

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
LAND CIVIL APPEAL NO 67 OF 2019
(ARISING FROM MUKONO CIVIL SUIT NO. 28 OF 2015)

1. OLOKA JASPER
2. BWAIGA NIGHTAPPELLANTS

VERSUS

BIRABWA MARGARETRESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

1. This appeal arose from the judgment and orders of Her Worship Koburunga Patience, the trial Magistrate Grade 1 of Mukono Chief Magistrates Court at Mukono dated 16th September, 2019.

Background

2. The Respondent / Plaintiff filed Civil Suit No. 28 of 2015 against the 1st Appellant / Defendant for a permanent injunction restraining the Defendant, employees, servants or his agents from trespassing on the suit land or interfering with the Plaintiff's use, possession and occupation of the suit land; general damages; interest of 15% on

general damages from the time judgment till payment in full; and costs of the suit.

3. The Defendant filed a written statement of defence and jointly with the 2nd Appellant filed a counter claim against the Plaintiff / Counter Claimant which was as well replied to. Judgment was entered by the trial court with the following orders:
 - (a) An award of general damages of UGX. 10,000,000/= to the Respondent/Plaintiff;
 - (b) A declaration that the Plaintiff / Respondent fraudulently acquired the title on Block 116 Plot 3221;
 - (c) The counter claim only partially succeeded entitling the counter claimants to a declaration that the title was procured to defeat the unregistered interest of the 1st Appellant / Defendant;
 - (d) Costs of the suit awarded to the Plaintiff at the rate of 6% from the date of judgment.

Appeal

4. The Appellants being dissatisfied with the judgment and above orders of the trial court appealed to this honourable court and the Respondent cross appealed. The grounds of the appeal and cross appeal are as follows:

Grounds of the appeal:

- i. **The learned trial Magistrate erred in law and fact when she found that the 1st Appellant was a trespasser and not the**



Respondent or 2nd Appellant who sold her interest to the 1st Appellant on land at Block 116 Plot 3221 land at Nsube;

- ii. The learned trial Magistrate erred in law and fact when she found that the 1st Appellant was not a *bonafide* purchaser for value through his purchase of a unit in Plot 3221;**
- iii. The learned trial Magistrate erred in law and fact when she dismissed the counter claim of the Appellants and granted to the 1st Appellant the remedy of quiet possession of his plot while premised on a dismissed pleading;**
- iv. The learned trial Magistrate erred in law and fact when she slapped the Appellant with UGX. 10,000,000/= as general damages awarded to the Respondent/ Plaintiff on land decreed to the 1st Appellant;**
- v. The learned trial Magistrate erred in law and fact when she did not consider the case of the 2nd Appellant in the entire proceedings whereas she was a party through the counter claim;**
- vi. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the overwhelming evidence that weighed against the Respondent and thus came to a wrong conclusion on the issues at trial;**



- vii. The learned trial Magistrate erred in law and fact when she awarded inappropriate remedies in the circumstances.**

Cross Appeal:

- i. That the trial Magistrate erred in law and fact when she failed to evaluate the evidence on record thereby arriving at a finding that the Respondent fraudulently acquired Plot 3221 on Kyaggwe Block116 and with intent to defraud the interest of the Appellants;**
 - ii. That the trial Magistrate erred in law and fact when she declined to allow the counter claim together with costs;**
 - iii. That the trial Magistrate erred in law and fact when she awarded only 10,000,000/= as general damages;**
 - iv. That the trial Magistrate erred in law and fact when she declined to order the Appellants in the main appeal to vacate the suit land;**
 - v. That the trial Magistrate erred in law and fact when she declined to award interest on general damages and costs.**
- 5. Both parties filed their written submissions. During the hearing of this appeal and cross appeal, the Appellants were represented by Counsel Lydia Ntono from M/s Wagabaza & Co. Advocates who held brief for Counsel Rose Namukose from M/s Ouma & Co. Advocates. The**



Respondent was represented by Counsel Getrude Mutesi from M/s Kayongo Jackson & Co. Advocates. For consistency, I will refer to Mr. Oloka Jasper as the 1st Appellant, Mrs. Bwaiga Night as 2nd Appellant and Mrs. Birabwa Margaret as the Respondent in the consideration of both the appeal and cross appeal.

6. In **Re Deborah Joyce Alitubeera & Richard Masaba (2012) 1 ULR 349** it was held that a first appellate court has a duty to appraise the evidence on record and subject it to fresh scrutiny in order to determine issues before it.
7. In further consideration of this appeal and cross appeal, I will jointly categorize and analyse the grounds and cross grounds of the appeal in three orders as hereunder since the resolution of one makes the others accordingly resolved:
 - a) The 1st, 2nd, 3rd, 5th, 6th grounds of the appeal and 1st, 2nd & 4th grounds of the cross appeal;
 - b) The 4th ground of the appeal and 3rd ground of the cross appeal; and
 - c) The 7th ground of the appeal and the 5th ground of the cross appeal.

Appeal

Ground 1: The learned trial Magistrate erred in law and fact when she found that the 1st Appellant was a trespasser and not the Respondent or 2nd Appellant who sold to him interest to the 1st Appellant on land at Block 116 Plot 3221 land at Nsube;



Ground 2: The learned trial Magistrate erred in law and fact when she found that the 1st Appellant was not a *bonafide* purchaser for value through his purchase of a unit in Plot 3221;

Ground 3: The learned trial Magistrate erred in law and fact when she dismissed the counter claim of the Appellants and granted to the 1st Appellant the remedy of quiet possession of his plot while premised on a dismissed pleading;

Ground 5: The learned trial Magistrate erred in law and fact when she did not consider the case of the 2nd Appellant in the entire proceedings whereas she was a party through the counter claim.

Ground 6: The learned trial Magistrate erred in law and fact when she failed to properly evaluate the overwhelming evidence that weighed against the Respondent and thus came to a wrong conclusion on the issues at trial; and

Cross appeal

Ground 1: That the trial Magistrate erred in law and fact when she failed to evaluate the evidence on record thereby arriving at a finding that the Respondent fraudulently acquired Plot 3221 on Kyaggwe Block 116 and with intent to defraud the interest of the Appellants.

Ground 2: That the trial Magistrate erred in law and fact when she declined to allow the counter claim together with costs;



Ground 4: That the trial Magistrate erred in law and fact when she declined to order the Appellants in the main appeal to vacate the suit land.

8. The Appellants' counsel submitted that it is not in dispute that the Respondent purchased a portion of land measuring 100 feet x 100 feet from a one Goli James and later was transferred by the Administrators from Plot 541 Block 116 to land measuring 150 feet x 100 feet on Block 116 Plot 3221 land at Nsube after sub-division since the entire plot measures 93 decimals. That the Respondent stated that he was given 150 feet x 100 feet then later she was promised to be given another part which is bigger in size by the Administrators who also promised to issue a certificate of title for the land.
9. That the Respondent does not mention how big the land she was given was but rather claims ownership of the entire Block 116 Plot 3221. And that the Respondent stated further that she accepted the 94 decimals and the Administrators executed transfer and mutation forms. Counsel wondered what the mutation forms was for if the Respondent claims to have been given the entire land on Block 116 Plot 3221 which does not even measure 94 decimals and that she did not produce before court any agreements giving her the 94 decimals she is claiming.
10. Counsel averred that the 2nd Appellant stated in her witness statement that on the 9th September, 2012 in considering the processing of the

title for the Respondent, the Administrators by an agreement with the Respondent made an ex-gratia added to her land shifting consideration and that this would entitled her to 100 feet x 150 feet on her intended title. That the 2nd Appellant further stated in her witness statement that the mutation would have the plot divided into 5 with measurements of 0.179 acres (100 feet x 150 feet) to the Respondent and that the mutation forms were handed over to the Respondent. That this statement is consistent with the Respondent's statement that she was given transfer forms.

11. Furthermore, that the Respondent stated that she got a surveyor and subdivided the land herself because the Administrators were not doing anything for her and that Plot 3221 is 0.023 hectares. That PW2 confirms that he signed a mutation form. That this is a clear indication that the Respondent was not entitled to the entire 94 decimals as she claimed but to only a plot measuring 150 feet x 100 feet as per the mutation form and the agreement tendered in court and that the 1st Appellant is not a trespasser as it was held by the trial Magistrate.

12. Besides, the Appellants' counsel asserted that the Respondent alleges to have divided land on Plot 3221 yet she denies having been given mutation forms and also the fact that the Respondent got a surveyor and allegedly sub-divided the land by herself without the involvement of the Administrators demonstrates clear dishonesty of the Respondent with intent to defraud the interest of the Administrators and the unregistered interest of the 1st Appellant.

13. The Appellants' counsel further contended that the Administrators agreed with the Respondent that she takes the portion equivalent to that on Plot 541 and that they added 0.09 hectares from Block 116 Plot 3221. That the Respondent however, went ahead to fraudulently obtain title for the entire Plot 3221 in total disregard of the agreement dated 9th September, 2012. Counsel contest that had the trial Magistrate properly evaluated the evidence on record, she would have noticed that the Respondent was not entitled to the entire Plot 3221 and thus she erred when she held that the 1st Appellant was a trespasser yet the portion of the suit land he owns does not form part of the land sold to the Respondent or the addition of 0.09 hectares.

14. Learned counsel similarly averred that the Respondent confirmed in cross examination that when she took possession in 2014, the gentleman (1st Appellant) was in possession of the land, which means he was not in trespass of portion of the suit land belonging to the Respondent. That it was then wrong for the trial Magistrate to hold that the 1st Appellant was a trespasser on land which never formed part of the Respondent's interest. (see **Justine E.M.N Lutaaya v. Starling Civil Engineering Co., SCCA No. 11 of 2002**)

15. The Appellants' counsel added that the case of **Adrabo Stanley v. Madira Jimmy, Civil Suit No. 24 of 2013**, lays down the grounds a party must prove to succeed in an action for trespass to wit; actual possession at the time of entry, unlawful entry and the Defendant's entry caused damage to the Plaintiff. That in the instant case, the 1st Appellant contended in his written statement of defence that he lawfully

acquired the suit land from the 2nd Appellant one of the Administrators of the suit land and took effective possession of it and constructed a permanent house on it and occupied it and that's when the Respondent appeared to lay claims over his property.

16. It is further submitted for the Appellants that the 1st Appellant stated in his witness statement that he had constructed his house up to the roofing level when the Respondent showed up with a letter from Mukono Municipal authorities contesting his building plans and that when he met the authorities, they okayed his plans and he completed his house and the authorities never faulted him on any issue of trespass but instead it was the Respondent who trespassed on Kizito Magera's land but she brought it to order.

17. That the Respondent simply wants to interfere with the rest of the people who purchased land and are settled on Plot 3221. Additionally, that by the time the Respondent acquired Plot 3221, the 1st Appellant was in occupation of his portion on the said plot which evidence was not shaken by the Respondent in cross examination. That DW2, DW3 and DW4 all testified that the 1st Appellant, the Respondent, Magera Kizito and Bashir are on Block 116 Plot 3221.

18. Learned counsel further contended for the Appellants that it is rather the Respondent who had interfered with the 1st Appellant's quiet possession of his portion of land on Plot 3221. That in light with the decision in the case of **Ojwang v. Wilson Bagonza, CACA No. 25 of 2002**, the 1st Appellant acquired interest from the 2nd Appellant who is

a beneficiary and Administrator of the estate of the late Saulo and the portion she sold to the 1st Appellant was her beneficial share in the said estate just like the other two administrators to wit PW2 and Paddy Musoke. Further, that the 2 Administrators never contested the 2nd Appellant's sale of her beneficial interest to the 1st Appellant hence she had a right to sell her interest in the suit land to him just like the other two administrators / beneficiaries also sold their interests in the land.

19. That the Respondent's statement that the other two administrators were not satisfied with the 2nd Appellant's sale to the 1st Appellant was a fanciful thought and wish since none of them lodged a complaint at police nor instituted a suit against the 2nd Appellant for selling her beneficial share to the 1st Appellant. Further, that the Respondent in cross examination stated that she had no issue or claim against the 1st Appellant and that such assertion shows that the 1st Appellant's possession or occupation of the suit land did not in any way amount to interference with the Respondent's physical possession which would amount to trespass or injure the interest of the Respondent. Counsel contended that had the trial Magistrate evaluated the evidence on record, she would not have held that both the Appellants and the Respondent had dirty hands.

20. Counsel further stated for the Appellants that it is trite law that the memorandum of understanding dated 9th September, 2012 amounted to a document and when a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing it is bound by it and it is wholly immaterial whether he has read the



document or not as was clearly held in the case of **L'Estrange v. F. Graucob Ltd [1934] 2 KB 394.**

21. That in the instant appeal, the Respondent signed the memorandum of understanding dated 9th September, 2012 which entitled her to only 0.09 hectares of the suit land and not 94 decimals and also Plot 541 measuring 100 feet x 100 feet which certificate she had in her possession. That the Respondent never alluded that the memorandum of understanding was entered into by either fraud, misrepresentation, duress, undue influence or non factum to justify her dispute of the same. And that neither did the Respondent plead nor prove any threat as a result of entering into the agreement dated 9th September, 2012.
22. The Appellants' counsel contested that had the trial Magistrate put into consideration the counter claim of the 2nd Appellant, she would have come to the right conclusion that the Respondent was bound by the agreement dated 9th September, 2012. That the 2nd Appellant confirmed in cross examination that they agreed as a family to sell to the 1st Appellant. Counsel averred that even if the Respondent was the owner of land or in possession of the suit land, she would be estopped from laying proprietary claims against the 1st Appellant under the doctrine of proprietary estoppel. That the Respondent would not have waited for the 1st Appellant to complete the construction of a house on the suit land before bringing up the suit and claim for compensation from him. That this is a conduct against the principle of proprietary estoppel.



23. As to the 2nd ground of the appeal, the Appellants' counsel submitted that the unchallenged testimony of the 1st Appellant is that by the time he bought his portion on Plot 3221, he met the L.C.1 Chairperson of the area called Keffa and he got to know that the suit land was in the hands of Bwaiga Night, Kizza George William and Paddy Sunday as joint Administrators. That the said Keffa did not tell him that the Respondent was the owner of the portion he bought but rather the 2nd Appellant and her brothers. That the 1st Appellant conceded in cross examination that he did not conduct a search at the Land Registry to ascertain the status of the suit land but that by the time he acquired his portion on Plot 3221, the certificate of title for it was still in the names of the Administrators including the 2nd Appellant from whom he bought the land.

24. Counsel stated that PW2 in cross examination told court that Plot 3221 is sub-divided and that he positively identified the mutation form he had signed to sub-divide the suit land in favour of the Respondent. That it is not in dispute that the mutation forms were signed by the 2nd Appellant and the other administrators to carve out the portion they had sold to the Respondent and that it was a condition that the Respondent surrenders the title of Plot 541 before she gets the title equivalent of the size of Plot 541 out of the bigger chunk of Plot 3221 of Block 116. Counsel contended that the 1st Appellant purchased the portion of the suit land in good faith from the 2nd Appellant who was one of the registered proprietors of the land.

25. It was further submitted for the Appellants that the Respondent has a chequered history of acquisition of land. That first she acquired part of



the estate from Goli, who was not an administrator of the estate but the administrators ratified the illegal acquisition until she was given the alternative portion on Plot 3221 on condition of surrendering Plot 541 which was not equivalent to the entire Plot 3221. That it is evident that the Respondent was only given part of Plot 3221 an equivalent of Plot 541 measuring 150 feet by 100 feet.

26. That the learned trial Magistrate erred in law and fact when she found that the 2nd Appellant had no apparent title when she is one of the registered proprietors on the suit land before the Respondent fraudulently transferred the title into her names and that the 1st Appellant had constructive notice that the suit land was in possession of another person other than the vendor without any evidence. Counsel asserted that none of the administrators protested to the sale by the 2nd Appellant to the 1st Appellant. That the 1st Appellant was therefore a *bonafide* purchaser for value without fraud. Counsel prayed that this court finds so.

27. The Appellants' counsel submitted on grounds 3 and 5 of the appeal that in 2005, the Administrators of the suit land realized that the land which the Respondent had been given was encroaching onto the land which the late Saulo Kalumba had donated to Church of Uganda and that an agreement was made to relocate her to another nearby portion within the same Block and village. That the 2nd Appellant further stated that the agreement was to entitle Birabwa only to 0.093 as per her title registered in 2004 which according to counsel is a clear indication that from 100 feet x 100 feet, she was entitled to 0.093 hectares and not 1



acre she fraudulently acquired title to without the consent of all the administrators.

28. Counsel affirms for the Appellants that the trial Magistrate was right to hold that the Respondent fraudulently acquired the title of Plot 3221 since it is in contravention of what she is entitled to as to defeat the unregistered interest of the Appellant. However, that she erred when she held that the 1st Appellant was a trespasser for which counsel prayed for this honourable court to set aside the erroneous finding. Counsel stated that had the trial Magistrate considered the said issues in the counter claim, she would have not arrived at an erroneous decision that the 1st Appellant was a trespasser nor condemned him to pay the general damages of 10,000,000/= and costs to the Respondent.

29. It is further the Appellants' submission that Order 8 rules 2, 7 and 8 of the Civil Procedure Rules, S.I 71-1 provides for counter claim and that a counter claim is substantially a cross action and not merely a defence to the Plaintiff's claim. That the trial Magistrate should have considered the counter claim and made specific findings on it as a separate action within the same suit. That the fact that the trial Magistrate failed to hear and determine the counter claim as she did, is an error in law. (see **Kabonge & Another v. Ssemanda, Civil Appeal No. 76 of 2014**).

30. The Appellants' counsel submitted on the 1st ground of the cross appeal that according to the trial court's judgment, the evidence adduced shows that the Plaintiff procured title to defeat the



unregistered interest of the 1st Appellant. (see the case of **Katarikawe v. Katwiremu & Another (1977) HCB 174** cited by the trial Magistrate). Further, that the 2nd Appellant stated in her testimony that on the 9th September, 2012, in consideration of processing title for the Respondent, they together with the Respondent by an agreement made before the area L.C.1 Chairperson one Keefa, made an ex-gratia addition to the Respondent shifting consideration which would entitle her to 100 feet x 150 feet on her intended title.

31. That she further stated that the mutation would divide the plot into 5 with the Respondent having a bigger share of 100 feet x 150 feet and that the mutation and transfer forms were handed over to the Respondent because of the zeal she had on the land. Further, that the Respondent also stated that she got a surveyor who sub-divided the land because the Administrators were not doing anything for her. Counsel added that PW2 confirmed having signed the mutation and transfer forms. That this means the Respondent was not entitled to the entire Plot 3221 but rather to the portion measuring 100 feet x 150 feet.
32. Learned counsel added for the Appellants that the Respondent stated in her evidence that she knew the 1st Appellant in November, 2013 when he had started building on her land. That she further stated that she took possession of the suit land in 2014 when the gentleman (the 1st Appellant) was in possession of a portion of the land. That on the other hand the 1st Appellant stated that on the 18th December, 2012, he formalized the purchase of his land from the 2nd Appellant where an agreement was made to seal the transaction. That this implies that he



acquired equitable interest in the land in the year 2012 yet the Respondent obtained the certificate of title to the suit land in 2014 well aware of the unregistered interest of the 1st Appellant which act amounted to fraud.

33. The Appellants' counsel submitted on the 4th ground of the cross appeal that the trial Magistrate having rightly held that the Respondent fraudulently obtained the certificate of title on Plot 3221 Block 116 and with intent to defeat the unregistered interest of the 1st Appellant, there was no way she would order the Appellants to vacate the suit land in favour of the Respondent yet the unregistered interest of the 1st Appellant is recognized in law. That the trial court was supposed to instead order for a cancellation of the Respondent's name from the certificate of title of the suit land as it had been fraudulently obtained.

34. The Respondent's counsel on the other hand submitted that PW2 testified that himself, a one Sande Musoke and the 2nd Appellant were the three administrators of the suit land and that they made a sale agreement in favour of the Respondent and even gave the Respondent transfer of the suit land. That PW2 further stated that the Respondent was supposed to take the whole of Plot 3221 and that the Respondent (PW1) corroborated this testimony.

35. That while at locus which was not attended to by the Appellants without any reason, the Respondent repeated her earlier testimony in court that she was the first in time on the suit land and that the 1st Appellant came later and in 2013 and 2018 he constructed a house and the wall fence

respectively. That the sketch map of the house and wall fence are shown on page 29 of the record of appeal. Further that it is clear that it was the 1st Appellant who trespassed on the suit land and avoided to carry out any further investigations even when he was told that there were three administrators, he decided to deal with only the 2nd Appellant. That the 1st Appellant therefore knew that he was dealing in land on which the 2nd Appellant did not have authority to deal with.

36. Concerning the 2nd ground of the appeal the Respondent's counsel contended that to be a *bonafide* purchaser for value, the 1st Appellant needed to prove that: he held a certificate of title; he purchased the land in good faith; he had no knowledge of fraud; he purchased for valuable consideration; the vendor had apparent good title; he purchased without notice of any fraud; and he was not a party to the fraud. That in the instant case, the 1st Appellant does not at any time hold the certificate of title of the suit land.

37. That the Respondent surveyed the suit land in 2010, obtained signed transfer form for the suit land from all the administrators in 2011 and registered her name on the title of the suit land in 2014. That the 1st Appellant did not obtain the suit land in good faith. In addition, that the 1st Appellant was determined to occupy the suit land with or without third party interest. That he either knew of the Respondent's interest in the suit land or did not want to know prior to paying the purchase price of the suit land.



38. Counsel cited the cases of **Frederick J.K Zaabwe v. Orient Bank Ltd & 5 Others, SCCA No. 04 of 2006** and **Kampala Bottlers Ltd v. Damaico (U) Ltd, SCCA No. 22 of 1992** on fraud. He stated that the 1st Appellant who was aware that the 2nd Appellant had no sole authority to deal in the suit land was a party to the fraud and that he was dishonest while purchasing the suit land for valuable consideration from the 2nd Appellant who had no title of the suit land by herself. As to the 3rd ground of the appeal, the Respondent's counsel submitted that the trial Magistrate should have dismissed the counter claim with costs to the Respondent instead of contradicting the same with a remedy of quiet possession.

39. The Respondent's submission on ground 5 of the appeal was that the case of the 2nd Appellant was premised on the evidence provided in her testimony and that she did not dispute the testimonies of the Respondent and PW2 that she was only one of the three title holders who sold the suit land to the Respondent and later gave the Respondent the transfer of the suit land. That the 2nd Appellant provided no proof to back up her claim that she was entitled to the suit land, though she claimed her lawyers had the document. That she admitted that the Respondent was in possession of the certificate of title of the suit land. That the rest of her testimony is not of any evidential value to salvage her case. That the evidence provided by both parties instead supported the Respondent's case.

40. It was submitted for the Respondent on the 1st ground of the cross appeal that she acquired the suit land in 2005, over 7 years before the



1st Appellant entered into the suit land, she surveyed the land in 2010, obtained signed transfer form for the suit land executed by all the Administrators including the 2nd Appellant in 2011 and registered her names on the title in 2014.

41. That by the time the 1st Appellant began to trespass on the suit land, the Respondent had long taken steps to occupy the suit land and also register her names on the certificate of title a year after the 1st Appellant had trespassed on the suit land. That it was only by coincidence that the transfer of the suit land was completed after coming on the land by the 1st Appellant. That the 2nd Appellant who sold the suit land to the 1st Appellant provided no proof to back up her claim that she was entitled to the suit land and that she further admitted that the Respondent was the registered proprietor of the suit land.

42. On the 4th ground of the cross appeal, the Respondent's counsel contended that the trial Magistrate should have ordered the 1st Appellant to vacate the suit land having been found to be a trespasser on the suit land. That the trial Magistrate should have also issued an order of permanent injunction against the Appellants or anyone acting under them or deriving interest from them from further trespassing on the suit land or claiming interest thereon.

Neither of the parties submitted on the 6th ground of the appeal.

Court's Analysis of the Appeal

43. A trespass to land is a wrong against possession. Any unlawful interference with land or building in possession of another is actionable.



It occurs when a person directly enters upon another's land without permission or other lawful cause and remains upon the land, places or projects any object upon the land and thereby interferes with another person's lawful possession of that land.

44. In **Halsbury's Laws of England, 4th Edition Vol 45 paragraph 1384** at page 631 - 632 what constitutes trespass to land is stated thus:

"Every unlawful entry by one person on the land in possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses on land if he wrongfully sets foot on it, rides or drives over it, or takes possession of it or expels the person in possession of it, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it or places or fixes something on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land."

45. Therefore, to succeed, the plaintiff must show that he or she was in possession of the suit land and that the Defendant has had an unauthorized entry onto the land which interfered with his or her quiet possession.

46. In **Justine E. M. N Lutaaya v. Stirling Civil Eng. Civ. Appeal No. 11 of 2002**, the Supreme Court held that:

“trespass to land occurs when a person makes an unauthorized entry upon another’s land and thereby interfering with another person’s lawful possession of the land.”

Similarly, in the Nigerian Court of Appeal case of **Alh. Tajudeen Ibrahim Olagunju v. Alhaja Habibat Yahaya (2005) All FWLR 247**, the court held as follows:

“Trespass to land is a wrong committed against a person who is in exclusive possession of the land trespassed on. Consequently, when a parcel of land which was trespassed on is in the lawful exclusive possession of another person, a suit in trespass is not maintainable by the owner of the land who has no right to immediate possession at the time the trespass was committed, nor can a person who has a right to possession or in actual possession of a land be liable for trespass.”

47. **Black’s Law Dictionary, 9th Edition page 1355** defines a bonafide purchaser thus:

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

48. The Respondent in paragraphs 4 (e), 5 and 6 of the plaint averred that the 1st Appellant without any colour of right whether legal or equitable



has trespassed on to her land by commencing construction thereon, and that the 1st Appellant's acts of commencing construction on the suit land are illegal and tantamount to trespass to land. Further, that she is entitled to enjoy quiet possession, occupation and use of the suit land having acquired the same free from any encumbrances. In her witness statement, PW1 stated that having acquired title on Block 116 Plot 541, she was informed that part of the land included land that was sold to a one Kirunda Timothy. That the administrators requested her to accept another piece of land bigger than the one she had in her title and that they executed transfer and mutation forms for her out of which she processed title in Block 116 Plot 3221, land at Nsube, Mukono District.

49. PW1 further testified that in the year 2012, the 2nd Appellant who is one of the administrators sold part of the suit land to the 1st Appellant. That she consented and signed an agreement to take the land she had initially bought. That she later discovered that the whole transaction was unlawful and illegal intended to fraudulently take away her land and that she immediately wrote to the administrators cancelling the agreement. Further, that she is holding the title to Block 116 Plot 541 until she is compensated for processing title on Block 116 Plot 3221 which the administrators had agreed to process for her but in vain. That she first saw the 1st Appellant in November 2013 when he had started building on her land.

50. In cross examination, PW1 stated that she has certificates for both Block 116 Plots 541 and 3221. That the Administrators first gave her 150 feet x 100 feet then later promised to give her another part which



is bigger and that they also promised to issue a certificate of title for the land. She added that she got a surveyor and sub-divided the land for herself because they were not doing anything for her. That she was not given a mutation form and contested to the attached mutation form that it's not telling the truth. That she was in possession of the suit land in 2014 but the gentleman (1st Appellant) was in possession of a portion of the land.

51. PW2's testimony supported the Respondent's evidence and according to his testimony, the Respondent seems to have been shifted twice. During cross examination, he stated that Plot 541 was next to the church and that after shifting the Respondent to Plot 3221, they signed transfer and mutation forms. That the Plaintiff was not happy as she was told in a meeting with the L.C.1 to take 100 feet x 100 feet.
52. The 1st Appellant who testified as DW1 stated that he started to investigate for purposes of buying the portion of the suit land in September, 2012 and made a final commitment to buy it. That on the 18th December, 2012, he formalized the purchase from the 2nd Appellant where an agreement was made to seal the transaction. That in his investigation, he had known the 2nd Appellant as both a beneficiary and an administrator over the suit land and that at the time of the purchase, he had never known the Respondent.
53. DW1 further testified that there was equally no hindrance from anybody or a physical notice on the land objecting to any purchase. That he built peacefully until he roofed his house that's when the

Respondent showed up with a letter from Mukono Municipal Authorities in a complaint she filed against him and one Magera. That when the Municipal authorities investigated the matter, it was found that he had not trespassed on the Respondent's land and that he was told to continue to settle on his land.

54. He added that he has seen and known from the administrators that the Respondent already owns Plot 541 which she was meant to exchange with a portion in Plot 3221. That Plot 3221 was acquired irregularly by the Respondent when he was already in occupation with the other occupants. That the Respondent rejected the exchange arrangement as per her letter dated 24th October, 2012 in favour of the bigger land in Plot 3221 though the administrators have never approved such rejection. That despite the grumbles of the Respondent, he has never seen any purchase agreement giving her the entire Plot 3221.
55. The 2nd Appellant (DW2) who was the 1st Counter Claimant corroborated DW1's testimony. She added that the Respondent in 2000 bought land from one Goli James who had no color of right to vend. That however, out of good will, the administrators (herself inclusive) later ratified the sale in lieu of refunding her money through which she got registered on the land at Nsube, Kyaggwe County, Block 116 Plot 541 measuring 0.093 hectares converted to 0.22 of an acre. That the agreement made was to entitle the Respondent to 0.093 hectares as per her title registered in 2004. That they made an ex-gratia addition to the Respondent in lieu of processing the certificate of title which would entitle her to 100 feet x 150 feet.



56. Furthermore, DW2 stated that as administrators, they know that the suit land comprised in Kyaggwe Block 116 Plot 3221 was sufficient to accommodate the Respondent, the 1st Appellant, Magera Eddy and Kizito Bashir. That knowing what the Respondent deserved, the administrators on the 3rd August 2012 executed mutation forms for the sub-division of Block 116 Plot 3221. That the mutation would have the plot divided into 5 with the Respondent taking the biggest measurements of 100 feet x 150 feet. That the mutation and transfer forms were handed over to the Respondent over the zeal she had on the land.
57. She added that to her dismay, she discovered that all the land in Kyaggwe Block 116 Plot 3221 had been transferred to the Respondent without their consent instead of the subdivision and titling of different portions. That she subsequently lodged a caveat on the said plot to protect the interests of the administrators, beneficiaries and the *bonafide* purchasers. That Plot 3221 held by the Respondent must accommodate other interests on the land including those who have not been sued by the Respondent.
58. DW3 - the L.C.1 Chairperson of the area where the suit land is situated whose testimony seems to be more believable, testified that the Respondent was offered Plot 541 measuring 100 feet x 100 feet which was meant to be exchanged with another plot through which he suggested that the administrators give the Respondent extra land to cater for the inconveniences of shifting her. That the Respondent was then to receive land measuring 100 feet x 150 feet in Plot 3221 and that



this plot is settled by the 1st Appellant, the Respondent, Magera and Bashir.

59. That PW3 is not a neighbor to the suit plot as he claimed. That he has never received any complaint against Bashir and Magera from the Respondent and that it was through his office that she earned an extra plot of land to make her have the biggest share of land in Plot 3221 that is to say, 100 feet x 150 feet. That even if the Respondent had attempted to buy the entire suit land, it had already been settled on by other individuals for which she would compensate them. He concluded his testimony that it is his desire that the residents of his village live and stay in harmony.

60. From the above analysis of both parties' evidence, it is clear that the Respondent was entitled to land measuring 100 feet x 150 feet which included the equivalent of land in Block 116 Plot 541 and the additional 50 feet, which to my analysis was for the inconveniences caused to her in shifting her to another plot and not in lieu of processing the title for the Respondent by the administrators. The mutation forms which the Respondent admitted of having signed in her evidence and which has been exhibited by the lower court was to my understanding meant to mutate the Respondent's portion from the entire Plot 3221. The purpose was to ensure that the interests of the other people in occupation of the plot are secured. Otherwise, if the entire Plot 3221 was given to the Respondent in exchange of Plot 541, then it would be needless for parties to sign the mutation forms.



61. As to whether the 1st Respondent is a *bonafide* purchaser for value or not, it is not in dispute that the 2nd Appellant who sold part of the suit land to the 1st Appellant is one of the administrators and beneficiary to the suit land being the daughter of the late Saulo Kalumba, to whom the suit land belonged. It is trite that in equity, interests in land passes upon payment of the purchase price. In **Semakula & Anor v. Sentimba, CA No. 5 of 2013**, it was held that;

“In sale of immovable property, upon payment of deposit, property passes to the purchaser who acquires equitable interest and that the purchaser becomes the lawful purchaser when he has paid the deposit.”

62. In the instant case, the equitable interest in the portion of the suit land passed to the 1st Appellant, upon completion of payment of the purchase price in 2012 as exhibited in his evidence – in - chief. It was DW1’s case that after acquiring such interest, he took possession of the land and that he and his family have been in occupation of it. Having successfully sold the suit land to the 1st Appellant without any complaint from the other two administrators, this court is satisfied that the 1st Appellant lawfully purchased a portion of the suit land from the 2nd Appellant which portion according to the evidence on the lower court record, he took possession of in 2013 before the Respondent took possession of her exchanged portion in 2014. In other words, the possession and occupation of the portion of Block 116 Plot 3221 by the 1st Appellant was not disputed to by the other two administrators who in law are considered to have acquiesced to the acquisition.



63. This is depicted from the Respondent's testimony that when she took possession of the suit land in 2014, the gentleman (the 1st Appellant) was in possession of part of the land. There is also unchallenged evidence by the 1st Appellant that at the time of purchasing portion of his land, he had never known the Respondent and further, that there was equally no hindrance from anybody or a physical notice on the land objecting to his purchase. In my judgment, the 1st Appellant was a *bonafide* purchaser for value without notice.

64. Accordingly, this court finds that the 1st Appellant is not a trespasser as held by the trial Magistrate. However, the trial Magistrate rightly held that the Respondent fraudulently obtained the certificate of title on the entire land in Block 116 Plot 3221 considering the fact that the 1st Appellant and other occupants have equitable interest in the land. The 1st, 2nd, 3rd, 5th and 6th grounds of the appeal succeed while the 1st, 2nd and 4th grounds of the cross appeal fail.

65. Ground 4 of the appeal: The learned trial Magistrate erred in law and fact when she slapped the 1st Appellant with UGX. 10,000,000/= as general damages awarded to the Respondent/ Plaintiff on land decreed to the 1st Appellant; and

Ground 3 of the cross appeal: That the trial Magistrate erred in law and fact when she awarded only 10,000,000/= as general damages.



66. The Appellants' counsel averred that it is true that general damages are awarded at the discretion of court and they are awarded to compensate the aggrieved party fairly for the inconveniences accrued as a result of the actions of the other party. That it is the duty of the claimant to prove that there were damages, losses or injuries suffered as a result of the 1st Appellant's actions.

67. The Appellants' counsel further argued that in her judgment, the trial Magistrate stated that the evidence adduced indicated that the Respondent as of October, 2012 was aware of the unregistered interest of the 1st Appellant and that the Respondent obtained title in 2014, incidentally as of 2012, the administrators were still the registered proprietors of the suit land. That the trial Magistrate further stated that the evidence adduced shows that the Respondent procured title to defeat the unregistered interest of the 1st Appellant and that this fits within the definition of fraud.

68. Further, it was submitted for the Appellants that the Respondent is the registered proprietor of both Plots 541 and 3221 on Block 116 yet transfer and mutation forms were signed in exchange of 541 for Plot 3221. That these observations by the trial Magistrate shows that the Respondent did not suffer or undergo any pain warranting general damages but rather committed acts of fraud against the Appellants and thus rewarding her with general damages would amount to legitimizing fraud which is contrary to the laws of the land. Counsel referred to the case of **Byabasaija v. Attorney General, High Court Civil Suit No. 243 of 2011.**



69. It was further argued for the Appellants that the Respondent did not plead in her evidence inconvenience suffered due to the conduct of the Appellants but that rather it's the Appellants who have been inconvenienced by the Respondent since she fraudulently transferred the entire Plot 3221 into her names to defeat the unregistered interest of the 1st Appellant and is also still in possession and registered on both land titles.

70. The Respondent's counsel opposed the 4th ground of the appeal and submitted that it is trite law that damages are granted as a judicial remedy at the discretion of court and that the discretion should be exercised judiciously, taking into consideration the circumstances of each case. That taking into account the 1st Appellant's conduct right from the time he entered the suit land in 2013 throughout to 2018 and after, when the dispute was already in court, a sum of UGX. 10,000,000/= was insufficient against a party that went ahead during the same period and built a house and a wall fence on the suit land and continued in occupation of the suit land to-date.

71. The Respondent's counsel submitted on the 3rd ground of the cross appeal that taking into account the 1st Appellant's conduct in the circumstances and the evidence already pointed out, the trial Magistrate acting judiciously should have awarded general damages of UGX. 15,000,000/= to the Respondent with interest of 15% from the time of judgment till payment in full. Counsel prayed that this ground of the cross appeal is allowed as proposed in the argument.

72. General damages are the direct natural or probable consequences of the act complained of. In **Uganda Revenue Authority v. Wanume David Kitamirike [2012] 1 U.L.R. 219** at page 233 - 234 Justice Kasule, JA said:

“General damages are awarded by court at large and after court assessment. They are compensatory in nature in that they should offer some satisfaction to the injured plaintiff. Punitive or exemplary damages are an exception to the rule that damages generally are to compensate the injured person.....”

73. In the case of **Takya Kushwahiri & Another v. Kajonyu Denis, CACA 85 of 2011**, it was held that general damages should be compensatory in nature in that they should restore some satisfaction as far as money can do it to the injured Plaintiff. In **Uganda Commercial Bank v. Kigozi [2002]1 EA 35**, the court gave guidance on how to assess the quantum of damages that;

“the consideration should mainly be the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered”.

74. Considering the above circumstances under which general damages are awarded, and having found that the Respondent fraudulently registered herself on land comprised in Kyaggwe Block 116 Plot 3221 to defeat the unregistered interest of the 1st Appellant, the trial



Magistrate was wrong to award the person she had considered a fraudster general damages since she was neither an injured party nor did she suffer any loss. Pursuant to the foregoing, this court finds that the award of general damages of UGX, 10,000,000/= to the Respondent was inappropriate in the circumstances. The 4th ground of the appeal is therefore allowed while the 3rd ground of the cross appeal is dismissed.

75. Ground 7 of the appeal: The learned trial Magistrate erred in law and fact when she awarded inappropriate remedies in the circumstances; and

Ground 5 of the cross appeal: That the trial Magistrate erred in law and fact when she declined to award interest on general damages and costs

76. The Appellants' counsel submitted on the 7th ground of the appeal that the orders given by the trial court are ambiguous and do not reflect the actual legal or equitable interest of each of the parties. That on the issue of costs courts are guided by section 27 (1) of the Civil Procedure Act, Cap. 71 which confers upon a court or judge the discretion and full power to determine by whom and out of what property and to what extent costs incidental to all suits are to be paid and to give all necessary discretions for those purposes. That despite this very wide discretion, as a general rule, the successful party in contested proceedings is usually entitled to an award of costs as per the case of



Candiru Alice v. Amandua Fenisto & 2 Others, HCCS No. 19 of 2014.

77. Section 27 of the Civil Procedure Act, Cap 71 provides that

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.

(2) The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection (1); but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(3) The court or judge may give interest on costs at any rate not exceeding 6 percent per year, and the interest shall be added to the costs and shall be recoverable as such.”

78. In **Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1999] 1 EA 55** it was held that “ although courts had a discretion as to the awarding of costs, it was a general rule of law and practice that costs should normally follow the event in the suit. Where the court exercised its discretion, that discretion would not be disturbed unless



matters that were irrelevant to the issue had been taken into consideration or the court had applied a wrong principle of law.”

79. The lower court’s judgment does not clearly state who the successful party in Civil Suit No. 0028 of 2015 was and what the trial Magistrate based upon to award costs to the Respondent since she was not the successful party. Furthermore, a declaration had been made that she fraudulently acquired the suit land comprised in Plot 3221.

80. The Appellants’ submission on ground 5 of the cross appeal is that an award of general damages and costs to a litigant who has been decreed fraudulent is a mode of legitimizing fraud and thus counsel re-echoed their earlier submission that the Respondent did not deserve any damages let alone costs since she was not the successful party to the suit. The Appellants’ counsel further submitted that the trial Magistrate rightly declined to award interest on general damages and costs at a commercial rate. Counsel prayed that it pleases this court to grant orders that: the appeal is allowed; the cross appeal is dismissed with costs; the judgment or decision of the trial Magistrate be set aside save for the 1st Appellant being entitled to his purchased portion through quiet possession; and that costs of the appeal and in the lower court be awarded to the Appellants.

81. In opposition, the Respondent’s counsel contended on ground 7 of the appeal that the trial Magistrate instead awarded incomplete or insufficient remedies to the Respondent. That UGX. 15,000,000/= would be sufficient award for general damages and that the trial



Magistrate could have in addition awarded interest of 15% on the general damages from the judgment time till payment in full as prayed for in the plaint. Further, that the trial Magistrate should have as well ordered the 1st Appellant to vacate the suit land having been found to be a trespasser on the suit land and that she should have also awarded costs of the counter claim to the Respondent. That the trial Magistrate should have further issued an order of permanent injunction against the Appellants or anyone acting under them or deriving interest from them from further trespassing on the suit land or claiming interest thereon. The Respondent's counsel disposed of the 5th ground of the cross appeal under the 3rd ground.

82. From a perusal of the lower court's judgment, it is not clear who among the parties is the winner in the Civil Suit No. 28 of 2015 hence I agree with the Appellants' 7th ground of the appeal that the trial Magistrate indeed awarded inappropriate remedies in the circumstances.

83. In summary, having found all the grounds of this appeal for the Appellants, this court allows this appeal and dismisses the cross appeal and hold that

- (a) the Respondent's fraudulent registration on the entire land comprised in Kyaggwe Block 116 Plot 3221 land at Nsube, Mukono District is void;
- (b) the 1st Appellant is a *bonafide* purchaser for value without notice on the portion of land comprised in Kyaggwe Block 116 Plot 3221 land at Nsube, Mukono District measuring 50 feet x 100 feet and not a trespasser;

(c) The Respondent is entitled to land measuring 100 feet x 150 feet on land comprised in Kyaggwe Block 116 Plot 3221 land at Nsube, Mukono District and not the entire plot.

84. Therefore, this court hereby orders:

- (a) the Registrar of Titles to cancel the Respondent's names from the certificate of title to land comprised in Kyaggwe Block 116 Plot 3221 and reinstate the administrators' names on the title;
- (b) the administrators of the estate of the late Saulo Kalumba should execute fresh separate transfer and mutation forms in favour of the 1st Appellant and the Respondent in accordance with their entitlements in the suit land indicated herein above to enable them process individual certificates of title;
- (c) the Respondent should hand over the certificate of title on land comprised in Kyaggwe Block 116 Plot 541 land at Nsube, Mukono District to the administrators for cancellation of her names from the certificate of title;
- (d) a permanent injunction doth issue against the Respondent, her agents, workmen, relatives, successors in title or dependants restraining her or them from laying adverse claim of ownership over the entire land comprised in Kyaggwe Block 116 Plot 541 land at Nsube, Mukono District or interfering with the 1st Appellant's quiet possession of his portion of land within Plot 3221;



(e) costs of this appeal, that of the lower court and the counter claim are awarded to the Appellants.

I so rule and order accordingly.

This judgment is delivered this 24th day of Jan. 2023 by



FLORENCE NAKACHWA
JUDGE.

In the presence of:

- (1) Counsel Namukose Rose from M/s Ouma & Co. Advocates for the Appellants;*
- (2) Counsel Getrude Mutesi from M/s Kayongo Jackson & Co. Advocates for the Respondent;*
- (3) Mr. Oloka Jasper, the 1st Appellant;*
- (4) Ms. Birabwa Margaret, the Respondent;*
- (5) Ms. Pauline Nakavuma, the Court Clerk.*