THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-LD-CA-NO.060 0F 2021
(Arising from IBD-00-CV-LD-NO.005 OF 2018)

1. REGINA TIBAHITANA
2. NAMULI JUSTINE
3. NYAMWIZA DEMITORI :::::::::::::::::::::::::: APPELLANTS

VERSUS

BABRIREGYE SYLVIA:::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. LADY JUSTICE JOYCE KAVUMA

JUDGEMENT

INTRODUCTION

[1] This is an appeal against the judgement and decree of the learned Magistrate Grade One delivered on the 23rd of September 2021 at the Ibanda Chief Magistrate's Court, in which she found that the suit land did not belong to the Respondent Bariregye Sylivia and that the appellants were trespassers on the same. She accordingly found merit in the suit with costs to the defendants/appellants.

BACKGROUND OF APPEAL

[2] The background of this appeal as gathered from the lower court record of proceedings is briefly as follows:

The respondent filed a suit against the appellants in the Magistrate Grade One Court at the Chief Magistrate's court of Ibanda at Ibanda seeking the following reliefs: Declaration that the suit land belongs to her, Eviction order, and Permanent injunction restraining the

defendants from further trespass, General damages, Mesne profits and costs of the suit.

The suit was heard inter partes and judgement was entered in favour of the respondents

The respondent/plaintiff's claim was that at all material times she was the owner, user customary holder and occupier of the suit land. That in February 2018, the appellants/defendants jointly and severally trespassed on the suit land by harvesting matooke from the banana plantation and planting beans in the area prepared by the plaintiff.

The appellants/defendants on the other hand claim that the respondent has no cause of action against them because she has never been the owner of the suit land. That the land instead belongs to Namuli Justine's (the 2nd appellant's) paternal grandmother Nkakibona Perezia. That the plantation therein belongs to the 2nd appellant having acquired it from her grandmother. That the suit land was in Nkakibona Perezia's care until she was relocated to her grandchildren's place.

The Learned Magistrate found the suit in favour of the respondent/plaintiff Baririgye Sylivia. The appellants being dissatisfied with the decision of then Magistrates Grade One lodged this appeal.

REPRESENTATION

The appellants were represented by M/S Bwatota Bahsonga and Co. Advocates and the respondents were represented by M/S Bumpenje & Co. Advocates.

GROUNDS OF THE APPEAL

1. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognize that the suit land was part and partial of land owned by the Late Magyezi Adriano Long before he died not Katagira Matovu.
2. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognize that the Late Katagira Matovu had his own separate land and/or banana plantation from the suit land at Rukokoma Cell.
3. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognise that the letters of Administration the respondent produced in court were in respect of the Late Katagira Matovu not Magyezi Adriano the former owner of the suit land.
4. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognize the fact that Nkakibona Perezia was in occupation of the suit land and homestead thereon for decades before she gave it out as a gift intervivos to various beneficiaries including the 2nd appellant herein though DENO.1
5. The Learned Trial Magistrate Grade One erred in law and fact when she TREATED Nkakibona Perezia as an illiterate person and deaf yet Deno.1 is in Runyankore language her mother tongue and yet at the time of making this DENO.1 she was of sober mind with no hearing challenges and understanding the said language.
6. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognize that Nkakibona Perezia was

responsible for the burial of the Late Katagira Matovu at the suit land formerly for his late brother Magyezi Adriano.

7. The Learned Trial Magistrate Grade One erred in law and fact when she deliberately failed to recognize that the first occupation of the suit land including the adjacent undisputed pieces of land occupied by other beneficiaries under DENO.1 as well as the homestead thereon were for the Late Magyezi Adriano and his family before they all succumbed to HIV/AIDS pandemic.
8. The Learned Trial Magistrate Grade One erred in law and fact when she failed to appreciate the evidential value of the fact that the Late Magyezi Adriano and his two children were buried on the suit land much as the uncemented tombs/graves for the children were no longer visible by the time of locus visitation.
9. The Learned Trial Magistrate Grade One erred in law and fact when she ignored the fact that other beneficiaries under DEno.1 were all in occupation of their respective portions and others had already sold to 3rd parties and the respondent had never sued or questioned them save the 2nd appellant herein.
10. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognise that the annex to the house of Late Magyezi Adriano was put after the death Magyezi Adriano by Katagira Matovu for hid other wife Kyomugisha Jenipher specifically to look after his mother Nkakibona Perezia.

11. The Learned Trial Magistrate Grade One erred in law and fact when she deliberately failed to appreciate the evidential value of the fact that the Late Magyezi Adriano's house was much older with different colour of windows and doors separate from the annex the Late Katagira Matovu annexed to he said house from his wife Kyomugisha Jenipher to take care of his mother Nkakibona Perezia.
12. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognize that the Late Katagira Matovu and the Late Magyezi Adriano though brothers each had his separate land and homestead distant from each other.
13. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognize that the person who first lived and was buried on the suit land was Late Magyezi Adriano long before Nkakbona Perezia decided that the Late Katagira Matovu also buried besides his said Late brother Magyezi Adriano on the suit land for cultural reasons.
14. The Learned Trial Magistrate Grade One erred in law and fact when she treated Ssesanga John the step-son to the respondent who is living in the annex to the Late Magyezi Adriano's house as a trespasser without observing his constitutional right to a fair hearing and the fact that he occupied the same with consent of his mother Kyomugisha Jenipher.
15. The Learned Trial Magistrate Grade One erred in law and fact when she failed to recognize that the respondent forcefully took possession of part of the suit land specifically the banana

plantation in 2018 when the 2nd appellant the rightful owner was already married and living away from the village.

16. The Learned Trial Magistrate Grade One erred in law and fact when she denied Counsel for the appellants to make submissions in guidance of court to reach a just conclusion.
17. The Learned Trial Magistrate Grade One erred in law and fact when she injudiciously and unjustifiably awarded shs.3, 000,000/= as general damages and costs of the suit to the respondent without putting into consideration the relationship of the parties and the circumstances of the cases.
18. The Learned Trial Magistrate Grade One erred in law and fact when she treated the appellants as trespassers yet there was no credible evidence to that effect and the claim by the respondent was not legally bound.
19. The Learned Trial Magistrate Grade One erred in law and fact when she failed to evaluate the entire evidence on court record properly and legally thereby reaching at a wrong decision.
20. The Learned Trial Magistrate Grade One erred in law and fact when she failed to be guided by the features of properties on the suit land seen by court at locus to reach a just decision in favour of the appellants.
21. The Learned Trial Magistrate Grade One erred in law and fact when she treated appellants' evidence as well as evidence of DW4 and DW5 so lightly and instead credited evidence of PW1 and PW2 that was not credible at all.

DUTY OF COURT

[3] This being a first appeal, of a first appellate court to re-evaluate evidence. Following the cases of **Pandya vs R [1957] EA 336; Kifamunte Henry vs Uganda Criminal Appeal No.10.1997, Bogere Moses and Another v Uganda Criminal Appeal No.1/1997,** the Supreme Court stated the duty of a first appellate court in **Father Nanensio Begumisa and 3 Others vs Eric Tiberaga SCCA 17/20 (22.6.04 at Mengo from CACA 47/2000 [2004] KALR 236** that the legal obligation on a 1st appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court further stated the legal position as follows: -

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

I will therefore bear that principle in mind as I resolve the grounds of appeal in this case before me.

EVIDENCE IN THE LOWER COURT

PW1 Bariregye Sylivia the widow to the late Katagira Matovu testified that suit land was part of the estate of her late husband who died in 2000. That she found him staying on the land and lived with him till his death. That she applied for letters of administration for his estate

which she was granted and distributed the estate with the help of relative and resident. That the suit land was distributed to her and the 2md defendant Namuli Justine and her sister were also given a separate distinct pieces of land neighbouring hers. That in February 2018, the appellants jointly came onto her land erected a temporary structure which she took down, cut down banana plantations, harvested and stole bananas, cassava, illegally entered upon the land and insulted her. That her mother in law Perezia Nkakibona was living on the suit land but left in 2016. That it is her first time hearing that her mother in law gave the suit land to the 2nd defendant as a gift.

PW2 Kiiza Gapto testified that the suit land belongs to the respondent and her children. That the suit land has a residential house with a banana plantation intercropped with coffee. That he participated in the distribution of property and the 2nd defendant Namuli Justine was given a separate piece of land which she sold off. That the estate distributed was that for Katagira Matovu and not his brother Adriano Magyezi.

DW1 Regina Tibahitana the former LC1 Chairperson Rukokoma Cell testified that Nkakibona Perezia cannot be a witness because she is deaf, senile and old. That she is the author of DEXh1 an agreement showing that the Late Adriano Magyezi left the suit land to his mother Nkakibona Perezia. That in 2004 she could not understand anything but she thumb printed on the agreement. That the respondent occupied the suit land in 2018 and Perezia has been living on the same for 50 years. That the suit land was for the late Adriano Magyezi and not Katagira Matovu.

DW2 Namuli Justine a daughter to the 3rd defendant and step daughter to the respondent testified that she has no document showing the land belonged to the late Magyezi Adriano and doesn't know whether letters of administration were taken out in respect of his estate. That Perezia Nkakibona is 100 years and cannot comprehend things, illiterate and only thumbprints documents. That there I no document showing the suit land was given to Nkakibona Perezia by Magyezi.

DW3 Nyamwiza Demitori testified that the land has never belonged to the late Katagira Matovu but it is for Perezia Nkakibona. That no document shows the transfer of land to Perezia by Magyezi but was present when Perezia gave the land to Namuli Justine the 2nd appellant.

DW4 Kobwemi Francisco testified that h thumb printed on the document where perezia was giving her grandchildren land that was for Magyezi. That Katagira bought a house next to Magyezi and was occupied by his wife.

DW5 Kasiisi Charles testified that DEXh1 was drawn by Tibahitana Regina, the chairperson in runyankole. That nothing in the document shows that it was read back to Perezia and that she understood the content.

RESOLUTION OF APPEAL

[4] Counsel for the appellants in his submissions handled grounds 1,2,3,4,5,6,7,8,10,11,1,13,15 & 21 jointly, grounds 4,5,9 jointly, grounds 18 and 19 jointly and grounds 14,16,17,18 and 19 jointly.

Counsel for the respondent on the other hand summarized the grounds into three grounds. In resolving the merits of the appeal I shall adopt a similar approach to counsel for the respondent.

Ground One

The Learned Trial Magistrate erred in law and fact when she failed to recognise that the suit land was part and partial of land owned by the late Magyezi Adriano long before he died, not Katagira Matovu.

[5] Counsel for the appellant submitted that the Learned Trial Magistrate ignored a lot of the evidence of the defendants.

That she ignored the fact that the respondent Babriregye Sylvia cannot hold letters of administration for the estate of her late husband Katagira Matovu and the estate of his brother the late Magyezi Adriano. That the respondent deviated from her pleadings when she said she's the customary owner and not administrator of the suit land contrary to **Order 6 rule 7 of the Civil Procedure Rules** which states that:

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

Counsel for the appellant also stated that the respondent never proved how she acquired the suit land and that she misled court in stating that the suit land had only a banana plantation yet at locus there were coffee trees, banana plantations and an old homestead built by Adriano and family. Counsel for the respondent in response submitted that the respondent's petition for grant of Letters of Administration **PEXh2** was

not objected to by appellants. He relied on **Section 191 and 192 of Succession Act** which state that:

Section 191

> "*Except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.*

Section 192

> "*Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death.*

Counsel for the respondent also submitted that the respondent distributed to the beneficiaries including the 2nd appellant their respective properties from the estate of the late Katagira Matovu.

Resolution

[6] PW1 Bariregye Sylivia stated in the lower court that the letters of administration dated 30th October 2001 she was granted for were in respect of the estate of her late husband Katagira Matovu and not of the estate of the late Magyezi Adriano. That she distributed to the 2nd defendant some of the Late Katagira's properties neighbouring the suit land but the 2nd defendant sold it off. That it was her first time hearing that her mother in law Perezia Nkakibano gave land to the 2nd

defendant. This evidence was corroborated by PW2. Kiiza Gapto DW1 not aware of when the land was given to Perezia by late Adriano and no document confirms the same.

DW1 **Regina Tibahitana** testified in the lower court that as an LC1 Chairperson she authored an agreement **DEXh1** which is purported to be between the late Adriano and the late Nkakibona Perezia. That the agreement was written at Perezia's home and none of the appellants were present. She further testified that the respondent Sylivia occupied the suit land in 2018 and that Sylivia Bariregye acquired letters of administration for the estate of the late Katagira and distributed the beneficiaries including Perezia and the 2nd appellant Namuli Justine. Further, she stated that the letters of administration were not challenged by anyone in court. This was also corroborated by PW1 and DW2 which corroborates the respondent's testimony in the lower court.

DW2 Namuli Justine a daughter to the late Katagria Moses testified that at the time of her father's death the respondent Sylivia Bariregye was living at the deceased's home. That she did receive a share of her late father's land at Rukokoma as distributed by the Sylivia and that she sold the share to a one Alosyious. That the land borders the suit land. She further testified that the suit land belonged to her uncle Magyezi Adriano but does not have any document that shows the same. That by the time, the agreement DExh1 was written, the Late Magyezi Adriano was already deceased and had already given the land to Perezia.

DW3 Nyamwiza Demitori testified that the suit land never belonged to the late Katagira Moses but rather to Nkakibona Perezia. She however also testified that she did not know how Perezia acquired the land and

also stated that there is no document of transfer from the Late Adriano Magyezi to Perezia Nkakibano

DW4 Kobwemi Francisco also testified that there is no document showing that the late Adriano gave Perezia the suit land. That Katagira only bought a house next to Magyezi's house. **DW5 Kasiisi Charles** testified that he did not know if Perezia had acquired letters of administration for the estate of the late Magyezi and that Katagira annexed a house in the suit land.

[7] The learned Trial Magistrate in the lower court on analysing the evidence and witnesses held on **page 22** of her judgement that none of the defendant's/appellants witnesses was aware of when Nkakibona Perezia was given the said land and neither could they adduce any document in proof of the same.

[8] From analysing the evidence of the lower court and the analysis of the trial Magistrate, it is clear that some of the defendants/appellants in this case were not sure about how Nkakibona Perezia acquired the suit land from the Late Magyezi Adriano. None of the defendant's/appellant's witnesses had a document showing that the suit land was given to Nkakibona by the late Magyezi Adriano. I am alive to the fact that land cannot only be transferred through a transfer document however, even in the absence of a transfer document, the appellants failed to show how Perezia acquired the suit land. They relied on DEXh1 an agreement drafted by DW1 the LC1 chairperson and purportedly thumb printed by Perezia confirming that the suit land was indeed given to her by the Late Adriano Magyezi but failed to bring Perezia to testify to that fact. The appellants did state that Perezia is

about 100 years, mentally unstable, deaf and illiterate. They also stated that nothing on the agreement shows that the agreement was read back to her to confirm that she did understand what she was thumb printing. The only defendant/appellant's witness who seems to have been present when the agreement was made is DW1 the author of the document. No other person that is said to have been present at the time of the making of this document was present. The appellants also failed to bring Perezia during locus to testify. **Section 117 of the Evidence Act** states that:

> **"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind." (Emphasis mine)**

Further, in the case of **Uganda v Candia Anthony Criminal Sessions Case No. 019 of 2020** the Hon. Justice Stephen Mubiru held that:

> **"The rule under section 117 of The Evidence Act is that all persons who can perceive, and perceiving, can make known their perception to others, may be witnesses. A deaf-mute may not be able to hear and speak but his or her other senses, such the sense of sight, remain functional and allow him or her to make observations about his or her environment and experiences. Thus, a deaf-mute is competent to be a witness so long as she has the faculty to**

make observations and she can make those observations known to others. A speech and hearing impaired person need not be prevented from being presented as a witness in court merely on account of his physical disability. Under section 118 of The Evidence Act, a witness who is unable to speak may give his or her evidence in any other manner in which he or she can make it intelligible, as by writing or by signs; but the writing must be written and the signs made in open court. The evidence so given is deemed to be oral evidence."

In the instant facts, Nkakibona Perezia is deaf and DW1 Regina Tibahitana testified that she did not know that the deaf can adduce evidence however, this is not something that should be new to the appellants counsel because it is an ordinary principle in our laws.

It is therefore clear from the above authorities that it would have been for court to determine whether Nkakibona Perezia is unable to give evidence in court due to her old age and deafness. Her evidence would have been crucial to the case given that the case revolves around whether she was given land by her late son Adriano Magyezi and whether she understood the agreement DEXh1 on which he thumb printed. DEXh1 was firstly drafted after the fact, Magyezi Adriano was already deceased by the time it was drafted putting its authenticity into question.

[9] Counsel for the respondent rightly noted that this offended the provisions of the **Illiterates Protection Act Cap 78. Section 2 of the Illiterates Protection Act** provides that:

"No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall also write on the document his or her own true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate." (Emphasis mine)

Section 3 of the Illiterates Protection Act also provides that:

"Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her. " (Emphasis mine)

In the instant case, DW1 wrote the agreement DEXh1 but nothing on it shows that Perezia Nkakibona instructed her to do so and that the document was read over to her and explained to her. DW1 stated that *"In 2004 Perezia could not read", "…nothing indicates that she read through."* DW2 Justine also stated that "*nothing shows that it had been read back to her and explained." "… She is 100 years and cannot comprehend things."* DW5 also stated that *"nothing shows that it was read back to perezia and that she understood the content." (Emphasis mine)*

The term "illiterate" is defined under ***Section 1(b)*** of the ***Illiterates Protection Act (supra)*** to mean, in relation to any document, a person who is unable to read and understand the script or language in which the document is written and printed. In ***Tikens Francis &another v. The Electoral Commission & 2 Others, H.C Election Petition No.1 of 2012*** it was held that*;*

> "*There is a clear intention in the above enactments that a person who writes the document of the illiterate must append at the end of such a document a kind of 'certificate' consisting of that person's full names and full address and certifying that person was the writer of the document; that he wrote the document on the instructions of the illiterate and in fact, that he read the document over to the illiterate or that he explained to the illiterate the contents of the document and that, in fact, the illiterate as a result of the explanation understood the contents of the document…the import of S.3 of the Act is to ensure that documents which*

> *are purportedly written for and on instructions of illiterate persons are understood by such persons if they are to be bound by their content…<u>these stringent requirements were intended to protect illiterate persons from manipulation or any oppressive acts of literate persons."</u>*

Further, the Supreme court noted in the case of ***Kasaala Growers Co-operative Society v. Kakooza &Another (supra)*** citing with approval the case of ***Ngoma Ngime v. Electoral Commission & Hon. Winnie Byanyima ,Election Petition No. 11 of 2002*** *that :*

> *"…the illiterate person cannot own the contents of the documents when it is not shown that they were explained to him or her and that he understood them."*

In the instant case, counsel for the appellants in his submissions stated that the Illiterates Protection Act was not offended because the language document was written in is Perezia's mother tongue Runyankore and that at the time of making the document she was of sober mind with no hearing challenged and had an understanding of the language. However, no evidence was adduced to prove that Perezia was indeed of sound mind when the document was authored.

The Learned trial Magistrate also held in her judgement on **Page 27** that DExh1 (a) and (b) is suspect because it disposes of property of the estate of the Late Magezi Adriano to the 2nd defendant neither as a gift intervivos nor like an administrator of the estate. That Nkakibona Perezia was duped by DW2 her granddaughter and DW1 the

Chairperson of the area who also doubles as the cousin of the late Katagira Matovu and Adriano Magezi.

Therefore, relying on the above authorities, I agree with the holding of the learned trial Magistrate that the agreement DEXh1 is not an authentic document because it lacks the basic requirements of proving that the illiterate person Perezia Nkakibona understood what she thumb printed. The appellant's failure to bring her in as a witness is also questionable.

[10] In regards the alleged contradictions made by the respondent Bariregye Sylivia in stating that she was the owner, user, customary holder and occupier of the suit land in the plaint and then stating that she is the administrator of the estate of the Late Katagira Matovu. Further, counsel for the appellant argued that the respondent claimed that the suit land composed of a banana plantation only in the plaint and yet at locus the court observed old coffee trees mixed with banana plantation. I however noted that in in her witness statement, the respondent noted that the land has banana plantation intercropped with coffee.

In the case of **Alfred Tajar v Uganda EACA No.167 of 967** the court held that:

> **"Major inconsistencies ill lead to the evidence of witness being rejected. Minor inconsistencies will not have the same unless they point to deliberate falsehood."**

Further, in the case of **Uganda v Kakande Mike alias Ojara,** The learned Justice Stephen Mubiru stated that:

> *"The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "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 basis of the relative importance between the point being offered by the contradictory evidence and its 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" (Emphasis mine)*

In the instant case, the respondent Bariregye Sylivia stating in her plaint that she is *"the owner, user, customary holder and occupier of the suit land"* and then stating under cross examination that she has letters of administration for the estate of the Late Katagira Matovu instead, is not a major inconsistency that is collateral to the outcome of the case. From the record, the respondent has maintained the claim that the suit land she is in occupation of the suit land and is the owner of the same. She also made it clear that she acquired it after getting letters of administration for the estate of her late husband Katagira Matovu. DW1 Regina, DW2 Namuli Justine and DW3 also did testify that the respondent as the administrator of the late Katagira's estate had distributed it to the different beneficiaries.

I find that the inconsistencies in the respondent's evidence are minor and do not point to deliberate untruthfulness. They have thus been disregarded. Consequently, on the basis of the above reasoning and authorities, I am not convinced that Perezia Nkakibona understood as an illiterate person, understood the contents of the agreement DEXh1 purportedly showing that the late Adriano Magyezi gave her the suit land.

It is not disputed that Nkakibona Perezia was living on the suit land long before the respondent who came onto the suit land with her husband and that she left in 2016. However, the authenticity of DExh1 and the failure to bring Perezia who was living, to testify was also questionable. Therefore, on a balance of probabilities, the evidence adduced by the appellants in the lower court was insufficient.

I find that grounds **1,2,3,4,5,6,7,8,10,11,1,13,15 & 21** fail.

[11] Counsel for the appellant on **Ground 16** submitted that the trial Magistrate erred in law and fact when she denied counsel for the appellants to make submissions in guidance of court to reach a just conclusion. That the trial magistrate denied the parties the opportunity of entering into the stage of submissions whether oral or written. He stated that infringed on the appellants right to a fair hearing as per **Article 28 of the Constitution of the Republic of Uganda** and that a fair hearing includes submissions by lawyers in court.

The trial Magistrate directed that no submissions would be made after the end of the locus proceedings because the respondent's counsel Magoba John Bosco had passed on. Counsel for the appellant stated

that the submissions could have enriched and guided her in making a just decision.

Order 18 rule 2 of the Civil Procedure Rules is to the effect that the opposing party in a suit may after presenting his or her case may address court on the generally on the whole case. It states that:

> **"(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove.**
>
> **(2) The other party shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case.**
>
> **(3) The party beginning may then reply generally on the whole case; except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply." (Emphasis mine)**

This rule gives guidance on the trial procedure and particularly states in sub rule 2 that after the other party states his or her case and produces evidence, then they may address the court generally on the whole case i.e. make submissions. The use of the word *'may'* suggests that these submissions are not mandatory. From analysing the trial magistrates judgement, it is clear that she considered the evidence produced by both parties and carried out a proper evaluation of the same according to **Order 21 rule 4 of the Civil Procedure Rules** which states that "*Judgments in defended suits shall contain a concise statement of the*

case, the points for determination, the decision on the case and the reasons for the decision". Further, the court has the discretion and inherent powers to make orders necessary for the ends of justice as per **Section 98 of the Civil Procedure Act Cap 71.** If the trial Magistrates actions of refusing the parties to file submissions or make oral submissions had an impact on how she analysed the evidence and thus occasioning a miscarriage of justice, then I would have agreed with counsel for the appellants. However, in the instant case, no miscarriage of justice has occurred and the Learned Trial Magistrate properly evaluated the evidence before her.

Ground 16 therefore fails.

Ground 2

The Learned Trial Magistrate erred in law and fact when she treated the appellants as trespassers yet there was no credible evidence to that effect and the claim by the respondent was not legally grounded.

[12] Trespass was defined in the case of **Justine EMN Lutaaya v Stirling Civil Engineering Company Ltd (Civil Appeal No. 11 of 2002) [2003] UGSC 39** as:

> *'…when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land…"*

This therefore means that any person who simply makes an unauthorised entry upon another person's land and interferes with it, he or she is liable for the tort of trespass to land.

The learned trial magistrate in her judgement on **page 29** stated that the actions of the defendants/ appellants amountd to trespass and that Ssesanga John, a son to DW3, the plaintiff's co-wife is also a trespasser on the suit land. That the plaintiff proved that she was in possession of the suit land before the defendants were on it.

Counsel for the appellants firstly submitted on **Ground 14** that the trial magistrate wrongly treated Ssesanga John, the step son to the respondent Bariregye Sylivia as a trespasser without observing his constitutional right to a fair hearing. That Ssesanga John is currently living on the suit land with his children on the part of the house that belonged to Magyezi Adriano and was not a party to this suit.

I agree with counsel for the appellant that in holding that Ssesanga John is a trespasser on the suit land is a violation of his constitutional right to a fair hearing as per **Article 28(1) of the Constitution.**

Ground 14 of the appeal has merit.

[13] Counsel for the appellant also submitted on **Ground 9** that the trial Magistrate ignored the fact that other beneficiaries were all in occupation of their respective portions and others had already sold to 3rd parties and the respondent never sued or questioned them.

A party to a case is entitled to join whoever they may please as a defendant in a suit as per **Order 1 rule 3 of the Civil Procedure Rules SI-71-1.** Firstly, the respondent/plaintiff cannot be faulted for suing one and not suing the other. The trial court merely has the duty of

determining whether or not the cause of action against that defendant was proved. Secondly, the court was tasked with determining whether the suit land belonged to the plaintiff/respondent or the appellants. It was not tasked to determine the ownership of land occupied by other persons not party to the suit.

[14] In regards the trial Magistrate's holding that the appellants are trespassers on the suit land, the respondent Bariregye Sylivia testified that in February 2018, the defendants jointly came onto her land and erected a temporary structure which she later took down. That they also cut down banana plantations, harvested and stole bananas, cassava and illegally entered upon the land.

Given that I have already found that on the balance of probabilities the suit land belongs to the respondent Bariregye Sylivia, consequently, the appellant's intrusion on the suit land amounts to trespass.

Ground 3

The Learned Trial Magistrate erred in law and fact when she unjustifiably awarded shs.3, 000,000/= as general damages and costs of the suit to the respondent without putting into consideration of the relationship of the parties and the circumstances of the case.

[15] Counsel for the appellants submitted that the award of damages was high considering no crop or harvest was done by the appellants on the suit land in the year 2018 or after. That the award of costs was not judiciously considered as well because the respondent is a co-wife to the 3rd appellant, the 2nd appellant is a step daughter to the respondent, the 1st appellant is a cousin sister to the late Katagira Matovu and Late

Magyezi Adriano and a sister in law to the respondent. That the parties are close relatives and almost one family which the trial magistrate never considered and ended up arriving at a wrong decision in awarding the general damages and costs. He relied on **Article 126(2) (d) of the Constitution of the Republic of Uganda** which enjoins the courts to promote reconciliation between parties.

On the other hand, counsel for the respondent submitted in this ground that the trial Magistrate independently visited locus and assessed the inconvenience or loss suffered by the respondent before exercising her discretion to award general damages to the respondent. That the trial Magistrate on **Page 30 of the Judgement** held that the respondent never proved mesne profits and that the award of 3,000,000/= general damages was fair and reasonable in the circumstances. He relied on the case of **ECTA (U) LTD vs Geraldines Namurimu & Josephine Namukasa** where relying on the case of **Patel V. Samaj and Another (1941) 11 EACA 1** where the Court of Appeal of Eastern African cited with approval **Flint vs Lovell (1935) 1 KB 360** where it was held that:

> **"In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law or that the amount awarded was so extreme1y high or so very small as to make it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled"**

<u>Resolution</u>

[16] It is an established principle that the award of general damages and costs is discretionary to the court. **(See James Fredrick Nsubusa v. Attorney General. H.C.C.S No. l3 of 1993t Erukan Kuwe V Isaac Patrick Matovu & Anor H.C, C.S. No. l 77 of 2003.)** General damages are the direct natural probable consequence of the wrongful act complained of and includes damage for pain, suffering and inconvenience. **(Se Kiwanuka Godfrey T/a Tasumi Spares and class mart v Arua District Local Government H.C Civil Suit No.186 of 2006.**

In the instant case, given that I already found that the appellants trespassed on the respondents land by cutting down banana plantations, harvesting and stealing bananas, cassava and illegally entry upon the land. I therefore, in light of the above would find no reason to interfere with the award of general damages and costs in the lower court. The appellant's argument that the court ought to promote reconciliation is valid, however, the loss suffered by the respondent cannot be ignored by the courts either.

Ground 17 fails.

In the result, the appeal fails and the decision of the lower court in favour of the respondent is upheld. The appellants shall bear the costs for the appeal and the suit in the lower court.

Dated, delivered and signed at Mbarara this **30th** day of **April 2024**.

Joyce Kavuma
Judge