

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**

**CIVIL APPEAL NO. 084 OF 2012**

**NALONGO NALWOGA NAKAZI**

..... **APPELLANT**

**VERSUS**

**SALONGO KESI BAGALAALIWO .....**  
**RESPONDENT**

*(Arising from Luwero Chief Magistrates Court Civil Suit No. 044 of 2011)*

**Hon. Lady Justice Monica K. Mugenyi**

**Judgment**

The respondent claims to have been a bonafide occupant of the suit premises, having lived thereon since 1960 and developed the land. In 2006 the appellant allegedly entered onto the respondent's land claiming to be the registered proprietor thereof, built a structure thereon and threatened to evict the respondent from his kibanja. The appellant, on the other hand, denies harassing or intimidating the respondent and contends that the piece of land she occupied was not part of the respondent's land but was allegedly inherited by her from her grandmother, one Nakazi (deceased), following her installation as the latter's customary heir. The appellant further contends that the appellant acquired the suit land unlawfully without the consent of the landlord. The respondent successfully sued the appellant for trespass, hence the present appeal.

The memorandum of appeal spelt out the following grounds of appeal:

- 1. The learned trial magistrate's judgment and orders were bad in law and against the weight of the evidence.**

2. **The learned trial magistrate erred in law and fact when she held that the appellant was a trespasser on the suit land.**
3. **The learned trial magistrate erred in law and fact when she held that the respondent was the lawful owner of the suit land and the property therein.**
4. **The learned trial magistrate failed to evaluate the evidence before her and came to a wrong conclusion.**

At the hearing of the appeal Mr. Abubaker Sebbanja represented the appellant while the respondent was represented by Ms. Faridah Nabakiibi. Addressing ground 3 hereof, Mr. Sebbanja argued that whereas the appellant had attested to having acquired the suit land by inheritance as customary heir to Nakkazi, the respondent failed to produce either a sale agreement or busuulu tickets to validate his alleged ownership of the same land and the witnesses that testified in support of his claims were not truthful. Learned counsel referred this court to the case of **Gilbert Kigozi Mayambala vs. Joseph Sentamu & Another (1987) HCB 68** (High Court) in support of the proposition that **'once a party is in actual possession of a part of the land and it is proved that he owns some of it, there would be a presumption of ownership of the whole in the absence of proof to the contrary.'** With regard to grounds 1, 2 and 4 of the appeal, Mr. Sebbanja argued that the trial magistrate was wrong to have relied on the evidence of the respondent's witnesses to decide that the appellant was a trespasser on the suit land yet their evidence had been discredited during the visit to *locus in quo*. Counsel cited the definition of trespass in the case of **Justine E. M. N. Lutaaya vs. Stirling Civil Engineering Company Ltd Civil Appeal No. 11 of 2002** (unreported) in support of his contention that the appellant was not a trespasser to the suit land as had been held.

On her part, learned counsel for the respondent urged this court to uphold the judgment of the trial court and dismiss the appeal. With regard to ground 3 of the appeal, Ms. Nabakiibi reproduced the evidence adduced in support of the respondent before the trial court, arguing that it was consistent and well corroborated, and discredited the appellant's evidence that she had been in occupation of the suit premises for 12 years. Learned counsel faulted the appellant's evidence for being untruthful and inconsistent, and falling short on proof that the appellant was a lawful occupant of or owned the suit land. It was counsel's contention that the case of **Gilbert Kigozi Mayambala vs. Joseph Sentamu & Another** (supra) did not apply to the present appeal given that the appellant had not

established her alleged ownership of the suit land. Citing the definition of trespass in Mukiibi, Moses, '**A handbook for practicing advocates and judicial officers**', 2010, and the cases of **Justine E. M. N. Lutaaya vs. Stirling Civil Engineering Company Ltd** (supra) and **Sheikh Mohammed Lubowa vs. Kitara Enterprises Ltd Civil Appeal No. 4 of 1987**; Ms. Nabakiibi argued that the evidence before the trial court clearly established the appellant as a trespasser on the suit land and negated the appellant's claim that she was a kibanja holder on the same land. Finally, learned counsel supported the findings of the trial magistrate and submitted that she had evaluated the evidence before her properly.

It is well settled law that a first appellate court is under a duty to re-evaluate the evidence on record and arrive at its own independent conclusion. See **J. Muluta vs S. Katama Civil Appeal No.11 of 1999 (SC)**. This would address the fourth ground of this appeal. It is also well settled law that an appellate court will always be loath to interfere with a finding of fact arrived at by a trial court and will only do so when, after taking into account that it has not had the advantage of studying the demeanour of the witnesses, it comes to the conclusion that the trial court is plainly wrong. See **Kasifa Namusisi & Others vs Francis M.K. Ntabaazi Civil Appeal No. 4 of 2005 (SC)**, **Jiwan Vs Gohil (1948) 15 EACA 36** and **R.G.Patel Vs Lalji Makaiji (1957) EA 314**. This court takes due cognition of these rules of procedure. I propose to address the second and third grounds of appeal concurrently as follows: *The learned trial magistrate erred in law and fact when she held that the respondent was the lawful owner of the suit land and the property therein, and the appellant was a trespasser on the said land.*

It was stated in the plaint that the respondent came into occupation of the kibanja in issue in 1960, and had since occupied it with his family, developed it and buried relatives on it. On that premise the respondent claimed to be a bona fide occupant of the suit premises clothed with the rights prescribed under article 137(8) of the Uganda Constitution. In his evidence, however, he attested to having purchased the suit land from Dassan Iga in 1960 but the sale agreement had got burnt during the war in the 1985. This piece of evidence was materially corroborated by PW2, the respondent's wife. The respondent did also attest to having had *busuulu* tickets but did not produce them before the trial court. Conversely, the appellant testified that she first visited the land she occupied in 2001 at the prompting of her deceased grandmother's spirit; returned there in 2002 and 2005; on one of those visits she was referred to the LC Chairman by the

respondent, and she finally built a house on that land in 2007. It was the appellant's evidence that the land she occupied was on a hill far away from the respondent's home; it was the respondent that had trespassed onto her grandmother's land, and he later attempted to rape her and have her killed. The appellant testified that the respondent had neither proved his alleged purchase of the suit land nor that he secured the consent of the (mailo) land lord to occupy the said land.

Before I consider the question of ownership I think it is necessary to address the apparent discordance between the respondent's pleadings and his evidence. Order 6 rule 1(1) of the CPR states that '**every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be.**' In the case of **Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139** it was held:

**"The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent."**

In the case of **Uganda Breweries Ltd vs. Uganda Railways Civil Appeal No.6 of 2001** where the court was faced with evidence that contradicted the pleadings, Oder JSC addressed the issue as follows:

**"To my mind the questions for decision under ground 2(i) of the appeal appears to be whether the party complaining had fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining (in the instant case the appellant); or whether the departure was a mere irregularity, not fatal to the case of the respondent whose evidence departed from its pleadings."**

Referring to his earlier decision in **Interfreight Forwarders (U) Ltd vs. East African Development Bank Civil Appeal No. 33 of 1993** (unreported), his lordship held:

**"In Interfreight Forwarders (U) Ltd (supra) the cause of action as stated in the plaint and reflected in the issues framed by the party at trial was negligence. But the learned trial judge erred when he found in the alternative that the respondent was liable**

**on a different cause of action namely, as a common carrier, which puts strict liability on the carrier for any change or loss to goods he accepts to carry. This court upheld the ground of appeal complaining against the trial judge's finding to that effect on the ground that the cause of action proved was a complete departure from what had been pleaded by the respondent." (emphasis mine)**

From the foregoing, it seems to me that departure from the cause of action outlined in pleadings would constitute a departure from the pleadings and not mere irregularity in so far as it negates the opposite party's right to have fair notice and full information of the case against him or her. In the instant case the cause of action was trespass to land. That cause of action was premised on the respondent's interest in the land. In my considered view, the circumstances underlying an alleged interest in land would constitute 'material facts on which the party pleading relies for a claim or defence' as prescribed in Order 6 rule 1(1) of the CPR. In the instant case the alleged purchase of the disputed kibanja goes to proof of ownership of the kibanja and, therefore, would have been a material fact that should have been included in the plaint as prescribed in that rule. More importantly, it seems to me that an interest in land grounded in bonafide occupancy as was pleaded by the respondent herein raises entirely different legal issues than one premised on a legal purchase of such land. The purchase of land, if proven, raises connotations of lawful occupancy while bonafide occupancy entails an entirely different set of parameters as set out in Section 29(2) of the Land Act. I therefore find that the respondent's evidence on the alleged purchase of the suit land constituted a departure from his pleadings. Consequently, this court shall not consider it as it determines the present question of the respective parties' interest in the suit land and trespass.

I now revert to a determination of the ownership of the suit land. It was common ground in the present appeal that the suit land was a kibanja. The parties addressed the suit land as such in their pleadings and evidence. They did have the benefit of legal representation at trial therefore it cannot be suggested that the term kibanja was applied in any other context but its strict legal sense. Bibanja holdings are not recognised as such either by the Uganda Constitution, 1995 or the Land Act. The four land tenures that are recognised by both these laws are customary, freehold, mailo and leasehold tenure systems. Nonetheless, historically bibanja holders in Buganda were recognised as peasants who had settled on the land as customary tenants with the consent of the mailo land owner, and such land holding was

regulated by the Busuulu and Envujjo Law, 1928. See **Mugambwa, John T., 'Principles of Land Law in Uganda', Fountain Publishers, 2006 reprint, p.2.** This form of land holding is recognised under section 29(1)(a) (i) of the Land Act, and persons holding land as such are acknowledged as lawful occupants under that legal provision.

In the instant case, however, the respondent claimed to have been a bonafide occupant of the suit premises, having lived thereon since 1960. He testified that he had built a permanent house on the land and tilled the land since he occupied it. The respondent further testified that he had enjoyed quiet possession of his kibanja until 2009 when the appellant claimed to be the registered proprietor of a portion thereof. It was the respondent's evidence that the appellant had initially occupied a school in a forest called Nakazi, and later his neighbour's kibanja but upon being chased away from both pieces of land she trespassed onto the end of his kibanja. The respondent's evidence was materially corroborated by PW2, PW3 and PW5. PW2 attested to having lived with the respondent on the kibanja since 1960; PW3, the respondent's neighbour, attested to having seen the respondent on the suit land since 1969, while PW5 attested to the appellant having attempted to settle onto Kyegomba School land but, upon being sent away therefrom, she settled on the respondent's kibanja. The appellant's evidence did not rebut the respondent's evidence on the question of his uninterrupted occupation of his kibanja since 1960. The gist of her evidence was that when she first visited Luweero in 2001 she was informed that her grandmother's palace used to be where a school was presently located; the school was located in a forest on a hill; the respondent had told her that nobody owned a kibanja on the hill; the respondent's home was far away from the hill, and it was the respondent (not herself) that had trespassed onto her grandmother's land. The appellant's evidence did make reference to her occupation of the school in the forest as attested to by the respondent, but was not explicit on her occupation of the neighbouring kibanja or of the respondent's own kibanja. She did testify, though, that she had built a house on the disputed piece of land in the presence of the respondent and with the help of two of his sons. This court's reconstruction of the evidence on record is that the appellant initially settled on school land in a forest on a hill far away from the respondent's kibanja but subsequently relocated to his kibanja on the premise that it belonged to her deceased grandmother and the respondent was a trespasser thereon. Therefore it seems clear to me that the appellant did enter onto land that otherwise was known to belong to the respondent.

Section 29(2) of the Land Act defines a bonafide occupant of land to include a person who, before the coming into force of the Constitution, had occupied and utilised or developed any land unchallenged by the registered owner or agent thereof for a period of twelve years or more. From the evidence on record, undoubtedly the respondent has occupied, developed and utilised his kibanja continuously and unchallenged since 1960. The only challenge to his occupation thereof came from the appellant well after 1995 when the Constitution came into force. I am satisfied, therefore, that the respondent was a bonafide occupant of his kibanja. I so hold.

As a bonafide occupant the respondent cannot be considered a trespasser on his own land as was alleged by the appellant. Nonetheless, the appellant's alleged trespass onto the respondent's land is a question of fact that must also be satisfactorily established. The law on trespass to land was aptly stated in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)** as follows:

**“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass.”**

Citing with approval the case of **Wuta-Ofei v Danquah (1961) 3 All E.R.596 at p.600**, his lordship held that for purposes of the rule cited in **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company** (supra) above, possession did not mean physical occupation; rather, the slightest amount of possession would suffice.

Having found that the respondent was a bonafide occupant of the kibanja in issue it follows that he was in lawful possession thereof with a right to sue for trespass against anyone that made an unlawful entry on the land and thus portended to interfere with his lawful occupation. The evidence on record did also establish that he had been in actual possession of the said kibanja, tilling and planting crops thereon. The question then is whether or not the appellants did, in fact, trespass onto the respondent's land. I am acutely aware that the boundaries of the respondent's kibanja were not attested to by any witness. PW1, the respondent simply testified that his

kibanja went as far as ‘where his garden stops.’ All the witnesses who testified in support of the respondent simply stated that the appellant trespassed onto his known land. In addition to the oral evidence adduced at the trial the trial court did visit the locus in quo presumably to verify this very matter. At the locus in quo 2 additional witnesses testified in support of the respondent. They all attested to the respondent having been in occupation of the kibanja. On her part, the appellant did not produce any witnesses, stating that she disagreed with most potential witnesses politically while others were also in occupation of the same land.

Visits to loci in quo are provided for by the **Practice Direction on the issue of orders relating to registered land which affect or impact on tenants by occupancy, Practice Direction No. 1 of 2007**. Guideline 3 of the Practice Direction provides as follows on visits to *locus in quo*:

**“During the hearing of land disputes the court should take interest in visiting the locus in quo, and while there:**

- (a) Ensure that all parties, their witnesses, and advocates (if any) are present.**
- (b) Allow the parties and their witnesses to adduce evidence at the *locus in quo*.**
- (c) Allow cross-examination by either party or his/ her counsel.**
- (d) Record all the proceedings at the locus in quo.**
- (e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.”**

Guidelines 3(a), (b) and (c) would appear to provide for persons that have already testified at trial to substantiate their evidence at locus quo and be subjected to cross examination. They therefore pertain to trial witnesses. To that extent the Practice Direction No. 1 of 2007 reiterates prior-established practice for visits of loci in quo as stated in the case of **Yeseri Waibi vs. Elisa Lusi Byandala (1982) HCB 28 at 29**. In that case it was held that ‘**the usual practice of visits to locus in quo was to check on the evidence given by witnesses.**’ Manyindo J. (as he then was) then outlined the procedure at visits to loci in quo thus:

**“The trial judge or magistrate should make a note of what takes place at the locus in quo and if a witness points out any place or demonstrates any movement to the court, then the witness**



**should be recalled by the court and give evidence of what occurred. Fernandes vs. Noronha (1967) EA 506 applied.**

Guideline 3(e) of Practice Direction No. 1 of 2007, on the other hand, mandates courts to form their own opinions or conclusions from observations made and/ or additional evidence adduced by trial witnesses.

In the present appeal the persons that provided information at the *locus in quo* were not witnesses in the main trial. This was an error on the part of the trial magistrate. However, in my judgment the error did not occasion a miscarriage of justice for reasons I shall explain below. It is, in my considered view, debatable how effective the visit to *locus in quo* could have been in the present case. As spelt out in its long title, Practice Direction No. 1 of 2007 pertains to orders in respect of registered land viz a viz tenants by occupancy. It seems to me that under the said Practice Direction trial judges or magistrates are enjoined to visit *locus in quo* before issuing orders that might *inter alia* negate the security of occupancy for tenants by occupancy on registered land that is provided to them under section 31(1) of the Land Act (as amended). Tenants by occupancy are defined in section 1(dd) of the Land Act to include bonafide and lawful occupants on registered land as recognised under section 31 of the same Act. In the instant case, to the extent that this court has found the respondent to have been a bonafide occupant on the suit kibanja, the above Practice Directions might have been applicable but for the absence of evidence before the trial court that the said kibanja was, in fact, situated on registered land. This court cannot presume that this was the case. In the premises, I find that the procedural error at the visit to *locus in quo* herein did not occasion a miscarriage of justice as such visit was inapplicable to the circumstances of this case.

In the instant case both parties were not registered proprietors of the land in question; rather, each sought to have a superior kibanja interest in the disputed land than the other. The appellant claimed to have inherited the said land as customary heir of her deceased grandmother but the uncontroverted evidence on record clearly depicted a claimant that had no idea where the land allegedly bequeathed to her was located, initially settling on 2 different pieces of land before relocating onto the respondent's kibanja. In her own evidence, the appellant claimed that it was the respondent that had trespassed onto her grandmother's land before, in what seemed like an alternative attestation, stating that she had built her house on the disputed land in the respondent's presence and with assistance

from his sons. In my considered view, this evidence establishes that the appellant did indeed purport to settle onto the respondent's know kibanja. It is in tandem with the evidence of the respondent and PW5 that the attempted to settle on Kyegomba School's land and, upon being sent away from that land, resorted to the respondent's kibanja. I am, therefore, satisfied that the appellant trespassed onto the respondent's land and do so hold. Consequently, I would dismiss the second and third grounds of appeal.

Having so found, I cannot fault the trial magistrate's evaluation of the evidence, neither would I agree with the notion that her judgment and orders premised on such evaluation are bad in law. Accordingly, the first and fourth grounds of this appeal do also fail.

In the result, I would dismiss this appeal with costs in this and the lower Court to the respondent.

**Monica K. Mugenyi**

**Judge**

24<sup>th</sup> October, 2014