

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[LAND DIVISION]  
CIVIL SUIT NO. HCT-00-LD-CS-2443-2015**

1. NAKALYANA TEOPISTA
2. NALUBEGA KASIFA
3. MATOVU JOSEPH
4. LUBEGA ISMAIL
5. LUWEMBA WILSON :::::::::::PLAINTIFFS/COUNTER DEFENDANTS

***VERSUS***

**KAGGWA JUMA :::::::::::DEFENDANT/COUNTERCLAIMANT**

**BEFORE: HON. JUSTICE BERNARD NAMANYA**

**JUDGMENT**

**Introduction:**

1. The plaintiffs claim that they are lawful owners of the land comprised in Busiro Block 74 Plot 1 at Mutungo (hereinafter “the suit land”) and have a certificate of title registered in their names. The defendant contends that the plaintiffs were fraudulently registered, and filed a counterclaim seeking cancellation of plaintiffs’ certificate of title.

**Representation:**

2. The plaintiffs were represented by Mr. Obed Mwebesa of M/s Obed Mwebesa & Co. Advocates. The defendant was represented by Mr. Sanywa Shaban of M/s Sanywa, Wabwire & Co. Advocates.

**The plaintiffs’ evidence:**

3. The plaintiffs produced of 2 (two) witnesses to prove their case: PW1 (Nakalyana Teopista) and PW2 (Beatrice Namika Mutebi).



4. The plaintiffs relied on the following documents:
- i). Exh.P1 – Letter from Bbale & Partners Advocates dated 22/6/2015;
  - ii). Exh.P2 – Letter from Naalinya Namika dated 29/6/2015;
  - iii). Exh.P3 – Certificate of no objection dated 23/7/2012;
  - iv). Exh.P4 – Certified copy of minutes from the Administrator General’s office;
  - v). Exh.P5 – Letters of Administration in favour of the plaintiffs dated 27/2/2013; and
  - vi). Exh.P6 – Certificate of Title for the suit land certified by the Commissioner for Land Registration.

**The defendant’s evidence:**

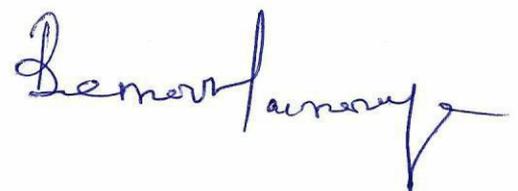
5. The defendant produced 3 (three) witnesses to prove his case: DW1 (Kaggwa Juma), DW2 (Sajjabi Haruna Elias), and DW3 (George William Njara Luwalira).
6. The defendants relied on the following documents:
- i). Exh.D1 – Letter requesting for certified copies of letters of administration from the High Court dated 19/12/2020;
  - ii). Exh.D2 – Letters of Probate in favour of Ntale Sabiiti and Tebandeke Moses Katerrega dated 5/3/2013;
  - iii). Exh.D2(a) – Petition for letters of administration
  - iv). Exh.D2(b) – Identification of applicants for letters of administration
  - v). Exh.D2(c) – LC 1 letter certifying death
  - vi). Exh.D3 – Letter by Deputy Registrar dated 9/10/2020;
  - vii). Exh.D4 – Letter from the Kingdom of Buganda dated 29/2/2016



- viii). Exh.D5 – Letter by the office of the clan leader, Nsamba dated 20/2/2017; and
- ix). Exh.D6 – National ID of Nakiganda Teopista.

**Locus in quo visit:**

7. On the 23 June 2023, I carried out a locus in quo visit to the suit land located at Bulyana in Wakiso District in the presence of Mr. Obed Mwebesa (counsel for the plaintiffs), and Mr. Sanywa Shaban (counsel for the defendant). The plaintiffs; Nakalyana Teopista, Nalubega Kasifa, Matovu Joseph, Lubega Ismail, and Luwemba Wilson were present. The defendant, Kaggwa Juma was also present. Other defence witnesses; Sajab Haruna and Luwarila George William were also present.
8. During the locus in quo visit proceedings, I observed that the suit land is occupied by several families who own various developments such as homes, gardens and other structures. These persons are not parties to the instant court proceedings. I also established from the evidence of witnesses that the defendant is in occupation of a portion of the suit land measuring about 5 acres with a home and other developments.
9. The 1<sup>st</sup> plaintiff (Nakalyana Teopista) and the defendant (Kaggwa Juma) gave evidence during the locus in quo visit, and were cross examined by either counsel. The two witnesses confirmed their earlier evidence before court during the hearing of the case.
10. The defendant gave further evidence on the extent of the land he occupies, stating that the land has burial grounds, and he occupies about 5 acres out of the total land area of about 632 acres. He also stated that there are about 131



occupants on the land who used to pay Busuulu to a one Kagodo who would collect it on behalf of Damali Nakalyana. He clarified that as of now, occupants on the land are not paying Busuulu.

**Issues to be determined by the court:**

11. The following issues were framed for court's determination:
  - i). Whether the late Nakalyana Damali who was originally registered on the suit land was of Mbwa (dog) clan or Ngabi (antelope) clan.
  - ii). Whether the plaintiffs' letters of administration are forged and/or acquired fraudulently.
  - iii). Whether the registration of the plaintiffs on the certificate of title of the suit land as administrators of the estate of the late Nakalyana Damali was by fraud.
  - iv). Who are the rightful beneficiaries of the suit land between the parties?
  - v). Whether the defendant/counterclaimant has locus standi to bring the action against the counter defendants/plaintiffs.
  - vi). What remedies are available to the parties?

**Issues No. 1, 2, 3, 4 & 5:**

12. I shall handle Issues No.1 to 5 concurrently since they are interrelated.
13. The plaintiffs claim that they were lawfully registered as owners of the suit land. The burden of proof is on the plaintiffs to prove, on the balance of probabilities, that they are the lawful owners of the suit land. See sections 101, 102, 103 & 106 of the Evidence Act (Cap 6); and Senkungu & 4 Ors v. Mukasa (Supreme Court Civil Appeal No. 17 of 2014).



14. The plaintiffs led evidence from PW1 (Nakalyana Teopista). The evidence proves that the plaintiffs were registered as owners of the land on the 12 June 2013 under Instrument Number KLA567117 (Exh.P5). Their registration followed the grant of letters of administration in their favour by Hon. Justice Faith Mwendha, Judge of the High Court of Uganda (as she then was) on the 27 February 2013 vide Administration Cause No. 1168 of 2012 of the High Court of Uganda (Exh.P4, original seen by court). Exh.P4 proves that the plaintiffs are administrators of the estate of the late Nakalyana Damali who is the former owner of the suit land.
15. PW2 (Beatrice Namika Mutebi (Nalinya) testified that she is a custodian of Kasubi Tombs, and that she is knowledgeable about the matters before court. That she knows that the 1<sup>st</sup> plaintiff was installed as the customary heir of the late Damali Nakalyana who was also of the Ngabi clan. That the late Damali Nakalyana was buried at Kanyanya Tombs, and not at Kasubi Tombs. This is contrary to claims by the defendant that Damali Nakalyana was buried at Kasubi Tombs.
16. The defendant led evidence from DW2 (Sajjabi Haruna) and DW3 (George William Njara Luwalira) to the effect that Damali Nakalyana is of Mbwa clan. I do not believe the evidence of DW2 and DW3, that Damali Nakalyana was of Mbwa clan because they kept referring to a book about the Mbwa clan which was not admitted in evidence.
17. On the basis of the evidence of PW2 (Beatrice Namika Mutebi (Nalinya), whom I found to be a reliable witness, it is my finding that Damali Nakalyana was of Ngabi clan, and not of Mbwa clan as claimed by the defendant.



18. Therefore, I am satisfied with the evidence adduced by the plaintiffs that they are the lawful registered owners of the suit land. I now turn to consider the evidence adduced by the defendant to determine if the presumption of ownership of the suit land established by the plaintiffs can be rebutted.
19. Before I consider the defendant's case, I wish to warn myself on the burden of proof. In the case of Greenland Bank (In Liquidation) v. Richard Ssekiziyivu t/a Global General Auctioneers, High Court (Commercial Division), Civil Suit No.501 of 2001 (per Justice Yorokamu Bamwine (as he then was)), it was held that:
- “When [a] party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof, that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption.”*
- See also the Supreme Court of Uganda case of J.K Patel v. Spear Motors Limited, SCCA No.4 of 1991
20. In the instant case, the plaintiffs have proved that they are the lawful owners of the suit land. But the defendant asserts that the plaintiffs were fraudulently registered as owners of the suit land. The defendant alleges that the plaintiffs committed several acts of fraud as set out in paragraph 3 of the counterclaim, including an allegation that the plaintiffs forged letters of administration, and used forged letters to become registered owners of the suit land. According to the above principle of law, the burden of proof now shifts to the defendant; he bears the burden to prove that the plaintiffs used forged letters of administration and were fraudulently registered.



21. It is a well established principle of law, that in fraud cases, the party asserting fraud bears a heavier legal burden prove his case beyond a mere balance of probabilities. See the case of Fam International Ltd & Anor v. Muhammed Hamid (Civil Appeal No. 16 of 1993) [1994] UGSC 12 (per Justice Benjamin Odoki (J.S.C)).
22. The defendant, DW1 (Juma Kaggwa Ssegalum), led evidence to the effect that letters of probate granted under Probate Cause No.1168 of 2012, were granted to Ntale Sabiiti and Tebandeke Moses Katerega, in respect of the estate of the late Musini Kayemba Wakulira (Exh.D2). The crux of the defendant's evidence is that documents certified by the Registrar of the High Court in Administration Cause Number 1168 of 2012 concern an estate that is completely different from the late Nakalyana Damali. According to the defendant, this is evidence of fraud committed by the plaintiffs pursuant to which they were fraudulently registered as owners of the land. It is noted that the plaintiffs adduced Exh.P4, letters of administration granted under the same Administration Cause Number of 1168 of 2012.
23. The letters of administration produced by the plaintiff were not certified by the Registrar of the High Court. PW1 (Nakalyana Teopista) testified that efforts to trace the court file pursuant to which letters of administration were granted have proved futile. However, the plaintiffs were able to produce certified copies of the minutes taken by the Administrator General (Exh.P4), and a certificate of no objection (Exh.P3). On the basis of this evidence, it seems that the plaintiffs complied with procedures of procuring a certificate of no objection from the Administrator General.



24. Turning back to the defendant's case, his assertion is that the plaintiffs' letters of administration are forged. The burden is upon the defendant to prove forgery of the letters of administration. The defendant did not produce evidence from a handwriting expert to prove the allegation of forgery of letters of administration. There are two versions of letters of administration/probate produced by the two parties to the suit; the version produced by the plaintiffs refers to the estate of the late Nakalyana Damali; and the second version produced by the defendant refers to the estate of the late Musini Kayemba Wakulira. Notwithstanding that the letters of probate produced by the defendant, were certified by court, a report of the handwriting expert, subjecting the two sets of letters of administration/probate to forensic analysis, would have helped to shed more light on claims of fraud and forgery. But the defendant did not adduce such evidence.

25. Section 234 of the Succession Act (Cap 162) provides that:

***"234. Revocation or annulment for just cause***

*(1) The grant of probate or letters of administration may be revoked or annulled for just cause.*

*(2) In this section, "just cause" means—*

*(a) that the proceedings to obtain the grant were defective in substance;*

*(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;*

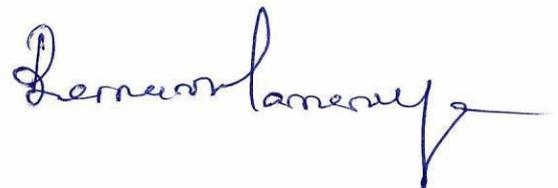
*(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently [...]"*



26. The law provides in section 234 of the Succession Act (Cap 162) for revocation of letters of administration obtained fraudulently. The defendant has not proved that the plaintiffs' letters of administration have been revoked or that legal proceedings for their revocation have been commenced at the Family Division of the High Court where the appropriate proceedings ought to be pursued. Therefore, the defendant's claim that the plaintiffs' letters of administration are forged, and were obtained fraudulently is without *adequate* evidence and must fail.
27. Overall, I am not satisfied that the evidence presented by the defendant has proved forgery and fraud to the required standard defined by the law – proof beyond a mere balance of probabilities – to warrant cancellation of the certificate of title of the suit land. The defendant has failed to prove that the plaintiffs were fraudulently registered as owners of the suit land.
28. I wish to deal with the defendant's long occupation of parts of the suit land. DW1 (Juma Kaggwa Ssegaluma) testified:
- "That I was born on the suit land in 1970, raised and married from there and to date I am still staying on the suit land and that my late father died in 1992 and I buried him on our burial site which is on the suit land."*
29. Testifying on the defendant's interest in the land, PW1 (Nakalyana Teopista) claimed that the defendant's interest in the land originated from his grandfather, who owned a Kibanja on the land. She testified:
- "That up to now the defendant only occupies a Kibanja on the suit land that belonged to his grandfather and where his family graves are."*



30. The evidence adduced by the defendant as to when he settled on the land, that is to say, 1970, was not rebutted by the plaintiffs. In fact, the plaintiffs admitted to the defendant's long occupation of parts of the suit land. The evidence on record also proves that there are numerous families on the suit land measuring approximately 633.5 acres. This makes it necessary for me to give a detailed consideration of the defendant's long occupation of parts of the suit land to eliminate any possible abuse of the defendant by the registered owners of the land.
31. It seems to me therefore, that although the parties never argued the point directly, the real issue in controversy, is the relationship between the plaintiffs, as registered owners of the land, and the bonafide occupants on the land, and the legal interests accruing to both parties under the Land Act (Cap 227).
32. The legal system for mailo land ownership recognises the existence of dual legal interests on the same piece of land – a title interest; and a lawful or bona fide occupant interest. A title interest is held by the registered owner of the land. Tenants on the land can either be lawful or bona fide occupants, depending on how their interest in the land was created. Both of these two interests in the same parcel of land are lawful. It is for this reason that land law has elaborate provisions regulating the relationship between the registered owner and the tenant. For this purpose, section 2 of the Land Act (Cap 227) defines a “registered owner” as “the owner of registered land registered in accordance with the Registration of Titles Act.”; and “tenant by occupancy” as the “lawful or bona fide occupant.” I will set out below, some of the key provisions of the law governing the relationship between the registered owner and the lawful or bona fide occupant.



33. Section 29 of the Land Act (Cap 227) provides that:

***“29. Meaning of “lawful occupant” and “bona fide occupant”***

*(1) “Lawful occupant” means—*

*(a) a person occupying land by virtue of the repealed —*

*(i) 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.*

*(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.*

*(3)...*

*(4)...*

*(5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.*

34. A tenant by occupancy enjoys security of occupancy on the land as per the provisions of sections 31 & 32A of the Land Act (Cap 227) which provide that:



***“31. Tenant by occupancy***

*(1) A tenant by occupancy on registered land shall enjoy security of occupancy on the land.*

*(2) The tenant by occupancy referred to in subsection (1) shall be deemed to be a tenant of the registered owner to be known as a tenant by occupancy, subject to such terms and conditions as are set out in this Act or as may be prescribed.*

*(3) The tenant by occupancy shall pay to the registered owner an annual nominal ground rent as shall, with the approval of the Minister, be determined by the Board.*

***32A. Lawful or bona fide occupants to be evicted only for non payment of ground rent***

*“(1) A lawful or bona fide occupant shall not be evicted from registered land except upon an order of eviction issued by a court and only for non payment of the annual nominal ground rent.”*

35. Moreover, under section 3(4) of the Land Act (Cap 227), a mailo landowner holds the land subject to the rights of lawful or bona fide occupants. See the case of Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA) (per the Judgment of Justice Monica K. Mugenyi, JA). Section 3(4) of the Land Act (Cap 227) provides that:

*“(4) Mailo tenure is a form of tenure deriving its legality from the Constitution and its incidents from the written law which—*

*(a) involves the holding of registered land in perpetuity;*



*(b) permits the separation of ownership of land from the ownership of developments on land made by a lawful or bona fide occupant;*  
*and*

*(c) enables the holder, subject to the customary and statutory rights of those persons lawful or bona fide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all the powers of ownership of the owner of land held of a freehold title set out in subsections (2) and (3) and subject to the same possibility of conditions, restrictions and limitations, positive or negative in their application, as are referred to in those subsections.*”

underlining is mine for emphasis

36. Under Section 92(1)(e) of the Land Act (as amended by Act 1 of 2010), it is a criminal offence to attempt to evict a lawful or bona fide occupant without a lawful court order. The section provides that:

**“92. Offences and penalties**

*(1) A person who—*

*(a) ...;*

*(b) ...;*

*(c) ...;*

*(d) ...;*

*(e) attempts to evict, evicts, or participates in the eviction of a lawful or bona fide occupant from registered land without an order of eviction [...] commits an offence.”*

37. This is further buttressed by constitutional guarantees for security of occupancy under article 237(8) of the Constitution of Uganda (1995) which provides that:



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

38. In accordance with the above provisions of the law, a lawful or bona fide occupant of land can only be evicted from the land by an order of court, and the court can only make that order if the defendant has defaulted in payment of the annual nominal ground rent. In other words, a lawful or bona fide occupant has a legal obligation to pay annual nominal ground rent as shall be fixed by the district land board with the approval of the Minister responsible for lands. Accordingly, once a lawful or bona fide occupant has paid annual nominal ground rent, their interest in the land cannot be interfered with by the registered owner. A lawful or bona fide occupant can undertake developments on the land including buildings without hindrance from a registered owner. A registered owner of the land has the right to demand for payment of annual nominal ground rent but nothing more than that. He or she cannot wantonly evict a lawful or bona fide occupant from the land. In fact, there are criminal sanctions for attempting to evict a lawful or bonafide occupant without a lawful court order.
39. To prove that a person is a bona fide occupant on the land, he or she must prove that they had been in occupation of the land un-challenged by the registered owner for 12 years at the time of coming into force of the 1995 Constitution.
40. The Supreme Court of Uganda exhaustively dealt with the rights of a bona fide occupant in the case of Kampala District Land Board & Chemical Distributors



v. National Housing & Construction Corporation, SCCA No. 2 of 2004  
(Coram: Odoki CJ, Oder, Tsekooko, Karokora and Kanyeihamba JJ.SC). The brief facts of the case were as follows. In 1970, National Housing and Construction Corporation (NH&CC) constructed blocks of flats on its land during which period it was allowed to utilize the suit land to facilitate construction. Between 1970 and 2000, NH&CC remained in possession of the suit land. In June 1999, NH&CC learnt that the suit land had been offered on a lease to Chemical Distributors. A land title was subsequently processed in favour of Chemical Distributors. NH&CC filed a suit in the High Court against Kampala District Land Board and Chemical Distributors. The High Court decided the suit against NH&CC. On appeal to the Court of Appeal, the matter was decided in favour of NH&CC. The Court of Appeal inter alia decided that NH&CC was a bona fide occupant on the suit land. Dissatisfied with the Court of Appeal judgment, Kampala District Land Board and Chemical Distributors appealed to the Supreme Court of Uganda, who dismissed the appeal. As to whether, NC&CC was a bona fide occupant, the Supreme Court of Uganda (per Benjamin Odoki, C.J) held that:

*“[...] the respondent had been in occupation or possession of the suit land for more than twelve years at the time of coming into force of the 1995 Constitution. The respondent had not only occupied the land but had also utilised it, without any challenge from Kampala City Council. The respondent was entitled to enjoy its occupancy in accordance with Article 237(8) of the Constitution and Section 31(1) of the Land Act if the suit land was registered land. [...] Accordingly, the respondent was a bona fide occupant of registered land at the time the 1995 Constitution was made. [...] A bona fide occupant was given security of tenure and his interest could not be alienated except*



*as provided by the law. For instance, the bona fide occupant could apply for a certificate of occupancy under Section 33(1) of the Land Act [...] The respondent may not have been a registered owner but the respondent had a recognized or even registrable interest in the suit land.”*

41. It is an established principle of law that courts can only render decisions on unpleaded matters or issues where both parties have adduced evidence on the matter, and both parties have been heard on the matter. The effect of this is that whereas the general rule is that a party cannot be granted a relief which it has not claimed in its pleadings, where evidence has been adduced on a matter or issue, and both parties have been heard, a Court can render a decision on an unpleaded matter or issue. See the case of Jennifer Nsubuga v. Michael Mukundane (*supra*). The Supreme Court of Uganda in the case of Sinba (K) Ltd & 4 Others v. Uganda Broadcasting Corporation, Civil Appeal No. 3 of 2014 (Coram: Katureebe CJ, Arach-Amoko, JSC, Tsekooko, Okello and Kitumba, Ag. JJSC) (per the judgment of Justice Stella Arach-Amoko, J.S.C) held as follows:

*“[...] the case of Odd Jobbs v Mubia [1970] EA 476, is to the effect that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter in order to “arrive at a correct decision in the case and to finally determine the controversy between the parties. In the instant case, the record shows that all the parties not only led evidence by way of affidavits in support of their respective positions in the application but their lawyers addressed court on all the issues raised in the pleadings and by the court during the course of hearing the application as well [...] It follows,*



therefore, that notwithstanding the finding that there was no pleading or prayer for the cancellation of the 5<sup>th</sup> Appellant's certificate of title, since the evidence before the court had disclosed that the whole transaction leading to the sale of the property to the 5<sup>th</sup> Appellant was based on an illegal consent judgment and thus null and void, the court was obliged to make that order, after establishing that fact, in line with the authority of Odd Jobs (supra)." underlining is mine for emphasis

42. Therefore, although the issue was not directly argued by the parties, there is evidence before me to decide whether or not the defendant is a bonafide occupant on the suit land. During the locus in quo visit, I noted that there were several other families in occupation of parts of the land, and yet they are not parties to the suit. The defendant has proved to my satisfaction that he has occupied the land since 1970. Having regard to the law and evidence before me, it is my decision that although the plaintiffs are the lawful registered owners of the suit land, they have a legal and constitutional obligation to respect the legal interest of the defendant, who is a bonafide occupant on the suit land, and is protected by the law.
43. Other than my declaration that the defendant is a bonafide occupant on the suit land, the rest of the defendant's counterclaim against that the plaintiffs is dismissed with no orders as to costs.
44. In light of my decision that the defendant is a bonafide occupant on the suit land, the plaintiffs are not entitled to general damages.

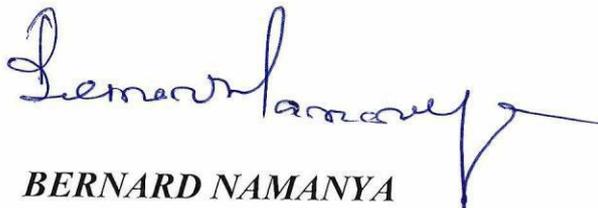


**Issue No.6: What remedies are available to the parties?**

45. In the final result, I grant the following declarations and orders:

- 1). That the plaintiffs are the lawful registered owners of the suit land.
- 2). That the defendant is a bonafide occupant on the suit land.
- 3). That the defendant's counterclaim is dismissed with no orders as to costs.
- 4). That a permanent injunction issues restraining the defendant, his agents, servants, workmen and all those claiming under him and/or deriving authority from him from interfering with the plaintiffs' registered interest in the suit land.
- 5). That each party shall bear its own costs, since they have both established that they own different legal interests in the suit land.

**IT IS SO ORDERED.**



**BERNARD NAMANYA**

**JUDGE**

**29 August 2023**

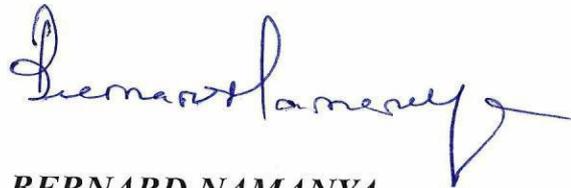
**Attendance**

29 August 2023 at 9:03am

Akakimpa Godfrey, holding brief for Obed Mwebesa	Counsel for the plaintiff
The plaintiff is absent	
Achola Felister holding brief for Shaban Sanywa	Counsel for the defendant
The defendant is in court	
Allena Kanyakire	Court Clerk

**Court:**

Judgment delivered in open chambers.



**BERNARD NAMANYA  
JUDGE**

*29 August 2023*