THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO.20 OF 2018

(ARISING FROM CIVIL SUIT NO.0172 OF 2010)

THE REGISTERED TRUSTEES OF

KAMPALA ARCHDIOCESE::APPELLANT

VERSUS

1. **PASTOR OSBORNE MUYANJA**
2. **DAN MULINDA::RESPONDENTS**

Before: Hon. Lady Justice Alexandra Nkonge

Judgment.

This appeal originates from the judgment and orders of ***Her Worship Mary Kisakye Lukwago*** the Chief Magistrate in the Chief Magistrates Court of Entebbe at Entebbe, dated *15th December, 2017.*

Facts in brief:

The facts of this case are that the appellant sued the respondents jointly alleging that the respondents had trespassed on land comprised in ***FRV 38 Folio 10 land at Kakindu*** *(hereinafter referred to as the "suit land");* and sought declaration that the defendants are trespassers thereon and were dealing with the land illegally; general damages for trespass; a permanent injunction; as well as costs for the suit.

The Registered Trustees of Kampala Archdiocese (the church) claimed to be the registered proprietor of the suit land, measuring approximately 594.82 acres, having inherited the same from the Registered Trustees of Mission of the White Sisters.

That it was discovered that the respondents had trespassed on the suit land in 2008 and that they had unlawfully curved out approximately 150 acres of the land which they had occupied and started developing, without its consent.

In their joint written statement of defence, the 1st respondent, Pastor Osborne Muyanja pleaded that he lawfully and equitably owns and occupies the suit land, having purchased *bibanja*

interests between 1997 and 2008, from different holders who had occupied and lived on the land for many years.

The 2nd respondent, Mr. Dan Mulinda pleaded that he is a lawful and *bonafide* occupant, having lived on the land since 1982, when he purchased the same.

Three issues at trial had to be resolved:

1. ***Whether the 1st defendant lawfully acquired interest in the suit land.***

2. ***Whether the 2nd defendant is a lawful/bonafide occupant.***

3. ***Remedies available to the parties.***

The learned trial magistrate in her judgment found that the 1st and 2nd respondents were *bonafide* occupants, lawfully occupying the property on the plaintiff's land and that they were not trespassers. The suit was accordingly dismissed with costs.

The appellant being dissatisfied with the judgment of the trial magistrate, appealed to this court raising seven grounds of appeal in the memorandum of appeal, namely;

1. ***The learned trial magistrate erred in law and fact when she came to a conclusion not supported by evidence on record that the vendors to the respondents had been in long occupation and utilized the suit land unchallenged by the appellant for 12 years before the coming into force of the Constitution and found them to be bonafide occupants.***

2. ***The learned trial magistrate erred in law and fact when she held that the Land Reform Decree of 1975 had been rendered redundant by the 1995 Constitution and was inapplicable to the transactions entered into between 1997 and 2nd May, 1998.***

3. ***The learned trial magistrate misdirected herself on the requirement of the law when she upheld the transactions that took place between 1998 and 2008 ignoring evidence on the record that they were not consented to by the appellant.***

4. ***The learned trial magistrate erred in law and fact when she came to a conclusion that the appellant's claim was partially barred by limitation.***

5. ***The learned trial magistrate erred in law and fact when she admitted unto the record of proceedings testimonies of strangers found at the locus and relied on them to find that the respondents are bonafide occupants on the land.***

6. ***The learned trial magistrate erred in law and fact when she concluded that the allocation of land to the church workers by the church's agent amounted to bibanja despite evidence on the record being consistent with their being licensees.***

7. ***The learned trial magistrate erred in law and fact when she failed to properly evaluate evidence and came to the conclusion that the vendors were church workers who had been allocated that land.***

Representation:

The appellant was represented by ***M/s Mayiga-Buwule & Co. Advocates*** while the respondents were represented by ***M/s Mudawa & Kyogula Advocates.***

Both learned counsel filed written submissions to argue their points.

Duty of this court.

As the first appellate court, the duty of this court is to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. ***See: Father Nanensio Begumisa & 3 others vs Eric Tiberaga SCCA 17 OF 2000 [2004] KALR 236.***

The first appellate court does re-evaluation on record of the trial court as a whole weighing each party's evidence, keeping in mind that an appellate court, unlike the trial magistrate had no chance of seeing and hearing the witnesses while they testified, therefore this court had no benefit of assessing the demeanor of the witnesses. ***See: Uganda Breweries v Uganda Railways Corporation 2002 E.A***

The evaluation of evidence must be approached as a whole. Court ought not to consider the plaintiff's story in isolation of the defendant's story before it finally decides on the balance of probabilities, which of the two to believe.

Ground 5: The learned trial magistrate erred in law and fact when she admitted unto the record of proceedings testimonies of strangers found at the locus and relied on them to find that the respondents are bonafide occupants on the land.

Before dealing with the merits of this appeal, I will consider first the matter raised by the appellant's counsel concerning the three court witnesses ***CW1, CW2, CW3*** who gave their

testimonies during the *locus* visit, but who were strangers to the proceedings under the main suit. According to him the calling of witnesses by the court at *locus* who had not testified at the trial was a violation of the ***Practice Directions No. 1 of 2007.*** That the learned trial magistrate had erred in law and fact when she relied on those testimonies to find that the respondents are *bonafide* occupants on the land.

Counsel for the respondents however argued in response that each witness had taken oath before giving evidence and that each side had given their accounts.

CW1, CW2 and CW3 were court witnesses who offered some guidance to court and each counsel cross examined the witnesses. Counsel at that point never raised any objection to the procedure which in any case, did not occasion any miscarriage of justice. Thus to expunge that evidence would be to uphold technicalities against delivery of substantive justice, contrary to the spirit of ***article 126 (e) of the Constitution.***

Resolution of this ground:

The purpose of visiting the *locus in quo* in a nutshell shell, is essentially to clarify on evidence already in court, thereby enabling the trial court to understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and testing the evidence on those points only.

It is a point to observe that the practice of visiting the *locus in quo* is to check on the evidence by the witnesses and not to fill in gaps in their evidence for them, lest court may run the risk of turning itself into a witness in the case. (***Fernades v Noroniha [1969] EA 506 & Nsibambi v Nankya [1980] HCB 81***).

That being said, although it is not mandatory in all cases for court to visit the *locus in quo,* during the hearing of land disputes, the trial court is under obligation to not only conduct the visit but also take keen interest in the proceedings.(***See: Practice Direction No.1 of 2007 by the Chief Justice).***

It is therefore pertinent that whatever transpires at the *locus in quo* must be recorded as part of the proceedings in the case, with a specific caution that the evidence at the *locus in quo* cannot be a substitute of evidence already on the record. It can only supplement, as it cannot be considered in isolation from the existing evidence recorded in court.

Although court is not allowed to accept testimonies of witnesses that did not testify in court at locus, it may consider witnesses who did not testify at court either due to old age, physical inability or being out of the country by the time of hearing in court; or any of those whom it

might deem relevant to help in resolving the dispute in a fair manner. These too are subject to cross examination, just like the rest who testified in court. ***See: Civil Appeal no.65 of 2017 Uzia Bweya v Bagheizi Zimonia.***

In the instant case the record of what transpired during the visit to the *locus in quo* was properly recorded and whichever witness testified at the *locus* was not only cross examined by advocates on both sides but also testified on oath.

There had been no departure or variance with the testimonies given on either side by the parties in court and in any case, there was nothing to show that the trial magistrate did solely rely on the proceedings at the *locus in quo.*

Since I find that there was no miscarriage of justice occasioned, I have no basis to fault the decision of court to allow such evidence at the *locus in quo.* The fifth ground therefore fails.

I will now jointly deal with ***grounds: 1,2,3,6,7.***

Analysis of the law and evidence:

Trespass to land, according to ***Salmon & Huston on the Law of Torts 19th edition,*** occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land.

In the case of ***Justine E.M.N Lutaaya vs Starling Civil Engineering Co. S.C.C.A No.11 of 2002*** trespass is premised upon interference with the possession of land. Needless to say, the tort is committed not against the land but against the person who is in actual r constructive possession of the land.

Since trespass is a continuous tort, every new action is a new cause of action, which therefore rules out the question of being time barred. ***(Lucy Nakitto vs Senyonga & Anor HCCS No. 170 of 2005).***

Actions for recovery of land on the other hand are essentially a claim for an out of possession claimant asserting his or her title or ownership. It is founded on a special form of trespass based upon a wrongful dispossession. It is an action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his title.

Thus in the case of ***Odyek Alex & Anor v Gena Yokonani Civil Appeal No.9 of 2017,*** the appellants' claim was for trespass and a declaration of ownership among others. The court observed that the suit was for all intents and purposes an action for recovery of land which the appellants claimed they had been unlawfully deprived of.

Court further observed that it did not matter that they named part of the action as trespass to land instead of recovery of land. That the court will consider the essence of action rather than the nomenclature adopted by the parties and that the essence of the claim was recovery of land and not trespass.

I find it pertinent to adopt the same approach in the instant case.

Contrary to the trial's finding, a cause of action is not determined by the relief sought. It was therefore erroneous for the trial court to conclude that once the consequential remedy against a trespasser is eviction, the action is for recovery of land, and as such time barred by limitation.

The objection, as duly noted was in any case not raised in the pleadings. I could not agree more that limitation would not apply to trespass but in respect of recovery of land, as stated ***section 3 of the Limitation Act.***

The law:

The principle under ***section 101 of the Evidence Act, Cap. 6*** is that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

It lies with the plaintiff who has to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. ***(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.)***

A *certificate* of title is conclusive evidence of title and takes priority over any adverse claims. By virtue of ***section 176 of the Registration of Titles Act, Cap 230 (RTA),*** save for fraud, it is an absolute bar and estoppel to an action of ejectment or recovery of any land. (***Refer also S. 64 (1) RTA).***

The general principle is that in order for a party to claim interest in the land, his title ought to be derived from someone who had a recognized right and title on land. (***Godfrey Ojwang Vs. Wilson Bagonza CA No. 25 of 2002).*** A lawful or *bonafide occupant,* as well as a customary tenant holds an equitable and therefore each has protectable interest accorded to him/her by law.

Section 29(1) defines a *lawful occupant* to include a person occupying land by virtue of the repealed ***Busuulu and Envujjo law of 1928.*** It also includes a person who entered land with consent of the registered owner and includes a purchaser.

Under ***subsection (2),*** thereof a *bonafide* occupant includes a person who before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for 12 years or more.

In relation to customary tenancy, the court in ***Kampala District Land Board & George Mutale vs. Venansio Babweyala & Ors (SCCA 2/07),*** held that a customary tenancy must be proved by long occupation, recognition of the owner of the reversion or landlord (and vice versa) and payment of ground in the case of land in Buganda, and in some instances payment of a type of land tax or rent.

Where however a person develops or utilizes the land unchallenged equity would come in to infer acquiescence on the part of the registered owner. The conclusion arrived at by the trial court in this case was that the church as the registered owner had acquiesced to the continued stay of the occupants on that land, several of them having been employed by it.

With the enactment of the ***Land Act, Cap.227*** in 1998 however, the law came out clearly not only to protect the equitable interests acquired prior to but also after the passing of the 1995 Constitution, making consent prior to any transaction therefore in principle a mandatory requirement.

Specifically, ***section 34 of the Land Act*** governs transactions with tenants by occupancy. It provides that prior to undertaking any transaction to which *subsection (1)* refers, the tenant by occupancy shall submit an application in the prescribed form to the owner of the land for his consent to the transaction.

Further still, ***Section 34 (9)*** provides that:

> ***"No transaction to which this section applied shall be valid and effective to pass any interest in land if it is undertaken without the consent as provided for in this section and the recorder shall not make any entry on the of any such transaction in respect of which there is no consent."***

In addition, ***section 35*** gives the first option to assign the tenancy to the tenant by occupancy or the registered owner, as the case may be. As noted earlier, the enforcement of these provisions began in 1998, following the enactment of ***the Land Act.*** I will relate all the above principles of law to the evidence on record.

Analysis of the evidence.

The plaintiff/appellant's evidence:

Counsel for the appellant's point of contention was that nowhere did the evidence of Mutyaba John put a time frame when any of the vendors came on that land, to support the conclusion that they were on the land years before the coming into force of the Constitution and therefore qualify to be *bona fide* occupants.

Evidence of Pastor Muyanja could not establish when the vendors acquired their respective holdings which he claimed to have purchased. Indeed the agreements of purchase were silent on the period when the vendors acquired their interests.

That none of the above witnesses supported the conclusion of court that the vendors occupied and utilized the suit land in the 1970s. Counsel therefore faulted court for shifting the burden to the church to prove that the vendors had occupied and utilized the land for 12 years or more before the Constitution.

The respondents on their part through the submissions of their counsel argued that the evidence on record proved that each of those who sold to the respondents had been on that land since 1970s and that their names were mentioned by witnesses like Mutyaba John Leonard Nkolo and Dan Mulinda who grew up on that land, the suggestion made therefore was that the respondents had acquired *bonafide* and equitable interests in the suit land.

The trial magistrate ruled that the 1st defendant/respondent had purchased from people who had long been in occupation and utilizing the land unchallenged by the registered owner. That this was confirmed by the evidence of Monsegnor Charles Katongole who testified as ***PW1***; Mutyaba John Leonard Nkolo as (***PW2)*** and Dan Mulinda, ***DW2,*** who told court that the vendors used to cultivate on the suit property way back in the 1970s before any of the church witness came on the land.

Undisputed evidence:

The undisputed evidence on record shows that the church is the registered owners of the land comprised in ***FRV No. 38, Folio 10, Kakindu, Busiro,*** measuring *594.82* acres. (***PExh 1).***

From the said title the land had three leases which were registered as encumbrances in 2003. The church also owned a brick making factory and a forest, and had clear instructions to the care takers of this land not to give out the forest land for cultivation.

At the scheduling, the total area which the church claimed the respondents had committed unauthorized entry was stated to be between 100 to 200 acres, a fact which came to their notice in 2008.

The trial court made specific note that the church became registered owners in 1970; had put certain people to care take the land; but that all those named by Pastor Muyanja as people who had sold to him were not known to the church authorities. *(Refer to page 10 of the record of proceedings.).*

Analysis of the evidence for the appellant/plaintiffs:

During the trial, the appellants relied on the evidence of five witnesses. Monsignor Charles Kato Katongole presented to court a certificate of title, admitted as ***PExh 1,*** as confirmation that the church owned 594, acres some of which land was occupied by employees of the church, whose names he did not know. He further told court that he had been the caretaker of the church land since 2007 and one of the trustees of Kampala Archdiocese. That evidence was not challenged.

He admitted that the church had given some *bibanja* to some people and allowed some to settle on the land but merely as squatters. The church recognized Kimbowa, Safi Automotive Ltd as lessees as well as Bruno Serunkuma who was at one point a care taker and who came on the land in 1980 and is still unlawfully in occupation of the land though the church had made attempts to evict him.

This court however notes that Serunkuma had not been made a party to this suit as indeed his name did not feature in the land given away made to those who sold to Pastor Muyanja, the 1st respondent.

The witness testified that he also came to know the Mr. Mulinda, the 2nd respondent upon learning that he had unlawfully settled on the church land and even made developments on it, without authority from the church. Monsignor Katongole further told court that despite the fact that Mulinda had unlawfully acquired the land no steps were made to evict him.

PW2, Mr. Mutyaba John testified that the church had a policy. Express authority had to be obtained from the headquarters at Rubaga. A person was given a *kibanja* upon marrying a wife. Upon death of either or both parents, the *kibanja* would revert to the mission.

The children of the deceased would write asking for the same *kibanja* from the mission and the mission reserved the right to give it back to them. Mutyaba was a caretaker of the church land from 1994; and was given a portion of it as a care taker and from his evidence he himself had followed all the necessary procedures. Since he too had lived on the land since his child hood, his evidence was considered crucial by this court.

An important point to note from his evidence was that the land given out to the villagers solely for cultivation.

One Sekitooleko, as an agent of the church had been authorized to give people who were working for priests some areas for cultivating crops. Before him was Kabeba another care taker but the church had made it clear that no authority had been given out to allocate any *bibanja* within the forest. That although therefore these had been authorized to give married workers areas for cultivating crops, no authority was given to him to locate any areas within the forest. Indeed no one in court claimed to have acquired their portions from any of the caretakers for the church land in the successive years

In cross-examination, Mutyaba John rejected the claim therefore that Muyanja had been allocated any land by the church. The identity of, and distinction between on the one hand the married workers who were entitled to and allocated the land and on the hand the village members who occupied or tilled the land were crucial matters, but these were areas which did not come out clearly from the evidence by either side..

PW5 Emmanuel Kennedy Sentongo, a surveyor found who compiled the report made a finding that three people: Mr. Kanaabo, Councillor Jude and the respondents had encroached the land. From his report, the total area of encroachment was 151.2 acres, which constituted 25.42 of the entire land.

PW4, Busulwa David, a land inspector at Kampala Archdiocese land board since 2007, told court that he found that roads were being constructed, trees were cut and a barbed wire fence had been put up. He did not however indicate what the church had at that point done to stop the perceived encroachment.

As of 2002, according to Father Edward Sekabembe, ***PW3,*** the land part of which the respondent had tried to sell, had been vacant. The suggestion from the evidence availed by the church witnesses was that none of the occupants had acquired any rights to transfer to the respondents.

Analysis of the 1st respondent/defendant's evidence:

Pastor Muyanja on his part however claimed to have purchased the various *bibanja* between 1997 and 2008, from several persons who claimed to have occupied portions of the land and which according to the church had been obtained without their prior knowledge and consent.

In *paragraph 10* of his witness statement, he therefore claimed to be a *bonafide* occupant and equitable owner of the *kibanja*, having bought the various interests from *bibanja* owners who had stayed and lived on the suit land uninterrupted in his words, 'from time immemorial' .

In *paragraph 6* of his statement, he told court that some of the purchases he made were effected by his agent Muwonge Muhammed Magembe, son of the LC 1 Chairman, who had also been introduced to him as the broker. This court noted however that Mohammed Muwonge was not called in as a witness in this matter, despite the fact that he too had sold some land to Pastor Muyanja.

Muyanja who testified as ***DW1*** relied on the evidence of ***DW3,*** Mr. Lawrence Kiiza**.** He contended that he purchased and occupied the land measuring 200 acres between 1997 and 1998 from various individuals though in *paragraph 7* of his statement he only mentioned 100 acres of the total land purchased by him. The discrepancy in the acreage proved that he did not carry out an actual survey prior to any transaction, to support his claim.

He however claimed that before purchasing the land he had consulted Mr. Badru Mulumba, the LC 1 chairman of Kakindu who told him that the land lord was Stephen Nsereko, whom he himself had never seen but whose ownership of that land according to him was confirmed by the villagers although no one in that village had ever met him, and according to Muyanja, was only known on paper.

That with regard to the transactions therefore, he had been dealing with the family of Stephen Nsereko and in particular Mr. Nsereko Christopher who however was not a witness to any of the sale agreements presented to court. The witness further admitted that he never saw the title to the suit land.

None of those who sold to him as again admitted by him, had obtained any express consent from the person known to them then as the land lord and indeed none of those whom he had dealt with or consulted were called in as his witnesses.

In his further bid to prove that he had carried out due diligence, he told court that although he never visited any land committee, he had gone to Entebbe LCs, Entebbe Ministry of lands, Surveys and Mapping, Wakiso land office and Katabi Subcounty land office to verify that information. He had relied instead on information from the villagers to confirm that Nsereko was the land owner.

He further testified that all the vendors gave him written documents endorsed by the LC and to this end adduced evidence of the same in the form of sale agreements, admitted in evidence as ***DEx1, DEx2, DEx3, DEx4, DEx5, DEx6, DEx7, DEx8, DEx9.***

For the church, the point was that the learned trial magistrate misdirected herself on the requirement of the law when she upheld the validity of the transactions that took place between 1998 and 2008, ignoring evidence on record that they were not consented to by the appellant.

In her judgment at *pages 173 and 174* of the record of appeal, the trial court had divided the transactions into two sets, each governed by a different legal regime. The first set was from 1997 to 2nd May, 1998 while the second set was for those transactions that took place between 1998 and 2008.

Court had this to say:

> *'It therefore follows that the transactions of 1997 to 1998 before the coming into force of the Land Act could only be governed by the 1995 Constitution and not the 1975 Land Reform Decree entirely by implication because as stated above the Land Decree had been made inconsistent to that extent of the modifications that the Constitution of 1995 had made to it.'*

In the trial court's view, Muyanja and those who sold to him did not require notice before the sale of their *bibanja* interests as the transaction fell in the regime of the 1995 Constitution which did not require consent, or notice before sale, hence his transaction could not be affected by ***sections 4 and 5 of the 1975 Decree.***

That the law regulating transactions between *bona fide* or lawful occupants and registered owners had not been enacted yet. It therefore follows that the *bonafide* or lawful occupants would deal with the land as they deemed fit. I will deal with each transaction independently. examine each

1. ***Transaction between Kwezi and 1st respondent (DExh 1A and DExh 1B):***

According to the evidence in chief of Pastor Muyanja (***DW1)*** he had bought 6 acres from Kwezi who claimed to have acquired the land as an inheritance from his parents and was a *bonafide* occupant.

From John Mutyaba's evidence in cross examination, Kwezi was also digging from the *kibanja* his mother was digging from. Although however there was no documentary or other form of evidence to prove when his mother had relinquished the *kibanja* to him, whether as a gift or by way of inheritance. What came out clearly is that the church through the evidence of John Mutyaba knew about the existence of what he occupied, but not its actual size.

Muyanja's assertion that Kwezi had authority from the land lord to sell was however not substantiated since according to him proof of ownership had been verbal.

Furthermore in cross examination, Muyanja claimed to have bought only four acres from Kwezi, at a cost of ***Ugx 2,600,00/***, What was availed to court however was an agreement dated 18th February, 1997, ***(DExh 1(A))*** indicating the purchase price ***Ugx 3,000,000/=***. The agreement did

not indicate the actual size of the *kibanja*. Those discrepancies in Pastor Muyanja's evidence in terms of price and size should have been explained to court.

It is also noted that there had been no survey exercise conducted before or even after the purchase, to verify the actual boundaries as stated in the agreement or the actual size of the *kibanja* which the 1st respondent claimed to have bought. Neither the vendor nor any of those who had witnessed the transaction (including the chairman Mulumba Badru) were called in as witnesses to that transaction.

This court found it therefore difficult to reconcile the discrepancies identified in Muyanja's evidence *vis a vis* that which was contained in the agreement: ***DExh 1A and DExh 1B***, which Kwezi himself could have explained if he had been called in as a witness.

This also created serious doubts about the authenticity of Muyanjas claim in respect of that *kibanja*. The conclusion by this court is therefore that Kwezi disposed of a *kibanja* which did not belong to him as there is no evidence that he had the authority to do so.

2. Transaction between Fred Kaweesi and the 1st respondent: (DEx2A and Dexh2B).

Muyanja claimed in cross examination that he had bought land located at the forest. The sale agreement between ***DW1*** and Kaweesi stated as follows:

> *I Kaweesi Fred of Kakindu Kasubi have sold to OSBORN MUYANJA my plots located at the forest. This plot is different from that of Mulinda Dan and is also different from that of Ssalongo Alifunsi Matovu. This plot ends at the road. I have sold it at Ugx 5,000,000/=.*

The transaction was made on 5th September, 1997, but it is not clear under what circumstances and when the land had been acquired. Evidence led by the appellant's side as already indicated was besides very clear. Those who were authorized by the church to allocate land for cultivation had no authority to touch any part of the forest.

Not only did Muyanja therefore fail to establish what was on the ground before purchasing it, but also did not present any proof as to how the person whose land he was buying had acquired the *kibanja at the forest* whose size, and neighborhood was neither defined nor ascertained.

From John Mutyaba's evidence, Kaweesi used to work at the stone quarry and his parents were staying in the area where Muyanja was claiming. The family was not recognized by the church but no action was taken to challenge their stay.

The conclusion by court relating to this transaction was that even if court were to believe that the family was on that land with acquiescence of the church, Kaweesi had no specific authority

from the rightful owners of the land to deal with any part of that land (whose boundaries were not even known).

He could not therefore lawfully transfer it to a third party. His rights were not any different from those of a licensee since the church did not recognize his family as the rightful owners. He too did not testify.

Under ***section 29 (4) of the Land Act,*** a person on the land on the basis of a license from the registered owner is not to be taken to be a lawful or *bonafide* occupant. The issue of license was decided upon in ***Civil Appeal No. 52 of 2010 Musisi Gabriel Vs Edeo Ltd & George Ragui Kamoi.*** Going by its definition, a licensee by invitation is a common law principle and defined by ***Black Law Dictionary 9th Edition at page 1064 as:***

> ***"One who is expressly or impliedly permitted to enter another's premise to transact business with the owner or occupant or to perform an act benefiting the owner or occupant".***

The cardinal principle is that a licensee is simply authorized to do a particular act or series of acts upon the other's land without possessing any estate therein. It is a principle founded on personal confidence. It is generally not assignable or transferrable. No proprietary interest passes to the licensee. It is revocable at will by the property owner. Kaweesi was therefore a mere licensee on his mother's *kibanja.*

3. ***Transaction between Ngarambe Deogratious and the 1st respondent: (DEx3A and DEx3B).***

Pastor Muyanja claimed in cross examination that he had bought 7 acres from Ngarambe. The purported agreement dated 21st December, 1997, while indicating the neighborhood did not specify the size or actual measurements of the *kibanja.*

The vendor and witnesses to that transaction, including the LC 1 chairman were not called as witnesses in court. Ngarambe was known to John Mutyaba as a neighbor of Muyanja, the 1st respondent. The size of the *kibanja* was not known however.

Ngarambe's specific year of occupation was not known. It is not known as to how, from whom and when he acquired the 7 acres. Since no survey was carried out court could not verify with ease the extent of his claim.

The date and year on which the sale is made was not by itself enough to dispel the claim that the land had no *bibanja* owners but were merely squatters. The conclusion that he too was a mere licensee, with no right to transfer the land to any third parties was therefore inevitable.

4. ***Transaction between Nakku Tekera Leeya and 1st respondent: (DEx 4***

In *paragraph 7* of the WSD, Muyanja pleaded that he purchased *kibanja* interest from Nakku Leeya in 1997 and 2006. The agreement he relied on however was made on 17th May, 2007. (*Refer to* ***DExh 4)***. During cross examination the 1st respondent told court that she had sold to him a total of 13 acres.

The purchase price was ***Ugx 20,000,000/=***. The actual size of what he bought was however not spelt out in the agreement. While it is true therefore as confirmed by the LC II Chairperson, Lukalaga Gerald Majera***(CW2)*** at *locus,* that Nakku Leeya had a *kibanja,* court had no proof that she had all the 13 acres to sell to Muyanja as her *kibanja* and how each of these had been acquired. There was no explanation given to court as to why she did not testify in court to confirm Muyanja's claim.

But more significantly, the transaction having been made without the consent of the legal owner, offended the provisions of ***sections 34 and 35 of the Land Act, Cap. 227*** as cited earlier, thus rendering the transaction null and void.

5. ***Transaction between Emmanuel Ssempala and the 1st respondent: (DEx5A and Dexh5B).***

During cross examination Muyanja told court that he had bought about 28 acres from Sempala. He relied on a sale agreement dated 3rd March, 1998. The purchase price was ***Ugx 20,000,000/=***. John Mutyaba in his evidence told court that Ssempala was the treasurer, also digging in the area of the forest, but had sold and left the area.

Sworn evidence taken at the *locus* visit by ***CW3*** Margaret Kigongo Nalongo, a former wife to Dan Mulinda (the 2nd respondent) confirmed that Sempala was indeed known in the area as a *kibanja* owner.

This was further confirmed by ***CW2*** Lukalaga Gerald Majera who told court that he had been the LC Chairman for 25 years. Nothing from the contents of the agreement or the evidence availed could however assist it to determine the actual size of the *kibanja,* how he had acquired it; whether or not he had sold the entire *kibanja* or a portion of it; and if so, how much was sold to Pastor Muyanja.

Neither Ssempala nor any of the witnesses to the agreement ***(DEx5A and Dexh5B)*** was in court to provide any clarification. Be that as it may, Ssempala's occupation had been known, having lived on the land prior to 1998. His occupation on that land remained unchallenged.

6. ***Transaction between Badru Mulumba and the 1st respondent: (DExh 6A and Dexh6B).***

Muyanja claimed in cross examination that he had bought 2 or 3 acres from Badru Mulumba, the LC1 Chairman of the area. He relied on an agreement dated 9th January, 1998. (***DEx6A and Dexh6B).***

It reads:

> *I Mulumba Badru.....have sold to Muyanja Osborn.. my plot (kibanja). This land is equal to that of Kyagulanyi Emmanuel on the right, on the left is equal to that of Paul Sekitooleko and the upper part stretched to the road.*

The description of the land was not helpful since the actual size/measurements, how and when acquired were all missing. Without a survey report, and in absence of Mulumba Badru as a witness in court, it therefore became difficult to understand how Pastor Muyanja could have arrived at that estimate.

The evidence of the vendor was so crucial, not least because he was the LC Chairman at the time and had therefore been instrumental in most of the transactions concerning this land. It also strikes this court as strange that he was not around during the *locus* visit and no explanation was given for his absence or that any other LC1 leaders. It was the LC II who testified during court visit.

Accordingly, Muyanja's claim on that portion f land also remained shrouded in uncertainty.

7. ***Transaction between Matia Kyakamala and the 1st respondent: (DEx7A and Dexh7B).***

The sale agreement ***DEx7A and Dexh72B,*** is dated 2nd May, 1998. Mr. Kaweesi Fred one of the vendors, as per ***DEx2A and Dexh2B,*** had also been one of the witness to this transaction but he too did not turn up in court as a witness or as one of the vendors. The agreement also fell short of providing all the relevant details in support of his claim.

John Mutyaba testified that he was known to him as a person who was staying on the roadside but (contrary to the policy of the church) was digging in the forest area which meant that he could not have been authorized by the church.

More likely than not and in absence of substantial evidence to the contrary, his status remained that of a licencee.

8. ***Transaction between Kyagulanyi Emmanuel and the 1st respondent: (DEx8).***

Pastor Muyanja, the 1st respondent claimed in cross examination that he had bought 13 acres from Kyagulanyi Emmanuel who testified as ***CW1***. He claimed that he bought his land in 1979 from Kalori Sserwadda who had informed him that the land lord was Mr. Nsereko Stephen.

Kyagulanyi put up a house on the *kibanja* for the workers and later sold his portion to Muyanja. The purchase price as per that agreement was ***Ugx 25, 000,000/=.*** The date of the transaction was 3rd February, 2007, as per sale agreement, admitted as ***DExh 8.*** An attempt was made to define the location of the *kibanja* but again no actual measurements were availed on record.

As admitted by Muyanja himself, without a proper survey, all these were mere estimates. John Mutyaba knew him as a person who started digging the area in the 1990s. It is not clear how the vendor could have acquired the entire area of 13 acres as a *kibanja* without the consent of the purported landlord, Steven Nsereko or the signature of his purported agent.

Muyanja as a buyer made no serious efforts to establish the whereabouts of the actual landlord as a way to secure his consent. From Mutyaba's evidence, the church was aware of his presence on that land and for more than 12 years, he remained on the land unchallenged by the registered owner. Kyagulanyi therefore acquired protectable interest under ***section 29*** of the ***Land Act.***

However any subsequent transfer of his interest to third parties had to be sanctioned by the registered owner. Thus when he disposed of the *kibanja* to Muyanja, that transaction offended the mandatory requirement for consent from the registered owner, as stipulated under s***ections 34 and 35 of the Land Act.***

During *locus* he testified that since no one seemed to know the land owner the tenants did not know to whom the *busuulu* was to be paid, which therefore put the status of his occupation in serious doubt and so was therefore the validity of the transaction between him and Muyanja in balance.

9. Transaction between Kiiza Lawrence and the 1st respondent: (DEx9).

In his written statement, the witness Lawrence Kiiza who testified as Kiiza Lawrence told court that he came to the suit land as a casual labourer for Mr. Kyagulanyi who had a *kibanja* and resided on the suit land.

He later bought a *kibanja* in 1986 from John Kyakabale measuring two acres at ***Ugx 60,000/=*** and the two executed an agreement which however got lost. It is not clear from his evidence how Kyakabale got onto the land whether as a church worker or a child of a church worker.

What is clear is that in 1998, Kiiza had sold off his entire *kibanja*, at ***Ugx 3,000,000/=.*** The agreement dated 7th February, 1998 was tendered in as ***(DEx9).*** It however had no English version.

The witness also admitted that he never saw any document authorizing Kyakabare to sell that land. Kyakabare himself was not a witness to the sale or in court and it is not known how he had he had acquired the land.

From Muyanja's evidence, at the time he sold the *kibanja* to him in 1998, the agent of Nsereko was present. However, he neither mentioned the name of the agent nor offered to explain why the agent did not sign any of the agreements or even pay to him the *busuulu,* if indeed he had been the agent of the owner.

During cross examination it was noted that the agreement purported to be that of 1998 had been written on a document of 2008. Below was the explanation that ***DW3*** gave during re-examination:

> *... when I sold in 1998 I made an agreement, then in 2008 defendant approached me saying his sale agreement had been destroyed so requested I make for him another agreement.*

This was relevant evidence but it had not come out in the evidence of Muyanja during the trial. The explanation in any case failed to satisfy this court that this indeed was a transaction that had been made in 1998. More likely than not, the transaction had been made in 2008 and therefore also null and void.

10. Transaction between Muwonge Muhammed and the 1st respondent: (DEx10).

In *paragraph 2* of the 1st respondent's written statement, Muwonge Muhammad was introduced to Muyanja as a broker and a son of the area Chairperson Mulumba Badru.

He is the one who introduced him to other vendors. He himself sold some portion of land to him. The agreement between the two was dated 17th January, 2008. The *kibanja* purportedly covered an area of 2 acres.

It was sold to the 1st respondent at ***Ugx20, 000,000/=***. It had been passed on from his father Mulumba Badru having received it from Nabakooza Jenit his grandmother. The agreement was endorsed by the RC on 17th January, 2008.

Again none of the witnesses to the transaction was invited to testify. Additional to that, there was no evidence that the parties to this transaction had secured prior consent of the landlord, within the spirit of ***section 34 and 35 of the Land Act.***

Learned counsel for the respondents in submission argued that the above evidence was overwhelming in proving that the category of church workers who were given *bibanja* by Sekitoleko, as an agent of church, as confirmed through the evidence of John Mutyaba.

The trial magistrate in her judgment on *page 172* of record of appeal held:

> ***As seen in the above evidence the first defendant purchased from people who had been in occupation and utilizing the land unchallenged by the registered owner and this is confirmed by the evidence of PW2, PW3, and DW1 who told court that those vendors used to cultivate on suit property way back in the 1970s before any of the plaintiff's witnesses who came on the land.***
>
> ***There was no evidence .... to show that vendors to the first defendant had ever been challenged by any one.***
>
> .....
>
> ***.....I thus have no choice but to believe the defence evidence that these vendors to the 1st defendant had been on the suit property more than twelve years unchallenged before the coming into force of the 1995 Constitution. By virtue of the above mentioned legal provisions, they qualify to be bonafide occupants as provided for under section 29(2) (a) of the Land Act of 1998.***

On *page 178* of the record of appeal, the court while acknowledging that the consent was required stated that such consent should not be held unreasonably. The findings above by this court however dictate otherwise. Could Mutyaba therefore claim equitable interest in the church land?

Decision of court:

From the above as indicated, the trial court appeared to have proceeded on the presumption that each of those who sold to the respondents had rightfully obtained a *kibanja* on the church land which was transferrable. The court did not look deep into the merits of each transaction.

Secondly, it failed to take into account the fact that subsequent transferees of the land from those who claimed to be genuine occupants or *bibanja* owners still had to obtain the necessary authority to purchase, utilize and occupy that land. Several of them were mere licensees.

Thirdly, the court did not dwell on the question of the actual year of entry and occupation by each vendor or by Muyanja the transferee. It made blanket observations, relying on the dates as reflected on the agreements, the authenticity of which needed to be verified first.

Fourth, the court did not also consider that each of the transactions between Muyanja and the vendors had taken place after the promulgation of the 1995 Constitution, which by virtue of ***article 26*** recognizes every person's right to own property either individually or in association with others.

The paramount principle as enshrined in that provision was that no person is to be deprived of property or any interest therein save in certain conditions as specified in that clause, none of which however applied to this case.

That clause obviously applies to property acquired by any person before the Constitution had been enacted. It specifically applied to Muyanja who in 1997 and 1998 obtained part of church land.

This court did not find the ***Land Reform Decree*** particularly relevant or applicable to the present circumstances. Suffice to note that consent to own or acquire land had to be sought from the relevant owner or authority. It may be direct/express or indirect/implied, the latter through acquiescence by the legal owner of the occupant's long stay and occupation, and may also be demonstrated through acceptance of payment of *busuulu* and *kanzu*.

This court noted however that none of the vendors or the respondents in this case presented any evidence of *busuulu* payments, and their explanation (which this court rejects) was that they failed to trace the owner.

The trial court appears misguidedly proceeded to make its own conclusions based on the presumption that some attempts had been made by the vendors or by Muyanja thereafter to obtain consent from the rightful owner, who unreasonably denied to give it.

Court in my view had no legal basis upon which to determine that those who sold to Muyanja in 2006 to 2008 were *bonafide* occupants and that by virtue of ***section 29 (5),*** Mr. Muyanja therefore also automatically became a *bona fide* occupant.

Some occupants as noted earlier were mere licensees while others were squatters, without proprietary rights. The evidence showed that those who sold had no inkling about the ownership of this land; or if they did, could not take the trouble to validate their stay on that land.

Oral and documentary evidence availed to court proved that most of the vendors, as a matter of fact could not explain how and from whom they had acquired the land. They remained on that land only at the will of the church. They consequently became trespassers on that land.

Finally, Pastor Muyanja himself had no clear understanding of what he set out to buy or the truthfulness of the claim that the vendors had the right to sell to him. He purchased land from people whom he knew or ought to have known had no proprietary rights on that land. He was not therefore a *bonafide* purchaser for value without notice.

A *bona fide* purchaser is defined in ***Black's Law Dictionary 8th Edition at page 1271*** as:

> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."***

In ***Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995),*** failure to make reasonable inquiries or ignorance or negligence was held to form particulars of the offence of fraud.

Lands are not vegetables that are bought from unknown sellers. They are valuable properties and buyers are expected to make thorough investigations, not only of the land but of the sellers before purchase. ***(Sir John Bageire vs Ausi Matovu Court of Appeal CA No. 7 of 1996).***

Reasonable inquiries are a must. Such inquiries include a proper search at the land office and survey of the land to be conducted to establish the boundaries before committing any funds in a land sale transaction.

Such is evidenced not only by oral testimonies but by a proper search certificate/report, evidence of consultations from the neighbours and local leaders, none of which evidence had been availed to court. Thus all estimates on the size of the land in respect of each transaction were a mere concoction.

Muyanja in respect of each of the said transactions therefore ultimately failed to meet the criteria of a *bonafide* purchaser. His evidence to the effect that he made inquiries before he bought the *bibanjas* at Wakiso District Land Office was not properly documented.

Furthermore, as noted earlier by this court, there were clear policies by the church on giving out land to married workers only; that children needed express authority from the church to take over land from their deceased parents; and that there had been restrictions against allocation of land in the forest.

This implied that those who got the *bibanja* contrary to those policies had obtained the same irregularly. They cultivated on the land and remained on it only at the will of the legal owner.

The failure to establish the actual identity of the landlord was fatal to Muyanjas claim. It was not a viable excuse that any of the respondents could use to take away the legal requirement for consent as demanded by law. As a matter of fact this ought to have served as a red flag to any prospective buyer.

On that account therefore, Pastor Muyanja acted with impunity when he according to Mutyaba took over the whole forest contrary to the policy of the church; and according to Katongole attempted to sell that land, leave alone buying land from vendors whom he knew or had reason to believe had no proprietary interest in the land to pass over to him..

Transaction for Dan Mulinda, the 2nd respondent (DEx11).

This has been addressed in part. Dan Mulinda claimed that he was not aware that the appellant was the registered owner for all that time, until 2010 when this suit was filed against them.

In his written statement he told court that he was contacted by a longtime friend, Kyagulanyi Emmanuel, who informed him that one J. Namusoke was selling her *kibanja* situate at Kakindu Katabi. He claimed that prior to the purchase he had consulted local authorities who confirmed that the *kibanja* belonged to Namusoke before he purchased it in 1982 at ***Ugx 30,000/=***.

That he was not aware that the church was the registered owner for all that time, until 2010 when this suit was filed against them. Although he was known to Mutyaba, the latter denied the claim that the church had given him the land.

Monsignor Katongole claimed that Mulinda started living on the land around 2008, which he however did not prove, as Mulinda claimed that he had bought the land in 1982 and remained uninterrupted for more than two decades.

The total area of 3.5 acres is what was originally acquired by him on 7th February, 1982 by Namusoke who however passed on before fulfilling her promise to introduce him to the owner of the land.

During the *locus in quo* conducted on 18th October, 2017 court was able to confirm that he had been residing there, having constructed two permanent houses. Court also found that the land was also used for cultivation and that the 1st respondent had fenced off the biggest portion and put up various farms and rearing goats.

CW2 had been a leader in that area for more than 25 years although court could not establish the actual sizes occupied by the former owners, from whom each portion had been obtained and when.

CW3 as earlier noted had been a wife to the Mulinda, the 2nd respondent. She told court that she found Mulinda, her husband on that *kibanja*. The two had lived there for over 20 years, cultivating on that land which had been a forest, which was conclusive evidence of physical occupation and utilization. Mulinda acknowledged the ***CW3s*** presence on that land as a licensee and himself as the *bonafide occupant.*

Some developments including a house and 4 rentals had been made on this land which ***CW3*** claimed were hers although she admitted that Mulinda was the *kibanja* owner. She also told court that he too had sold off part of the *kibanja* to Muyanja, which assertion did not come out clearly from the evidence on record. She did not even disclose what exactly had been sold off to him.

CW3 added that she was later authorized by church to complete her house and even received ***Ugx 2,000,000/=*** from them to complete her house, but with strict instructions not to sell the *kibanja.*

Her evidence confirmed the appellant's legal interest in the land and that anyone who had interest to know over the years would have easily found out that the church was the rightful owner of the land. It also confirmed Mulinda's long time occupation and development of that land, which remained unchallenged for years.

Ground No.4: The learned trial magistrate erred in law and fact when she came to a conclusion that the appellant's claim was partially barred by limitation.

At *page 12 (page 174 of the record of appeal)* the trial magistrate took note of the objection raised by counsel for the respondents that the suit was time barred, in respect of the transactions made between 1997 and 1998, since the appellant filed the suit after more than 12 years.

Having classified this as an action in trespass, the issue of limitation did not arise as it applied only to recovery of land governed under ***section 6 of the Limitation Act.***

Conclusion:

In the final result, the trial court therefore:

a) *misdirected itself on the requirement of the law when it upheld the transactions that took place between 1998 and 2008 ignoring evidence on the record that they were not consented to by the appellant.*

b) *erred in law and fact when it also came to a conclusion that the appellant's claim was partially barred by limitation.*

c) *erred when it came to the conclusion that the vendors had occupied utilized and/or developed the suit land for 12 years or more before the coming into force of the 1995 Constitution and that they were all therefore bonafide occupants;*

d) *erred when she concluded that the allocation of land to the church workers by the church's agent amounted to bibanja despite evidence on the record being consistent with some of them being licensees;*

e) *erred when she failed to properly evaluate evidence and came to the conclusion that the vendors were church workers who had been allocated that land.*

The prayers sought in the lower court were:

1) *A declaration that the plaintiff is the lawful owner of the land granted in* ***FRV 38 Folio 10 land at Kakindu;***

2) *A declaration that the defendants are trespassers on the suit land;*

3) *A permanent injunction restraining the defendants from further trespass and or dealings on the suit land;*

4) *The defendants' dealings whatsoever on the suit land are unlawful and therefore void;*

5) *General damages for trespass;*

6) *Costs of the suit.*

The prayers above succeeded only against the 1st respondent who is required to validate his stay on the land. By the acquiescence of the church, the 2nd respondent became a recognized *kibanja* owner, with equitable rights on the land.

General damages:

In ***Robert Coussens vs Attorney General SCCA No.8 of 1999,*** it was stated that the object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered.

Therefore in the assessment courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and extent of the breach. ***(Uganda Commercial Bank vs Kigozi [2002]1 EA 305).***

In the premises, an award of ***Ugx100, 000,000/=*** as general damages to the appellant would be fair.

The appeal therefore succeeds to that extent. Costs to be paid by the 1st respondent for the appeal and in the lower court.

I so order.

.....

Alexandra Nkonge Rugadya

Judge

12th March, 2021

Delivered by email : 17/3/2021.