

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT JINJA

HCT-03-CV-CA-0115-2022

(ARISING FROM CIVIL SUIT NO.078 OF 2018)

1. NANSUBUGA ESTHER

RUTH:.....APPELLANT

VERSUS

1. MUGALA MARTHA

2. MUTASA

CHRISTOPHER:.....RESPONDENTS

Land Appeal:

Held: All Grounds of Appeal FAIL. The decision/Judgement of Her Worship Kambedha Lydia Magistrate Grade one of the Chief Magistrate’s Court of Jinja at Bugembe, delivered on the 7th of September 2022 is upheld in its entirety.

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

The Appellant being dissatisfied and aggrieved by the decision/Judgement of Her Worship Kambedha Lydia Magistrate Grade one of the Chief Magistrate’s Court of Jinja at Bugembe, delivered on the 7th of September 2022, appealed to this Honorable Court against the whole decision/Judgement and Orders on the following grounds: -

1. . The learned trial Magistrate erred in law and fact when she held that the marriage between the 1st and 2nd Defendant is void ab initio thus occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when she relied on the plaintiff’s contradictory evidence to hold that the 2nd Defendant has never resided in the suit property.
3. The learned trial Magistrate erred in law and fact when she held that the suit land is not family/matrimonial property thus occasioning a miscarriage of justice.

4. The learned trial Magistrate erred in law and fact when she held that the 2nd Defendant's consent was not required for the sale of the suit land.
5. The learned trial Magistrate erred in law and fact when she awarded the Plaintiff remedies in a case she failed to prove on the required standard thus occasioning a miscarriage of justice.

They prayed that:-

- a) The Judgment and Orders of the learned trial Magistrate in **Civil Suit No. 0078 of 2018** be set aside and Judgment be entered in the Counter Claim.
- b) The suit land is declared to be the matrimonial property, family land or/and jointly owned by the Appellant and the 2nd Respondent.
- c) The sale of the suit land between the 1st and 2nd Respondents is void for failure to procure the consent of the Appellant.
- d) The Appellant has security of occupancy on the suit land.
- e) Costs of the Appeal and the main suit are awarded to the Appellant.

THE BACKGROUND

The brief facts according to learned counsel for the Appellant is that the Appellant is the wife of the second Respondent since 1983. They purchased and developed the suit land with their home which became their matrimonial property where their home was established and where they lived as wife and husband with their children.

That in 2017, the second Respondent sold the suit land with the house thereon to the first Respondent without the Appellant's knowledge and consent. The Appellant refused to vacate and she was sued together with the 2nd Respondent for recovery of the suit land and trespass. The Appellant also filed a Counter Claim against both Respondents seeking for declaration that the sale between them was null and void.

On the other hand, the background according to learned Counsel for the 1st Respondents is that the 1st Respondent/Plaintiff instituted **Civil Suit No.078 of 2018** against the Appellant/2nd Defendant and the 2nd Respondent / 1st Defendant, for a declaration that she is the lawful owner of the suit land, a declaration that the Defendants had no right to continue occupying the suit land and an order of eviction.

The 1st Respondent contended that she purchased the suit land from the 2nd Respondent on the 1st day of June, 2017 at UGX.20,000, 000 and the 2nd Respondent requested for some grace period to give vacant possession,

however, the Appellant forcefully took possession of the suit land and refused to give vacant possession to the 1st Respondent.

To prove her case, the 1st Respondent presented 6 witnesses inclusive of herself and relied on documentary evidence **PEX1** purchase agreement dated 1st June, 2017, **PEX2** Purchase Agreement of the 2nd Respondent dated 22nd November, 1990.

The 2nd Respondent filed a Written Statement of Defence wherein he admitted to have sold the suit land to the 1st Respondent and confirmed that he was not legally married to the Appellant and did not require her consent to sale, Judgment on Admission was entered against the 2nd Respondent on the 14th day of October, 2019.

The Appellant filed her defence on the 1st day of February, 2019 wherein she contended that she is married to the 2nd Respondent and the suit land is their family home and if there was any sale, the same is null and void as her consent as a spouse was not sought before selling the same.

The Appellant presented five witnesses inclusive of herself. Judgment was delivered in favor of the 1st Respondent and the Appellant filed the present appeal which came up for hearing on the 3rd of May, 2023 and Court ordered parties to file submissions, to wit; the Appellant by 5th June, 2023, the Respondents by 5th July, 2023, Rejoinder, if any, by 12th July, 2023, and Judgment was reserved for the 14th September 2023; however, in total contempt of Court Orders, the Appellant never filed submissions as ordered by Court and by their letter dated 4th July, 2023 filed in Court on the 5th July, 2023, prayed for the appeal to be dismissed under **O.43 r.31 of the Civil Procedure Rules**.

That shockingly without any leave of Court, the Appellant filed submissions on the date fixed for Judgment 14th September, 2023, this habit of willfully disobeying court orders should not be condoned and prayed the said Submissions be struck out and the Appeal be dismissed accordingly, however, if Court is inclined to allow the said Submissions responded as hereunder.

From my own analysis, the Plaintiff's case is that the 1st Respondents filed **Civil Suit No.0078 of 2018** wherein on the 1st day of June 2017 purchased land from the 2nd Respondent/1st Defendant measuring approximately 20ft. by 100ft with a commercial house and boys quarters of two rooms located at Namaganga, Busedde Sub County, Jinja (the suit property).

The 1st Defendant/2nd Respondent asked for time to be allowed to vacate the suit property, but later 2nd defendant / Appellant took possession of the suit property refused to vacate the land claiming she is the wife of the 1st

defendant and thus her consent was not sought before the sale. The plaintiff hence sues for orders restraining the defendants from the suit property, permanent injunction, eviction orders, general damages, special damages and costs of the suit.

The 1st Defendant replied and admitted to having sold to the plaintiff the suit property which he purchased using proceeds from his business and that the 2nd defendant is not his spouse/wife.

On the other hand, the 2nd defendant / Appellant customarily married the 1st defendant and has lived on the suit property from when it was a wattle and mud house until 2017 when the 2nd defendant was away and the 1st defendant sold the suit property without her consent.

Defendant's case

In reply, the 2nd Defendant/Appellant wherein she raised a preliminary objection to the fact that the plaintiff's/1st Respondents claim does not disclose any cause of action against her as she did not participated in any sale of land to the plaintiff/1st Respondent and prayed that the plaintiff's suit against her be dismissed with costs.

That the 2nd defendant/ Appellant contended that she is living in her family home where she has lived since the year 1983 to date and she has not entered any sale in respect of the suit land with the plaintiff.

That she got married to the 1st defendant/2nd Respondent having celebrated customary marriage in the year 1983 and they have since lived as husband and wife and bore 9 children four of whom are now deceased. That after marrying the 2nd Defendant / Appellant was living in the in the same house with her co-wife Esereda Nakato at Nabiwalulo the Defendants worked hard and acquired the suit property for purposes of resettling the 2nd Defendant/Appellant in a separate home from her co-wife.

That after some time, the 1st Defendant/ 2nd Respondent established a home for the 2nd Defendant / Appellant and shifted her to the suit land where she has lived to date. That defendants started a mud and wattle house on the suit land and later upgraded to a permanent house with both their efforts.

That in 2017 as the 2nd defendant was away from her home in Namaganga for farming at Nakandula in Kamuli she got information from her children that the 1st Defendant/ 2nd Respondent had sold the suit land. That on learning about this sale the 2nd defendant/ Appellant came back home and consulted 1st defendant who confirmed the same, after intervention of other people the 1st defendant asked the 2nd Defendant/ Appellant to allow him sale another piece of land which was their farm land at Nakandula to refund

plaintiff's/1st Respondent's money, which idea 2nd Defendant/Appellant did not oppose.

That the 2nd defendant/ Appellant was shocked to be served with summons in civil suit 52 of 2017 which is still pending before the chief Magistrates' court Jinja claiming the defendant was just a cohabitee not entitled to the suit land.

She further contended that if there was any sales in respect of the suit land the same was null and void as her consent as a spouse was not sought before engaging in the same.

REPRESENTATION

When this matter came before me for hearing, the Appellant was represented by learned Counsel Mr. Shafik of Justice Centers Uganda, while the Respondent was represented by learned counsel Kevin Amujong M/S. Okalang Law Chambers Advocates and Legal Consultants. Both sides were directed by Court to file Written Submissions and they each complied.

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. ***Bogere Charles vs Uganda, Criminal Appeal No. 10 of 1996***, where 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 APPEAL

In resolving the grounds in this Appeal, I have carefully examined the typed and certified record of proceedings and Judgment of the lower court as availed to and taken into account the submissions of both learned counsel.

GROUND 1: That the learned trial magistrate erred in law and fact when she held that the marriage between the first and second defendants is void ab initio thus occasioning a miscarriage of justice.

It was submitted by learned counsel for the Appellant that the Appellant testified at page 21 of the record of proceedings that the second Respondent is her husband. That they got married in the year 1983 in a traditional way and at that time their matrimonial home was in Nabiwawulo. At page 22 from the last paragraph, she continued to state that during the traditional marriage, they brought alcohol, two goats and hens and then she was given away.

That her parents and relatives were present then though some are now dead. Those present included Badaza George, Sosipateri Babi, Isabirye Wilberforce. She reiterated these averments during cross-examination at page 23. She stated during cross examination that she was 15 years old at the time of this marriage and it is upon this fact that the learned trial Magistrate capitalized to decide that there is no existing marriage between the Appellant and the 2nd Respondent, as it was *void ab initio*.

They categorically abandon this ground of appeal in agreeing with the learned trial magistrate, but we however aver that the impropriety in conducting the marriage does not exclusively estop the Appellant from enjoying certain marital rights for example rights to own or occupy property as we are interested in this particular case. This is therefore our argument herein below in the foregoing grounds.

In reply, learned counsel for the Respondents argued on this ground that the Appellant and Counsel have rightly conceded to the learned Trial Magistrate's finding that there was no valid marriage between the Appellant and the 2nd Respondent and have abandoned this ground. This alone resolves the entire Appeal and calls for its dismissal with costs as it remains moot and a wastage of Courts time; the issues for determination in the lower Court were;

1. Whether the Defendants were legally married?
2. Whether the suit property is family land?
3. What are the remedies available to the parties?

From the above issues, the Appellant concedes that indeed they were not legally married as held by the learned Trial Magistrate, this resolves the entire case which dealt with whether the Appellant was married to the 2nd Respondent and whether her consent was required before the 2nd Respondent sold the suit property and having conceded to the fact that the Appellant and the 2nd Respondent were not legally married then automatically it goes without saying that her consent was not required before sale and proceeding to entertain the Appeal where the Appellant has conceded to issue one would be moot; as was held in the case of **Joseph Borowski vs ATT GOF Canada (1989) ISCR 342** cited with approval in the case of **Uganda Human Rights Network for Journalists & anor vs Uganda communications Commission & 6 OTHERS, HCMC NO.219 OF 2013** thus;

"An Appeal is moot when the decision will not have the effect of resolving some controversy affecting or particularly affecting the parties"

The Appellant having conceded that there is no valid marriage between her and the 2nd Respondent there remains no live dispute to be resolved by Court and the Appeal ought to be dismissed as Courts of law resolve live disputes between parties and not mere mock judicial proceedings set up to examine a hypothetical case as an academic exercise.

Further, that though Counsel for the Appellant concedes to the fact that there was no valid marriage, he with due respect ironically submits that;

"The impropriety in conducting the marriage does not exclusively estop the Appellant from enjoying certain marital rights for example rights to own or occupy property"

The said submission is really absurd for having conceded that there was no valid marriage, how one in the same breath can talk of marital rights! What marital rights when no marriage existed from inception?

It is not even true that there was impropriety in conducting marriage rather there was no marriage ever conducted and this was well articulated by the learned Trial Magistrate as seen at pages 3, 4 and 5 of the Judgment, where she clearly points out that though the Appellant alleged to have been customarily married as from 1983, she failed to prove that she has ever been customarily married and rightly so for **Section 1(b) of the Customary Marriages (Registration) Act Cap 248** defines customary marriage as;

"One celebrated according to the rites of an African community"

And in the case of ***Sekandi J vs Peter Kato and 3 others (1976) HCB 204*** cited with approval in the case of ***Jennifer Mussamali vs Stephen Musamali, HCT -04 -CV-CA- 0001/2002***, it was held thus;

"The test of determining the existence of a marriage is whether the union is treated as a marriage by the laws or customs of the nation, race or sect to which the parties belong"

And in the case of ***Bujara vs Bujara*** referred to in the case of ***Negulu Milly EVA vs Dr. serugga Solomon, HCCA No.103 of 2013*** it was held thus;

"A Customary marriage is complete if customary practices of the community/tribe have been complied with or performed or if it does not offend the provisions of Section 11 of cap 248 laws of Uganda which are, the female party has not attained the age of 16 years, the male party has not attained the age of 18 years, one of the parties is of unsound mind, the parties are within prohibited degrees of kinship or the marriage is prohibited by the Custom of one of the parties to the marriage, one of the parties has previously contracted a monogamous marriage which is still subsisting"

That in the present case, the 2nd Respondent contended in his defence under paragraph 3(e) that save for producing children with the Appellant, they have never been married and in the case of ***Christine Male & anor vs Sylvia Mary Namanda & anor (1982) HCB 140*** it was held thus;

"The mere fact that somebody had children with a woman does not make her a wife in the meaning of the law"

The burden to prove the existence of customary marriage was on the Appellant to prove the marriage in line with Section 101, 102 and 103 of the Evidence Act Cap 6 that he who alleges must prove. The Appellant failed to prove the alleged customary marriage and only aggravated matters when she claimed that at the time she got customary married, she was 15 years old making any supposed marriage a nullity as it would be contrary to **Section 11(a) of the Customary Marriages (Registration) Act cap 248** and the learned Trial Magistrate rightly found that even if any such marriage was said to have been conducted, the same could still be null and void as the Appellant herself told Court that at the time she got customarily married she was only 15 years old, and the learned Trial Magistrate was right in not condoning it as courts do not condone illegalities as was held in the case of ***Makula International vs Cardinal Nsubuga CA No.4 of 1981.***

The Appellant having conceded and abandoned this ground ought not to waste Courts time with a frivolous Appeal and we invite Court to be pleased to dismiss the Appeal with costs; however, if Court is inclined to consider other grounds we do submit as hereunder;

In resolving this ground, I have first summarized the evidence of both sides as led before the trial Court. The following are the issues that were agreed upon to be resolved in this matter before the lower court:-

1. Whether the Defendants were legally married?
2. Whether the suit property is family land?
3. Remedies available to the parties

The Plaintiff's 1st witness was **Mugala Martha, a female adult aged 64 years Namaganga, Katala Kabi Industrial Area L.C.1, Kisasi Parish, Busedde Sub- County, Jinja of District (herein after referred to as PW1)**. She admitted the sale agreement and it was admitted & marked **P.EX 1**.

She testified that the 1st defendant is Mr. Mutasa Christopher later Defendant failed to give him vacant possession. That she bought the land and house on 1/6/2017 and learnt that the suit land was for sale through a certain man, Nanioyo Grace.

That they went to the suit land, she inspected it. It was at Namaganga Trading Centre. She saw a plot on which was a house inside the house was a big bodied woman selling milk also there was a man operating a drug shop inside the house. Nanioyo Grace told her that the lady and man were tenants. After one day, she met 1st Defendant and asked from him whether he was indeed selling the suit land he confirmed to her that it's true. She then started inquiries from people who had stayed many years in Namaganga Trading Centre namely;

1. Giripina Waiduubi (RIP)
2. Gwonka Amisi (neighbour to 1st Defendant)
3. Galubale Yokosani
4. Muzondo John Bulolo
5. Mpaulo Moses
6. Carol (L.C. 1 Chairperson of Namaganga Trading Centre)

That all these people confirmed to her that the suit land belongs to 1st Defendant. Gwanka Amisi even confirmed to her that he is the one who sold to 1st defendant the suit land. One day Nanioyo Grace and 1st defendant came to her and they began negotiations. They agreed at Ugx 20,000,000/-, she bought the suit land as agreed at Ugx 20,000,000/= and they executed an agreement and she has a copy of the same. It is dated 1/6/2017 and was

executed at Namaganga Trading Centre at L.C.1 Chairperson's place, Mr. John Karo.

That **PW1** signed on it. Defendant also signed. C. Mutasa Christopher) it also bears the L.C. 1 Stamp Namaganga Trading Centre L.C. 1. There were other people/witnesses.

1. Nanioyo grace
2. Bikaba Grace
3. Kalabye Robert etc.

The witnesses also signed on the agreement.

Further, that she first bought the plot. It's a purchase agreement for the plot. Seller was Gwanka be instant case, the witness is now the beneficial owner of the suit land the agreement was the basis of buying the suit land. It has been admitted by the 1st Defendant.

Court agreed with Counsel Were for Plaintiff since the practice of buying unregistered land is that the seller passed on the purchase agreement to the new buyer. The 1st defendant has identified the agreement, he was a party to it and seller of suit land to the Plaintiff. **Agreement dated 22/11/90** admitted and marked **PEX 2**.

That after executing the agreement and even paying the purchased price, the 1st Defendant requested for 3 weeks to make arrangements to move his tenants. After 3 weeks passed, **PW1** went to him. He asked for more time because she said that he had some challenges. When a big period had passed she went to the Chairperson who wrote me a letter and she took the same to 1st defendant who still requested for more time to move his tenants when she served him with the letter from the L.C. To date, the 1st Defendant as never vacated the tenants. This is the reason sued him.

She knew the 2nd defendant she is a wife of the 1st defendant; 2nd Defendant is one of the persons occupying the suit property but **PW1** has no idea how she took possession of it. She did not know when she took possession because when she went to inspect the house, (suit property) she was not there, even at the time of paying she was not there.

That she first saw the 2nd Defendant in 2019. Before 2019 she was staying at Nabitambala village, she had lost a child and we had gone to attend the funeral. Nabitambala is found in Nabitambala Parish, Busedde Sub-County, Jinja District. That she had never seen the 2nd Defendant staying on the suit property before. She was not present when **PW1** purchased the suit land/property; she inquired from the 1st Defendant whether there is anyone

else responsible for the suit land and the 1st defendant answered her *“Before all these witnesses, I bought the suit land before I married. I have brought my son Bikaba Grace to sign for you because he is my heir”*.

That currently, the suit property is occupied by the 2nd defendant and a man, one Kitimbo Ronald. The failure by 1st Defendant to give her vacant possession has affected her as below:-

She borrowed the purchase money the creditors are on her case. Since 2018 when she filed this suit, she has spent heavily on transport fares. Last time for work. The purpose was to establish a grocery. She has been unable to achieve her purpose and seeks courts assistance to remove the current occupants.

During Cross examination, PW1 answered that she first met the 2nd Defendant at the loss of her child; and used to use that path so when she heard that she was bereaved, attended the funeral.

She was shown two wives of 1st Defendant when she went to 1st Defendant’s home. Both women were staying in one house at Nabiwawulo. She had forgotten, but learned that 2nd Defendant was staying on the suit property in 2018. She used to use the path near the home of 2nd Defendant in Nabiwawulo going to the garden but she had never gone to the home; and did not know the 2nd Defendant’s home before she attended the 2nd Defendant's child funeral.

Further, that they executed two agreements; the first agreement was executed on 27/5/2017. She paid Ugx 6,000,000/ = and paid Ugx 20,000,000/- in 2 instalments.

That the 3 weeks which the 1st Defendant requested for to vacate the premises was not in the agreement they executed and they verbally agreed. The 1st Defendant never suggested to reimburse Ugx 6,000,000/ to her and she was not aware whether 1st Defendant sued the 2nd defendant at Chief Magistrate's Court at Jinja. None of the tenants witnessed the agreement. At Nabiwawulo where she attended the funeral of 2nd Defendant's child there was only one house.

That she met the 2nd Defendant who was introduced to her as 1st Defendant’s wife before she bought the suit land. She did not know the children of the 2nd defendant, but present at sale was there child and has never sued 1st defendant and 3 others at Police.

That she sued 1st defendant for selling to her land and failing to give her vacant possession at court. There are no grave yards on the suit property. She knew where the 1st defendant buries his relatives, it's at Nabiwawulo.

That apart from the two rooms being occupied by the milk seller and drug shop owner, behind were 2 other norms, however, she did not know who was occupying the behind rooms.

In Re-examination, PW1 confirmed that the 2nd defendant was not staying on the suit property at the time of purchase. The 2nd defendant never protested her purchase of the suit property was not present. The 1st defendant has never refunded any money to her.

The Plaintiff's 2nd witness was **Kalyabe Baden Robert, a male adult aged 56 years , resident of Bulinda, Namaganga village, Kisaasi parish, Busedde sub-county, Jinja of District (herein after referred to as PW2)**. He confirmed that he was in court to testify about a plot of land located at Namaganga Trading Centre, Kisasi parish, Busedde Sub- County, Jinja District, Butembe County. The size of the plot is 20 feet x 100 feet. On the plot is a house of 2 rooms, it's a commercial building. That the 1st defendant was the owner, but later he sold to Plaintiff.

That the plot is now owned by the Plaintiff. She purchased it at Ugx 20,000, 000/=, the transaction was reduced in writing and she was present when they were selling.

As per **P. EX. 1, PW2** added that upon viewing it confirmed that it's a Sale Agreement showing that the 1st defendant has sold the plot to Plaintiff. She appeared as a witness (No. 10) on the agreement. Later, they heard that 2nd defendant who is the wife of 1st Defendant had sued Plaintiff that 1st defendant had sold off her land to her. That she sued her at L.c. 111 Court at the Sub-County. The issues were not resolved and this is why they are in this court.

That before the sale of the suit land, she knew that it belonged to the 1st defendant and had seen 1st defendant on the land for over 10 years; and that she did not remember when the 1st defendant acquired the land. That the 1st defendant constructed a commercial building on the land and rented it out to tenants and **PW2** used to know the 2nd defendant as the wife of 1st defendant.

That she thought that 2nd defendant's home was at Nabiwawulo village in Nabitambala parish, Busedde Sub-County, Jinja District because it's where they buried her child. The Defendants lost a child, they attended a funeral and that is how she came to understand that the 1st defendant had 2 wives. Both women were staying in Nabiwawulo village.

That **PW2** never used to see the 2nd defendant at the suit land, she used to see tenants on the land and did not see the 2nd defendant when the suit land was sold to Plaintiff by 1st defendant. That she was invited by Plaintiff to

witness the transaction because, she was a former member of the Area Land Committee. That she was convinced to witness the transaction because, was aware that the plot belongs to 1st defendant and she was not aware whether the Plaintiff was handed over the suit land.

During Cross examination, PW2 answered that he did not know who is using the suit land. That he sees tenants and thinks the tenants are 1st Defendant's since he has not handed over land to the Plaintiff. **He did** not know when defendant began living together as husband and wife and had never seen 2nd defendant before attending the funeral of her child.

PW2 did not know whether at the time 1st Defendant purchased the suit land he was living with 2nd defendant because, he did not know when he purchased the suit land. That at the time he witnessed the transaction between Plaintiff and 1st Defendant, he did not know where 2nd Defendant was staying because he did not see her and none of 1st defendant's wives were present when the transaction he witnessed happened. He did not know where the 2nd defendant is living and was not a neighbor to the suit land. He did not own land nearby the suit land, was not a neighbor to 1st Defendant in Nabiwawulo.

That when he went for the funeral, there were 2 houses, one 1st defendant's another of his son and a kitchen. It is residents who told them (mourners) at the funeral that 1st defendant has two wives using the suit land before the sale. He did not know what is behind the house, but in front, there are tenants. He did not know the person using the house at the back because he had never gone behind it.

In Re-examination, PW2 responded that at the time of the funeral, he found 2nd defendant at Nabiwawulo. Now, he did not know where her home is.

The Plaintiff's 3rd witness was **Mugega Edirisa Baliraine, a welder, male adult aged 57 years, resident of Namaganga and Namaziba village, Busedde Sub-County Jinja of District (herein after referred to as PW3).** He knew Magala Martha during the transaction and knew Nansubuga from this case, but before he did not know her. That he was in court to give evidence between Martha, Christopher and Nansubuga.

He testified in chief that Martha bought a house from Christopher, which Nansubuga claims is hers. The land and house are located at Namaganga, Busedde sub-county, Jinja District. The neighbors to this land. North: Hajji Amis East: Amini Gwaka North: Road to Muguluka, South: Late Sadiki.

That the land in question is for Martha who bought it from the original owner Christopher Mutasa; he was present when she bought on 1/6/2017 at 20

million. Apart from him, there were other witnesses like Chairperson L.C.1 called Kalu John, Bulolo John Secretary, Bikaba, Grace Nanioyo, Mpaulo Galubale Yokosani.

That at that time, **PW3** was L.C.11 chairperson of Kisasi Parish; and can identify the agreement that was made. ***Witnesses shown the agreement (P.EXH 2)***. He responded that it is the one they made. At the time Martha bought the land was in possession of some tenants like Musawo and Wambwa John. Musawo is still occupying the house, but Wambwa was chased out by Nansubuga; and that by the time Christopher sold to Martha, Esther was not in occupation and he has stayed in Namaganga village for about 5 years. That Nansubuga Esther came in the house by breaking the padlock, he did not remember which year exactly.

During cross examination, PW3 answered that he stays in Namazimbi village, Namaganga Trading Centre. The suit land is located Namaganga Trading Centre. That the 1st Defendant has no other land in Namaganga Trading Centre, he has other pieces of land in the village, where he is staying in Nabiwawulo, **PW3** could not specify what exactly he uses his land for in Nabiwawulo.

That he had never met the 2nd Defendant before this case, he equally stays in both villages and was L.C. 11 chairperson for 15 years and both villages allocated in his parish. That he was a witness on the purchase agreement. The neighbors present during the purchase had died then, none of the neighbors witnessed the sale. That the parties had agreed to transact so they could not oppose because Christopher had brought the purchase agreement he had purchased the said land from. The Chairperson L.C.I was present Kali John.

That the current chairperson is now called Mutamnbuze Edward, he did not know how many children have. Christopher (1st Defendant) has 1 wife that he knows but it is not 2nd Defendant.

In Re-examination, he responded that the neighbors were dead at the time of purchase. None was present.

The **Plaintiff's 4th witness was Wambwa John, a carpenter, male adult aged 40 years, resident of Namaganga Busedde Sub-County Jinja of District (herein after referred to as PW4)**. He knew Magala Martha as person who was to be his landlord, Mutasa Christopher was his landlord and that he did not know Nansubuga Esther.

He testified that Mutasa was his landlord in the house in Namaganga Trading Centre, Busedde, Jinja District. The neighbors to the said land were: North -

Isa Bonoka-he is no longer the L.C.1, South - late Amisi Dondolo, West - Road Muguluka and East - Amisi.

That he started renting the said house on 15/5/2014 paying 20,000/- per month being paid to Mutasa Christopher. Apart from him, there were other tenants like Musawo and he was no longer renting the said premises. That when Nansubuga had that Christopher has sold off the house, she went to Police and they came and broke the padlock from the room **PW4** was occupying and was forced to leave. That it is not true that Nansubuga has been in occupation from 1990s, he occupied the said house while it was vacant.

During cross examination, PW4 answered that he did not know Nansubuga. She older than him so he give her respect. Martha purchased the suit land in a year I forgot from Christopher. It was in 2016 when Nansubuga attacked Martha for the house it is the same period Martha had just purchased the suit land from Christopher. Currently it is Nansubuga utilizing the suit house.

That when he was coming to rent, he found nothing in the house. Between him and Musawo, it is Musawo who rents it. There was no agreement for tenancy or receipt between me and Christopher; and he did not remember how and when the house was built, but it is Mutasa who constructed the house as a builder. He never saw Nansubuga the time of construction of the said house, it was Mpiya who collected and fetched water from construction and he knew some of the children of the landlord. They were not present at the time of construction of the said house.

In questions by court, PW4 answered that Christopher and Esther were once husband and wife. Esther had occupied the said house before he entered into it.

In Re-examination, he responded that he knows what it means for one to be a wife to a man and was not present when the 2nd defendant was getting married to 1st defendant Esther had separated from Christopher and only came back after Mutasa had sold off the said house where she previously stayed.

The Plaintiff's 5th witness **was Kalo John, a carpenter, male adult aged 62 years, resident of Namaganga Busedde Sub-County Jinja of District (herein after referred to as PW5).** She testified that she knew the Plaintiff as a village mate but different zones. The Plaintiff bought from Mutasa Christopher from Mutasa Christopher a plot with a 2 roomed house and boy quarter in Namaganga Trading Centre. He knew Mutasa Christopher as a resident of Nabitambala, Busedde Sub-County, Jinja District

and knew Nansubuga Esther while she stayed at Mutasa's home in Nabiwawulo as a wife.

That he was not present when they got married, but they as Basogas, every woman you bring in your home we refer to her as your wife. That he is in court today because Mutasa sold to Mugala a house and never handed it over to Mugala. The said plot and house is located in Namaganga Trading Centre, Busedde, Jinja. The neighbors to the plot are: Left - Amisi Gwala (late), Right - Amisi Zilaba (late), Top- Road from Busedde Sub-County to Kaitandovu and South - Amisi Zilaba

That Mugala bought on 1/6/2017 and **PW5** was present as the Chairperson L.C. 1 of the Village. Other people present were Kalyabe Robert (L. C member), Bulolo John and was the author of the agreement, Edirisa Mugega I L.C.11 chairperson) and son to the seller called Bikaba, Mpaulo Moses. That he can identify the Sale Agreement if shown. **(Witness shown the agreement (P.EX 2)** and identified it to be the one they made.

That he signed on it and put his stamp as the L.C. 1 Chairperson. At time Mugala bought the suit land it had 2 roomed house and boy's quarter. House had tenants with a drug shop and retail shop and behind there was a tenant and by the time the said house was sold off Nansubuga was not using or in occupation of the suit property. He could not tell how Esther started claiming the suit land.

During Cross examination, PW5 maintained that that it is true she is a resident of Namaganga L.C.1, was born from Namaganga and did not know when Christopher acquired the suit plot and was not present when he acquired it. That Nansubuga Esther is a wife to Mutasa in their culture in Busoga, she only came to see Nansubuga claim for the suit plot after Mutasa had sold it off in 2017. Before 2017, **PW5** had never seen Esther Nansubuga on the land and would only see, used to see Esther at Mutasa's home at Nabiwawulo.

That if you bring a document to show that Nansubuga was in occupation of the suit land, there that documents are not right. She did not know how to read. *[The Plaintiff is read to witness it is Civil Suit No. 52/2017].*

That even if the contents in the Plaintiff indicate that Nansubuga was in the suit house from 1995, she confirmed she has never seen her occupy the same but only tenants to date. She knew Wambwa John, did not when he became a tenant. Wambwa was born in their village. She knew Kitimbo Ronald as also tenant on Mutasa's house and he is still a tenant on the said house. **PW5** confirmed that Mutasa sold the said land.

That Mutasa has not yet handed over to Mugala because there were tenants whose term had not expired yet. She did not know because Kitimbo pays rent to Mutasa and did not know of any police case between Mutasa and Nansubuga. Nansubuga was not present when Mutasa was selling to Mugala and did not know when Mutasa sought Nansubuga's consent before selling off too.

In re-examination, she responded that Nansubuga is a wife to Mutasa because she was staying at his home at Nabiwawulo.

The Plaintiff's 6th witness was **Namulondo Jessica, a farmer, female adult aged 70 years, resident of Buvuma, Buikwe District (herein after referred to as PW6)**. She knew the Plaintiff and testified that she bought land and house from his brother Mutasa, second name she could not remember. She knew Nansubuga Esther she was once her in-law. She was cooking at her brother's home. They were staying at Nabiwawulo Busedde, Jinja District. Nansubuga is no longer staying together with Mutasa for now many years.

She did not know Nansubuga's parents and Mutasa has never visited the parents of Nansubuga. They got themselves from the Disco during Christmas and after leaving Mutasa's home she went back to her parents.

During cross examination, PW6 answered that there was no function when Mutasa brought Nansubuga home. Mutasa never took any amendment and to Nansubuga home. That she is a resident of Buvuma and it is true Mutasa and Nansubuga were living at Nabiwawulo. She knew the suit plot, he bought after getting married to Nansubuga. They were living as husband and wife and they even have children in the said relationship.

The Defence case opened with **Esther Ruth Nansubuga, a female adult aged 52 years of Namaganga, Kisaasi, Busedde, Jinja District (herein after referred to as DW1)**. She testified that she had come to defend herself. That Mutasa Christopher is her husband, they are married and got married in 1983 in a traditional way and their matrimonial home was at Nabiwawulo. That she was sued for being in home that is not mine. The land in dispute is in Namaganga trading Centre, Kisaasi Parish, Busedde, Jinja. The land neighbors Bottom- Nulu, Top-Road to Miuguluka from Magamaga/ Kakira, East-Misi Gwaka (late) and West- Manza.

That she was currently in occupation of the suit land. The suit property belongs to me and her husband. That they worked together and acquired it, had worked in sugar molasses and they would sell it. That they bought the land from Amisi Dondolo Gwaka in around 1992 and after buying the land

they constructed a house. At first it was mud house and they entered it in 1993.

That after they constructed a permanent house but she did not remember the year. That she made a lot of contribution on the house, put a lot of energy since and was still a young girl and even they sold her goats to construct this house. That after construction, we stayed in court and even gave birth to all her children although currently she has 5 children.

That Magala Martha is a neighbor at the village. She was a teacher to her children. That she was aware of the sale, but she came to know it after she had come back from digging in Nankandulo. The sale was made steal fully and were hiding. The garden where she had gone to dig was hired by her relatives and had gone or about 3 months to dig in Nankandulo because her husband Christopher had sold off all their land for cultivating in Nabiwawulo and it was about 3 acres.

That when she learnt of the sale, she went to the L.C.1 but it never helped. He kept confusing her around and he is called **Kalo John (PW5)**, so when he failed her and went to Sub-County. That the L.C.III Chairperson summoned Christopher Mutasa her husband and they sat, but they faulted him and told her she was rightly on the land. That currently she is using the suit and her husband has over disturbed her. That he is threatening to kill her and she wants court to decide the matter in her favour.

That at their traditional marriage they brought alcohol, 2 goats, hens and then they gave me away. During this marriage my parents were present although some are dead but there present was George Badaza, Sosipateri Babi, Isabirye Wilberforce.

During cross examination, DW1 asserted that she got married in 1983 when she was 15 years. That they had a traditional marriage in the Kisoga customs, however that she did not have the letter that Mutasa wrote to her parents requesting for her and she didn't remember the year she was born. That her parents died but her caretakers told her the years. She asserted that at the time she married Mutasa, he was married to someone else called Esereda Nakato. Esereda Nakato was staying in Nabiwawulo.

That her parents allowed Mutasa to come home and consented to her marriage. Document sharing that Mutasa brought 2 goats at home witnesses but there were there. That when she started staying with Mutasa, he took her to the house where Nakato was staying. They said land was about 5 acres where Nakato was she gave birth to had 9 children. She gave birth to her last child in 2000, **DW1** gave birth to the 1st child in 1984. By 1984, the disputed land was not yet purchased.

She knew she has 5 children, the 4 died and were buried at Nabiwawulo. That she only gave birth to 2 children on the land where Esereda was staying and she left and went to dig in Nankandulo. That she went after Mutasa had he gave out all the 5 acres to Esereda and it is not true that shewent to Nankandulo in a different village. It is not true that she had a child with another man.

DW1 had no agreement showing she bought the suit land with Mutasa. It is Mutasa who kept all the documents. In the agreement her name was not indicated as a purchaser but he told her he had bought it for her. That she was present at the purchase and the Bataka know her. That she was not included in the witnesses present at the purchase. The house on the suit land is commercial building. The house am Occupying has 2 rooms and behind one of the room sleeping, one when children visit she put them in, other rooms have tenants and that is where she get her daily sustenance.

That it's true that she accessed one of the tenant's rooms by breaking since he had refused to get out. Before breaking the padlock, she was using the said room but Mutasa had displaced her. That the person who bought it is using it. The land she used to cultivate Mutasa sold it. Esereda too is using her portion where she is staying. The land on which she first stayed was for Esereda and it is still existing. It is not true that am still using it. Esereda has like 7 children. Mutasa had separated her from Esereda and gave her another portion that he sold off.

In re-examination, DW1 affirmed that she gave birth to 2 children from the land Esereda is occupying and 7 from the suit land. That her parents never had any issue with it for her to get married at 15 years. That it is Mutasa who came back and told her that "my wife I have bought for you your land in Namaganga and you will shift shortly after construction". That at the time of purchasing the suit the agreement was made at Namaganga and she was at home in Nabiwawulo.

Apart from Mutasa, she did not have any other man. By the time she went to Nankandulo Mutasa had sold her portion in Nabiwawulo. The tenant we evicted was Wambi John after following the L.C.111 order and Police. That except the children she has with Mutasa, she has no other child out. He had spent like 2 months in the suit room.It is Mutasa who had placed him in the said room and at that time she had gone dig in Nankandulo.

The second Defence witness was **Edward Mutunga Batambuze, a male aged 67 years resident of Namaganga Trading centre, Kisasi Busedde, Jinja District, (herein after referred to as DW2).** He testified knew the Plaintiff as resident of Katabaki L.C.1. I know the 1st Defendant Christopher he is a resident in his village and the 2nd defendant is a wife to

the 1st Defendant. That he had come to give evidence on behalf of Nansubuga Ruth regarding the land and house she occupied East-Misi Gwaka (late), West- Manza

He testified that he first saw them use the plot in 1990s. It measures 20ft by 100ft approximately. The suit land has a house and it is a permanent house and it is being occupied by defendant and the tenants of the defendants. That he has for long been seeing the 2nd Defendant use the land because he has been in the village for long and he was once a treasurer on the L.C.1 committee.

That she had been in occupation of the land but she goes and dig and come back. He did not know about the sale of the suit land between the 1st defendant and the Plaintiff and **DW2** was not party. That as the chairperson L.C.1 before one sell or buys land, he or she has to come to him before. Both Plaintiff and 1st Defendant never came to him before selling and buying of the suit land.

As regards the marriage of Defendants, he knew they are married because he was born on that village studied and married and stayed on that village while seeing both Nansubuga and Mutasa married. That when Christopher bought the land from Dondolo, there was mud house and then he brought in Nansubuga to stay there as his wife. That he saw them while married and constructed there a permanent house. At the construction of the mud and wattle house the 2nd defendant was in Nabiwawulo and they jointly constructed the permanent house.

During cross examination, DW2 answered that he was not present when Nansubuga and Mutasa were getting married, was not present when the suit plot was purchased and he affirmed that it was Christopher Mutasa who purchased the suit plot alone. The house on the suit is a commercial house with 2 boy's quarters. Christopher was staying in Nabiwawulo LC1 before purchasing the suit land from Nabiwawulo to Namaganga where the suit land is 1 ½ km.

He knew Christopher's land and home in Nabiwawulo. It's not true that I have had a relationship with Nansubuga. Christopher is his young brother and he has wives. It is not himei who removed her from Christopher's home to Nankandulo.

The third Defence witness was **Kitimbo Ronald, male aged 42 years resident of Namaganga Trading centre, Kisasi Busedde, Jinja District, (herein after referred to as DW3).** He affirmed that he did not know Magala Martha, but knew Mutasa Christopher as his landlord together with Nansubuga Esther and rented out their house in Namaganga Trading

Centre. That he just rented 1 double room and then later they added him 1 single room this was 2012 December and he started using it in January 2013 to date.

The 2nd Defendant also stays on the same building in Namaganga and he found her living there to date. That she just left once for like 3 months to go and dig but she came back and this was in 2016. He stated that during the 2nd Defendant's absence, he then saw the 1st defendant bring in a certain man called Wambwa into the room of Nansubuga. Wambwa occupied the said room for about 2 months and left after Nansubuga had come back. When she returned she asked the 1st Defendant why he had put a tenant in her room.

The L.C III and Police were engaged and the 2nd Defendant was restored back to her room. The relationship between 1st defendant and 2nd defendant are husband and wife because it is Mutasa (1st Defendant) who introduced 2nd Defendant to me as his wife while he was going to hire their house. Leven paid his rent to both of them pay the rent to the 2nd Defendant after the RPC and L.C.111 Currently Chairperson ordering him and the Plaintiff is and has never been his land lady.

During cross examination, DW3 answered that he was not present when 1st and 2nd defendant were getting married. The 1st tenant stays both at Namaganga and in Nabiwawulo. That he is a lab assistant, had not come with his academic documents and operates a drug shop but I have not more with it. He maintained that he had a tenancy agreement showing that his a tenant of the 1st defendant and shall avail it the next hearing date.

That it was true that the 2nd defendant at one point left the room for 3 months to go and dig, he never went with her. I cannot confirm what she went to do. He knew a one Wambwa, Wambwa took possession of the room which they currently in occupation of 2nd Defendant. That to remove Wambwa from the said room they never broke the padlock but he was just told to vacate. He was present when Wambwa was told to vacate. Court should believe him when he say that the padlock was not broken but Wambwa was told to vacate. That very day is the day they told him to give Nansubuga the money for rent. They never heard a court order, before then he was paying rent to Mutasa (1st Defendant).

In Re-examination, DW3 answered that he has a tenancy agreement between him and 1st defendant. When the 2nd Defendant left the room she told him she was going to dig since her husband had sold off the portion she was using. That before all this scuffle, he was paying rent to both Defendants but after sometime he started paying the 1st defendant.

The fourth Defence witness was **Bamwidukile Grace, a female aged 47 years , business man ,resident of Namaganga Trading centre, Busedde Sub-County, Jinja District, (herein after referred to as DW4).** He knew Mugala Martha. She is a resident of Katalakabi village, near Namaganga. He testified that the 1st Defendant is her niece Mutasa Christopher, she is a resident at Namaganga and also Nansubuga is a resident of Namaganga.

That the 1st and 2nd Defendants are husband and wife. She never attended their marriage Ceremony, knew about their marriage when they shifted from Nabweawulo to Namaganga. That they also bought a plot in Namaganga and are in court today because 1st Defendant sold out the house to the Plaintiff without 2nd Defendant's consent.

That the house is found in Namaganga Trading Centre. They bought the suit plot from Dondolo. **DW4** was not present at the time of purchase but she came to know about the purchase and even constructed thereon a semi-permanent house before transforming to permanent house. She did not remember the year. But they stayed in that house together and gave birth to 3 more children adding on the 2 they came with.

That in 2016 the 1st Defendant sold off land which the 2nd Defendant was using to dig and then she went looking for land to do cultivation in Nankandulo and she was there she heard that the husband had sold off the house in the Namaganga where she was staying until she reported them and announced on the public address system in the Centre passing a warning on whoever had bought the land.

That the 2nd Defendant has never left the suit property apart from when she went to dig. When the 2nd defendant announced on a public address in the Centre saying that whoever bought did it on his own peril because she never consented.

DW4 believed the Plaintiff heard this announcement although she is a different village. The L.C. 111 Chairperson tried to reconcile both parties but it failed with the help of Chairperson L.C. 111 and RDC Kakira, the 2nd Defendant was able to access her room.

During cross examination, DW4 answered that she was not present when 1st defendant and 2nd defendant got married. At the time they sold the said plot the 2nd Defendant had gone to dig and not on the plot. They have a home in Nabweawulo, she never went with her and she cannot be sure what she went to do, because she is part of the business community which she

heard and they told her she had gone to dig, but never saw her dig but saw her harvests.

That the 1st Defendant and 2nd Defendant came from Nabiwawulo. Apart from them building on the suit, she has no other evidence to show that she was not the one who runs Christopher's affairs. At the time they purchased the land in dispute she was not present and did not know who was present as witnesses at the time of the purchase.

To her knowledge it is the 1st and 2nd defendant who bought the suit land. **DW4** had no proof to show that both defendants contributed financially to construct the said house but they would work jointly. At the time the house it is the 1st and 2nd defendant who bought the suit land jointly from Dondolo and was not the one who constructed the house on the suit land.

She did not know who facilitated the finances to construct the house but it could be both defendants, it was sold to Magala Martha, Wambwa was a tenant in the said house. That in 2016 she was not a local leader. In 2017 was just chairperson of the business community and was not in court to defeat the interest of Mugala having bought the suit plot. It is not true that in 2016 she had approach the 1st defendant to purchase the suit land and he refused.

That just look at the 2nd defendant and the children who will be left homeless. The children of 2nd defendant are married. It is not true that her concern is to take the house herself.

In Re-examination, DW4 answered that the house at Nabiwawulo it is occupied by Mutasa's 1st wife. The first wife has never lived on the suit land. At the time of construction of suit by the 2nd Defendant cooked for the builders and fetched water for construction. That she just knows the 2nd defendant as a local resident nothing else and has no interest in the suit plot.

The fifth Defence witness was **Badaza George, male aged 63 years, business man and resident of Bulondo, (herein after referred to as DW5)**. He knew the 1st Defendant as her niece and she was in court to give evidence between Mutasa in favour of Nansubuga Esther concerning a house in Namaganga Trading Centre which was their matrimonial home. That she had known Nansubuga since 1970s when her sister came to their home with Nansubuga. She was called Kanifa Kiiza and mother to Narnsubuga and she was also staying with Sosi Patri Babi and he too is an uncle Nansubuga.

That Esther Nansubuga left their home in 1983 having got married to Christopher Mutasa through a traditional marriage. According to Kisoga customs the girl tells her parents the day her would be husband to come

home and then we decide the bride which is given and then after paying bride price, the girl goes with husband's home.

He did not remember the exact date but it was 1983. The 1st defendant paid 2 goats, 2 hens, 1 kanzu, 1 gomesi, 1 bicycle, a guard of alcohol. He only brought 2 goats, 2 hens, 1 guard of alcohol and 1 kanzu. That after giving us the bride we allowed her to go with the husband that day and followed by the brother called Monday Ikomba to Nabiwawulo. Esther Nansubuga having married my niece took her to Nabiwawulo village is his home. That Mutasa and Nansubuga stayed together married as husband stayed together married as husband and wife. She did not have documents to confirm the marriage but can confirm the documents were there and were left with our father called Babi Sosi.

During Cross examination, DW5 answered that he had a relationship with Nansubuga, was not a biological brother to Nansubuga mother Kanifa Kiiza and did not know Nansubuga's father but knew Nankandulo village.

He did not know why Nansubuga has ever stayed in Nankandulo village. He was not aware that Nansubuga has ever left Mutasa home since 2000, not aware that when she left Mutasa, she went to Nankandulo and not the biological father of Nansubuga but has a clan relationship with her because she is her niece. When Nansubuga left their home, she was taken to Nabiwawulo. That he has never been to Nabiwawulo and Nansubuga has ever lost a child and not only one. They are 4 in number and they were buried in Nabiwawulo.

That he has ever gone to Nabiwawulo for burial but not as a resident. Mutasa had 1 wife before getting Nansubuga. Nansubuga stayed in Nabiwawulo. They then bought a plot in Namaganga and **DW5** was not there when the plot was bought.

That it is Mutasa who bought the plot for his wife and children, DW5 had no document to show that Mutasa bought the plot for Nansubuga. In Busoga custom, they write a letter to the parent but he did not have it personally, neither did he have the letter accepting Mutasa to come for introduction; and had no list of the items in written for list of items requested as bride price. That his y relationship with Nansubuga is maternal.

In Re-examination, he answered that he did not know Nansubuga's father's she is from Buganda and thought the lawyer had asked him why he was a resident of Nabiwawulo. That he has ever gone there for burial. Mutasa after buying a plot he came and told them he had bought to separate his wives who were both at Nabiwawulo.

In clarification by court, DW5 responded that he is a Musoga. *“I know the Busoga custom. When a girl is introducing her husband, she introduces the husband to the clan members. Nansubuga's father was in Masaka. I do not know Nansubuga's clan. Nansubuga is not a Musoga. She introduced her husband at her uncles”.*

That by the time Nansubuga introduced her husband, her mother was alive. By the time Nansubuga introduced the father had died. Nansubuga's mother never attended the burial of her husband. The maternal grandfather of Nansubuga is the one who died the bride price. The introduction of Nansubuga was performed at her maternal side without her partial side. Nansubuga's mother was buried at their place.

Having summarized all the evidence of both sides, I have found that the question to be answered by this court is whether there is a valid customary marriage between the Appellant and the 2nd Respondent?

Article 31 (1) of the Constitution of the Republic of Uganda 1995 states that, *“men and women of the age of 18 years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.”*

In the case of ***Alai vs. Uganda [1967] E.A 596*** Sir Udo Udoma held that *“marriage is a ceremony by which a man and woman become husband and wife thereby creating the conditions of belonging to a particular class of persons to whom the law assigns certain equal capacity as qualified.”*

The Appellant claimed to have been married to the 2nd respondent under Busoga customs however, in all her evidence, she failed to give particular dates but only mentions her age. Her witnesses were also not certain of how this alleged customary marriage took place and exactly where it took place. Her witness **Edward Mutunga Batambuze**, who claimed that the marriage of Defendants, he knew they are married because he was born on that village studied and married and stayed on that village while seeing both Nansubuga only confirmed that he saw Mutasa bring the appellant and they started living together as husband and wife, but he **during cross examination, DW2** answered that he was not present when Nansubuga and Mutasa were getting married. The same goes for **Kitimbo Ronald**, who **during cross examination**, answered that he was not present when 1st and 2nd defendant were getting married; and **DW4 Bamwidukile Grace**, also never attended their marriage ceremony, but claimed to know about their marriage when they shifted from Nabiwawulo to Namaganga and was not present when 1st defendant and 2nd defendant got married.

Also, **DW5 Badaza George**, who claimed to be her niece stated that *“according to Kisoga customs the girl tells her parents the day her would be husband to come home and then we decide the bride which is given and then after paying bride price, the girl goes with husband's home”* did not remember the exact date but it was 1983. He claimed that *“the 1st defendant paid 2 goats, 2 hens, 1 kanzu, 1 gomesi, 1 bicycle, a guard of alcohol. He only brought 2 goats, 2 hens, 1 guard of alcohol and 1 kanzu. That after giving us the bride we allowed her to go with the husband that day and followed by the brother called Monday Ikomba to Nabiwawulo. Esther Nansubuga having married my niece took her to Nabiwawulo village is his home. That Mutasa and Nansubuga stayed together married as husband stayed together married as husband and wife”*.

It is however clear that she also did not have documents to confirm the marriage but can confirm the documents were there and were left with their father called Babi Sosi.

During Cross examination, DW5 answered that *“in Busoga custom, they write a letter to the parent but he did not have it personally, neither did he have the letter accepting Mutasa to come for introduction; and had no list of the items in written for list of items requested as bride price”*. **[Emphasis Mine]**

In Re-examination, he was also clear that and answered that he did not know Nansubuga’s father's she is from Buganda.

In clarification by court, DW5 responded that he is a Musoga. *“I know the Busoga custom. When a girl is introducing her husband, she introduces the husband to the clan members. Nansubuga's father was in Masaka. I do not know Nansubuga's clan. Nansubuga is not a Musoga. She introduced her husband at her uncles”*.

That by the time Nansubuga introduced her husband, her mother was alive, the father had died and the maternal grandfather of Nansubuga is the one who died the bride price. The introduction of Nansubuga was performed at her maternal side without her partial side.

The evidence of DW5 contradicts that of **DW1** herself who asserted that **during cross examination**, that *“she got married in 1983 when she was 15 years. That they had a traditional marriage in the Kisoga customs, however, she did not have the letter that Mutasa wrote to her parents requesting for her and she didn’t remember the year she was born. That her parents, died but her caretakers told her the years.That her parents allowed Mutasa to come home and consented to her marriage. That Document showing that Mutasa brought 2 goats at home witnesses but there were there”*

It is clear from the above that **DW1** was not even aware of what was paid as her bride price and stated it was 2 goats as opposed to the so many things **DW5** claimed that when she claims that her parents consented to the marriage and documents were made.

Section 1 of the Customary Marriages Registration Act Cap 248 (hereinafter referred to as the Customary Marriage Act) defines customary marriage as *“a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or, any marriage celebrated under Part III of this Act”*.

It is now settled law in our courts that payment of the full bride price requested by the bride’s family is proof that a customary marriage has been celebrated between two parties, see for example **Aggrey Awori vs Rosette Tagire HCCS 178/2000 and Uganda vs. Olinga & Anor [1974] HCB 87**.

This same principle was considered in the cases of **Mifumi (U) Limited & 12 Ors vs. Attorney General and Anor (Constitutional Petition No. 12 of 2007)** where Hon. Justice S.B.K Kavuma recognized that payment of bride price is widely practiced in Uganda.

Further, in **Nemezio Ayiia Pet vs. Sabina Onzia Ayiia (Divorce Petition No. 8 of 1973)** court held that before all dowry is paid, a man and a woman cohabiting can be regarded as husband and wife, but (the customary) marriage is not valid until all dowry is paid.

As rightly submitted by learned counsel for the Respondents, the onus to prove the marriage was upon **DW1** and much as she alleged that she was married at 15 years old, there was no substantial evidence to prove her marriage to the 1st Respondent.

DW1 states during cross examination on **pg.23 line 6-8 of the record of proceedings**, she stated that;-

“True we had a traditional marriage in the Kisoga customs. I do not have letter that Mutasa wrote to my parents requesting for me”.

It was also **DW5** testimony Badaza George on **pg.33 lines 9-12 of the record of proceedings**, he stated that;

“I have no document to show that Mutasa bought the plot for Nansubuga. In Busoga custom, they write a letter to the Parent but I do not have it personally. Neither do I have the letter accepting Mutasa to come for introduction. I have no list of thr items requesting for bride price. My relationship with Nansubuga is maternal.”

He further added that during clarification by court that on **pg. 33 lines 35-36 of the record of proceedings**

From the foregoing, it is clear that the learned Trial Magistrate's finding that there was no valid marriage between the Appellant and the 2nd Respondent was based on the evidence presented before him. Instead a reevaluation of the evidence of both sides reveals that the Appellant and 1st Respondent were not legally married as held by the learned Trial Magistrate,, but it was an act of cohabitation that led both to live together and bear children.

Having found as I have and in total agreement with the learned trial Magistrate, then the question of whether her consent was required before the 2nd Respondent sold the suit property is clearly negative. It automatically goes without saying that her consent was not required before sale and proceeding to entertain the Appeal and on this I agree with the submissions of learned counsel for the Respondents and the case law cited.

It is therefore my finding and decision that the Appellant having conceded and abandoned this ground and in view of my own analysis of the evidence presented before the lower court, it is clear that the Appellant has failed to prove a valid customary marriage between her and the 2nd Respondent because her cohabitation with the 1st Respondent is *void ab initio*.

Having resolved the first ground as I have, I will resolve the rest of the grounds in this Appeal concurrently since they all rotate around ownership of the property and whether had the capacity to sell without the Appellants consent.

GROUND 2: That the learned trial magistrate erred in law and fact when she relied on the Plaintiff's contradictory evidence to hold that the second defendant has never resided in the suit property.

It was submitted for the Appellants that it is just too convenient that for over 30 years that the house existed on the suit land, **PW4**, John became the first tenant to rent in the room where the Appellant lived. The Appellant testified at page 22 that:

"The suit land belongs to me and my husband. We worked together and acquired it. We worked in sugar molasses and would sell it. We bought land from Amisi Dondolo, Guwaka around 1992 and after buying the land we constructed a house, at first it was a mud house and we entered in it in 1993. mAjier we constructed a permanent house but I do not remember the year. I put a lot of contribution on the house. I put a lot of energy since I was still young girl, and we even sold my goats to construct my house. After construction we stayed in it and even gave birth to all my children although

currently I have 5 children..." She further stated that she is the one in occupation of the suit land.

That her evidence was corroborated by that of **DW2, Edward Mutunga Batambuze** who is also resident in Namaganga Trading Centre and the Chairperson of the village where the suit land is located. At page 25 he testified that the suit land belongs to the Appellant and the 2nd Respondent.

That he first saw them using the same in the 1990s and that for long he has been seeing the Appellant in occupation of the same because he was once a member in the LC1 Committee acting as the treasurer and at the time of his testimony he was the Chairperson LC1.

That **DW3 Kitimbo Ronald** who is a tenant in the suit premises testified at page 27 that he has been a tenant in the suit building and his landlords are the Appellant and the second Respondent. He stated that he rented a double room and later they added him a single room. This was in December, 2012 and he started using the house in January, 2013: This witness is a laboratory assistant. He continued to aver that:

"The 2nd Defendant also stays on the same building in Namaganga and I found her living there and she still does to date. She once left for like three months to go and dig but she came back. This was in 2016.

In the Second Defendant's absence I then saw the 1st Defendant bring in a certain man called Wambwa into the room of Nansubuga. Wambwa occupied the said room for about 2 month and left after Nansubuga had come back."

That the 2nd Respondent's home in Nabiwawulo is occupied by his first wife, Esereda as stated by **DW2** at page 26 and the Appellant at page 22 stated that the 2nd Respondent had sold off all of the land at Nabiwawulo that she used to cultivate and it is currently being used by the purchaser.

This is the reason why the Appellant went to Nakandulo in Kamuli district to find an alternative farming land and that is the reason why the Appellant was absent from the suit land for the three to four months within which the 2nd Respondent sold the suit land to the first Respondent. They prayed that this ground of appeal succeeds.

In reply, learned counsel for the Respondent submitted and contended that though the ground is coined, as such, it is very vague in as far as no such alleged contradictory evidence has been pointed out. That clearly, the ground is an emulation of the Appellant's fishing expedition, for rather than pointing to the alleged contradictions, the Appellant seems to mislead court that she has been in occupation of the suit land which is not true at all. Counsel for the Appellant has also posed a question that for over 30 years

the house has existed on the suit land, how is it possible that John became the first tenant which question is also hinged at misleading court for the evidence on Court record is very glaring that the suit land was purchased by the 2nd Respondent and developed by the 2nd Respondent who placed therein tenants not only Wambwa John but others also. That it was after the 2nd Respondent selling to the 1st Respondent the suit land that the Appellant came from Nankandulo where she was resident and forced herself in the house which at the time had been rented by Wambwa John. This evidence from the Plaintiffs witnesses was never disputed in any way it was actually corroborated by the evidence of **DW1**.

Appellant at page 24 of the record of proceedings who told Court that at the time the suit land was sold she was in Nankandulo where she had gone to dig. That she evicted the tenant Wambwa John with the help of the LC111 and took possession of the said house. That **DW2** also told Court that the 2nd Defendant/Appellant was in Nakandulo and it is the LC111 who directed her to break the padlock and access the suit house.

That as rightly held by the learned Trial Magistrate, the Appellant had never been resident on the suit land she only came on the suit land after it had been sold to the 1st Respondent and we invite Court to find so and even if she had stayed thereon that alone does not confer on her rights on property which was solely purchased and developed by the 2nd Respondent.

They argued that if spouses are allowed to own property separately even if they are married as held in the case of **Julius Rwabinumi vs Hope Bahimbisomwe**, it would be very absurd to say that cohabitees have equal rights over properties acquired solely just like in the present case, where the 2nd Respondent solely purchased the suit land as per **PEX2**, to say that the Appellant has rights to it would be very absurd.

The Appellant has no color of right over the suit property and her consent was not required before sale and invited Court to find so.

GROUND 3: That the learned trial Magistrate erred in law and fact when she held that the suit property is not family/matrimonial Property thus occasioning a miscarriage of justice.

It was submitted for the Appellant that the Appellant testified at page 22 that *"The suit land belongs to me and my husband, we worked together and acquired it. We worked in sugar molasses and would sell it. We bought land from Amisi Dondolo Gwaka around 1992 and after buying the land we constructed a house. At first it was a mud house and we entered in it in 1993, we constructed a permanent house but I do not remember the year, I put lot of contribution on the house. I put a lot of energy since I was still a*

young girl, and we even sold my goats to construct my house, after construction we stated in it and even gave birth to all my children although currently I have 5 children. .. "

She further stated that she is the one in occupation of the suit land was corroborated by that of **DW2, Edward Mutunga**. Her evidence Batambuze who is also resident in Namaganga Trading Centre and the Chairperson of the village where the suit land is located. At page 25 he testified that the suit land belongs to the Appellant and the 2nd Respondent.

That he first saw them using the same in the 1990s and that for long he has been seeing the Appellant in occupation of the same because he was once a member in the LC1 Committee acting as the treasurer and at the time of his testimony he was the Chairperson LC1.

The 2nd Respondent's home in Nabiwawulo is occupied by his first wife, Esereda as stated by **DW2** at page 26 and the Appellant at page 22 stated that the 2nd Respondent had sold off all of the land at Nabiwawulo that she used to cultivate and it is currently being used by the purchaser.

Now, we cannot rely on the illegality of the marriage between the Appellant and the Respondent and put a blind eye to the Appellant's contributions towards the acquisition and development of the suit land and above all the lengthy period in which she has occupied the suit land and treated the same as her home after she was separated from her co-wife Esereda.

The principle of equity which provides that, "*equity regards as done that which ought to have been done*". This maxim of equity refers to and caters for situations where individuals are by an agreement or by law supposed to perform an act, equity will consider the parties to be in the position where they would have been had the obligations under the contract been fulfilled.

Counsel for the Appellant cited the landmark case of **Haji Musa Kigongo vs Olive Kigongo, Land Suit No. 295 of 2015**, Hon, Justice Godfrey Namundi in his Judgment that was upheld on appeal to the supreme court of Uganda held that, proprietary estoppel is one of the forms of estoppel by representation it may arise where a person has by his word or conduct made to other a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, and the other person has acted on such representation and thereby altered his position.

That in such circumstances an estoppel arises against the party who made the representation and he or she is not allowed to aver that the fact is otherwise than he represented it to **Ref: paragraph 1075 Halsbury's Laws of England, Vol. 1 6(2)**".

*"Proprietary estoppel is an equitable doctrine which only involves the promise of interests in land, and it arises when the representation consists of a promise of an interest in land. **Ref: paragraph 1089, Halsbury's Laws of England, Vol. 16(2).***)

That in the **Kigongo case**, in Issue 2, the learned trial judge had rightly found that there is no subsisting marriage between the Plaintiff and the Defendant, he however, went on to apply the principle of equity and held as hereunder:

"In the instant case, I find that equity is in favour of the Defendant. It is only fair that the Defendant is entitled to an interest in the suit property which has been her 'marital home' with the Plaintiff for nearly 26 years and is still living there. The Defendant was assured that she had a home for life and it did not matter whether she made any financial contributions to its construction, for as long as she lived on the assurance by the Plaintiff that she was a wife and that she had a security of tenure."

They carried the same argument to the instant case. The Applicant lived with the second Respondent as wife and husband and she honestly believed that they were legally married for all the years she has, been in a relationship with the second Respondent. She stated that she contributed to the purchase of the suit land by selling her goats to contribute on the purchase price. After construction of the mud wattle house, she shifted from the first wife's home in Nabiwawulo and she had her own home now, which is the suit land in the year 1993.

That after sometime, they upgraded to a permanent house which is the existing development on the suit land. She cannot be deprived of her 'home merely because in 1983 she entered into a void marriage with the second Respondent. In any case, the suit land was acquired and developed by the parties jointly after the defunct marriage; so, the marriage cannot be a ground for depriving the Appellant of her rights in her home.

That the 2nd Respondent sold the pieces of land that the Appellant cultivated and grew food crops for her sustenance and she found an alternative land in *onkandulo* in Kamuli district where she occasionally went to cultivate and look after her crops, and her absence for a period of months created a erect window for the second Respondent to sell the suit land to the first Respondent. It is not contested that the sale was done without the knowledge and consent of the Appellant. Was the consent of the Appellant required prior to the sale; this is the issue to be addressed in

In reply, learned counsel for the Respondents submitted that the learned Trial Magistrate in resolving the issue whether the suit land is family land held at page 7 paragraph 10 held thus;

"No evidence was adduced to prove that the suit property is treated as family land under the customs or norms of the clan or ethnicity that the Defendants subscribe to"

The above finding is well supported by the law for **Section 38 (4) of the Land Act Cap 227 (as amended)** defines family land as land-

"a) On which is situated the ordinary residence of the family;

b) On which is situated the ordinary residence of the family and from which the family derives sustenance,

c) Which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or

d) Which is treated as family land according to the norms, culture, traditions or religion of the family".

And in the case of **Julius Rwabinumi vs Hope Bahimbisomwe, SCCA NO.10 OF 2009** family land is defined to mean;

"Property that the parties call home and/or to whose acquisition both contributed to"

They submitted that as already highlighted underground one, the Appellant concedes that she was not legally married to the 2nd Respondent and the suit property cannot be regarded as matrimonial property and as to whether it is family land; and submitted that it is not family land and the 2nd Respondent miserably failed to prove so; the 2nd Respondent in his Written Statement of Defence under paragraph 3(b) stated that the suit land was his personal property, that he purchased from one Aminsi Gwaka in 1990 for his business purposes and solely owned the same, that he constructed a permanent house thereon and put in tenants for business purposes and he sold the same to the Plaintiff and he did not require consent from the Appellant.

The purchase agreement was exhibited as **PEX2** and the same bears only the 2nd Respondent's name as purchaser and the Appellant is nowhere, not even as a witness, and before Judgment on admission was entered the 2nd Respondent told Court as seen at page 1 of the record of proceedings thus;

"It's true, I sold the plot and house, however my friend grabbed the said house forcefully by breaking the padlock, I was not around, I have already given all my children their share of my property, the suit property is Commercial and even the children we had them at a different home, the

Appellant deserted me in 2005 she was away for three years and this is when I sold the house, she returned and harassed my tenants who left and she trespassed onto the house"

That the said Admission from the 2nd Respondent confirms that the suit property is not family land as it does not have the ordinary residence of the family, it is not where the family was deriving sustenance, the family did not agree to be called such and the Appellant and 2nd Respondents Custom does not acknowledge it as such.

That **PW1 (Magala Martha)** at page 6, 7, 8, 9 and 10 of the record of proceedings told Court that; before purchasing the suit land she physically inspected and the suit land had tenants, i.e, one selling milk and another had a drug shop. That she made further inquiries from people who had stayed long in Namaganga Trading Center, to wit; Giripina Waiduubi, Gwonka Amisi, Galubale Yokosani, Muzondo John Bulolo, Mpaulo Moses, LC1 Chairperson who all confirmed that the suit land was for the 1st Defendant and Gwanka Amisi who sold to the 2nd Respondent also confirmed that the land was for the 2nd Respondent.

That at the time of inspection, the Appellant was not a resident on the suit property. That she saw the Appellant in 2019 and that before 2019, the Appellant was a resident in Nabiwawulo village, Nabitantala parish, Busedde Sub- County, Jinja District. That the 2nd Respondent buries his relatives at Nabiwawulo and that the Appellant was not staying on the suit land at the time of purchase.

That **PW1's** evidence was corroborated by the evidence of **PW2, 3, 4, 5 and 6, PW2 (Kalyabe Baden Robert)** told Court at pages 11-13 of the record of proceedings that the suit land belonged to the 2nd Respondent/1st Defendant, that the 2nd Respondent constructed a commercial building on the land and rented it out to tenants and he had seen the 2nd Respondent on the land for over 10 years.

That he knew the Appellant and her home was at Nabiwawulo village, that the Appellant lost a child and burial was at Nabiwawulo. That he came to know the Appellant at the burial of her child that the Appellant has never stayed on the suit land.

That **PW3 (Mugega Edirisa Baliraine)** at page 15-17 of the record of proceedings told Court that at the time the 1st Respondent bought the suit land from the 2nd Respondent, it was occupied by tenants like Musawo and Wambwa John, that Musawo was still occupying but Wambwa was chased out by the Appellant. That at the time of sale, the Appellant was not in

occupation of the suit land, that the Appellant entered the suit house after evicting Wambwa and she broke his padlock.

That **PW4 (Wambwa John)** told Court that he started renting the suit house in 2014 and was paying rent to Mutasa Christopher, that apart from him there was another tenant Musawo, that when the Appellant heard that the house had been sold, she came with police, broke his padlock and forced him out of the house. That the Appellant has never occupied the suit land that it is the 2nd Respondent who constructed the house and not the Appellant. That it is Mpiya who collected and fetched water for construction.

That **PW5 (Kalo John)** told Court at page 18-20 that at the time the 1st Respondent bought the suit land, it was occupied by tenants and that the Appellant was not using it and was not in occupation, that he used to see the Appellant at her home in Nabiwawulo.

That **PW6 (Namulondo Jesca)**, told Court at page 20-21 of the record of proceedings that the 2nd Respondent and Appellant used to live in Nabiwawulo village. The evidence adduced by the Plaintiff/1st Respondent show that the suit property was solely bought and developed by the 2nd Respondent for commercial purposes; and that at the time she bought the suit land had tenants for the 2nd Respondent/1st Defendant and the Appellant has never Occupied the same and was never discredited in any way by the Appellant, for even the Appellants witnesses did confirm that the suit land was bought by the 2nd Respondent who developed the same for commercial purposes and that the Appellant only gained access to the same after evicting the 2nd Respondents tenant Wambwa John using force by way of breaking his padlock.

That **DW1 (Esther Ruth Nansubuga)**, the Appellant herein told Court at page 21-24 of the record of proceedings, that there matrimonial home was at Nabiwawulo village, though she claimed to have purchased the suit land with Mutasa Christopher, no evidence was adduced to that effect as **PEX 2**. That clearly reveals one buyer, the 2nd Respondent, even in cross-examination, **DW1** admitted that she was not even present when the suit land was bought, and though she also claimed to having contributed to the construction no evidence was adduced to that effect.

That she told Court that she started staying with Mutasa Christopher and his first wife, Esereda Nakato at Nabiwawulo and the land was approximately five acres. That together they had nine children and that four of her Children died and were buried in Nabiwawulo village. That at the time the suit house was sold to Mugala Martha, she was not present as she had gone to Nankanduro village to cultivate. That she returned and found Wambwa John in the house and that she used Police, Resident District Commissioner to

forcefully evict Wambwa John from the house and she entered therein and that is where she is to date.

That **DW1**'s evidence reveals that she stayed with Mutasa in Nabiwawulo and not on the suit land and that the Appellant only forcefully entered on the suit land when it was already sold upon evicting Mutasa's tenant Wambwa John as before then she had never stayed on the suit land, **DW2 (Mutanga Edward)** also told Court at page 24-26 of the record of proceedings in cross-examination that Christopher Mutasa purchased the suit plot alone and that the house thereon is commercial.

That Christopher was staying in Nabiwawulo village, that at the time they sold the house, Nansubuga was not staying thereon, that when Nansubuga's children died they were buried in Nabiwawulo and that Esther's children were buried in Nabiwawulo as it is the ancestral land.

DW3 (Kitimbo Ronald) at page 27-28 of the record told court that Mutasa Christopher stays in Nabiwawulo, though **DW1** admitted to breaking the padlock to Wambwa John's house. **DW3** stated that it was never broken clearly being untruthful and his evidence ought to be regarded with caution.

DW4 (Bamwidukire Grace) told Court at page 29-30 that Mutasa and Nansubuga have a home at Nabiwawulo. **DW5 (Badaza George)** told Court at page 31-33 of the record that Mutasa Christopher took Nansubuga to Nabiwawulo and that it is where they were staying and it is where her Children were buried 1990 reveals Mutasa Christopher, the 2nd Respondent defence, he confirmed that he bought the suit property

Learned counsel for the Respondent asserted, **PEX-2** which is a Sale Agreement of as the only purchaser of the suit land in his capacity as an individual and for his sole use and not as a family, all the evidence on Court record points to one fact that what was agreed to be a family home is land in Nabiwawulo village where the children of the Appellant were buried and not the suit land.

That it is also clear from the evidence that the Appellant had before the sale never stayed on the suit land. Surprisingly having even separated from the 2nd Respondent from Nabiwawulo way back in 2005 and even settled with another man in Nakandulo as per the 2nd Respondent's admission. The Appellant having heard of the sale shockingly came back, forcefully evicted the tenant, Wambwa John and took possession and she is there to date, this was without a court order and such wanton acts cannot be condoned by Court.

That Counsel for the Appellant evokes equity and relies on the case of **HAJI Musa Kigongo vs Olive Kigongo**, however, the said case is very

distinguishable from the present case, for in that case, both parties had agreed to the land in dispute to be their home and even if they were found not to be legally married, Court considered the long stay in the said home.

The contribution by each party and ordered for equal share in the said home, however, in the present case, what was agreed to be home was land in Nabweawulo and not the suit land. The Appellant never made any contribution to purchase and development of the suit land, the Appellant forcefully entered the suit land at her own detriment.

That he who comes to equity must come with clean hands which cannot be said for the Appellant. The Appellant well knew that the suit land is not their home, she had left the 2nd Respondent in 2005, staging her come back by forcefully entering the suit house just to annoy the person of the 2nd Respondent at the detriment of the 1st Respondent is not clean at all. The actions are arbitrarily and should not be condoned by Court.

They argued that the Appellant cannot claim that she was deceived to being married for she failed to prove the alleged customary marriage. The Appellant was very much aware that at the time she was with the 2nd Respondent she was a cohabitee as no form of marriage had ever been conducted, and even producing nine children could not make her a wife, and the mere fact that she cohabited with the 2nd Respondent does not entitle her to properties solely acquired by the 2nd Respondent.

That she can only be entitled to properties she contributed to and in this case, she miserably failed to prove any contribution to the acquisition of the suit property as well held in the case of **Julius Rwabinumi vs Hope Bahimbisomwe** thus;

"That marriage does not take away the right to separately acquire and own property"

Ground 4 of the Appeal: That the learned trial magistrate erred in law and fact when she held that the second Defendant's consent was not required for the sale of the suit land.

It was submitted by learned counsel for the Appellant argued that, the consent of the Appellant was and is a prerequisite prior to the sale of the suit land. The Appellant procured, developed and lived in the suit land on assurance by the Second Respondent that she is his wife and the suit land is their home.

That Equity is therefore, in her favour and she is entitled to the security of tenure, so, with the foregoing we pray that this court declares that the suit land is the family land, marital home, matrimonial property of the Appellant

and the 2nd Respondent and they have the same rights over it; and they prayed that this ground of appeal succeeds.

In reply to this ground, learned counsel for the Respondents submitted that if even in marriage one can own property as an individual what about in the present case where the Appellant and 2nd Respondent were only cohabiting, the 2nd Respondent had exclusive rights over his property and lawfully sold the same to the 1 Respondent and did not require the Appellant's consent.

That the family does not ordinarily reside on the suit land, the Appellant imposed herself thereon after the sale in 2017, the Appellant failed to prove that she contributed to the purchase of the suit land or the developments thereon, the family land is in Nabiwawulo and if the Appellant is to claim any interest, that is the land she ought to claim and not the suit land and we invite court to find so.

That the learned Trial Magistrate erred in law and fact when she held that the 2nd Defendant's consent was not required for the sale of the suit land. As the Appellant rightly concedes that there is no valid marriage between her and the 2nd Respondent equally her consent was not needed before selling the suit land to the 1 Respondent.

That as seen from **PEX2**, the Purchase Agreement of the 2nd Respondent, he purchased the suit land as an individual and developed the same for commercial purposes and in cross-examination, the Appellant admitted that she was not even present when the 2nd Respondent purchased the suit land. The 2nd Respondent told court that while cohabiting with the Appellant, their home was in Nabiwawwulo village and it is there that the Appellant abandoned him in the year, 2005 and went to stay with another man in Nankandulo and even begot a child.

That the evidence on record clearly shows how the Appellant gained access to the suit land, that she used police, and local leaders without any court order broke Wambwa John's padlock who was the 2nd Respondent's tenant and gained access therein this was after the suit land had been sold to the 1st Respondent and the 2nd Respondent had asked for a grace period for the tenants to vacate, all this is inclined to one fact that the Appellant has no right whatsoever in the suit property and her consent was not necessary. He cited **Section 38(4) of the Land Act (supra)**.

GROUND 5: That the trial magistrate erred in law and fact when she awarded the Plaintiff remedies in a case she failed to prove on then required standard of proof thus occasioning a miscarriage of justice.

It was submitted for the Appellant that briefly, this ground basically regards the remedies awarded by the learned trial Magistrate. That as they have elucidated above, the suit land belongs to the Appellant and the second Respondent as their marital home/ family land or matrimonial property; therefore, the 1st Respondent is not entitled to any of the remedies she was awarded.

That regarding the sale between the Respondents, the same was void *ab initio* because the suit land is the 'marital home' of the Appellant and the 2nd respondent.

That it is now trite position of the law, as espoused in the Supreme Court's decision in the case **of Uganda Posts: & Telecommunications vs. Abraham Kitimba & Anor SCCA No. 36 of 1995 reported [1997] IV ALR 103** also cited in approval in the case of **Mudiima Issa & 5 Ors vs. Elly Kayarnja o 2 ORS (supra)** in which it was held that:-

"A person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a bona fide purchaser without notice."

They sought this court to adopt the dictum in above cited cases and hold that the 1st Respondent ought to have made thorough investigations not only of the land, but of the vendor and the persons who have resided upon the suit land prior to the purchase. The 1st Respondent confirmed that she saw a tenant in one of the rooms and yet she did not interact with him.

That at *locus in quo*, she stated that she did not see any lady who sold milk in one of the rooms in the suit land. Before, purchase, she was expected to have visited the suit land, spoken to the persons whom she found in occupation of the same. She clearly did not do these and therefore, it is absurd that she was declared the owner of the suit land.

With the foregoing, they prayed that this appeal succeeds, the Judgment of the lower court be set aside and Judgment be entered in the counterclaim; and that costs of this appeal and of the lower court be awarded to the Appellant.

In reply to this ground, learned counsel for the Respondents submitted that *"for avoidance of doubt, this section shall not apply to spouses who are legally separated"*

That the above provision disentitles a spouse who has separated, how about in the present case where the Appellant and 2nd Respondent were only cohabiting and not legally married and the Appellant left the 2nd Respondent in 2005 and even started cohabiting with another man in Nakandulo. They questioned how can she be allowed to just come back and claim the 2nd Respondent's property out of pure spite? That this level of injustice should not be condoned.

The learned Trial Magistrate erred in law and fact when she awarded the Plaintiff remedies in a case she failed to prove on the required standard thus occasioning a miscarriage of Justice.

They maintained that the learned Trial Magistrate found that the Appellant and the 2nd Respondent were not legally married. This was in favor of the Plaintiff/the 1st Respondent.

She further found that then suit land was not family land as the Appellant who alleged that it was family land failed miserably to prove so and having found in favor of the Plaintiff/1st Respondent, the learned Trial Magistrate as right in granting the remedies, to wit; declaring the Plaintiff as the lawful owner of the suit are, awarding general damages for the inconvenience caused to the Plaintiff relying on the case of **James Fredrick Nsubuga vs Attorney General HCCS No.13 of 1993** wherein it was held that general damages are awarded at the discretion of Court for the inconvenience and suffering brought onto the party by the actions of the other.

That the Plaintiff /1st Respondent at page 9 of the record clearly told Court that she has not been able to put her property to use since she purchased it, that she hoped to establish a grocery on the suit land which was not possible and the money that she used to purchase the property, she borrowed it and the creditors were on her case as all her business plans flopped due to the Appellant's actions. All this inconvenience ought to be atoned in damages and the learned Trial Magistrate was right in awarding the same.

As for costs, they do follow the event as stipulated under **Section 27(2) of the Civil Procedure Act Cap 71** and as rightly found by the Trial Magistrate the Plaintiff/1st Respondent having proved her case there was no reason to deny her costs of the suit.

That it is further not true that the Plaintiff/1* Respondent never carried out due diligence as alleged by the Appellant, to the contrary. **PW1 (Mugala Martha)** clearly told Court that at the time she bought the suit land it was occupied by tenants who confirmed that they were paying rent to the 1st Defendant/2nd Respondent.

That the Appellant/2nd Defendant was not in occupation of the suit land, a purchase agreement in the sole name of Mutasa Christopher, **PEX2** was given to her. She consulted with the Local Council Chairperson who confirmed that the 1st Defendant was the sole of the suit property and the neighbors also confirmed the said fact.

The evidence on record reveals that the 2nd Defendant/Appellant had already left the 1st Defendant/2nd Respondent, the Plaintiff exercised all due diligence as stipulated in the case of **John Bageire vs Ausi Matovu C.A No.7 of 1996** and she bought the suit property in good faith.

Clearly, the Appellant was not married to the 2nd Respondent, the suit property was sole property for the 2nd Respondent as per **PEX2**. The suit property is not family land as defined under **Section 38(4) of the Land Act** and the 2nd Respondent did not require the Appellant's consent before selling to the 1st Respondent and the 1% Respondent lawfully purchased the suit land. The Appeal is clearly frivolous and mere moot and prayed that the Appeal be dismissed with costs.

In resolving all the above stated grounds, the position of the law is clear that for the disputed suit land and property to constitute a matrimonial home therefore requiring spousal consent before the 2nd Respondent sold it to the 1st Respondent, there must have been a valid marriage between the couple. This question has already been answered in the negative.

Be that as it is, I have critically analyzed the circumstances under which the 2nd Respondent acquired the suit property. The Sale Agreement admitted as **PEX 2** dated 22/11/1990 by the 2nd Respondent and a one Aminsi Gwaka of Namaganga Trading Centre measuring approximately two sticks of ten feet each shows that the 2nd Respondent was the owner of the suit premises and the sale agreement between the 1st Respondent and second respondent admitted as **PEX 1**

Secondly the contents therein corroborates the evidence of both **PW1 and DW1** on all fours very well. **PW1** in her evidence in chief on pg.6 in line 29 **of the record of proceedings** testified that;-

“Gwanka Amisi even confirmed to me that he is the one who sold to the 1st Defendant the suit land”.

PW2 corroborated this on pg.11 in line 37 **of the record of proceedings** that *“the 1st Defendant was the owner but later sold to the Plaintiff”.*

Further on **pg.12 lines 1-4 of the record of proceedings** that *“the plot is now owned by the Plaintiff. She purchased it at Ugx.20,000,000/-. The transaction was reduced in writing. I was present when they were selling.”*

Again, DW5 on pg. 33 line 8-9 **of the record of proceedings** he affirmed that;-

"It is Mutasa who bought the plot for his wife and children".

Further during **re-examination**, he maintained **on pg.33 lines 19-20 of the record of proceedings** that *"Mutasa after buying a plot he came and told us he had bought to separate his wives who were both at Nabiwawulo."*

From the foregoing, it is evident that the 2nd Respondent is the lawful owner of the suit property.

The next question to be answered is whether the suit property amounted to a matrimonial home. Learned counsel for the Respondents ably submitted on what amounts to matrimonial property.

Section 38A and 39 Land Act of 2004 (as amended) is particular. It does not matter whether the either party is maintaining the other. What is of importance is proof of the fact that the land in question constitutes 'family land' within the premise of **Section 38A (4)**. It provides:

"Family land" means land -

- a. *On which is situated the ordinary residence of a family;*
- b. *On which is situated the ordinary residence of the family and from which the family derives sustenance;*
- c. *Which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b);*

Or

- d. *Which is treated as family land according to the norms, culture, customs, traditions or religion of the family;*

"Ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period;

"Land from which the family derives sustenance" means-

- a. *Land which the family farms ; or*

- b. *Land which the family treats as the principal place which provides the livelihood of the family; or*
 - c. *Land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food.*
1. *For the avoidance of doubt, this section shall not apply to spouses who are legally separated."*

From the above definition the suit land also falls into the definition of matrimonial and or family land.

Relating the above to the evidence in this case, **I have critically analyzed the evidence of all the witnesses in this case.**

I also agree with learned counsel for the Respondents that there is no proof that the 1st Appellant contributed towards the developments on the suit property or that it is the property where the family derives their livelihood. I have taken time to study the decision in the case of ***Julius Rwabinumi vs Bahimbisomwe (supra)*** **relied upon by learned counsel for the plaintiffs that** *"where the spouse makes substantial contribution to the property it will be called matrimonial property. That the contribution may be direct or monetary or indirect and non-monetary".*

In this case, I have arrived at a finding that the Appellant has not proved that she contributed to the acquisition and development of the suit land. Comparing this with the defence evidence, although the Appellant claimed that she had a home on the land, it was confirmed as a fact that she did not own the suit property on the disputed land.

Further to this, the above evidence proves that the Appellant was not truthful when she stated that she contributed towards the purchase and building of the suit property. The Supreme Court adopted the holding by Bbossa J (as she then was), in ***Muwanga vs Kintu High Court Divorce Appeal No. 135/1997*** and held that: - *"matrimonial property is understood differently by different people. There is always property which the couple chooses to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should, in my view, be considered differently. **The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to.**"* (Emphasis mine).

Further, there is no proof that the suit property was jointly owned by the appellant and the 1st respondent and thus could not be sold without the consent of the appellant as provided for in **Section 39** of the **Land Act (as amended)**.

My findings are that the Appellant failed to lead convincing evidence that she the suit land qualified as properties which the parties acquired during the subsistence of marriage or the land on which the parties have a matrimonial home and the family derived sustenance by cultivation on the. Instead, this is answered in the negative as in the first ground of Appeal, the Appellant failed to prove a valid marriage between her and the Respondent and therefore no spousal consent was required.

The 1st Respondent in her claim contended that the Defendant had deprived her access and enjoyment of the suit property since she purchased it in 2017. The learned Trial Magistrate awarded her damages of UGX 3,000,000/= .

This suit was resolved in favor of the Plaintiff/the 1st Respondent. She further found that then suit land was not family land as the Appellant who alleged that it was family land failed miserably to prove so and having found in favor of the Plaintiff/1st Respondent.

My own findings and decision are that the learned Trial Magistrate was right in granting the remedies, to wit; declaring the Plaintiff as the lawful owner of the suit are, awarding general damages for the inconvenience caused to the and therefore, all this inconvenience ought to be atoned in damages .

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.

I see no justifiable reasons to deny the 1st Respondent costs in this Court and the Court below; she is therefore awarded full costs in this Honourable Court and in the lower Court

My final decision is that:-

1. All the Appellant's Appeal FAIL.

2. The Judgment and Orders of the learned Trial Chief Magistrate are hereby UPHeld in their entirety.
3. The Respondents are awarded costs in the appeal in the High Court and in the lower court.

I SO ORDER

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
09/05/2024

This Judgment 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 Judgment to the Court of Appeal of Uganda.

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
09/05/2024