THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL SUIT NO.133 OF 2011

KALUNGI KIRUMIRA MOSES.....PLAINTIFF

VERSUS

1. **LT MBAZIRA SEBINENE**
2. **KAVULU BADRU**
3. **JULAYINA NANSUBUGA**
4. **NALONGO SEMBATYA**
5. **NALONGO SSEBAGALA**
6. **SHEIKH NUHU**
7. **RONALD MUTEBI**
8. **KINOBE TOFA.....DEFENDANTS**

BEFORE: HON. MR.JUSTICE HERNY I. KAWESA

JUDGMENT

This suit was brought by the Plaintiff seeking:

1. A declaration that the Plaintiff is the true owner/registered owner of land comprised in **Block 158B Plot 21 at Namulonge, Musaale, Kyadondo** (*hereinafter the suit land*).
2. A declaration that the Defendants are trespassers on the said land.
3. An eviction order against all the Defendants and their agents from the suit land.
4. A permanent injunction against the Defendants restraining them or their agents, servants, workmen and any other person or entity deriving authority from them, trespassing on the suit land, selling the land, interfering with the Plaintiff's possession or use and

dealing with the suit land, cutting the forest, laying bricks on the suit land.

5. Special damages for cutting trees/lumbering and brick laying.
6. General damages for trespass.
7. Interest
8. Costs of the suit.

Plaintiff's Claim

The Plaintiff is the registered proprietor of the suit land having bought it from Mr. Jacob Musajjalumbwa Kitamirike in 2001. It is his claim that the suit land had a natural forest of various valuable trees which he was interested in preserving and harvesting upon maturity. That at the time of purchase, the suit land was free from any encumbrances and no one had a kibanja interest thereon.

That he was surprised in 2010 when he visited the suit land, in the company of his lawyer Mr. Dalton Opwonya, the Defendants claimed bibanja interests thereon and went ahead to cut down his valuable trees, sold timber, laying bricks, and attempted to sell the suit land.

That the aforesaid activities were commanded and engineered by the 1st Defendant, a soldier, who went ahead to give false information to the Office of the President, through Hajji Seddunga, with a view to grabbing the Plaintiff's land. That the said Hajji Seddunga together with the Defendants ordered the Plaintiff off his land rendering it impossible to develop it.

Defendants Claim

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The Defendants denied all the Plaintiff's allegations in their joint statement of defense and even set up a counterclaim against the Plaintiff. It is their defense that they are bonafide or lawful occupants on the suit land having severally acquired their respective interests between 1955 and 1993, and that they have been living on the suit land since then to date. That having acquired interests on the suit land as bonafide/or lawful occupants, they cannot be trespassers thereon. That the Plaintiff acquired the title to the suit land subject

to their lawfully acquired and protected interests and had notice of the same.

Defendants' Counterclaim

In the counterclaim, the Defendants seek:

1. A declaration that they are bonafide and/lawful occupants on the suit land.
2. A permanent injunction restraining the Plaintiff, his agents, officers, servants and/or any one from/under whom he claims from trespassing on their land and/or disturbing their quite possession and peaceful enjoyment of the suit land in any way.
3. Aggravated damages.
4. General damages for inconvenience.
5. Costs of the counterclaim.

It is their claim that the Plaintiff has over a very long period of time trespassed on their land and physically grazed his cattle in their gardens, destroyed their dwellings and burnt down their crops. That the Plaintiff has on many occasions meted out and threatened violence against
them making their quiet possession and peaceful enjoyment of their land extremely difficult. That the Plaintiff has always been arrogant, insolent, malicious and caused them much anxiety for which they seek aggravated damages, among others.

On record there is a consent judgment between the Plaintiff and the 7th Defendant endorsed by Court on the 24th day of May 2011. This matter shall, therefore, proceed only in respect of the Plaintiff and the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants.

Scheduling Conference

The parties agreed on only two issues for determination. These are:

Issue No.1

Whether the Defendants are bonafide and/or lawful occupants on the suit land?

Issue No.2:

What remedies are available to the parties

Witnesses called by the Parties

In proof of the issues, the Plaintiff called five (5) witnesses. These are PW1 Kalungi Kirumira Moses; PW2; Aloysious Sekyanzi; PW3; Tom Alex Ogwal; PW4; Michael Musajjalumbwa Kitamirike Salongo; and PW5; Hashakimana Claire.

The Defendants also called six witnesses to rebut the Plaintiffs' case. These are DW1; Judith Nalongo Ssebaggala; DW2; Gladys Nakabubi *a.k.a.* Nalongo Ssembatya, DW3;Florence Namusisi, DW4; Sewava Nuhu; DW5; Tegawooma Paul and DW6; Kitaka Yusuf.

Having reviewed the evidence and pleadings of the parties, I find it necessary to add a third issue. This arises by implication from the Plaintiff's plaint, and needs to be addressed in order to completely dispose of the controversy between the parties. The issue is added pursuant to O.15 r.5(1) of the Civil Procedure Rules, and is:

Issue No.3

Whether the Defendants are trespassers on the suit land

Locus Visit

The Court visited *locus* at the end of trial. It observed that there are three permanent structures on the suit land belonging to Kavulu Badru, Sewava Nuhu, and Namusisi Julayina; and gardens belonging to Nalongo Ssebaggala, Nalongo Ssembatya, among others.

The suit land is on one end, lower side, and there is also land/ bibanja undisputedly belonging to the Defendants on another end, upper side. Both lands (suit land and Defendants' undisputed portions of

land) are separated by Zirobwe road. The Plaintiffs evidence and his clarifications at locus is that his land is in Namulonge, Nabalanga Village, whereas the Defendants' evidence during trial and clarifications at *locus* is that their land is in Busukuma.

The evidence of the parties would be enough to dispose of the matter, but at *locus* some Defendants insisted that their lands crossed the road, from the upper side of the road into the suit land, onto the lower side of the road.

The Defendants are, therefore, before Court to demonstrate that they have bibanja interests on the suit land; and the Plaintiff is here to demonstrate that the Defendants are trespassers on the suit land, that their land does go beyond the upper side of the road.

At *locus* again, Counsel for the Defendants attempted to exhibit receipts of Busuulu tickets, but this was encountered by Plaintiff Counsel's objection. Court also rejected exhibiting the said Busuulu tickets on ground that they were not part of the record. I have seen that Counsel for the Defendants still submitted about the said Busuulu tickets in his submissions, praying that Court takes judicial notice of them under Section 57 and 79 of the Evidence Act, on ground that they are already part of the record of Misc. Application No.191 of 2015 arising from the main suit. The Plaintiff's Counsel has nevertheless objected to this in his submissions.

With due respect to Counsel for the Defendants, the Court considers his submission erroneous. First of all, as the Plaintiff's Counsel as submitted, the purpose of *locus in quo* is to clarify on the evidence already given at trial. Very many cases confirm this view, among which is ***Nalongo Nalwoga Nakazi versus Salongo Kesi Bagalaaliwo H.C.C.A. No.84 of 2012***; ***Lamwaka Lucy versus Laloyo***

Jalon & Anor; CA No.31 of 2017, and others as cited by Counsel for the Plaintiff to wit, ***Gawona Muhamad versus Mawazi Kemba & Others HCCA No.008 of 2016***, among others.

Secondly, there is no provision under the Evidence Act Cap. 6 that requires Court to take judicial notice of its record. Section 56 of the Act talks of facts admitted by parties, and the Plaintiff never admitted to the contents of those tickets. Further, **Section 79 of the same Act** speaks of presumption as to documents produced as record of evidence, and signed by a Judge or Magistrate. In this case, the said tickets were neither produced during trial as a record of evidence of this case nor signed by a Judge or Magistrate. This renders both Section 59 and 79 of the Evidence Act inapplicable in this case.

In view of the above observations, Counsel for the Defendants' further attempt to smuggle into the record the said Busuulu tickets also fails. The said tickets shall not, therefore, be considered in determining the matter.

Determination of the Issues

Counsel for the parties filed written submissions which I shall consider accordingly.

Status

This shall based on its observations in determining the issues. The survey reports shall not, thus, be considered.

Issue No.1:

Whether the Defendants are bonafide and/or lawful occupants on the suit land

This issue arises by implication from the Defendants' counterclaim. It is trite law that the party that alleges must prove his **or** her case on

the balance of probabilities (Section 101(1) of the Evidence Act Cap. 6, and ***Uganda Petroleum Co. Ltd versus Kampala City Council Civil Suit No.250 of 2005***).

In this case, the Defendants bear the burden of proving that they are bonafide, or lawful occupants on the suit land. This burden must be discharged on the balance of probabilities.

It suffices to state that each of the Defendants, except the 2nd and 6th Defendants, seem to have sought to prove his or her case separately from the other, especially since each of them claims a separate piece of land. This view is further supported by the submissions of each Counsel, but more particularly the Plaintiffs Counsel.

I find that, that was a good strategy by Counsel. I shall thus adopt it except for the 2nd and 6th Defendants. Accordingly, I shall address this issue starting with the 1st Defendant, then 2nd and 6th Defendant; then 3rd, 4th, 5th, 6th , and 8th Defendants in that order.

Plaintiff's Evidence in Chief

Since the Plaintiff's evidence was given as a one whole, I deem it necessary to reproduce it first.

PW1 testified that he carries out farming on the suit land. That the Defendants are also cultivating on part of the suit land and that the 2nd and 6th Defendants have put structures on the suit land, and that there is an old structure belonging to a deceased woman which was abandoned for five years. That the 2nd Defendant has also dumped bricks on the suit land and is trying to build. That the other Defendants have homes outside the suit land but they cross into the land to cultivate small gardens on his farms.

PW1 also stated that he acquired the suit land on the 20th of August 1999 from the late Jacob Edward Kitamirike Musajjalumbwa. That at the time, the suit land had a natural forest, bushes and no development thereon. That the late handed to him the suit land and its documents free of encumbrances. That the suit land was surveyed and mark stones planted in 2000; and that in 2001, his land was parceled off from the mother title and he obtained his title, which was exhibited PEXH 1, and a deed of transfer as PEXH2. He further stated, emphasizing, that the suit land had nil developments and adduced a copy of a consent to transfer form alluding to the same, which was exhibited as PEXH3.

That there was no resistance while he did the survey and opening of boundaries, and that local authorities were also notified before opening boundaries. That in 2002, he started by commercial farming and stocked cows on the suit land. That it took many years, until 2008, when he got trouble with his neighbours. That he first got a report from his farm manager that people were trying to put illegal structures on the suit land. That he later found the 2nd Defendant constructing and he told him that he had been given permission by the President.

That his barbed wire and mark stones planted in 2000 were removed at night, and that he applied to Police and Wakiso District to open boundaries again and replace mark stones; *copies of letters to that effect were exhibited as PEXH7, PEXH8, and PEXH9*. That he opened boundaries and established the positions of the mark stones and also saw three illegal structures.

That the Defendants have killed his animals, threatened to kill him and his workers; and that he has so far lost 10 heads of cattle, 8 horses, and that the 2nd Defendant has also cut down his trees and calling

inviting other people onto the suit. Photographs showing his cows and horses, a dead cow and horse with cut wounds, and cut trees were exhibited as PEXH10, PEXH 11, and PEXH 12 respectively. He also stated that the vendor of the suit land wrote a letter to the Registrar of Title, a one Opio Robert, detailing the history and status of the land. A copy of the said letter dated 4th of April 2001 was exhibited as PEXH13.

PW2 stated that he is the LC 1 Chairperson of Nabalanga Namulonge. That he has been chairperson of the area since 1987. That the suit land is in his area of jurisdiction. That it was bought by the Plaintiff from the late Edward Kitamirike who had about a mile of land. That the late was a lawyer and that whenever he sold he could come to him (PW2). That the late came with the Plaintiff and introduced him as the one to whom he had sold the suit land; and that he was taken to the area by the late and inspected the land.

PW2 also stated that there were no people on the suit land; and that after selling, surveyors came and planted mark stones and that he received no complaint from any person. That sometime later, Bankers came to him inquiring whether the Plaintiff had land in the area, and he confirmed to them. That after two years, the Plaintiff put a fence and brought cows and donkeys on the suit land, and also introduced his workers to him. That in 2010, the Plaintiff came to him complaining that his cows had been cut and he advised him to take the matter to Police. That except the 5th Defendant, the rest of the Defendants' land is not within his area of jurisdiction.

PW3 testified that he is a Police Officer stated at Busukuma Police station in animals which was recorded as CRB 073/2016. That the Plaintiff was the complainant in that case. That the Plaintiff reported the 1st Defendant and other neighbours of his land in

Namulonge as suspects. That he carried out a formal search to ascertain the true owner of the suit land, and that he obtained a certificate of title, a mortgage deed, mutation form, area schedule, and a letter from Opio Robert by Mr., Edward Kitamirike. *A copy of a transfer form in favor of the Plaintiff, dated 18th January 2001 was exhibited as PEXH14, and a copy of a mortgage deed between the Plaintiff and Barclays Bank (U) Ltd and in respect of the suit land was exhibited as PEXH15.*

He came to the conclusion that the suit land belonged to the Plaintiff. That he visited the crime scene several times. That whenever he sent the case to the Resident State Attorney, they could not proceed because there was an injunction issued by this Court restraining the Defendants from trespassing and cutting trees on the suit land, but that these activities were still ongoing when he visited the crime scene. It was his testimony also that when he first visited the suit land, there was a house under construction, but was later completed on his recent visit.

PW4 testified that he is heir and Administrator of the estate of the late Edward Jacob Musajjalumbwa. That he knows the Plaintiff and the 1st, 4th, 5th, and 7th Defendants. That the Plaintiff bought the suit land from his deceased father in 1999, and that the said Defendants held bibanja portions of part of the estate held by his father. That at the time of the Plaintiffs purchase of the suit land, he was mature and very close to his father who was already frail and need him to be around.

PW4 also testified that when the Plaintiff sought to purchase the suit land, he was very particular on what he wanted, that is: land free from any bibanja holders and squatters; and that his father also assured the Plaintiff that he was to obtained what he desired. That his

deceased father, himself (PW4), the Plaintiff and his company toured the land at the insistence of the Plaintiff to ascertain its state and suitability. That the suit land was bushy and completely unutilized.

That the said Defendants (1st, 4th, 5th and 7th Defendants) were settling on his father's other land, different from the suit land, and some in other local councils of Busukuma and Seeta because his father's land was huge and covered three local councils, including Namulonge. That before the Plaintiff took possession, he asked for further proof that the land was free of encumbrances and his father gave him documents, among which a letter was endorsed by his father to the lands Office regarding bibanjas in the neighbourhood.

That about 2002, he received visitors who introduced themselves as Barclays Bank Officials and were on inspection of the suit land and sought clarifications. That soon thereafter, he also saw the Plaintiff bring cows onto the suit land, and later saw horses grazing on some part thereof. That at that time, the whole suit land was completely fenced off and there was no one digging thereon as a squatter or kibanja holder.

Further, PW4 testified that in 2016 some bibanja holders on the other land, separate from the suit land, requested to have registered interests by acquiring title from him as landlord, and that he agreed and agreements were executed. That some of those bibanja holders included the brother of the 1st Defendant and heir of the estate of the late Sebinene (DW5); a one Father Ddungu Josephat on behalf of his mother, the 4th Defendant; the children of the 5th Defendant who included a one Kasolo Joseph, the heir to the **5th** Defendant's deceased husband; and the 7th Defendant.

That on the 4th of August 2016, he executed an agreement with DW5 wherein they equally shared 4 acres of land/kibanja which their family was occupying; and that their family had already been given the certificate of title for the 2 acres. Further, that on the 8th of August 2016, he also executed an agreement with father Ddungu Josephat on behalf of his mother, the 4th Defendant, wherein they agreed to pay for their kibanja at Ushs.25,000,000/- *(twenty five million shillings only)* per acre totaling to Ushs.125,000,000/- *(one hundred twenty five million shillings only)* and that only Ugshs.10,000,000/- *(ten million shillings only)* had since been paid. That on the 29th of April 2016, he executed an agreement with a one Kasolo Joseph, heir to the 5th Defendant's deceased husband, who signed, with his siblings wherein they took 0.80 acres leaving him (PW4) with 2.11 acres.

Further, that part of the 5th Defendant's kibanja had been sold to a one Busulwa Sewakiryanga Fredrick who, on the 8th July signed 2016 executed an agreement with him in respect of the same, wherein he paid Ugx.10,000,000/- *(ten million shillings only)* deposit out of the Ugx.15,000,000/- *(fifteen million shillings only). Copies of the agreements alluded to were exhibited as PEXH14.*

PW4 further testified that the 7th Defendant, Ronald Semusu, sold his kibanja to father Ddungu Josephat and formed part of the 5 acres in respect of which the latter signed an agreement with him. But that the 7th Defendant in 2012/2013 bought 0.293 decimals from him and got a certificate of title from the same, jointly with Mariam Nalunkuma. *A copy of that title was also exhibited as PEXH14*.

It was PW4's testimony also that the other Defendants; 2nd, 3rd and 8th Defendants, were complete strangers to him until he was invited by the Commission of Inquiry. That all the exhibited

agreements were executed following a survey of each of the kibanja holders by professionals and obviously, they were outside the suit land's boundaries.

Lastly, PW5 testified that he is a Forensic Document Examiner in the department of questioned Documents, Directorate of Forensic Services of Uganda Police Force. That he holds a BSC in Industrial Chemistry from Makerere University Kampala, a certificate in Questioned document examination from Sherlock Institute of Forensic Science, India, 2017, and a nine years of experience in the field of Questioned Documents.

That sometime in October 2020, her supervisor, Mr. Andrew K. Mubiru, the Ag. Director, Forensic Services instructed her to conduct a laboratory forensic examination of three questioned documents titled '*Busulu*' No.8 dated 23rd August 1958; Busulu No.9 dated 10th April 1960; and Busulu No.68 dated 28th September 1970. That the request for examination of the questioned documents was pursuant to a request by M/S Richard Mwebembezi Solicitors & Advocates contained in the letter under Ref: RM/134/2017 dated 11th October 2019.

That her instructions were to examine, inter-compare and establish whether the sample and signatures in Exhibit A, B, C have the same handwriting or not. That she proceeded to carefully execute her instructions using scientific analytical methods of video spectral comparator (VSC 5000), sketching and visual observation method. That she observed that the photocopies of the said exhibits have certain limitations in the analytical process, however the copies in this case were clear enough for analysis to be carried out.

It was her evidence that she noticed significant similarities between the questioned handwriting and signatures in the exhibits A, B, and C. That these similarities fall under the same class of general and individual handwriting characteristics of the same writer and these include; handwriting skill, design and manner of execution of letters, for example, S, N, a, t, m, y, k, u, b. B and figures 8 and 5, relative letter sizes, relative slant of writing, internal and external proportions of letters for example in the words Seeta, Kisubi and Musaale, margin effect and relative letter spacing. That based on her observations, her opinion is that there is strong evidence to show that the questioned handwriting and signatures in exhibits A, B, and C were authored by one and the same writer. A copy of her report was exhibited as annexure "A", and exhibits referred to as annexure **"B",** "C", and "D".

Law on Lawful and Bonafide Lawful Occupants

Counsel for the Plaintiff and for the Defendants properly cited the relevant law on lawful, and bonafide occupants being **Section 29 of the Land Act Cap.** 277.

Sub-section 1 of the said **Section** provides that:

> (1) *"Lawful occupant" means—*
>
> *(a) a person occupying land by virtue of the repealed W Busuulu and Envujjo 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.

And **sub-section 2 of the said Section** provides that:

(2) "Bona fide occupant" means a person who before the coming into force of the Constitution— (a) had occupied and utilised 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.

The Defendants' case is particularly anchored on Section 29(1)(a) and (b) and Section 29(2)(a) of the above provisions. I shall not evaluate the evidence of the parties against the provisions of the said Section, sub-section, and paragraphs. I start with the 1st Defendant.

1st Defendant

The 1st Defendant's evidence was given by DW5; Tegawooma Paul.

DW5 testified that the 1st Defendant and himself are sons of the late Sebinene Langton Maggwa who passed on in 2012 and he (PW1) was appointed a heir. That his great grandfather the late Jacob Lule Musajjalumbwa gave birth to many children including the late Ason Kitamirike who was his grandfather and brother to the late Edward Kitamirike. That the late Edward Kitamirike gave birth to Michael Kitamirike Musajjalumbwa Salongo (PW4) who purportedly sold the suit land to the Plaintiff.

It was his testimony that according to his late father, Sebinene Langton Maggwa, the suit land was given to his sister the late Bamanya who used to sign tickets for payment of Busuulu hi the 1970s, but these were not attached as the statement stated. Further, when the

late Bamanya died, her heir who is also deceased took over responsibility but being a girl child; her inherited land was fraudulently sold off to the Plaintiff by PW4. That the land that was given to the late Bamanya has a land title and since the emergence of this dispute, the family placed a caveat on this land, which is comprised in Block 158 Plot 7 and 8. *A copy of a Certificate of Succession reflecting the details of the said land was attached to his witness* statement as annexure "A", but this was never admitted hence depriving it of any evidence value.

That the Plaintiffs claim that he bought the suit land free from any occupants is false because he has spent 59 years of his life in the area and grown up seeing most of the Defendants and their families living on the suit land. That at first, they did not know that the Plaintiff had bought the suit land because they did not receive any notice about that development and were shocked when men in army uniforms came to the suit land with a herd of cows and horses and placed them on the late Sebinene's land in 2011. That the animals destroyed most of the food crops on the land including those on the neighboring land and that they chased them from their farm land but the said men threatened to shoot them. That the said threats have continued even after Court issued a temporary injunction in 2015. That since then, whatever farming they have carried out, the Plaintiff's agents have destroyed it.

During cross-examination, DW5 admitted that the land he testified about as belonging to the late Bamanya and described as comprised **in Block 158 Plot 7 and 8** is different from the suit land, which is described as **Block 158B Plot 21 at Namulonge, Musale, Kyadondo**. He also acknowledged that his evidence relates to another piece of land as opposed to the suit land; and that the suit land was sold to

the Plaintiff by the late Edward Musajjalumbwa and not PW4 as he stated in his testimony.

He however stated, during re-examination, that Bamanya's land is at Namulonge and that it is the same as the suit land.

Counsel's Submissions

Counsel for the Defendants generally submitted that the Defendants are bonafide occupants under Section 29(2)(a) of the Land Act, by virtue of their evidence that they settled onto the suit land for a long period without being interrupted by the landlord.

On the other hand, Counsel for the Plaintiff submitted that the 1st Defendant has no interest in the suit land as he neither qualifies as a bonafide nor lawful occupant. That his evidence and case is for a registered land and not kibanja. He referred me to Section 59, 38(3), and 37(1) of the Registration of Titles Act Cap. 30 in support of this view.

Counsel for the Plaintiff also submitted that it is practically impossible to believe DW5 evidence in reexamination; and that it is also important to note that the survey reports of both parties show that Sebinene's land is outside the Plaintiff s land and comprised in Plot 1231.

Resolution

1 noted DW5's inconsistency with the facts of the case. Whereas he testified that the suit land was sold to the Plaintiff by PW4, this is not the case. Secondly, DW5 stated that the suit belongs to the late Bamanya, but later acknowledged that the said Bamanya's land is different from the suit land.

I also noted some weakness in his evidence. He stated that the late Bamanya owned land because his late father, Sebinene Langton Maggwa, told him that the suit land was given to his sister the late Bamanya. This is clearly inadmissible heresy according to Section 59 of the Evidence Act Cap. 6. I further refer to the case of ***R versus Khelawon 12006] 2 R.C.S. 787*** to that effect.

Whereas DW5 testified that he and the 1st Defendant have been in occupation of the suit land for about 59 years, their occupation for the said period was never substantiated. He alluded to Busulu tickets to substantiate this, but these were not exhibited.

I am also mindful of PW4's testimony that on the 4th of August 2016, he executed an agreement with DW5 wherein they equally shared 4 acres occupied by DW5 and the 1st Defendant's family; and that, that family has already been given a certificate of title for the 2 acres. The land, the subject of that agreement, is as stated by PW4, different from the suit land. That agreement was exhibited as PEXH14.

DW5 never denied being the heir of his late father, and also a representative of his family in executing PEXH14. He also never denied that that family includes the 1st Defendant, and that in this suit, the latter claims a kibanja in the name of that family.

PEXH14 indicates that the family derived 2 acres of registered land out of its initial 4 acres of kibanja. That that kibanja is located in Namulonge as is the case with the suit land, hence coinciding with PW2's testimony that only the 1st Defendant's land is within his area of jurisdiction. I am conscious and I note, however that the land in PEXH14 is different from the suit land.

The above notwithstanding, DW5 appeared to claim also that part of the suit land constitutes part of his late father's initial kibanja, yet

he had affirmed in PEXH14 that his late father's kibanja was not part of the suit land by the very fact that the initial 4 acres of their undisputed kibanja were not part of it. It is then illogical of him to claim that part of the suit land was part of their initial kibanja since adding the former to the latter would mean that their kibanja exceed the 4 acres already acknowledged in PEXH 14.

Under the Evidence Act Cap.6, admissions are admissible evidence. According to **Section 19 of the Act**, an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any person, and in the circumstances referred to the Act. However, admission are not conclusive proof of the matters admitted, but they may operate as *estoppels*. (**Section 28 of the Act**).

Further, under Section 17(3) of the Evidence Act Cap. 6, statements made by persons who have any proprietary or pecuniary interest in the subject matter of the proceeding, and who made the statement in the character of persons so interested are regarded as admissions. Under those provisions, the maker need not necessarily be a party to the proceeding provided he or she is considered by law as a real party in interest. Where this is the case, the maker's admission is admissible against a party to the proceeding with whom he or she holds a joint interest in the subject matter of such a proceeding (Hanson vs. Parker, 1749, 1 Wills 257). In Kowsulliah Sundari Dasi & Anor versus. Mukta Sundari Dasi (1885) ILR 11 Cal 588, the Indian Court persuasively observed that;

> *'where several people are jointly interested in in the subject matter of the suit, the general rule is that the admissions of anyone of these persons are receivable against himself and fellows, whether they be all suing jointly or sued, or whether an action be brought in*

favor of or against one or more of them separately, provided that admissions relate to the subject matter in dispute and be made by the declarant in his character of person jointly interested with the party against whom the evidence is tendered".

In this case, I consider that DW5 admitted in PEXH14 that the late Sebinene Langton Maggwa's initial kibanja was 4 acres; that 2 acres of it remained after relinquishing the 2 acres to PW4 in exchange for 2 acres of registered land, and that it was and is not part of the suit land.

Further, Court considers that DW5 and the 1st Defendant are jointly interested in the subject matter of this suit. As such, DW5's admission binds the 1st Defendant. Consequently, the 1st Defendant is *estopped* from claiming that their kibanja extended onto the suit land.

In view of the above and the Plaintiff's evidence, it is improbable that the 1st Defendant is a lawful or bonafide occupant (kibanja) on the suit land just as Counsel for the Plaintiff submitted in other word. Consequently, I find that the 1st Defendant has failed to prove his case on the balance of probability that he is a lawful or bonafide occupant on the suit land.

2nd and 6th Defendants

The evidence of these Defendants was given by DW4 (Sewava Nuhu) and DW6 (Kitaka Yusuf). I shall start with that of DW6. DW6 testified that he is a son of the 2nd Defendant; now deceased. That in 1987, his father acquired a kibanja of 7 acres in Busukuma through a caretaker known as Ignatio Kizza who later took him around the kibanja. *A copy of the agreement purchasing a kibanja was exhibited as DEXH1*. That the kibanja had as neighbors on the right side Julayina Nankanjja, on left side Kyoffa; and that it went

down to the swamp bordering Sebinene's land. That his father gave the money to the said caretaker, who then introduced him to the Local Council Committee.

That his father also informed him that he had a brother in Kampala, the 6th Defendant. That his father invited the 6th Defendant to his kibanja and gave him a portion of it to raise his children. That the 6th Defendant was then taken to the landlord, Michael Kitamirike Musajjalumbwa (PW4) to whom he presented a '*kanzu*'. That the said Kitamirike, then approved the 2nd and 6th Defendants as bibanja holders, and that he (PW4) also wrote a letter which they were to take to the caretaker at the time, a one Wilberforce Ssekanjako. That the letter was informing the caretaker that the two were free to use their bibanjas. *A copy of the said letter was exhibited as DEXH12.*

That he was shocked in 2000 when a man came to his father's home, dressed as a Muslim and warned his father to leave hi land. That the man also told his father that he was going to do everything to evict them because he does not want anybody on his land.

DW6 made other statements alluding to how the dispute with the Plaintiff later unfolded. I shall not reproduce these because they are not relevant to the issue at hand.

During cross-examination, DW4 admitted that DEXH1 does not show the acres of the alleged kibanja. That Ignatio Kizza is not the one who sold to his father, though the money was given to him; and that he has never seen a letter authorizing the said person to sale land on behalf of the landlord.

He also admitted that DEXH2 does not show that PW4 received any money and that it does not have Ignatio Kizza's hand/signature. That DEX2 is dated 20th May 1993 and that he mother title, from which the

suit land was parceled, was still registered in the name of Jacob Musajjalumbwa who is not a party to DEX2. It was his evidence that PW4 was just a writer in 1993 and that he wrote DEXH2 upon being instructed by his father who did not know how to write.

Similarly, DW4 also testified as DW6; and for avoidance of repetition, I shall not reproduce some of his statements. In addition to that, DW4 also stated that he started constructing on the kibanja given to him by the 2nd Defendant in 1993 and that he has since had 3 children born thereon. Like DW6, he also testified that he started having issues on his kibanja in 2000 when somebody came on his land and warned him leave it.

Counsel's submissions

I already noted that Counsel for the Defendants' submissions were general. A large part of them did not specify which Defendant they referred, but he also stated, in respect to the 2nd and 4th Defendants, that these are lawful occupants under **Section 29(1)(a) and (b) of the Land Act.** He submitted that some Defendants' evidence pointed out how the landlord and PW4 dealt with their relatives, husbands and Defendants. That the existence of such evidence on record can ably be argued that the Defendants were known to the landlords, and thus a lawful occupancy can be inferred.

On the other hand, Counsel for the Plaintiff submitted that there are flaws in DEXH1 and DEXH2 and that these cannot be relied upon to validate any legal transaction. That DEXH1 does not qualify as a valid contract because the buyer and seller did not sign it and was never witnessed, and shows no consideration, among others. He referred me to **Section 10 of the Contracts Act 2010** regarding the

contents of a valid contract, and **Section 20 of the same Act** to the effect that a contract without consideration is void.

Further, Counsel for the Plaintiff submitted that there is no evidence that Ignatio Kizza had authority to sell land belonging to Edward Jacob Kitamirike. That lawful authority to act is given by powers of attorney. I was referred to **Section 146(1) of the Registration of Titles Act** as regards Powers of Attorney and the case of ***Fredrick Zaabwe versus Orient Bank Ltd & Others SCCA No.4 of 2006*****,** among others, to that effect.

Regarding DEXH2, Counsel for the Plaintiff submitted that Michael Kitamirike who is alleged to have written it denied it, and that neither was independent evidence called to support it nor a handwriting report produced to challenge PW4's denial. Further, that DW6 testified that PW4 wrote DEXH2 because his deceased father (*Edward Jacob Kitamirike*) did not know how to write and yet there's on record PEXH13 which was written by Edward Jacob Kitamirike. Further, that DEX2 is also irrelevant and its contents not authentic on ground that it was neither marked nor thumb printed by Edward Jacob Kitamirike.

It was also Counsel for the Plaintiff's submission that DEXH 1 and DEXH2 are void on ground that in 1987 and 1993 when they were executed, the law did not permit dealing in land without permission from a prescribed authority. On that matter, I was referred to **Section 4 and 5 of the Law Reform Decree of 1975,** and the case of ***Tifu Lukwago versus Samwiri Mudde Kizza & Anor; SCCA No.13 of 1996*** to the effect that;

"Notice to a prescribed authority was relevant to validate a sale of a kibanja and where such notice was not given then such transaction was not valid".

Counsel for the Plaintiff also cited the case of ***Paul Kisekka Sakti versus Seventh Day Adventist Church SCCA No. 8 of 1993*** where the *Supreme Court* held that;

"transfer of the customary interest was governed by Section 4(1) of the Law Reform Decree which required the said transfer to be preceded by a 3 months' notice to the intended transfer to the prescribed authority; that since there was no such notice, the transfer was unlawful and void."

Counsel for the Plaintiff also argued that the **2nd** and 6th Defendants do not also qualify as bonafide occupants under **Section 29(2)(a) of the Land Act,** since their occupation was not 12 years prior to the coming into force of the Constitution of 1995. Counsel referred me to the case of ***Prince Phillip Katerega versus Joseph Kiyimba HCCS No. 482 of 2011*.**

Ultimately, Counsel for the Plaintiff argued that the 2nd and 6th Defendants do not qualify as bonafide or lawful occupants due to illegal, unlawful and defective transactions upon which they purport to claim the same.

Resolution.

First, I also have strong reservations with DEXH1, though my reasons are somewhat different from the Plaintiff's counsel. The authenticity of that document was not proved. It is the obligation of a party exhibiting documentary evidence to prove that it is authentic, in other words, that it is what it purports to be. On this point, I find the propositions of my learned brother *Justice Mubiru Stephen* in ***Kaggwa Michael versus Olal Mark & 6 Orslligh Court Civil Appeal No.10 of 2017***, persuasive. He observed therein that:

> *"Documentary evidence must be properly authenticated and a foundation laid before it can be admitted at trial. Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either: (a) by anyone who saw the document executed or written; or (b) by evidence of the genuineness of the signature or handwriting of the maker".*

In this case, neither DW4 nor DW6 saw DEXH1 being executed. DEXH1 indicates no witness that witnessed its execution. It shows, however, that it was executed by a one Ignatio Kizza. No effort was made by the 2nd and 6th Defendant to call that person if he is alive, or to prove the genuineness of his signature or handwriting.

The authenticity of DEX1 is very crucial especially since it is the foundation of the 2nd and 6th Defendant's claim of a kibanja on the suit land. DEXH2 is also founded on DEXH1.

The other challenge to DEXH2 is that its authenticity is also challenged by the Plaintiff. The document shows that it was executed by PW4. But PW4 vehemently denied executing it during cross-examination. It was therefore necessary for the 2nd and 6th Defendants to lead independent evidence showing that it was written or signed by PW4. This view is captured from **Section 66 of the Evidence Act Cap.6, which provides** that:

> *If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his or her handwriting.*

The burden of proving that DEXH2 was written and signed by PW4 lay on the 2nd and 6th Defendants. This was not discharged. DEXH1 and DEXH2 therefore, are of little or no evidential weight.

Without prejudice to the above, DEXH1 also has another issue, and this was raised by Counsel for the Plaintiff. Whereas it was allegedly executed by Ignatio Kizza claiming as a caretaker of Edward Jacob Kitamirike, the 2nd and 6th Defendants did not lead any evidence that the said person was authorised by the former to deal with his land. The time at which DEXHI was executed is also crucial. As Counsel for the Plaintiff submitted citing **Section 4 and 5 of the Law Reform Decree of 1975** and the relevant cases, it was necessary for the vendor to give three months' notice to a prescribed authority prior selling the alleged kibanja, otherwise the purported sale was void. There is no evidence that that notice was given.

Considering the observations above and the Plaintiff's evidence, it is difficult for this Court to conclude that the 2nd Defendant acquired the alleged kibanja by purchase. The 2nd Defendant has thus not discharged the burden of proof placed upon him to the required standard. As such, he together with the Defendant cannot **fall under Section 29(1)(b) of the Land Act Cap.227.** The only alternative protection to the 2' and 6th Defendants would be Section 29(2)(a) of the Land Act, which provides that a *"bona fide occupant is 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 of the registered owner for twelve years or more".* The hurdle, however, is that none of the two occupied the suit land for 12 years before the coming into force of the Constitution of the Republic of Uganda 1995. The 2nd Defendant, according to DEXH1, came onto the alleged kibanja in 1987, and 6th Defendant in 1993 as per his evidence, thus being 8, and 2 years prior to the coming into force of the said Constitution.

There is also another vital account. Both DW4 and DW6 testified that there kibanja is in Busukuma. I already noted that the suit land is in Namulonge, Nabalanga village. The two areas are separated by Zirobwe Road. I do recall PW2's undisputed testimony that the Defendants except, the 1st Defendant, are not within his jurisdiction but come from another village and cross into his village where the suit land is located. The implication of this is that the 2nd and 6th Defendants' alleged kibanja is not part of the suit land.

Considering the analysis and observations above, I find it improbable that the 2nd and 6th Defendants are bonafide occupants on the suit land. They have, therefore, also failed to discharge the burden placed upon them of proving that they are bonafide occupants on the suit land on the balance of probability.

The 2nd Defendant has thus not discharged the burden of proof placed upon him to the required standard. As such, he together with the Defendant cannot fall under Section 29(1)(b) of the Land Act Cap.227.

The only alternative protection to the 2' and 6th Defendants would be Section 29(2)(a) of the Land Act, which provides that a *"bona fide occupant is 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 of the registered owner for twelve years or more".* The hurdle, however, is that none of the two occupied the suit land for 12 years before the coming into force of the Constitution of the Republic of Uganda 1995. The 2nd Defendant, according to DEXH1, came onto the alleged kibanja in 1987, and 6th Defendant in 1993 as per his evidence, thus being 8, and 2 years prior to the coming into force of the said Constitution.

There is also another vital account. Both DW4 and DW6 testified that there kibanja is in Busukuma. I already noted that the suit land is in Namulonge, Nabalanga village. The two areas are separated by Zirobwe Road. I do recall PW2's undisputed testimony that the Defendants except, the 1St Defendant, are not within his jurisdiction but come from another village and cross into his village where the suit land is located. The implication of this is that the 2nd and 6th Defendants' alleged kibanja is preferably probably not part of the suit land.

Considering the analysis and observations above, I find it improbable that the 2ndand 6th Defendants are bonafide occupants on the suit land. They have, therefore, also failed to discharge the burden placed upon them of proving that they are bonafide occupants on the suit land on the balance of probability.

3rd Defendant - Her evidence was given by DW3.

DW3 testified that the failure of the Plaintiff to rightful identify her late mother Julayina Nankanjja, who died in 1993, while living on her kibanja located in Busukuma village, is clear indication that he was never introduced to the persons who were resident on the land to obtain proper information about them. That her mother who died in 1990 and buried her on her land in Busukuma had five children who are now deceased with her as the only surviving child.
That her mother's kibanja was approximately 4 acres and it runs from the end of the late Badru Kavulu's kibanja right to Nalongo Ssembatya. That she does not know when her mother bought her kibanja because all documentations were lost during the war in the 1980s. That she was only able to find three receipts confirming

payment of Busuulu long before the time the Plaintiff claims to have bought the suit land. The said receipts are what PW5 examined *as exhibit "A", "B" and "C"*.

That she lived partly on the alleged kibanja with her mother until she got married in 1975; and that upon her mother's death, the kibanja remained with her sisters. That she is now living in Masaka and left the son of her late brother, Kavulu, to ensure that no encroachment happens on the alleged kibanja.

During cross-examination, she testified that the village where the alleged kibanja is located is Busukuma. That the owner of the suit land was Kitamirike before selling to the Plaintiff. That her mother was paying Busulu to Kitamirike. When referred to the Busulu tickets attached to her witness statement, she confirmed that Kitamirike was not the person to whom rent was paid or person that issued the tickets, but a one Galusanja, and Y. Sempala. She also confirmed that Busuulu ticket annexed as **"A", "B",** and "C" show Seeta Kasubi as the village in Musaale Sub-county.

Counsel's submissions.

Counsel for the Defendants alluded to DW3's testimony and the three receipts and submitted that her testimony infers a lawful occupancy because she often referred to tickets of Busuulu; as well as bonafide occupancy because of the use, utilization, and occupancy. It was his submission that her testimony alluded to the agent of the landlord, being a one Galusanja, to whom Busuulu dues were paid. That no specific rebuttal was made by the Plaintiff about the existence of the said agents and how they related with the Defendants. He generally concluded that the Defendants are bonafide occupants under **Section**

29(2)(a) of the Land Act; or lawful occupants under Section 29(1)(a)(b) of the Land Act.

On the other hand, Counsel for the Plaintiff submitted that when he examined the Busulu tickets, he discovered that the land owner (*Omwami*) on them is Y. B. Bamanya and Sala Namala, and not Kitamirike. That all the 3 tickets show the village as Seeta Kasubi, and the suit land is in Namulonge at Nabalanga village as per PW2's evidence. That DW3 also testified that the sub-county where the suit land is located is Busukuma but her tickets showed the sub-county to be Musaale.

Further, Counsel for the Plaintiff also submitted that the evidence of Busulu tickets was also concocted as per the report of PW5 whose evidence was unchallenged during cross examination because the defence concentrated on academic qualifications, rank and background of the paper. That they did not present a contrary report to prove the authenticity of Busuulu tickets. On the overall, Counsel for the Plaintiff again concluded that the 3rd Defendant is also not a lawful or bonafide occupant.

Resolution

The evidence of DW3 in respect of the alleged kibanja on the suit land was generally oral. She substantiated her oral evidence with 3 Busulu tickets which were not exhibited. But since the Plaintiff alluded to them through PW5 and his Counsel submitted on them, I shall evaluate them that notwithstanding. Like it was with DEXH1 and DEXH2, the authenticity of the said 3 Busulu tickets was not proved. I already alluded to how authenticity of documents is demonstrated. I need not to repeat.

On the issue of authenticity again, PW5 exhibited a report that challenged the said tickets. PW5's evidence was given as an opinion of a handwriting expert. I shall now refer to the law and principles of expert opinions for instructions on this issue.

According to **Section 43 Evidence Act Cap 6,** when Court needs to form an opinion on a technical matter, the opinion of an expert is relevant. Such opinions are however received by Court with caution. Accordingly, ***Morris in Evidence in East Africa at pg.94 while quoting from Woodroffe &Ameer Ali, Law of Evidence (4^{1h}Edn.,) p.44*** states that;

> *The evidence of experts is to be received with caution because they may often come with such a bias in their minds to support the cause in which they are embarked that their judgments become warped, and they themselves become even more conscientiously disposed, incapable of expressing a correct opinion.*

Considering the above quoted proposition, the ***EACA*** held in ***C.D de Souza versus BR Sharma (1954) 21 EACA 384,*** that Court may reject an expert opinion if it finds good reason for not acting on it. In further support of this, this Court in ***Christopher Bamweyana versus Herman Byanguye Civil Appeal No. 24 of 2017,*** quoting ***Kimani versus Republic (2000) E.A 417,*** properly observed *that:*

> *....it is now trite law that while the Courts must give proper respect to the opinion of expert, such opinions are not as it were, binding on the Courts.... such evidence must be considered along with all other available evidence and if* a *proper and cogent basis for rejecting the expert opinion would be perfectly entitled to do so...*

From the above propositions, I deduce that for an expert opinion must be convincing before it can be acted upon by Court. I also add that when an expert opinion is given, the grounds upon which it is based become relevant **(Section 49 of the Evidence Act).** The implication is that a convincing expert opinion is one based on sound grounds.

For handwriting experts in particular, the position of the law is that:

> *A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a person who, habituated to the examination of handwriting directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province.* **(*Onyango versus Ug [19691 EA 362*.**

In ***Nguku versus R [2004]1 EA 188*,** the *Court of Appeal of Kenya*, further emphasized that a handwriting expert is not restricted to merely pointing out features of similarity or dissimilarity between the forged documents but also entitled to give his opinion with no argument about is finding.

PW5's opinion was that the three Busuulu tickets were written by the same person notwithstanding that they indicate being issued by different persons. His opinion was without argument. The similarities he pointed out were in the handwriting skill, design and manner of execution of letters, S, N, a, t, m, y, k, u, b. B and figures 8 and 5, relative letter sizes, relative slant of writing, internal and external proportions of letters in the words Seeta, Kisubi and Musaale, margin effect and relative letter spacing.

It suffices to note that PW5's testimony as to the similarities pointed out was not challenged by the Defendants. As Counsel for the

Plaintiff argued, the cross examination of PW5 was mainly on his qualifications and procedure of conducting her instructions. Her qualifications were neither discredited. I have taken ample time to scrutinize the said three Busulu tickets against PW5's testimony. In my considered view, PW5 is not alone. There is good reason to believe her opinion in view of the similarities she pointed out. It is, therefore, my considered view that PW5's opinion is well convincing.

Accordingly, this Court finds that the 3 Busulu tickets were probably executed by the same person, and this deprives them of any evidential weight.

Without prejudice to the above observation, the Busuulu tickets indicate that the 3rd Defendant's alleged kibanja is located in Seeta-Kisubi village in Musaale sub-county. This evidence rhymes with that of PW4 that the Defendants' land, save the 1st Defendant, is in Busukuma, and PW4's testimony that other Defendants were settling on his other father's land in other local councils of Busukuma and Seeta. I already noted that the suit land is in Namulonge in Nabalanga village. Therefore, it is more probable than not that the 3rd Defendant's alleged kibanja is not on the suit land but elsewhere in Seeta-Kisubi village.

In view of the above, it is my conclusion that the 3rd Defendant has failed to discharge the burden of proof laid on her. She is neither a bonafide nor lawful occupant on the suit land.

4th Defendant - This Defendant gave her evidence as DW2.

She testified that she came on the suit land on 3rd September 1955. That she was brought by her husband, Ssalongo Aloysius Ssembatya who also started residing on the suit land in 1943 and bought his kibanja in 1945

from a man called Nsubuga after he had introduced him to a one Ignatio Kizza, a caretaker then and who used to collect Busulu and signed the same on behalf of Kitamirike. That during the war period about 1984, the book where they kept the busuulu tickets was taken by the rebels believing it to be money. That the kibanja bought by her husband is approximately 8 acres. That its upper part had their house and the lower part across the road was cultivated by the family and that it had plants such as eucalyptus trees, yams, sweet potatoes, among others. That all these developments have been destroyed by the Plaintiff and his men while enforcing a Court order and their continued refusal to allow them to use their kibanja.

It was her evidence that the previous owner of the suit land neither notified them that he was selling it nor give them a chance to buy themselves, but that she received such information when being threatened with eviction by the Plaintiff. The rest of her statement is not relevant to the issue at hand, and I need not reproduce it.

During cross examination, DW2 stated that the land issue is in Busukuma, but also confirmed that Busukuma is different from Namulonge. That she does not know that the suit land is in Namulonge.

Regarding the caretaker Ignatio Kizza, she stated that she saw no other document from him save Busulu tickets. That the customary heir to her late husband is a one Ddungu Joseph, her son. That she knows that her son approached PW4 to obtain a legal interest and made an agreement to that effect, although not aware that the alleged kibanja was approximately 5 acres after survey.

During re-examination, she testified that her children made an agreement with PW4 when she was sick.

Counsel's submissions

Counsel for the Defendants submitted that DW2's testimony demonstrates the fact that the 4th Defendant's family has used, occupied, developed, and had uninterrupted occupation of the suit land since 1945. It was thus his submission that the 4th Defendant is a bonafide occupant of the suit land **under Section 29(2)(a) of the Land Act.**

Counsel for the Defendants also submitted that DW2 referred to an agent of the landlord, a one Ignatio Kizza, and that no specific rebuttal was made by the Plaintiff about the existence of the said agent and how he related with the Defendants. He generally concluded that with the existence of such evidence, it can be argued that the Defendants, in particular 4th Defendant, was known to the landlord and thus a lawful occupancy can be inferred **under Section 29(1)(a)(b) of the Land Act.**

On the other hand, Counsel for the Plaintiff referred to DW2's testimony and stated that his submissions on the 5th Defendant apply to the 4th Defendant. As regards the 5th Defendant, his submissions were that in 1955, land was governed by the Busulu and Envujjo Law. He cited Section 8(1) of that law which provided that no one shall have the right to reside on a mailo owner's land except with the consent of the mailo owner except a child or wife of the kibanja holder. He also cited Section 8(2) of the same law which provided that no one shall have the right to transfer a kibanja or sublet to any other person.

It was his submission that DW2 did not present the consent of the mailo owner at the time. That there was no power of attorney from the mailo owner authorizing a one Nsubuga to deal with the subject land; and he referred me to Section 146(1) and (2) of the Registrations of Titles Act,

whose provisions refer to a power of attorney, which he argued was applicable by then since its commencement date is 1st May 1924 for authority to transact on Edward Jacob Kitamirike's land.
That DW2 also admitted that they have no developments on the suit land something which is collaborated by PW4's testimony that he sold land measuring approximately 5 acres to the 4th Defendant's son on behalf of his father's family, and that this land was not part of the suit land. Counsel thus prayed that Court finds that the 4th Defendant is neither a lawful or bonafide occupant by reason of non- compliance with the law at the time and because she is not in occupation of the suit land.

Counsel for the Defendants also submitted that DW2 referred to an agent of the landlord, a one Ignatio Kizza, and that no specific rebuttal was made by the Plaintiff about the existence of the said agent and how he related with the Defendants. He generally concluded that with the existence of such evidence, it can be argued that the Defendants, in particular 4th Defendant, was known to the landlord and thus a lawful occupancy can be inferred under **Section 29(1)(a)(1)) of the Land Act** in the absence of any cogent evidence that she purchased and occupied part of the suit land as her kibanja, and paid Busuulu for her occupation of the same. I therefore disagree with her Counsel on that matter.

On the other hand, Counsel for the Plaintiff referred to DW2's testimony and stated that his submissions on the 5th Defendant apply to the 4th Defendant. As regards the 5th Defendant, his submissions were that in 1955, land was governed by the **Busulu and Envujjo Law.** He cited **Section 8(1)** of that law which provided that no one shall have the right to reside on a mailo owner's land except with the consent of the mailo owner except a child or wife of the kibanja holder. He

also cited **Section 8(2)** of the same law which provided that no one shall have the right to transfer a kibanja or sublet to any other person.

It was his submission that DW2 did not present the consent of the mailo owner at the time. That there was no power of attorney from the mailo owner authorizing a one Nsubuga to deal with the subject land; and he referred me to **Section 146(1) and** (2) of **the Registrations of Titles Act,** whose provisions refer to a power of attorney, which he argued was applicable by then since its commencement date is 1st May 1924 for authority to transact on Edward Jacob Kitamirike's land. That DW2 also admitted that they have no developments on the suit land something which is collaborated by PW4's testimony that he sold land measuring approximately 5 acres to the 4th Defendant's son on behalf of his father's family, and that this land was not part of the suit land. Counsel thus prayed that Court finds that the 4th Defendant is neither a lawful or bonafide occupant by reason of non-compliance with the law at the time, and because she is not in occupation of the suit land.

Resolution

The 4th Defendant's evidence was oral. She referred to a one Nsubuga whom she said to have sold her deceased husband the kibanja in issue; and a caretaker, a one Ignatio Kizza, to whom her husband was introduced upon buying the said Kibanja. That said and done, the *nexus* between those two people and the late Jacob Edward Kitamirike Musajjalumbwa, the landlord by then, was not established.

Establishing the said *nexus* was crucial especially in view of the Plaintiffs evidence, and in particularly PEXH13, wherein the said landlord emphasized that there were no bibanja holders at the time

he sold the suit land to the Plaintiff; and not forgetting PEXH3 which showed that there were nil developments on the suit land.

The 4th Defendant need to challenge PEXH13, PEXH3, and the Plaintiff's other evidence by demonstrating that a one Ignatio Kizza and a one Nsubuga were agents of the landlord and that their transactions bound him. That would then create the inference that the 4th Defendant's husband was in occupation of the subject kibanja with knowledge and consent of the landlord since 1945.

The necessity of establishing the *nexus* was even more crucial considering the fact that the law at the moment, as cited by Counsel for the Plaintiff, required the consent of a landlord prior occupying mailo land as a kibanja holder. Counsel for the Plaintiff therefore, right to submitted that a power of attorney as dictated by **Section 146 of the Registration of Titles Act** would have sufficed to establish the facts alluded to.

In view of the foregoing, I find the evidence that the 4th Defendant's husband bought a kibanja on the suit land lacking. For that reason, I find that the 4th Defendant has not proved on the balance of probability that she is a lawful occupant under Section **29(1)(a)(b) of the Land Act.**

In the alternative to that; DW2 also testified that her husband came onto the alleged kibanja in 1945 and that she also started living there on the suit land since 1955. This evidence was given to claim that they lived on the suit land without being challenged by the landlord for 12 years before the coming into force of the Constitution of the Republic of Uganda, and thus the inference that she is a bonafide occupant under **Section 29(2)(a) of the Land Act.**

But DW2 was skeptical of where the suit land and her alleged husband's kibanja are located. During cross examination, she is captured saying that the alleged kibanja is in Busukuma, and that Busukuma is different from Namulonge. But the suit land is in Namulonge, Nabalanga Village, as per the Plaintiff's evidence. There is evidence however of PEXH14 executed between PW4 and the 4th Defendant's son in respect of her husband's undisputed kibanja. This shows that the undisputed kibanja is in Seeta village in Namulonge. That notwithstanding, DW2 insisted that the alleged kibanja extended from one side of Zirobwe road onto the suit land.

Further, PEXH14 shows that the 4th Defendant son's affirmation that his deceased father's kibanja was measuring approximately 5 acres, and not 8 acres as his mother stated herein.

I have already alluded to the effect of a statement of a person with a joint interest in the subject matter of a proceeding against a party thereto. I need not to repeat myself.

In this case, the 4th Defendant is jointly interested with her son in the alleged kibanja, being family land. The latter's affirmation to PW4 that their deceased father's kibanja was approximately 5 acres and that the same is located in Seeta is an admission that the alleged kibanja is not part of the suit land. The 4th Defendant is estopped from claiming that her late husband's kibanja extended from Seeta village across Zirobwe road onto the suit land in Nabalanga village.

Considering the above observations, I find it improbable that the 4th Defendant occupied the suit land for 12 years before the coming into force of the Constitution without being challenged by the landlord. For that reason therefore, I find that the 4thDefendant has not discharged,

to the required standard, the burden of proving that she is a bonafide occupant on the suit land under **Section 29(2)(a) of the Land Act.**

5th Defendant - Her evidence was given by DW1.

DW1 testified that she came on the suit land on the 27th of July 1958. That she found out that her husband, Salongo Ssebaggala, had bought the kibanja in 1955 but started living on it in 1956. That the kibanja was mainly used for farming on the lower part, and that the upper part has their house.

That at the time, the Busulu was paid to a one Leo Wagwabi, the caretaker of the registered land; and that the Busulu receipts were lost during war. It was her testimony that she later found the receipts dropped in the hallway together with the sale agreement.

That a lot of her stuff was destroyed by the Plaintiff's agents including her plantation on the suit land. That she did not first know that the Plaintiff had bought the suit land because she saw people making tours and carrying out measurements on the land. That the person he saw was a Police man, and he told her that her coffee plantation was part of the land he had bought and that his cows loved the shade they created. That he told her that they would reach an understanding, but that she has not seen him again since.

During cross-examination, she stated that the land in issue is in Busukuma. That her husband told her that she bought the kibanja from a one Sejjaka, the agent of Edward Jacob Kitamirike. That the heir to her deceased husband is Joseph Kasolo, and that Nalubwama Josephine, Babirye Judith, and Nabbumba Kigongo are her daughters. She confirmed knowing that her children approached PW4 to obtain a legal interest and

made an agreement to that effect. PEXH14 is the agreement she referred to.

That she has ever met with Kitamirike as a kibanja owner. That she never asked Sekanjako if he knew Kitamirike. That the alleged kibanja was 7 acres; and that Kitamirike was the landlord though he never issued her any ticket of Busulu to confirm her tenancy.

Counsel's Submissions

Counsel for the Defendants submitted that DW1's evidence in chief, cross examination, and re-examination underscores the fact of occupation and utilization of land since the late 1950s. That her evidence shows that she had a good relationship with the landlord and his agents. He thus submitted that all her evidence ably supports the fact that the 5th Defendant's occupation and use of the kibanja in issue was never challenged by the landlord. On the overall, Counsel submitted that the 5th Defendant is a lawful occupant under Section 29(1)(a)(b) or a bonafide occupant under Section 29(2)(a) of the Land Act Cap.277.

I already reproduced Counsel of the Plaintiff's submission on the 5th Defendant, under the 4th Defendant. I shall, therefore, not replicate it.

Resolution

The 5th Defendant's evidence is more less the same as that of the 4th Defendant. She also referred to a one Senjako and Leo Wagwabi as agents of the late Edward Jacob Kitamirike Musajjalumbwa as regards transactions concerning the alleged kibanja on the suit land. Like the case with the 4th Defendant, the nexus between the two and the late Jacob Edward Kitamirike Musajjalumbwa was also established. I have already alluded to the necessity of this; and I need not repeat myself. For that reason, I find that the 5th Defendant has not proved on the

balance of probability that she is a lawful occupant under Section **29(1)(a)(b) of the Land Act.**

In the alternative to that; DW 1 also testified that her husband came onto the alleged kibanja in 1956 and that she also started living thereon the suit land since 1958. This evidence was given to establish the fact that the said person's occupation of the suit land was not challenged by the landlord for 12 years before the coming into force of the Constitution of the Republic of Uganda, and thus the inference that DW1 is a bonafide occupant under **Section 29(2)(a) of the Land Act.**

DWI was also skeptical of the location of the suit land and her alleged husband's kibanja. During cross examination, she is stated that the kibanja in issue is located Busukuma. The suit land is however located in Namulonge, Nabalanga village according to the Plaintiffs evidence. That notwithstanding, DW1 also appeared to insist that the alleged kibanja extended from one side of Zirobwe road onto the suit land.

There is evidence however of PEXH14 wherein the 5t^{h} Defendant's children affirmed that their deceased father's kibanja measured 2.11 acres and not 7 acres as their mother, DW1, testified herein. It suffices to note that DW1 confirmed knowledge of PEXH14. The land in PEXH14, according to PW4 is not part of the suit land, and is in another village.

In principle, PEXH14 is an admission by the 5th Defendant's children; and this binds the 5th Defendant as already illustrated hereinabove. I find that the 5th Defendant is *estopped* from denying that her deceased husband's kibanja was 2.11 acres and that the same is part of the suit land.

As was the case with the 4th Defendant, I also find it improbable that the 5th Defendants deceased husband, under whom she claims through, had a kibanja on the suit land. For that reason, it is not probable that the 5th Defendant occupied the suit land for 12 years before the coming into force of the Constitution without being challenged by the landlord.

In view of the above, I conclude that 5th Defendant has also not discharged, to the required standard, the burden of proving that she is a bonafide occupant on the suit land under **Section 29(2)(a) of the Land Act.**

8th Defendant

No evidence was led by this Defendant as regards the issue. I find that the 8th Defendant has not discharged the burden of proving that he is a lawful or bonafide occupant on the suit land.

Overall Conclusion

In conclusion, this issue is found in the negative. Consequently, the Defendants' counterclaim fails and is hereby dismissed.

Issue 2:
Whether the Defendants are trespassers on the suit land

Trespass to land occurs *"when a person makes an unauthorized entry upon land, and thereby interfering, or portends to interfere, with another person's lawful possession of that land"* (***Justine E.M.N. Lutaaya versus Sterling Civil Engineering Co. SCCA No.11 of 2002***).

In this case, the Plaintiff has not only legal possession of the suit **land** since he is the registered proprietor, but also had physical possession of the same—going by his evidence.

The Defendants' interference with his possession of the suit land was supported by the Plaintiff's evidence, and was also evidence when Court visited locus.

The Court has ruled out the fact that the Defendants had any interest in the suit land to justify their interference with the Plaintiff's possession. As such, their entry onto the suit land was unauthorised. Consequently, this Court finds that the Defendants are trespassers on the suit land.

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

This issue shall only be determined in respect of the Plaintiff only. Considering the findings above, this Court grants the Plaintiff;

1. A declaration that the Plaintiff is the true owner/registered owner of land comprised in Block 158B Plot 21 at Namulonge, Musaale, Kyadondo.
2. A declaration that the Defendants are trespassers on the said land.
3. An eviction order against all the Defendants and their agents from the suit land.
4. A permanent injunction against the Defendants restraining them or their agents, servants, workmen and any other person or entity deriving authority from them, trespassing on the suit land, selling the land, interfering with the Plaintiff's possession or use and dealing with the suit land, cutting the forest, laying bricks on the suit land.

The Plaintiff also sought for the following damages:

<u>Special damages for cutting trees/lumbering and brick laying.</u>

In principle, special damages must be specifically pleaded and strictly proved ***(John Nagenda versus Sabana Belgian World Airlines (1992) KALR 13; and Kyambadde versus Mpigi District Administration (1983) HCB 44)*.**

The Plaintiff gave the following particulars of special damages:

i) Cutting of over 100 trees and selling wood estimated at approximately Ugshs.50,000,000/- (*fifty million shillings only).*

ii) Brick laying by the Defendants for over a period of 2 years Ugshs.10,000,000/- (*ten million shillings only).*

The Plaintiff did not lead any documentary evidence as regards the pleaded amounts. That said, while special damages must be strictly proved, they need not be supported by documentary evidence in all cases **(*Kyambadde W. M. versus Mpigi District Administration 11983] HCB 44*).**

Save for evidence alluding to the Defendants' cutting of trees and brick laying, there is no evidence by the Plaintiff demonstrating the claimed quantum of special damages. For that matter, therefore, this Court is constrained to find that the Plaintiff failed to strictly prove special damages suffered. Accordingly, the same are denied.

General damages for trespass

According to ***Kibimba Rice Co. Ltd versus Umar Salim ll992l V KALR 17***, Court held that;

> *"a party is entitled to general damages even without proof of the same as they are presumed to have naturally resulted from the breach of duty".*

Considering the circumstances of the case, it is not unreasonable to say that the Plaintiff naturally suffered a loss owing to the Defendants' trespass on the suit land. The lumbered his tress, laid bricks on the suit land, killed l0 of his cows and 8 horses (as PWI testified), dispossessed him from part of the suit land while

cultivating it, cut his barbed wire around the suit land, and also put him at the expense of prosecuting this suit against them. The Plaintiff must have suffered pain, and inconvenience. He should thus be awarded general damages.

It was observed in ***Uganda Commercial bank vs. Kigozi [20021] 1 EA 305*** that;

> *"general damages are not awarded to punish the guilty party, but to compensate the innocent party; and that in assessing the same, Court must take into account the value of the subject matter, the nature and extent of breach, and inconvenience suffered by the innocent party".*

Considering the circumstances of this case, I award ugshs.50,000,000/- (*fifty million shillings)* to the Plaintiffs as general damages. This sum is to be paid by the Defendants jointly and severally.

In addition, interest is awarded on the said amount at a rate of 8% per annum from the date of this judgment until payment in full.

The costs of the suit are awarded to the Plaintiff.

I so order.

……
Henry I Kawesa
JUDGE

29/04/2022
Babu Rashid for the Plaintiff present.

Agnes Gwokyalya also holding brief for Matovu, Nakato Angella also holding brief.

Plaintiff present.

3rd Defendant in Court.

Counsel for the Plaintiff:

Matter for Judgment and we are ready to receive it.

Court:

Judgment delivered in the presence of all the parties in Court.

Sgd:
Kintu Simon Zirintusa
ASST. REGISTRAR.
29/4/2022

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