**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**CIVIL SUITS No. 0068 OF 2006 AND 0078 OF 2006**

**C.S. No. 68 OF 2006**

**1. YOWERI BAMUHIGA }}**

**2. TINKASIMIRE JACKSON }}**

**3. KESI KABOONA }} ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::**

**PLAINTIFFS**

**4. KWONKA MARTIN }}**

**5. ASIIMWE GIDEON }}**

**6. JACKSON KAGGWA }}**

***VERSUS***

**1. CHRISTINE MUGARRA {(*As administrators of the estate*}}**

**2. MARTIN BAHINDUKA {*of the late Mugarra Kabagambe*)}}**

**3. BUNDIBUGYO DISTRICT –}} ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::**

**DEFENDANTS**

**LAND BOARD }}**

**AND**

**C.S. No. 78 OF 2006**

**1. YOWERI BAMUHIGA }}**

**2. TINKASIMIRE JACKSON }}**

**3. KESI KABOONA }} ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::**

**PLAINTIFFS**

**4. KWONKA MARTIN }}**

**5. ASIIMWE GIDEON }}**

**6. JACKSON KAGGWA }}**

***VERSUS***

**1. FRANK BAGONZA }}**

**2. MWAMBA DAVID }}**

**3. KYOMUHENDO KABAGAMBE }}**

**4. KABAGAMBE YOFESU }} :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::**

**DEFENDANTS**

**5. BUNDIBUGYO DISTRICT - }}**

**LAND BOARD }}**

**BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO**

**JUDGMENT**

The Plaintiffs in the two suits herein have jointly and severally brought the two actions against the Defendants jointly and severally. The 1st and 2nd Defendants in the first suit have jointly been sued in their respective capacity as the administratrix and administrator of the estate of the late Mugarra Kabagambe, hitherto the 1st Defendant therein. The 3rd Defendant in the first suit which is also 5th Defendant in the second suit (herein after called the corporate Defendant) has been sued in its capacity as the Bundibugyo District Land Board. The Plaintiffs plead with this Court, in both suits, for the following declarations or orders; namely that:

(i) The Plaintiffs are the owners of the suit lands under customary tenure.

(ii) The Plaintiffs are entitled to possession and occupation of the suit lands.

(iii) The alienation of the suit lands to the other Defendants in both suits by the corporate Defendant was wrongful, unlawful, illegal, null and void, and of no legal effect.

(iv) A permanent injunction restraining the corporate Defendant from alienating the suit lands to any other person except the Plaintiffs.

(v) A permanent injunction restraining the other Defendants in both suits from trespassing onto the suit lands.

(vi) The Defendants pay general damages to the Plaintiffs.

(vii) The Defendants pay costs of the suit to the Plaintiffs.

The Defendants in both suits each denied the allegations contained in the respective plaints; with the corporate Defendant contending that its alienation of the suit lands to the other Defendants was lawful as it had done so by virtue of the suit lands having vested in it by law; and the other

Defendants, for their part, contending that they had each acquired lease proprietorship over their respective portions of the suit lands through lawful allocation by the corporate Defendant herein.

At the commencement of the hearing of the first suit, the two suits were, at the instance of the parties by consent, consolidated in accordance with the provisions of O. 11, r. 1(a) of the Civil Procedure Rules; and heard together, owing to the fact that the matters in controversy between the Plaintiffs and the different Defendants therein involved the same questions of both facts and law, hence could conveniently be disposed of at the same hearing. Counsels for the respective parties then invited Court to take each of the parties' case as they were pleaded; and the following facts were agreed upon, namely:

(a) The suit land was at one time gazetted a Controlled Hunting Area.
(b) The 1st and 2nd Defendants in the first suit, and the 1st, 2nd, 3rd, and 4th Defendants in the second suit applied to the corporate Defendant for leases of the suit lands.
(c) The applications for the aforesaid leases were successful.
(d) There are inspection reports regarding the suit lands (annexure 'D' to the plaint in the second suit).
(e) The suit lands were surveyed.
(f) The Plaintiffs disputed the grant of the leases in the suit lands.

The issues framed for determination were as follows:

(i) Whether the Plaintiffs had any interest in the suit lands at the time the Defendants applied for and obtained grants of the leases of the same.
(ii) Whether the corporate Defendant lawfully granted the leases contested herein.
(iii) Whether the parties are entitled to any of the remedies prayed for.

In his written final submissions, Grace Mwebaze Ndibarema, learned counsel for the corporate Defendant herein, raised a very important point of law which he ought to have done so, as a preliminary point; namely that the Plaintiffs had not served the said Defendant with the mandatory requisite statutory written notice in accordance with section 2(1) (c) of The Civil Procedure and Limitation (Miscellaneous Provisions) Act, (Cap 72 Laws of Uganda Revised Edn. 2000); and which provides that no suit can lie or be instituted against a scheduled corporation until the expiration of 45 days after service of such notice on such scheduled corporation.

Counsel referred me to a couple of authorities on the matter; namely ***Rwakasoro vs. Attorney General [1982] H.C.B. 40; and Hajji Badru Wegulo & 2 Ors vs. Attorney General, Kampala H.C. Misc. Applica. No. 85 of 1993, (1993) III KALR 53***. He then submitted that breach of this provision of the law is an illegality which on the authority of ***Makula International vs. His Emminence Cardinal Nsubuga & Anor., [1982] 136***, and ***Gulu Municipal Council vs. Nyeko Gabriel & Ors, [1996] HCB 66,*** cannot be sanctioned by this Court; and therefore even if the Court were to find that the Plaintiffs were entitled to any of the remedies sought against the said Defendant, they should be disallowed for the said reason.

While the point raised by learned Counsel is really a component of the last issue framed by the parties for determination by this Court; it is my considered persuasion that it be disposed of at the very outset, as I now proceed to do, owing to the importance and the bearing it has on the entire claim made by the Plaintiffs against the said Defendant. I fully concur with learned counsel on the point of law he has raised; and the consequences that result from commencing any action without compliance with the clear mandatory provisions of the law. The corporate Defendant herein, being a District Land Board, is a scheduled corporation by virtue of the provisions of the Third Schedule to the Act; and accordingly any suit brought against it without service of statutory notice, or before the expiration of 45 days of service of such notice on it would be untenable.

That said, I must however express Court's deprecation of the ill–considered timing of the objection. Counsel ought to have taken the first opportunity, and raised the objection as a preliminary point before, or at the commencement of the hearing of the suits herein; upon which this Court would have been under duty to first dispose of such objection. In the event that the objection was upheld, the suits, as against the corporate Defendant, would have been struck out without the Court having to inquire into the merits; thereby saving both the time and resources which Court has had to apply in the determination of the matters in controversy between the Plaintiffs and the corporate Defendant.

Be it as it may, in both the original and the amended plaints, the Plaintiffs pleaded service of the statutory notice on the corporate Defendant. This was denied by the corporate Defendant in its defence pleadings made in response to the said plaints; and consequently the Plaintiffs were under duty to prove that indeed such service of statutory notice as they had pleaded had been effected on the Defendant. True, there is no copy of the aforesaid statutory notice on record. The record reveals

that M/s Ngaruye Ruhindi, Spencer & Co. Advocates took up the conduct of this suit on behalf of the Plaintiffs at a much later stage from M/s Mwesigye, Mugisha & Co. Advocates the counsels who had hitherto filed the suits and conducted the matter on behalf of the Plaintiffs.

I would therefore not be surprised if M/s Ngaruye Ruhindi, Spencer & Co. Advocates themselves may not be in possession of a copy of such statutory notice; unless the previous counsels had the grace to pass the same on to them. In any case while the Act sets out the form and substance the statutory notice must take and have respectively, it is not a requirement that such notice is appended to the plaint. The Act only states in section 2 (2) that:

*'… every plaint subsequently filed shall contain a statement that such notice has been delivered or left in accordance with the provisions of this section.'*

Nonetheless, the Court record also contains a supplementary affidavit previously sworn by one Tinkasimire Jackson – evidently the 2nd Plaintiff in both suits herein – in Miscellaneous Application No. 156 of 2006 of this Court. This was a failed application the Plaintiffs herein had brought for representative action with respect to Civil Suit No. 68 of 2006 herein; and to that affidavit there is attached among the clusters of annexures marked 'B' a letter dated the 3rd of January 2007, from one Byamungu Elias the Chief Administrative Officer of Bundibugyo District, addressed to the said previous counsels for the Plaintiffs.

The letter is referenced: 'STATUTORY NOTICE OF INTENDED SUIT'; and therein the said Chief Administrative Officer acknowledges receipt of the notice of intended suit by five Plaintiffs seeking prerogative orders of certiorari from the High Court; and further, in so far as it is relevant to the issue before this Court, he stated as follows:

> *"We thank you for the notice. When I saw the notice in November 2006 when I had just assumed this office I started on comprehensive study of the problem to guide the authorities on the relevant facts on the ground. … In this case, we have met all the parties and agreed on a joint field work to verify all the lands applied for in the degazetted Semuliki Flats Controlled Hunting Area. This will take place on Friday 12th January and Saturday 13th January 2007. … For these reasons I am appealing to you to stay action and request Court to pend the proceedings already programmed …"*

Further to this, when the Chairperson of the corporate Defendant, Jeremiah Mutooro – DW1, was cross examined by Ngaruye Ruhindi counsel for the Plaintiffs, in the proceedings that followed Court's visit to the locus in quo, he admitted that the corporate Defendant had indeed been served with the statutory notice which the officials of the corporate Defendant had passed over to its lawyer. In the circumstances then, the floundering belated adverse contention by counsel for the corporate Defendant cannot be upheld. It is of no adverse effect to the Plaintiffs' case that the statutory notice served on the corporate Defendant was with regard to an intended action for judicial review of the administrative decision of the corporate Defendant.

What is important is that the subject matter of the complaint for which that action was intended is precisely what has subsequently been brought to Court by ordinary civil suits; and so are the remedies sought in the subsequent suits. I am therefore satisfied that the requisite mandatory statutory notice was duly served on the said Defendant; and therefore find that this objection is without merit. I accordingly overrule it.

On the first issue – whether the Plaintiffs had any interests in the suit lands at the time the Defendants applied for and obtained grants of leases out of the same – the parties hereto have presented contentious positions which are quite adversarial and irreconcilable. The Plaintiffs have averred in their pleadings and testified in Court that they had acquired and have been in unchallenged possession of the suit lands under customary tenure long before the contested lease grants; and that they have grazed their respective herds of cattle in these lands throughout the period of their said possession, and have several homesteads with cattle kraals in various locations in the suit lands.

For their part, the Defendants pleaded in their written defences and testified in Court that their proprietary rights over the suit lands were based on the grants made to them by the corporate Defendant, in whom the lands had vested as controlling authority, following the de-gazetting of the Controlled Hunting Area which the suit lands had been part of. They denied that the Plaintiffs had prior to 2005 occupied the suit lands at all. Their case was that there was no way the Plaintiffs could have occupied these suit lands prior to the de-gazetting, as this was Government land under the control of the Uganda Wildlife Authority, and its predecessor the Game Department.

It is clear from this controversy that the determination of the first issue turns principally on what the legal status of Controlled Hunting Areas – more specifically the Semliki Flats Controlled Hunting

Area in which the suit lands fall – was. If I establish that by law a controlled hunting area did not permit human settlement, then first it would cast doubt on the veracity of the Plaintiffs' case that they had for decades enjoyed unchallenged occupation and utilisation of the suit lands as owners thereof. If however the converse is established, namely that human settlement was permitted; then, what will remain for determination by this Court is whether in fact the Plaintiffs were in possession by occupation and use of the suit lands as they claim.

The Semliki Flats Controlled Hunting Area was created under Legal Notice 353 of 1963, namely Statutory Instrument No. 226-15: The Game (Semliki Flats Hunting Area) Order, made under the provisions of sections 71 and 72 of The Game (Preservation and Control) Act (Cap. 226, Laws of Uganda - 1964 Edn.); now repealed, but with the statutory instruments made there under saved. The two sections provided as follows:

*"S. 71 (1) The Minister, by statutory order may, in any area of Uganda where there is in his opinion danger of a serious diminution of any species of scheduled animal or where it is in his opinion necessary or desirable to do so in the interest of game management –*

*(a) prohibit the hunting of that species …; or*
*(b) prescribe the maximum number of that species … which may be hunted.*

*(2) Where an order has been made of the kind referred to in paragraph (b) of sub section (1) of this section, the district commissioner of the area to which the order relates may, … issue to persons holding licenses to hunt animals of the species to which the order relates, permits to hunt animals of that species in that area."*

*'S. 72 (1) In any order of the kind referred to in paragraph (b) of subsection (1) of section 71 of this Act, the Minister may prescribe a fee to be paid on the issue of a permit of the kind mentioned in that section;*

*Provided that, in the case of permits issued to persons who are bona fide residents of the district or area to which the permit relates–*

*(a) no fee shall be payable unless the government of the Federal State or the administration of the District requests the Minister in writing to prescribe a fee; …"*

The Game (Semliki Flats Hunting Area) Order aforesaid spelt out, in the First Schedule, the area covered by the Order; and prohibited the hunting of certain species of animals specified in the Second Schedule to the Order, and also restricted the hunting of certain animals that were specified in the Third Schedule to the Order. In the First Schedule to the Order, the boundary of the area covered by the said Order is described as passing through the village of Rwebishengo. The village of Rwebishengo named therein is now a small township. The word 'Controlled' was neither used in the Act nor in the statutory instrument aforesaid creating the hunting areas. It would appear that the word was only later brought in, and used in common parlance in the terminology of the hunting areas, for purpose of emphasising the intention of the law.

No wonder then that the interpretation section of the Act cited does not contain a definition of the word 'controlled'; but does so for the word 'hunt'. It is also clear from the provisions of these two sections of the now repealed Act, and the said Statutory Instrument made there under which the repealing Act saved, that the Act and the Order did not concern themselves with ownership, but rather the protection of the relevant named animal species in issue in the area; hence the prescription on the manner of hunting that could be carried out within the area declared as a Hunting Area.

A village like Rwebishengo through which the Hunting Area passed was certainly a human settlement; and therefore could not, by any stretch of definition, be said to have been set aside as an exclusive animal sanctuary as was the case with game parks and game reserves. This position is further made clear from the correspondences that emanated from two top officials of the Uganda Wildlife Authority over the same subject matter, at different times; and were admitted in evidence by consent. In her letter addressed to the Minister of State for Lands, dated 23rd September 2008, exhibited by consent and marked CE9, Ms Eunice Nyiramahoro Duli the then Acting Director of Uganda Wildlife Authority attached a brief on the legal status of Controlled Hunting Areas, exhibited and marked CE9 (e). In so far as it is relevant to this suit, the brief stated as follows:

*"**Background***

*Over the past 60 years the former Game Department (GD) established a number of 'Controlled Hunting Areas' (CHAs) in areas where it was felt that certain species may be threatened by overhunting. In contrast to other areas of the country, where there were no*

*quotas, CHAs had strict hunting quotas (or a complete hunting prohibition) for certain species. …… …*

*At the time of establishment of the CHAs the rural population of Uganda was still relatively low and pressures on land were much less than they are today. CHAs were declared in areas where there were important wildlife populations, regardless of whether there were people living in these areas or not. Other than for the control of hunting, the CHAs did not provide for the control of other activities detrimental to wildlife, such as settlement, agriculture or pastoralism. Thus, other than the hunting of scheduled species, the Game department had no control whatsoever over any form of land use in CHAs. …… …*

***Legal status of CHA***

*Given that some CHAs still retained biodiversity of value, Section 92 (2) of the Uganda Wildlife Statute provides for a 24 month period of coming into force of the Act, in which UWA must decide 'which controlled hunting areas shall be declared as national parks, wildlife reserves, wildlife sanctuaries, community wildlife areas or any other area … … [and which CHAs] shall cease to exist'. …… …*

*The review recommended sections of some Controlled Hunting Areas specifically East Madi, West Madi and Kaiso Tonya CHAs to be declared Wildlife reserves. Some were recommended for creation of Community Wildlife Areas like parts of South Karamoja, North Karamoja and Semliki Flats CHAs. The rest were recommended for degazettement. The proposals were presented to Cabinet and thereafter to Parliament.*

*Records of the Hansard indicate that all proposals were accepted except the one of West Madi where the Lomunga Wildlife Reserve had been proposed. However according to the commissioner Wildlife, (who was in charge of finalizing the gazetting and degazetting processes) when the process for having Statutory Instruments made after the resolutions of Parliament, the Solicitor General indicated that the process for degazetting CHAs was time barred since the statutory 24 months had expired."*

In his letter dated the 12th March 2007, written to the Chief Administrative Officer Bundibugyo District, exhibited by consent and marked CE10 (6), the Executive Director of Uganda Wildlife

Authority Moses Mapesa clarified specifically on the legal status for Kanara and Rwebisengo Sub–Counties of Ntoroko County, Bundibugyo District. The relevant parts of the letter read as follows:

*"Uganda Wildlife Authority undertook a review of its protected area and developed a new Wildlife Protected Area System Plan … Specifically, for … the Semliki Flats Controlled Hunting Area, the following changes were made: …*

*The wetland area within the Semliki Flats Controlled Hunting Area (in Rwebisengo sub county) was gazetted a community wildlife area to ensure sustainable conservation of the wildlife species therein some of which are threatened and endangered. These species include elephants, buffalos, kob, waterbuck and the highly endangered shoebill stork.*

*The remaining part of the Semliki Flats Controlled Hunting area was recommended for degazettement, which has not happened up to now. It still remains a Controlled Hunting Area in law until such a time that the legal instrument (Statutory Instrument No. 226-15 of 1964) that created it is revoked. Controlled Hunting Areas at their time of creation were areas with concentrations of wildlife on communally owned land where hunting licenses and quotas were issued."*

To this was attached a copy of Statutory Instrument No. 57 dated 5th September 2003, exhibited by consent and marked CE10 (b) (2) under the heading 'The Uganda Wildlife (Declaration of Wildlife Conservation Area) (Rwengara Community Wildlife Area) Instrument 2003' which declared the area which is described in the schedule thereto, namely: *'All wetland areas in Bundibugyo District along the shore of Lake Albert and along the Semliki River'* to be a community wildlife area and a wildlife management area. Sections 7 and 8 of the Uganda Wildlife Act (Cap. 200, Revised Edn. 2000) provide as follows:

*"7. A wildlife sanctuary declared under subsection (3) (a) shall be an area which has been identified as being essential for the protection of a species of wild animal or wild plant in which activities which are not going to be destructive to the protected species or its habitat may be permitted."*

*"8. A community wildlife area declared under subsection (3) (b) shall be an area in which individuals who have property rights in land may carry out activities for the sustainable*

*management and utilisation of wildlife if the activities do not adversely affect wildlife and in which area the State may prescribe land use measures."*

Section 18 (3) of the Act, provides that a wildlife management area shall be either a wildlife sanctuary, or a community wildlife area; and section 19 of the Act provides as follows:

*"(2). The purposes of a wildlife management area under section 18 (3) shall be –*

*(a) to so manage and control the uses of land by the persons and communities living in the area that it is possible for wildlife and those persons and communities to coexist and for wildlife to be protected;*

*(b) to enable wildlife to have full protection in wildlife sanctuaries notwithstanding the continued use of the land in the area by people and communities ordinarily residing there;*

*(c) to facilitate the sustainable exploitation of wildlife resources by and for the benefit of the people and communities living in the area;*

*(d) ……*

*(e) to carry out such of the purposes of a wildlife conservation area set out in section 2 as are compatible with the continued residence of people and communities in the wildlife management area and the purposes under paragraphs (a) and (b) of this subsection."*

Clear evidence of the application of this law is in the fact that the Municipalities of Entebbe and Jinja, which are densely populated by human settlement, are in fact gazetted as wildlife sanctuaries for the protection of animals of all kinds, under the First and Second Schedules respectively, of Statutory Instrument 200 – 11, The Uganda Wildlife (Declaration of Wildlife Sanctuaries) Instrument made under sections 17 and 18 of The Uganda Wildlife Act. Under section 3(a) of the Act a wild life sanctuary is a wildlife management area which under section 1 of the Act (the interpretation section), and sections 7 and 8 of the Act reproduced above is an area protected for the sustainable management of wildlife there in; and in coexistence with human settlement.

It is abundantly clear that the common thread that runs throughout these two Statutes and the subsidiary legislations made there under, and as well the authoritative briefs from the two Executive Directors of the Wildlife Authority, is that the law has always expressly recognised and permitted human settlement in Controlled Hunting Areas and later other areas set aside for the protection of specific species of animals; hence the suit lands have at all times been available for human settlement irrespective of whether they constituted parts of the Controlled Hunting Area under the

old laws, or were under the new legislations curved out and reclassified as Wildlife Management Area going by either the name ‘wildlife sanctuary’ or ‘community wildlife area’.

The legislations were directed at the protection or management of wildlife; not ownership of land by either of the two Governmental bodies: the Game Department or its successor the Wildlife Authority. It was and is only human settlement and land usage incompatible with the provisions protecting wildlife, not the land occupation or usage per se, which would bring such occupiers and users of the lands in conflict with the law. The nearest that the legislation went towards control of the land in issue is in the provision for determination of the manner of land use by the inhabitants therein; and all this was geared towards ensuring the protection of wildlife.

Consequently then, the communication by the Minister of State for Lands in his letter to the Chairman of the District land Board Bundibugyo, dated 26th September 2006 – exhibited in Court by consent and marked CE9 – in which he states that the Semliki Flats Controlled Hunting Area had been de-gazetted is ill informed, totally erroneous and a misrepresentation of the law and fact regarding the process of degazetting of a Controlled Hunting Area, and therefore misleading. May be, not surprisingly, because it did not originate from the line Ministry responsible for the subject matter at hand; and was unfortunately manifestly issued without adequate consultation.

The Parliamentary Hansard which the Honourable Minister relied on, signifying Parliamentary resolution for the de–gazetting of the named Controlled Hunting Areas and wildlife reserves, is not a legal instrument and could not effect the de–gazetting. It is clear from the evidence on record that the process of de–gazetting the Controlled Hunting Area by Ministerial Statutory Instrument was a still–birth due to its being overtaken by statutory passage of time. My finding from the evidence reviewed above is that, in fact, the Semliki Flats Controlled Hunting Area has, to date, not been de–gazetted.

I now turn to the second leg of the first issue: namely, whether the Plaintiffs were in fact in possession of the suit lands; and if so whether lawfully. Yoweri Bamuhiga (PW1), in his testimony stated that he had acquired and been in possession of his portion of the suit lands since colonial times; and that Uganda’s attainment of independence found him already in occupation thereof, meaning that by the time the leases were granted to the Defendants herein, he had already occupied his several portions of the suit lands for well over 40 years. He stated that when the area was

declared a controlled hunting area he was already in occupation of the land; and that the other Plaintiffs followed him later.

The Plaintiffs all testified as to how they had acquired their portions of the suit lands; and that it was either through alienation by first occupation in accordance with Batuku customary practice, or by inheritance from their parents. Further to this, my findings that Controlled Hunting Areas have always expressly permitted human settlement therein, has partly answered this issue. The Plaintiffs all testified that in the suit lands they each have several homesteads, owing to the large number of cattle they each own. In fact their evidence disclosed that they have, between themselves, cattle numbering well over 8000 (eight thousand).

Their evidence was that except for occasional conflict with personnel of the Game Department which was later resolved when they lodged complaints with the relevant authorities, they had otherwise each enjoyed unchallenged possession and usage, hence ownership of their respective portions of the suit lands, until 2005 when the Defendants were allocated these lands and surveyed them off. The conflict the Plaintiffs had with the Game Department is brought out by the letter of the Permanent Secretary, Ministry of Tourism Trade and Industry dated 30th May 1997 and addressed to the Executive Director Uganda Wildlife Authority.

This letter is exhibited by consent and marked CE15; and in it the Permanent Secretary explains that it was the unlawful occasional intrusion into the adjacent game reserve by cattle grazing which was the source of conflict between the cattle owners and the game rangers. For this reason, I must reject the testimony of DW8 the game ranger who despite his over-zeal was evidently ignorant of the difference between the status of the game reserve, which it was his duty to protect, and the Controlled Hunting Area that lay adjacent to it; and for which he can be forgiven.

Apart from the evidence of the Plaintiffs, which I have carefully subjected to evaluation, the Court visited the locus in quo. As pointed out, the Plaintiffs have, between themselves, well over 8,000 head of cattle. There is also the report made by the surveyor who acted on behalf of the Defendant allocatees of the suit lands. In the document intituled 'Job History', exhibited in Court and marked PE1, the surveyor who carried out the survey of the suit lands sometime in 2005 as shown by the evidence, clearly pointed out as follows:

*"… the land is overgrazed and very flat; you almost don't need a road with little cutting."*

In the course of the visit to the locus in quo which was quite elaborate and exacting, as it took Court the whole day – from 9.30 a.m. to 5.00 p.m. in the field – to accomplish, it was evident that the vast lands in issue were unmistakably highly overgrazed. Certainly, the overgrazing noticed by the surveyor could not have resulted from cattle belonging to the Defendants who had just got allocated the suit lands by the corporate Defendant. In any case, from their own account, the Defendants' cattle on the land then were not more than 500 in number; and therefore could not have caused the overgrazing of an area measuring some 5 (five) square miles of land – which is what the area of the suit lands is – and more, in such a short period of time between the contested allocations and the survey in 2005.

During that Court visit, and in their evidence in the proceedings thereat, the Plaintiffs pointed out several old homesteads they claimed belonged to them; and a number of survey mark stones planted on what they claimed were their lands. The Court was able to see, first hand, evidence of long duration of occupation and land use exceeding 10 year period; and DW1 the Chairperson of the corporate Defendant conceded this point in evidence following this visit. The Court saw in the suit lands structures which Christine Mugarra pointed out as hers; one of which was newly put up and made of mud and wattle and roofed with corrugated iron sheets. She explained that the old structure that stood thereon had collapsed, and the new structure was a replacement.

From her homestead Christine Mugarra led Court in a south easterly direction, towards the game reserve; generally tracing the western borderline of the suit land that had been leased to her, up to a point where she stated a mark stone had been planted but had been removed. This marked her southern–most border point; and from which the land lay in an easterly direction. Within this land leased to Christine Mugarra, the Plaintiffs showed Court homesteads belonging to Yoweri Bamuhiga, Martin Kwonka, Tinkasimire Jackson, and other persons who are not parties to the suit, such as Asiimwe Robert. Court also came across a number of smaller homesteads whose occupants identified themselves as herdsmen for Yoweri Bamuhiga.

The Court found at the homestead of Jackson Tinkasimire, situated within the leased land, a freshly built mud and wattle structure roofed with old iron sheets. His explanation was that an old grass thatched structure therein had collapsed and the fresh structure was a replacement. There was however evidence of occupation, in the form of a kraal much older than this recent structure, albeit not to the size and age of that of Yoweri Bamuhiga, Kesi Kabona, and Martin Kwonka. Given that

Christine Mugarra herself had reconstructed an older one which had collapsed, Court could not discern any mischief in the freshly constructed structure by Jackson Tinkasimire.

Three Plaintiffs showed Court homesteads outside this borderline. To the west of the borderline Asiimwe Gideon showed Court two evidently old homesteads; one of which he stated was his, and the other his father Kaahwa Charles'. His evidence was that while these homes were outside the land leased to Christine Mugarra, his and his father's lands extended eastwards up to Yoweri Bamuhiga – PW1's land; and was enclosed within the land leased to Christine Mugarra. To the south west, south, and south east of Christine Mugarra's southern borderline, Court was shown homesteads belonging to Joshua Mwesige, Kesi Kabona, Jackson Kaggwa, and Martin Kwonka.

The evidence adduced by these Plaintiffs was that while the said homesteads stood outside the land leased to Christine Mugarra, the respective owners' lands extended northwards and fell within the land leased to Christine Mugarra; and southwards towards the game reserve. I must point out that the homesteads shown to Court as being those of Yoweri Bamuhiga, Kesi Kabona, and Martin Kwonka respectively were remarkably old and big homesteads. Each homestead was characterised by a large old kraal in which the most striking and enduring tell–tale manifestation of long occupation was the creeping *oruchwamba* grass which in the Luo language is called *motto*; and which the parties all agreed invariably thrives in cattle kraals.

Court then proceeded to the east and was shown a collapsed grass thatched community prayer house; beyond which there were homesteads of Kesi Kabona, and Martin Kwonka with large kraals and the trade mark *oruchwamba* grass; with a mark stone reportedly at a point just a few meters only from Martin Kwonka's home; but the stone had been removed. Further east still, and this was now in Rwenyana, Rwangara parish, Kanara sub county, Court was shown old homesteads and kraals belonging to Yoweri Bamuhiga, Jackson Tinkasimire, and Kesi Kabona; with a mark stone close by Yoweri Bamuhiga's old homestead. The mark stones that were identified, and were still in place, and shown to Court, bore the following marks: DD2092, and DD2109.

The Defendants who, save for Christine Mugarra, did not show Court any evidence of their homesteads, instead claiming that these had been destroyed, contended that the homesteads the Plaintiffs had shown to Court belonged to Congolese refugees who had been resettled in the area by the local authorities following their flight from the conflict in their country. Indeed Court found a couple of Congolese homesteads in the suit land, but as was confirmed by DW1 and DW5 in their

evidence in the locus in quo proceedings, Bodwe – a Congolese found in the suit land – clarified that it was Yoweri Bamuhiga who had resettled him, in the year 2000, on the land where Court found him.

Further to this, PW6 the Chairperson LC3 of Rwebishengo Sub – County testified that they had resettled the Congolese refugees with consent of the local residents of the area. If indeed the contention by the Defendants that human settlement in the suit land was barred owing to its status as a Controlled Hunting Area were to stand, then the local authorities could not have resettled Congolese refugees on it. In the course of the proceedings that followed the visit to the locus in quo, both DW1 the Chairperson of the corporate Defendant, and DW4 Christine Mugarra who stated that she had not seen the house before that day, conceded that the homestead of PW1 shown in Kimara village was a very old structure.

The weight of evidence is therefore heavily against the contention by the Defendants that the Plaintiffs were not in occupation of the suit lands before the inspection in 2005. Concession by DW1 and DW4 that the house of PW1, seen on the land leased to DW4, was a very old one settles the matter. I am fully satisfied, from the evidence on record and my own observation at the locus, that indeed the Plaintiffs have established that their occupancy of the suit lands commenced long before the lands were allocated to the Defendants by the corporate Defendant; and thereby I resolve the first issue in the affirmative.

With regard to the second issue – whether the corporate Defendant had lawfully leased the suit lands to the Defendants – it has been the case for all the Defendants in their respective pleadings and evidence that the corporate Defendant herein lawfully allocated the suit lands to the other Defendants by reason of the lands having vested in it after being de–gazetted from its former status as a Controlled Hunting Area. I need to reiterate here that owing to my finding herein above on the status of a Controlled Hunting Area, any part of the Semliki Flats Controlled Hunting Area not occupied, or claimed by any person or authority, whether or not it has been de–gazetted, clearly vests in the corporate Defendant; and it would perfectly be in order for the corporate Defendant to alienate it to anyone by grant of an estate in leasehold or freehold.

The corporate Defendant as a District Land Board is a creature of Article 240 of the 1995 Constitution of Uganda, and The Land Act (Cap. 227 Revised Edn. 2000). Article 240 of the Constitution has established District Land Boards as corporate entities, independent of the Uganda

Land Commission in which, hitherto, all public land in Uganda was vested. Article 241 of the Constitution sets out the functions of the District Land Boards as follows: –

> *"(1) The functions of a district land board are –*
>
> *(a) to hold and allocate land in the district which is not owned by any person or authority;*
>
> *(b) to facilitate the registration and transfer of interests in land; and*
>
> *(c) to deal with all other matters connected with land in the district in accordance with laws made by Parliament."*

Section 59 (1) of The Land Act, (Cap. 227 Laws of Uganda, Revised Edn. 2000) has replicated the first two functions assigned to the District Land Boards by the Constitution. Section 60 (1) of the Act provides that in the performance of its function a District Land Board shall take into account, inter alia, the particular circumstances of different systems of customary land tenure within the district. Article 237 of the Constitution of Uganda 1995, provides that land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in the Constitution. Among the land tenure systems recognised in Article 237 (3) of the Constitution, is customary land holding.

Whereas hitherto customary occupants of public land were mere tenants on such lands and were relatively in a precariously insecure position vis–a–vis any person who wished to lease and better develop these lands, the land mark revolution ushered in by the Constitution of Uganda 1995, was the transformation of customary land tenure by elevating it to the same status, and with equal protection and security, as the mailo and freehold land tenures. The Land Act restated the transformation of the Plaintiffs from being vulnerable customary tenants on public land – which they had been under the provisions of the 1967 Constitution and the Public Lands Act 1969 – and elevated them to private customary owners of the same land; and in perpetuity.

The evidence adduced by the Plaintiffs is that they held the suit lands under Batuku customary land holding practice; having acquired proprietary rights therein by adverse possession, with traditionally known and recognised natural features marking their respective boundaries. Therefore the corporate Defendant could not, at all, lawfully alienate these lands to the detriment of the Plaintiffs; just as it could never, at all, alienate land held in freehold or leasehold to the detriment of such land holder.

The Land Act makes this point very clear by providing in section 3 (1), in so far as it is relevant to the case before me, as follows:

*"(1) Customary tenure is a form of tenure–*

*(a) applicable to a specific area of land and a specific description or class of persons;*

*(b) subject to section 27, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;*

*(c) applicable to any persons acquiring land in that area in accordance with those rules;*

*(d) subject to section 27, characterised by local customary regulation;*

*……*

*(h) which is owned in perpetuity."*

In this regard, customary land tenure is a matter of evidence; and is by no means uniform. Each community has its mode of customary land claim of ownership. In some communities, the entire customary tenure may be on private land holding; whereas in others, private customary land holding may be interspersed with public or communal customary land holding, as is quite common amongst the Acholi. Section 23 (3) of the Land Act recognises that land may be set aside for common use for purposes of, inter alia, grazing and watering of livestock, hunting, and such other purposes as the tradition among the community using the land communally may prescribe.

Section 64 of the Act, as amended by section 27 of The Land (Amendment) Act, 2004, provides that a District Council may, in its discretion, establish a Land Committee at any Sub County. The said amended section 64 (7) of the Act provides as follows with regard to the Sub–County Land Committee:

*"(7) A Committee shall assist the Board in an advisory capacity on matters relating to land including ascertaining rights in land and shall perform any other functions conferred on it by this Act or any other law."*

In the course of these proceedings, certain matters of grave concern came out in evidence which it is the duty of this Court to address itself to. This is with regard to the manner the corporate Defendant and certain of its officials conducted themselves in the performance of official functions and duties. Regulation 23 of The Land Regulations 2004, which was already in force at the time when the suit lands were allocated to the Defendants herein clearly lays down the procedure the Uganda Land

Commission and the District Land Boards have to follow in the process of their allocation of land, as follows:

*"23. (1) A person may apply to a board or the commission to be allocated land –*

*(a) in the case of a board, land in the district which is not owned by anybody;*

*(b) in the case of the commission, land held by it.*

*(2) On receipt of an application referred to in sub–regulation (1), the board or the commission may –*

*(a) advertise the application by giving notice of at least twenty one days in a newspaper with wide circulation in the district and by such other means as are likely to draw the matter to the attention of persons likely to be affected by the application within the district;*

*(b) invite any person to comment on or object to the application, giving reasons for any comment or objection;*

*(c) determine, after taking into account any comments or objections that may be made, in a meeting at which members of the public may be present, whether the applicant should be allocated the land for which application is made."*

Almost everything that the corporate Defendant did in the process of granting the disputed allocations was in utter non–compliance with the law. Regulation 16 provides that an application for a lease, in case of land held by a District Land Board, shall be in Form 8 in the First Schedule to the Regulations. That Form provides that the applicant fills it by entering his or her or its name, and signing it; and enters the date of the application. However the application by the late Hon Mugarra Francis exhibited by consent and marked CE1(a) derogated from this mandatory requirement in that the applicant did not sign the form. Jeremiah Mutooro the Chairperson of the corporate Defendant himself conceded when it was pointed out to him that this was an incurably defective anomaly.

The most irresponsible procedural anomaly was in the corporate Defendant's conduct of the purported inspection of the lands applied for by the Defendants. The corporate Defendant exercised no caution at all. It left it to the applicants to orally notify the local authorities of the then impending

inspection. Common sense should have dictated and sounded a warning note to the officials of the corporate Defendant that an applicant who was bent on acquiring land by improper means would ensure that any person with an adverse claim over the land was kept in the dark about the visit of the granting authority whose decision would otherwise be negatively swayed by any objection to such an application.

It was therefore not surprising that they neither found any official of the Rwebisengo Sub–County in office on the material day; nor any L.C. official at the suit lands when they went for their purported inspection. I do believe that the officials of the corporate Defendant indeed went to the suit lands as they testified in evidence. On finding no local officials or any other person on the lands for inspection, they should have called off the exercise. However looking at the entire manner of their conduct of official business, I am inclined to think, and I would not be surprised, that it was more of a perfunctory visit to justify an otherwise foregone conclusion – namely grant of the inspected lands to the Defendants – than to seriously carry out their mandated statutory functions.

As was pointed out by PW6, the LCIII Chairperson Rwebishengo Sub County who has been in that chair since 1985, the practice had always been that his office was notified by the Land Board whenever it was coming to inspect land applied for, and the office would mobilise the people of the affected area; but that with regard to the suit lands there was no such communication to his office or to the LCs of the area at all. PW1 Yoweri Bamuhiga in cross examination by counsel for the corporate Defendant, reiterated the existence of this practice; and named one Zerali in respect of whose application for land the local authority upon notification by the District Land Board had effectively mobilised the people of the area accordingly.

In the instant case, in failing to adhere to this time honoured practice the local population were aware of and which had served them well, the officials of the corporate Defendant pathetically conducted themselves very much like pre–colonial African Chiefs who did not have the benefit of literacy, and therefore relied on oral relay of official communication. But even those African Chiefs knew the importance of effective communication of official business, and did better by relying on established official channels for such official communication.

No wonder then, following the revelation of the several old homesteads in the suit lands during the visit to the locus in quo, DW1 the Chairperson of the corporate Defendant conceded in his testimony that his inspection exercise had not been as elaborate as the Court's visit to the locus had been; and

therefore he had not been shown these homesteads during the inspection; and that if he had seen them, and the Plaintiffs' objections had been brought to the corporate Defendant's attention at that time, there was no way that the suit lands would have been allocated to the Defendants.

Owing to the fact that land in the district not claimed by any one vests in it, the District Land Board is in a fiduciary position regarding land users in the respective district; and because of this, it is of the utmost importance that its officials adhere to the laws and regulations pertaining to their official functions, and bear in mind at all times the interests of such land users. Had the corporate Defendant cared to advertise the applications as provided for in the Regulations cited above, even merely by notifying the local authorities of Rwebisengo and Kanara Sub–Counties in writing, it would certainly have been spared the instant suits which have otherwise resulted.

In this regard the decision of the Court of Appeal in ***Venansio Bamweyaka & 5 Others vs. Kampala District Land Board & Another – Civ. Appeal No. 20 of 2002*** is pertinent. In that case, Okello J.A. held that where the application for, and the alienation of the land by the controlling authority has been done without consultation of those in occupation thereof such grant would not be allowed to stand. There the Court was interpreting the import of regulation 22 of the Land Regulations 2001 (Statutory Instrument No. 16 of 2001) which was worded in textually the same language as regulation 23 of the Land Regulations 2004 reproduced herein above; and which replaced it.

The import of this decision of the Court of Appeal is that although the regulations about consultation are couched in language which suggests the Land Boards have discretion over the matter, the Land Boards are in fact duty bound to treat it as mandatory. To do otherwise would, as has manifested itself in the instant case, deny any potential objector the right to be heard; and this is a breach of the cardinal rule of natural justice prescribing the right of anyone, on whom a decision may impact, to be heard before such decision is made. The District Land Boards are therefore under strict duty to treat all applications with utmost circumspection; and avert any possible mischief by notifying the public in the area the land applied for is situated, of such application.

Further to this, the Court restated the position of the law that where land is occupied under customary tenure, the District Land Board has no authority whatever to alienate it to any person or authority; as it can only allocate land not owned or claimed by any person or authority. I have already found that the suit lands were effectively occupied by the Plaintiffs. Accordingly, the Bundibugyo District Land Board could not lawfully alienate the same to any other person. The only

role the corporate Defendant could have performed therewith was either to convert the customary holdings into freeholds if the Plaintiffs so wished, or to grant them certificates of customary ownerships as prescribed by the law.

There are yet other matters of grave concern in the process of the acquisition of the suit lands by the Defendants. It came out in evidence that David Mwamba a member of the corporate Defendant then, and Frank Bagonza the Secretary to the corporate Defendant had lease documents showing the land they had jointly acquired was 700 hectares (1,720 acres) and not the 1000 acres they had been jointly allocated, and had paid for. Bagonza signed the lease document both for the corporate Defendant and for himself. The chairperson of the corporate Defendant was shocked to learn in Court that this was so, as the information in the lease offer was not from the corporate Defendant; and the lease offer was made before any survey had been carried out.

The litany of evidently fraudulent process did not stop there. With regard to Frank Bagonza's land he had entered information in the inspection report that he had cattle on the land and yet he confessed in Court that this was not so; and so was the information about the semi permanent building on the land which in fact was non–existent. Gideon Kabagambe and Yofesi Kabagambe each processed a lease twice the size of the land that they had been allocated. The two had been allocated 250 acres, but the print for their lease now read 202.80 hectares (500.9 acres). Gideon Kabagambe had given information which appeared in the inspection report that the cattle on his land belonged to Congolese, and yet in Court he stated that the cattle belonged to Hon. Mugarra.

These fraudulent parties sought to persuade Court that these were errors or later developments which could be rectified to reflect the earlier allocation. The officials of the corporate Defendant themselves either participated in the fraud or tacitly promoted it by their laxity and blameworthy manner of carrying out official duties. The counsels for the Defendants have argued in their final submissions that these malfeasances can be rectified and made good. I think otherwise. These instances of blatant fraud and others that have come out in evidence say a lot about the Defendants.

There could never be any better instance of fraud in the circumstance. They are a pack of untrustworthy greedy land grabbers whose denial of the fact of the Plaintiffs' occupation of the suit lands has been deliberate falsehood which they perpetrated even during their Court appearances; and was designed for the singular purpose of taking advantage of the Plaintiffs' ignorance and

vulnerability. I certainly condemn their several and collective actions in the strongest term possible; and therefore answer the second issue in the negative.

With regard to the last issue – the remedies available to the parties – the applicants all stated in the respective forms that the land they were applying for had no occupants or neighbours except themselves; yet in their pleadings they all contended that the area the suit lands fell within had been a Controlled Hunting Area which had not permitted human settlement and they acquired their rights thereto as allocatees of the corporate Defendant. There were only two ways the Defendants could have acquired proprietary rights over the suit lands: either as customary occupants or as lessees of the corporate Defendant.

If they had been customary occupants they would have applied for conversion of their customary interests into freeholds and not leaseholds. Therefore, owing to the fact that their pleadings were clear that they had acquired the suit lands through applying for the leases from the corporate Defendant, they cannot escape from their own case. I reject each of their evidence, that prior to their tendering their applications for, and inspection of the suit lands they were already in possession, as a pack of lies. It is trite law that a party is bound by his, her, or its pleadings; and any departure therefrom without prior or consequential amendment is unacceptable and treated as amounting to deliberate falsehood.

There is a host of authorities on this; see ***Candy vs. Caspair Air Charter Ltd. (1956) E.A.C.A. 139; Akisoferi W. Biteremo vs. Damscus Munyanda Situma S.C. Civ. Appeal No. 15 of 1991; Interfreight Forwarders (U) Ltd. vs. East African Development Bank S.C. Civ. Appeal No. 33 of 1992, [1994 - 95] H.C.B. 54; Goustar Enterprises Ltd. vs. John Kokas Oumo S.C. Civ. Appeal No. 8 of 2003; Kasifa Namusisi & Others vs. Francis M.K. Ntabazi S.C. Civ. Appeal No. 4 of 2005***, among many others. I do not see any remedy that can be availed to the Defendants at all. Instead I allow both suits with costs to the Plaintiffs. The Plaintiffs have pleaded with this Court for inter alia general damages of U shs. 15m/= each owing to the stress they have suffered due to the culpable deeds of the Defendants.

I take cognisance of the fact that the Plaintiffs were never at any time denied the use of the suit lands. The threat largely remained on paper and they were able to nip it at the bud. I consider that in the circumstance an award of U shs 3m/= to each of the Plaintiffs is reasonable atonement for the damages suffered. In the result, I make the following declarations and orders:

(i) The Plaintiffs are the customary owners of the suit lands and are entitled to quiet possession thereof.

(ii) The alienation of the suit lands to the Defendants in both suits by the corporate Defendant, and the processes that ensued therefrom, are hereby all nullified for being unlawful, wrongful, and or fraudulent.

(iii) The Defendants are all ordered to give vacant possession of the suit lands to the Plaintiffs.

(iv) An order of permanent injunction hereby issues restraining the corporate Defendant and the other Defendants from meddling in, or in any way interfering with the proprietary interests of the Plaintiffs in the suit lands.

(v) The Plaintiffs are each awarded general damages in the sum of U. shs. 3,000,000/= (Three million only).

(vi) The Defendants shall pay the costs of the suit.

Before taking leave of this matter, I must address the plea raised by counsel for the Plaintiffs for a certificate for two counsels. Indeed the law provides for such certificate in deserving cases. My understanding of such provision is that the Court must be satisfied that the matter before it was of such complexity that it required the services of two counsels for its conduct; and that in fact two counsels participated in the conduct of such matter. I am afraid I have not been able to see any complexity in the instant case. Owing to the consolidation of the two suits it could have appeared exacting; but the truth of the matter is that every process in the conduct of the suit catered for both suits simultaneously.

Further to this I did not see the participation of two counsels for the Plaintiffs. Participation is not measured by mere presence at the bar in Court, but by actual involvement that goes beyond merely helping to carry files to Court. The rules regulating the remuneration of advocates provides, in the alternative or in addition, for agreement – as between counsel and client – for such higher remuneration than what is provided for in the Sixth Schedule to the Rules as they may negotiate and agree upon. This seems to be the avenue the counsel for the Plaintiffs could have pursued. I therefore disallow the prayer for certificate for two counsels; as not deserving in the instant case.

**Alfonse Chigamoy Owiny – Dollo**

**JUDGE**

**14 – 08 – 2009**