

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
CIVIL APPEAL NO. 13 OF 2021
(ARISING FROM MUKONO LAND CIVIL SUIT NO. 45 OF 2013)**

KAVUMA LAWRENCE APPELLANT

VERSUS

OWORI PETER RESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

Background

1. This is an appeal arising from the judgment and orders of the Magistrate Grade 1 of Mukono Chief Magistrate's Court delivered by Her Worship Stella Okwong Paculal in Civil Suit No. 45 of 2013. The Appellant who was the Plaintiff in Civil Suit No. 88 of 2011, instituted the suit against the Respondent in Lugazi Court on 15th May, 2011, for trespass on his land comprised in Kyaggwe Block 319, Plot 120, and sought for:
 - (a) a declaration that the Defendant's act is unlawful;
 - (b) an eviction order;
 - (c) a permanent injunction restraining the Defendant from further entry on the land;
 - (d) general damages for trespass;



- (e) mesne profits;
- (f) interest on the decretal sum with effect from the month of September, 2010 till payment in full;
- (g) costs and any other relief deemed fit by the honourable court.

2. In 2013, the file was subsequently transferred to the Chief Magistrate's Court of Mukono Holden at Mukono and given a new file No. 45 of 2013, from which this appeal is arising. The Defendant filed his amended written statement of defence on 18th March, 2014, denying the Plaintiff's allegation and contending that he purchased an interest in the said land sometime on or around the 12th April, 2007 from the family of the late Kikutte Bashir who was the lawful and *bonafide* occupant of the suit land. That upon conclusion of the sale transaction with the beneficiaries of the estate of the said deceased person, he was introduced to the then landlady, a one Norah Busswa, to whom he paid kanzu. The suit was dismissed with costs to the Defendant.

The Appeal

3. The Appellant being dissatisfied with the judgment and orders of Her Worship Stella Okwong Pacual, the learned trial Magistrate Grade 1, filed this appeal. The Memorandum of Appeal filed on 27th April, 2022, contains the following grounds:

- i. **That the learned trial Magistrate erred in law and fact when she held that the Respondent was a lawful owner of the *kibanja* in issue located on the Appellant's land hence occasioning a miscarriage of justice to the Appellant;**



- ii. **That the learned trial Magistrate erred in law and fact when she held that the Appellant had no locus to challenge a sale to the Respondent hence reaching a wrong decision;**
 - iii. **That the learned trial Magistrate erred in law and fact when she accepted the Respondent's agreement of 2007 from that of 2010 hence reaching a wrong conclusion;**
 - iv. **That the learned trial Magistrate erred in law and fact when she decided the case against the weight of evidence on record hence occasioning a miscarriage of justice to the Appellant;**
 - v. **That the learned trial Magistrate erred in law and fact when she held that the Appellant was not entitled to any of the remedies prayed for in the lower court hence occasioning a miscarriage of justice to the Appellant; and**
 - vi. **That the learned trial Magistrate erred in law and fact when she dismissed the Appellant's case and awarded costs of the suit to the Respondent hence occasioning a miscarriage of justice to the Appellant.**
4. During the hearing of this appeal, the Appellant was represented by Counsel Ssekatawa Alex from M/s Baganda, Ssekatawa & Co. Advocates. The Respondent was represented by Counsel Gawera



Topher who held brief for Counsel Patrick Semakula from M/s Patrick Semakula & Co. Advocates.

5. As I proceed to determine the appeal on its merits, I will consider resolving the 1st, 2nd, 3rd and 4th grounds of the appeal together since they all relate to the issue of whether the Respondent is a trespasser on the suit land. The 5th and 6th grounds which relate to award of remedies including costs will also be jointly determined.

Grounds of the appeal:

- i. That the learned trial Magistrate erred in law and fact when she held that the Respondent was a lawful owner of the *kibanja* in issue located on the Appellant's land hence occasioning a miscarriage of justice to the Appellant;
- ii. That the learned trial Magistrate erred in law and fact when she held that the Appellant had no locus to challenge a sale to the Respondent hence reaching a wrong decision;
- iii. That the learned trial Magistrate erred in law and fact when she accepted the Respondent's agreement of 2007 from that of 2010 hence reaching a wrong conclusion; and
- iv. That the learned trial Magistrate erred in law and fact when she decided the case against the weight of evidence on record hence occasioning a miscarriage of justice to the Appellant.



6. The Appellant's counsel argued that the Respondent has two agreements; one indicates that he purchased the suit *kibanja* in 2007 and another indicates that he bought it in 2010. He claimed that the true date of purchase was 2007 and that he started using the land immediately after the purchase. Counsel contended that the agreement of 2007 which is said to be an agreement made during the purchase and made by the chairperson L.C.1 was never signed by the chairperson who however, told court that it was made in his presence and that he signed it.
7. The Appellant's counsel submitted that the Respondent conceded to the fact that there were people who were using the *kibanja* before he purchased it and that they had cassava and sweat potatoes. Counsel stated that the Respondent claimed that they vacated after removing their food crops, that's when he started using the land. It was agreed by the Respondent and Ssali Ali that it was D.W.2 the chairperson who had put the said persons on the *kibanja* and who removed them.
8. Counsel further contended that according to the evidence of D.W.2, those people vacated the land in 2011 and that's when the Respondent started using the land by fencing it off, digging ponds and putting animals. That D.W.3 Ssali Ali confirmed that when he sold the land, D.W.2 had put people to use the land and that they vacated so that the Respondent could use the land. That if the agreement of 2007 was not signed by the chairperson and yet he confirmed that he signed on the agreement of sale for the suit *kibanja*, that means the *kibanja* was bought in the year 2010 and not 2007 as claimed by the Respondent.

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9. The Appellant's counsel submitted that the Respondent conceded that he started using the *kibanja* immediately after buying it, but it is the evidence of D.W.2 and D.W.3 that there were people who were using the *kibanja* and that they vacated in 2010. That it's therefore clear that the Respondent started using the land in 2010 but not 2007 as he claims.
10. The Appellant's counsel stated that D.W.4 who confirmed that the Appellant bought the land from Norah Buswa in 2007 told court that he was not there when the Respondent bought and that he does not know when the Respondent bought the suit *kibanja*. The Respondent gave evidence during cross examination that he got consent from the land lord while buying the *kibanja* but no evidence was brought to prove that and the land lord never signed on his agreement and that he had no ticket or receipt for the Busulu which he claimed to have paid. The Respondent further told court that he did not ask for any documents of ownership, *Busulu* or *Envuijo* payments from the sellers and previous owners.
11. It was added for the Appellant that D.W.3 told court that he did not seek the consent of the land lord while selling the *kibanja* and that the land lord never signed on the sale agreement. Further, that D.W.2 told court that the land was not for Norah Buswa and it was not for the Appellant and that no consent was obtained from them. That he said the disputed portion was on Galiwango's land but that the buyer never introduced himself to the landlord. That D.W.4 told court that he was not present when the Respondent was buying his *kibanja* and he does

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not know when he bought it. He added that the *kibanja* occupied by the Respondent was on two titles, one portion was on the land bought by the Appellant and another portion was on Galiwango's land.

12. The Appellant's counsel further averred that *kibanja* holding on mailo land is demonstrated by proof of consent by the landlord or mailo owner for the occupation of his or her land, or proof of succession to the *kibanja* holding in accordance with applicable customary practices, which would in itself require proof of the envisaged customary practices. Counsel stated that once the existence of such interest has been established, any assignment thereof would be subject to the consent of the mailo owner which entitles the owner to the first option of assignment.

13. In this case, the Respondent disputed ownership of the land to the Appellant at the time when he purchased the suit *kibanja*. Counsel submitted that the Appellant got registered on the suit land on the 5th June, 2009, before the Respondent bought any interest thereon and before he started to use the same. That it's clear that no consent was given by the Appellant to the Respondent and no option was given to the Appellant before any part of his land was sold to the Respondent contrary to the law. That such a sale is illegal and cannot give the Respondent any interest in the land and hence he cannot be a *kibanja* holder on the Appellant's land.

14. The Appellant's counsel submitted on the 2nd ground of the appeal that the Appellant is the registered proprietor of land comprised in Kyaggwe Block 319, Plot 120 Nyenga Buikwe District, having got

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registered to the same in the year 2009, on which the Respondent trespassed in the year 2011 and started fencing off and putting ponds, for which he has no valid claim. That the fact that the Respondent claimed to have acquired the *kibanja* on the Appellant's land way back before the Appellant bought the land which is in any case disputed cannot stop court from investigating the Appellant's complaint how the Respondent acquired the purported *kibanja* even before the Appellant got title to the land. Counsel stated that there is no evidence that the Respondent got the consent of the previous proprietor to the title.

15. The Appellant's counsel argued that the 2007 land sale agreement was introduced by the Respondent to defeat the Appellant's interest which is a total abuse of court process and illegal. Counsel stated that this agreement contravened the rules of amendment as it provided to the Respondent a defense which was not available to him originally, and calculated to mislead court into coming at a wrong decision and cause a miscarriage of justice to the Appellant.

16. The Appellant's counsel added that the agreement of 2010 was made when the Appellant was the owner of the suit land and he never consented to the sale and that the agreement of 2007 was intended to claim that the *kibanja* was bought when Norah Buswa was the landlord and not the Appellant which is false. Counsel stated that the said agreement of 2007 was never signed by the chairperson of the village who claimed to have made it, an indication that it was fraudulently made and it purports to be what it's not. That the trial Magistrate erred when she wholly relied on the second agreement purportedly made in



2007, without giving consideration to other pieces of evidence and other circumstantial evidence at trial in the lower court.

17. It was further submitted for the Appellant that the Respondent purported sellers did not have any *kibanja* holding on the Appellant's land not even with the former land owner, Norah Buswa. The Appellant's counsel argued that it is so unlikely that Kikutte's family could pass or sell a *kibanja* situate on the Appellant's land to the Respondent when they did not have any on the said land. Counsel added that the law relating to lawful occupancy does not protect the Respondent in the circumstance. That the Respondent's claim to have acquired the *kibanja* from Sali's family but the said Sali's interest is neither known nor proved by the Respondent. That the Respondent seem to suggest that the *kibanja* is not on the Appellant's land and that D.W.2 told court that the *kibanja* is on Galilwango's land but D.W.4 told court that the *kibanja* sold to the Respondent was on two titles, one portion was on the Appellant's land and another portion was on Galilwango's land. Counsel averred that the Appellant is not claiming any *kibanja* beyond his land. That it was wrong for the trial Magistrate to consider the *kibanja* where there were graves and the old house of Kikutte to make this judgment when that *kibanja* was outside the suit land.
18. The Appellant's counsel submitted that the trial court is faulted for its finding that the evidence of the two sale agreements were sufficient to prove that the Respondent has a *kibanja* on the Appellant's land without properly evaluating and ascertaining whether the



Respondent is indeed a lawful or *bond fide* occupant on the Appellant's land. That the trial court ought to have employed the provisions of the law in addressing the issues of determining the rights of the Respondent if any. That the Appellant is entitled to the remedies sought at the trial court.

19. On the other hand, the Respondent's counsel contended that the trial Magistrate did consider the evidence as a whole and arrived at a correct and valid decision. Counsel argued that possession of the land in question is crucial for a successful claim in trespass. That pursuant to the Appellant's pleadings, he was obliged not only to prove ownership of the suit land, but his actual possession and use of the portion in dispute at the time of the alleged trespass by the Respondent. That he also had to prove that the alleged trespass occurred when he was already the registered proprietor of the suit land, which he failed to do so.

20. The Respondent's counsel submitted that all the Appellant's witnesses including his own attorney - Jimmy Wasswa Salongo (P.W.1) testified that the portion in dispute was not in the Appellant's possession at the time of the Respondent's alleged trespass. That they solidly testified that that particular portion of land was in possession and use by the family of late Yakubu who grew crops thereon. That in cross-examination, the Appellant's attorney added that he does not know for how long Yakubu's family had used the portion in dispute because he settled at the Buyizzi Village in 1993 but he found them cultivating on that particular portion of the suit land. That P.W.1 also

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confirmed that the Appellant never compensated Elisa/Yakubu's family for the portion in dispute.

21. Additionally, the Respondent's counsel argued that the evidence by the Appellant's own witnesses contradicted the averments in his plaint. That they showed that at no time did the Appellant take possession or use the portion in dispute despite having purchased the mailo interest thereof. That the Appellant was neither in actual nor constructive possession of the suit land at the time of institution of the suit. That when the Appellant realized that it was getting hard to prove that the Respondent is a trespasser on the suit land, he sought to ride on his perceived weaknesses in the defence case claiming that the sale agreement dated 12/4/2007 between the Respondent and the sellers of the suit *kibanja* is a forgery. However, he led no evidence to prove that it was actually a forged document yet he sought to have the transaction nullified. That the Appellant did not plead forgery or fraud in his plaint, as such he was required to restrict himself to the averments in his plaint.

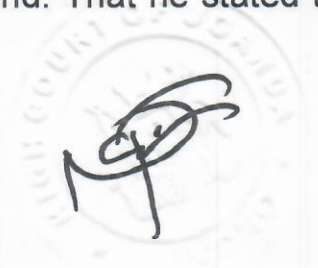
22. The Respondent's counsel prayed that this honourable court finds that the Appellant miserably failed in his duty to prove that the Respondent is a trespasser on the suit land. That the Respondent on the other hand pleaded that he owns a *kibanja* on the suit land that he purchased from Ssali Ali and his siblings. That he also testified that by the time he purchased the suit *kibanja*, the landlord thereof was a one Norah Buswa.



23. The Respondent's counsel submitted that according to the purchase agreement which was tendered in court, the Respondent purchased the suit *kibanja* on the 12th April, 2007 and that by this date, the proprietorship of the suit land was still in the names of the said Norah Buswa. That it only changed in favour of the Appellant much later on 25th June, 2009 and that this meant that it was Norah Buswa who could grant consent to the sale of the suit *kibanja* and indeed such consent was sought and obtained by Ssali Ali –D.W.3, as per his oral evidence.

24. The Respondent's counsel stated that Ssali Ali stated that the *kibanja* belonged to him having acquired it when he was still a toddler but was raised by his uncle Yakubu. That he also testified that Norah Buswa knew him and his siblings as the owners of the suit *kibanja*. That he initially sought to sell the *kibanja* to her but the landlady intimated to him that she didn't have money to purchase their *kibanja* interest and instead granted them permission to find other buyers. That hence, he sold it to the Respondent and upon conclusion of their sale transaction with the Respondent, he introduced him to the landlady and the Respondent paid Kanza (payment to the landlord for accepting a *kibanja* holder on land) to her which she received but gave no receipt to the Respondent.

25. It was further averred for the Respondent that the above evidence was corroborated by the seller's agent one Junior Bazira Salongo who was also one of the witnesses and author of the Appellant's purchase agreement for the suit land. That he stated that

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at the time of the Appellant's purchase of the suit land, the Respondent was already one of the recognized *kibanja* holders thereon and that he also stated that it was agreed between the late Norah Buswa and the Appellant that the latter would compensate all *bibanja* holders on the suit land.

26. P.W.1 stated that some *kibanja* owners were compensated by the Appellant but also acknowledged that several others were not compensated. The Respondent's counsel stated that he confirmed that the Appellant never compensated anyone for the suit *kibanja*. That if the Appellant had contacted them for compensation, he would have learnt that they had already disposed of their *kibanja* interest to the Respondent. That it is incomprehensible for the Appellant to claim that the Respondent trespassed on that particular portion of the suit *kibanja* which has never been in his possession.

27. The Respondent's counsel further submitted that there is no legal requirement that such consent should be expressed in writing. That in the instant case, the Respondent himself, D.W.3 and D.W.4 confirmed that the Respondent was introduced to the landlady at the time one Norah Buswa and he paid Busulu. That this evidence was not rebutted by the Appellant or his witnesses.

28. The Respondent's counsel stated that the Appellant instead overly premised his case on his assertion that the Respondent purchased the suit *kibanja* in 2010 and that the Appellant claimed that the Respondent forged the purchase agreement dated 4th April, 2007. That he believes that the trial court ought to have premised its

judgment on this particular assertion in isolation of other overwhelming evidence confirming the Respondent's purchase, settlement and use of the suit *kibanja* way before the Appellant's purchase of the suit land.

29. In answer to the accusations of forgery, counsel asserted that the Respondent gave a very coherent explanation pertaining to the two agreements. That he stated that he had lost his original agreement and he agreed with the persons who sold him the *kibanja* and the local council authorities to make a fresh agreement but at the time of making the impugned agreement in 2010, the Respondent had long purchased and settled on the suit *kibanja* in the year 2007. That by that time, the Appellant like many others including the Respondent was also still a *kibanja* holder on the suit land. That the trial Magistrate was right when she ruled that the Appellant had no locus to challenge a transaction that had been recognized and blessed by his predecessor in title. That the trial Magistrate considered all the available evidence, examined and arrived at a just and judicious decision. The Respondent's counsel prayed that it pleases this honourable court to answer the 1st - 4th grounds of the appeal in the negative.

30. In rejoinder to the 1st to 4th grounds of the appeal, the Appellant's counsel argued that the Appellant is the registered proprietor of the suit land having been registered on it on the 5th June, 2009, and that the certificate of title exhibited in court indeed indicates that the Appellant was registered as proprietor of land comprised in Kyaggwe Block 319, Plot 120 situated at Buyizzi, Nyenga Sub-County, Buikwe District, taking over from the former registered proprietor Norah Buswa.

31. The Appellant's counsel rejoined that this is clear evidence that the Appellant was in clear possession of the land in 2010 when the Respondent trespassed on it. That the Respondent's submission that at the time of making the agreement in 2010, he had had long purchased and settled on the *kibanja* in the year 2007 is false because he conceded that he started using the land in 2011 and that there were people using the suit *kibanja* before he purchased it. That this evidence was further corroborated by the evidence of D.W.2 and D.W.3.
32. Counsel further submitted in rejoinder that the Appellant has demonstrated and provided sufficient proof of ownership of the suit land and therefore it is right for him to claim that the Respondent trespassed on his land. That the Respondent is not required to prove actual possession and use of the suit land at the time of the trespass as averred by the Respondent.
33. The Appellant's counsel stated that the Respondent sought to amend his defence and was granted the same after having realized that the Appellant's title indicated that he became the registered proprietor in 2009 yet the agreement the Respondent was relying on was made in 2010. That this agreement was back dated to cheat the Appellant of his interest in the suit land. That the agreement of 2007 which is said to be an agreement made during the purchase and made by the chairperson L.C.1 was never signed by the chairperson who however told court that it was made in his presence and that he signed it.



Court's consideration

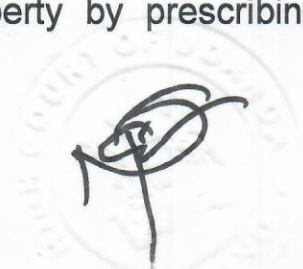
34. As a first appellate court, the duty of this court is to re-appraise all evidence on record and reach its own conclusions bearing in mind that it neither heard nor saw witnesses during the hearing to assess their demeanour. In the case of **Sanyu Lwanga Musoke v. Sam Galiwango, SCCA No. 48 of 1995**, Justice A. Karokora, (J.S.C as he then was) held thus:

"... it is settled law that a first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross examination so as to test their veracity..."

35. Section 101 (1) of the Evidence Act, Cap. 6, provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and the burden of proof lies on that person.

36. To prove his assertions before the lower court, the Plaintiff who is the Appellant herein introduced 3 witnesses namely, Mr. Jimmy Waswa Salongo as P.W.1, Mr. Musisi Ssemalulu as P.W.2 and Mr. Bukenya Godfrey as P.W.3 who all proceeded by witness statements.

37. Protection of the right to property is among the central concerns of Uganda's Constitution and laws. The law on civil trespass to one's property aims at facilitating enjoyment of property by prescribing



damages for civil trespass. Land is a very important factor in the social, economic and political spheres of Uganda, making it an arena for contestation.

38. Trespass to land is the wrongful or unjustifiable interference with another person's possessory rights in land. It occurs where a person directly enters upon another's land without permission, or remains upon the land, or places or projects any object upon the land. The Supreme Court while defining trespass as per the case of **Justine E. M. N Lutaaya versus Stirling Civil Eng. Civ. Appeal No. 11 of 2002**, held that:

"trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering, or portends to interfere, with another person's lawful possession of the land".

39. According to **Halsbury's Laws of England, 4th Edition Vol 45 paragraph 1384** at page 631 - 632 what constitutes trespass to land is stated thus:

"Every unlawful entry by one person on the land in possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses on land if he wrongfully sets foot on it, rides or drives over it, or takes possession of it or expels the person in possession of it, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it or places or fixes something on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another or if he discharges water



upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land."

40. Trespass to land is therefore an intentional or negligent tort whereby merely entering land in possession of another is sufficient for a claim in tort to stand and it is actionable *per se* without the need to prove damage. Consequently, deliberate entry to land in possession of another is required to prove trespass and lack of knowledge as to trespass will not be a defence.

41. It is trite that in equity, interest in land passes upon payment of the purchase price. In the case of **Ismael Jaffer Allibhai & Ors v. Nandalr Harvijan Karia & Anor SCCA No. 53 of 1995**, it was held that:

"In sale of immovable property, upon payment of deposit, property passes to the purchaser who acquires equitable interest and that the purchaser becomes the lawful purchaser when he has paid the deposit".

42. To succeed in a claim for trespass to land, the Court of Appeal in **Sheikh Muhammed Lubowa v. Kitara Enterprises Ltd, CACA No. 4 of 1987**, observed that one must prove that:

*"(a) the disputed land belonged to the Plaintiff
(b) the Defendant had entered upon it, and*



(c) entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the disputed land”.

43. Trespass is a tort of strict liability except in circumstances where the Defendant can prove that the act constituting the trespass was beyond his or her control, for example where one is forced onto the land of another by a third party. In **John Katarikawe v. William Katwiremu [1977] HCB 210 at 214**, it was observed by Byamugisha J., (as she then was) that interests in land, in particular, include registered and unregistered interests. In the instant case, whereas the Appellant’s claim in the suit land is based on a registered interest, that of the Respondent is based on an unregistered interest.
44. It was further observed in the case of **Ojwang v. Wilson Bagonza CACA No.25 of 2002**, that for one to claim an interest in land, he or she must show that he or she acquired an interest or title from someone who previously had an interest or title thereon.
45. In the instant case, evidence was adduced through a certificate of title in the lower court record that indicates that the Appellant is the current registered proprietor of land comprised in Block 319, Plot 120, having been registered on 5th June, 2009, under Instrument No. MKO104074. What is in contention is whether the Respondent is a *bonafide* occupant on the said registered land of the Appellant.
46. A *bonafide* occupant is defined under section 29 (2) of the Land Act, Cap. 227 as amended to mean:

*“A person who before the coming into force of the Constitution—
(a) had occupied and utilized or developed any land
unchallenged by the registered owner or agent of the registered
owner for twelve years or more; or
(b) had been settled on land by the Government or an agent of
the Government, which may include a local authority.”*

47. Section 29 (5) of the same Land Act adds that:

*“Any person who has purchased or otherwise acquired the
interest of the person qualified to be a bona fide occupant under
this section shall be taken to be a bona fide occupant for the
purposes of this Act.”*

48. The law treats lawful or *bona fide* occupants as tenants by occupancy on registered land who shall enjoy security of occupancy on the land. The security of occupancy enjoyed by tenants is also entrenched in the Registration of Titles Act which stipulates that land included in any certificate is subject to the interest of any tenant even if it is not specially notified as an encumbrance on the certificate. This means that any buyer of titled land buys subject to any encumbrance on it including rights of *bona fide* and lawful occupants.

49. It is trite law that a change of ownership of title effected by the registered owner of the land by sale, grant and succession or otherwise does not in any way affect the existing lawful interests or a *bonafide* occupant and the new owner is obliged to respect the existing interest.



50. In the instant case, whereas the Appellant claims that the Respondent is a trespasser on the suit land, the Respondent claims to have interest in the suit land as a *bonafide* occupant. P.W.1 the Appellant's Attorney testified in paragraph 5 of his witness statement that the Respondent came on the Appellant's land in 2011 and fenced a portion thereof without the Appellant's authority and consent. He added in paragraphs 7 and 8 of his witness statement that at the time the Appellant purchased the suit land, the Respondent was not on the land and that the portion claimed by him was occupied by the late Yakubu's family. He stated that before selling the land to the Appellant, the previous owner, Norah Buswa, first called all the people occupying her land and requested them to verify their occupation and that she notified them of her intention to sell her land. That at that time, the Respondent was not on the suit land and was not among the occupants.

51. During cross examination at page 26 of the record of appeal, P.W.1 testified that before the Respondent trespassed on the suit land, it was Yakubu's wife Elisa who was using the land and that Yakubu's family remained cultivating the suit land after his death and that Yukubu's family was not compensated for the suit land. That the agreement between the Appellant and Norah Buswa does not mention Yakubu's family as occupiers of the suit land and that the Appellant never compensated Yakubu's family.

52. P.W.1 further gave evidence at page 27 of the record of appeal that when Norah Buswa called the tenants to get to know them, the

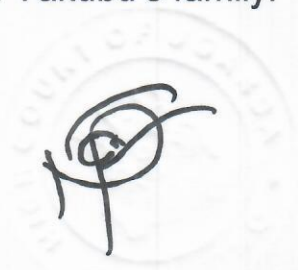
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meeting was not attended by Yakubu's family who were cultivating the suit land. That at the time of giving his testimony, he had lived within the suit land area for about 25 years and that he found Elisa's / Yakubu's family already cultivating the suit land.

53. PW1 stated that Norah showed to the Appellant only Kyeswa, Kate Nakyejwe, Musamba, George Egesa and Semakula and that those were the people who knew the Appellant as the new landlord. That they did not have power to tell Norah that they used to see others on the *kibanja*.

54. P.W.1's evidence of Yakubu's family owning the suit *kibanja* was corroborated by P.W.2 who stated during his cross examination that he knew more about Yakubu's use of the suit land and that he did not know Yakubu's children. He said that he heard about Sali Ali and that he can believe if it is said that he is Yakubu's son. P.W.2 further testified at page 30 of the record of appeal that in the 1st meeting, Norah Buswa did not know the *bibanja* holders and that nobody showed up as the owner of the suit *kibanja*. But he confirmed to court that the suit land has a *kibanja* holder. He said that when the Respondent came to occupy the land, he never heard any complaint from those who were evaded that their *kibanja* was taken.

55. P.W.3 also stated during cross examination at page 32 of the record of appeal that in the meeting with the landlord Buswa Norah, no one claimed the suit land and they agreed that was Yakubu's portion and that he does not know if anyone bought it from Yakubu's family.



56. The Appellant contests to the admission of the Respondent's land sale agreement dated 12th April, 2007. However, I note that on 4th April, 2014, the lower court at page 19 of the record of appeal allowed the Respondent's application to amend his written statement of defence to substitute the 2007 agreement which he claimed to have been misplaced and later recovered with that of the 2010 agreement. The Respondent was further granted leave to amend his written statement of defence to change his name from Peter to John.
57. Though the Appellant opposed the application for amendment of the Respondent's defence, the ruling was delivered in the presence of both parties and the Appellant never appealed against the said ruling and order of court, which means he was contended with the lower court's order to amend the Respondent's written statement of defence. Even when the 2007 sale agreement was tendered in court on 30th September, 2019, in the presence of both the Appellant and his counsel, neither of them objected to its admission.
58. D.W.1 who was the Defendant in the lower court and the Respondent herein testified in his witness statement which was admitted as defence evidence that he purchased the suit *kibanja* in the year 2007 from Ssali Ali, Ssentongo Silaje and Hanifa Nantongo who are children of the late Kikutte Bashir who was a lawful and *bonafide* occupant on the suit land. That he was introduced to the land lady the late Norah Buswa by the sellers and that he paid *kanzu* to her. That he immediately started using the suit *kibanja* as a cattle farm.



59. D.W.1 further testified that he has been in quiet and effective possession or utilization of the suit *kibanja* since the year 2007 and that he had never been challenged or contested by any person until the year 2011 when the Appellant started calling him a trespasser. That prior to the sale of the mailo interest in the suit land to the Appellant, the landlady through her agent a one Bazira Robert and the then Land Tribunal had encouraged all *bibanja* owners on the suit land to purchase her mailo interest but unfortunately, he could not afford it at the time. That the Appellant who was in a better financial position bought the suit land from the landlady subject to all *bibanja* holders' unregistered interests therein.
60. D.W.1 added that in 2011, the Appellant and his Attorney tried to engage him to sell to them his *kibanja* but they failed to agree on the terms of sale and that it was around this time that the Appellant declared him a trespasser and sought to evict him from his *kibanja*.
61. During re-examination, D.W.1 stated that the landlady Buswa Norah never denied the existence of the *kibanja* on the land. That she recognized Ssali and his siblings as lawful owners of the *kibanja* on the land and that she did not refuse his transactions with the Ssali's. That Buswa never informed him before her demise about the Appellant being the new landlord.
62. D.W.1 clearly explained to the lower court how the 2007 and the 2010 land sale agreement came into existence. That the 2007 agreement was misplaced and they made the 2010 agreement to



replace that of 2007, which was later recovered and included in his amended written statement of defence and later admitted as DEx 1.

63. D.W.3 Ssali Ali, one of the sellers of the suit land to the Respondent testified in the lower court that when he was born in 1975, their home was on the suit land. That the suit land initially belonged to his grandfather Shaban Kikutte from whom his father Kikutte Bashir inherited the suit land. That upon his father's death, they inherited the suit land which comprised their family cemetery where his father and grandfather were both buried.
64. D.W.3 also gave evidence that his father died when he was 7 years old and he was brought up by his paternal aunt the late Sauya and uncle Yakubu and that throughout his childhood, he used to till the *kibanja*. That the documents proving payment of the Busuulu got burnt from their house which was on the suit land. This relationship with Yakubu clearly connects to the testimony of P.W.1 and P.W.3 who stated that after Yakubu's death, his family remained on the suit *kibanja* and that they are its *kibanja* owners.
65. Additionally, D.W.3 averred that in 2007 after the death of their late ^aAunt, they decided to sell off the suit *kibanja* to the Respondent. They talked to the landlady Norah Buswa to purchase the same but she informed then ^m that she didn't have money and gave them a go ahead to get another person to whom they could sell the suit *kibanja*.
66. D.W.3's testimony corroborated the Respondent's evidence that after selling the suit *kibanja* to the Respondent, they introduced him to

Norah Buswa and he started occupying and utilizing the land since then. During cross examination at page 40 of the record of appeal, D.W.3 stated that though Norah never signed anywhere authorizing him to sell the suit *kibanja*, she verbally authorized him to sell his *kibanja*. That the 2nd agreement was made because the Respondent had misplaced his original agreement and that he sold the suit land to the Respondent in 2007.

67. D.W.4's testimony further corroborated the Respondent's evidence that the Respondent was introduced to his grandmother Norah Buswa who had allowed him to manage her land. During locus visit, D.W.3 who still confirmed that in 2007 when his aunt Sauya died, they sold the suit *kibanja* to the Respondent, showed court the grave of his father and grandfather which were on the suit land.

68. It is clear from both the Appellant's and Respondent's evidence above that prior to the Respondent's purchase of suit *kibanja*, it belonged to the family of late Yakubu who were its known owner and who were never compensated by either the previous or the current mailo or registered owner. I find no evidence adduced by the Appellant or any of his witnesses to discredit the overwhelming evidence that the suit *kibanja* was indeed sold to the Respondent prior to the Appellant's purchase of the mailo interest. All evidence adduced by the Respondent's witnesses pointed to the fact that the 2010 agreement was meant to replace the misplaced 2007 agreement which was later recovered. Though the Appellant claimed that the 2007 sale

A handwritten signature in black ink, consisting of a stylized 'A' with a large loop and a horizontal stroke.

agreement was backdated to defeat his interest and a forgery, there was no evidence adduced in the lower court to support his allegation.

69. This court is more convinced that the Respondent acquired his *kibanja* prior to the sale of the mailo interest to the Appellant and that is why he knew only the late Norah Buswa as the land lady of the suit *kibanja* since she never introduced to him the new landlord as being the Appellant. Since the Respondent purchased the suit land from *bonafide* occupant, he is also considered a *bonafide* occupant on the suit land in line with section 29 (5) of the Land Act. Therefore, he cannot be considered a trespasser on the suit land. Consequently, the 1st, 2nd, 3rd and 4th grounds of the appeal have failed.

Grounds

- a. That the learned trial Magistrate erred in law and fact when she held that the Appellant was not entitled to any of the remedies prayed for in the lower court hence occasioning a miscarriage of justice to the Appellant; and
- b. That the learned trial Magistrate erred in law and fact when she dismissed the Appellant's case and awarded costs of the suit to the Respondent hence occasioning a miscarriage of justice to the Appellant.

70. The Appellant's counsel challenged the lower court's decision and argued that by making a decision that the Respondent was not a



trespasser on the suit land, it occasioned a miscarriage of justice to the Appellant and thus by awarding costs to the Respondent further prejudiced the Appellant. That there is no way the Appellant can pay costs to the Respondent who does not hold any interest in the suit *kibanja* but rather entered the suit *kibanja* without any permission or consent from the Appellant or the former landlord thus not recognized as a tenant on the suit land hence a trespasser.

71. The Appellant's counsel prayed that this court overrules the decision of the lower court in awarding costs to the Respondent. Counsel further prayed that the judgment and orders of the trial Magistrate be set aside and substituted with orders that the Appellant is the rightful owner of the suit land and that the Respondent doesn't hold any *kibanja* interest in the suit land.
72. In response, it was argued for the Respondent on the 5th and 6th grounds of the appeal that the Appellant has failed to prove the grounds of appeal pertaining to his desired remedies. Counsel prayed that this honourable court upholds the judgment of the trial court and dismisses the appeal with costs to the Respondent.
73. In rejoinder, the Appellant's counsel maintained that the Appellant is entitled to the remedies sought as indicated in his submissions having clearly proved his case against the Respondent. That by making a decision that the Respondent was not a trespasser on the suit land it occasioned a miscarriage of justice to the Appellant and thus by awarding costs to the Respondent further prejudiced the



Appellant. Counsel prayed that this honourable court overrules the decision of the lower court in awarding costs to the Respondent and that the judgment and orders of the trial court be set aside.

Court's consideration.

74. Award of costs is entirely in the discretion of the court. Section 27 (1) of the Civil Procedure Act, Cap. 71, provides thus:

"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."

75. In the Tanzanian case of **Nkaile Tozo v. Phillim on Musa Mwashilanga, (2002) TLR 276**, the court held thus:

"... the awarding of costs is not automatic. In other words, they are not awarded to the successful party as a matter of course. Costs are entirely in the discretion of the court and they are awarded according to the facts and circumstances of each case. Although this discretion is a very wide one like in all matters in which courts have been invested with, discretion in awarding or denying a party his costs must be exercised judicially and not by caprice..."


76. One of the known established principles of law is that costs would usually follow the event, unless there are reasonable or justifiable grounds or unless special circumstances exist for depriving a successful party of his or her costs. For instance, a successful party could lose his or her costs if the said costs were incurred improperly or without reasonable cause, or by the misconduct of the successful party or his or her advocate.
77. This legal proposition is found in **Mulla's the Code of Civil Procedure, 12th Edition of 1953, p. 150** which states thus:
"The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation."
78. Further, in the case of **Uganda Development Bank v. Muganga Construction Company Limited [1981] H.C.B 35**, Manyindo J. (as he then was) held that costs under section 27 (1) of the Civil Procedure Act should follow the event unless the court otherwise orders. That the discretion given by the above section should be judicially exercised.
79. The theory on which costs are awarded to a plaintiff is that, default of the defendant made it necessary to sue him or her, and to a defendant is that, the Plaintiff sued him without cause. Therefore, costs

are in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his or her rights in court. Consequently, the party to blame pays costs to the party without fault. In summary, the rationale for costs is to bar parties from filing hopeless cases and to reimburse expenses incurred by the successful party.

80. I see no reason to depart from the general rule and the usual practice that costs should follow the event. Since the 1st, 2nd, 3rd and 4th grounds of appeal have failed, I find no reason to fault the trial court for awarding costs to the Respondent who emerged the successful party in the lower court. Therefore, the Appellant having lost in the lower court and in this court, he is not entitled to any of the remedies prayed for. The 5th and 6th grounds of the appeal also fail.

81. Pursuant to the foregoing analysis, I find no merits in this appeal and it is hereby dismissed with costs to the Respondent. I so order accordingly.

This judgment is delivered this 19th day of June 2024 by


FLORENCE NAKACHWA
JUDGE.

In the presence of:

*(1) Counsel Ssekatawa Alex from M/s Baganda, Ssekatawa & Co.
Advocates, for the Appellant;*

- (2) Counsel Gawera Topher from M/s Patrick Semakula & Co.
Advocates, for the Respondent;
- (3) Mr. Jimmy Wasswa Salongo, with power of attorney from Mr.
Kavuma Lawrence, the Appellant;
- (4) Ms. Pauline Nakavuma, the Court Clerk.

