispute that both the plaintiff and the 1st defendant applied and were granted freehold offers in respect of the land situate in Kirayangoma and Kyekulula villages respectively and both the plaintiff were inspected upon their respective application by the same Area land committee of Kisseka Sub County which recommended them to the 3rd defendant to be issued with a freehold offers in their respective lands and indeed the 3rd defendant issued both the plaintiff and 1st defendant freehold offers, who both were given instruction to survey and deed plans, however, the question for determination is whether both the parties were given the same land or different lands as their Freehold offers seem to suggest.

That Medi Kasule who testified as **PW1** and Donee of Power of Attorney for the plaintiff testified that the land on which the plaintiff is a customary tenant is situate at Kirayangoma and it was on the same land that the plaintiff was granted Freehold offer after being inspected by the Area Land Committee of Kisseka.

Further, that Hajji Kalibbala who was the then Chairman of the Area Land Committee of Kiseka Sub County at the time both the plaintiff and the 1st

defendant were inspected testified that the land they inspected for the plaintiff is Kiryangoma and was approximately 42 acres and the one they inspected for the defendant was in Kyakulula approximately five (5) acres. That he concluded that the suit land is the land they inspected and recommended to the 3rd defendant for the plaintiff and not the 1st defendant.

In addition, that Mr. Ssembajjwe Henry, then District Staff Surveyor also confirmed that he inspected the suit land for several times, first he went with the 1st defendant alone and later after the 1st defendant was issued with a certificate of title and the plaintiff complained to his boss, he was again tasked to go with all the parties together with the members of the Area Land Committee Kisseka Sub County and indeed it was confirmed that the suit land belongs to the plaintiff and not the 1st defendant.

Furthermore, that from the evidence of the plaintiffs' witnesses and the cross-examination of the defendant and his witnesses the land in dispute is the land which the plaintiff was occupying as a customary tenant and later on applied to the 3rd defendant, inspected by the area land committee of Kisseka Sub County which later recommended him to be granted a freehold offer as a customary tenant.

Conclusively, they submitted that the plaintiff is the customary owner of the suit land and not the 1st defendant.

In reply, learned counsel for the 1st defendant submitted that in paragraphs 5(a)- (e) of the Written Statement of Defence together with paragraphs 2 to 7 of the 1st Defendant's Witness statement which was exhibited as his evidence in chief, the 1st Defendant averred that he has been a resident of the current Kyekulula LCI, Busubi Parish, Kisekka Sub county in Lwengo District (formerly part of Masaka District) since 1955 having settled there in 1950 when his family moved from Kitabazi in Masaka and settled in Kyekulula village after the 1st Defendant's Father a one Paul Walusimbi bought a *kibanja* at Kyekulula village.

That it is the 1st Defendants evidence that the 1st Defendant, Paul Walusimbi, (the 1st Defendant's father), Kanyemera and his two sons namely Sirasi and Kalaveri utilized the suit land for grazing cattle, sheep and goats.

Further, that it is the 1st Defendant's evidence that Kanyemera died and was buried on the land of Ndulu neighbouring the suit land while the 1st Defendant,

Walusimbi (the 1st Defendants' Father), Sirasi and Kalaveri continued using the land. That around 1986, Paul Walusimbi (the 1st Defendant's Father) shifted to Masaka and left the 1st Defendant together with Sirasi and Kalaveri (the sons of Kanyemera) continued utilizing the land for grazing cattle sheep and goats. That the 1st Defendant further testified that Sirasi and Kalaveri went back to Rwanda following the capture of power in Rwanda by 1994 and upon their return to Rwanda, the 1st Defendant continued using the land for grazing cattle, sheep, and goats and for growing crops like cabbages, yams, pineapple without any interruption or claim from any other person. That the evidence of **DW1** was corroborated by **DW2 (Nassolo Faridah)** a former L.C.1 of the area, **DW3 (Christopher Ssebagala)** a son to the 1st Defendant and **DW4 (Robert Ssenkanga)** a resident of the same area.

That **DW4 (Robert Ssenkanga)** who was 42 years by the time he made his witness statement on 28th August 2018 told court that he has a resident of Kyekulula Village since childhood he came to know the 1st Defendant since childhood as a resident of Kyekulula Village and that the land in dispute was formerly being utilized by the 1st Defendant, his late father the late Paul Walusimbi, Kanyemera and his two sons to wit Sirasi and Kalaveri for grazing cattle, sheep and goats. That **DW4** told Court that Kanyemera died and was buried on the land of Ndulu neighbouring the suit land while the 1st Defendant, Walusimbi (the 1st Defendants' Father), Sirasi and Kalaveri continued using the land. That **DW4** told Court that around 1986, Paul Walusimbi (the 1st Defendant's Father) shifted to Masaka and left the 1st Defendant together with Sirasi and Kalaveri (the sons of Kanyemera) utilizing the land for grazing cattle sheep and goats.

That it is **DW4's** evidence that Sirasi and Kalaveri went back to Rwanda following the capture of power in Rwanda by 1994 and after their return to Rwanda, the 1st Defendant continued using the land for grazing cattle, sheep, and goats and for growing crops like cabbages, yams, pineapple without any interruption or claim from any other person. That **DW4** told court that the 1st Defendant had even constructed two houses on the land which were demolished when he together with his two workers were arrested in 2009 on allegations that they had trespassed on the suit land. It is **DW4's** evidence that even after the release of the 1st Defendant from police detention he continued occupying and utilizing the suit land. That **DW4's** evidence was subjected to cross-examination but remained consistent and unshaken. That **DW2 (Nassolo Faridah)** a former L.C 1 of Kyekulula LCI, Busubi Parish, Kisekka sub county, Lwengo District where the suit land is situate testified in her evidence in chief that before assuming the

position of chairperson Kyekulula LCI, she was the Vice Chairperson of the same area since 2008 and knew the 1st Defendant as a resident of Kyekulula LCI ever since she settled in the area in 2002.

That it was **DW2**'s evidence that ever since she came to Kyekulula LCI, she has been seeing Magunda Christopher (the 1st Defendant) using, cultivating and grazing cattle, sheep and goats on the land in dispute located at Kyekulula LCI, Busubi Parish, Kisekka Sub County, Lwengo District. That it is **DW2**'s evidence that in 2009, the 1st Defendant was cultivating the land by growing pineapples, cabbages, and maize and that he stopped cultivating the land in May 2009 after he together with his workers were arrested by Hajji Semugenze and that during **DW1**'s detention, all his crops were destroyed. That **DW2** told Court that she knows that the land for the Plaintiff together with his father, the late Muhammed Kasule and other family members is located at Kirayangoma L.C.1, Nakateete Parish, Kisekka Sub County, Lwengo District and that they have never owned any land in Kyekulula L.C1. That **DW2** remained consistent during cross-examination and told court that she got to know the land and it is located in Kyekulula which she was heading and that as a leader, she knew its physical boundaries and the neighbouring areas. That **DW2** further testified during cross examination that according to her, it was government land which later the 1st Defendant applied for and got and that the Plaintiff has never been under her L.C.1 when she was the LCI Chairperson.

In addition, that **DW3 (Christopher Ssebagala)** a son to the 1st Defendant, corroborated the evidence of **DW1** and **DW2** when he testified in his evidence in chief that the land in dispute was formerly being utilized by the 1st Defendant, the late Paul Walusimbi, Kanyemera and his two sons to wit; Sirasi and Kalaveri for grazing cattle, sheep and goats and further that he knows the Plaintiff as a son of the late Kasule Muhammed who owned land at Kirayangoma L.C 1, Nakateete Parish, Kisekka Sub County, Lwengo District and their family land is located at Kirayangoma L.C 1, Nakateete Parish. That **DW3** consistently testified during cross-examination that he came to court to give evidence in court to prove that the land is for his father, the 1st Defendant. That he further testified that the land is at Kyekulula Plot No. 17 and that he knows the land belongs to his father as they used to use it since he was a child and that the father also has a title to it. That it is **DW3**'s evidence that the 1st Defendant had even constructed two houses on the land which were being used as accommodation for his workers and that the same were destroyed when the 1st defendant and his workers were arrested in 2009 and detained at Masaka Police Station by Hajji Kasule Semugenze on allegations of trespass.

They added that **DW3** told court that he knows Hajji Semugenze(the Plaintiff) as the son of late Kasule Muhammed who owned land at Kirayangom LCI, Nakateete Parish, Kiseka Sub County Lwengo District and that Hajji Semugenze Kasule and his family have never owned land in Kyekulula LC1 Busuubi Parish, Kisekka Sub county, Lwengo District. That all the 1st Defendant's witnesses corroborated each other that the land in dispute is owned by the 1st Defendant as it was formerly being utilized by the 1st Defendant, his father, the Late Paul Walusimbi, Kanyemera and his two sons to wit; Sirasi and Kalaveri for grazing cattle, sheep and goats. That in addition, the 1st Defendant presented a report of the area land Committee dated 1st December 2008 indicating that the 1st Defendant has managed and developed the land through farming and that the real Land Committee did not receive complaints from people since the public Notice was issued. That the Area Land committee even established that the 1st Defendant had occupied the land for a very long time and fenced it. That on that basis, the 1st defendant as recommended for issuance of freehold. The Area Land Committee was signed by all the members.

That the 1st Defendant's occupation and utilization of the land was also confirmed by Ssembajjwe Henry the Masaka District Staff Surveyor in his report dated 29th/6/2012 when he was directed by the secretary Masaka District Land Bard to verify the 1st defendants land. Ssembajjwe even attached photographs indicating the 1st defendant's developments on the land. That to the contrary, the plaintiff did not produce any report made the Kisekka Sub county Area Land Committee confirming his possession and use of the land prior to issuance of the plaintiff's Freehold offer on 30th May 2009.

That it is also clear that at the time the plaintiff applied for conversion of land from customary to Freehold, the 1st Defendant was already in possession of the land and had been issued with a leasehold offer over the same land in 26th May 2006 vide MSKLB76(b)(i)/05/05 of 18th May 2006. That it is rather surprising that the same Sembajjwe Henry who had inspected the 1st defendant's land twice and recommended him as the one in occupation and utilization of the land turned around and wrote requested the Secretary Kisekka Sub county Area Land Committee to guide as to who is the customary owner of the land on 04/1/2013 after a period of over four years since the 1st Defendant was recommended by the same Area Land Committee. That on the same date, the Kisekka Sub County Area Land Committee wrote back to the District staff Surveyor indicating that they had scrutinized the record and done a physical visit to the land in question and that the land belongs to Haji Semugenze who was recommended by the same Sub County Area land Committee

That the Report further indicated that Salongo Magunda has never been recommended for this land and that he was allocated three different portions of land near the parish of Busubi according to the minutes. The Area Land Committee even recommended for cancellation of the 1st Defendant's certificate of title. That a reading of the letter of Sembajjwe Henry and the response by the area land committee points to collusion between the two to defeat the 1st defendants interest in the land for the following reasons.

The members of the Area Land Committee ought to have gone back to the land to confirm the land to confirm the allegations of Sembajjwe but they did not go as there exists no proof to that effect. That a visit of the Area Land Committee to the land is premised by a letter written to the local leaders of the area informing them of the exercise and requesting them to be present. The Committee is also required to notify the concerned persons to be present to confirm the boundaries of the lane each one claims.

In addition, the immediate neighbours to the land in issue are also informed in writing to be present. That there in such communication. There is no attendance list that was compiled and attached to the report. The report of the Area Land Committee is dated 4/01/2013, the same day when instructions were given. It is doubted that all the above mentioned preliminary steps could have been made on the same day to enable the visit to the land possible. That the report does not indicate which three other plots were allocated to the 1st Defendant as alleged and the said minutes were not even attached.

Further, that the Report was not signed by the Secretary of the Area Land Committee as by law required. To show the bias of the Area Land Committee, they even recommended for cancellation of any interests he has in the land and the Report. That **Article 237(3) of the 1995 Constitution (as Amended)** provides that; *"Land in Uganda shall be owned in accordance with the following land tenure systems—*

- a) Customary;*
- b) Freehold;*
- c) Mailo; and*
- d) Leasehold.*

Article 237 (4) *provides that; on the coming into force of this Constitution—*

- (a) All Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and*

(b) Land under customary tenure may be converted to freehold land ownership by registration.”

They submitted that in the instant suit, it is evidently clear from the evidence on record that the 1st Defendant owned and utilized the suit land at Kyekukula, which he later on applied for a lease offer and subsequently for a conversion from customary tenure to freehold tenure. That from the above evidence, it is clear that the 1st Defendant was the owner, the registered proprietor of the lease and in occupation of land comprised in FRV 1285, Folio 20 also known as Buddu Block 907 Plot 17 measuring 17.05 hectares at Kyekulula village, Busubi Parish, Kisekka Sub County, Lwengo District which he occupied since 1977 without any interference from any person. That it is the 1st Defendant's evidence that in the year 2006, he applied for a lease in respect of the same land that he had occupied and the 3rd Defendant on the 26/5/2006 vide Minute No. MSKLB 76 (b) (i) 05/05 of 18/52006 granted him a lease for a period of 15 years commencing from 2006. That the lease was based on the fact that the 1st Defendant was in occupation of the land at the time of granting it.

That before the grant of the lease offer, the 1st Defendant was in occupation of the same land and established a mixed farm thereon which he is still operating to the present date and after the grant of the lease, the 1st Defendant continued in occupation of the suit land, carried out further developments on the land without any claim and/or interference from the Plaintiff. That later on, the 1st Defendant applied for a conversion of the lease hold interest into freehold interest in the same land and inspection of the same land was carried out by the Kisekka sub county Area Land Committee which confirmed that the 1st Defendant was in occupation and had developed the land in question to the satisfaction of the 3rd Defendant in consequence of which he was given a freehold offer on 13/5/2009 vide MSKLB 36 (32) 2009 of 12/10/2009 for purposes of converting his leasehold to freehold.

That **PW2 (Medi Kasule)**, a brother to the Plaintiff told court in cross examination that the Plaintiff has land in Kirayangoma in Nakateete Parish which he applied for and was using it until he applied to be given a title. That a look at the Plaintiff's application for conversion from customary tenure to freehold tenure attached to the Plaintiff and marked as annexure "A", shows the location of the land the subject of application is Kirayangoma Village, Nakateete Parish which land is different from the suit land that is located at Kyekukula village, Busubi Parish. That this is further proof that the Plaintiff was granted an offer for a different land located at Kirayangoma, Nakatete Parish as opposed to the suit land which is located at Kyekukula village, Busuubi Parish. That **PW3**

(Ssembajjwe Henry), the District Land Surveyor, Masaka District confirmed in witness statement which was admitted as his examination in chief that as a result of a report confirming that the 1st Defendant owns the land, the title could be issued to him.

That even during cross examination, he testified that by the time the Plaintiff complained, the 1st Defendant had a certificate of title and had gone through all the necessary steps and his application for conversion from customary tenure to Freehold tenure was admitted. That by the time the Plaintiff applied for the land in 2008, the 1st Defendant was in possession as the owner of the suit land and there is no way whatsoever it would have been granted to him as alleged by the Plaintiff. That they wish to note that the plaintiff did not adduce any evidence to prove that the land he applied for was inspected by the Kisekka Sub County Area Land committee prior to him being granted a freehold offer.

That the Report of the Area Land Committee is important as it confirms the location of the land, the developments carried out on the land, the neighbors to the land whether there are complaints regarding the ownership of the land the subject of the application.

That the absence of the of the Area Land Committee supporting the Plaintiff's is an indicator that the land that the Plaintiff was applying for was not inspected by the Kisekka Sub County Area Land Committee to confirm that the same was in possession and had been utilized developed by the Plaintiff prior to applying for conversion to freehold. They thus prayed that this honorable court be pleased to find that the 1st Defendant is the customary owner of land comprised in FRV 1285 Folio 20 Buddu Block 907, Plot 17 land at Kyekulula.

In resolving this issue, I have carefully analyzed the evidence of all the witnesses of both sides, and the submissions of both sides as captured in this judgement. To prove his claims, the Plaintiff first called **John Mary Kasagga, a male adult aged 54 years old, peasant farmer resident of Kiryangoma village, Nakateete Parish, Kisseka Sub County Lwengo County in Lwengo District (hereinafter referred to as PW1)**. He was the LC1 Chairperson of Kirayangoma village ever since 2001 and testified that he knew the plaintiff as a resident in his village and had known him ever since he was still young. He also knew the defendant as a resident of Kyekulula, the neighboring village in Busubi Parish, Kisseka Sub County in Lwengo District; and that he knew the dispute between the plaintiff and the 1st defendant as that of land which is situate in his village.

That he knew the suit land belongs to the plaintiff as he came to know of such fact when he became the L.C.1 Chairperson of Kirayangoma village in 2001, however, over 10 years the plaintiff told him that the 1st defendant had fraudulently obtained title over his land which he had also applied on to get a freehold title.

That it was a result of that dispute that around the same 2012, the members of the Kisseka Land Area Committee together with Masaka District staff Surveyor and police officers from Masaka came to his village to verify between the plaintiff and the 1st defendant owns the suit land.

That during the said exercise, the brother to the plaintiff a one Med managed to show the plaintiff 's land as he had always known it to belong to the plaintiff but the defendant refused to come closer to the area to show his alleged land in his village. That after wards the Committee left until the year 2014 when the plaintiff told him that he had instituted this instant suit against the defendants in respect of the suit land and he requested him to be his witness in this matter.

During cross examination by learned counsel for the 1st defendant, PW1 answered that he lives in Kirayangoma village in Nakateete Parish and has been there for 54 years and that is where he had been born from. That he has been LC Chairman since 2001 and knew Kyekulula village, it is in Busubi village. That Hajji Kasule is a resident of Kirayangoma village and he has always seen him there and owns a large chunk of land there, but he can't estimate its acreage in acres. That his father is Hajji Muhammed Kasule, he used to stay in Kirayangoma but he lied, Hajji Kasule Muhammed never had land in Kyekulula.

He knew Christopher Magunda, that he stays in Kyekulula in Busubi Parish and didn't know if he has land there; that he has seen Magunda for quite some time since his childhood and he knew his home in Kyekulula and knew his neighbors like Ssali, the other neighboring places are vacant.

That he also knew Hajji Sulaiti Kitayunwa who used to stay in Kyekulula, knew the Banakalori Brothers and they are all situate in Kyekurura. He knew Joseph Joseph Mulwanyamuli Ssemogerere and knew Namwandu Eseri, they all stay in Kyekurura. He knew Hajji Asuman of Kirayangoma, knew Muhammad Kasule also of Kirayangoma and also knew the Land Committee situated at the Sub County.

That in 2008, the chain was Hajji Kalibbala, Hajji Jamira Kiyirira and one lady Kalanzi, but had forgotten the others. That Kirayangoma and Kyekulula are two different Parishes.

That the land in dispute is situate in Kirayangoma, he knew some of the neighbors to the land in dispute-Hajji Asuman Lwanga is a neighbor Banakalori Brothers, Mulwanyamuli Seemogerere and a road to Mbarara, Father Kasekende Antonio Nduru, Namwandu Eseri is a bit far from the land in dispute; Hajji Sulaiti was a neighbor but a *kibanja* owner. That Hajji Ssemugenze is in occupation of the land in dispute, he has been using it since 2001; his father Kasule was using it when he died, Ssemwogerere used it. That Magunda Christopher grazes on the suit land, Hajji Ssemugenze grazes cattle on the suit land, also cuts trees on the suit land. That the Area Land Committee came to inspect the suit land and the 1st Defendant was there. That he later left when the exercise was ongoing. That the Area Land Committee wrote to him informing him of the visit, Hajji Ssemugenze wasn't there they had Muhammed. That Muhammed Kasule was the owner of the farm which he now left to his children when he died.

In reexamination, PW1 responded that he didn't know when Ssemugenze started using the land and that he found him using it. That Magunda came later and after the fence was destroyed. That Magunda left when the inspection was still going on; he was able to show his boundaries; and Haji Ssemugenze was the one using the land and applied for a title to the land and he told him they were still processing his title. He thought the land is registered in Ssemugenze's land.

That Magunda's land is near the disputed land, they are separated by a road and that he found them when the land was occupied and he never recommended anyone to apply. He knew Muhammed Kasule, that the land is utilized by Hajji Ssemugenze. That he was present when the Area Land Committee and Hajji Sulaiti as chairman of Kyekurura. That there was Muhammed Kasule among the members of the Area Land Committee were Hajji Kalibbala, Hajji Jamira and Mrs. Kalanzi.

The second plaintiff's witness was **Meddi Kasule, a male adult aged 43 years old, peasant farmer, resident of Kirayangoma village, Nakateete Parish, Kesseka Sub County in Lwengo District (hereinafter referred to as PW2).** He knew the plaintiff as his elder brother and a resident of Kirayangoma, but currently in the United Kingdom. He knew the 1st defendant as a resident of Kyekulula, the neighboring village in Busubi Parish, Kesseka Sub County in Lwengo District.

He testified that the plaintiff donate to him Powers of Attorney and attached and that to the best of his knowledge, the suit land belongs to the plaintiff. That around 2008, the plaintiff instructed him to act on his behalf during the visit by the members of the Area Land Committee of Kisseka, the area was done in the

presence of the LC1 Chairperson and all the neighbors to the suit land. That he clearly showed the Area Land Committee the plaintiff's land as he had shown it to him, before he left for United Kingdom; and that the said exercise went on smoothly and the Area Land Committee recommended the plaintiff to be issued with a lease offer by the 3rd defendant.

That around 2012 when the plaintiff returned briefly, he found that the 1st defendant with some police officers from Masaka, the members of the Area Land Committee Kesseka Sub County in Lwengo District, both LC1 Chairpersons for Kirayangoma and Kyekulula, the 1st defendant and him representing the plaintiff.

That later on, the plaintiff came back in 2014, he instituted this instant suit against the defendant and since he is not always within Uganda, he donated Powers of Attorney to pursue it in his behalf.

During cross examination by learned counsel for the 1st defendant, PW2 answered that he stopped in P.5, Hajji Ssemugenze is his older brother and that he stays in Kirayangoma village and didn't own land there. That he has a *kibanja* given to him by his father Muhammed Kasule. That Ssemugenze has land in Kirayangoma in Nakateete Parish, he applied for the land, was using it until he applied to be given a title in 2008.

That he invited the Area Land Committee, they came and inspected the land and went back. That it is Ssemugenze who invited the Area Land Committee but he couldn't recall if he wrote to them. That the 1st defendant's land is in Kyekulula LC1 and **PW2** didn't know how he acquired it. That Kyekulula and Kirayangoma are in two different areas, there is a boundary of a road tarmacked and there is also a river, and he was sure about it.

That his father never had land in Kyekulula, and he didn't know land comprised in Block 80, Plot 7. That his brother applied to the Area Land Committee, he couldn't read English but saw a letter of allocation to his brother Ssemugenze allocating the suit land to him.

That his brother Ssemugenze never inherited land from his father; and he knew the 1st defendant as a resident of Kyekulula, Busubi, he also has land in Kyekulula, but it's not the land in dispute. That the neighbors to the land that his brother applied for are Hajji Asuman Lwanga, Banakalori Brothers, Kasagga John, and Muhammad Kasule **PW2's** father has land opposite the land in dispute; and that all the said people stay in Kirayangoma. That his father has Mailo land in Kirayangoma and Ssemugenze's land is Public Land, it's all located in Kirayangoma and not Kyekulula.

Further, that Ssemugenze's land is Plot 17, it does not stretch to Kyekulula and if someone says that it does, he would be a liar as Ssemugenze's land is only situate at Kiryangoma. That **PW2** was present when the Area Land Committee came to inspect, Ssemugenze was there and **PW2** was there as his caretaker. That the 1st defendant refused to come, he was invited for the inspection, came there but later left because he disagreed with the Committee. That Ssemugenze never got a certificate of Title to the disputed land, the file got lost in the Lands Office Masaka and was never found.

That it's not true that the 1st defendant had even got a Certificate of Title for the suit land; **PW2** was absent when the Surveyor called Stephen came and opened the boundaries; and that at that time the file was still around and the Plot No. is 17.

During cross examination by counsel for the 2nd defendant, PW2 answered that Ssemugenze applied for the disputed land in 2008 to the Area Land Committee, he was granted land by the Area Land Committee based at the Sub County and he applied for the title in the Land Ministry, the District Land Board and that it allocated him the land.

PW2 was shown Ssemugenze's application applying for the land in dispute and that nothing was written on the area of allocation. He insisted that Ssemugenze applied to the Land Office, the file got lost there, he didn't know if the application was submitted to the Land Office. That the Area Land Committee inspected the whole land and that it is the same Committee responsible for Kirayangoma and Kyekulula.

That Ssemugenze is utilizing the land in dispute as well as the 1st defendant, and that Ssemugenze has been using it over time, while the 1st defendant started using it in 2008 and was formerly using the Banakalori Brothers' Land. That the land was surveyed around 2011 and Ssemugenze never had a title to the disputed land.

In reexamination, PW2 answered that Hajji Ssemugenze was using the land for over 40 years before he applied for it, grazing cattle.

The third plaintiff's witness was **Hajji Abdul Kalibala, a male adult aged 76 years old, peasant farmer, resident of Kiwangala village, Kakambe Parish, Kesseka Sub County in Lwengo District (hereinafter referred to as PW2).** He was the Chairperson Kisseka Area Land Committee until 2016 and knew the plaintiff as a resident of Kirayangoma and even knew his father the late Hajji Muhammed Kasule; he also knew the 1st defendant as a resident of Kyekulula,

the neighboring village in Busubi Parish, Kesseka Sub County in Lwengo District.

He testified that to the best of his knowledge, the suit land belongs to the plaintiff because he has ever taken them there during the time he was applying for a freehold title over the same. That the plaintiff filled the required form requesting the Area Land Committee of Kisseka Sub County to which **PW3** was Chairman to go and visit in order to recommend him to the 3rd defendant to issue him with a freehold title over his *kibanja*. That around 2008, as is required by the law, they notified the area LC1 Chairperson to make sure that all persons who know that they neighbor the land adjacent to that of the plaintiff be present during the exercise.

That the plaintiff clearly showed them his *kibanja* and he noted that he already planted the boundary marks (*lukoni*) using the *kibajna* as farm for cattle and nobody protested the plaintiff's interest in the *kibanja* visited. That the said exercise went on very smoothly; and he referred to their recommendation; and they recommended the plaintiff to be issued with lease offer by the 3rd defendant, however around 2012, they were summoned by Masaka District Staff Surveyor to verify on the land they recommended for both the plaintiff and 1st defendant. That the Masaka District Staff Surveyor came along with some police officers from Masaka, both LC1 Chairperson for Kirayangoma and Kyekulula, the 1st defendant and plaintiff was represented by his brother Med Kasule.

That as the Area Land Committee to which **PW3** was Chairperson, they indicated the land which they had recommended for the plaintiff as the one in dispute and they clearly indicated that the land they had recommended for the 1st defendant is Kyekulula village, Busubi Parish, Kesseka Sub County in Lwengo District. That after the exercise, they made a report addressed to the Masaka District Staff Surveyor indicating the suit land belongs to the plaintiff and not the 1st defendant; and relied on a copy of the Report.

Later on, that when the plaintiff came back in 2014, he informed them that he had instituted this instant suit against the defendants and needed **PW3** as a witness.

During cross examination by learned counsel for the 1st defendant, PW3 answered that he knew Magunda Christopher and had known him for over 10 years and knew he stays in Kyekulula. He knew the late Hajji Ssemugenze since childhood.

That Kiryangoma and Kyekulula are in different Parishes, Hajji Ssemugenze stayed in Kiryangoma. That he was Chairman Area Land Committee of Kisseka

Sub County, he couldn't recall when he became Chairman of the Land Committee or when he stopped, but was Chairman for 10 years

He confirmed that he has ever inspected the 1st defendant's land in Kyekulula; and also inspected Hajji Ssemugenze's land in Kiryangoma and Kyekulula. That he just inspected Hajji Ssemugenze's land, they made a report for the 1st defendant.

PW3 was shown the Report; and acknowledged his signature that it is authentic; and also confirmed that it was the 1st defendant's Report dated 1st December 2008 and 5 members signed the Report, Nabaterega was Secretary of the said Committee.

PW3 was shown another Report and answered that it was for Hajji Ssemugenze Kasule, and it was made on 12th January 2009. He confirmed signing on the said Report, the Secretary never signed that Report and he responded that she may not have been there when they inspected the land. That she never refused to sign because they had included the 1st defendant's land, and that they inspected the 1st defendant's land in Kyekulula. That the land they inspected for Ssemugenze was different from that of the 1st defendant and that they inspected two different pieces of land.

That the neighbors to the 1st defendant's land are Brothers who are at the bottom, he didn't recall if he neighbors Karina because it's a long time, that he borders Katikkiro Ssemogerer's land and he didn't recall the other neighbors.

That Ssemugenze's land borders the bottom with Banakalori Brothers, there is a road and others he didn't know, that he borders Kasule and Hajji Lwanga.

PW3 was also shown both Inspection Reports; and he responded that the 1st Report was for 1st December 2008 and is for the 1st defendant. That the one for Ssemugenze was made on 12th January 2009, the reference number is for Ssemugenze was **505 i.e. KSK/505/1**, the other is **KSK/505/1**. He confirmed that they gave the same reference numbers and that it could have been an oversight, they shouldn't be the same, but should have borne different numbers

Court noted that PW3 later declined to read other documents claiming he has no glasses and can't see.

Further, that they are expected to name neighbors of the land applied for.

Learned counsel for the 1st defendant applied to tender in the certified copies PW3 had identified, learned counsel for the plaintiff had no objection and

Court admitted the Report for Magunda dated 1st December 2008 **Ref. KSK/505/1-Lan/9206/4 as D Exhibit No1.**

The Report of Ssemugenze Kasule dated 12/01/2009 **Ref. KSK/505/1-Lan/9206/4** was also admitted as **D. Exhibit No2.**

Further, that there is a Form which shows neighbors, the Secretary of the Land Committee is the one who draws the sketch.

PW3 was shown the sketch and he responded that it was drawn by Hajjati Janat. That according to the sketch, the neighbors to the 1st defendant are Banakalori Brothers, then he claimed he can't read but after that mentioned Sulaiti Kitanywa, Ssemogerere. He confirmed that the Report has his signature, it also bears the stamp of Kisseka Sub County and all the members of the Committee signed on that Report.

Learned counsel for the 1st defendant applied to tender in the demarcation PW3 had identified, learned counsel for the plaintiff had no objection and **Court** admitted **as D Exhibit No 3.**

Further, **PW3** was shown the application Form of the plaintiff and he acknowledged that he received it from the Plaintiff and that Kasule Hajji Ssemugenze is the one who applied. That the land was in Kirayangoma, in Nakateete Parish, Kisseka Sub County. He answered that their roles was to recommend, but the District Land Board to approve and that they recommended to District Land Board. That they don't follow up to ascertain whether the approved was granted. He confirmed that he signed on the Form, 4 of them signed and the Committee has 5 members, **PW3** identified his signature.

Learned counsel for the 1st defendant applied to tender in the Form PW3 had identified, learned counsel for the plaintiff had no objection and **Court** admitted **as D Exhibit No 4.**

In addition, that when they were inspecting Hajji Ssemugenze's land, the neighbors were present and they signed; that he could recall the names, Ssemugenze sent his brother, the 1st defendant wasn't present because it never concerned him. That the 1st defendant showed the land he had applied for, his neighbors were present, no one objected when he did and the neighbors present approved his application.

In reexamination, PW3 answered that the land they inspected of the 1st defendant is in Kyekulula, that the land they inspected for the plaintiff is partially in Kyekulula and Kirayangoma. That the land was distinct from that of

the 1st defendant had applied for. That they make their Reports later after visiting the locus and that the Report of the 1st defendant shows where the land is situate

The fourth Plaintiff's witness was **Ssembajjwe Henry a male adult District Staff Surveyor Masaka District (*hereinafter referred to as PW4*)**. He testified that for years now, he has been handling the matter concerning the plaintiff and the 1st defendant in his official capacity and authored annextures marked 'M' and 'N' on the 1st defendant's WSD. That in regard to annextures marked 'N' specifically he was asked by the District Land Board Masaka to verify on who actually owns the land in dispute between the plaintiff and the defendant. That he tried to contact the plaintiff but could not get him as he was informed by the 1st defendant that he was in the United Kingdom; and as a result, he proceeded to the site for verification purposes with the 1st defendant alone. That on reaching the site, the 1st defendant showed him what he called his land and even showed that the animals on it were his.

That for verification purposes, he met the Vice Chairperson, Kyekulula, M/S Nassolo Faridah at her home who also confirmed that the 1st defendant has land down the valley. That as a result that a report confirming that the 1st defendant owns the said land and thus the title could be issued to him. That when the plaintiff returned from abroad and found out that the title had been issued to the 1st defendant he complained to their office that the 1st defendant grabbed his land and that they had issued him with a certificate of title on his kibanja which he had applied for to be issued a freehold title.

That upon receipt of the complaint by the Plaintiff, the Secretary District Land Board tasked him again to go with both parties' plaintiff and 1st defendant so that each would show exactly what he owns. That during this time, they went together with both parties where the plaintiff was represented by his brother Med and some police officers from the land Protection Unit and Area L.C.1 Chairperson of both villages of Kyekulula and Kirayangoma, and was shocked with the findings to wit:-

- a) It was discovered that the land title issued to the 1st defendant is located at Kirayangoma as it can be discerned from his lease offer.
- b) That the 1st defendant was also granted a lease offer on some piece of land situate at Kyekulula.
- c) When he tried to call the 1st defendant to come closer to the site and actually show the land he alleges he owns, he refused to reach the site as he remained far from the site.

- d) That he realized also that the 1st defendant actually showed him, belongs to the plaintiff, and even the animals that the 1st defendant showed actually belonged to the plaintiff.
- e) That when they summoned the Vice Chairperson L.C.1 Kyekulula M/S. Faridah Nassolo to verify what land she had told him that the 1st defendant owns, she said she thought he was referring to the one in Kyekulula.
- f) That as a result, he realized that the 1st defendant misled him in the first place and showed land in possession of the plaintiff as his.
- g) That as a result, he wrote to the Area Land Committee to verify to whom they recommended the land they had visited with them as per **annexure A**.
- h) That the Area Land Committee of Kisseka wrote back to him confirming that the land in issue belongs to the plaintiff as per **annexure B**.
- i) That as a result, he made a report to the effect to the 3rd defendant confirming his findings as per the report attached as Annexure C.
- j) THAT he advised the 1st defendant accept his mistake and execute transfer forms in the names of the plaintiff in order to sort this issue amicably.
- k) That the 1st defendant refused insisting that for him, he has the title and that is all that matters.
- l) That as a result, he was informed by the plaintiff that he has filed **Civil Suit No. 095 of 2014** and he needed him as a witness to the effect.

During cross examination, PW4 answered that he wrote, they visited the site, Ssemugenze was not around, so he wrote to verify who the actual person was. That when he visited the land, the members of the Area Land Committee were present, he couldn't recall if the LCs or if the neighbors of the adjacent land were present, but Hajji Ssemugenze was present and Mr. Magunda was around.

Further, that Mr. Magunda had earlier shown the land which he wanted to be converted to freehold, Mr. Ssemugenze was not around at the time and the Members of the Area Land Committee were not around then, neither were the LCS or the owners of the adjacent land. That what had taken him there was to confirm the deed plan which Hajji Magunda had got was the right one, and he confirmed it was the right one. That he visited the land twice; his first visit to the site was to confirm the deed plan of Haji Magunda and he confirmed it. On the second visit, the purpose was to confirm who the rightful owner of the land was; and Mr. Magunda was present and Hajji Ssemugenze, the members of the Area Land Committee but he didn't know if the owners of the adjacent land was present or the LCs. that he went to visit the land when a complaint was raised by Mr. Ssemugenze. That the Area Land Committee would help him to identify the owners of the land, the owners of the adjacent land were not relevant in

determining the owner of the land and the LCs were also not relevant. That they reached the site, both sides failed to agree, so they wrote to the Secretary Area Land Committee, but his visit did not yield the fruits he wanted.

In respect to **annexure 'C'**, that he came to the conclusion, that the Area Land Committee wrote to him and he had also visited the site. He was not aware that the Area Land Committee had recommended Mr. Magunda or that the same Area Land Committee had also recommended Mr. Ssemugenze. He was aware that there must a recommender of the Area Land Committee before the conversion from customary to freehold; and was not aware that by the time he was requested to go to visit the land, the District Land Board had recommended Mr. Magunda.

PW4 was availed a document and he responded that it bears the date of 29.6.2012 and he confirmed that he authored it. That he did not verify the deed plan by Mr. Magunda, but confirmed that he authored the document and it bears his signature. That it says that Mr. Magunda's land is neighboring by Mulwanyammuli Ssemwogerere, Banakaloori and Kiteredde. That he got the information from Mr. Magunda and it was an oversight that he did not confirm it with the neighbors. That he stated that the land had a house, goats and cultivation and he attached photographs; that he verified them and they were there. That he involved the LCs afterwards when doing the exercise, you don't involve LCs.

PW4 confirmed that Mr. Magunda's land is located in Kyekulula, Kirayangoma is in the estate and that he included Kirayangoma because they are neighbors. That he did not visit Hajji Ssemugenze's land then and he never knew which LC the plaintiff Hajji Ssemugenze's land was located. That he met the LC of the area afterwards and she confirmed that Hajji Ssemugenze has land.

PW4 was availed another document titled Verification of land at Kyekulula; and he responded that he never confirmed that Hajji Ssemugenze had land at Kyekulula, that he verified , not confirmed and that that confirmation is by the Area Land Committee.

Defence counsel Katumba prayed at this point to tender in the above stated letter as Defence Exhibit, learned counsel for the Plaintiff had no objection and **Court** admitted it as **D. Exhibit No.1**.

Further, **PW4** responded that he was not aware that Mr. Magunda applied for conversion to freehold, he had a leasehold on the land. He confirmed that he is still the District Land Surveyor Masaka and knew some of the clans in the area and was not aware that land in Kirayangoma was Mailo land but was aware of

the two different villages, but not the parishes and was not aware between Kiryangoma and Kyekulula.

That by the time Haji Ssemugenze complained, Mr. Magunda had a certificate of title and had gone through all the necessary steps and his application was admitted.

PW4 was availed another document titled **Annexure 'A'** to the Complaint and confirmed that he was aware of the documents and paragraph 11 indicates the location of the land and it is located at Kirayangoma. That the Secretary recommended, but the Chairman did not sign, it does not bear the seal and is a photocopy.

Paragraph 13 of the Complaint was read in court and **PW4** confirmed that he went to the land, made a report and wrote to the Secretary Area Land Committee. He confirmed that his findings were in paragraph 13(a)-(l); that the Board never tasked him to make a Report and that he went with both parties. That the Area Land Committee wrote a Report, (a)-(l) were his findings and he never included them in the Report.

That **Annexure 'B'**, for them they just wrote to him and it does not detail all that in paragraph 13. That the findings in paragraph 13 are his findings and that he got them afterwards after he was tasked by the District Land Board and it is **Annexure 'C'**. That the basis is after (d) through to the end. That he went to the ground and visited the area and made his findings and got the findings in paragraph 13 after wards. That they are in the Land Office and he reported back to them after the task.

That the District Land Board tasked him to find the rightful owner, he did not have to write everything, as they are precise. That Hajji Ssemugenze's land, he did not get the LC, but it is the same land which Magunda showed him. That at the time he recommended the village and Parish, now he didn't, but it is also the same land he was shown by both parties.

In respect to **Annexure 'A'**, that he confirmed Mr. Magunda the first time. Then confirmed Mr. Ssemugenze. That he went the third time with Mr. Magunda and a representative of Ssemugenze, but Mr. Magunda never reached the site; that the third time it is Magunda who never reached the site, but was at the nearby playground with the Area Land Committee members talking, some went with **PW4** and others remained. That it is a long time, he had forgotten some things as he is human, it was 2012; that they don't make deed plans they are made at Entebbe. That they had not been made for Mr. Ssemugenze. That deed plans are

not for anybody but the District Land Board, and were made for Mr. Ssemugenze by the Commissioner Lands and Surveys.

In re-examination, PW4 responded that he made **Annexure ‘C’** on 11.01.2013 after a visit by the Area Land Committee and a representative of Hajji Ssemugenze to the site. He didn’t know why Mr. Magunda never reached the site.

In response to questions by Court, PW4 answered that it is the same piece of land, the 1st defendant is claiming which he found to belong to Hajji Ssemugenze, the plaintiff. That he named a recommendation for Mr. Magunda as well, the one for Mr. Magunda was the first. That Hajji Ssemugenze came back from abroad, the deed plans were concluded; that when Ssemugenze came back, he visited and he showed him the same area.

The Plaintiff closed his case with the above witness.

The Defence case opened with the evidence of the 1st Defendant **Magunda Christopher, a male adult Ugandan aged 65 years old of Kyekulula village, Bisubi Parish, Kisseka Sub County in Lwengo District [formerly Masaka District] (hereinafter referred to as DW1)**. He testified that he has been a resident of the above address since 1955 having settled therein in 1950 when his family moved from Kitabazi in Masaka and settled in Kyekulula village after his father the late Paul Walusimbi bought a *kibanja* in Kyekulula. That he is the registered proprietor and in occupation of land in FRV 1285 Folio 20 also known as Block 907 Plot 17 measuring 17.051 hectares at Kyekulula village, Busubi Parish Kisekka Sub County, Lwengo District (the suit land).

That prior to his application for lease interest in the land, him together with his father the late Paul Walusimbi, Kanyemera and his two sons to wit Sirasi and Kaleveri utilized the suit land for grazing cattle, sheep and goats. That Kanyemera died and was buried in the same land while his late father, Sirasi and Kaleveri continued using the land.

That in or around 1986, his late shifted to Masaka while him together with Kanyemera’s said two sons continued utilizing the suit land for grazing cattle, sheep and goats. That Sirasi and Kaleveri went back to Rwanda following the capture of power by the rebels in Rwanda in 1994 and after their return to Rwanda, **DW1** Continued using the land for grazing cattle, sheep and goats and for growing crops like cabbage, yams, pineapples without any interruption or claim from any other person.

That in the year 1997, he applied for a lease in respect of the same land which was granted to him by the 3rd Respondent on 26/5/2006 vide **Minute No. MSKLB 76(b) (i) /05/05/2006** for a period of 15 years commencing from 2006 as per his **Annexure 'A'**.

That before the grant of the lease offer, he was in occupation of the same land and had established a mixed farm thereon which he is still operating to date; and after the grant, continued in occupation of the suit land, carried out further developments on the land without any claim of right or intervention from the plaintiff. That he fenced the land using barbed wire, *lukoni* plats and poles.

That later on 28th September 2008, he applied for a conversion of the leasehold into freehold as per **annexure 'B'**.

That in November 2008, the members of Kisseka Sub County Land Area Committee gave notice informing the public of its inspection of the land and called all persons who had interest in the land and owners of the adjacent land to attend the meeting of the Committee scheduled for 10th November 2008 to forward their claim if any. That the public meeting was held and no one disputed his ownership, possession and utilization of the land as per **Annexure 'C'**.

That the members of Kisseka Sub County Land Area Committee equally inspection of the land was carried out and confirmed that he was in occupation and use of the land in question in consequence of which they wrote a Report recommending him for the grant on the basis that he had developed the land through farming; there was no complaints from any other person from the date of pinning of public Notice to the date of inspection and that he had occupied the a very long time as per **Annexure 'D'**.

He further testified that on the basis of the Report the members of Kisseka Sub County Land Area Committee, he was on 30th November 2010 given a freehold title after vide MSKLB 36(32)/2009 for purposes of converting his Leasehold to freehold as per **Annexure F**.

That after the grant, the freehold offer, the plaintiff falsely claimed ownership of the land, reported a case of threatening violence and malicious damage to property and caused his arrest together with his children and workers to wit: Ssebagala Christopher, Ssekabira Ronald, Kigozi Raphael, Kalyango, Kalema and Kayodo who were detained at Masaka Police Station on allegations of the above offences. That during his detention with his children and workers at Masaka Police Station. That the plaintiff encroached onto the suit land, destroyed houses for his workers, barbed wire fence and stole 3 rolls of barbed

wire among others; and that the rest of the detained person were granted police bond on 8th May 2009 as per **Annexure F**.

That he was charged before Masaka Chief Magistrates Court with the offence of malicious damage to property, was bailed and the matter came up for hearing on several occasions but the plaintiff didn't appear in court in consequence of which the case was dismissed as per **Annexure G**.

That the District Staff Surveyor gave instructions for the survey of the land vide U/1/03991 of 18/11/2011 per **Annexure H**.

That being disturbed by the acts of the plaintiff, he carried out further inquiries about the claim by the plaintiff and the inquiries revealed that:-

- a. The plaintiff applied for conversion of customary tenure to freehold tenure for land located at Kirayangoma village, Nakateete Parish, Kisekka Sub County, Masaka District on 25th May 2008, which land measures approximately 20 hectares and shares boundaries with Mwamadi Kasule, Hajji Lwanga and Kasango John.
- b. The persons who were indicated as customary owners of adjacent land to wit Mwamadi Kasule, Hajji Lwanga and Kasango John are all not residents of Kyekulula, but residents of Kirayangoma Parish, Nakateete Parish, Kisekka Sub County which is a totally different area in terms of village and parish.
- c. The plaintiff's application for conversion of customary tenure to freehold tenure was not signed by all the members of the Land Area Committee nor sealed with the official seal for Masaka District Land Board as per **Annexure I**.
- d. The plaintiff's application for conversion of customary tenure to freehold tenure was considered under **Minute MSKLBD005(A)/03/09(i)** and a freehold offer was given the same reference as per **Annexure J**.
- e. The plaintiff's freehold offer has reference **No. LAN.119/190**, yet the application for a deed plan quotes reference **No. LAN.119/188** which is a different from the one appearing on the freehold offer.
- f. The document containing instruction to survey indicates that the land which is the subject of the survey measures 20 hectares located at Kirayangoma Nakateete, Kisekka, which is different from his land as per **Annexure J2**.

That after realizing all the above, **DW1** on 12th April appealed to the office of the Commissioner Survey and Mapping to call upon the relevant documents

concerning the above plot together with the survey documents certificate of title applied for by the plaintiff as per **Annexure K**.

That arising from the above complaint, the Permanent Secretary Ministry of Lands, Housing and Urban Development cancelled the deed plans issued to the plaintiff on 8th June 2010 and this was communicated to the District Staff Surveyor Masaka Land Office by a letter dated 18th April 2012 **Annexure L**.

That by a letter from the District Staff Surveyor Masaka Land Office dated 20th April 2012, the said deed plans were released back to the Assistant Commissioner Department of Survey and Mapping as **Annexure M**.

That having received a copy of his complaint dated 12th April 2012, the Masaka District Land Board directed the District Staff Surveyor to visit the disputed land to ascertain the true position on the ground and the surveyor visited the land and by a letter dated 29th June 2012 to the Masaka District Land Board directed the District Staff Surveyor confirmed that that the suit land belongs to him and was in his occupation as per Annexure **N**.

That also in response to a letter dated 18th July 2012 to Commissioner Survey and Mapping, Nakandi the Land Officer Masaka District confirmed that the suit land was allocated to him vide **Minute No. MSKLB005 (A)(X11)** and that the plaintiff in his application dated 21st May 2008 applied to be allocated land situate at Kirayangoma Nakateete, Kisekka , Bukoto and that under **Minute No. MSKLB005 (A) (Xii)** allocated land measuring 20 hectares at Kirayangoma Kisekka which is different from the disputed land as per **Annexure O**.

That the dispute over the same land was also referred to the Principal land Management Officer Masaka Zonal Office who carried out investigations and made a Report that the suit land legally belongs to him as per **Annexure O**.

That on the basis of all the above investigations and findings, all the relevant authorities established and confirmed that he properly applied and obtained the suit land and that the land applied for by the applicant is located in totally a different area. That the plaintiff has never owned any *kibanja* in Kyekulula village, Busubi Paris, Kisekka Sub County, however, the plaintiff's family owns land in Kirayangoma village which is different for Kyekulula village.

All the documents alluded to by **DW1** were admitted as **Defence Exhibits and others for identification**.

During cross examination by Counsel Wasswa J, DW1 answered that **D. Exhibit No. 19** is his land which he was talking about, it is located at Kyekulula, Kisekka Parish, Kisekka Sub County, Lwengo District and that he is the

registered proprietor. That he knows where the disputed land is located at Kyekulula and is 42.04 acres. That it was at first Public land by the acquired title on it and settled on it in 1950 by his father Paulo Walusimbi, and he also herds there. That the Muluka Chiefs used to give out Public land in those days. He was born in 1953 and was informed of the facts by his father who brought him to the land in 1955 and had a *kibanja* on the other side and used the other side for grazing with the late Kanyemera; and it was 10 acres. That Kanyemera had 10 acres which he used Public Land for grazing, and he had nothing on it, but a haome on the 10 acres they sued to graze on the Public Land. That he is in occupation of the 10 acres which used to belong to his late father. That he grazes and farms but the plaintiff destroyed all his crops.

DW1 confirmed that he knew the plaintiff as a resident of Kilayangomaa son of the late Haji Kasule and that he is the owner of plot 14 on Mailo land, Block 392 and is his neighbor in the west. That Kanyemera's grave is on the disputed land. That what is stated in paragraph 5 is correct, and he confirmed that Hajji Ssemugenze has land at Kilayangoma. That Kalaveri and Silasi had no *bibanjas*, they just used the Public land to graze. That paragraph 10, the neighbors he refers to are Banakalori Brothers who surround him and Hajji Ssemugenze only; and even now it is Hajji Ssemugenze, Banakalolri Bothers, and Hajji Kamda who bought from the Brothers.

That the Area Land Committee inspected this land, he didn't know if they drew a sketch but left after the inspection. They were Hajji Kalibbala Chairman, Hajji Jamiru Kiyira Assistant Chairman, Hajjat Namusisi Gombolola Chief, himself, Chairman LC1, Haji Sulaiti Kyekulula, Haji Jamiru Kitanya Chairman of Bannakalori Brothers; and that the plaintiff was not there, he was told he was in the UK.

DW1 was availed a document and he responded that they did a sketch, but he didn't know who did it and was not the sketch for the land in dispute. That in that demarcation, he did not know this land, but he confirmed that it has Hajji Sulaiti Kitanywa, Bannakalori Bothers, Ssemogerere, Namuddu Eseri, that on the suit land he only knows Bannakalori Bothers.

He later answered that the Form is in respect of the land is talking of land at Busubi Parish, land at Kyekulula but it is not the suit land, that his name is inserted there but it is not in his handwriting. That the Area Land Committee members who signed it are Hajji Kalibbala, Mbabali Josepgh, Namusisi, Nabateregga Gombolola Chief and they are members of the Area Land Committee but that it is attached to another piece of land. That he has his other Form at home, therefore it is another document, but something else is attached.

That paragraph 14, he reported the acts of the plaintiff to police but was not given a reference. He admitted that paragraph 18, he instructed his lawyers to write to the Commissioner Lands and Surveys and he complained to the land Office but not Police. That the Registrar told him it was okay, he would correct it ND the dispute was that Hajji Ssemugenze took a different file to get a deed plan and it was forgery as he took 19/188 on a deed plan on the disputed land. That he had not yet got at title on the suit land. That the Registrar Galiwango told him it was ok he would correct it but he had not correspondence between him and the Registrar but relied on in the Commissioner Lands. That the forged deed plan was returned to Entebbe and cancelled it and they gave him copies. That annexure **K /D/ Exhibit No.14**, the plaintiff did not get a copy of it and it was not necessary to copy him in, he did not make the deed plan. That he has no complaint with any; land at Kirayangoma and didn't know that place. That the letter halted the process of registering the plaintiff on the suit land and caused the recalling of the deed plans, he left Kirayangoma and came back to Kyekulula. That it was trespassing on all his land not just adding to his. That he was involved with Ssembajjwe the Senior Staff Surveyor and he learnt they sued a wrong file for 119/188 instead of 119/190.

In respect of 17(e), that he got that information from Ssembajjwe the Senior Staff Surveyor and got a copy of the application. That he did not have the deed plan but found it at Entebbe, Ssembajjwe testified in court but he did not confirm that the land belongs to the plaintiff, that it is his land and it was a falsehood he got the freehold offer on 30.10.2010; the plaintiff got his leasehold offer on 30/3/2009. That it was forged and not signed from the start. That he was given 25 hectares in his Freehold offer and his title is 42 acres, and he didn't know the equivalent of 25 hectares.

Further, in cross examination by counsel Waduka, DW1 answered that **D. Exhibit No. 3 Ann B** is an application Form in respect of the suit land, it is 25 hectares, the neighbors are Ssemugenze, Hajji S Kikinywa Namwandu and Katula and it does not show the plaintiff as a neighbor. That his land is strictly at Kyekulula, application I is for Hajji Ssemugenze, he asked for Kilayangoma 20 hectares , the neighbors he indicated are Hajji Kasule, Hajji Lwanga and Hajji Kassagga. **DW1** didn't know if they are his neighbors, that he has never been in Kirayangoma, but confirms he has land at Kirayangoma and he applied for land at Kirayangoma. That Annexure 'N' from the Senior Staff Surveyor, it confirmed it was his land. That he did not come to the site on that date, it refers to the disputed land. That he saw him visit the land twice the day he took the photographs and went with three other people from Lands to confirm his ownership of the land and the plaintiff who was using his land. That the plaintiff

was not present; that the 2nd time he was present, the plaintiff was there and others not in court now and that **DW1** had already got the Certificate of Title. That he didn't know the findings, they wanted him to go to Kirayangoma which was the wrong place. That Kirayangoma and these are neighboring areas yet the suit land is at Kyekulula. That there are mark stones, there is no stream and that he uses part of the suit land and Medi uses the other; that he is utilizing his land at Kyekulula and plants nursery beds.

That paragraph 18, the Area Land Board visited the land, members of the Area Land Committee Kalibbala, Mbabali Haji, Jamil and Namusisi . The neighbors to the suit land were there, he did not see the sketch they drew that they said they were going for burial and the Report is attached. That when the District Land Board came, the chairman was not there, he had died, and the Vice was there, the 2nd time they came they remained in the car and wanted him to go to Kirayangoma the next village, that he feared to be murdered. He confirmed that he was in court when the surveyor testified and that his certificate of title does not overlap Kirayangoma.

In reexamination, DW1 answered that the 5 acres on which Kanyemera had a home are part of the suit land, that Paulo Walusimbi is his father, Kanyemera and Silasi and his sons were using the land for grazing, that Kanyemera had 5 acres in Kirayangoma and was buried there and are being used by Hajji Ndugwa and is not disputed, it is mailo land the suit land is Public land.

He then changed and stated that Kanyemira was not buried on the suit land and it was wrongly captured. That the sketch introduced by the plaintiff's counsel in cross examination is not the sketch of the suit land. That the land is on the same village, it was just annexed to the wrong document, the land is at Kyekulula and he has its file and applied to it. That Seemogeree is not his neighbor in respect of the suit land, Eseri Namwandu is his neighbour on another parcel of land. That paragraph 14, he reported to Police, forgave him when the land was declared his. That he saw the deed plans for the plaintiff at Entebbe in respect of the suit land. That Hajji Ssemugenze created FN 119/188, his original file is 119/190. That he told him he had luck, they had imprisoned him by the time he would have come out the title would have been out. That Mr. Okia called the deed plans. Annexure N Ssembajwe visited the land, asked people and took photos then he returned to the office, that he asked the Vice Chairperson Faridah and other residents, John Kajura, Ssentongo and Ssenkooge. That on the 2nd visit he did not go they wanted to go to Kirayangoma, but the disputed land is at Kyekulula and he had crops on it; he didn't know the land at Kirayangoma.

The second defence witness was **Nassolo Faridah, a female adult aged 39 years old, resident of Bisubi Parish, and Kisseka Sub County in Lwengo District [formerly Masaka District] (hereinafter referred to as DW2)**. She testified that before assuming the position of chairperson, she was the Vice Chairperson of Kyekulula LC1 since 2008 and was well conversant with some facts relating to the suit land in this matter. She had known Magunda Christopher as a resident of Kyekulula LC1 since she settled in the area in 2002 and has been seeing him using, cultivating and grazing cattle sheep and goats on the land in dispute then in Masaka and not Lwengo District. That Hajji Ssemugenze has never been the owner nor has he ever occupied the land in dispute for all the time she has stayed in Kyekulula. that in 2009, Magunda Christopher was cultivating the said land with pineapples, cabbages and maize, he stopped in May 2009 after he together with his workers were arrested by Hajji Ssemugenze allegedly for trespassing onto the suit land and during their detention at Masaka Police Station, his crops and houses on the land were destroyed.

She knew Hajji Ssemugenze Kasule together with his father the late Muhammed Kasule and other family members is located at Kirayangoma LC1; and that during all the time she has stayed in Kyekulula and held the position of responsibility has never seen Hajji Ssemugenze cultivating or utilizing the suit land.

During cross examination, DW2 confirmed that she knew Hajji Ssemugenze Kasule as a resident of Kirayangoma and had known him for a long time since 2009; she also knew Magunda Christopher as a resident of Kyekulula from 2002 when she came to the village and she knew the land in dispute and knew its boundaries which were on the road on the East it is bordering Banakaroli Brothers, West the late Medi Kasule, on the side Haruna Hmadi and other side the Ssemugenzes again. That the plaintiff is another neighbor, but the boundary of Kyekulula is bordering the plaintiff, but the land is at Kyekulula village but she couldn't tell the measurements and can identify it on the ground. That Namwandu Esera is not a neighbor and that there are many Ssemugenzes but she didn't know any neighboring the land. She knew Haji Kitalya and knew the land belongs to Magunda Christopher who is in occupation and used to farm on it by cultivating and grazing and that currently he is the only grazing. That Hajji Ssemugenze has never utilized the suit land.

That she was the Chairperson LC1, then not now from 2013. She knew the surveyor Henry Ssembajjwe and has ever seen him on the suit land in 2009; that he came alone to be shown the suit land Magunda and Hajji Ssemugenze were not present. That she knew the physical boundaries of Kirayangoma and

Kyekulula, there is a road to Kirayangoma and it is the boundary, one side is Kirayangoma and the other side is Kyekulula

DW2 denied seeing burial grounds on the suit land that Magunda has land at Kyekulula and not Kirayangoma and it is registered but she was not in office during the time it was registered and was Vice Chairperson. That it is inspected by Mr. Kalibbala the Area Land Committee, but she was not around then. that as a leader she had to know its physical boundaries and neighboring areas, that Magunda stopped cultivating it in 2009 he was arrested and put in prison, but is grazing on it. She knew that Haji Ssemugenze and his father has land in Kirayangoma, not Kyekulula. She was not present during the inspection by the Area Land Committee but know the land that was inspected but did not go to the land. That it is the only land in dispute between the parties and was told by the chairperson the. That Haji Ssemugenze was not present, that he did not tell her all the boundaries and it does not contain a nursery bed. That when Ssembajjwe came, she physically went to him, took him around the boundaries of the land and she saw him once. That Magunda and his employees were arrested under instructions of Hajji Ssemugenze allegedly for trespass on the disputed land.

In Reexamination, DW2 confirmed that Ssembajjwe came and she showed him the boundaries, he told her he was a surveyor and had come to see the land because they were going to register it but did not tell her the person who instructed him. That she went to the land and showed him the boundaries she knew, her boss the late Sulaiti Kitalya the Area LC was present.

DW2 was not present when the Area Land Committee inspected it, that she knew the land and its boundaries even before the Area Land Committee came and it is at Kyekulula and borders Kirayangoma. That the chairman who told her that the land was inspected is Hajji Sulaiti Kitalya, who was the Chairman and she was his vice. That she also visited the land in 2009 after Magunda's property was destroyed on the land and he was put in custody; she didn't know how the case of arrest ended.

In questions by court, DW2 responded that she knows where the disputed land is, and according to her, it is Government land, later Magunda Christopher applied for it and he got it, utilized it by cultivating on it and that Hajji Ssemugenze Kasule has never been under her LC1 when she was there. Magunda Kigozi was in her LC.

The third defence witness was **Christopher Ssebagala, a male adult aged 35 years old, resident of Kyekulula village, Bisubi Parish, Kisseka Sub County**

in Lwengo District (hereinafter referred to as DW3). He is the son of Mr. Magunda Christopher, the 1st defendant and well conversant with some facts relating to the suit land and added that the land in dispute was formerly being utilized by Magunda Christopher, his father, the late Paulo Walusimbi, Kanyemera and his two sons Sirasi and Kalavari for grazing cattle, sheep and goats. That Kanyemera died and was buried on the same land while Magunda Christopher, his late father Paulo Walusimbi, Kanyemera and his two sons Sirasi and Kalavari continued using the land. Later Christopher Magunda's father relocated to Masaka together with his above said two sons continued utilizing the suit land for grazing cattle, sheep and goats. That Sirasi and Kalavari went back to Rwanda following the capture of power by the rebels in 1994 and after their return to Rwanda, he continued using the land for grazing cattle, sheep and goats and for growing crops like cabbage, yams and pineapples without any interruption or any claim from any other person.

Further that Christopher Magunda had even constructed two houses on the land which were being used as accommodation for his workers and he same was destroyed when he together with Magunda Christopher and his workers were arrested in 2009 and detained at Masaka Police Station by Hajji Ssemugenze Kasule on allegations that they had trespassed on the suit land; and that even after their release, Magunda Christopher continued to use the land for keeping cattle, sheep and goats to the present day. That since 1994, Mr. Magunda Christopher has occupied and utilized the land to the present day and had even fenced it off by using a barbed wire fence. That after the destruction of crops and houses on the land, Mr. Magunda Christopher continued using the land and has been utilizing the land to rear cattle, sheep and goats thereon.

DW3 confirmed knowing Hajji Ssemugenze Kasule and his family have never owned any land in Kyekulula LC 1; and that the suit land belongs to Mr. Magunda Christopher who is using it to the present day.

During cross examination, DW3 confirmed that he is a son of Mr. Magunda Christopher and that he knows Hajji Ssemugenze Kasule as a resident of Kirayangoma. That he did not know the dispute between his father and the plaintiff, but came to give evidence to prove that the land is for his father Magunda Christopher at Kyekulula plot No. 17.

That he knows the land belongs to his father, they used to use it since he was a child and he has a title to it. That he heard Hajji Ssemugenze claiming it, and he knew its boundaries very well, Hajji Umaru Kamali on the east, Bannakaroli Brothers on the uppers ide, Muhammad Kasule on the lower side, Nduulu's land and Hajji Ndugwa on the western side. That Hajji Ssemugenze is not a neighbor

to the suit land but his late father Hajji Kasule, Namwandu Esero is not a neighbor but to another land, Hajji Sulaiti Kitalya is also not a neighbor and he did not know Ssemwogerere neighboring the suit land. That his father has 6 pieces of land and among them, one piece is bordered by Ssemwogerere and Hajji Sulaiti, Bannakaroli Brothers and he can't recall the acreage. That the title is in the process and not yet issued and that the land is not neighboring the land in dispute. That his father had no land in Kirayangoma all his land is at Kyekulula and that he knows the boundaries between the two villages. That there is a boundary, mark stones, Kirayangoma is Mailo land, but Kyekulula is Public Land and has a different Block with Kirayangoma. That Kyekulula is Block 907 while Kirayangoma is 392 and there is no dam separating the two. That as per paragraphs 2,3 and 4, he used to see his father Paulo Walusimbi, Kanyemera and his two sons grazing on the suit land around 1998. That he knows a bit about how his father acquired the land. That Kanywemera died and was buried on the suit land, his grandfather Paulo Walusimbi also left and came to Msaka, Sirazi and Kalaveri returned to Rwanda and his father remained using the land alone and later applied for the title on the land. That his father told all this and had documents but he couldn't recall when. in paragraph 4, he denied saying that Kalasa and Sirasi are Magunda's sons but of Kanyemera; that Magunda is utilizing the land, grazing on it and he goes there daily and part of the nursery bed is on the suit land but he didn't know how it came to be there and its owned by Medi Kasule who is not a relative of the 1st defendant but of Hajji Ssemugenze.

That Hajji Ssemugenze grazes on the neighboring land not on the suit land. He admitted paragraph 10 and that he grew up on the land and was the vice president of the area and all the people on the village and all of Hajji Ssemugenze's land.

In reexamination, DW3 responded that Nawwandu Esera is a neighbor to another piece of land belonging to Magunda Christopher but not in dispute. That Kalasa and Sirasi are not sons of Magunda but of Kanyemera. That his father rears cattle and goats on the suit land. That he talked of a nursery bed for Medi Kasule put there about 1 year ago. That Nmwandu Eseri is a neighbor to the land of his father and so is Sulaiti and Bannakalori Brothers and it is located at Kyekulula.

In questions by court, DW3 answered that there is another land of his father where Haji Sulaiti Namwandu Eseri and Bannakalori Brothers are neighboring and it is not disputed but different.

The fourth defence witness was **Robert Ssenkanja, a male adult aged 43 years old resident of Kyekulula village, Bisubi Parish, Kisseka Sub County in**

Lwengo District (hereinafter referred to as DW3). He testified that he was born in Kyekulula village and has been residing there since his childhood having been born on 1st December 1975 and well conversant with the facts relating to the suit land. He knew Magunda Christopher since childhood as a resident of Kyekulula village.

The rest of his evidence is a reflection of that of DW3 verbatim and I see no need to repeat it here.

During cross examination, DW4 answered that he is not related to Magunda Kigozi Christopher, but knows him and he lives at Kyekulula village. He knew Hajji Ssemugenze and that the land in dispute is at Kyekulula, e dint know the acreage but knew it physically and is not titled and belongs to Magunda Christopher, but he didn't know how he came to own it. That the Area Land Committee came and inspected it but he couldn't recall when but knew its boundaries. he didn't know when the members of the Area Land Committee inspected it that the Chairman Kyekulula was there and neighbors are Bannakalori Brothers, Ssemugenze and Hajji Bumali. That Haji Sulaiti Kikinywa, Namwandu Eseri are not neighbors to it; that Magunda Christopher's land is not in Kirayangoma but at Kyekulula.

That in 1988 Magunda Christopher his father Paulo Walusimbi and the sons of Kanyemere were grazing cattle, sheep and goats on the land. He could not recall when the father of Magunda died and he had last visited the land in 201 and found 2 houses which had been built on it destroyed when he was in Masaka Prison. That in August they were not there but evidence of where they were can be seen. That they were destroyed in 2009 in his presence. That Hajji Ssemugenze and his sons are not utilizing the land but Magunda Christopher.

In questions by Court, DW4 answered that he last visited the land in 2018 and by that time Magunda Christopher was utilizing the land; Kanyemera and his two sons and Magunda that they left in 1994 when the war in Rwanda was over and he didn't know when they last used the land

The Defendants closed their case and court adjourned to visit the locus in quo.

In resolving the first issue, I have carefully analyzed the above captured evidence and submissions of both sides. In the first place, I want to make it categorically clear that all the documents relied upon by the plaintiff as attached to his Complaint were never given Exhibit Numbers by my predecessor who recorded

this evidence; however, I have confirmed from the record that on 25th /05/2017, he admitted the witness statements of **PW1** up to **PW3** in their entirety. My understanding of this is that this included the annexures attached thereto although no Exhibit Numbers were allocated to the said annexures. The Court also directed the **2nd and 3rd defendants** to avail certified copies of these documents, and they complied and these were put on record. As such, I do not doubt their authenticity.

Having found as I have in respect of the plaintiff's annexures, I have evaluated all the evidence of both sides.

The court had an opportunity to visit the locus in quo in this case on.....and ascertained that Kirayangoma and Kyekulula are neighboring villages, sharing a common boundary. The evidence also reveals that currently, both sides which are claiming the same suit land on the ground and are utilizing it for various activities especially grazing animals, growing seasonal crops like cabbages and brick making.

Upon visiting, the disputed land, the boundaries as pointed out by the plaintiff and his witnesses were Hajji Kasule located diagonally down, Banakalori Bothers and one Lwanga.

The above was also pointed out **PW2** who stated during the *locus in quo visit* and he insisted that it is Kirayangoma village.

DW3 on the other hand pointed out neighbors at locus as John Katula, Namwandu Esero, Sulaiati Kitongo and Semwogerere; he later changed and said it was Haji Kasule, Haji Lwanga, Mwami Ndulu, Hajji Kamali and Hajji Kasule; and that it is at Kyekulula village.

Court was shown an old mark stone at Kirayangoma village where the suit land is said to start from and the plaintiff stated that it is where his land begins and separates the Mailo land from the disputed land. This was disputed by **DW2 Nassolo** who claimed that the mark stone was in a *musambya* tree nearby and that its where Kyekulula village, but despite her saying so, no mark stone was found there.

From the evidence and on the ground during the *locus in quo visit*, court ascertained that both sides were disputing the boundary between Kirayangoma village and Kyekulula villages. What was clear was that the two were neighboring each other. It was neighbored by Hajji Kamadi's land where the mark stone separating his mailo land from the Public land is located on the northern end, a banana plantation was found on the western side and Court observed that when

facing the suit land from the road, the defendant's land is on the right side and not the plaintiff, while Lwanga and Bannakaroli Brothers are situated on the southern side.

An analysis of the evidence revealed that:-

- a) The disputed land is located in Lwengo District (formerly part of Masaka District) and that explains why at the time, the transactions on it were made it was still under Masaka District which is reflected on all the exhibits.
- b) Each party to this suit is claiming the same parcel of land. Each side and their witnesses are giving a different account of the names of the village where the land is situated. While the plaintiff claims it is at referred to as Kirayangoma and traverses up to Kyekulula, the 1st defendant and his witnesses claim that it is located at Kyekulula.

A further analysis of the evidence led by both sides leads to the following conclusions:-

- a) That **PW4 Mr. Ssembajja Henry** the then Senior District Staff Surveyor who clearly stated that he inspected the suit land for several times: first he went with the 1st defendant alone and later after the 1st defendant was issued with a Certificate of Title and the plaintiff complained to his boss, and he was again tasked to go with all the parties together with the members of the Area Land Committee Kisseka Sub County confirmed that it is the same suit land that both parties were showing him.
- b) The above is confirmed by the evidence of the **Court Witness No. 1 (CW1)** that the suit land in terms of village is located at Kirayangoma village, Nakateete Parish, Kisseka Sub County, Lwengo District and not on Kyekulula village.
- c) The evidence also leads me to conclude that instructions were to survey this plot were issued to two different people namely: Hajji Ssemugenze Kasule and Magunda Kigozi Christopher.
- d) In respect of Hajji Ssemugenze Kasule and Magunda, it was under I/S numbers U/1/2016 (attached to his pleadings) and he was the first to survey the suit land under U/1/2016 issued on 18/03/2009 (attached to his pleadings) and its deed plan was approved on 08/06/2010 with an area of 17.2 Hectares
- e) The instructions issued in respect of Magunda Kigozi Christopher under U/1/0391 issued on 31/11/2011; and the deed plan was approved on 26/07/2012 with an area of 17.05 Hectares. Magunda Kigozi Christopher went ahead and acquired a Certificate of Title in respect of the suit land.

I have analyzed the above findings with the evidence of **CW1** who was tasked by court to ascertain exactly where the location of Plot 17 is by opening and establishing its boundaries on the ground. He was also tasked by Court to ascertain how many surveys had been done and approved for this plot.

In his findings admitted in Court as Court Document No.1, he testified that using Global Positioning System Equipment (Trimble R8 Series) in Real Time Kinematic Mode:

- a) The plot is actually located at Kirayangoma, Nakateete, Kisseka, Masaka District and not at Kyekulula as the defendant and his witnesses were claiming.
- b) He also found that instructions to survey this plot were issued to two different people namely: Hajji Ssemugenze Kasule and Magunda Kigozi Christopher under I/S numbers U/1/2016 and U/1/0391 respectively.
- c) Further, that plot 17 was first surveyed under U/1/2016 issued on 18/03/2009 and its deed plan was approved on 08/06/2010 with an area of 17.2 Hectares for Hajji Ssemugenze Kasule.
- d) Plot 17 was later surveyed under U/1/0391 issued on 31/11/2011 and deed plan was approved on 26/07/2012 with an area of 17.05 Hectares for Magunda Kigozi Christopher.
- e) That the shape and location of plot 17 correctly fits the representation on the cadastral map.
- f) A freehold offer was issued to Hajji Ssemugenze Kasule under Minute MSKLB 005(A) /03/09 9ii) as per Appendix A. Later a different Freehold offer was issued to Magunda Kigozi Christopher under Minute MSKLB 36 (32)/2009 OF 12/10/2009.
- g) A Certificate of Title was produced following the second survey and registered in the names of Magunda Kigozi Christopher on 26/09/2012 as per Appendix B.
- h) His final recommendations were that Hajji Ssemugenze Kasule who was issued with the first Freehold offer should have been issued with the title.

Having evaluated the above findings critically, and compared the above evidence with that of the other witnesses who testified in Court for both sides and the Court's own findings during the *locus in quo visit*, I have arrived at a conclusion that the suit land on the ground suit land is situated on Public Land and not on the Mailo land which neighbors it.

Secondly, the suit land falls on the side of Kirayangoma village, but a very small part falls in Kyekulula village.

Thirdly, it is also my finding after an examination of the certified copy of **Form 4 Application for Conversion from Customary Tenure to Freehold Tenure/ Grant of Freehold (Annexure A to the Plaintiff)** for the plaintiff approved by the 3rd defendant vide **Minute No. MSKLB005(A) 03/09(ii)** that the Plaintiff applied for and was granted the suit land at Kirayangoma, Nakateete, Kisseka Sub County, Bukoto in Masaka District **(as it was then, now Lwengo District)** which was at the time of allocation occupied and utilized by himself (Hajji Ssemugenze). The neighbors were indicated as Mwamadi Kasule, Haji Lwanga and Kasaga John. It is also indicated that he had developed it and was using the suit land to graze animals and grow seasonal crops.

On the other hand, I have also found that while the 1st defendant was given a Certificate of Title on land with the same description, but indicating a different village of Kyekulula, yet his land is actually a distance away neighboring on the right and is not the one named on the Certificate of title he is holding on the ground.

I therefore agree with the submissions of learned counsel for the plaintiff when he concluded that it is not in dispute that both the plaintiff and the 1st defendant applied for and were granted Freehold Offers in respect of the same suit land although for the Plaintiff it was indicated as situate in Kirayangoma while for the 1st Defendant, it was indicated as situate at Kyekulula village.

Both the plaintiff and 1st defendant's applications respective applications were carried out by the same Area Land Committee of Kisseka Sub County which recommended them to the 3rd defendant that each be issued with a Freehold offers in respect of the parcels of land they had applied for.

It is also not in dispute that the 3rd defendant issued both the plaintiff and 1st defendant Freehold offers, who both were given instruction to survey and deed plans.

Land on the ground does not shift or move from its location on the ground; and I can safely conclude that the suit land claimed by both sides is still in its original location.

The unfortunate thing for both sides is that the confusion created by the Area Land Committee of Kisseka Sub County was bound to be found out.

The position of the law is that in order for exclusive possession to confer or constitute proof of ownership of a parcel, there ought to be evidence of enjoyment

by this person, the right to gather and use the fruits of the land; and *abusus*, the right to alienate i.e. to sell, lease, grant as a gift or mortgage.

In respect of this case, since it is undisputed that land both parties are claiming the same parcel of land and that the circumstances that led to the confusion of who actually is the lawful owner of the suit land started from the Area Land Committee of Kisseka Sub County which recommended the same piece of land to two neighbors on neighboring villages, I do not agree with the submissions of learned counsel for the 1st defendant that the absence of the of the Area Land Committee supporting the Plaintiff's is an indicator that the land the Plaintiff was applying for was not inspected by the Kisekka Sub County Area Land Committee to confirm that the same was in possession and had been utilized developed by the Plaintiff prior to applying for conversion to freehold.

I also do not agree with the conclusions he drew, instead, my findings are that that since this is one and the same piece of land on the ground as proved by both **PW4 (Ssembajwe Henry)**, the District Land Surveyor, Masaka District and **CW1** who confirmed this on the Survey Report carried out on suit land. The same was also confirmed by at **PW2 (Medi Kasule)**, a brother to the Plaintiff who testified in cross examination that the Plaintiff has land in Kirayangoma in Nakateete Parish which he applied for and was using it until he applied to be given a title.

Although **DW1 Magunda Christopher** testified that the land he was claiming and on which he got the Certificate of Title is located at Kyekulula LCI, Busubi Parish, Kisekka Sub county in Lwengo District (formerly part of Masaka District) since 1955 having settled there in 1950 when his family moved from Kitabazi in Masaka and settled in Kyekulula village after the his father a one Paul Walusimbi bought a *kibanja* at Kyekulula village and that Kanyemera and his two sons namely Sirasi and Kalaveri utilized the suit land for grazing cattle, sheep and goats; I have critically analyzed his evidence and found that he and his witnesses all knew the plaintiff very well before as an occupant of the neighbouring village. The evidence also reveals that **DW1 Magunda** was allocated three different portions of land near the parish of Busubi according to the minutes; and that he used different forms to get a title for the suit land.

This Court is alive to the law governing land ownership in Uganda at **Article 237(3) of the 1995 Constitution (as amended)** as submitted by learned counsel for the 1st defendant; however, although learned counsel for the defendant submitted that a reading of the letter of **PW4 Sembajwe Henry** and the response by the Area Land Committee points to collusion between the two, I have not found any evidence of that.

My own findings and conclusions after a critical examination of the plaintiff's evidence confirms to me that save for the evidence of **PW2 Hajji Kalibala** who was the then Chairman of the Area Land Committee of Kiseka Sub County at the time both parties respective claims and who **during cross examination**, was deliberately telling lies and trying to confuse court, the rest of the evidence heavily supports the plaintiff's claim on the suit land.

Furthermore, from the evidence of the plaintiffs' witnesses and the cross-examination of the 1st defendant and his witnesses, it is clear that the land in dispute is the same land which the plaintiff was occupying as a customary tenant; and later on applied to the 3rd defendant, inspected by the Area Land Committee of Kiseka Sub County which later recommended him to be granted a Freehold offer as a customary tenant.

The fact that the Plaintiff was never issued with his title and his file kept on getting lost in the Land Registry at Masaka cannot be blamed on him. It is also clear to me that the Area Land Committee of Kiseka Sub County knew exactly what they were doing when they caused the confusion in recommending both parties. As to what they should have done and their failure to do it cannot also be blamed on the plaintiff in this case; and I believe this explains the shoddy way in which the Area Land Committee they carried out their work. Their Report is dated 4/01/2013, the same day when instructions were given.

A critical examination of the first lease offer and subsequent application for a conversion from customary tenure to freehold tenure in respect of the land comprised in FRV 1285, Folio 20 also known as Buddu Block 907 Plot 17 measuring 17.05 hectares at Kyekulula village, Busubi Parish, Kiseka Sub County, Lwengo District on the 26/5/2006 vide Minute No. MSKLB 76 (b) (i) 05/05 of 18/52006 granted to the 1st defendant clearly shows that he was granted a lease for a period of 15 years commencing from 2006.

Be that as it is, the documents used to grant this leasehold are suspect since they clearly refer to a different piece of land located at Kyekulula which evidence has been proved not to be the disputed land.

As for the freehold offer on 13/5/2009 vide MSKLB 36 (32) 2009 of 12/10/2009 for purposes of converting his leasehold to freehold, although it was submitted for the 1st Defendant that he continued using the land for grazing cattle, sheep, and goats and for growing crops like cabbages, yams and pineapples without any interruption or claim from any other person after Kanyemera died and was buried on the suit land as claimed by **DW1**, it is clear that there was no grave of Kanyemera pointed out to court on the suit land, but instead, the evidence

confirms that Kanyemera was buried on the land of one Ndulu neighbouring the suit land.

I have also found that other than **DW1**, his witnesses **DW2 (Nassolo Faridah)**, a former L.C.1 of the area, **DW3 (Christopher Ssebagala)** a son to the 1st Defendant and **DW4 (Robert Ssenkanga)**, untruthful as far as the location of the suit land being located at Kyekulula village.

The only conclusions I can therefore draw from all the evidence of both sides is that the 1st Defendant is a foreigner to the suit land; and he only laid his claim on the same through deceptive and active connivance of the Area Land Committee Members of Kisseka. It is also clear that the mediocracy exhibited in the way the title he is holding was recommended by the District Land Board and later issued by the Land Office Masaka also confirms that there was connivance with officials from the Land Office to grant this title.

Secondly, although it is clear that both sides were utilizing the suit land at the time of the *locus in quo visit*, the evidence adduced firmly confirms that the Plaintiff was the customary owner of the suit land who was utilizing the suit land before he applied to convert it into Freehold title; and not the 1st defendant since the suit land is clearly located at Kirayangoma, Nakateete, Kisseka, Lwengo District and not at Kyekulula Busubi Parish, Kisseka Sub County, Lwengo District as the defendant and his witnesses were claiming.

For all the reasons I have given above, my final decision on this issue is that the rightful owner of the suit land is the Plaintiff who was granted a lease offer on the same before the 1st defendant lay claims to it.

Issue 2: Whether or not the 1st Defendant obtained Registration of the land comprised FRV 1285 Folio 20 Buddu Block 907, Plot 17 Land situate at Kyekulula by fraud?

It was submitted by learned counsel for the plaintiff that in the case of ***Patel vs Patel (1992-1993) HCB at 137***, Karokora J (as he then was) held that “*a certificate of title is conclusive evidence of ownership and no submission or oral evidence can be called to vary the certificate of title unless of consideration or illegality is proved*”.

That fraud was defined in the case of ***Fredrick Zaabwe vs Orient Bank & Others, SCCA No.4 of 2006***, to mean; “*An intentional perversion of truth for*

purposes of including another in reliance upon it to part with some valuable thing...” that in the matter of **Ruzhwengyibwa** and **in the Matter of Ruzigana, Miscellaneous case No. 48 of 1976**, Court held that; “*knowledge of other peoples’ rights or claims and the deliberate acquisition of a registerable title in the face of such knowledge is fraud*” and Section 77 of the Registration of Title Acts is to the effect that a certificate of title procured by fraud is void.

That according to the two surveyors Henry Ssembajja and Patrick Kasujja who testified as witnesses, the 1st defendant used the same deed plans which had been issued to the plaintiff first yet 1st defendant maintains that their lands are different, but **Kasujja Patrick CW1** confirmed that the suit land is the same land to which the plaintiff was granted a freehold offer first, deed plans and instruction to survey but it was the 1st defendant who was issued with the certificate of title.

That the 1st defendant according to his form 4 which is the application for conversion a customary tenure to freehold tenure indicated that the land he applied for was neighbored by John Katula, Namandu Esero and Hajji S.Kitanya yet in his witness statement and evidence in cross-examination, he denies the said persons being his neighbors in respect of the suit land. That even form 23 which is demarcation form for certificate of customary ownership indicates the sketch map drawn by the members of the Area Land Committee of Kiseka Sub County for the land the 1st defendant had applied for and even the neighbors who included Namwandu Esero, Ssemogerere, Hajji Sulati Kitanywa and Banakalori brothers but the 1st defendant in cross-examination denied all of them his neighbors yet they appear for the forms tendered in by himself.

Further, that the Supreme Court in the case of **Fr. Narsensio Begumisa & 3 Others Vs. Eric Tibebaga, Civil Appeal No.17 of 2002** in his lead judgment Mulenga JSC (RIP) while faced with similar scenario like the one in the instant case observed that; “*In my view, it follows that the inviolability of a certificate of title is circumscribed in as much as it is confined to the particulars in the certificate. The court therefore, cannot receive the certificate as evidence of particulars, which are not set forth in it. For that reason, and particularly in view of the defence, the respondent also had to show that the particulars in Exh.P1, relate to the suit land on the ground. He fell far short of doing that. He did not show, and I have not found, any nexus between his application for title and the certificate he obtained. The most significant gap is the lack of any independent evidence to prove the respondent's assertion that the land, which the adjudication committee verified as his, was surveyed, let alone to show that Exh.P 1 was issued on strength of a*

survey of that land. The remark by Berko JA, that the respondent tried to show the Commissioner a print where a mark-stone had been removed and the latter did not listen, cannot be a substitute of such proof. I must emphasise that the inviolability of a certificate of title under the RTA is hinged on a survey that determines and delimits the land to which the certificate relates’.

They submitted that if the application for the land the 1st defendant made to the 3rd defendant and the area land committee of Kiseka Sub County to be considered the land which the 1st defendant applied for is completely different from the land on which the certificate of title comprised in FRV 1285 FOLIO 20 also known as Buddu Block 907 Plot 17 measuring 17.051 hectares relates to.

Further, that according to the evidence of the Chairperson Area Land Committee and **Kasujja Patrick CW1**, the suit land on which the 1st defendant was issued a certificate of title was the land on which the plaintiff was issued freehold offer, deed plan and instruction to survey first before the 1st defendant obtained the same and consequently a certificate of title before the plaintiff; and they prayed that this issue too be answered in the affirmative.

In reply, learned counsel for the 1st defendant cited the case of **Fredrick J.K Zaabwe vs. Orient Bank Ltd & 5 Others Civil Appeal No. 4 of 2006, Justice Bart Katureebe** (as he then was), who wrote the lead judgment and observed that “...an allegation of fraud needs to be fully and carefully inquired into. Fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others...” **Bart Katureebe JSC** Supra then defined fraud citing in approval the Blacks’ Law Dictionary 6th Edition page 660 as; “An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture.....A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestion or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated. Bad faith and fraud are synonymous, and also synonymous of dishonesty, infidelity, faithfulness, perfidy, unfairness, etc.....”

“Fraudulent” is defined in the **Black’s Law Dictionary** as; *“To act with “intent to defraud” means to act wilfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.”*

That in the case of **Kampala Bottlers Ltd vs Damanico (U) LTD, (S.C. Civil Appeal No. 22/92)**, the Supreme Court held that even if fraud is proved, it must be attributable directly or by implication, to the transferee. **Wambuzi, C.J (as he then was)** stated at page 7 of his judgment that; *“... fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.”* The learned Chief Justice further stated that; *“Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.”*

In addition, that from the meaning of fraud as defined in the cited authorities and submitted that fraud must be intended to take advantage over another or any unfair way by which another is cheated. That in land matters, for one to rely on fraud, he must prove that he/she had an interest in land which interest was defeated by the fraudulent acts of the other party. That in this regard, it was incumbent upon the Plaintiff to prove that he had any interest in the land prior to the defendant’s acquisition of the lease which interest was defeated by the 1st Defendant’s lease application and subsequent granting of freehold interest and the certificate of title thereof. That fraud in land matters cannot be committed against the entire world but it is committed against a person having interest in the land with the intention of defeating that other person’s interest in the land.

That it is therefore a requirement that a person who alleges fraud must prove that he or she has/had an interest in the land that the person who is alleged to have committed fraud or wanted to defeat. That while listing the particulars of fraud in the plaint, the plaintiff only pointed out two particulars against the 1st Defendant to wit;

- -Applying for a freehold title on land which he clearly knew that the plaintiff was in occupation and had already made the same application in respect thereof;
- Going to survey the said land well knowing that it had already been surveyed by the plaintiff to process the certificate of title; and

- the 2nd Defendant siding with the 1st and defendant specifically the 3rd Defendant who was well aware that it was the plaintiff in occupation of the suit land and had already an application thereto first before the 1st Defendant.

They submitted that at the time the 1st Defendant applied for freehold interest up to the time when he was granted with the freehold offer, the plaintiff had no interest in the land as he was neither the owner nor in occupation of the suit land. That when applying for conversion from customary tenure to freehold tenure, the 1st Defendant indicated the then use of land as farming and housing.

That the land that was applied for by the Plaintiff is totally different from the land applied for by the 1st Defendant. That whereas the Plaintiff indicated in his application for conversion from customary to freehold tenure that the land he applied for was measuring 20 located in Kirayangoma village/ward, Nakatete Parish/zone, Kiseka Sub county/Town, Bukoto County/Division in Masaka District, the land that the 1st Defendant applied for measures 25 acres located at Kyekulula village/ward, Busubi Parish/ zone, Kiseka Sub County/Town, Bukoto County/Division in Masaka District.

That the location and the adjacent land the plaintiff and 1st Defendant applied for in terms of villages and parishes are totally different especially if one puts into consideration the size of the land being applied for of 20 and 25 hectares. That it cannot be the same.

That be that as it may, the 1st Defendant was first recommended by the Area Land Committee to register the land from customary ownership to freehold on 1st December 2008 on grounds that he had managed to develop the land through farming, and that the area land committee had not received any complaints from the other people since the public notice was pinned up to the inspection time and that the 1st Defendant had occupied the land for a very long time and fenced it and had already been allocated to the 1st Defendant over which the 1st Defendant had a certificate of title as per annexure "B" attached to the 1st Defendants Written Statement of Defence. That the Plaintiff was only recommended on 12th January 2009 and the members of the Area land Committee could not have forgotten that the same land had already been recommended for the 1st Defendant. That the recommendation given to the plaintiff must have been for a different area as indicated in the plaintiff's application for conversion from customary to free hold.

That even in his application for conversion from customary to freehold tenure to freehold, the Plaintiff in Annexure attached to the Plaintiff indicated that the

location of the land the subject of the application as Kirayangoma village which is a different location from the suit land. The evidence of PW2 (Medi Kasule) in cross examination is that the Plaintiff had land in Kirayangoma in Nakateete Parish which he applied for. This proves that the Plaintiff has never owned and never been in occupation and possession of the land in Kyekulula that was allocated to the 1st Defendant. The Plaintiff therefore had no interest in the suit land capable of being defeated by the 1st Defendant's application and subsequent grant of the freehold offer and acquisition of certificate of title in the suit land. That the Plaintiff did not have any interest in the suit land that he alleges was fraudulently defeated by the 1st Defendant's acquisition of a certificate of title.

That before they submit on whether the 1st Defendant acquired the freehold certificate of title for land comprised in FRV 1285 Folio 20 Buddu Block 907, Plot 17 land situate at Kyekulula fraudulently, the history of how the 1st Defendant acquired the suit land, it is an agreed fact that the 1st Defendant is the registered proprietor for land comprised in FRV 1285 Folio 20 Buddu Block 907, Plot 17 land situate at Kyekulula. That that admission is however being subjected to the Plaintiff's claim that the 1st Defendant got registered as proprietor of the suit land fraudulently. That prior to the 1st Defendant's application for a lease interest over the suit land in 1977, the 1st Defendant together with his late father, the late Paul Walusimbi, Kanyemera and with his two sons to wit; Sirasi and Kalaveri utilized the suit land for grazing cattle, sheep and goats.

That it was the 1st Defendant's evidence that before the grant of the lease offer in 2006, he was in occupation of the same land and had established a mixed farm thereon which he was still operating at the time the suit was filed and after the grant of the lease, he continued in occupation of the suit land, carried out further development on the land without any claim of right or intervention from the Plaintiff.

They added that later, on the 28th day of September, 2008, the 1st Defendant applied for a conversion of the leasehold interest into freehold interest as indicated in annexure "B" to the 1st Defendant's Witness statement and thereafter, in November, 2008, the members of Kisekka Sub County Area Land Committee gave notice informing the public of its inspection of the land and called all persons who had interest in the land and owners of the adjacent land to attend the meeting of the committee scheduled for 10th November, 2008 to forward their claim if any. That the public meeting was held and no one disputed the 1st Defendant's ownership, possession and utilization of the land as per the report of the members of Kisekka Sub County Area Land Committee attached as annexure "D" to the 1st Defendant's Witness statement.

That on the basis of the report by the members of Kisekka Sub County Area Land Committee, the 1st Defendant's application was approved on 12th October, 2009 and the decision of the Masaka District Land Board was signed by both Rev. Fr. Kayita Joseph (the Chairperson Masaka District Land Board) and Kazibwe Elisah (the Secretary of Masaka District Land Board) vide MSKLB 36(2)/2009 of 12th October 2009 for purposes of converting his leasehold to freehold and his as per the freehold offer attached to 1st Defendant's Witness statement and marked as annexure "E". That Plaintiff's application was purportedly approved and signed by Kazibwe Elisah (the Secretary of Masaka District Land Board) without the involvement of the chairperson. That in furtherance of the grant of the 1st Defendant's freehold offer, the District Land Surveyor gave instructions to undertake survey of land measuring approximately 25 hectares at Kyekulula as indicated in the letter dated 18th November, 2011 appearing as annexure "H" attached to the 1st Defendant's witness statement.

They further submitted that the 1st Defendant after obtaining the freehold offer continued in occupation of the land and utilization of the same for grazing cattle, sheep and goats and for growing crops like cabbages, yams, pineapples without any interruption or claim from any other person until the year in 2009 when the Plaintiff came onto the suit land without any color of right and falsely claimed ownership of the land, reported a case of threatening violence and malicious damage to property and caused the 1st Defendant's arrest together with his children, workers to wit; Ssebagala Christopher, Sekabira Ronald, Kigozi Raphael, Kalyango, Kalema and Kayondo who were detained at Masaka Police station on allegations of threatening violence and malicious damage to property. That the same information as given above is contained in the Defendant's witness statement, particularly paragraphs 3-9 of the Defendant's witness statement. That from the above facts, the 1st Defendant applied and was granted a freehold offer after passing through all the procedures required of any applicant. That the rest of the process was handled by the 2nd, 3rd Defendants together with the Department Surveys and mapping and the 1st Defendant was eventually issued with a freehold certificate of title for the land he applied for.

That it is not at all indicated in the pleadings by the Plaintiff or in his evidence that the 1st Defendant had a hand or any form of influence in processing the certificate of title apart from applying for a leasehold and subsequently a freehold tenure and fulfilling what was required of him. That there is no any evidence which was adduced by the plaintiff to prove that the 1st Defendant was aware of the plaintiff's application for free hold interest in the suit land and defeated it and there is no any instance of fraud which is attributable to the 1st Defendant

as a transferee either directly or by necessary implication. The Plaintiff has not adduced evidence to prove that the 1st Defendant as a transferee of the suit land from the Masaka District Land Board is guilty of some fraudulent act or he knew of such act by somebody else and took advantage of such fraudulent act. That the 1st Defendant is an innocent person who applied for land which he occupied and complied with what he was required of by the Masaka District Land Board and the Department of Surveys and Mapping until he was issued with a certificate of title.

That in response to the Plaintiff's allegations in his submissions that the two surveyors Henry Ssembajja and Patrick Kasujja testified that the 1st Defendant used the same deed prints which had been issued to the Plaintiff, this averment by the Plaintiff was not pleaded as a ground of fraud and is a departure by the Plaintiff from his own pleadings since the Plaintiff did not mention it in the particulars of fraud in his Pleint. That it was belatedly brought up during the Plaintiff's submissions and neither is such evidence on court record. That be as it may, **DW5** told court the 1st presented documents all the documents required for titling the land and that the deed plans for the plaintiff had been cancelled by the Permanent Secretary as indicated in a letter dated 18th April 2012 signed by Yafesi Okia and the returned as per the letter dated 29th April by Ssembajjwe Henry (**Exh.DE13**). It was belatedly brought up during the Plaintiff's submissions and neither is such evidence on court record. That it is not possible that the deed prints allegedly issued to the plaintiff for the land at Kirayangoam measuring 20 could end up being used by the 1st Defendant to create a certificate of tile for the land at Kyekulula measuring 25 acres.

Furthermore, that Patrick Kasujja was not a plaintiff's witness but a court witness. That the report filed by Kasujja is suspicious and should not be relied on by court because he did not indicate to court that he indeed went to the ground. That both Sembajja and Kasujja did not prove to court how the deed prints allegedly issued to the plaintiff for the land at Kirayangoam ended up being used by the 1st Defendant for the land at Kyekulula. This is because they originated from different file with different reference numbers. That the 1st Defendants freehold application was duly approved by the 3rd Defendant and a free hold offer was granted to the 1st Defendant MSKLB 36(32)2009 of 12/10//2009 after following the due process and after going through all the relevant steps sanctioned by all the relevant offices and the 2nd Defendant proceeded to act upon it by issuing a certificate of title in favor of the 1st Defendant. That any anomalies if any cannot be attributed to the 1st Defendant. That in a letter dated 18th July, 2012, (appearing as annexure "O" attached to

the 1st Defendant's Witness statement) from Christine Nakandi, Senior Land Officer, Masaka and addressed to the Commissioner, Department of Mapping and Surveys clearly states that; "upon perusal of the records, she noted that the Plaintiff was under minute No. MSKLB 005(A)(ii) allocated 20 hectares of land situate at Kirayangoma Kiseka which is totally different from the disputed land and confirmed that the 1st Defendant as the rightful owner of the suit land and recommended that the deed plans in respect of the same to be issued in the names of the 1st Defendant.

That the burden of proof of every allegation in the plaint is imposed upon the Plaintiff under **Sections 101, 102 and 103 of the Evidence Act Cap. 6**. The Plaintiff failed to adduce evidence to prove the alleged fraud imputed on the 1st Defendant. That burden is legally imposed on the Plaintiff and it does not shift to the 1st Defendant. That be that as it may, the 1st Defendant as a lay man applied for a freehold offer and the same was granted to him and subsequently a certificate of title upon satisfying all the conditions imposed upon him by the controlling authority. That it was not the 1st Defendant who granted himself the suit land as this was the mandate of the Masaka District Land Board and any errors if any on the part of the controlling authority cannot be visited on the 1st Defendant 15 years later as a ground of fraud to defeat the 1st Defendant's title secured without any form of fraud directly to defeat the Plaintiff's interest in the suit land if any. That the sum total of the evidence of DW1 is that the existence of a certificate of title is the last stage and before it is issued all other steps must have been complied with. This implies that no certificate of title can be issued without passing through all the preliminary stages.

That the allegation that the 1st Defendant used the deed plans which had been issued to the plaintiff to process his certificate of title is false because the 1st Defendant's freehold offer had a reference number LAN113/287 and the plaintiff's reference number is LAN.119/190 which are totally different. That in addition, the plaintiff's deed plans were cancelled by Dr. Yafesi Okia, the Permanent Secretary Ministry of Lands, Housing and Urban Development and this was communicated to the District staff Surveyor Masaka District Land Officer by a letter dated 18th April 2012 (**DID1**) who requested for the deed plans to be sent back. That indeed, by a letter dated 20th April 2012 (DE12), Ssembajjwe Henry, the Masaka District Staff Surveyor forwarded deed plans that had been issued to the Plaintiff. It is therefore untrue that the 1st Defendant used the deed plans for the plaintiff to create his certificate of title. That the plaintiff's deed plans were cancelled among others due to the fact that the Plaintiff's freehold offer has reference No.LAN119/190 yet the application for deed plan

quotes reference No. LAN119/188 which is different from the reference on the lease offer.

Further, that the 1st Defendant has no hand in the processing of land title but merely presents documents and since he has a title which is conclusive proof of evidence of title, he must have presented proper documents and that the department responsible was satisfied with his documents. That DW1's evidence above is further corroborated by the contents of a letter dated 13th August, 2014 (appearing as annexure "P" attached to the 1st Defendant's Witness statement) from **Satya Semu Mangusho, the Principal Land Management Officer** who further states that; *"...So it means that the subsequent transactions of giving a freehold offer to Hajji Kasule (Plaintiff) over land which had already been leased to Mr. Magunda (1st Defendant) is null and void. And Hajji's documents are in fragrant breach of the law and land regulations and are tainted with fraud. Therefore, it would be futile on our part to cancel Magunda's (1st Defendant's) title."*

That for completeness of the record, we wish to submit that the Ministry of Lands, Housing and Urban Development has been very clear in all its correspondences touching the suit land as one that was applied for and granted to the 1st Defendant who got registered as proprietor on 26/6/2012. That whereas the Plaintiff claims to have been a customary tenant in occupation of the suit land which forms part of the 1st Defendant's freehold title, he failed to prove his customary occupation as claimed which burden they failed to discharge since no evidence was led in proof of that fact. That it is very unfair that the plaintiff who actually trespassed on the 1st Defendant's land and caused the dispute are before this Honourable court seeking for cancellation of the 1st Defendant's certificate of title. That the Defendant as a registered proprietor had all the rights to deal in his land as he wished. There was nothing unlawful and fraudulent done on the land and the alleged fraud was not pleaded by the Plaintiff as a particular of fraud or as a fraudulent attempt to defeat their interest in the suit land if any existed.

They also relied on the case of **Kampala Bottlers Ltd vs Damanico (U) LTD, (S.C. Civil Appeal No. 22/92)** the Supreme Court held that even if fraud is proved, it must be attributable directly or by implication, to the transferee. **Wambuzi, C.J (as he then was)** stated at page 7 of his judgment that; *"... fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."* That the Defendant duly complied with all that was required of him as an applicant and the Plaintiff did not adduce any evidence

to prove that indeed the Defendant had any hand in the omissions committed 2nd and 3rd Defendant if any. That the 1st Defendant acquired the freehold certificate of title for land comprised in FRV 1285 Folio 20 Buddu Block 907, Plot 17 land situate at Kyekulula without any scintilla of fraud on his part. That in conclusion of this issue, we submit that since proof of fraud carries a heavier burden beyond the usual balance of probabilities as generally applied in civil matters, the Plaintiff has miserably failed to either directly or indirectly show that the 1st Defendant was involved in or committed any fraud the intention of defeating the Plaintiff's interest in the suit land if any. They prayed that issue two be resolved in the negative.

In resolving this issue, I have addressed my mind to the law relating to fraud. Both learned counsel ably submitted on it, but I wish to emphasize that the definition of Fraud is now settled law; and I agree with the submissions of both sides as far as the definition of fraud is.

According to case of **Edward Mpoza Katuluba & Another vs- John Lukoma & 2 others Civil Suit No.4 of 2016** with approval referred to the case **F.I.K Zaabwe vs. Orient Bank & Other S.C.C.A No.4 of 2006** in which Hon. Justice Katureebe relying on the **Black Dictionary 6th Edition at page 660** stated the definition of fraud relying on **Black's Law Dictionary 6th Ed. at page 660**, defines fraud to mean: -

"...the intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right. It is a false representation of a matter or fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury".

Further, in the case of **Edward Mpoza Katuluba & Another vs- John Lukoma & 2 Others (supra)** court also referred to the case of **Kampala Bottlers Limited versus Damanico (U) Limited SCCA NO. 22 of 1992** where Justice Wambuzi clarified that *"Fraud must be attributed to the transferee. I must add that it must be attributed either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act"*.

Again according to the learned authors **Kerr on the Law of Fraud and Mistakes 5th Edition, part i page 1**, fraud is defined in contemplation of Civil Court of Justice to include *'all acts, omissions confidence, justly reposed and injurious to another or by which undue or unconscientiously advantage is taken of another.*

All surprise, trick, cunning, dissembling and unfair way that is used to cheat anyone. Fraud in all cases implies a willful act on the part of anyone whereby another is sought to be deprived by illegal or inequitable means of what he is entitled to’.

The above was expounded upon by the Court of Appeal in the case of **Yakobo M, Ssenkungu & Others vs- Cresensio Mukasa Civil Appeal No. 17 of 2014** relied on the definition of fraud in the case of **Husky International Electronics, Inc. vs- Ritz No. 15-145 of 2016 the Supreme Court of United States of America** and expanded the meaning of actual fraud to include ‘*fraudulent conveyances, typically involve transfer to the close relative, a secret transfer of title without possession or for grossly inadequate consideration’.*

The burden of proof in cases of fraud requires a standard beyond the balance of probabilities as per the case of **Bugembe Kagwa Segujja vs Steven Eriaku & Alvin Ssetuba Kato** with approval referred to the case of **Sebuliba vs Coop Bank Ltd (1987) HCB 130** where court stated that ‘*the standard of proof in fraud cases is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases.*”

And this court is acutely aware that the standard of proof in fraud cases is heavier than on the balance of probabilities generally applied in civil matters. See also **Kampala Bottlers Ltd vs Damanico (U) Ltd CA No. 22/1992** and **Ntege Mayambala v Christopher Mwanje CA No. 72/93 [1994] I KALR 67.**

In the case before me, learned counsel for the 1st defendant put up spirited arguments that the 1st defendant was issued with the Certificate of Title after following all due process; however, having evaluated the evidence for both sides and taking into account the position of law under **Section 101(1) of the Evidence Act** which places the onus to prove his interest in the suit land on the plaintiff; and specifically relating it to **s. 176 (c) Registration of Titles Act** which gives locus to any person deprived of any interest in land by fraud to bring an action to recover that interest in the land against the person registered as proprietor of that land through fraud, or against a person deriving title otherwise than as a transferee bonafide for value through fraud, my findings according to the two surveyors **PW4 Henry Ssembajja** and **CW1 Patrick Kasujja**, firmly confirms that the 1st defendant used the same deed plans which had been issued to the plaintiff first, yet 1st defendant maintains that their lands are different.

The evidence led before this court has already confirmed that the suit land is the same land to which the plaintiff was granted a freehold offer first, deed plans

and instruction to survey, but it was the 1st defendant who was issued with the certificate of title as elaborated upon clearly by **Kasujja Patrick CW1**.

It is also noted that there are anomalies on the face of the documentation that the 1st defendant presented as his exhibits. A critical look at the 1st defendant according to his **Form 4 -Application for Conversion a Customary Tenure to Freehold Tenure** indicated that the land he applied for was neighbored by John Katula, Namandu Esero and Hajji S.Kitanya, yet in his Witness Statement and evidence in cross-examination, he denies the said persons being his neighbors in respect of the suit land.

Form 23-Demarcation Form for Certificate of Customary Ownership indicates the sketch map drawn by the members of the Area Land Committee of Kisseka Sub County for the land the 1st defendant had applied for and even the neighbors who included Namwandu Esero, Ssemogerere, Hajji Sulati Kitanywa and Bannakalori Brothers, but the 1st defendant in cross-examination denied all of them his neighbors, yet they appear for the forms tendered in by himself.

Learned counsel for the plaintiff in his observations of the above relied on the Supreme Court in the case of **Fr. Narsensio Begumisa & 3 Others vs. Eric Tibebaga, Civil Appeal (supra)** and submitted that if the application for the land the 1st defendant made to the 3rd defendant and the Area Land Committee of Kisseka Sub County be considered, the land which the 1st defendant applied for is completely different from the land on which the certificate of title comprised in FRV 1285 FOLIO 20 also known as Buddu Block 907 Plot 17 measuring 17.051 hectares relates to.

My own findings are that according to the evidence before me, the land on which the 1st defendant was issued with a Certificate of Title was the land on which the plaintiff was issued a Freehold Offer, deed plan and instruction to survey first before the 1st defendant obtained the same and consequently a certificate of title before the plaintiff. This buttressed by **PW2, PW4 and CW1**,

It has already been established that the land that was applied for by the Plaintiff is not totally different from the land applied for by the 1st Defendant; the location and the adjacent land the plaintiff and 1st Defendant applied for in terms of villages and parishes is also the same on the ground.

Learned counsel for the 1st defendant also argued that the 1st defendant as a registered proprietor had all the rights to deal in his land as he wished; and that there was nothing unlawful and fraudulent done on the land and the alleged

fraud was not pleaded by the Plaintiff as a particular of fraud or as a fraudulent attempt to defeat their interest in the suit land if any existed.

I have had occasion to examine the plaintiff's Pleint; his interest is clearly articulated and the particulars constituting fraud are clearly spelt out in Paragraphs 5 (a), (b), (c) and (d) of the Pleint.

Under **Order 6 rule 3 Civil Procedure Rules**, the law also specifies that if the facts of alleged in the pleading are such as to create a fraud it is not necessary to allege fraudulent intent; what is important is that the acts alleged to be fraudulent must be set out, and it should be stated that those acts were done fraudulently. See ***B.E.A Timber Co. v Inder Singh Gill [1959] 463 per Forbes, V.P at page 469*** beefed up in the cases of ***Waimiha Saw Mills Co. Ltd v Waione Timber Co. Ltd (4) [1926] AC 101 (Privy Council)*** and ***David Ssejaaka Nalima v Rebecca Musoke CA No. 12/1985 per Odoki JA.***

A close scrutiny of the events that led to the acquisition of the suit property by the 1st defendant reveals that there are glaring anomalies in the process of acquisition of the suit land.

While learned counsel for the 1st Defendant put up spirited arguments that the 1st defendant had acquired the suit property with clean hands, way back before the Plaintiff did, I have however found overwhelming evidence which points at dishonesty on the part of the 1st defendant in the process of acquiring the suit property. The evidence of both sides reveals that the 1st defendant with full knowledge that the property in question was in the hands of the plaintiff went ahead and in connivance of the Area Land Committee of Kisseka Sub County brought them on the suit land claiming it to be his and they made a Report in his favour. It has also been found that the documents he attached to acquire title to the suit land do not match.

In light of **PW1's** testimony at trial that the land on which the plaintiff is a customary tenant is situate at Kirayangoma and it was on the same land that the plaintiff was granted freehold offer after being inspected by the Area Land Committee of Kisseka; and according to the two surveyors **PW4 Henry Ssembajjwe and CW1 Patrick Kasujja**, the 1st defendant used the same deed plans which had been issued to the plaintiff first, yet 1st defendant maintains that their lands are different but **Kasujja Patrick CW1** confirmed that the suit land is the same land to which the plaintiff was granted a freehold offer first, deed plans and instruction to survey but it was the 1st defendant who was issued with the certificate of title.

I have also relied on **Section 59 of the Registration of Titles Act** provides that:-

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

In the instant case, the 1st defendant was issued with and is in possession of the said Certificate of Title in his names while the plaintiff's title has never been issued. On the 6th of June 2022 this very court visited the locus in quo, and while at the locus, it was confirmed that indeed the plaintiff was the one in occupation of the larger portion of the suit land at Kirayangoma with grazing activities and that the 1st defendant also grazed his animals on the same land. The plaintiff was able to clearly point out the land he was claiming and it was obvious that he knew this land well.

In its observations during the *locus in quo visit*, court observed a seasonal string traversing through the marshy land that comprised the larger part on the suit land, this stream had been denied by the defendant and his witnesses as not existing.

Remnants of barbed wire could also be found on the suit land it is also clear that when the 2nd defendant was titling the same, the land was wrongly coordinated by the first surveyor thus being misplaced on the ground. The above led to a complaint by the plaintiff which prompted **PW4** to revisit the suit land to ascertain its location on the ground once again and made his findings.

My findings and conclusions are that the 1st defendant could not legally obtain a title to the same without due regard to the plaintiff's equitable interest on the same piece of land.

Having found that there was active connivance of the 1st defendants with officials of the 2nd and 3rd defendants, it is my finding and decision that the 1st Defendant obtained Registration of the land comprised FRV 1285 Folio 20 Buddu Block 907, Plot 17 Land situate at Kyekulula by fraud.

This issue is answered in the affirmative.

Issue three (3): Whether the 2nd Defendant acted in abuse of his powers when he issued to the 1st Defendant a Certificate of Title for land comprised in FRV 1285 Folio 20, Buddu Block 907, Plot 17 Land situate at Kyekulula?

It was submitted that the plaintiff's counsel considering the evidence of Sembajje Henry and Kassuja Patrick it was an abused power by the 2nd defendant to issue the 1st defendant a certificate of title on the land in occupation by the plaintiff as customary tenant who had already applied for the same to the 3rd defendant and inspected and approved by the area land committee Kiseka Sub County which recommended him to the 3rd defendant who granted him a freehold officer, instruction to survey and deed plan issued to him, only pending issuance of a certificate of title, only to be surprised to learn that on the same land the 2nd defendant issued a certificate of title to the 1st defendant in the year 2012. It is their humble prayer that this issue be answered in the affirmative.

In reply, it was submitted for the 1st defendant that before the creation and issuance of a Certificate of Title is based on the documents presents to the Registrar of titles. That Mr. Galiwango Herman Nsubuga, the senior Registrar of Titles who turned up in court a witness for the 2nd Defendant told court that on 28/8/2012, the Registry received the 1st Defendants file from the office of the Commissioner Land Registration which had been forwarded to the Commissioner Land Registration with a request to title land comprised in Buddu Block 907, plot 17 for Magunda Christopher Kigozi of P.O. Box 1297 Masaka and that the request had been signed by Senior Land Officer in the names of Nakandi Christine on behalf of the Commissioner for Land Registration. That the said file contained three (3) sets of deed prints, a land Board Minute No. MSK LB 6(32)/209 of 12th October 2009, receipt No. 7767 dated 1/2/2009, freehold offer which was prepared on 30/4/2009. That DW5 also told court that the office also received application by Magunda Christopher Kigozi for conversion of customary tenure to freehold accompanied by a demarcation form, form 23 (**DEXH20**) and form 10 and Inspection report dated 1/12/2008. All the above were forwarded by a letter dated 28/8/2012 (**DEXH 22**).

That **DW5** told court that having perused the 1st Defendant's file as forwarded, the office of the Commissioner for Land Registration proceeded to issue Magunda Kigozi Christopher with a freehold certificate of title for land comprised in FRV 1285 Folio 20 Buddu Block 907, Plot 17 at Kyekulula measuring 17.051 hectares in the names of Magunda Christopher under instrument No. 475287 of

26/9/2012. That from the evidence of **DW4**, it is clear that the plaintiff had earlier applied for the same land and had been given an offer after the application had been approved by the land Board and had surveyed the land and had been issued with Deed prints on 8th June 2010, however, **DW5** did not tell court whether the plaintiff had been given all the documents as those presented by the 1st defendant and whether the plaintiff had lodged his documents for the creation of certificate of title. That the 1st Defendant presented to the office of the Commissioner for Land Registration all the documents required for the creation of the certificate of title from the relevant offices and at that time the plaintiff had not presented any document.

That the creation of the 1st Defendant's Certificate of Title created basing on the presented documents which fulfilled all the requirements for issuance of a certificate of title. That the 2nd Defendant acted within his power when issuing to the 1st Defendant the certificate of title for land comprised in FRV 1285, Folio 20, Buddu Block 907, plot 17 at Kyekulula. That **DW5** told court that the shape of the land for the 1st defendant is V shape on the certificate of title and the one on form 3 is rectangular in form, this is not true. That while they admit that the shapes differ, they however are not in shapes as described by **DW5**. That the difference in the shape is caused by the fact that the shape accompanying form 23 is estimated and not drawn on scale while the form in the certificate of title is exact based on opening the boundaries of the land applied for. They certainly cannot appear to be the same and the difference in shape does not per se mean that they are for two different pieces of land. That **DW5** told court that the 1st Defendant's documents passed through the proper procedure before they reached office for titling and the Registrar was satisfied with them.

That when asked by court, **DW5** told court that there was nothing suspicious with the 1st Defendant's documents other than the shape. That from the evidence of **DW5**, there was no issues with the documents presented by the 1st Defendant save for difference in shape which we have explained. That the 1st Defendant having gone through the right procedures for applying for freehold and was issued with all the relevant documents requesting to be issued with the certificate of title for the land applied, the 2nd Defendant had no choice but to issue the certificate of title. It should be noted that at the time the certificate of title was issued, there was no order stopping the 2nd Defendant to execute its mandate.

In resolving this issue, I will start with the undisputed evidence on record that the 2nd defendant first granted the plaintiff with a lease offer long before they made an offer to the 1st defendant came into the picture. There is also no proof

that before the 1st defendant was given an offer on the same piece of land, the 2nd and 3rd defendants cancelled or rescinded the offer they had made to the plaintiff. This means that lease offer made to the plaintiff was still valid and subsisting under the law.

It is also clear that the 2nd defendants in this case acted irregularly and with material defect when they recommended that the 3rd defendant issues the Certificate of Title to the 1st Defendant without first ascertaining if there was any other offers made to another person prior to that or any competing rights over the same piece of land.

This was clearly stated by **PW4** the Senior Staff Surveyor Masaka who after a complaint was made to the offices of the Land Office Masaka, made subsequent visits to the suit land and confirmed that that it was the same land which the 1st defendant had pointed out to him as his before the title was executed in his favour. **PW4** in his evidence also made it clear that it was a mistake on their part to issue the Freehold Certificate of Title to the 1st Defendant as they did in this case; and his evidence reinforces the plaintiff's claim and his other witnesses **PW1, PW2, PW3 and CW1**.

With the above uncontroverted fact, the only conclusion I can draw is that the 2nd Defendant acted in contravention of the law and in total abuse of his powers when they recommended to the 3rd defendant that a Certificate of Title in respect of land comprised in FRV 1285 Folio 20, Buddu Block 907, Plot 17 Land situate at Kyekulula which land was under a valid leasehold title in respect of the plaintiff be issued to the 1st defendant.

It is therefore the finding and decision of this Honorable Court that the 2nd should be held responsible for perpetuating an illegality which they should have discovered had they exercised due diligence in the execution of their duties. This issue is therefore resolved favour of the plaintiff.

Issue four (4): What remedies are available to the parties?

It was submitted for the Plaintiff that basing on the above cited authorities, facts and evidence the plaintiff is entitled to the remedies sought in this suit and prayed that court gives judgment in the Plaintiff's favour for the reliefs sought as captured earlier in this judgement.

In reply, it was submitted for the defendants that the plaintiff has failed to prove his case to prove the allegation against the 1st defendant to the standard required in cases of fraud. They prayed that the same be dismissed with costs in accordance with **Section 27 (2) of the Civil Procedure Act Cap 71**, which inter alia provides that costs of any action shall follow the event unless the court or judge shall for a good reason otherwise order; and relied on the case of **Jennifer Behinge, Rwanyindo Aurelia, Paulo Bagenzi vs School Out fitters (U) Ltd CACA No. 53 of 1999 (UR)**, where Court held that “A successful party is entitled to costs unless there are good reasons to deny such party costs.”

They did not see any good reason to deny the 1st Defendant costs of the suit and prayed that the suit be dismissed with costs.

In resolving this issue, I have already found in respect of the first three issues that the plaintiff has successfully proved his claims on the suit land. It is therefore only fair that he is granted all the reliefs sought in respect of the suit land.

The principles for awarding General damages are well settled. The settled position is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the defendant’s act or omission. See: **James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993; Erukan Kuwe v. Isaac Patrick Matovu & A’nor H.C.C.S. No. 177 of 2003 per Tuhaise J.**

Also, in the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered. See: **Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305**. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong. See: **Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.**

The party claiming general damages is expected to lead evidence to give an indication of what damages should be awarded on inquiry as the quantum. See: **Robert Cuossens v. Attorney General, S.C.C.A No. 8 of 1999; Ongom v. Attorney General. [1979] HCB 267.**

In the instant case, the Plaintiff has succeeded to satisfy this court that he suffered great inconvenience at the instance of the 1st defendant; and has gone

through intolerable suffering at the hands of the 1st defendant. I therefore agree with learned counsel for the Plaintiff and find that they are entitled to general damages. An amount of Shs. 20,000,000/= (Twenty Million Shillings Only) has been found sufficient in this case.

Secondly, **section 27 (2) of the CPA** makes provision for interest on claims for monetary payment. In the instant case, the Plaintiff has succeeded in defending this case against the 1st defendant, and given the time his money has been tied in this land, the 1st defendant on the other hand has been maximally utilizing the suit and the amount of depletion of the suit land observed by court during the locus in quo visit, I find no any compelling and or justifiable reason to deny the Plaintiff interest on the general damages awarded.

It is therefore my decision that interest on the general damages from the time of this judgment until full payment. A just and reasonable interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. In that regard I would consider a commercial rate of interest of 23% per annum to be just and fair. It shall be applicable to the general damages.

Further, it is now well established law that costs generally follow the event. See ***Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989 (SC) and Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35***. Indeed, in the case of ***Sutherland vs. Canada (Attorney General) 2008 BCCA 27*** it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a 'reasonable expectation' of obtaining an order for costs.

Applying the decisions arrived at in the above cases, I have also not found any justifiable reason to deny the plaintiff the costs in this case. The Costs of this suit are awarded to the plaintiff in this case; and for the reasons I have given in this judgment, the plaintiff is awarded full costs in this case.

Lastly, the Commissioner for Land Registration Masaka Zonal Office is directed to effect the said transfer the suit land into the names of the plaintiff and that the plaintiff be given vacant possession of the same.

It is the final decision of this court is that judgment is entered for the plaintiff against the 1st Defendant with the following orders: -

1. A declaration that the Plaintiff is the customary owner of the land comprised in in FRV 1285 FOLIO 20 also known as Buddu Block 907 Plot 17 land situate Kyekulula measuring 17.051 hectares.
2. The Plaintiff has proved that the Certificate of Title issued to the 1st defendant in favour of the 1st defendant in respect of Buddu Block 907 Plot 17 land situate Kyekulula measuring 17.051 hectares lawfully belongs to the Plaintiff.
3. A permanent injunction restraining the 1st Defendant, his agents/workers, servants, successors in title and/or any one claiming under him from interfering with the Plaintiff's enjoyment and use of the suit land.
4. Orders of vacant possession, Eviction and Permanent Injunction are hereby issued against the 1st Defendant, his agents, servants and anybody claiming under any of them in this case in respect of the suit land comprised in Buddu Block 907 Plot 17 land situate Kyekulula measuring 17.051 hectares.
5. The Plaintiff being the successful party in this case is awarded General Damages of Ug. Shs. 20,000,000/= (Twenty Million Shillings Only).
6. The Plaintiff is also awarded interest at a commercial rate of 23% per annum applicable to the General Damages until payment in full.
7. The Plaintiff is also awarded full costs of the suit from the time of filing till Judgment.
8. A declaration is hereby made that the Defendant acquired the suit land comprised in Buddu Block 907 Plot 17 land situate Kyekulula measuring 17.051 hectares unlawfully and through fraudulent means.
9. A consequential order doth issue to the Commissioner Land Registration Masaka Zonal Area for the rectification of the title and transferring of the Certificate of Title for land comprised in Buddu Block 907 Plot 17 land situate Kyekulula measuring 17.051 hectares with immediate effect into the names of the Plaintiff.

I SO ORDER

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
25/08/2023

This Judgment shall be delivered by the Honorable Deputy Registrar Masaka High Court who shall also explain the right to appeal against this Judgment to the Court of Appeal of Uganda.

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
25/08/2023