

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA**  
**HCT-03-CA-CS-001-2022**  
**(ARISING FROM CIVIL SUIT NO. 029 OF 2010 AT KAMULI)**

**KAUZI**

**RICHARD :::APPELLANT**

**VERSUS**

- 1. KABANDA PETER**
- 2. KABANDA MARTIN**
- 3. SAMANYA SAMUEL ISWAYA**
- 4. KAUZI SOSI**
- 5. KABANDA JOHN ISWAYA**
- 6. BALIKOWA STEPHEN**
- 7. MUZALE**

**WILSON :::RESPONDENTS**

***Land Appeal***

***Held:*** All Grounds of Appeal Fall. The Judgement and Orders of Her Worship Kyomugisha Evelyn Setrina, Magistrate Grade One at Kamuli delivered on the 14<sup>th</sup> of December 2021 are upheld in their entirety.

**BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE**  
**JUDGMENT ON APPEAL**

The Appellant being dissatisfied with the decision of Her Worship Kyomugisha Evelyn Setrina, Magistrate Grade One at Kamuli delivered on the 14<sup>th</sup> of December 2021, appealed to this Honorable Court challenging the said decision on the grounds contained in the Amended Memorandum of Appeal filed on the 12<sup>th</sup> of January 2022 as follows:-

1. That the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision.
2. That the learned trial Magistrate erred in law and fact by finding that the Defendants are not trespassers for having obtained the land by purchase from Kulabako Mukobeza who had no legal right over the same thereby arriving at a wrong decision and causing a miscarriage of justice .

3. That the learned trial Magistrate erred in law and fact, when she ignored the evidence on record at locus thereby arriving at a wrong decision and leading to miscarriage of justice.
4. That the learned trial Magistrate erred in law and fact when she failed to consider the document dated 28<sup>th</sup> October 1991 signed by the Defendants as well confirming Kafuko Robert and Kafuko Dawson to be owners of the suit land thereby arriving at a wrong decision and occasioning a miscarriage of justice.

### **He prayed that;**

1. The Appeal be allowed and the decision and findings of the learned trial Magistrate be over turned by this Honourable Court.

### **BACKGROUND**

The brief background of this Appeal according to learned counsel for the Appellant is that the Appellant who holds Letters of Administration of his late father, Kafuko Robert Jonathan and Powers of Attorney for his paternal uncle Kafuko Dawson Isabiryie filed a suit vide **Land Civil Suit No. 29 of 2010** against the Respondents at the Chief Magistrate's Court of Jinja at Kamuli for recovery of two pieces of land.

The first one being the land that belonged to his late father measuring approximately 20 sticks of 12 ft wide stretching from Bukungu main road along the path going to Immeri stretching down to the Kasuleta swamp while the second portion which belongs to his paternal uncle Kafuko Dawson Isabiryie begins from that of the late Kafuko Robert Jonathan goes up to Immeri and Nanunano and then stretches down to Kasuleta swamp.

Evidence was laid and the matter was decided in favour of the Respondents. Being dissatisfied with the judgment of the Learned Trial Magistrate, the Appellant filed a Memorandum of Appeal in this Honourable Court as per page 103-104 of the record of Appeal vide **Civil Appeal No. 001 of 2022** on the 12<sup>th</sup> day of January 2022.

The Appellant called six witnesses including himself, while the Respondents called eleven witnesses including himself to prove their respective cases.

### **THE LAW**

It is now settled law that it is the duty of the plaintiff to prove his or her case on the balance of probabilities. In relation to the onus of proof in civil matters, 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 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 v Minister of Pension [1947] ALLER 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 & 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: -

- (i) Anything, state of thing, or relation of thing capable of being perceived by senses as per **Section 2 1(e) (i) Evidence Act**.

On the duty of the first appellant court, the first appellate Court is mandated to subject the proceedings and Judgment of the lower Court to fresh scrutiny and if necessary make its own findings. In **Bogere Charles vs Uganda, Criminal Appeal No. 10 of 1996**, the Supreme Court held that *“The appellant is entitled to have the first appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and reconsider the materials before the trial Judge. Thereafter, the first appellate Court must make its own conclusion, but bearing in mind the fact that it did not see the witnesses. If the question turns on demeanor and manner of witnesses, the first appellate Court must be guided by the trial Judge's impression.”*

This being the first appellant court, it is duty bound to evaluate evidence and arrive on its own conclusion, bearing in mind that it did not have benefit of the observing the demeanor of the witnesses. The duty of the first appellate court is to re-evaluate, assess and scrutinize the evidence on the record. This duty was well stated in **Selle vs. Associated Motor Boat Co. [1968] E.A 123** and followed in **Sanyu Lwanga Musoke vs. Galiwango, S.C Civ.**

***Appeal No.48 of 1995; Banco Arabe Espanol vs. Bank of Uganda S.C.C. Appeal No.8 of 1998.***

A failure to re-evaluate the evidence of the lower court record is an error in law. The appellate court has a duty to re-evaluate the evidence as a whole and subject to a fresh scrutiny and reach its own conclusion. ***See Muwonge Peter vs Musonge Moses Musa CACA 77; Charles Bitwire vs Uganda SCCA 23/95; Kifamunte Henry vs Uganda SCCA No. 10/1997.***

It is also trite law that the appellate court can only interfere and alter the findings of the trial court in instances where misdirection to law or fact or an error by the lower court goes to the root of the matter and occasioned a miscarriage of justice. ***See Kifamunte Henry vs Uganda SCCA No. 10/1997.***

Having satisfied myself and taken due recognition of the Law and rules of evidence applicable to a first appellate court, I will now turn to the substantive matters as raised in the Memorandum of Appeal and proceed to re-evaluate the evidence on record.

**RESOLUTION OF THE GROUNDS OF APPEAL**

**Ground 1: Whether the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving to a wrong decision.**

**Ground 2: That the learned trial Magistrate erred in law and fact by finding that the defendants are not trespassers for having obtained the land by purchase from Kulabako Mukobeza who had no legal right over the same thereby arriving at a wrong decision and causing a miscarriage of justice .**

It was submitted by learned counsel for the Appellants that **PW1** testified that the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye acquired the suit land from their late father Iswaya Jonathan during his life time in 1986 who later died in 1988 and the two were confirmed on the suit land in 1991 as noted by the Learned Trial Magistrate at page 98 of the record of appeal.

Further, that **PW4** (Dauson Isabirye Kafuko) elder brother to the late Kafuko Robert Jonathan at page 44 and 45 of the record of appeal testified that the

suit land was given to him and his late brother by their father during his life time in 1986 and he died two years later.

That sometime the suit land was occupied by squatters and these included Kiringi Enock and Juma Ngobi among others. That later in 1991, they called clan-mates, leaders and *bataka* who confirmed that the land was theirs and this was done in order to avoid trespassers and encroachers on the suit land; therefore by the Learned Trial Magistrate considering the testimony of **DW4** which was baseless was very unfortunate and led to a miscarriage of justice.

They submitted that the learned Trial Magistrate in her Judgment at page 101 of the record of appeal concluded that the Defendants were not trespassers as they purchased from Kulabako Muhammad (**DW8**) the rightful beneficiary of the late Ngobi's estate and therefore their entry was not unauthorized to amount to trespass.

Further, that the issue was not whether **DW8** was the rightful beneficiary of the estate of his father, the issue would have been whether his father the late Niobic Juma was the rightful owner of the suit land to enable him sale the same to the Defendants. That pursuant to **PEX1** and the evidence of **PW4**, it is clearly shown that the suit land belonged to him (**PW4**) and his brother the late Kafuko Robert Jonathan were in possession of the same until 1999 when the dispute arose.

Further, that by the Learned Trial Magistrate's failing to evaluate this evidence reached a wrong conclusion that the Defendants were not trespassers. That even the sales between Kulabako Muhammed (**DW8**) son to the late Ngobi Juma and some of the Defendants of the suit land were null and void as the same were between a person who had no legal right over the suit land and hence the defendants are trespassers as they fall in four corners with the case of ***Justine E.M.N Lutaaya vs Sterling Civil Engineering Company. SCCA No. 11/2022 (Supra).***

Additionally, that the Trial Magistrate seemed to have based her decision on the fact that because Kafuko Robert had grabbed the land, **DW8** (Kulabako Mohammed) complained to the District Commissioner and Tibikoma Fred who convened a meeting and officially handed over the land to **DW8** on the 22<sup>nd</sup> /3/1998 in the letter that was tendered in court which was defence **Exhibit No. 3** as per page 98 of the record of appeal.

That there were a lot of loopholes and contradictions in the evidence of the defence; and that it is not true that the late Tibikoma Fred had ever

convened a meeting to hand over back the suit land to **DW8**. That evidence showed that it was actually **DW1** who convened the said meeting.

The second last paragraph at page 50 of the record of appeal, **DW1** said during examination in chief that it was Tibikoma Fred who chaired the meeting. He however contradicted himself during cross examination in the ninth last paragraph that it was actually him (**DW1**) who chaired the meeting and this is confirmed by the evidence of **DW1** during cross examination at page 89 of the Record of appeal who also confirmed that **DW1** chaired the said meeting, therefore this meeting was convened by **DW1** (Kabanda Peter) by himself and in his own capacity and without instruction what so ever from Tibikoma Fred. That one would think that maybe **DW1** who is the Clan Secretary and claimed to have got instructions from the District Commissioner Tibikoma Fred to write the letter dated 22<sup>nd</sup> /3/1998 was aware that **DW1** was also given instructions to chair the purported meeting. That this is not the case as per the 2<sup>nd</sup> last paragraph at page 89 when he confirmed that *"I don't have evidence to show that **DW1** got a letter from Tibikoma Fred to chair that meeting."*

That this did not come to the mind of my sister the Learned Trial Magistrate when she noted that the District Commissioner Tibikoma Fred convened the meeting that handed back the land to **DW8**.

That another loophole is at page 50 of the Record of appeal when **DW1** said that what prompted Tibikoma Fred to write this letter was because **DW8** (Kulabako Mohammed) had complained to him about the land which was occupied by Robert Kafuko Jonathan which he had grabbed, but this evidence was contradicted by the evidence of **DW1** at page 89 of the record of appeal who confirmed that there was no evidence that **DW8** was claiming land from Kafuko Robert.

They submitted that there was no evidence what so ever that was tendered in court to show that **DW8** had ever complained to Tibikoma Fred which compelled him to convene a meeting to hand back the land to **DW8**. The question then one would ask is, *'on what basis did **DW1** hold the purported meeting that handed back the land to **DW8**?';* and what is surprising, is that the said purported meeting did not have any minutes to that effect, but only the attendance list; and this was confirmed by **DW1** at page 51 of the record of appeal that no minutes were recorded.

They relied on the case of ***Bintubizibu Sam vs Juma Sekibamu Civil Appeal No.9 of 2019*** quoting the case of ***David vs Omro Phillip H.C.C.S***

**No. 100 of 2018** where it was held that *“it’s trite law that grave inconsistencies and contradictions unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored”*.

They further submitted that what constitutes a major contradiction will vary from case to case; and the question always is whether or not the contradictory elements are material, that’s to say “essential” to the determination of the case. Material aspects of evidence vary from case to case but generally in a trial, materiality is determined on the basis of the relative importance between the point being offered by the contradictory evidence and it’s consequence to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central or that is only collateral to the outcome of the case.

That the Learned Trial Magistrate failing to caution the Defendants (**DW1** and **DW11**) on their contradictions which were material and relevant as to the consequences and outcome of the case made the trial court to reach a wrong conclusion.

Furthermore, that at page 51 of the record of appeal **DW1** claimed that it was Tibikoma Fred who signed and stamped the letter dated 22<sup>nd</sup>/3/1998 (**Defence Exhibit 3**) which is not true. That **PW5** at page 47 of the record of appeal who was a brother and the Vice (Katikiro) to the late Tibikoma Fred from 1974-2012 when he died testified that the stamp and signature on the letter dated 22<sup>nd</sup> /3/1998 was forged. He showed court the right stamp and signature of the late Tibikoma Fred. He went further testified that Tibikoma Fred between the period of 1998-2006 had never changed the stamp and that the signature and stamp on the Plaintiff’s documents **PEX “C”, PEX”D”** and **PEX”E”** are the right signature and stamp; and this evidence was never controverted during cross examination.

That **PW5** went on to testify at page 48 of the record of appeal that although **DW11** (Saidi Mondha) was the Secretary to Tibikoma Fred, he never instructed him to write the letter dated 22<sup>nd</sup>/3/1998 and actually when Tibikoma Fred came to know of these forgeries, **DW8** was dismissed. That this is not denied by **DW11** at page 90 of the record of appeal on the 5<sup>th</sup> last paragraph when he said *“I was fired it is true by Tibikoma Fred for making that document (WSD “A”*. For emphasis, this the letter dated 22<sup>nd</sup>/3/1998.

They therefore submitted that the purported letter and meeting that gave back the suit land to **DW8** was a sham and a planned move between **DW1** and **DW11**; and by the Learned Trial Magistrate failing to evaluate this evidence reached a wrong decision.

In the premises, they prayed that the appeal be allowed and the Judgment of the trial court be set aside.

**In reply**, it was submitted for the Respondents that the Trial Magistrate rightly evaluated evidence and came to a rightful conclusion and cited pages 4 & 5 of the Trial Magistrate's Judgement that;-

*"That the 1<sup>st</sup> defendant informed court, that he is the Gombolola Chief of Nkondo in the Luuba the Iruba clan has never entered or utilized the land.*

*However, he testified that the land belongs to Kulabako Muhammad the son of Juma Kabanda Ngobi who was the owner of the land and was killed in 1985 while staying on the suit land. That upon Juma's death the land remained in the care of his brother Jonasani Iswaya. D1 informed court that he was not present when the land was given to Kafuko Robert and Kafuko Dauson in 1991.*

*That Kafuko had grabbed the land and as a result Kulabako Muhammed complained to the District Commissioner Tibilkoma Fred, who convened a meeting and officially handed over back the land to Kulabako Muhammed, on 22 March 1998. This document was part of evidence. That it was after the land was officially handed over, to Kulabako Muhammed, that he decided to sell his land to buy another land in Bugere. That he sold D2, D3 & one Joshua Mukobeza his paternal uncle.*

*D2 also informed court that the land used to belong to Ngobi Juma Kabanda father to Mukobere Muhammed who sold to him.*

*Analysis of the evidence on record reveals that the land formerly belonged to one Iswaya who had 3 children, namely Ngobi (father of Kulabako Mukobeza Muhammed), Alamazan and Jonathan Iswaya (Father to Kafuko Robert & Kafuko Dauson). The evidence reveals that the land in question belonged to Ngobi Juma Kabandi and upon his death....the land remained under the care of his brother Jonathan Iswaya the father of Kafuko Robert and Kafuko Dauson were confirmed on the land, but in 1998 Kulabako Mukobeza Muhammed son to Ngobi came and claimed his land and complained against Kafuko Robert which complaint was handled by the District Commissioner and land was given back to Kulabako Mukobeza Muhammed who then sold*



*his land to some of the Defendants; court visited the locus and noted that the defendants are in possession of the land except the 1<sup>st</sup> Defendant.*

*From the evidence presented the Plaintiff has not been able to prove that this land was given to Alamanzani Iswaya by the father for him to pass it on, to Kafuko Robert and Kafuko Dauson. The only evidence the plaintiff is relying on is the document dated 28/12/1991 when Kafuko Robert and Kafuko Dauson were confirmed on the land. However it is clear this was made before Kulabako Mohamed showed up to claim his land.*

*It is in that regard, that I find that the Defendants are not trespassers”*

Further, that the above long quotation revealed a fairly long and reasoned evaluation of the evidence on record. That the Trial Magistrate believed the Defendants version of the evidence and disbelieved the Plaintiff’s version, he submitted that the learned trial Magistrate should not be faulted and that that ground of appeal should fail.

Specifically in respect to the second ground of appeal, they replied that Kulabako Mukobeza had no legal title over the suit land, he submitted that it was wrong.

In addition, that a lot had been covered in his submission as to how Kulabako Mukobeza successfully claimed part of the suit land, which he sold to some of the Defendants; that he finds no need to reproduce that evidence as it was well articulated in the evidence of **DW1 and DW8**. That the question to resolve was whether Kulabako Mukobeza Muhamed on claiming that portion of land, he had acquired legal title.

Again, that the land was under customary tenure, Kulabako Mukobeza Muhamed went through the officials of the Iruba Clan, where the parties to the clan belonged and a meeting was convened, resulting in the land being handed to him. That he got the land on 22<sup>nd</sup> March 1998, nobody challenged the proceedings of 22<sup>nd</sup> March 1998, then he made the sale of part of the said land to the 2<sup>nd</sup> Defendant on 3<sup>rd</sup> March 1999 i.e. one year later and he sold a portion to the 3<sup>rd</sup> Defendant on 2<sup>nd</sup> February 1999 and he sold the remaining portion Joshua Mukobeza. That the said Kulabako Mukobeza Muhammed got the land and even exercised proprietary rights over the land by selling it.

That the Title of Mukobeza Kulabako Muhammed has to date not been challenged by anyone. That even when these sales were belatedly

challenged, in this suit which was filed in 2010, nobody has ever sued Kulabako Mukobeza Muhammed, challenging his title to the said land.

They therefore submitted that Kulabako Mukobeza Muhammed, had legal title over the land that he successfully claimed which land he sold to some of the Defendants and that therefore this ground should fail.

Furthermore, that the 2<sup>nd</sup> Defendant had bought the land he occupies on 3<sup>rd</sup> March 1999 that he immediately took occupation of the land.

At the locus in quo, court saw his permanent house on the land, two grass thatched huts and court noted that he has been on the land since 1999; he was sued in 2010 after 11 years; as of now 2023, he has been on this land for the last 24 years.

That the 3<sup>rd</sup> Defendant bought his portion on 2<sup>nd</sup> February 1999, he put a commercial house/home; he was sued in 2010, 11 years later as now he has been on the land for the last 24 years; at the *locus in quo*, court saw his permanent house and a banana plantation.

The 5<sup>th</sup> Defendant bought his portion of land on 4<sup>th</sup> July 1976 and immediately took possession of the said land, he was sued in 2010, after a period of 34 years; as of now, and he has been on the land for a period of 47 years. That at the locus, court saw the house on the land. That Defendant No.5 stated to court that he had sold part of his land, to one Mawerere in the year 2000, that is before he was sued.

That the 4<sup>th</sup> Defendant has oranges, mangoes & Jackfruits; court noted that at the time of the court's visit, he had been on the land for about 20 years. That the 6<sup>th</sup> Defendant stated that he came on the suit land in 1996, he was sued in 2010 after 14 years; as of now, he has been on the land for the last 27 years.

That the 7<sup>th</sup> Defendant came on the land in 2006, after purchasing it from one Hadijja Namusobya; he constructed a permanent house on the land in 2007, before he was sued. That all these transactions took place when the Plaintiff was seeing, or at least his father was seeing; on the face of it, this suit was filed as an afterthought to destabilize the Defendants, or the suit was prompted by greed to dispossess the Defendants that therefore court should not destabilize the respondents; and cited the case of ***Semeo Wandia v Yakobo Pokeya; Civil Appeal No.100 of 1969; [1970] HCB 60-61*** where court found as a fact that in 1995, the Appellant saw the

Respondent settled on the suit land and took no steps to assert his rights to right to ownership and right to possess the suit land.

They added that the Respondents had been in possession of the land, since 1949; the appeal is **Civil Appeal No.100 of 1969**. The court held that the Appellant had acquiesced in the Respondent's possession of the land; so the court considered it a proper exercise of equitable jurisdiction to refuse a relief to the appellant, on ground of acquiescence; and relied on **John Oitamong vs Mohamed Olinga; Civil Appeal No.104 1982 [1982] HCB 86-88**. In that case, the Respondent had been in occupation of the suit land uninterrupted for 34 years, from 1946 to 1979 when the dispute arose or when the suit was filed before a Grade II Magistrate's court. The suit was filed by the Plaintiff/ Appellant; the Appellant argued that the Respondent had been allowed to stay on the land temporarily. The Chief Magistrate (on appeal) held that since the Respondent had been in occupation of the suit land for 34 years, that occupation could not be regarded as temporary, thus judging the case in favour of the Respondent/Defendant, hence the appeal to the High Court by John Oitamong. It was Held that;

*"The appellant had slept on his rights, if the land belonged to him. He acquiesced in the occupation of the land, by the respondent for over 30 years. He did not protest or attempt to recover the land from the respondent all this period.*

*In these circumstances, equity would come to the aid of the respondent to prevent the appellant from succeeding in this suit when he made the respondent to believe that he would peacefully continue to enjoy possession of the land in dispute without disturbance from the appellant or anyone. The appellant had taken too long, to assert his rights and would be deemed to have acquiesced to the respondent's long and uninterrupted occupation, and therefore it would not be proper exercise of equitable jurisdiction, to allow the appellant to disturb that long occupation".* The appeal was dismissed.

They further submitted that the Defendants have led evidence that they are the legitimate owners of the suit of land over which they have been sued and have been in occupation for a long time at the watch of the Plaintiff and therefore the appeal should fail.

**In order to resolve all the first two grounds in this Appeal**, I have found it necessary to first summarize all the evidence led before the trial Court on the certified record as availed to me. The Plaintiffs/Respondent led six (6) witnesses to prove his claim on the suit land, while the

Respondents/Defendants led eleven (11) witnesses and they were all subjected to cross-examination as follows:-

The first witness was the **Plaintiff/Appellant Kauzi Richard, aged 31 years old resident at Nanvunano Village, Nabwigulu Sub-County, Kamuli District (at pages 3-5 of the record of proceedings) (herein after referred to as PW1)**. He testified that the late Kafuko Robert Jonathan was his father and he has Letters of Administration. That he is also suing on behalf of his uncle Kafuko Duson Isabirye who gave him Powers of Attorney to be his Lawful Attorney to litigate the **Land Case No.29/2010** in Kamuli Court on his behalf.

That save for **D1**, the Defendants encroached onto the suit land under instructions of the 1<sup>st</sup> Defendant in the name of the Sub-County Clan leader Nkondo. **PW1** didn't know the size of his paternal uncle's land, but he knew the size of his father's land which measures 20 sticks of 12 ft. in width and on length up to the swamp called Kasuleta. That the land of his late father and that of his uncle share common boundaries, but were destroyed by the Defendants.

That his late father and paternal uncle acquired the suit land from his grandfather, the Late Iswaaya Jonathan in 1986, who died in 1988. That after a period of 03 years, a meeting was held to confirm the same the two Kafukos in the year 1991.

That the letter confirming the Kafuko's as owners of the suit land was witnessed by **D2, D3, D4, & D5** plus other clan members on **PEX "A"** and other documents include:-

"B" dated 7/02/2000

"C" dated 17<sup>th</sup> /11/2006

"D" dated 8<sup>th</sup>/1/2006

"E" dated 30/03/2008

"F" dated 28<sup>th</sup>/02/2008

"G" dated 8<sup>th</sup>/03/2008

"H" dated 29<sup>th</sup> /09/2009

"I" dated 17<sup>th</sup>/01/1989

That his neighbor on the East is Joshua Mukobeza, West is Sande Bugwoira along the path going to Nanvunano.

Further, that the 1<sup>st</sup> Defendant Kabanda Peter convened a meeting in 1998 about the land of his late father Kafuko Robert Jonathan and through that, led the delegation of some of the above Defendants to grab land of his late

father and uncle influencing the sale of it. That the 1<sup>st</sup> encroachers onto the suit land were 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

That in 1999, his late father Kafuko Robert Jonathan filed a civil suit in Jinja **High Court 0096 of 1999 Southern East** suit against 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who entered part of the suit land in 1999, unfortunately his father died in 2005 and the matter was dismissed in 2006 for lack of prosecution and he was unable to follow up as he was still a student and refiled it in Kamuli Court in 2010.

**During cross-examination** he answered that **D1** spearheaded the encroachment of the suit land by convening a meeting on 22/3/1998 using his office of the Gombolola Chief in the clan (Iruba clan) and that they signed for the District Clan head Tibikoma Fred, yet he hadn't sanctioned the meeting. That the meeting had no Secretary, no Minutes for the meeting and that **DW1** used his office to do his unlawful acts. That **PW1** didn't know that Kulabako Muhamad had sold to 2<sup>nd</sup>, 3<sup>rd</sup> Defendants and Mukobeza Joshua, but only saw the documents on record.

That Enock Kiringi was a squatter on the suit land and not a lawful bonafide occupant, therefore he could not sell to the 5<sup>th</sup> Defendant in 1976. That **D5** encroached on the suit land in 1999 not 1976 and that he didn't know whether **D5** sold some portion to **D4** in 2003 and he was not aware whether **D5** gave some portion to **D6**.

That he knows Salim Kadedesi Mugasa as a relative, he wasn't aware whether Namusobya Hadijja sold to **D7** because that portion belongs to Kafuko Dauson Isabirye is the caretaker of the late Salim Kadedesi Mugasa in Butagaya Sub-County Jinja as evidenced on **PEX 1** dated 17/1/1989.

That **PW1** and Kafuko Dauson Isabirye informed the Clan District Head about Tibikoma Fred and he wrote to them on 17/11/2006 about their encroachment. That **Annexure 'A'** of the WSD was a forgery because stamp and signature are not the official ones of the Late Tibikoma Fred.

The second Plaintiff witness was **Kabanda Alex Kafuko, a male adult aged 40 years, teacher by profession, attached to Iringa Township P/S, and resident of Nakasedhere Village, Nkondo Sub-County, Buyende District (at pages 6-7 of the record of proceedings) (herein after referred to as PW2)**. He testified that the suit land belonged to his late grandfather Iswaya Jonathan who distributed the same during his lifetime to some of his two sons i.e. Kafuko Dauson Isabirye (his father) and the late Kafuko Robert Jonathan in 1986 before he died in 1998.

That in 1991, his paternal uncle and his father called for a clan meeting confirming the same and in that meeting Kauzi Soosi (**D4**), Kabanda Martin (**D2**), Samanya Iswaaya Samuel (**D3**) and Kabanda John Iswaya (**D5**) were present as evidenced on **PEX 'A'** witnessed and signed on confirmation documents of the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye his father.

That in 1998 Kabanda Peter (**D1**) convened also about the same. In 1991 (**D1**) ordered all the suit land to be grabbed from his uncle and father (two Kafukos) and Kauzi Sosi is the one who chaired the meeting of confirmation as clan member and Vice-Chairperson, RC1 Nakasedhere, **D2** was Secretary for Defence Nakasedhere Zone, **D3** and **D5** clan members as evidenced on **PEX "A"**.

That in the meeting of Kabanda Peter in the names of Sub-County Clan leader without knowledge of his uncle and father he instructed the whole suit land to be grabbed and this is why he was dragged into this matter. He also forged a stamp and signature of the Clan District head late Tibikoma Fred **WSD 'A'**.

That he was the one who convened their meeting and then tied his boss Tibikoma Fred that he gave instructions the land be grabbed and given to Kulabako Mohamed.

That from 1986-1998 it is his uncle and father who were in occupancy of the suit land. That Kafuko Robert Jonathan died in 2005 when he already filed a case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in **Jinja High Court Civil Suit No.0096/99** and the rest had not yet entered onto the suit land.

That Kauzi Richard is the heir /Administrator to the family of the late Kafuko Robert Jonathan and holds Powers of Attorney of Kafuko Dauson Isabirye because he is sickly and the land measures 30 acres. That the two Kafuko's has a gardens on the suit land, bricks, and trees before the Defendant's encroachment.

**During cross-examination, PW2** confirmed that the Late Iswaya gave his sons land in in 1986 and the same was confirmed by the clan members and Bataka in 1991 and wrote confirmation documents and the two Kafukos took occupation thereon since 1986-1998 until they were disorganized by the Defendants. That WSD "A" is a forged document because the stamp and signature did not belong to the Late Tibikoma Fred and it was done in the office of (**D1**).

That Fabiano Kabanda was the Kisoko Chief and also signed on confirmation document **PEX 'A'** and is number 13.

The third Plaintiff witness was **Kyebayiga John, a male adult aged 38 years old, a Field Officer in Community Vision (NGO), resident of Nakasedhere Village, Nkondo Sub-County in Buyende District (At pages 8-9 of the record of proceedings) (Hereinafter referred to as PW3)**. He testified that the whole suit land belonged to the late Iswaya Jonathan who distributed to his two sons, the Late Kafuko Jonathan & Kafuko Dauson Isabiye during his lifetime in 1986.

That sometime back some squatters like Enock Kiringi, Sosani Kabanda, Iduma Mukobeza (Iswaya's brothers); and that in 1991, the Kafuko's called a Clan meeting to confirm the same and some of the Defendants i.e. Kabanda Martin (**D2**), Samanya Samuel (**D3**), Kauzi Sosi (**D4**) and Kabanda John Iswaya (**D5**) witnessed and signed confirmation document **PEX "A"**.

He testified that in 1998 Kabanda Peter (**D1**) convened a meeting of the same in the capacity of the Sub-County Clan leader Iruba where the stamp and signature WSD "A" were forged of the late Tibikoma Fred were forged his boss. That in that meeting, Mzee Robert Kafuko (late) wasn't invited, but Kabanda Peter (D1) through his office instructed Kulabako Mukobeza to take part of the late Kafuko Jonathan's land forcefully and Kafuko Robert Jonathan dragged 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who first encroached in Jinja High Court.

That the late Kafuko Robert was given a letter from LC1 forwarding him to Police where 2<sup>nd</sup> Defendant was threatening to kill him (**PEX B**) dated 7<sup>th</sup> Feb.2000. That in 1998 Kabanda Peter (**D1**) instructed Kulabako Mukobeza to grab land from Kafuko Robert Jonathan through his forgeries, looking at the attendance list **WSD (A) D1** made a conclusion in capital letters, there was no Secretary in the meeting, but wrote a heading and conclusion by himself which means he had interest, and abused his office and led to the grabbing of the suit land.

That Kabanda Peter (**D1**) first told Mzee Kafuko Dauson Isabirye that he was taking a decision removing land from late Kafuko Robert and giving it to Kulabako Muhammad, but Mzee Kafuko Dauson warned 1<sup>st</sup> Defendant not to do so because the late Kafuko Robert was given the land by his father and confirmed by the Clan leaders and members plus Bataka but **D1** went ahead and did it forcefully so the dispute and confusion was caused by the 1<sup>st</sup> Defendant.

That Kadedesi Mugasa had only one portion of land in Butagaya not Nakasedhere and there is a document of 1989 confirming the same. That Namusobyia Hadijja sold part of the suit land illegally because their land is in Butagaya Jinja District not at Nakasedhere Zone in Buyende

**During cross-examination, PW3** answered that the witnesses who signed did so illegally because the land belongs to the two Kafukos.

The fourth Plaintiff witness was **Dauson Isabirye Kafuko, a male adult aged 80 years old, resident of Nakasedhere village in Nkondo Sub-County and a retired head teacher. (At pages 9-11 of the record of proceedings) (herein after referred to as PW4).** He knew most of the Defendants except **D7** as were residents of Nakasedhere village and testified that in 1986, his father gave them the suit land with his brother Kafuko Robert Jonathan who is his young brother and his portion doubles that of **PW4**.

That sometime the suit land was occupied by squatters i.e. Kiringi Enock, Juma Ngobi. That shortly after their father gave them the land, he died after two years and in 1991 they called a clan meeting with clan mates, clan leaders, Bataka who confirmed their ownership of the land to avoid encroachers and trespassers on the suit land.

He confirmed that Kiringi Enock, Juma Ngobi and others were squatters just and later vacated the land and him and his brother started utilizing the land until they started getting disturbances from the Defendants especially **D1** Kabanda Peter.

That the dispute started in **1999**, none of the Defendants was in occupation then of the suit land 70s or 80s, but all started disturbing is in 1999 and his brother the late Kafuko Robert dragged **D2** and **D3** to court in 1999 in **C/S No.096/1999** to which Kabanda John started calling him a thief as if the land he was occupying was his.

Further, that **D5** Kabanda John is occupying his portion, yet he even signed the confirmation document which confirms **PW4** and his brother as owners of the suit land and he wondered why he says he bought it from Enock Kiringi who was just a squatter. He questioned how come **D5** bought this land from Kiringi in 1976 and again he confirms to him on the same on 1991 **PEX "A"**.

**During cross-examination, PW4** confirmed that the father died in 1988; and that the meeting held in 1991 was confirming the Kafukos as owners of the land by **D2, D3, D4 & D5**. That **D1** is the one who influenced the sale of



part of the suit land and Hadijja Namusobya was just a figure head because their land is in Butagaya Jinja District and a document dated 17/1/1989 that they only have that piece of land.

That **D1** is the one who influenced the sale and grabbing by misusing his office as Sub-Country Clan Head of the Iruba and hence **D1** is the main cause of confusion and his boss the late Tibikoma Fred fired him for bringing such confusion in the clan as evidenced in document dated 30/3/2008 (**PEX E**) for his illegal actions.

**In re-examination, PW4** answered that he resides near the suit land across the road of Bukungu and has always known Juma Ngobi as a squatter in the suit land who died in 1985 and was buried in Ndolwa where his portion is not at Nakasedhere. That he knows Mukobeza Kulabako as the son of Juma Ngobi and the said Mukobeza Kulabako has never settled on the suit land.

That the late Kafuko Robert has never been a caretaker, but owned the land as seen in **PEX 'A'**. That **D1** is the one who influenced the sale by giving it to Kulabako and the buyers were much aware of the land belonged to Robert Kafuko Jonathan; and the suit land is along Kamuli Bukungu Road.

The fifth Plaintiff witness was **Mpubani Sedrach, a male adult aged 72 years old, a peasant, Resident of Nakabira Village, Nakabira Parish, Buyende T/C in Buyende District (at pages 11-13 of the record of proceedings) (herein after referred to as PW5)**. He testified that the claimant is his clanmate, he knew some of the Defendants and others he didn't and that they are in court because of a land dispute. That Tibikoma Fred was the elder brother who was the Clan Head of Iruba, he was summoned by Mr. Kabanda Peter **D1** that they had a problem, but the meeting never took place because people didn't turn up.

That he was in court to testify about the forged stamp and signature of the Late Tibikoma Fred on WSD 'A' and to show court the signature and stamp his brother was using and those on **WSD 'A'** are forged. That the right stamp and signature are those on Plaintiffs papers **PEX 'C'** dated 17/11/2006 and **PEX 'D'** dated 08/12/2006 & **PEX 'E'** dated 30/3/2008; and that the one on **WSD.'A'** is forged. That the reason he was in court he is sure that the late Tibikoma Fred would have testified to the same if he had been alive.

That Tibikoma Fred was District leader of Base Iruba Clan and had only one stamp which he stamped on the Plaintiff's paper as were tendered in court by **PW5**. That **PW5** was in court to tender the stamp and papers stamped and signed documents by because he was the vice to Tibikoma Fred.

**During cross-examination**, he confirmed that his elder brother was called Tibikoma Fred. He was his brother in the clan and were both leaders in the same office as he was his Vice (*Katikiro*). That he was the Vice since 1974 until when he died in 2012.

That between 1998-2006, the Late Tibikoma Fred never changed stamp. That in 1998, he was staying at Nakabira-Buyende so was his brother and he was aware his brother had a Secretary called Saidi Mondha, but he never authorized him to write the letter **WSD 'A'** because he would have signed it himself as Tibikoma Fred, he didn't sign for him and that Saidi Wondha is still alive.

The sixth Plaintiff witness was **Stephen Martin Ngobi, a male adult aged 51 years old, a peasant, resident of Ndolwa-Buluba LC1, Ndolwa Parish, Buyende Sub-County in Buyende District (at pages 13-14 of the record of proceedings) (herein after referred to as PW6)**. He knew the Plaintiff as his brother, a son to his paternal uncle the late Kafuko Robert Jonathan and the Defendants- three (3) of them are his uncles (**D4 Kawusi Sosi, (D3) Samanya, (D6) Balikoowa** while the other three (3) are his grandys; **Peter Kabanda (D1), Martin Kabanda (D2) and D. John Iswaya**.

He didn't know and was aware why the parties were in court; and testified that the Plaintiffs filed a case against seven (7) Defendants who trespassed upon his father's piece of land and his father's Dauson Kafuko Isabirye located at Nakasedhere Zone, Iringa Parish, Nkondo Sub-County in Buyende District.

That the Plaintiff inherited the land from his uncle Kafuko Robert who died in 2005. That the matter was first filed in Jinja High court by his paternal uncle Kafuko Robert in 1999 and Kauzi Richard re filed it here in 2010.

Further, that the land was given by his grandfather the Late Iswaya Jonathan in 1986 to the two Kafukos (his sons) and some of the Defendant witnessed when his grandfather was doing so like **D2, D3, D4 & D5 on PEX'A'**; and that he also now wonders how they encroached on the land when they already knew that it belonged to the Kafuko's.

**During cross-examination**, he answered that apart from **D1**, the rest are in occupancy of the suit land and they decided to divide it among themselves yet they do not have any color of ownership.

**The Plaintiff closed his case with this witness and the matter went on defence.**

**The Defence Case** opened with the first defence witness **Kabanda Peter, a male adult aged 58 years old, a farmer, resident of Nakasedhere Village, Iringa Parish, Nkondo Sub-County, Buyende District (at pages 14-18 of the record of proceedings) (herein after referred to as DW1)**. He was born and lived in Nakasedhere village and knew the Plaintiff as the son of the late Kafuko Robert, while Dauson Kafuko is the elder brother of Late Robert Kafuko.

He testified that the dispute in court concerns land which is being used by the rest of the Defendants situated at Nakasedhere. That he has no claim on the land, has never used it nor stayed on it and had never connived with the co-defendants to grab the land. That the land belongs to Kulabako Mohamed son of Iduma Kabanda Ngobi.

He confirmed knowing the letter dated 22/3/1998 'A' (WSD) written by Tibikoma Fred together with Saidi Mondha. That it was written by Saidi Mondha the Secretary on instructions of Tibikoma Fred and the meeting was held at his home. That Tibikoma Fred was the District Clan Head Iruba Clan (*Baise Iruba* Clan) and that he belongs to that clan together with Robert Kafuko and Dauson Kafuko.

That what prompted him to write this letter is Mukobeza Mohamed had complained to Tibikoma Fred about the land occupied by Kafuko Jonathan who grabbed his land and that the letter was supposed to return the land from Kafuko Robert to Kulabako Mohamed Mukobeza. That before the letter was written, Tibikoma Fred and Saidi Mondha wrote to him asking him to invite them for a meeting to solve the problem that Kulabako had complained that Robert Kafuko had occupied his land. That when Kulabako Mohamed returned to that land, Kafuko refused him to use it because he was staying at his aunt's place since 1985. That Tibikoma Fred chaired the meeting; when Mukobeza Mohamed's father died (Iduma), the land remained under the custody of his uncle Jonathan Iswaya (the brother of his father).

That the letter stated the suit land belonged to Mukobeza Kulabako. Robert Kafuko refused to attend the meeting though he was invited to attend, he said he wasn't sure if he got the letter inviting him and after it was given to Kulabako, he started looking for buyers to sell the land wherein he sold it to Martin Kabanda **D2**, Samanya **D3** and to Joshua Mukobeza Plaintiff's paternal

uncle. That he was not present on the date document **PEX 'A'** was made but he knew about it.

**During cross-examination, DW1** answered that he had evidence to confirm that Tibikoma Fred convened a meeting. That he also had letters he was written to convene the meeting. **DW1** read the letter to court in which he stated it wasn't him who convened the meeting, but Tibikoma; no minutes were recorded, no attendance list was made, there was no evidence to show that Saidhi Mondha was the Secretary and the last paragraph was written by **D1**. That it was Tibikoma Fred who signed the letter and stamped on it and **DW1** received it. That it was Kulabako Mohamed who brought him the letter and he just received it as it was there.

That he is near the suit land and all that is done he sees it; and he was present when Namusobya Hadijja was selling the land and they asked him to assist write the agreement (**Annexure 'E' to the WSD**).

That Juma Ngobi was killed in 1985 while on the land and he attended his funeral and no document was recorded at the funeral. That Juma Ngobi left only that piece of land, he was buried at his brother's home in Ndolwa. That he had two (2) brothers i.e. Iswaya Jonathan and it was very long to reach his home, so his brother decided to bury him at his home. That the distance where he was buried is 3 km from his land.

That no minutes were jotted down to show that Juma Ngobi had only one piece of land, yet he was buried in different land 3 kms away from the suit land. That the son of Ngobi came back in 1998, the land was vacant, no one was occupying the land and it is the complainant who knows why he complained about Kafuko Robert's (occupation). That the purpose of the meeting was to solve the dispute between Kafuko Robert and Kulabako, but the former didn't attend the meeting. That it was decided by clan leader Tibikoma Fred and that he had never received a letter firing him and has never received a notice of intention to sue by the Plaintiff.

**In re-examination, DW1** answered that the document was written at his home WSD 'A'; that Saidi Mondha went with it. That the body of Juma Ngobi had decomposed as he was just collected in a polythene bag for he was cut into pieces and was buried at his brother's home which is about 3 kms from the suit land. That he was requested to write the agreement by Kabanda John and he didn't know anything about Tibikoma Fred firing him to stop him from being the Gombolola Chief (clan leader).

The second defence witness was **Kabanda Martin, a male adult aged 54 years old, a farmer, resident of Nakasedhere Village, Iringa Parish, Nkondo Sub-County, Buyende District (at pages 18 -20 of the record of proceedings) (herein after referred to as DW2)**. He testified that Kauzi Richard is his grandson and son to Kafuko Robert, he also knew Dauson Kafuko as a son to his brother Iswaya Jonathan and was aware of the dispute before court.

That he had never trespassed upon the Plaintiff's land, but bought it from Kulabako Mohamed on 3<sup>rd</sup>/03/1999 after which he took occupation. That he has two wives and the 2<sup>nd</sup> wife lives thereon, he build there a permanent house and a semi-permanent house and also grows maize and sweet potatoes thereon; and his neighbors are Joshua Mukobeza in between the road going to Kamuli -Bukungu road up to the swamp called Kasuleta. That the land belongs to Mukobeza which belonged to his late father Ngobi Juma Kabanda and he knows how Ngobi Juma Kabanda acquired that land.

That he acquired it from his father Kauzi. That Juma Ngobi Kabanda occupied the land for long, the land was given to him in an agreement between himself and Mukobeza Mohamed after the death of his father in agreement in an exercise book. That it is the seller who signed and the Secretary and the agreement was written by Mutaalu. He wasn't sure if he is still alive for he vacated the land.

Counsel for the defendant tendered in the Agreement dated 3/3/1999 for identification and it was admitted and marked as **(Exh IDI)**.

Further, that Kauzi started his claims in 2010 when he received a document claiming the suit land. That he knew the document of 1991(**Annexure 'A' to the Plaint**); his name was on the document and he was the Defence Secretary in 1991 and he signed the document before knowing the owner of the land. That eventually he understood the owner when Mukobeza Mohamed came and complained to the Clan Elders. That the clan elders said that Iswaya Jonathan, Iduma or Juma Ramadan. That Iswaya Jonathan distributed land to his children, the father of Robert Kafuko was given, Ngobi Juma Kabanda was also given his portion and in the meeting it was decided that this land was given to Juma Kabanda.

That the land which was given to Robert Kafuko is situated at the road Kamuli-Bukungu road (part of the suit land); and that he attended the clan meeting which investigated the matter.

**During cross examination, DW2** answered that he didn't know how old he was in 1986, but said he was born in 1962. He didn't know how old he was in 1991. That he signed the document which gave **PW1** the suit land, but didn't know anything. That he was born in Nakasedhere village and so were **PW1's** father and paternal uncle.

Further, that the land was not clear, he never run made in 1991 and wasn't forced to sign the document (**Annexure A' to the Plaintiff**). That he bought the land from Mukobeza in 1999 and came back in 1998 and claimed that the land was given to him so he also bought. That they sat in meeting where they made a document that gave the land to Mukobeza. It was written on 22/03/1998. That Kulabako was claiming for this disputed land.

That the clan head wrote to the Gombolola Chief if Iruba clan to convene a meeting for this land. That he didn't recall who the Area Chairman was in 1999. He stated that one could buy land without the presence of the Chairman. That he had no document inviting Kafuko Robert for the meeting in 1998. That meeting was held at **DW1's** home, no minutes were recorded at the meeting and there was no consent between Kafuko Robert and Kulabako Mukobeza. That Iswaya Jonathan wasn't the father of Ngobi and Ramadan Juma. That Juma Ngobi left one Kibanja at Nakasedhere.

Finally, that Juma Ngobi died and was buried at Ndolwa, he was buried at his brother Ramadan; his Kibanja was at Nakasedehre and after his death, the land was care taken by **PW1's** grandfather Iswaya Jonathan. That he was lying to court.

**In re-examination, DW2** responded that he didn't recall who the Area Chairperson of Nakasedhere was, he thought he was the Defence Secretary in 1999. That he is not the secretary for Defence LC1, he doesn't recall when he stopped being Secretary for defence LC1. That he went to school and stopped in P.4. That the people who signed the document confirming land to the Kafukos were the same people who signed other documents that the same land belonged to Kulabako like Kabanda Alex and that Ngobi Juma died in 1985.

The third defence witness was **Samanya Samuel Iswaya, a male adult aged 42, years old, a farmer, resident of Nakasedhere Village, Iringa Parish, Nkondo Sub-County, Buyende District (at pages 21-23 of the record of proceedings) (herein after referred to as DW3)**. He was born in Nakasedhere, knew the Plaintiff as a son of his brother Kafuko Robert who was his clan brother and testified that he is not a trespasser on his land, but

he acquired it through purchase from Mukobeza Mohamed Kulabako on 6/2/1999 and they wrote a document written by Mutaalu Andrew who vacated the area and he didn't know his whereabouts, he disappeared and he didn't sign the agreement as it was the procedure at that time as buyers didn't sign agreements then.

That the one who wrote the agreement is the one who wrote his name and he paid 150,000/= and that he has his commercial home on the land. That his neighbors are Zirabaa Muzaale, Sosipateri and Martin Kabanda from the road to Bukungu then up to a swamp Kasuleta.

Counsel for the defendants requested court for **Annexure 'C'** to be received as exhibit for identification of the Agreement dated 6/2/1999 and marked as **Exhibit ID2**.

**DW3** further testified that the land is for Iduma Ngobi and knew because he was born in the village; and that he was present in the meeting held on 22/3/1998 and that the meeting ended when the Clan Head, Tibikoma Fred returned the land to Mukobeza. That he is of the Iruba clan and was present in the meeting which confirmed Mukobeza as owner of the land, but that it was the Secretary who wrote for him his name. That he didn't recall when Kauzi Richard started claiming for the land.

**During cross-examination, DW3** confirmed that he received the Notice of Intention to Sue from **PW1**. That his father has also sued them in **Jinja HC in 1999 vide CS NO.096/1999** which was dismissed upon his death in 2006. That he was still young and didn't know what happened between 1986 and 1991. He only knows when he was born but not his age. That he signed the confirmation because he was ignorant, but those who signed in 1991 are the same people who signed that it belonged to Kulabako but doesn't recall those who were present that contradicted themselves.

He didn't know why Kulabako's father Juma Ngobi wasn't buried in his land. That he wasn't confusing court that he doesn't know who the Chairman was of Nakasedhere when he bought his land and that he comes from Nakasedhere village and at the time it wasn't important to purchase land in the presence of the area chairman. He remembered that **PW1's** father was Kafuko Robert Jonathan was the Area Chairperson when he bought the land.

The fourth defence witness was **Kabanda John Iswaya, a male adult aged 72, years old, a farmer , Resident of Nakasedhere Village , Iringa Parish, Nkondo Sub-County, Buyende District (at pages 23 -26 of the record of proceedings) (herein after referred to as DW4)**. He

knew Kauzi Richard, and wasn't aware of the suit land. He testified that it is his land, it didn't belong to **PW1** and he bought it from Enock Kiringi in 1976 who had got it from the Kisoko Chief Edward Kabanda. That he was present in 1965 and that Enock Kiringi is not alive and he doesn't know where he went. That when he bought the suit land, he cultivated thereon potatoes, cassava, jackfruit that even his home is on the land.

Counsel for the defendants tendered in **Annexure D** and submitted that the agreement was written by Peter Obeke, son of Kiringi, who migrated and he didn't know where he went and that the document was in custody of **DW4** and prayed that the document be tendered in under **Section 90 of the Evidence Act**, document dated 4/7/1976 being a document of 38 years old in custody of **DW4** who couldn't trace the author.

Although the Plaintiff objected that the document that it had been put on smoke and so he didn't agree with it, however, **Court** admitted the document dated 4/7/1976 and marked it as **Exhibit No.1** for the defence case.

**DW4** further stated that he bought the land at Shs.4,000. That Lulenti Kayimbwa (late) and Zekwri Bugweira were present when he bought the land and his neighbors are Kauzi Sosi, Lulenti Kayimbwa. That where Lulenti was, there is no body as he died, so did his wife and the other neighbor is Robert Sande Bugwoira.

That he sold part of his land to the 4<sup>th</sup> Defendant (Kauzi Sosi) in 2003 and he sold him 5 sticks and that Kauzi Sosi is using his land and he sold it to him at 75,000/= and that he gave him an agreement which was written by Peter Kabanda (**D1**).

Further, that **DW4** knows how to write and his eyes can see well to read. **DW4** stated that he could identify the agreement between him and Kauzi Sosi (**Annexure 'E'**) is shown to the witness). He recognized the document as the *Kibanja* between Kauzi Sosi and himself written by Peter Kabanda (**D1**).

In addition, that when he sold the land to Kauzi Sosi, no one protested. That Dauson Kafuko has never possessed land there. That his land didn't cross the road. That he got the proof that the land belongs to Kiringi from the Kisoko Chief Kabanda.

That the Sub-County Chief Iruba clan (**D1**) can produce the evidence because **D1** and **D4** are witnesses in this. That he has been on the land for



34 years and that he bought it from a Langi who came from Pallisa. That the elders who were present know that he didn't get land from the clan; he just bought his *Kibanja* and that the clan refused to give him land which belonged to his father. That Enock Kiringi came as a squatter, the Kisoko Chief Edward Kabanda was present as it was him who sold to Kiringi.

**DW4** further stated that Kabanda Edward sold 3 pieces of land. That he was aware that Iswaya Jonathan called a clan in 1986 and distributed land to his children. That he wasn't aware that Kauzi Sosi stood for him as surety when he was in prison and that he sold land to Kauzi Sosi because he stood surety for him.

That Sosani Kabanda had two *bibanjas*, he had a Kibanja on the road and at his father's place. That land belonged to the Late Salim Mugasa. That he was present when the **PW1's** grandfather Iswaya Jonathan in 1986 was giving his sons the two Kafuko's, but that he didn't know that he was giving on even his land and that is why he signed on **(Annexure A to the Complaint)**.

He further stated that he wasn't aware that Dauson Kafuko sued him for trespass in 2003, but that he remembered it happened and that Kabanda Edward was the Kisoko Chief in 1965.

That they didn't give him a document to that effect that Enock Kiringi bought from Edward Kabanda in 1965 and that Kauzi Sosi and Peter Kabanda **(D4 & D1)** were witnesses in this. That court should note that **D4** was born in 59 and **D1** was born in 56. That **D4** was 6 years in 1964 and **D1** was 9 years in 1965; and that the Secretary signed for all of them because they did not know how to write and that's why he didn't thumb print or sign.

He confirmed that Kafuko land is on the Western side not on the Eastern side. That he had never confirmed the Kafukos on the land that he is occupying. That he has heard about the document of 1991, but its false **(Plaintiff's Exhibit A)**.

That he was just hearing about the document in court and that he didn't confirm that it belonged to Kafuko Dauson. That he didn't know anything about Notice of Intention to Sue. That he was aware that Mukobeza Joshua returned his portion to the Plaintiff in **Civil Suit No.45/2013 Kamuli Court**. That their neighbors were Ezekiel Bugwoira, Lulenti, Sosani Kabanda. That Sosani Kabanda was the one caretaking. That it was not him who recorded his name there or who wrote it on **(PEX A)**.

The fifth defence witness was **Kauzi Sosi, a male adult aged 54 years old, a farmer, resident of Nakasedhere Village, Iringa Parish, Nkondo Sub-County, Buyende District (at pages 14-18 of the record of proceedings) (herein after referred to as DW5)**. He had lived on Nakasadhre village since he was born and knew Kauzi Richard as a resident on the same village; and testified that he has never grabbed his land, but rather the Appellant is the one grabbing **DW5's** land.

That the land is located at Kamuli to Bukungu Nakasedhere village; and he acquired the land by way of purchase from one John Kabanda Iswaya (**D5**) who was in court. That he bought it on 15/3/2003 at shs.95,000 and the witnesses present were Peter Kabanda, Mukembo Godfrey, Martin Kabanda, Mukembo Godfrey, Martin Kabanda, John Kabanda and others whom he had forgotten. That he was given a document authored by Kabanda Peter.

Counsel for the Defendants tendered in the document as **Annexure 'E'** to the Defence.

**DW5** further testified that he didn't sign on the document, but rather Peter Kabanda (**DW1**) and that it was his signature thereon.

Defence Counsel applied to court to tender in the document / agreement for identification and called Mr. Kabanda Peter to tender it in, the Plaintiff admitted that he had seen the document and **Court** admitted the agreement dated 15/1/2003 between John Iswaaya Kabanda and Kauzi Sosi marked **Exhibit ID3** for the Defence.

**DW5** continued that his neighbors in the East are Muzaale Sosi, West-John Kabanda, South-Sande Bugwoira and North Enumu. That there is a road in the West and Kabanda John. That he bought 7 sticks of 10ft, in which by 180 sticks of 10 ft in length; he cultivated on the land and he has thereon oranges, jackfruits, *Mvule* trees and other crops. That he found the *Mvule* tress there, knows how John Kabanda acquired it by way of purchase, he bought it from Enock Kiringi but he didn't remember when he bought it. That Kauzi Richard started claiming this land in 2005.

**During cross-examination, DW5** answered that he has been on the land for the last 54 years and that his land is on road going to Nanvunano. That P is his name and that he wasn't confusing court. That he wasn't around when John Kabanda bought the land and that he couldn't recall that in 1991 he was the Vice -Chairperson.

He confirmed that **PW1's** grandfather gave the suit land to the two Kafukos (**Annexure A to the Plaintiff**). That he bought the land from Kabanda John because he knew that Kabanda bought it from Kiringi; and Kiringi bought the land from **DW5's** father. That he doesn't remember the year and didn't sign the agreement. That he bought the land in 2003 and didn't know who the Area Chairperson was at that time. He didn't know if Kabanda John consented with Kabanda John Iswaya. He wasn't aware that the matter as reported to the clan head Tibikoma Fred in 2006.

That he didn't remember receiving **Annexure 'C'** on the Plaintiff, saw **Annexure 'D'** on the Plaintiff and he had never received **Annexure 'F'** in the Plaintiff. That he knows Mukobeza Joshua and was also aware that he was also on the suit land. That he wasn't aware of Mukobeza's reply to the letter and he wasn't aware that Mukobeza Joshua handed the land to **PW1** and wasn't aware that **PW1** had sued Mukobeza Joshua. That he wasn't aware that he sued him and judgement was given in favor of **PW1** in **Civil Suit No.0045/2013** Kamuli Court. That he saw the letter on Plaintiff **Annexure 'H'**

**In re-examination DW5** responded that his land neighbors the road going to Nanvunano. That he first bought 5 sticks, lastly he bought one stick from Iswaya Jonathan and in total they are six sticks.

That he came to know John Kabanda as he had grown up; and that Kulabako Mohammed came in the clan and claimed his father's estate. His father was Mukobeza. That this is Iruba clan, they gave him and that that document was given to that orphan by the Clan Head. That it was mistake to give that father of the Kafukos who wasn't the rightful owner.

Counsel for the defendant prayed under **O.18 rule 13 of CPR** to recall **DW1** to tender **Exhibit ID3** which has been tendered in court and court allowed it.

After **DW1** was reminded that he was on oath, he testified for the second time that his name is Kabanda Peter, he knew Kauzi Sosi and that they are in the same clan and that he is his brother's son. That his neighbor, **DW1** is his paternal uncle.

That Kabanda John called him to assist him to write for them an agreement that he was selling land to Sosi Kauzi when this happened, he wrote it but he wrote his names on the agreement as P. Kabanda. That it was him who wrote the document and that it was his real handwriting.

Counsel for the defence prayed the document be received as **ID3** as Defence Exhibit, but the **Plaintiff, PW1** objected to the document being tendered in court as an exhibit on ground that P is not a name, but a mere letter and he knows how to sign as it is known on **(Annexure 'F' on WSD)**. **Court** over ruled the objection under **S.6 of the Evidence Act** and received and marked it as **Exh.D2** for court.

**During cross-examination by the Plaintiff, DW5** answered that he just wrote everything, sometimes he just uses a sign and sometimes he writes his name. That his name is Kabnda Peter, he has two names.

That he didn't recall the Chairperson of Nakasedhere in 2003, the LC1s were elected in 2001 and he had never heard of their elections again. That he was still in Nakasedhere LC1 and knows the Chairperson now who is called Bagwira Sande Robert. He was not aware when he was elected.

That he is the Sub-County Clan Head who wrote as the Secretary of the agreement, but not as Sub-County Clan Chief but was just asked to assist, which was a different duty from his role. That he was not there when Kabanda Edward was buying from Enock Kiringi. That was not of their clan, his elder brother asked him to write the agreement on his behalf and he didn't know that Enock Kiringi was a squatter on that land.

**In re-examination**, he responded that Kabanda Iswaya John had stayed on the suit land for more than 10 years, but didn't exceed 11 years.

The sixth defence witness was **Balikowa Stephen, a male adult aged 41 years old, a farmer, resident of Nakasedhere Village, Iringa Parish, Nkondo Sub-County, Buyende District (at pages 31-32 of the record of proceedings) (herein after referred to as DW6)**. He had lived Nakasedhere for 41 years, his father is John Kabanda Iswaya **(D5)** and he testified that that **PW1** is his son- the son of his elder brother Kafuko Robert Jonathan and they are of the same clan. That the land which he is occupying is for his father **John Kabanda Iswaaya (D5)** and that he has never bought a *Kibanja* and he pointed at him that he was present on court.

Further, that he was occupying the land which his father gave him on the side. That he gave him a portion to put up his house and that the land is very big, he just told him to build somewhere and he didn't give him boundary marks. That the land didn't belong to him, but was for his father, he constructed there his house in 1986- a grass thatched house and that the father acquired the land by way of purchase from Kiringi in 1976.

**During cross-examination by the plaintiff, PW6** answered that proof shows he has been on the land since 1986, he produced 9 children from this land and he uses it to cultivate and grows crop like oranges, mangoes and seasonal crops on the land. He confirmed that his father gave him the land, constructed his house thereon and he has never left. That his father bought the land and at the time the neighbors were Zekeri Bugwoira, Enumu Kasadha Lulenti Kayibwa.

That Lulenti Kayimbwa died, but he didn't know the neighbors that were there at the purchase of the land, he didn't know if those neighbors were included in the sale agreement and that he wasn't aware that his father was arrested by Kafuko Dauson Isabirye in 2000 while trespassing on through the suit land.

**PW6** didn't know how old he was in 2000, he wasn't aware that Sozi Kauzi **\*(D4)** was the one who stood for his father as surety at Police and he wasn't present when his father was buying the suit land in 1976. That his father sold a portion to Kauzi Sosi and he signed on it. That it was done he was very young and he didn't know it, he didn't know how old he was in 1991, but was on that village and signed as a witness on **Annexure A** of the Plaint.

He read No.14 and it reads out as Kabanda John Iswaya. That he didn't know anything about the document, didn't know that the Clan Head had summoned them about the land for trespass and didn't remember receiving a letter from Wafula Advocates.

He confirmed knowing Mukobeza Joshua as his elder brother and was aware that he received document **PEX 'F'** from Wafula lawyer in 2008. He knew that Mukobeza Joshua was once on the suit land, but later handed it over through court and he didn't know Mukobeza Joshua wrote a document in respect of the land.

**In re-examination, DW6** responded that he didn't know the year he was born, his father is the one who had told him that he is 41 years now and he never went to school.

The seventh defence witness was **Zirabamuzaale, a male adult aged 55 years old, a farmer, Resident of Nakasedhere Village, Iringa Parish, Nkondo Sub-County, Buyende District (at pages 33-35 of the record of proceedings) (herein after referred to as DW7)**. He testified that he started staying at Nakadsedhere Zone in 2006, but before settling there, he was staying in Meru Village, Sabawali Miseru-Kidera and he didn't know Kauzi Richard before, but when he bought the land, then he came to know him.

That the land he is occupying is at Nakasadhere and he bought it from Hadijja Namusobya on 7/5/2006 and those present were Joshua Mukobeza Kauzi Singe, Zakayo, Robert Bugwoira, and he bought the land cash at 1,500,000. That the neighbors around his land are in the East, there's Nakasuleta swamp, and west a road going from Kamuli to Bukungu, across there is Alex Kabanda Kafuko, in North Samanya Samuel and in the South Sosi Kauzi.

That he found the vendor Hadijja at his neighbors where he had gone to assist and that is how he came to know her. That she explained to him that the land belonged to her father Salim Mugasa and she gave him a Sale Agreement and he produced a document dated 7/5/2006. That the document was authorized by Zakayo Kauzi who is still alive. That he didn't sign the Sale Agreement, but it was signed by the Secretary. He then admitted that he signed the agreement.

**Counsel for defence** prayed to tender Agreement for identification and **Court** admitted the Agreement dated 7/5/2006 and marked **EXH.ID No.4** for the defence case.

**DW7** further testified that the LC Chairperson of the time was Robert Bugwoira who signed the document and they stamped it and he is still alive. That he has cultivated the land and plants there his crops, maize, beans and soya and has his house on the same land. That Mr. Kauzi Richard started claiming the suit land in 2007, but that the land doesn't belong to **PW1** and the person who sold it to him is still alive.

**During cross-examination by the Plaintiff, DW7**, confirmed that he signed onto his agreement and he showed court that he wrote thereon his full name Muzale Sosi. That he wasn't confusing court, he bought the land genuinely from Namusobya Hadijja in 2006 and his basis to buy the land was that because there were many people and that she had inherited the same from her father. That she has two sisters who were present when he was buying the land and they mentioned their names but he didn't know them.

That Namusobya Hadijja never gave him a copy of the Letters of Administration, never showed him any letter from the Administration General nor gave him a letter from her sister and brother authorizing her to sell the land or a copy of Powers of Attorney from the family. That he wasn't aware that there were four children of Salim Mugasa Kadedesi

Further, that he didn't know that the father of Namusobya Hadijja and others a left a document/Will confirming that he had one *Kibanja* at Butagaya Jinja

District. That he didn't recall being summoned by the clan head (late Tibikoma Fred on the suit land, didn't recall that the clan head forwarded the matter to court and that he had received a notice from **PW1 (PEX'F')**, but didn't know how to read. That he wasn't aware that Mukobeza Joshua also trespassed upon the suit land and wasn't aware that he handed over the land to **PW1** as indicated in **PEX'G'**; and that he would call Namusobya as his witness.

**There was no re-examination, and Counsel for the Defence** applied for leave to call Muhamad Kulabako Mukobeza and Namusobya Hadijja as witnesses who participated in the transaction in this matter; and **Court** granted this leave.

The eight defence witness was **Mukobeza Kulabakho Mohammed, a male adult aged 48 years old, a farmer, Resident of Bukamba Village , Bukamba Parish, Nazigo sub-county, Kayunga District (at pages 35-43 of the record of proceedings) (herein after referred to as DW8)**. He had lived in Bukamba for 30 years, knew **PW1** as a son in the clan and that they share a grandfather and their father's relatives. He testified that **PW1** is a son of Kafuko Robert and that he knows the suit as it is concerning land Iringa Nkondo Sub-County belonged to his father Ngobi Juma.

That the land was for the clan, he was given the land by his grandfather Kabanda Iswaaya and he wasn't aware when his father acquired the land. That he was born on the *Kibanja* in 1963 and grew up there while staying with his father, but he later left and went to work in Bunya.

He didn't know the year he was born, but was knowledgeable then, but when he was 12 years he got information that his father had died in 1985 and he attended his burial. That when he arrived, his paternal uncle Ramathan Kabanda Mayanja had brought the body to his place for burial and that his father was already buried.

That his father was murdered at Balowoli Road, the uncle buried him at Ndolwa village on another clan land. That whilst at his paternal uncle's home, he told him to go to his *kibanja* that the father had left and he went there where he feared the death of his father and therefore only stayed there for a day. That he left the land/place and went to his paternal aunt in Bugerere, he didn't leave the land under anybody's care and he left because his brother Robert Kafuko threatened him off the land.

That after a period of 10 years in Bugerere, his elder brother Dauson Kafuko sent Mukobeza Joseph to call him to handover the land as it was done. That he didn't recall the year as the land was being threatened to be grabbed. That he got the message and feared for his life and he feared to be murdered like his father.

That when he arrived a Kafuko's home, he told him to go to his elder brother Robert Kafuko who was intending to grab his land and he went to Nakabira the clan head of Iruba. That the Clan Head is Bageya Tibikoma where he introduced himself as son of Ngobi Juma, father to Kulabako Mohammed Mukobeza. That he told him that he is the land of his father, then he wrote to the Sub-County Clan Head Peter Kabanda **(D1)** ordering him to call for a meeting.

That the clan members and elders gave him the land. That it's Peter who convened the meeting in 1999 On the 22<sup>nd</sup> in the month he didn't recall. That Tibikoma himself attended the meeting where he was given his land; and after he was given the land, he went back to his home in Bugerere and took a document in respect of his ownership on the land.

**Counsel for the defendant** relied on their **Annexure 'A'** to the **WSD**, the Plaintiff objected that according to this stamp on this original copy, it is not the same size with the stamp on the original copy, Court having inspected the same confirmed that it was the original and admitted it and marked **Exhibit No.3** for the Defense case

**DW8** further testified that after receiving his land, he didn't settle on it because of fear so he decided to sell it. That he sold it Martin Kabanda, 5 sticks of 12 ft from Kamuli -Bukungu Road to swamp of Kasuleta at 75,000/= and he gave him a document. He showed court the agreement the made for him. That he didn't know how to read but knew the agreement and that it was authorized by Mutaalu. He affixed his thumbprint and also showed it to court. That those present were Kauzi Sosi and Samanya Samuel. He didn't know where Mutalu went. That he said it on 3/3/1999

The document was given to Plaintiff Counsel for the Defendant, it was annexed to the defence as **annextures 'B'**, the **Plaintiff** had no objection and **Court** admitted the agreement of sale between Mukobeza Mohamed Kulabako and Martin Kabanda dated 3/3/1999 is hereby taken and marked **EXH. No.4** for the defence.



**DW8** continued that he sold land to Samanya Samuel 10 sticks of 12 ft from Kamuli-Bukungu Road to the swamp of Kasuleta at shs.150,000/= in 1999, authorized by the same Mutalu & Doc given to the Plaintiff

**Counsel for the Defense** applied to tender in court this doc. **ID2** through this witness who was the seller and his author; **Annexure 'C'** on the WSD, **the Plaintiff had no objection** and **Court** admitted the Sale Agreement between Mukobeza Mohamed, Samanya Iswaya Samuel dated 6/2/1999 is here taken and marked as **Exhibit No.5** for the defence.

**During cross-examination, DW8** answered that **PW1's** name was on the document on which he was handed over his land. That **PW1** was present in the meeting and even those who handed him the lands saw him. That his grandfather was Kabanda. That the brothers of his father were Jonathan Iswaya (late) and Ramathan Kabanda (late).

That they were all in the Plaintiff's lineage, his grandfather had one *Kibanja* in Nakasadehere Iringa, but not in Ndolwa where **DW8's** father was buried. That also his father was given land- his father was given 20 sticks in width. That the neighbors of his father's land are Paire at the time then one side, Salim and Kiringi Enock. That he wasn't there when Kiringi Enock sold the land.

Further, that his father died in 1985 when he was about 30 years, he was born in 1962 and his father was buried in Ndolwa at his elder brother's home Ramathan Mayanja. That his father had one piece of land located at Iringa. That there was no document that was made on his father's funeral, he based that the land was his on his clan, he was 10 years old and he didn't recall the year. That the evidence to shows that Dauson Kafuko and Mukobeza called him, he forgot it at his aunt's place in Manjeri Bugerere in Feb 1999.

That Dauson Kafuko sent Mukobeza in 1999. That he didn't know the document of 1999 and he stood in court to testify about the property which he was given and that it was the document that was given to him in 1999. That he attended the meeting and he showed court a document dated 22/3/98 marked as **WSD 'A'**.

That the meeting was chaired by **Tibikoma Fred** the Clan Head who gave him the documents, but no minutes. That he wasn't aware if Tibikoma summoned a Clan Meeting in 2006 after the death of **PW1's** father dated 17/11/2006, he wasn't aware of the meeting and never received summons to attend. That he wasn't aware that the land was occupied by **PW1's** father and wasn't aware that **EXH.A** to the Plaint gave land to **PW1's** father that he

was grabbing his land in 1991. That the land didn't belong to **PW1's** grandfather, he wasn't aware Tibikoma was a witness where the land was confirmed to belong to **PW1's** father, but confirmed that Tibikoma Fred was witness **No.3 on PEX 'A'**.

In addition, that Kafuko Dauson had already got the share for their father, he wasn't aware that **D2 & D3** was a witness to confirm that the land belonged Kafuko Robert. That all of them were present when his *Kibanja* was given to him; and that in 1991, Bageya Yolamu was that Clan Head in 1991 who led the delegation to confirm that the land belonged to the Kafukos as evidenced in **PEX 'A'**.

**DW8** again answered that he didn't go to school, he wasn't aware if Tibikoma Fred obtained Letters of Administration. That he sold to Joshua Mukobeza and he wasn't aware if Joshua Mukobeza handed over the portion he sold him to **PW1** and therefore he apologized on his own behalf.

**In Re-examination, DW8** responded that Tibikoma Fred and Bageya are two different people. That the land was handed to him by Tibikoma Fred, he wasn't told that **EXH. D3** was addressed to Kafuko Robert and he didn't know how to read. That what he testified is what he knew and it's what is in the document he had produced in court

The ninth defence witness was **Namusobya Hadijja, a female adult aged 40 years old, a farmer, resident of Bugeywa Village, Butansi Sub-County, Kamuli District (at pages 44-48 of the record of proceedings) (herein after referred to as DW9)**. She testified that she lives in Nakyaka now for 3 years, but was living in Batagaya before in Kagoma, Jinja District. That she is an aunt to **PW1**, she didn't know the father of **PW1** whom she claimed that she is her brother; and that the reason she was in court was to testify about the land at Iringa Nakasedhere village.

**DW9** didn't know the Parish, Sub-County and the District where the suit land is, but that the land is along Kamuli Bukungu road and that it belonged to her father Salimu Mugasa Kadedesi. That her father acquired the land from his father called Kyebiyiga. That she was staying on the land with her father, but couldn't recall when they were staying there. That they started staying there in the 1970's, their neighbors were Kafuko Dauson then on the other side as Kabanda Jeremiya and she didn't recall other neighbors.

That nothing happened on this land, her father died in 1987 and after his death, they sold the land together with her siblings; Twakoba Zamu, Kabanda Siragi, Zaina Tereza and herself. That they sold the land in 2006 to

one Sosi who still lives there up to now and he is in court today as **D7** at shs.1, 500,000. That Muzaale Soosi told her that the land she sold to him was in court that **PW1** is claiming the land.

Further, that the land belongs to them as the children of Salim Kadedesi Mugasa; they sold it to **D7** and that they wrote a Sale Agreement which was authorized by Zakayo who is still alive. That the agreement was witnessed by Kabanda Martin, and Kauzi, but the Plaintiff wasn't there. She knew Robert Bogoiri who is her brother who stays at Iringa and a father to the Plaintiff, rather the father to the Plaintiff is Kafuko Robert Jonathan who has responsibilities in Iringa, he is a teacher.

That she doesn't know how to read and write and couldn't show her name on the agreement to court. That the agreement was written in her presence and she saw the book in which it was written. That no other person has ever claimed the land before.

**During Cross-examination, DW9** answered that her father owned two *Bibanjas*- that one was at Iringa-Nakasedhere and another was at Butagaya. That they used to stay in Nakasedhere. That her father acquired the land from his late father Kyebayiga. That Kyebayiga only had that Kibanja, the village mates know this and Kyebayiga died in the Second World War. That her father died in 1987 as he took sick and was buried at Butagaya as they had no transport to bring him at Iringa. That she attended her father's burial.

That they were staying with her father on the land, but she couldn't recall when they were living there. That they started living there in the 1970's, their neighbors were Kafuko Dawson then on the other side there was Kabanda Yereimiya and she didn't recall other neighbors. That Salim Kadedesi died in 1987 and after his death they sold his land.

That there was nothing written on the funeral of her father. That they used to go from Nakasedhere to Batagaya and vice versa. That her father never left a Will, he had four children, one boy and three girls. That Siragi Kabanda was the heir of their father and that all the children sat and agreed to sell the land to Soosi Muzaale but since she couldn't read, she couldn't show Kabanda Siragi's name on the agreement but the author of it only indicated her name.

That she couldn't count the years from 1970-2016. That the neighbors to their land were Dawson Kafuko in the West and Kabanda in the East whose second name she did not know. That Iswaaya Jonathan was her paternal uncle and grandfather to the Plaintiff.

She further responded that it isn't correct that the land belongs to Iswaya Jonathan. That Iswaya was their guardian when their father Kadedesi died, she wasn't aware that Jonathan Iswaaya gave the land to the Kafuko's and that **D2, D3, D4 & D5** signed on **PEX 'A'** when her grandfather gave the land to the Kafuko's. That **D2** stays in Iringa, she knew **D5, D3** and she wasn't aware if they were present when Jonathan Iswaaya was giving land to his children in in **PEX 'A'**.

That she had forgotten name of **PW1's** uncle, it was Siragi Kabanda who authorized her to sell the land. She didn't know when she was born but she is 40 years, no Letters of Administration were produced by her, no Minutes from her family and no evidence about the land at Nakasedhere was tendered.

**In Re-examination by the Defendant counsel, DW9** responded that she was not told when she was born, she knew she was 40 years because she's grown up. That the father was buried at Butagaya because they had no transport to take him to Iringa. That he died at Butagaya, she authorized the writing of the Sale Agreement and that Siragi Kabanda didn't challenge the sale of the land.

The tenth defence witness was **Zakayo Kauzi Singe, a male adult aged 68 years old, a peasant , Resident of Nakasedhere Village , Iringa Parish, Nkondo Sub-County, Buyende District (at pages 48-52 of the record of proceedings) (herein after referred to as DW10)**. He had been living in Nakasedhere since he was born and testified that **PW1** is his nephew and the dispute in court is in relation to the land in Nakasedhere village which land has never been for the Plaintiff.

That the land was for Mukobeza Mohammed whose father was Juma Ngobi, parent of Hadijja is Salim Kadedesi. That he knew Muzaale for he bought land from Hadijja Namusoby and that he even authored the agreement. That the land transaction took place on 7/5/2006 for a consideration of 1,500,000/=.

He confirmed that land is for Hadijja Namusoby and she acquired it from her father and they are four children namely Kabanda Zaina etc. and upon purchase, Muzaale constructed a house thereon and he had no grudge with the Plaintiff.

**During cross examination by the Plaintiff, DW10** answered that the land belonged to father is for Hadijja Namusoby and her brother. That it belonged to their deceased father who was buried elsewhere, not on the suit

land. That the land formerly belonged to father of Salim and one Kibayiga and also acquired from his father Kabanda.

That one died in 2<sup>nd</sup> World War, **DW10** wasn't born yet when the land was given to father of Haddijja by Clan Head whose name he had forgotten. That the father of Haddijja died in 1987 from Butagaya and it's where he was buried but he didn't attend the burial and doesn't know whether people talked about the property of the late.

That the clan gave him the land, but he didn't know the year he was given. That there was no agreement, minutes will at his burial yet he was not there. That they were in Butagaya village when they agreed to sell the piece of land; and that it is the owner who has powers to sell the land and the seller has more powers.

That the land was given to this 4 children when Salim was still alive; Kabanda, Namusoby Haddijja, Zaina, he didn't know the 4<sup>th</sup> and that all their names weren't in the agreement. He had no idea as he didn't attend the burial of Salim, didn't know there was need to consent as children of Salim.

That he knows late Jonathan Iswaaya and Kafuko Isabirye are his late brothers and father; they were just caretaking for children of Salim and Juma Mukobeza. That their father was the eldest of Salimu and Juma. That he only heard that the suit land was given to Kafuko Robert and Kafuko Dauson and heard from **D2, D3, D4 & D5** that they were the witnesses in confirming the Kafuko's on the land on **PEX 'A'**, but he wasn't there.

That it was their father Iswaaya Jonathan who had power over the suit land, he thinks it's the clan who had authority to handle the land and the Clan Heads cannot give land upon the death of the owner. That when the children came, the clan gave them the land, there was no agreement, documents, Minutes giving Namusoby Haddijja or authority to sell.

That he was present only for Mukobeza Mohammed; and before the land was given to Muhamed Kulabako, it was occupied by Robert Kafuko. That he didn't know who gave Robert Kafuko to care take. That he recalls in 1990's he requested Robert Kafuko **PW1**'s father to give him land operate a church of which he did allocate him part of the suit land.

Furher, that Juma Ngobi was buried at Ndolwa because at Nakasedhere there was no house for him, there were the brothers and a sister; and Jonathan Iswaaya (our father), Mayanja, Juma Mukobeza. That there were no Minutes at the burial of Ngobi Juma showing that he only had one *kibanja*.

That Juma was the brother to Iswaaya Jonathan, **DW10** didn't recall the year Juma was given land. That Joshua Mukobeza is his brother and that he had never heard about Joshua Mukobeza Written Notice to leave the land. That **annexure G** to the Plaintiff the handwriting was for Joshua Mukobeza and that **DW10's** follower who has never been mad so he wrote **document 'G'** to the plaintiff.

**In Re-Examination**, he responded that he wasn't present when Mukobeza Joshua wrote the letter. That Jonathan Iswaaya was a caretaker. That it's true in the 1990's, he asked his brother Robert Kafuko to give him space on the suit land for church. That by then he was still a care taker, he wasn't present when Mayanja was given land and that the attendance list was made when handing over land to Muhamed Kulaba s/o Juma Mukobeza.

**Learned Counsel for the defendant submitted that he had got the letter from the Plaintiff about the sell and constructing new houses on the suit land by the Defendants; Court advised that the Defendants to just know that the people they were selling to land when this case is in court, will bring him in the court for false sales and even new houses you are constructing will be demolished at his own costs if he loses in this matter.**

The eleventh defence witness was **Saidi Mwendha, a male adult aged 58 years old, a peasant, resident of Namavundu, Nakabira Parish, Buyende T/C Buyende District (at pages 52-56 of the record of proceedings) (herein after referred to as DW11)**. He testified that he was in court to give evidence on the documents which handed over land to Mohamed Kulabako. That the land is at Iringa Village, Nakasedhere, Nkondo Sub-County in Buyende District and he only handed over the agreement that gave land to Mohamed Kulabako, but Fred Tibikoma was the author who died around 2012.

That the document was written to hand over the land from Fred Tibikoma to Kulabako Mohamed. That the land belonged to father of Kulabako Mohamed, he died and the clan decided to give Kulabako Mohamed. That the Parish Chief Kafuko Dauson brought Kulabako Muhamed and told Fred that Muhamed was an orphan and they were chairing the meeting in order to hand over the land to Kulabako. That the father of Mohamed Mukobeza was Ngobi Juma.

That at the time his father died, Mukobeza Kulabako was about 18-19 years, the meeting was held and **DW11** was directed by Tibikoma Fred to write a

handover document **WSD 'A'**. That the land was handed over to Kulabako, he wrote the document in the capacity of Secretary of the clan (*Baise Iruba*).

Learned Counsel for the defendants submitted that it's **Annextures A** in their defence and was already tendered & exhibited dated 22/3/1998.

**DW11** further testified that he wrote the document himself, it was written to Kulabako Mohammed and was addressed to Kafuko Robert & the handwriting is his and sign is for Tibikoma Fred. That it was addressed to Robert Kafuko because he was cultivating on it and there was no list of members that attended and neither were any minutes.

**Counsel for the defendants** prayed for an adjournment to 26/4/2017 to produce the Minutes and Attendance list. That **DW11** testified that when he went to the home of Tibikoma Fred, he found his widow and requested her to check the office where the documents are kept and she allowed **DW11**, but he couldn't find it. Learned Counsel for the defendant added that in view of this Witness Statement they cannot trace his document of 1998 (it is 19 years ago) and the person who kept it died. They therefore prayed that the photocopy in possession of witness also **annexture "A"** to the Witness Statement be received as Exhibit and treated as secondary evidence under **Sec.64 of the Evidence Act**.

The **Plaintiff** objected to tendering in the document, the document is a photocopy got from the original and he didn't know how they can be convinced it's the right document without its original and he prayed for it not to be admitted as evidence; **Court** however admitted it and Exhibited at **"H"** and it's evaluated during Judgement writing.

**During Cross examination, DW11** answered that he wrote the agreement because he was the Secretary of the clan. That Tibikoma Fred instructed him to do so, it was handed over to Kulabako and the Chair of the meeting was Kabanda Peter Sub-County Clan Head Nkondo. That because Kafuko Robert was the one in part of the suit land and has refused to hand it over to Kulabako Mohamed. Kafukos are brothers of Kulabako, he didn't have evidence to prove that Kulabako was claiming land from Kafuko Robert and didn't have evidence to show that **Peter DW1** got letter from Tibikoma to chair that meeting.

That the document which summoned is with **D1**, it was one document which was instructing Kabanda Peter to inform Kafuko Robert to attend the meeting. Kafuko Robert wasn't present but **PW1** was present. That he didn't

sign on it. That **DW11** himself was the Secretary of the meeting, he wrote the document but failed to get the original.

That he was using land of Ngobi Juma, father of Kulabako and didn't know how the father of **PW1** entered on the suit land and there was no consent between them and Robert Kafuko. That there is a difference between his handwriting and signature of Tibikoma and that Tibikoma used his signature only (dated 22/3/1998).

That the signature of 17/11/2006 was for Tibikoma Fred (**Annexure 'D'** of the Plaint, he wasn't aware whether the two Kafuko's are the original owners of the suit land and that it isn't true that the Defendants were handing over land to Kafuko's. He knew the late John Bageya, he was the District Clan Head by that time in 1991 and that Tibikoma Fred was his Secretary. That on 22/3/1998, Tibikoma mentioned that the document was made by mistake to confirm Kafuko Robert over the same which is dated 28/10/91 **PEX 'A'**.

That the Minutes which got lost stated that it was done by mistake, he didn't remember that in 2009 he was accused of making a document without the notice of Tibikoma Fred who was his boss by not signing it and he signed for him.

He confirmed that it was true that he was fired by Tibikoma Fred for making the document (**WSD 'A'**). That Ngobi Juma had two children i.e. Kulabako Mohamed and another. That he had a grass thatched house, they never consented with **PW1's** father to handover the land to Kulabako and it was within his knowledge that Juma Ngobi wasn't given the suit land, but he was aware that it was given to Kafuko Robert, but it was done by mistake.

**In Re-examination, DW11** responded that it was necessary to inform the father of the Plaintiff when handing over the land to Kulabako. That when he failed to turn up, the clan had the authority to handover to Kulabako the owner.

**After the defence closed its case,** Court visited the *locus in quo* on 23<sup>rd</sup> November 2020 in the presence of both parties and some of their witnesses.

**During the locus visit,** court observed that the Plaintiff had 6 sticks in width up to Kasuleta swamp and are in between **DW2 & DW3**. **DW2** had a permanent house on the land plus two (2) huts (grass thatched), he also had plants; and he testified that he started staying on the land in 1999 after he purchase of 60ft by 10 ft up to swamp from Mukobeza Mohammad, built in



2003. He also confirmed that he signed the document in 1991, but for caretaking by Kafuko Robert for Kulabako Mohammed.

**Mukobeza Mohamed** testified that the 3<sup>rd</sup> Defendant came onto the land in 1999. There was a grave of his biological mother was buried on 14/5/2002 and a second grave of the child to the 3<sup>rd</sup> defendant. That he has a permanent house thereon with a banana plantation and cassava.

**DW7** confirmed that he came onto the land in 2006 when he purchased the land from Hadijja Namusobya. His permanent house was built in 2007. He has a mango trees, bananas and two huts. **DW4** confirmed that he came on the land in time court could not ascertain but has been on the land for about 20 years. That he has maize on the land. He has bricks, oranges, trees, mangoes, jackfruits, yams & Bananas

**During cross examination by the [plaintiff, D4** remembered that he came on the land in 2003. That he bought it from John Kabanda Iswaya. He confirmed that he signed a document in 1991 giving land to the late Kafuko Dauson and Kafuko Robert signed as **PEX A**. That he also signed his Sale Agreement.

**DW6** during *locus in quo* indicated that he had a permanent house and another under construction. That he came onto the land in 1996 which wasn't true for he settled thereon in 2006. That his father John Kabanda gave him the land when he was still alive. That his father made for him an agreement which wasn't shown. That his land measured 10 sticks of 10 ft. It had 2 huts, matooke, sweet potatoes and mangoes.

**During cross examination at locus in quo** by the Plaintiff he states that he didn't have the agreement his father gave him because he wasn't asked for it in court.

**DW5** confirmed that he came on the land in 1976 by way of purchase from Enock Kiringi who died in a year he didn't remember. Court established that he has a permanent house on the land in 2006. That he sold part of the land to John Maweerere in 2000. There was a permanent house constructed in 2017; and five (5) huts, cassava, jackfruits, *matooke* and maize.

**In Re-examination by the Plaintiff, DW5** stated that he had never signed a document confirming that the land belongs to Kafuko Dauson in 1991. That Sosani Kabanda was the caretaker of the land but it belonged to Salim Kadedesi but didn't know if Salim Kadedesi was mentioned as a neighbor when he was buying from Enock Kiringi in 1976.

Court further observed that the Plaintiff has 60 ft of 12 ft up to the swamp called Kasuleta and it is between **D2 & D3** under it is under use.

**In resolving the above two stated grounds**, I have critically analyzed all the evidence led by both sides before the trial court as availed to me on the record of typed and certified proceedings, I have also read the Judgement of the Trial Court and the submissions of both sides. The following are the issues that were agreed upon to be resolved in this matter before the lower court;

1. Whether the suit land belongs to the Plaintiff's late father and paternal uncle?
2. Whether the Defendants are trespassers?
3. Remedies sought?

I have taken time to unravel the genesis of how all the various claimants got onto the suit land. My analysis of the evidence as captured above points to the fact that most of the parties in this matter are interrelated and that the land in issue was originally belonging to the Iruba clan.

The evidence of both sides also reflects that the suit land was in possession of an unnamed common ancestor who had three children, namely Juma Ngobi (father of Kulabako Mukobeza Muhammad), Alamanzan and Jonathan Iswaya (father to Kafuko Robert & Kafuko Dauson/paternal uncle to the Appellant/Plaintiff).

The Appellant in this case sued **D1 Kabanda Peter** who it is clear from the evidence that he is not occupying or laying any claim on any portion of the suit land in 2010; but the meeting that decided to pass the suit land to Muhammad Mukobezi Kulabako sat at his place and he put into action what the clan decided. He also sued **D2 Kabanda Martin** who bought from Kulabako Mohamed on 3<sup>rd</sup>/03/1999; **D3 Samanya Samuel Iswaya** who also acquired it through purchase from Mukobeza Mohamed Kulabako on 6/2/1999; **D4 Kauzi Sosi** who acquired the land by way of purchase from **John Kabanda Iswaya (D5)** on 15/3/2003; **D5 Kabanda John Iswaya** who bought from Enock Kiringi in 1976 (after he allegedly had got it from the Kisoko Chief Edward Kabanda); **D6 BAlikowa Stephen** who was occupying land for his father **John Kabanda Iswaaya (D5)** and has never bought; and **D7 Muzale Wilson** who bought from Hadijja Namusobya on 7/5/2006.

It is therefore not in dispute that this was customary clan land that was handled by the clan heads of the Iruba Clan acting under the belief that they had a right to confirm, distribute and deal with the disputed land in their capacity as clan leaders.

I have also critically analyzed the circumstances under which this land was handed over to both Robert Kafuko Dauson (father of the Appellant) and to Kafuko Jonathan by their late father Iswaya Jonatahn in the year 1986 before his death in 1988. They both claim to have taken possession of the same and occupied the various portions allocated to them and after about three years in 1991, they caused a meeting of the Iruba Clan was held as per **P.EX A** whereby Kafuko Robert Dauson and Kafuko Jonathan were confirmed by the clan leaders as the true owners of th suit land in fulfillment of their late father's wishes.

In a turn of events, in the year 1999, the Appellant a son of Juma Ngobi who was a abrother to Iswaya Jonathan came into the picture; and the same clan members who had confirmed Robert Kafuko Dauson (father of the Appellant) and to Kafuko Jonathan as the owners of the suit land again sat agains and handed a portion of the land that had been occupied by one of the Kafukos to the Appellant on grounds that they had confirmed the two Kafukos on the suit land by mistake before Kulabako Mohammed showed up to claim his land.

The facts also reveal that upon being handed the suit land, Mukobeza Kulabakho Muhammad went ahead and sold portions of the suit land to other occupants who are currently in possession.

**The first leg of these two issues therefore rotates on whether there was any acts of trespass committed by the current occupants of the suit land.**

The **Appellant/Plaintiff (PW1)**, a son of Robert Kafuko Jonathan son of Iswaya Jonathan and all his witnesses testified that the land originally belonged to **PW1's** grandfather Iswaya Jonathan who gave it to his two sons, the late Robert Kafuko Jonathan & Kafuko Dauson Isabirye during his lifetime in 1986. The two called for a clan meeting confirming the Suit land as theirs; and in that meeting, confirmation documents on which the names of Kauzi Soosi (**D4**), Kabanda Martin (**D2**), Samanya Iswaaya Samuel (**D3**) and Kabanda John Iswaya (**D5**) appear as evidenced on **PEX 'A'** wwas executed.

The above is confirmed by the Appellant's witness **PW2 Kabanda Alex Kafuko, PW3 Kyebayiga John, PW4 Dauson Isabirye Kafuko, PW5 Mpubani Sedrach and PW6 Stephen Martin Ngobi.**

**PW4** specifically testified that the dispute started in 1999, his brother the late Robert Kafuko Jonathan dragged **D2** and **D3** to court in 1999 vide **Civil Suit No.0096 of 1999 Southern East against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (Respondents now),** but this suit was dismissed for lack of prosecution in 2006 after he died in 2005. The current suit out of which this Appeal arose was filed against the current Respondents vide **Civil Suit No. 0029 of 2010 by the Appellant,** five (5) years after the death of Iswaya Jonathan and four years after the dismissal of **Civil Suit No.0096 of 1999 Southern East.**

It is also not clear how big this land is, while **PW1** claimed that his father's land which he is claiming measures 20 sticks of 12 ft, his witness **PW2** stated that it was 30 acres; and to me, this discrepancy in the size of the suit land reveals that the Appellant has no idea of what size of land he is claiming.

It is also worth noting that in his defence, **DW1** denied any interest in suit land, save for being a party to the alleged forged letter from clan head. That he has never used it nor stayed on it and had never connived with the co-defendants to grab the land and that the land belongs to Kulabako Mohamed Mukobeza son of Iduma Kabanda Ngobi.

**DW1,** however confirmed that a Meeting of the clan heads sat at his place and gave land to the suit land to **Mukobeza Mohamed (DW8)** son of Iduma Kabanda Ngobi who was a brother to Iswaya Jonathahn; and that the reason why it was handed to his son is because the earlier confirmation of 1991 to the two Kafukos was made in error.

He was supported by all the defence witnesses and specifically, **DW11** who knew the late John Bageya as the District Clan Head by that time in 1991 and Tibikoma Fred his Secretary stated that on 22/3/1998, Tibikoma mentioned that the document dated 28/10/91 **PEX 'A'** was made by mistake to confirm Kafuko Robert over the suit land.

**DW1** further testified that Tibikoma Fred chaired the meeting; and that when Mukobeza Mohamed's father died (Iduma), the land remained under the custody of his uncle Jonathan Iswaya (the brother of his father). That he was requested to write the agreement by Kabanda John.

From the above it is clear that the claims by the Appellant now falls under the common law doctrine of proprietary estoppels. This doctrine was expounded widely in the case of **Wayi Atilio & Anor vs Elvira Ojali C.A No. 0023 of 2009** by the Hon. Justice Stephen Mubiru relying on the case of **Crabb v Arun District Council [1976] 1 Ch.183**, where Lord Denning explained the basis for the claim as follows:-

*“The basis of this proprietary estoppel, as indeed of promissory estoppel, is the interposition of equity. Equity comes in, true to form, to mitigate the rigors of strict law.”*

The above means that a claimant will be prevented from insisting on his strict legal rights, whether arising under a contract, or on his title deeds, or by statute, when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. It is also illustrated in the case of **Ramsden v. Dvson (1866) L.R. 1 H.L. 129**, thus;

*“If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake to which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.*

The Learned Hon. Justice Mubiru in the case of **Wayi Atilio & Anor vs Elvira Ojali (supra)**, was of the view that this doctrine is an equitable remedy, which will operate to prevent the legal owner of property from asserting their strict legal rights in respect of that property when it would be inequitable to allow him to do so. As is shown in **Crabb vs Arun District Council**, one aspect of modern proprietary estoppel is that it can be used as a cause of action, rather than just a defence contrary to the well-known mantra that estoppel may be used as a shield, but not a sword.

The learned Judge further argued that the doctrine is founded on acquiescence, which requires proof of passive encouragement. **Megarry and Wade’s The Law of Real Property (8<sup>th</sup> Edition) at pages 710 to 711, para 16-001** summarizes the requirements in relation to proprietary estoppel as follows:-

*“...Acquiescence can only be raised against a party who knows of his rights”.* As Lord Diplock put it in ***Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850, 884*** thus:

*The party estopped by acquiescence, must at the time of his active or passive encouragement, know of the existence of his legal right and of the other party’s mistaken belief in his own inconsistent legal right. It is not enough that he should know of the facts which give rise to his legal right. He must also know that he is entitled to the legal right to which these facts give rise.*

*“He further explained...The essential elements of proprietary estoppel are further summarized in **McGee, Snell’s Equity, 13 ed. (2000) at pp. 727-28**, as follows: an equity arises where:*

*(a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O’s property;*

*(b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and*

*(c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.*

*It will be observed from the above summary that to rely on such equity, two things are required, first; that the person expending the money supposes himself or herself to be building on his or her own land; and, secondly, that the real owner knows that the land belongs to him and not to the person expending the money in the belief that he is the owner.*

Relating the above doctrines to the instant case, the evidence led before the trial court reveals that the 1<sup>st</sup> Appellant became aware of the Respondent’s activities on the land way back in 1998 when the 1<sup>st</sup> Respondent spearheaded the rest of the Respondents in his capacity as the then Gombolola Clan Head of Nkondo Sub-County Iruba Clan to extend a portion of the land that had been confirmed as belonging to Robert Kafuko (father to the Appellant) to Mukobeza Kulabakho Muhammad.

Further, although it is undisputed that the Appellant filed a suit in 2010 against the Respondents, it is clear that he never at any one time brought an action against the clan leaders of the Iruba clan or specifically against Mukobeza Kulabakho Muhammad who became a beneficiary of the portion of land he is claiming.

This means that when the Appellant in the year 2010 sought to take unconscionable advantage of the Respondents by denying them rights or benefit over part of that land, it would be unconscionable in the circumstances of this case for him to be permitted to deny that he knowingly, or unknowingly allowed or encouraged Mukobeza Kulabakho Muhammad to mistakenly assume legal rights over the land now in dispute, which by his own account was meant to be his.

While learned counsel for the Appellant put up spirited arguments of knowledge and active participation of the 1<sup>st</sup> Respondent in passing the suit land to Mukobeza Kulabakho Muhammad after confirming the two Kafukos as the true owners, my findings are that this cannot stand. On the contrary, I agree with the submissions of learned counsel for the Respondents on the acquisition and subsequent possession of parts of the suit land by the Respondents; and I resolve this in favour of the Respondents.

**The second leg of this Appeal touches on the alleged forgery by applying a forged stamp and signature of the late Tibikoma Fred the Clan Secretary of Iruba Clan.**

In resolving this, I have considered the evidence of the Appellant **PW1** who **during cross examination** answered that Kafuko Dauson Isabirye informed the Clan District Head about Tibikoma Fred and he wrote to them on 17/11/2006 about their encroachment. That according to **Annexure 'A'** of the WSD, this was a forgery because the stamp and signature are not the official ones of the Late Tibikoma Fred.

He was supported by his witnesses **PW2 and PW3** that **DW1** is the one who influenced the sale of part of the suit land and Hadijja Namusobya was just a figure head because their land is in Butagaya Jinja District and a document dated 17/1/1989 that they only have that piece of land.

**PW3** specifically stated that in 1998 **Kabanda Peter (D1)** convened a meeting of the same in the capacity of the Sub-County Clan leader Iruba where the stamp and signature WSD "A" were forged of the late Tibikoma Fred were forged his boss. That in that meeting, Mzee Robert Kafuko (late) wasn't invited, but Kabanda Peter **(D1)** through his office instructed Kulabako Mukobeza to take part of the late Kafuko Jonathan's land forcefully and Kafuko Robert Jonathan dragged 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who first encroached in Jinja High Court **[Emphasis Mine]**.

Further, that **DW1** is the one who influenced the sale and grabbing by misusing his office as Sub-Country Clan Head of the Iruba and hence **D1** is

the main cause of confusion and his boss the late Tibikoma Fred fired him for bringing such confusion in the clan as evidenced in document dated 30/3/2008 (**PEX E**) for his illegal actions.

The above was supported by **PW5 Mpubani Sedrach**, a brother to Tibikoma Fred then Clan Head of Iruba, to tender alleged forged stamp and signature of the Late Tibikoma Fred on **WSD 'A'** and to show court the signature and stamp his brother was using and those on **WSD 'A'** are forged. That the right stamp and signature are those on Plaintiffs papers **PEX 'C'** dated 17/11/2006 and **PEX 'D'** dated 08/12/2006 & **PEX 'E'** dated 30/3/2008; and that the one on **WSD.'A'** is forged.

On the other hand, **DW1** confirmed knowing the letter dated 22/3/1998 '**A'** (**WSD**) written by Tibikoma Fred together with Saidi Mondha; and was supported by the rest of the defence witnesses especially **DW11 Saidi Mwondha** on the documents which handed over land to **Mohamed Kulabako (DW8)**. He testified that he only handed over the agreement that gave land to Mohamed Kulabako, but Fred Tibikoma who died around 2012 was the author.

**DW11** also confirmed that the document was written to hand over the land from Fred Tibikoma to Kulabako Mohamed; and that the land belonged to father of Kulabako Mohamed, Ngobi Juma who died and the clan decided to give Kulabako Mohamed. That the Parish Chief Kafuko Dauson brought Kulabako Muhamed and told Fred that Muhamed was an orphan and they were chairing the meeting in order to hand over the land to Kulabako; and that at the time his father died, Mukobeza Kulabako was about 18-19 years, the meeting was held and **DW11** was directed by Tibikoma Fred to write a handover document **WSD 'A'**; and he wrote the document in the capacity of Secretary of the clan (*Baise Iruba*).

**DW11** further confirmed that Tibikoma used his signature only (dated 22/3/1998); and that the signature of 17/11/2006 was for Tibikoma Fred (**Annexure 'D'** of the Plaint).

The position of the law is that Fraud must be particularly pleaded and particulars of the fraud alleged must be stated on the face of the pleading as per **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.**

The term “fraud” was given judicial interpretation by the Supreme Court in **Fredrick J.K Zaabwe vs. Orient Bank & Others, SCCA No.4 of 2006**, per Katureebe JSC (as he then was), as;

*“...Anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood ... 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 suggestions or by suppression of truth....and an unfair way by which another is cheated, .... As distinguished from negligence, it is always positive, intentional. It involves all acts.... involving breach of a legal duty or equitable duty resulting in damage to another.”*

It was also elaborately defined in the case of **Edward Gatsinzi and Mukasanga Ritah vs Lwanga Steven CS No.690 of 2004** as:-

*“Intentional perversion of truth for purposes 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 a single act or combination or by suppression of the 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 suppression of truth and includes all surprise, trick, and cunning dissembling...”*

**See also Kampala Bottlers Ltd v. Damanico (U) Ltd, SCCA No.22 of 1992**, where it was held that fraud must be particularly pleaded and strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters. It was held further held that;

*“The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; 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.”*

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. The case of **Bugembe Kagwa Segujja vs Steven Eriaku & Alvin Ssetuba Kato** cited with approval in 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.'*

Relating the above to the instant Appeal, I have had occasion to critically examine the pleadings before the lower court out of which this Appeal arises especially the Plaintiff filed by the Appellant in **Civil Suit No. 0029 of 2010**, but I have not found any evidence to prove that the Appellant ever pleaded fraud or that **Annexure 'A'** is a forged document because the stamp and signature did not belong to the Late Tibikoma Fred.

From the above, the allegations of the Appellant that the order of grabbing of the land in a meeting in the names of Sub-County Clan leader, allegedly using 'a forged' stamp and signature of the Clan District Head the late Tibikoma Fred cannot be entertained at this point in time since they were not pleaded.

The law is clear that a party is bound by his/her pleadings and Court can only arrive at a decision based on what is in the pleadings and not entertain extraneous matters brought in during the trial. It is also clear that the Appellant did not in any way plead that he was under any disability which prevented him from bringing a case against them at that time.

It is therefore my finding that if at all the Appellant was aware of the fraud he and his witnesses alluded to in their evidence, he ought to have pleaded it and particularized the grounds of fraud in his Plaintiff so that the Defendants/ Respondents put up a defence. Since this is sadly missing, it is my decision that this cannot succeed at this stage in the Appeal. This is also resolved in favour of the Respondents.

**The third leg of this case touches on who was occupying the suit land by the time Iswaya Jonatha allegedly gave it to his two sons in 1986.** According **PW2**, there were squatters who were on the land in 1986; and he specifically stated *"That sometime back some squatters like Enock Kiringi, Sosani Kabanda, Iduma Mukobeza (Iswaya's brothers)."* This was confirmed by **PW3** who also testified that sometime back some squatters like Enock Kiringi, Sosani Kabanda, Iduma Mukobeza (Iswaya's brothers); and that in 1991, the Kafuko's called a clan meeting to confirm the same and

some of the Defendants i.e. Kabanda Martin **(D2)**, Samanya Samuel **(D3)**, Kauzi Sosi **(D4)** and Kabanda John Iswaya **(D5)** witnessed and signed confirmation document **PEX "A"**.

The above was also confirmed by **PW4 Dauson Isabirye Kafuko**-the surviving son of the late Iswaya Jonathan who also testified that sometime the suit land was occupied by squatters i.e. Kiringi Enock, Juma Ngobi and confirmed that **D5** bought this land from Kiringi as far back as 1976 when the late Iswaya Jonathn was still alive.

The evidence also reveals that **DW4 Kabanda John Iswaya**, knew Kauzi Richard, and claimed to have bought his portion of the suit land from Enock Kiringi in 1976 at Shs.4, 000 and that who had got it from the Kisoko Chief Edward Kabanda in presence of Lulenti Kayimbwa (late) and Zekwri Bugweira. His agreement **Annexure 'D'** was admitted the document dated 4/7/1976 and marked it as **Exhibit No.1**. He also confirmed that he sold part of his land to the 4<sup>th</sup> Defendant (Kauzi Sosi) in 2003 and he sold him 5 sticks and that Kauzi Sosi is using his land and he sold it to him at 75,000/= and that he gave him an agreement which was written by Peter Kabanda **(D1)** (**Annexure 'E'**).

**DW4** further testified that when he sold the land to Kauzi Sosi, no one protested and that Dauson Kafuko has never possessed land there, his land didn't cross the road. That he got the proof that the land belongs to Kiringi from the Kisoko Chief Kabanda. That he has been on the land for 34 years and that he bought it from a Langi who came from Pallisa.

From the above, it clear that **DW4** also confirms that Enock Kiringi was on the suit land from as far back as 1976. I have also had the benefit of critically analyzing the defence of **PW5 Kauzi Sosi**, who purchased from one John Kabanda Iswaya **(D5)** on 15/3/2003 as per **Annexure 'E'** to the Defence admitted as **Exhibit ID3** for the Defence.

Again, **DW6 Balikowa Stephen**, a son of **John Kabanda Iswaya (D5)** also testified that he was occupying is for his father **John Kabanda Iswaaya (D5)** and that he has never bought a *Kibanja*. **During cross-examination by the plaintiff, PW6** answered that he has been on the land since 1986 and that his father sold a portion to Kauzi Sosi and he signed on it.

From the above, while it is not disputed that in 1991, the two Kafuko's called a clan meeting to confirm their father having given them the suit land and

some of the Defendants i.e. Kabanda Martin **(D2)**, Samanya Samuel **(D3)**, Kauzi Sosi **(D4)** and Kabanda John Iswaya **(D5)** witnessed and signed confirmation document **PEX "A"**, the evidence confirms that even by the time the late father the late Iswaya Jonathan was in possession of the suit land, there were already some other residents settled on the suit land i.e. Enock Kiringi, Sosani Kabanda and Iduma Mukobeza whom the witnesses referred to as "squatters".

**DW7 Zirabamuzaale**, bought the land, from Hadijja Namusobyia and she gave him a Sale Agreement admitted and marked **EXH.ID No.4** for the defence case. Turning to **DW9 Namusobyia Hadijja**, she was unsure of her relationship to **PW1**, but the evidence suggests that her father from whom she acquired the suit land which she later sold was among the squatters on the suit land by the time the suit land was given to the two Kafukos in 1986.

The position of the law is that land ownership in Uganda is spelt out in **Article 237 (3) of the Constitution of the Republic of Uganda. Article 237 (3) (a)** specifically mentions customary land ownership and a form of land tenure system in Uganda; reinforced in **section 4 of the Land Act 1998 (as amended)**. On the other hand, **Section 101(1) of the Evidence Act** places the onus to prove his interest in the suit land on the Plaintiffs.

I have also relied on will be to define **Section 29 of the Land Act Cap 227 (as amended)** which introduced the concepts of "lawful occupant" and "bona fide occupant". In its entirety it reads that:-

The meaning of "lawful occupant" and "bona fide occupant".

(1) "Lawful occupant" means—

(a) a person occupying land by virtue of the repealed—

(i) *Busuulu and Envujjo Law of 1928;*

(ii) *Toro Landlord and Tenant Law of 1937;*

(i) *Ankole Landlord and Tenant Law of 1937;*

(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or

(c) A person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate"

**Section 29(2) (a) of the Land Act** defines a 'bonafide occupant' on land as:-

“A person who before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent for twelve years or more.” [Emphasis Mine]

The question of who constitutes a *bonafide* occupant on land was extensively addressed in the case of **Kampala District Land Board and Another vs National Housing and Construction Corporation C. A. No. 2 of 2004 (UGSC)**. In that case the respondent had utilized the suit land unchallenged since 1970. The Court of Appeal held that it was indeed a *bonafide* occupant having utilized the suit land unchallenged for 25 years. The Supreme Court upheld the position of the Court of Appeal and I’m respectfully bound by the decision of the Supreme Court in **Kampala District Land Board &Anor vs National Housing & Construction Corporation (supra)**.

I have analyzed the law protecting bonafide occupants of land taking into account the facts of this case. I only wish to emphasize that the two categories of “lawful” and “bona fide” occupants were created by the **1995 Constitution (as amended)** and defined under the **Land Act (Cap.227) (as amended)**, passed in 1998 in order to recognize the *status quo* of the various tenancies existing on land in Uganda as at 1995, and to give security to persons who fell in those particular categories by providing for their rights on the land.

The principles above were crystallized in **Section 29 of the Land Act (Cap.227)** which defines a *lawful* and *bonafide* occupant (supra). The use of the word ‘*bonafide*’ is intended to restrict this provision to occupants of land that have extensively utilized such land, lived on it for the prescribed period of time, all with the knowledge of the owner of such land’, and have done this in the honest and genuine belief that they do have a semblance of ownership over the land. [Emphasis Mine].

On this point, it is my finding that even if Enock Kiringi got on the suit land as a squatter, he qualifies be a *bona fide* occupant as envisaged under **Section 29(1) of the Land Act**, since he entered the land in the 1970s and before he died, there was no objection from any of the former owners including the grandafather of the Appellant, Iswaya Jonathan.

I have also considered the provisions of **Section 34 of the Land Act** which provides that;-

**“Transactions with the tenancy by occupancy.**

(1) A tenant by occupancy may, in accordance with this section, assign, sublet, pledge, create third party rights in, subdivide and undertake any other lawful transaction in respect of the occupancy.

(2) A tenancy by occupancy may be inherited.

.....”

Relating the above to the facts of this case, it comes out clearly that there were valid transactions of disposing off the suit land by Enock Kiringa to **DW4, DW5 and DW6** as per the Sale Agreements they relied upon; and that these people by necessary implication also qualify as bonafide purchasers for value. In the case of **Hajji Abdu Nasser Katende vs Vithalidas Haridas & Co. LTD (Civil Appeal No. 84 of 2003)**, the Court of Appeal while discussing the doctrine of a *bonafide* purchaser for value without notice stated the position of the law as follows at pages 21-22 of the lead Judgment of L.L M. Mukasa-Kikonyogo DCJ;-

*“It suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine as was held in case of **Hannington Njuki vs William Nyanzi H.C.C.S No. 434 /1996** must prove that;-*

- (1) *he holds a certificate of title.*
- (2) *he purchased the property in good faith.*
- (3) *he had no knowledge of the fraud.*
- (4) *he purchased for valuable consideration.*
- (5) *the vendors had apparent title.*
- (6) *he purchased without notice of any fraud.*
- (7) *he was not party to the fraud.*

*A bonafide purchaser of a legal estate for value without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can.”*

**(Emphasis added).**

While learned counsel for the Appellant put up spirited arguments on the presence of the Respondents who acquired title from Enock Kiringi, my findings are that none of those Respondents faced any objections from the Appellant or anyone else for that matter by the time they each individually

bought their respective portions on the suit land; and yet the buyers were all interrelated and neighbours and in the village at the time.

My conclusions are that **DW4, DW5 and DW6** bought the portions they are occupying on the suit land from a person who genuinely believed that he had a title to pass on to them and as such, whatever he sold is binding. They are therefore protected under the above stated law.

For those reasons, I agree with the submissions of learned counsel for the Respondent; and I so hold.

In the final analysis, as detailed above, it is clear to me that in reaching her decision, the learned trial Magistrate thoroughly reviewed the background and circumstances of the case and considered the checkered history of the case. I cannot therefore fault her decision; and I also find that the first two grounds of Appeal FAIL.

**Ground 3: That the learned trial Magistrate erred in law and fact, when she ignored the evidence on record at locus thereby arriving at a wrong decision and leading to miscarriage of justice.**

Both parties did not argue the third ground of appeal, and it is therefore my understanding that the Appellant abandoned it. I see no need to waste time on it since it generally rotates on analysis of evidence.

**GROUND 4: That the Learned Trial Magistrate erred in law and fact when she failed to consider the document dated 28<sup>th</sup> October 1991 signed by the Defendants as well confirming Kafuko Robert and Kafuko Dauson to be owners of the suit land thereby arriving at a wrong decision and occasioning a miscarriage of justice.**

It was submitted for the Appellant that in **PW1**'s testimony at page one paragraph 4 of the record of appeal that the suit land belonged to his father the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye who obtained the same from their late father Iswaya Jonathan during his life time. That after the death of their father in 1988, the clan of Iruba in 1991 sat and confirmed the two (the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye) on the land in the documents dated the 28<sup>th</sup> day of October 1991 exhibited by court as **PEX "A"**.

Further that it was the evidence of the Appellant (**PW1**) at page 2 paragraph 5 of the record of appeal that most of the Respondents signed/endorsed the confirmation letters that that indicated that the suit land was given to the

late Kafuko Robert Jonathan and Kafuko Dauson Isabirye that is to say **DW2, DW3, DW4** and **DW5**.

That during examination in chief and cross examination of **DW2** at page 54 of the record of appeal, he testified in court that his name appears on the document that confirmed the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye on the suit land and that he was not forced to sign on the said document.

That it was also evidence of **DW3** at page 57 of the record of appeal that he was present and witnessed when Robert Kafuko Jonathan and Kafuko Dauson Isabirye were confirmed on the suit land in 1991 and also agreed that they were the owners of the said land. That **DW4 at page 61 of the record of appeal** confirms that the suit land belongs to Kafuko Dauson. This is the same position when **DW5** was cross - examined at page 62 of the record of appeal and he said *"I confirmed that your grandfather gave this suit land to two Kafuko's"*.

They submitted that, **it is a general principal of law that a person of full age and understanding is bound by his or her signature to the document whether he reads or understands it or not.**

**PEX "A"** shows that **DW2, DW3, DW4** and **DW5** signed on the documents that confirmed that the suit land was given to the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye. That much as **DW3** went on to testify at page 57 of the record of appeal that he signed the confirmation letters (**PEX "A"**) because he was ignorant and would like perhaps to be protected by the **Illiterates Protection Act Cap 78** which protects persons unable to read and understand scripts or language in which the document is written or printed. That the catch word in the general rule is that *"a person of full age"*.

They submitted that it was **DW3's** evidence during examination in chief at page 56 that he is 42 years and was born in 1972. That by simple subtraction from the time when he signed on the document and when he was born shows that he signed on the **PEX "A"** when he was 19 years old which means that he was a person of full age. Being a person of full age and understanding , the rule at common law is that, he was bound by his signature on the document whether he reads and understands it or not.

That the only exception to this position is when one raises a defence of *"non est factum"*. This allows a party who signed a document to escape its performance because it is fundamentally different from what he or she



intended to sign or execute. It means therefore that a person's signature was appended on the document by mistake and without knowledge of its meaning. They referred to the case of **Opia Moses vs Chukia Lumago Roselyn & 5 others Civil Suit No.22 of 2013**.

There was no evidence what so ever where either **DW2, DW3, DW4** or **DW5** testified that they signed on **PEX"A"** by mistake and or that the document they signed was different from what they intended to sign. Therefore they were bound by their signatures and by the Learned Trial Magistrate failing to consider **PEX"A"** in her judgment at page 95-103 as signed by the Defendants confirming Kafuko Robert and Kafuko Dauson to be owners of the suit land and failing to hold them by their signatures arrived at a wrong decision.

**In reply**, it was submitted by learned counsel for the Respondents that it is not true the Trial Magistrate didn't consider the document of 28<sup>th</sup> October 1991- **PEX A**. That the correct position is, the Trial Magistrate considered the document at page 5 of the Judgement, while evaluating the evidence e of **DW1**, as under;-

*"D2 also informed court that the land used to belong to Ngobi Juma Kabanda father to Mukobeza Mohammed who sold to him. He informed court that he signed the document of 1991 as the Defence Secretary because at that time he had not known the actual owner of the land. That it was not until Kulabako Mukobeza Mohammed showed up, and complained and the matter was looked into, that he got to know he was the actual owner of the land in dispute".*

They submitted that the Trial Magistrate believed **D2** and preferred the document of 22<sup>nd</sup> March 1998 **Defence Exhibit "H"** which gave the suit land to Mukobeza Kulabako Muhammad. They considered whether the trial Magistrate was justified in preferring the document of 22<sup>nd</sup> March 1998 to the document of 28<sup>th</sup> October 1991, **Annexure A** to the Amended Complaint, as under:-

*"In specific reply to paragraphs 5, 6, 7&8 of the amended complaint, the Defendants state that those who signed on annexure 'A' to the amended complaint, did so on the understanding, that the Land belonged, to Kafuko Robert Yonasani, BUT It transpired later that the land did not belong to him, but belonged to Juma Ngobi alias Kabanda, the father of Mukobeza Muhammad Kulabako successfully claimed it and recovered it"*

They therefore submitted that here the Defendants are pleading a mistake of fact, which at a later stage was corrected when new facts came up. They relied on **Black's Law Dictionary at page 1001**, which defines 'mistake of fact' as *"a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: or forgetfulness of a fact past or present, material to the contractor."*

- 1) *Belief in the present existence of a thing material to the contract which does not exist in the past existence in:*
  - (a) *An unconscious ignorance or forgetfulness of a fact past or present, material to the contractor.*
  - (b) *Belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which was not existed"*

They further submitted that in indeed at pg. 19 of the record of proceedings, **DW2** stated that he signed the document of 1991 i.e. **Annexure 'A'** to the Plaintiff, before he had known who was the owner of the suit land. That he eventually understood the owner when Mohamed Mukobeza came and complained and the clan elders sat and followed the matter. That the meeting decided that the land was for Juma Kabanda

That in **cross-examination DW2** said that the clan sat and they made a document which returned the land to Kulabako Mukobeza and that it was written on 22<sup>nd</sup> March 1998 and he bought his land from Mukobeza in 1999. That this piece of evidence tallies with the Defendant's pleadings in their Written Statement of Defence

Further, that **in cross-examination, DW2** was asked as to whether he was forced to sign the document of 1991, and **DW2** stated that he was not forced, hence the Plaintiff missed the point; it was never the Defendant's case that they were forced to sign, but rather they were led to believe that the land belonged to Kafuko Jonathan, but later on Kulabako Mukobeza Muhammed came to complain, it turned out that the land was his, this is the point the Plaintiff should have cross-examined about.

That in fact since the Defendants pleaded that they signed without knowing that the land actually belonged to Mukobeza Kulabako Muhammad, the Plaintiff should have either conceded the point or led evidence that Mukobeza Kulabako Mohammed did not successfully claim the land; but he left the facts as they are i.e. that Mukobeza Kulabako Muhammad

successfully claimed land; when he sold to the 2<sup>nd</sup> Defendant or some of the defendants, and they submitted that they got title.

In addition, that **DW3** stated that he was present when the document of 1991 was written, he said, that he did not know what he was signing, that he never went to school; he is therefore illiterate; that it is the author of the document who just recorded his name.

They therefore submitted that that witness did not sign the document, only his names were recorded. That **DW5** is not affected by this document, because he bought his portion of land from one Enock Kiringi in 1976, so the document of 1991 concerning Jonathan Kafuko cannot affect his purchase.

That **D. No. 5** sold part of his land to **D. No.4** is also not affected by the document of 1991. He sold to Defendant No.4 in 2003 long before this suit was filed and neither the Plaintiff nor his father challenged this transaction, however, that he also said he signed on **Annexure 'A'** to the Plaintiff, but he added that he did not know that his land was among the piece of land being given to Jonathan Kafuko, his other mistake, however, that it should be appreciated that Defendant No.5 bought his land in 1976, he put up an home on the land (**see pages 23 of the record of proceedings**).

However this transaction was not challenged until the year 2012 that is 34 years later; principles of equity, cannot allow the Plaintiff to uproot him from this land using a document signed under mistake.

That Defendant **No.6** Balikoowa Stephen stated in his evidence, that he is in the land he occupies because his father (Def.No.5) gave him that portion; he therefore derives title from his father who bought from Enock Kiringi not Kulabako Mukobeze, so he is not affected by the document of 1991.

That **Defendant No.7** stated that he had bought the portion of land from Hadija Namusobya on 7<sup>th</sup> May 2006, he is not affected by the document of 1991.

**DW8** was Mukobeza Kulabako, he stated that part of the suit land i.e. the land he claimed belonged to his father-Juma Ngobi; that he has been in the *Kibanja* and stayed in it and left it to go to Bunya. That his father used to occupy the *Kibanja*, in 1985 he was murdered and he did not say in the *Kibanja* because he was being threatened by Robert Kafuko.

That he got information that Robert Kafuko was intending to grab the land so he took steps to recover it from the clan, that at the instance of the District

Clans Head, the 1<sup>st</sup> Defendant convened a meeting, at which meeting, the clan resolved to give him his land, this is the land Kafuko Robert Jonathan was occupying and that's how the document of 22<sup>nd</sup> March 1998 was authored, that he received the land and after sometime, he sold to various persons including the 2<sup>nd</sup> Defendant.

They further submitted that the document of 22<sup>nd</sup> March 1998 rendered the document of 1991, **Annexure 'A'** to the Plaint, useless or irrelevant. That the document of 22<sup>nd</sup> March 1998 proved that the owner of the portion of land was Mukobeza Kulabako Mohamed and not Robert Kafuko Jonathan/Kafuko Dauson Isabirye.

Again, that Trial Magistrate should not be faulted for not relying on the document of 1991, therefore the appeal should fail.

**GROUND 4: That the Learned Trial Magistrate erred in law and fact when she failed to consider the document dated 28<sup>th</sup> October 1991 signed by the Defendants as well confirming Kafuko Robert and Kafuko Dauson to be owners of the suit land thereby arriving at a wrong decision and occasioning a miscarriage of justice.**

On this ground, it was submitted by Learned Counsel for the Appellant that the Learned Trial Magistrate erred in law and fact when she failed to consider the document dated 28<sup>th</sup> October 1991 signed by the defendants as well as confirming Kafuko Robert and Kafuko Dawson to be owners of the suit land thereby arriving at a wrong decision and occasioning a miscarriage of justice

Further, that it was the Appellant's claim as at page one paragraph 4 of the record of appeal is that the suit land belonged to his father the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye who obtained the same from their late father Iswaya Jonathan during his life time. That after the death of their father in 1988, the clan of Iruba in 1991 sat and confirmed the two (the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye) on the land in the documents dated the 28<sup>th</sup> day of October 1991 exhibited by court as **PEX "A"**.

That it was further evidence of the Appellant (**PW1**) at page 2 paragraph 5 of the record of appeal that most of the respondents signed/endorsed the confirmation letters that that indicated that the suit land was given to the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye that is to say **DW2, DW3, DW4 and DW5**. That during examination in chief and cross examination of **DW2** at page 54 of the record of appeal, testified in court

that his name appears on the document that confirmed the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye on the suit land and that he was not forced to sign on the said document.

That it was also evidence of **DW3** at page 57 of the record of appeal that he was present and witnessed when Robert Kafuko Jonathan and Kafuko Dauson Isabirye were confirmed on the suit land in 1991 and also agreed that they were the owners of the said land.

That **DW4** at page 61 of the record of appeal confirms that the suit land belongs to Kafuko Dauson. This is the same position when **DW5** when cross-examined at page 62 of the record of appeal and he said *"I confirmed that your grandfather gave this suit land to two Kafuko's"*

That it is a general principal of law that a person of full age and understanding is bound by his or her signature to the document whether he reads or understands it or not. That **PEX "A"** shows that **DW2, DW3, DW4** and **DW5** signed on the documents that confirmed that the suit land was given to the late Kafuko Robert Jonathan and Kafuko Dauson Isabirye.

That much as **DW3** went on to testify at page 57 of the record of appeal that he signed the confirmation letters (**PEX "A"**) because he was ignorant and would like perhaps to be protected by the *Illiterates Protection Act Cap 78* which protects persons unable to read and understand scripts or language in which the document is written or printed. That the catch word in the general rule is that *"a person of full age"*; and it was **DW3's** evidence during examination in chief at page 56 that he is 42 years and was born in 1972.

That by simple subtraction from the time when he signed on the document and when he was born shows that he signed on the **PEX "A"** when he was 19 years old which means that he was a person of full age and being a person of full age and understand, the rule at common law is that, he was bound by his signature on the document whether he reads and understands it or not.

That the only exception to this position is when one raises a defence of *"non est factum"*. This allows a party who signed a document to escape its performance because it is fundamentally different from what he or she intended to sign or execute. It means therefore that a person's signature was appended on the document by mistake and without knowledge of its meaning.

They referred to the case of **Opia Moses vs Chukia Lumago Roselyn & 5 others Civil Suit No.22 of 2013**; and submitted that there was no evidence what so ever where either **DW2, DW3, DW4** and **DW5** testified that they signed on **PEX"A"** by mistake and or that the document they signed on was different from what they intended to sign; therefore they were bound by their signatures and by the Learned Trial Magistrate failing to consider **PEX"A"** in her judgment at page 95-103 as signed by the Defendants confirming Kafuko Robert and Kafuko Dauson to be owners of the suit land and failing to hold them by their signatures arrived at a wrong decision.

**In reply**, learned counsel for the Respondents submitted that the Learned Trial Magistrate considered the document at pg.5 of the Judgment **"D2** also informed court that the land used to belong to Ngobi Juma Kabnda father to Mukobere (the correct name is Mukobeza) Muhammed who sold to him. That he informed court that he had signed the document of 1991 as the Defence Secretary because at the time he had not known the actual owner of the land. That it was not until Kulabako Mukobeza Mohammed showed up and complained and the matter was looked into, that he got to know that he was the actual owner of the land in dispute.

In addition that the Trial Magistrate believed **D2** and preferred the document of 22<sup>nd</sup> March 1998 defence exhibit **'H'** which gave the suit land to Mukobeza Kulabako Muhamad.

Further, that the Appellant in their plaint in paragraphs 5,6,7 & 8 of the amended plaint responded to the document of 1991, **Annexure 'A'** to amended Plaint, as under:-

*"In specific reply to paragraphs 5, 6, 7 & 8 of the amended plaint, the Defendants state that those who signed on Annexure 'A' to the amended plaint, did so on the understanding, that the land belonged to Eobert Kafuko Yonasani, but it transpired later that the land did not belong to him, but belonged to Juma Ngobi alias Kabanda, the father of Mukobeza Muhamad Kulabako, which Mukobeza Muhamad Kulabako successfully claimed it and recovered it".*

In addition, that the defendants were pleading mistake of facts which at a later stage were corrected when new facts arose. That the **Black's Law Dictionary at pg.1001**, defines mistake of fact as *"a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:*

1. *An unconscious ignorance or forgetfulness of a fact past or present , material to the contract; or*
2. *Belief in the present existence of a thing material to the contract which does not exist or in the past existence in:*
3. *An unconscious ignorance or forgetfulness of a fact past or present , material to the contract ;or*
4. *Belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which was not existed”.*

That indeed at pg.19 of the record proceedings, **DW2** stated that he signed the document of 1991 i.e. **Annexure ‘A’** to the Plaintiff, before he had known who was the owner of the suit land. That he eventually understood the owner when Mohamed Mukobeza came complained and the Clan Elders sat and followed the matter. That the meeting decided that the land was for Juma Kabanda.

**In cross examination**, he answered that the clan sat and they made a document which made a document w which returned the land to Kulabako Mukobezi; that it was written on 22<sup>nd</sup> March 1998 and he bought his land from Mukobeza in 1999; this piece of evidence tallies with the Defendants pleadings in their Written Statement of Defence.

He added that **DW2** was asked as to rather he was forced to sign a document of 1991 and he said that he had been forced. Counsel for the Defendants state that he had missed the point because it was never the Defendant’s case that they were forced to sign, but rather they were led to believe the the land belonged to Kafuko Jonathan, but later on Kulabako Mukobeza Muhammed came to complain, it turned out that the land was his, this is the point the plaintiff should have cross-examined about.

That in fact the Defendants pleaded that they signed without knowing that the land actually belonged to Mukobeza Kulabako Muhamed did not successfully claim the land; but he left the facts as they are i.e. that Kulabako Mukobeza Muhamed successfully claimed the land;

**In resolving this ground**, I have already unraveled the genesis of how all the various claimants got onto the suit land; and how **DW8 Mukobezi Kulabakho Muhammed** was handed the portion of the suit land that he sold off.

It is also clear that **D1 Kabanda Peter** is not occupying or laying any claim on any portion of the suit land, but convened the meeting that decided to pass the suit land to Muhammad Mukobezi Kulabako and he put into action what the clan decided.

**DW8 Muhammad Mukobezi Kulabako** testified that after receiving his land, he didn't settle on it because of fear so he decided to sell it to **Martin Kabanda (DW2)**; the agreement of sale between Mukobeza Mohamed Kulabako and Martin Kabanda dated 3/3/1999 marked **EXH. No.4** and was authorized by Mutaalu and he affixed his thumbprint in the presence of Kauzi Sosi **(DW4)** and **Samanya Samuel (DW3)** and the Sale Agreement between Mukobeza Mohamed, Samanya Iswaya Samuel dated 6/2/1999 is here taken and marked as **Exhibit No.5**.

While it is clear that the Appellant sued all the Respondents in the suit he filed in 2010, I have already found that he never specifically sued Mukobeza Mohamed Kulabako. It is therefore clear that he acquiesced to the fact that Kulabako Mukobeza had acquired a legal title over the suit land, after he successfully claimed part of it in a meeting of the officials of the Iruba Clan resulting in the land being handed to him on 22<sup>nd</sup> March 1998 vide **Defence Exhibit "H"**.

It is also clear that it is the said Kulabako Mukobeza Muhammed who sold part of the said land to the 2<sup>nd</sup> Defendant on 3<sup>rd</sup> March 1999 and to the 3<sup>rd</sup> Defendant on 2<sup>nd</sup> February 1999 and he also sold the remaining portion to Joshua Mukobeza.

It therefore follows that since neither the Appellant nor anybody else ever challenged the title of Mukobeza Kulabako Muhammed to date, the only conclusion I can draw is that the Appellant had no cause of action against him and as such, cannot have a cause of action against those who derived title from him.

Secondly, it is clear that the Trial Magistrate considered the document of 28<sup>th</sup> October 1991- **PEX A** at page 5 of the Judgement; and as rightly submitted by learned counsel for the Respondents she gave her reasons in the Judgement.

I also wish to emphasize that there is no document whatsoever written by the late Iswaya Jonatahn to prove that he had gifted the suit land to his two children which in law would qualify as a gift *intervivos*.



Instead, the Appellant and his witnesses are relying on the document written by the clan heads in 1991 admitted as **PEX 'A'**. The evidence shows that it is the clan heads who changed their opinion in respect of **PEX 'A'** believing that it had been signed by mistake after Mohamed Mukobeza surfaced and introduced himself to them and it is the same the clan elders who sat and allocated the suit land to **PW8**.

I therefore cannot fault the learned trial Magistrate for not relying on the document of 1991, especially as it is clear that it was the clan heads who dealt with the suit land in respect of both the two Kafukos and **DW8**; and there was no suit brought against them.

After a careful scrutiny and evaluating the evidence before me and on the balance of probabilities, I have also not found fault with the findings and decision of the learned trial Magistrate when she decided in favour of the Respondents/Defendants in this case. It is also my finding that while the Letters of Administration to the estate of the Appellants's father's estate are valid, they are not applicable to the suit land, but are limited to any other property that legally belonged to his late father and this does not include the suit land in this case.

For all the reasons given in this Judgement, it is my finding and decision that I have not found any merit in this Appeal. This ground of Appeal also FAILS.

Finally, 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.

In the instant case, the Respondents/Defendants have succeeded in defending all the grounds of appeal; I have no justifiable reason to deny them the costs in this Appeal. They are therefore awarded costs in this Appeal and in the hearing before the lower court.

Accordingly, Judgment is entered for the Respondents/Defendants against the Appellant/Plaintiff and it hereby ordered as follows;\_

1. On the whole all the Grounds in this Appeal FAIL.

2. The Judgement and Orders of the Her Worship Kyomugisha Evelyn Setrina, Magistrate Grade One at Kamuli delivered on the 14<sup>th</sup> of December 2021 are upheld.
3. The costs of this Appeal and in the Court below are awarded to the Respondents/Defendants.

I SO ORDER.

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**JUSTICE DR. WINIFRED N NABISINDE**  
**JUDGE**  
**06/03/2024**

This Judgement shall be delivered by the Magistrate Grade 1 attached to the chambers of the Resident Judge of the High Court Jinja who shall also explain the right of appeal against this Judgement to the Court of Appeal of Uganda.

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**JUSTICE DR. WINIFRED N NABISINDE**  
**JUDGE**  
**06/03/2024**