

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA; AT FORT PORTAL**  
**CIVIL SUIT No. 0052 OF 2007**

**THE REGISTERED TRUSTEES }  
OF } ::::::::::::::: PLAINTIFFS/COUNTER RESPONDENTS  
THE DIOCESE OF KASESE }**

*VERSUS*

**JOHN BAPTIST KIIZA }  
& } ::::::::::::::: DEFENDANTS/COUNTERCLAIMANTS  
51 OTHERS }**

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

**JUDGMENT**

The registered trustees of Kasese Catholic Diocese, a body corporate under the Trustees Incorporation Act, (herein after called the Plaintiffs), brought this action against the Defendants jointly and severally, with regard to land comprised in LRV 1520 Folio 18 Plot No. 7 (hereinafter referred to as the suit land), in their pleadings, and at the scheduling conference, their case was that the suit land which they are the registered proprietors of, in trust for the Order of the Banyatereza Sisters, had been given to the Sisters by Dr. John Babiha in 1975, as a gift inter vivos, when it was vacant; and soon after, the Sisters occupied it, cultivated seasonal crops and constructed buildings thereon.

They averred that the suit land was first registered in the name of the Sisters' Treasurer General, the late Sr. Jane Kaahwa on 24<sup>th</sup> February 1987, as the Banyatereza Sisters are not a body corporate; then on 4<sup>th</sup> January 1999, it was transferred to, and registered in the name of the Plaintiffs, because the land is located within the jurisdiction of Kasese Catholic Diocese. The

Sisters had licensed various persons, including some of the Defendants, to plant seasonal crops on the land; but the ethnic armed conflict which erupted in the area, disrupted the Sisters' use of the land. Later, the Defendants forcefully and unlawfully occupied and alienated the land despite the persistent objection and resistance from the Sisters. Accordingly, the Plaintiffs sought the following reliefs from Court; namely:–

- (i) A declaration that the Plaintiffs are the registered proprietors of the suit land.
- (ii) A declaration that the Defendants are trespassers on the suit land.
- (iii) An order of permanent injunction restraining the Defendants and any person acting in their behalf from committing any further acts of trespass on the suit land.
- (iv) An order for eviction and vacant possession of the suit land.
- (v) An order for mesne profits; and general damages for trespass.
- (vi) An order for costs of the suit.

The Defendants however all vehemently denied the Plaintiffs' claim, contending that they acquired and have each been in possession of their respective portions of the suit land by adverse possession dating from 1964; and thereby derive lawful ownership of such portion as bona fide occupants. They contended further that the Plaintiffs fraudulently got registered as proprietors of the suit land, with a view to defeat the unregistered interests of the Defendants; and accordingly by counterclaim –on which the Plaintiffs however joined issues with them in denial – sought the following reliefs against the Plaintiffs from Court: –

- (a) An order evicting the Plaintiffs, their agents, servants, and workmen from the suit land.
- (b) An order for cancellation of the Plaintiffs' certificate of title.
- (c) An order for general damages.
- (d) Costs of the suit.

The parties agreed, at the scheduling conference, that the issues to be framed by Court for determination are: –

- (i) Whether or not the Plaintiffs acquired registered interest in the suit land by fraud.
- (ii) Whether or not the Defendants are lawful and bona fide occupants of the suit land.
- (iii) What remedies are available to the parties?

The parties both presented several witnesses to prove their respective claims in the matters in controversy between them; as framed.

**Issue No. 1: Whether or not the Plaintiffs acquired registered interest in the suit land by fraud.**

The allegation that the Plaintiffs' acquisition of registered title to the suit land was fraudulently done; and that this was with a view to frustrate the Defendants' long held lawful occupancy of their respective portions of the suit land, was made by the Defendants. It was thus incumbent on the Defendants to prove such allegation; and as was stated by Wambuzi C.J. in *Kampala Bottlers Ltd. vs. Damanico (U) Ltd.; S.C. Civ. Appeal No. 22 of 1992*, for a plea of fraud to succeed, the fraud must be proved to be attributable to the transferee. The learned C.J. pointed out that: –

*"I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. ... Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters."*

The Defendants called eight witnesses with a view to discharge this burden. First, was John Baptist Kiiza (DW1), whose testimony in this regard was that he and the other Defendants have been in occupation of the suit land since around 1964 upon acquisition by adverse possession as virgin and vacant land, after their displacements from Tooro following the ethnic cleansing of the Bakonjo and Bamba by the Batooro. He impugned the Plaintiff's title, contending that until 1998 he and the other Defendants had no knowledge of John Babiiha's alleged ownership of the suit land; and further that the Defendants neither witnessed any surveying of the land, nor had any knowledge of the Plaintiffs' processing of registered title.

His further contention was that he learnt of the Sisters' registration on the 6<sup>th</sup> June 1998 when a letter from Virika Diocese, Fort Portal, threatened to evict them from the suit land and burn their houses; and that the Banyatereza Sisters first came on the suit land on 17<sup>th</sup> June 1998, built houses thereon the same year, chased some people away, and commenced cultivation of maize; but further eviction was halted by the Chief Administrative Officer of Kasese District who

advised that this should await a land law Parliament was due to enact. The Sisters then put up a permanent house on the land in 1999, then another in 2003.

Black Erisa (DW2) testified that the Banyatereza Sisters came on the suit land in 1998, and constructed their houses on John Ndyanabo's land around 1999 and 2003; and although in the meeting convened by the Chief Administrative Officer he learnt that the Sisters had acquired the land in 1974, he did not know how they had acquired it, and contrary to the requirements of the Land Act of 1998, the Sisters' title had no names of witnesses on it. John Ndyanabo (DW3) testified that he did not know how the Sisters got their title, and could not recall when they came on the land; but that they came with a lot of pressure, using guns, the police and soldiers, and people fled from the land, and this led to his imprisonment around 1987 which was also the year the Sisters' house was built.

Ezekiel Bamuloho (DW4) testified that he did not know how the Banyatereza Sisters came to the land, because the leaders of the area were not informed; but that John Babiiha, when he was Vice President, had land in the area whose size he did not know, with an iron roofed house and iron wall on it on a hill, although he did not know how he acquired it. He stated that rumours of the coming of the Sisters on the land started even before 1974; and when the Bakonjo got this rumour, they were bitter that the Sisters of Tooro were following them up to their (Bukonjo) land. He recalled first seeing the Sisters' houses on the land around 1974 when Kasese District was created; and although by that time he was a parish chief elsewhere in the mountains, he used to come to Rugendabara and saw workers of the Sisters at the houses.

Juma Chance Magonya (DW5) testified that by 1975 only peasants were on the suit land; and he first saw the Banyatereza Sisters there in 1998, and in 1999 and 2003 they constructed houses on it. He stated that he never saw the land being surveyed. More important, he described Bamuloho Ezekiel (DW4) as a respectable and trusted elder in the Rugendabara area. In re-examination, he conceded that he could not recall all the years the various events he talked of, happened. Upon Court examination, he stated that the Sisters have other land there, such as the one their houses are on, which is not claimed by the peasants.

James Bwambale (DW6), the LC1 Chairperson of the area, testified that the Sisters came on the Defendants' land in 1998 when he was already LC1 Chairperson of the area; and although he never saw any surveyor on the land, because the Sisters had a title to the land, the Chief

Administrative Officer allowed them to construct their houses on it; which they did in 1999 and 2003. He recalled that the Chairperson LCIII of the area was prosecuted for burning the Sisters' trees and crops; and also described Bamuloho Ezekiel (DW4), a former chief of the area, as a respectable elder. Eriya Bwambale (DW7) testified that the Sisters came in 1998 and cultivated the land of Ndyanabo. Richard Kyamuhangire (DW8) testified that the Sisters came in 1998 with documents to evict the occupants; and they constructed two houses on John Ndyanabo's land.

The Plaintiffs, for their part, called ten witnesses with a view to counter the evidence adduced by and on behalf of the Defendants. Rev. Fr. Expedite Masereka (PW1), Chancellor, General Secretary, and custodian of the records of Kasese Catholic Diocese, testified that the Diocesan records show that the suit land, comprised in LRV 1520 FOLIO 18 Plot No. 7, measuring 80.5 hectares, and situated at Rugendabara in Busongora County, Kasese District, was registered in the names of the registered trustees (the Plaintiffs), as a lease running for 44 years from 1<sup>st</sup> January 1974. He identified the certificate of title which was admitted in evidence by consent, and marked 'CE1'.

He explained that the land was first registered in the name of John Babiha on 8<sup>th</sup> of December 1986, then in the name of Sister Jane Rose Kaahwa (the General Treasurer of the Banyatereza Sisters then) on the 24<sup>th</sup> of February 1987; after which, on the 27<sup>th</sup> May 1998, Sister N. Agnes (who was Superior General of the Banyatereza Sisters), through her letter, admitted in evidence by consent and marked 'CE2', transferred the land to Kasese Catholic Diocese under whose jurisdiction the land is situated. Accordingly, on 4<sup>th</sup> January 1999, it was registered in name of the Plaintiffs. He recalled that in the 1970s, when he was a Seminarian, he used to pass by the suit land which the Sisters were cultivating, and on which they built a permanent house around 1975 to 1976.

David Henry Langoya, (PW2), a land surveyor, testified that on the 22<sup>nd</sup> December 1975, his boss Mr. Napwoli, the Regional Officer in charge Lands and Surveys, based at Fort Portal, instructed him by letter, admitted in evidence by consent and marked 'CE5', to sub divide Dr. John Babiha's land at Rugendabara into two equal halves; with one half remaining for Dr. John Babiha, and the other for the Banyatereza Sisters. Mr. Napwoli personally took him and showed him the land; and, in the presence of neighbours such as Kassami, he first re-opened the boundary of the land which had mark-stones, then curved out the half Dr. Babiha had given the Sisters, and planted boundary mark stones.

He identified the letter from Mr. Napwoli to the Commissioner of Lands, dated 3<sup>rd</sup> of December 1975 seeking consent for Dr. Babiha to transfer land to Banyatereza Sisters, admitted in evidence by consent and marked 'CE6', as referring to the suit land. At the time he carried out the sub division the Banyatereza Sisters' land was neither occupied nor under any cultivation at all; but the portion that remained for Dr. Babiha had some settlements on part of it. In 1982 he went back with the Bishop and surveyed another piece of land uphill measuring 67.35 hectares, and adjacent to the suit land; and this piece of land was also vacant, with human settlement outside it.

However, this second time he saw banana plantation, a permanent house, eucalyptus, and *buyenje* (boundary trees) on part of the suit land; and some people the bishop was familiar with were cultivating it. Otherwise, there were no other houses on the land. When cross examined, he explained that he curved out the suit land after prior notice had been given to the Parish Chief of Hima called Mr Byetaka, who was in charge of the area, to inform his people of the exercise. The 1<sup>st</sup> Defendant was pointed out to him in Court, but he stated that he was not among those who witnessed the curving out of the suit land in 1975.

When the Court visited the locus he showed Court the positions of the original mark–stones he had planted in 1975, but which had been removed and he had to plant nine new ones on 23<sup>rd</sup> April 2010, on Court directives to open up the boundary of his 1975 survey, in preparation for the Court's then impending visit to the locus. Rev. Sister Stella Mbabazi (PW3) testified that she served on the suit land from 1992 to January 1994, and the late Sister Thereza Rwiya showed her the boundary mark stones; and, with the assistance of Mr. John Baptist Kiiza from the nearby locality, she planted *obuyenje* (boundary trees) all round the land following the boundary.

She stated further that John Baptist Kiiza was head of the laity of Rugendabara Church, as well as her employee; and she allowed him to cultivate the land so as to augment the little she was remunerating him. Later, at John Baptist Kiiza's request, she and Sister Jane Kaahwa allowed eight other people to cultivate the land on the terms that they would pay the Sisters with a portion of their harvests, which John Kiiza collected from them. John Karani (PW4) testified that the Banyatereza Sisters came to the suit land around 1974 and 1975 when it was vacant; and at this time John Kiiza was staying at Nyakabale-Kikongo. Bernard Kagarama (PW6) testified that the Banyatereza Sisters got the suit land from Babiha, his neighbour, in 1975; and there were no people on it.

During the Court's visit to the locus he pointed at the direction of the big hill to the west, behind which he said people were settled when Sisters Theresa and Theodosio first came to the suit land in 1975. Erica Njanju (PW8) testified that the suit land was part of land Nyabongo acquired around 1954 or 1955; and in 1968 Nyabongo gave him a piece of his land which he had occupied since 1961. Around 1971 Nyabongo gave Babiiha another portion. Both his and Babiiha's portions were not occupied by anyone. Around 1974 to 1975, Babiiha gave the Banyatereza Sisters part of his portion, which extended up to the foot of the hills. During Court's visit to the locus, he showed Court the hills outside the suit land, on which some people had settled at the time Nyabongo gave Babiiha his portion of land.

Leonidas Kiwanuka Semakula (PW9) testified that in 1974, at the request of Bishop Magambo, his father Kiwanuka housed Sister Theodosio and 15 girls at their home, to enable them carry out developments on the suit land which Babiiha had given them. In 1975 he witnessed Mr. Langoya curve out the suit land from Babiiha's, and he helped carry boundary plants (*ruyenje*). At the time, the suit land was vacant as people were settled on the hill beyond it. John Bamuhiga (PW10) testified that in 1975, while he was removing trees and anthills from the land of Babiiha with a tractor, a field assistant called Lwanga showed him the suit land which extended up to the hills, as belonging to the Sisters.

To determine the issue of fraud, the status of the suit land at the time the Sisters acquired and took possession of it has to first be established. The Defendants have claimed that they acquired this land by adverse possession from 1964; and were already settled on it at the time the Sisters took possession, and acquired registered title thereto which was later transferred into the names of the Plaintiffs; something which they contend was done behind their backs. This is vehemently contested by the Plaintiffs whose case is that the suit land was owned first by Nyabongo who gave it to Babiiha, who in turn gave it to the Sisters, when it was vacant. Accordingly, I have to consider the relevant law in place at the material time that each side claims to have acquired the suit land.

In 1964, when the Defendants claim to have acquired their respective portions of the suit land by adverse possession, any land that was not held either under freehold, mailo, or lease, was public land vested in the Uganda Land Commission in accordance with the provision of the 1962 Independence Constitution, and the Public Lands Act of the time. If indeed the Defendants were in occupation of the suit land, and the acquisition of the registered title thereto first in the name of Sister Jane Rose Kaahwa, which was later transferred to the Plaintiffs, was done without the

knowledge of the Defendants, then this was not only in breach of the law, but clearly amounted to fraud.

On the other hand, if the Banyatereza Sisters acquired the land from Dr Babiha in 1974, and it was indeed registered land, then it was governed by the Registration of Titles Act in force at the time. The Defendants and their witnesses, except two, gave similar testimonies that the Sisters first came to the land in 1998 after having acquired the registered title to the suit land behind the Defendants' backs, as they did not witness any survey of the land. However their own witness, Bamuloho Ezekiel (DW4), described by Juma Chance Magonya (DW5) and James Bwambale (DW6) as a respectable and trustworthy elder in the Rugendabara area, contradicted the other defence witnesses by stating that when Dr Babiha was vice President of Uganda, he already had land in the area.

This would mean that as of late January 1971, Dr Babiha – who lost his vice Presidency in the military coup of January 1971 – had land at Rugendabara. Therefore, this corroborated the testimony of Erica Njanju (PW8) that Nyabongo gave Babiha land in the area in the early 1970s. Bamuloho Ezekiel (DW4) further testified that around 1974, he frequently came to his land in Rugendabara and used to see the Sisters and their workers on the suit land. Juma Chance Magonya (DW5) also testified that although the Sisters took land which belonged to the peasants, they constructed their present house on land not claimed by anyone; thereby contradicting the other defence witnesses who asserted that the Sisters put up their houses on Ndyanabo's land.

Whereas Bamuloho Ezekiel (DW4) contended that the leaders of the area were not notified of the Sisters' coming on the suit land, he was incompetent to provide any useful evidence regarding notice to the leaders, if such notice was indeed required, because he had already at the time, from his own revelation, been transferred from the area. There was thus no cogent evidence to controvert that of Mr Langoya (PW2) who stated that prior notice had been given to Mr. Byetaka the Parish Chief of Hima who was in charge of the area, to inform his people of the impending survey and curving out exercise. What is important is that his testimony was corroborated by the other Plaintiffs' witnesses and that of defence witness Bamuloho (DW4) that Dr. Babiha owned land in the area, which the suit land formed part of.

Further, he corroborated the testimonies of several of the Plaintiffs' witnesses, and again that of Bamuloho (DW4) that the Sisters first occupied the suit land around 1974. His testimony that he surveyed and curved out the suit land in 1975 was corroborated by a number of official



documents which were admitted in evidence by consent. In a letter dated 10th November 1975 to the Provincial Commissioner Lands and Surveys, Fort Portal, and copied to Rev. Sister Theresa Rwiija of the Banyatereza Sisters, which was admitted in evidence by consent as 'CE11', Dr. J.K. Babiiha made known his intention to transfer to the Abanyatereza Sisters 200 acres of land whose map the Commissioner had supplied him. On the 3rd December 1975, R.N. Napwoli, Provincial Commissioner Western, wrote to the Commissioner of Lands & Surveys, Kampala, his letter headed: 'LRV 731 FOLIO 13 Property 161.0 Hectares at Rugendabara (Formerly Bunvanaabu Toro) Rwenzori District. Proprietor: Dr. I. Babiiha'; which was admitted in evidence by consent as 'CE6', in which he said:

*'Dr. Babiiha intends to transfer 200 acres, being part of the abovelease registered under under Instrument No. 178228, to the Abanyatereza Sisters of P.O. Box 370 Fort Portal, for the purpose of establishing a Post - Primary Girls School, dealing in Agriculture, Poultry and Dairy Farming. The purpose of this letter is to request for permission from you, to go ahead with the sub division of the plot before the lessee submits a formal Request for Transfer of the said part.'*

Then on 22<sup>nd</sup> December 1975, R.N. Napwoli, Provincial Commissioner of Lands & Survey, (Western), issued instructions to David Henry Langoya (PW2) through the standard 'Survey Form 13' of Lands and Surveys Department, and headed: 'INSTRUCTION TO SURVEY' with the sub heading 'Sub division of Dr. Babiiha's plot at Rugendabara, Rwenzori District.', admitted in evidence by consent as 'CE5'; in which he clearly stated as follows:

*'Please mark off and survey 200 acres (80.93h) out of the above plot for the Abanyatereza Sisters of P.O. Box 370 Fort Portal ... A print is enclosed.'*

These three correspondences clearly corroborate the testimony of Bamuloho Ezekiel (DW4) that Dr. Babiiha, while he was vice President, had land in the Rugendabara area; and as well that of Erica Njanju (PW8) that by mid 1970s Dr. Babiiha had land in the Rugendabara area which he gave to the Banyatereza Sisters. The correspondences also corroborate the testimony of David Henry Langoya (PW2) that Dr. Babiiha's land had boundary mark stones; meaning it was registered land. He says that when he was carrying out the sub division, he had first to open the boundary before curving out the half which Dr. Babiiha had given to the Sisters.

It is also true as evidenced by the letter from J. K. Babiiha to the Saza Chief Bunyangabu County, dated 3rd December, 1973, and admitted in evidence by consent as 'CE3', that some

people had encroached onto and occupied his land at Rugendabara, and he had lodged complaint with the authorities. In this letter he states that those 'illegal occupants' had admitted in the presence of the Gombolola Chief Bugoye, Muluka Chief Rugendabara and Hima, and himself, that their occupation of the land was illegal; whereupon the meeting had left it to him to make the final decision on the matter.

It was in this letter that he did so by giving the encroachers up to 31st December that year to harvest their crops, remove their buildings, and vacate his land; otherwise he would take Court action against anyone found still on the land by 1st January 1974. The Defendants' counsel made much capital out of this, both in cross examinations of Plaintiffs' witnesses and in the final submissions, arguing that this was evidence that the suit land was occupied when the Sisters took possession of it. However, two correspondences admitted in evidence by consent have shed clear light on this. By his letter to the Gombolola Chief of Bunyangabu, dated 9th April 1974, admitted in evidence by consent as 'CE9', Dr. J.K. Babiha reported that the encroachers on his land at Rugendabara had vacated it; but that one strong-headed illegal occupant had defied the deadline (harvest period) he had earlier given to the encroachers to vacate the land and instead continued with his '*illegal usage and usufruct*'. He stated further that:

*"I shall be glad if you will trace this constantly troublesome person and cause him to know that there exists authority on this earth as in heaven. Such people think that there is neither law nor government. I am giving copies to District Commissioner Toro, the Regional Surveyor and Land Officer, Fort Portal, and the Permanent Secretary, Ministry of Minerals and Water Resources, to direct what can be done because as a Government Officer in Kampala I have no chance to be in Toro to be grappling with such lawless invaders on my property."*

By his letter of 3rd May 1974, admitted in evidence by consent as 'CE10'. G.W. Bakibinga, Permanent Secretary Ministry of Lands and Water Resources, gave a reply to Dr. Babiha's immediate foregoing letter, and advised him to pursue court action if the matter of encroachment he had complained of could not be settled amicably. Finally, there was the letter from A. B. Ndaboine the County Chief Busongora, Kasese to the Provincial Commissioner of Lands & Surveys Western, copied to Dr. Babiha, the Governor Western Province, and the Sub-County Chief Bugoye, and admitted in evidence by consent as 'CE10', in which he stated as follows:

*"... Physically I have personally with my Sub-County Chief of Bugoye solved the matter concerned, infact no person settled into Dr. Babiha's land, this was confirmed to me by Mr.*

*Idi Ngunule in written that no person has settled in the land. Therefore by the copy of this letter to Dr. J. K. Babiiha is to confirm to him that no person who has settled in his land, except Mr. Idi who is looking after that land with the permission of Dr. Babiiha.”*

These correspondences, looked at together, prove two things; namely that Dr. Babiiha owned land in the Rugendabara area in the early to mid 1970s, and further that the testimony of David Henry Langoya (PW2), corroborated by that of Erica Njanju (PW8), that there were no occupants of the suit land when he surveyed and curved it out in December 1975, but that the settlements were far away outside the fringes of the portion of the land which remained for Dr. Babiiha, is credible. In any case it is manifest, from the correspondences, that before personally taking David Henry Langoya (PW2) to sub divide Dr. Babiiha's land, the Provincial Commissioner Lands and Surveys - Western had to first satisfy himself that the land was indeed free and available.

The other evidence, adverse to that of the Defendants regarding the possible date when they first settled on the suit land, was that of Court witness Nziwa Jonathan (CW1), a forestry officer with 29 years experience; who during the Court's visit to the locus made physical assessments by measurements of various planted trees found on the suit land; and estimated their respective probable age as follows:

- (i) At the Sisters' home, the bigger *mitoma* (*ficus natelensis*) tree situated behind the house was over 25 years; and the smaller one was between 20 to 25 years old.
- (ii) At Kalisa Yostasi's home, the avocado tree was between 10 to 15 years; while the moringa tree was 8 to 10 years old.
- (iii) At Edorona Kyakumwa's home, the acacia was between 25 to 30 years old.
- (iv) At Kyangawa Daniel's home, the *mitoma* (*ficus natelensis*) tree was between 30 to 35 years old; and the mango tree was between 10 to 12 years old.
- (v) At the old homestead of John Baptist Kiiza, the *mitoma* (*ficus natelensis*) tree was between 30 to 35 years old.
- (vi) At Baluku Zaverio's home, coffee (*Grevelli Robusta*) was between 12 to 15 years old; and *mitoma* (*ficus natelensis*) tree was between 30-35 years old.
- (vii) At John Ndyanabo's home, the eucalyptus trees were between 16 to 18 years old; and palm trees between 20 to 25 years old.
- (viii) The *buyenje* (*eurphobia*) trees at the northern border were 15 to 18 years old.

He maintained that there was no planted tree at the locus older than the ones mentioned above. He conceded that there could be a margin of error, and allowance of about five years could be given for the age of the trees, owing to the fact that the area is dry savannah with high temperature and has relatively less rainfall. He was however emphatic, upon Court examination, that none of the trees he had seen at the locus could have been planted in the 1960s. The irresistible and inescapable wonderment then is why at all those who settled on the land in the mid 1960s had to wait until the 1970s and 1980s to plant trees on the land; including boundary trees. It is not farfetched or illogical to associate trees planted on the land in the 1970s with either Dr. Babiha's people, the encroachers he complained against to the authorities, or even the Sisters upon their taking possession of the land.

The other evidence adverse to the Defendants' claim that they occupied the suit land way back in the 1960s was in the judgment of the Court of Kasese, admitted in evidence as consent exhibit 'CE7'. where Bwambale James Muthaka the LC3 Chairperson of the suit area was prosecuted and convicted of having incited people of the area, as recently as 2003, to invade the suit land, which they did; and he proceeded to parcel it out to them. John Ndyababo - DW3 in the present suit, who contends that the Sisters built their house on his land - had admitted in the said criminal case, where he was defence witness, his participation in parceling out the suit land to the people who had been incited to invade it; and in planting the boundary marks thereon.

This clearly accorded with the letter John Baptist Kiiza testified he wrote to the President in 1997 threatening incitement of the cultivators to indulge in acts of violence against the Sisters if their threatened occupation was not halted. It begs the question why in 2003 - some 40 years after they allegedly occupied the suit land - the Defendants were still parceling out to themselves, and planting boundary marks on the suit land. This surely, adversely and conclusively, sealed the matter against them. During the visit to the locus, the Court noticed that the current settlements were all located on the fringes of the land, and the buildings were all non permanent structures. Second, the activities on the land were characterised by seasonal crop cultivation only.

The pattern of settlement on the land and nature of crop cultivated cast grave doubt in Court's mind on the Defendants' contention that they settled on the suit land as far back as 1964; and that they had homes, some of which were allegedly permanent with graves of their loved ones thereon, yet none such permanent building or grave was shown to the Court during its visit to the locus. Furthermore, the Sisters' permanent house on the land was, even to a lay person, manifestly and unmistakably much older than anything that could have been constructed in 1998.

I am persuaded that Dr. Babiiha's land was vacant when David Henry Langoya (PW2) surveyed and curved out the suit land for the Sisters.

From the evidence above, it is clear that Dr. Babiiha's land, part of which he gave the Sisters, was already registered land comprised in 'LRV 731 FOLIO 13 Provertv 161.0 Hectares at Rugendabara (Formerly Bunyangabu Toro) Rwenzori District'. The Defendants' denial of Dr. Babiiha's ownership of land in the area is ill founded; and the contradictory evidence given by their own witness, Ezekhiel Bamuloho (DW4), whom they hold with respect as a trusted elder in the area, settles the matter. I have not found any convincing evidence by or for the Defendants that anyone had proprietary interest in the land adverse to that of Dr Babiiha at the time he gave the suit land to the Sisters.

Since the conveyancing transaction between Dr. John Babiiha and the Banyatereza Sisters was with regard to registered land, there was no need to notify anyone of the process of survey for subdivision, although such notice was in fact given. However, it is apparent that the process of registration of the suit land was not completed before Dr. Babiiha's death; which explains why the title to the suit land, comprised in LRV 1520 Folio 18 Plot No. 7, issued on 8th December 1986 but stated to run from 1st January 1974, and admitted in evidence by consent and marked 'CE1', was first registered in his name posthumously, then eventually in the name of the Plaintiffs; leaving his half to be comprised in Plot No. 8.

The Sisters' title is rooted in that of Dr. Babiiha's from which it was sub divided. Upon taking possession of the land before registering their title the Sisters acquired equitable proprietary interest in it. Since Dr Babiiha died before the Sisters' acquisition of legal interest on the land, Dr. Babiiha's legal interest had, albeit posthumously, first to be reflected on the suit land at the time of registration of the title in 1986 then transferred to the administrator of his estate. The belated registration, and back-dating of the title effective from 1st January 1974, was merely a reflection of the date of the conveyancing by Dr. Babiiha, and acquisition of title by the Sisters.

So was the case with registration of the title in 1987 in the name of Sister Jane Rose Kaahwa (of the Banyatereza Sisters), which belatedly granted legal interest in the land to the Sisters effective from the date of the conveyancing by Dr. Babiiha. The bloody Rwenzurum insurgency of the 1980s certainly disrupted the possession and process of registering the Sisters' title. There is simply no evidence that the belated process of registration of the suit land in various names, culminating in those of the Plaintiffs', was by any means fraudulent or meant to frustrate or

defeat any adverse proprietary interest in the land. Equally there is no evidence that the Plaintiffs had any knowledge or notice of some fraud or defect in Dr. Babiha's title; from which theirs is rooted. Accordingly, I must resolve the first issue in the negative.

**Issue No. 2: Whether or not the Defendants were lawful or bona fide occupants of the suit land.**

The Defendants' contention, which I have exhaustively examined above, is that in 1964 they were ill fated by the ethnic bloodletting that engulfed Tooro, pitting the Batooro against the Bakonjo and Bamba, and forced them to flee from Tooro; following which the Government relocated them and settled them in the area covering the suit land which was not owned or occupied by anyone but was teeming with wild life; wherefrom they acquired their respective portions of the suit land by adverse possession, and have been in possession since. They contended that the Banyatereza Sisters first came on the land in 1998, and forcefully occupied the Defendants' respective lands notwithstanding their several and collective resistance and protests thereto.

John Baptist Kiiza (DW1) who is the first Defendant testified that upon hearing rumours that the Sisters were coming on the land, he himself wrote to the President in 1997 threatening to incite the people to resort to violence if the matter was not taken up since these people who had chased them from their home area were following them to their place of relocation. I have already rejected their contention with regard to occupancy of the suit land before the mid 1970s when the Sisters took possession of it; and instead accepted the Plaintiffs' converse position on the matter.

That however left the question of whether or not after this period the Defendants possibly took possession of the land in a manner that thereby afforded them protection of the law. This is the essence of issue No. 2, and the argument in the alternative by their learned counsel in his final submissions seeking to persuade this Court to find that the Defendants became lawful or bona fide occupants of the suit land by operation of the 1995 Constitution of Uganda. When it was promulgated in 1995, the Constitution of Uganda provided under Article 237 as follows:

*(8) Upon the coming into force of this Constitution and until Parliament enacts an appropriate law under clause (9) of this article, the lawful or bona fide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land.*

- (9) *Within the first two years after the first sitting of Parliament elected under this Constitution, Parliament shall enact a law-*
- (a) *regulating the relationship between the lawful or bona fide occupants of land referred to in clause (8) of this article and the registered owners of that land;*
  - (b) *providing for the acquisition of registrable interest in the land by the occupant.*

Pursuant to this, Parliament enacted the Land Act of 1998 which provided under section 29 as follows:

**29. Meanings of "lawful occupant" and "bona fide occupant".**

- (1) *"Lawful occupant" means-*
  - (a) *a person occupying land by virtue of the repealed-*
    - (i) *Busuulu and Envujo law of 1928;*
    - (ii) *Toro Landlord and Tenant law of 1937;*
    - (iii) *Ankole Landlord and Tenant law of 1937;*
  - (b) *A person who entered the land with the consent of the registered owner, and includes a purchaser; or*
  - (c) *A person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.*
- (2) *'Bona fide occupant' means 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.*
- (3) *In the case of subsection (2) (b)-*

- (a) the Government shall compensate the registered owner whose land has been occupied by persons resettled by the Government or an agent of the Government under the resettlement scheme;*
  - (b) persons resettled on registered land may be enabled to acquire registrable interest in the land on which they are settled; and*
  - (c) the Government shall pay compensation to the registered owner within five years after the coming into force of this Act.*
- (4) For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section.*

The Plaintiffs' several witnesses adduced evidence intended to prove that the Defendants took possession of the suit land in a manner that could not afford them protection under the laws cited above. John Karani (PW4) testified that John Baptist Kiiza was a member of an association called Mpamuse, which cultivated the Sisters' land from around 1976, and one time hired his (PW4's) tractor to till the land. The members of the association, he said, at first had only grass thatched structures on the suit land for shelter against rain and the sun, and for the purpose of chasing birds away from their crops; otherwise they lived outside the land. However, after the Rwenzururu war of around 1982 between the Bakonjo and the Batooro forced the Sisters off the suit land John Kiiza and others came and settled on it.

Sister Stella Mbabazi (PW3) testified that they employed John Kiiza to assist them, and permitted him to cultivate the land so as to augment the little they were paying him. Later, at the request of John Kiiza, she allowed other people from the neighbourhood also to cultivate the land on the terms that they would pay the Sisters' with a portion of their harvest which John Kiiza, who at that time was the head of the laity of Rugendabara church, was responsible for collecting from them. The cultivators were however not allowed to settle on the land; but built grass-thatched structures on it for food storage. When she left the land, no one was making any adverse claim on it.

Masereka Bahja Richard (PW5) testified that in 1986 he bought part of the suit land from John Nyabirembe, but John Baptist Kiiza, who at the time was living at Kikongo, informed him that the land he had bought belonged to the Banyatereza Sisters. Around May that year, John Kiiza together with Sister Stella and another, made him uproot banana stems he had planted on the



land. However, the Sisters allowed him and other people to remain on the land strictly to grow seasonal crops only and to pay the Sisters with part of their harvests collected by John Kiiza who lived in a small grass thatched house on the land as caretaker and, up to 1993, was chairman of the cultivators of the land which he was also cultivating.

He took over from John Kiiza following the latter's removal by the Sisters for his failure to deliver the rental harvests collected from the cultivators; and he collected harvests from John Kiiza as well. John Kiiza had no adverse claim to any part of this land. Those who found him there included Ndyanabo John (5th Defendant) and Baluku Zaverio (6<sup>th</sup> Defendant), from whom he collected the rental harvests until 1998 when he left the area. Ndyanabo Baluku and Mugendera were allowed to settle on the land near the boundary to keep encroachers away after 1988 when John Kiiza was chairman. He identified the writing in exhibit PE1. dated 15th June 1993, as his handwriting; and is a record he made of the rental harvests he collected from cultivators of the land, some of whom are Defendants in this suit.

David Henry Langoya (PW2) testified that when in 1982 he came with the Bishop to survey a second piece of land for the Sisters, some people whom the Bishop was evidently familiar with were cultivating maize and beans on the land he had earlier curved out for the Banyatereza Sisters from Dr. Babiiha's; and on which there was only one house; and this was a permanent one. Bernard Kagarama (PW6) testified that John Baptist Kiiza came on the land when an association called Mпамuse formed by Bishop Magambo was allowed by the Sisters to cultivate the land while paying for it with part of their harvests. The Rwenzururu insurgency broke out in the area in 1982 and disrupted the Sisters' activities on the land. He returned to the area after the war but found that the Sisters had left the land, and it was occupied by those now claiming it.

Sister Restetuta Mbabazi (PW7) testified that she supervised workers on the suit land from January 1993 for 12 years, but she was commuting to the land from elsewhere. When she first went there, people were cultivating short term crops on the land while living outside it; although they were allowed to construct small non-permanent shelters thereon. John Kiiza was supervising the cultivators and collecting part of their harvests for the Sisters up to 1994, when the cultivators rejected him; and elected Richard Bahja from among themselves to take over. John Kiiza reacted by selling off parts of the suit land to cultivators, and misled others not to pay the rental harvests to Richard Bahja.

The Sisters then stopped John Kiiza and the rebel cultivators from using the land; and sued them before the L.C. Court. She (PW7) identified the letter, written in Rutooro, dated 14th November 1995, and admitted in evidence by consent as CE8 (a) with the English version as CE8 (b). which she and others signed, copied to several secular and non secular authorities, giving a general notice to those refusing to pay the rental harvests, and issuing threats of violence against other cultivators and the properties of the Sisters, to vacate the land and remove their crops before the 1<sup>st</sup> August 1995, or else face court action.

Despite this communication, more people made intrusions onto the land in defiance, making adverse claim to it. All this was reported to the police, L.C.I, and Kasese Magistrate's Court. Furthermore, Sister Mary Agnes (the Mother General then) by letter dated 6th of June 1998, admitted in evidence as PE2. attempted to evict the intruders whose ring leaders were John Kiiza, Ndyanabo John, Erisa Black, and Mwiragura Andrea, from the land but allowing only those with crops to come for harvest. The intruders refused to comply with the notice, and instead resorted to destroying the Sisters' trees and properties; which led tonsome of them being prosecuted. Erica Njanju (PW8) testified emphatically that it was the Sisters who brought people on the suit land.

Leonidas Kiwanuka Semakula (PW9) testified that John Kiiza, Black, Mugenyi, Kyangaho, Nziabake and many others he knows only by face, came on the land with the Sisters' permission. The 1982 Rwenzururu uprising forced the Sisters to relocate to Yerya, and their building was de-roofed; and around 1986, John Kiiza started living on the land, and later some of the cultivators stopped paying the rental harvests, and also refused to vacate the land. John Kiiza also constructed a house on the land despite the Sisters objection thereto.

I am persuaded by the evidence adduced on behalf of the Plaintiffs that the Defendants came onto the land by two means. The first was by contractual arrangement by which the cultivators used the suit land and paid for it with a portion of their harvests; but without living on the land although they put up structures thereon to facilitate their use of the land. The second, were those who came onto the land either through wrongful purchase from John Baptist Kiiza or by sheer force of intrusion upon being incited by the LC3 chairman for which he was prosecuted at the Kasese Magistrate's Court. This second category of occupants came onto the land after John Baptist Kiiza the first (Defendant) had fallen out of favour with fellow cultivators and the Sisters had to terminate his services as caretaker of the land and supervisor of the other cultivators.

This alone would explain why it took the Defendants and others up to 2003 to invade the land and parcel out the land to themselves. Owing to my finding that the Defendants either came on the land on the strength of the cultivation contract or wrongfully from around 1994, as being the credible version of events, the only issue of bona fide or lawful occupancy by the Defendants for determination by this Court is with regard to the one based on the contractual arrangements from the period the Sisters took possession of the suit land from Dr. Babiiha, and the one based on the forceful occupancy after 1994.

The contractual arrangement between the Sisters and the cultivators with regard to the suit land was, as is clearly explained in MEGARRY'S MANUAL OF THE LAW OF REAL PROPERTY (6<sup>th</sup> Edition by David J. Hayton), neither a lease nor tenancy which would have accorded the cultivators proprietary interest in the land. It was a mere licence, and was akin to easement which is alternative to and distinct from a lease or tenancy. I can do no better than reproduce what the learned authors stated quite clearly at p. 370; which is that:

*"Traditionally, a licence is a permission given by the occupier of land which, without creating any interest in land, allows the licensee to do some act which would otherwise be a trespass. ... Unlike a lease or tenancy, a licence need not, and usually does not, confer a right to the exclusive possession of the land concerned."*

The arrangement between the Sisters and each of the cultivators in fact created a contractual licence beneficial to both the Sisters as licensor, and each cultivator as licensee. It however, as was pointed out by RUSSEL L.J. in *N.P.B. v. Hastings Car Mart. Ltd. [1964] Ch. 665 at p. 697*, created mere personal obligation on the licensor without conferring any interest in the land for the benefit of the licensee. Even for John Baptist Kiiza who was reported to have been allowed to live on the land as caretaker and supervisor, and Ndyanabo Baluku together with Mugendera who were allowed to settle on the land near the boundary to keep encroachers away after 1988, this did not create any proprietary interest in the land. Despite their settlement on the suit land, as Lord WRIGHT M.R. put it in *Clore v. Theatrical Properties Ltd. [1936] 3 All E.R. 483 at p. 490*, this was contractual license which merely created personal contracts between them and the Sisters, and not proprietary interests.

Admittedly, the learned authors recognise that contractual licences, which may come in all sorts of varieties, can be elevated into property interests by legislation, which could then provide for registration of certain types of contractual licence. However, section 29(4) of the Land Act, reproduced above, expressly bars any licensee from making any adverse claim to the land he or

she is in possession so as to be considered a bona fide or lawful occupant. Similarly those who took possession other than by license were squatters on the land. In explaining the effect of the Limitation Act 1980 of England, which is akin to the provision of our Constitution and Land Act on the matter, the learned authors clarified at p. 529 on the effect of the provision of the law in this regard as follows:

*"... it is not correct to say that the former owner's title is transferred to the 'squatter', i.e. the person who has occupied the land and in whose favour time has run. ... The effect of the Act is not positive but negative; it transfers nothing and merely extinguishes the former owner's claim. A squatter may thus see his title improved as lapse of time successively bars different persons with claims to the land, until ultimately his fee simple is free from rival claims."*

There is however a strong caveat against a general application of the provision of the law. Section 29(2)(a) of the Land Act 1998 requires that an occupant of land seeking to benefit from the provision of bona fide occupant has to prove that he or she had been in such possession for a minimum of 12 years without any challenge to such occupation before the coming into force of the 1995 Constitution. The suit land was, as shown by document admitted in evidence by consent as 'CE6', part of Dr. J. Babiiha's land comprised in 'LRV 731 FOLIO 13, at Rugendabara (Formerly Bunyangabu Toro) Rwenzori District; and which, before the intruders took possession, he had already given the Banyatereza Sisters who by law had acquired equitable proprietary interest in it awaiting acquisition of legal interest by registration.

The persuasive evidence before me is that the Sisters started experiencing problems of squatters on the suit land following the termination of John Baptist Kiiza's position as head licensee with responsibility to collect rental harvests from the other licensees in 1994, which led to his mobilising the otherwise hitherto peaceful licensees and other persons to forcefully take possession of the suit land; and which the Sisters responded to with notices of eviction dated 14th November 1995 admitted in evidence as CE8(a) and CE8(b). and followed by the one of 6th June 1998 admitted in evidence as PE2.

There is absolutely no evidence presented before me that any of the Defendants, or any other persons they could have acquired title from, took possession of the suit land and occupied it for up to 12 years without any challenge. In any case, even if I had found that the occupants had taken possession soon after the break out of the Rwenzururu insurgency of 1982, they would still not have acquired good title merely by proof of adverse possession in the light of the clear evidence that the Sisters were under a disability to challenge this occupation when they were

forced to flee the suit land and their house was deroofed; and they only regained possession of the suit land when the situation normalised.

I have carefully weighed the evidence adduced before me, and I have no doubt that none of the Defendants was either a lawful or bona fide occupant of the suit land within the meanings in the provisions of the Land Act 1998; and accordingly they can not call to their aid any of the provisions of that Act. It therefore follows that, as with the first issue, I have to resolve the second issue too, in the negative.

**Issue No 3: What remedies are available to the parties?**

Counsel for the Plaintiffs conceded his inability to establish mesne profits; but submitted that the Defendants have inconvenienced the beneficiaries, for whom the Plaintiffs have brought this action, for close to 30 years with threats to their lives, and physical torture resulting in mental anguish, which has occasioned considerable loss and damage. Accordingly counsel prayed for an award against the Defendants in the sum of U. shs. 4,000,000/= (Four million only) per Defendant – which would total U. shs. 208,000,000/== (Two hundred and eight million only) – as reasonable damages to atone for this loss. He arrived at this from the comparative sum of U. shs. 2,000,000/= (Two million only) which each of the Defendants pleaded for in their counterclaim as damages for disturbances they allegedly suffered in the hands of the Plaintiffs.

It is my finding that the Sisters started facing problems on the suit land, on account of some of the cultivators defaulting on the contractual license and other encroachers obtaining possession by wrongful purchase from John Baptist Kiiza, around 1995. Unfortunately, no evidence was led to determine how many of the Defendants acted in such actionable manner right from 1995. The other piece of evidence is that the bulk of encroachers were actually incited around 2003 when the suit land was wrongfully parceled out to them; and which earned the LCIII of the area prosecution at the Kasese Magistrate's Court. Owing to this predicament, I consider the year 2003 as the convenient cut-off point in time for the disentitlement of the Sisters from the suit land.

Because the Defendants wrongfully benefitted from the suit land over the years to the detriment of the Sisters; and this, coupled with the mental torture, fear of the very probable physical harm the Sisters have suffered, and being denied the right to use the land, the Plaintiffs are entitled to an award of general damages. The mental torture and fear of physical harm was underscored by the utterances by the Defendants that the Banyatereza Sisters from Tooro had followed them up

to their land in Bukonjo; yet they were forced to flee Tooro as victims of the ethnic cleansing that earlier engulfed Tooro. Indeed ethnic hate-campaign was the flame the Defendants used to wrongfully take possession of the suit land.

This was most unfortunate in the light of the self evident fact that the Order of the Banyatereza Sisters is a non-tribal religious organisation whose very basis for existence is the indiscriminate noble pursuit of uplifting society's spiritual and worldly wellbeing. I consider that in the circumstance, the sum of U. shs. 3,000,000/= (Three million only), per Defendant, which totals U. shs. 156,000,000/= (One hundred and fifty six million only) is reasonable general damages to atone for all the heads of loss suffered by the Plaintiffs. However John Baptist Kiiza unmistakably stood out as the chief villain who, in reaction to his loss of place as caretaker of the suit land and supervisor of the cultivators, incited them and instigated their rebellion against the Sisters and the wrongful dispossession of the Sisters.

He was not only the mastermind, but a direct beneficiary of the scheme to dispossess the Banyatereza Sisters of the suit land, as he took it upon himself to sell the suit land to others in the neighbourhood; thereby wrongfully enriching himself. In the pursuit of his evil enterprise, he was bold enough to communicate his avowed intention - born of nothing else but ethnic hatred – to the highest office in the Republic – that of the President, with apparent impunity. When such beastliness rears its head as has been shown here, it must be met with the strongest counteraction. The tragedy of Rwanda, born of the seeds of ethnic hatred is too recent in our collective memory. Therefore, unlike for the other Defendants, John Baptist Kiiza's case certainly attracts an award of punitive damages on top of the general damages awarded against all of them.

I therefore order him to pay the Plaintiffs the further sum of U. shs. 2,000,000/= (Two million only) as punitive damages for his wanton act. Society must rest assured that the Courts of judicature will not waver in their duty to protect the sanctity of property rights, and other rights, which is well enshrined in our Constitution. Accordingly, I make the following orders:

- (i) The Plaintiffs' suit is allowed.
- (ii) The Defendants' counterclaim is dismissed.
- (iii) The Defendants shall each pay the Plaintiffs the sum of U. shs. 3,000,000/= (Three million only) as general damages for the loss the Plaintiffs have suffered.
- (iv) The 1<sup>st</sup> Defendant (John Baptist Kiiza) shall pay the plaintiffs the further sum of U. shs. 2,000,000/= (Two million only) as punitive damages.

- (v) An order of eviction hereby issues against each and all of the Defendants to vacate the suit land forthwith.
- (vi) An order of permanent injunction hereby issues restraining each and all of the Defendants from any further encroachment, use, or occupation of the suit land.
- (vii) The Plaintiffs are awarded costs of the suit, and of the counterclaim.
- (viii) The damages and costs shall attract interest at Court rate from the date of this judgment.

**Alfonse Chigamoy Owiny – Dollo**

**JUDGE**

**23 – 05 – 2011**