

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – O1 – CV – LD – CS 0016 OF 2013**  
**CHRISTOPHER NICODEMUS WINYI ::::::::::::::::::::::::::::::: PLAINTIFF**  
**VERSUS**

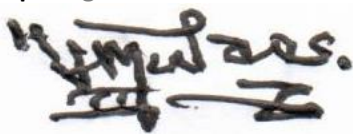
- 1. PAUL BAROZI**
- 2. YOWANA MUGENYI**
- 3. CHONGQING INTERNATIONAL CONSTRUCTION**
- 4. CHRISTOPHER MUGENYI**
- 5. PAUL KATO BAROZI ::::::::::::::::::::::::::::::: DEFENDANTS**

**BEFORE HIS LORDSHIP HON. VINCENT WAGONA**

**JUDGMENT:**

**INTRODUCTION:**

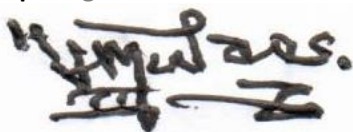
1. The plaintiff sued the defendants seeking among others a declaration that the suit land being part of **Burahya Freehold Block 39, Plot No. 5 land at Butulya** belonged to him; an order directing the 3<sup>rd</sup> defendant to complete the grading of the suit land following its use as a dumping site; and an order of eviction against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.
2. The 1<sup>st</sup> and 4<sup>th</sup> defendants counter claimed seeking among others declarations that they were bona-fide occupants on the suit land. The 4<sup>th</sup> defendant further sought a declaration that the plaintiff/counter defendant’s actions and claim on the suit land were unlawful; and an order for the cancellation of registration of the



plaintiff as executor and subsequently as proprietor of **Burahya Freehold Block 39, Plot No. 5 land at Butulya.**

### **BACKGROUND:**

3. The suit land was part of the estate of **Edward Greig Winyi Rusongoza** who died in 1981. Based on his will (**Exhibit P.Exh. 2**), his executors distributed the estate and his son **Stephen Edward Winyi** obtained the suit land. Upon the death of **Stephen Edward Winyi** the plaintiff took over his land and subsequently obtained probate (**Exhibit P.Exh. 3**) for the estate of the late **Edward Greig Winyi Rusongoza**, on the basis of which he obtained registration as **executor** and subsequently as **proprietor of Burahya Freehold Block 39, Plot No. 5 land at Butulya.**
4. The 1<sup>st</sup> and 2<sup>nd</sup> defendant claimed portions of the suit land. The 1<sup>st</sup> defendant averred that he was a bona-fide occupant while the 2<sup>nd</sup> defendant contended that he was a bona-fide occupant or customary tenant thereon. The 2<sup>nd</sup> defendant later sold part of the suit land to the 5<sup>th</sup> defendant. It is alleged that the 4<sup>th</sup> defendant also encroached on the suit land.
5. In his counter claim the 4<sup>th</sup> defendant averred that he was a customary tenant. The 4<sup>th</sup> defendant further averred that by virtue of the will of **Edward Greig Winyi Rusongoza** and the subsequent distribution his estate, the suit land belonged to the estate of the late **Stephen Edward Winyi**. That the plaintiff's claim against the estate of the late **Stephen Edward Winyi** was wrongful and further that his



registration as proprietor of **Burahya Freehold Block 39, Plot No. 5 land at Butulya** that contains the suit land, was obtained through fraud.

6. The 3<sup>rd</sup> defendant under agreement of 2010 with the plaintiff, used the suit land as a dumping site for debris during their construction of Fortportal-Bundibugyo road, which agreement the plaintiff alleges that the 3<sup>rd</sup> defendant later breached by failing to level the land after the dumping.

### **ISSUES:**

7. The following issues were framed for determination by Court:
  1. **Whether the plaintiff is the lawful owner of the suit land.**
  2. **Whether the 3<sup>rd</sup> defendant is duty bound to complete the grading of the suit land.**
  3. **Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have lawful interests in the suit land.**
  4. **What remedies are available to the parties?**

### **REPRESENTATION:**

8. Mr. Mugisha Rwakatooke of M/s Ngamije Law Consultants and Advocates represented the plaintiff while Mr. Patrick Atuhaire of M/s Atuhaire & Co. Advocates represented the defendants. The parties filed written submissions.

### **EVIDENCE FOR THE PLAINTIFF:**

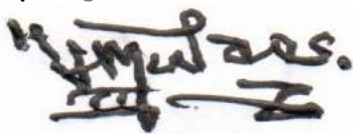


9. **PW1: Christopher Nicodemus Winyi** the plaintiff stated that the suit land was part of registered land of his father Greig Winyi who died in 1981 leaving a will (**Exhibit P.Exh. 2**), upon which his executors distributed the estate to his children, and the suit land was given to his brother **Stephen Edward Winyi**. That in 1989 **Stephen Edward Winyi** died intestate, childless and unmarried, and the plaintiff's mother and uncle allocated the suit land to the plaintiff who obtained letters of administration (**Exhibit P.Exh. 3**).

10. That in the 1980s due to draught, his father allowed the community to temporarily cultivate food on the land, including the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that the plaintiff's mother made the 1<sup>st</sup> defendant overseer over the suit land. That the suit land was always unoccupied and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants had nothing there and never lived on the land.

11. That in 2010 the plaintiff during the construction of Fortportal-Bundibugyo road signed an agreement (**Exhibit P.Exh. 7**) with the 3<sup>rd</sup> defendant allowing them to dump debris on the land, for which he was paid UGX 7m, out of which he paid the 1<sup>st</sup> defendant UGX 4m and the 2<sup>nd</sup> defendant UGX 1.5m in appreciation of their roles as overseers over the land, which they acknowledged in **Exhibit P.Exh. 8**.

12. That upon expiry of the agreement, the 3<sup>rd</sup> defendant was required to grade and restore the land to cultivable and habitable form, but the 3<sup>rd</sup> defendant breached the agreement by grading only a part of the land. That the 1<sup>st</sup> defendant, without the plaintiff's authority then started a stone quarry on the land and refused to vacate. That the 5<sup>th</sup> defendant bought part of the land from the 2<sup>nd</sup> defendant who

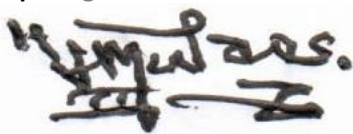


later entered into a consent judgment with the plaintiff (**Exhibit P.Exh. 12**) admitting to the plaintiff's ownership of the suit land.

**13.PW2: Benezeri Bitamazire, PW3: Koojo Godfrey Bwita and PW4: Kasaiija Peter** corroborated PW1 in material particulars. PW2 stated that the plaintiff owned the suit land as administrator of the estate of late Greig Winyi. PW3 stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendant encroached on the suit land to operate a stone quarry after the 3<sup>rd</sup> defendant had dumped stones and that the 1<sup>st</sup> defendant had been caretaker of the suit land between 1980 and 2000. PW 4 stated that the plaintiff was owner of the suit land and that the 1<sup>st</sup> defendant had never had a home there.

#### **EVIDENCE FOR THE 1<sup>ST</sup> DEFENDANT:**

**14.DW1: Paul Barozi** the 1<sup>st</sup> defendant stated that the plaintiff was his land lord but that he was a bona-fide occupant on the suit land having acquired it from his father Paul Mbeta who inherited it from his father the late Kabantonda who had inherited it from his father Mulindwa who had inherited it from his father Rumbugu. DW1 asserted that his father gave him the suit land in 1954 when he was still alive and that he had occupied the land measuring 4-5 areas since then. That he built his first house there in 1957 and subsequently built 2 more houses and married a wife with whom they produced 6 children. DW1 stated that his father and other relatives were buried on the suit land but that the graves got covered with debris dumped by the 3<sup>rd</sup> defendant; that however, his wife was buried elsewhere. That he was staying at Mukuku since 2011. That the plaintiff



paid him UGX 4m to allow the 3<sup>rd</sup> defendant use the land and that he later operated a stone quarry on the suit land.

**15.DW2: Mbabazi Teopista** stated that when she got married in the area, she found the 1<sup>st</sup> defendant on the suit land with a homestead and he was growing bananas, trees and seasonal crops; and that Paul Barozi a son of the 1<sup>st</sup> defendant also had a house there. That in 2009 the 1<sup>st</sup> defendant demolished his house and relocated his cows to another place. That when the wife of the 1<sup>st</sup> defendant died, she was buried elsewhere and that the suit land had no graves. That the 1<sup>st</sup> defendant had left the land when the 3<sup>rd</sup> defendant started dumping there and he was now living in Kitaka where he had another wife.

**16.DW3: Rwamwaro Joseph** corroborated DW1's evidence of inheritance of the suit land and stated that graves existed on the suit land but that no one had been buried there during his life time. That the 3<sup>rd</sup> defendant used the land in 2010 - 2011 and then they were paid to stop using the land and later regained its use and started a quarry project. That the plaintiff had no title to the suit land, as it belonged to Stephen Edward Winyi.

**17.DW4: Kahwa Joseph** stated that that he grew up knowing that the suit land belonged to the 1<sup>st</sup> defendant where he had bananas, trees, seasonal crops and grazed there; and that his son Paul Kato also had a home there. That in 2009 the 1<sup>st</sup> defendant voluntarily removed a small house that had been used by his herdsmen and relocated his cows to pave way for the 3<sup>rd</sup> defendant's use of the land. That the 1<sup>st</sup> defendant never lived in that house with his herdsmen as he was

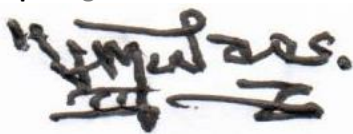


staying in Kitaka in Kazingo from 2009 where he bought land. DW4 told court that since 1992, when he came in the area, the 1<sup>st</sup> defendant's family never buried their dead on the suit land and that by the time the 3<sup>rd</sup> defendant was going to use the land he did not see any graves there; that the wife of the 1<sup>st</sup> defendant was buried at Mutulya on the clan burial grounds.

**18.DW5: Kiiza Everesto** stated that he had known the 1<sup>st</sup> defendant since the 1970s when he lived with them on the suit land because the 1<sup>st</sup> defendant had married his sister. That they cultivated different crops and reared cows, goats, sheep and chicken. That when his sister died, she was buried on the suit land. In cross examination, the witness said that the 1<sup>st</sup> defendant had another piece of land in Mutulya where they would bury their people and that during the time he lived there, he did not see any graves on the suit land.

**19.DW6: Bright Patrick Rwankwenge** stated that in 1984 when he came to the area he found the 1<sup>st</sup> defendant occupying the suit land, with a homestead, wife and children. That the 1<sup>st</sup> defendant had bananas, trees, seasonal crops and used to graze cattle on the suit land; and that the son of the 1<sup>st</sup> defendant also had a home. That the 1<sup>st</sup> defendant and his son demolished their houses in 2009 and the 1<sup>st</sup> defendant relocated his cows because the 3<sup>rd</sup> had wanted to compensate him so as to deposit soil on the suit land. That the 1<sup>st</sup> defendant voluntary left the suit land to allow the 3<sup>rd</sup> defendant dump murum.

**EVIDENCE FOR THE 3<sup>RD</sup> DEFENDANT:**

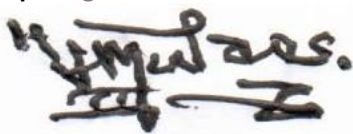


**20.DW7: Hasakimana Joseph** stated that the 3<sup>rd</sup> defendant had entered into an agreement with the plaintiff and paid the plaintiff UGX 7m for the dumping and agreed with the plaintiff that they would level the place and leave it in a cultivable and habitable state; that the 3<sup>rd</sup> defendant did the leveling before being stopped by the 1<sup>st</sup> defendant. That at the time they started dumping, the land contained eucalyptus trees.

#### **EVIDENCE FOR THE 4<sup>TH</sup> DEFENDANT:**

**21.DW8: Christopher Mugenyi** stated that he was a customary tenant on about 2 acres of the suit land where Greig Winyi was the registered proprietor (**Exhibit PE1**) that was bequeathed to his son Stephen Edward Winyi and his daughter Gladys Winyi, before it was mutated into Plot 10 bequeathed to his son Stephen Edward Winyi and Plot 9 to Gladys Winyi. That Gladys Winyi had offered him UGX 26,500,000/= as compensation for terminating his customary interest on Plot 9, which the plaintiff was now bent on grabbing without compensation. That he had built a house there that was no longer in existence as he had demolished it 10 years back and had sold part of the land to veterans.

**22.DW8** asserted that it was illegal and fraudulent for the plaintiff to have registered himself on the certificate of title for Block 39 Plot 10 as administrator of the estate of Stephen Edward Winyi, and subsequently as proprietor, when the same had been bequeathed to Stephen Edward Winyi. That the plaintiff was fraudulent in getting a grant of probate when his 3 predecessors had been administrators; and that the plaintiff was also fraudulent in bringing this suit under the representation





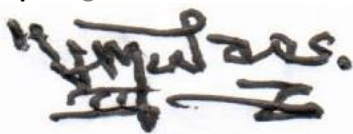
that the suit property was part of the estate of Edward Greig Winyi whereas it had under the said Greig's will become property of Stephen Edward Winyi. DW8 thus contended that the plaintiff had no powers to sue or evict him under a title that had been illegally registered through fraud.

### **EVIDENCE FOR THE 5<sup>TH</sup> DEFENDANT:**

**23.DW9: Paul Kato Barozi** stated that he owned customary land on the suit land that he had purchased from the 2<sup>nd</sup> defendant in May 2013 and built there a temporary structure. That he was aware that the land was titled in the names of late Greig Winyi who he had heard was the plaintiff's father. That he had never paid Busuulu and that he owned only 5 eucalyptus trees on the suit land which he had planted in 2014 in addition to those he found there and that currently he was only grazing there. DW9 stated that he was not aware of a consent judgment between the plaintiff and the 2<sup>nd</sup> defendant where the 2<sup>nd</sup> defendant had declared that the land in dispute belonged to the plaintiff.

### **BURDEN AND STANDARD OF PROOF:**

**24.**The plaintiff bears the burden to prove his/her claim on the balance of probabilities. Section 101 of the Evidence Act is to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. **(Kamo Enterprises Ltd Vs. Krytalline Salt Limited, SCCA No. 8 of 2018).**

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**ISSUE NO. 1: WHETHER THE PLAINTIFF IS THE LAWFUL OWNER OF THE SUIT LAND.**

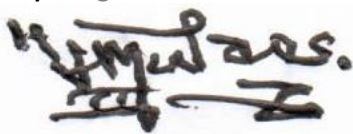
**Submissions for the plaintiff:**

**25.**It was submitted for the plaintiff that Section 59 of the Registration of Titles Act is to the effect that a certificate of title is conclusive proof of ownership of the land described therein and cannot be impeached save where fraud is proved. That fraud must be attributed to the registered proprietor (*Fredrick Zaabwe Vs. Orient Bank & 5 others, SCCA No. 4 of 2006*).

**26.**It was contended that in the pleadings and in Exhibits P.E.7 and PE8 the plaintiff was acknowledged as the registered proprietor of the suit land and that it was also clear from locus, that none of the defendants had developments or signs of settlement on the land.

**Submissions for the defendants:**

**27.**Learned counsel for the defendants contended that the title on whose basis the plaintiff filed this suit was obtained through fraud and illegality and as a result, the plaintiff lacked locus to bring this suit as he was not the owner of the suit land. That after the death of Stephen Edward Winyi to whom the suit land had been bequeathed, the plaintiff had illegally applied for letters of administration before illegally transferring the estate into his names. That without prejudice, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants had customary rights over the suit land.

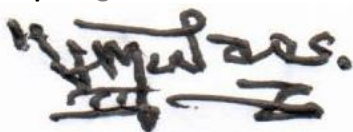
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## CONSIDERATION BY COURT:

**28.PW1: Christopher Nicodemus Winyi** the plaintiff stated that the suit land was part of registered land of his father **Greig Winyi** who died in 1981 leaving a will (**Exhibit P.Exh. 2**), upon which the executors distributed the estate to his children, and the suit land was given to his brother **Stephen Edward Winyi**. That in 1989 **Stephen Edward Winyi** died intestate, childless and unmarried, and the plaintiff's mother and uncle allocated the suit land to the plaintiff who later obtained letters of administration (**Exhibit P.Exh. 3**).

**29.**The 4<sup>th</sup> defendant by way of counter claim averred that by virtue of the will of **Edward Greig Winyi Rusongoza** and the subsequent distribution of the estate, the suit land belonged to the estate of the late **Stephen Edward Winyi** and that the plaintiff's claim therein was wrongful. Further that his claim as registered proprietor of **Burahya Freehold Block 39, Plot No. 5 land at Butulya** that contains the suit land, was obtained through fraud.

**30.**The 4<sup>th</sup> defendant stated the particulars of fraud as consisting of the following alleged misrepresentations: (i) that the suit land was still part of the estate of the late **Edward Greig Winyi Rusongoza** whereas it had by his will been bequeathed to and thus formed part of the estate of his late son **Stephen Edward Winyi**; (ii) that the plaintiff had been appointed as executor of the will of the late **Edward Greig Winyi Rusongoza** whereas not; (iii) that the late **Stephen Edward Winyi** died childless; (iv) that the plaintiff was the only suitable survivor of **Stephen Edward Winyi** to obtain authority over his estate; (v) that

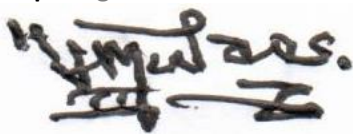


the plaintiff could become an executor of the estate of **Edward Greig Winyi Rusongoza** whereas his predecessors in title were administrators; (vi) that there was a family consensus that the plaintiff grab the estate of **Stephen Edward Winyi** for himself alone.

31. The 4<sup>th</sup> defendant testified that **Burahya Freehold Block 39, Plot No. 5 land at Butulya** having been distributed and the suit land allocated to **Stephen Edward Winyi**, the plaintiff had no authority to take over the estate of the late **Stephen Edward Winyi**. Further, that the plaintiff was fraudulent in obtaining probate and registering himself on the title of **Burahya Freehold Block 39, Plot No. 5** as executor and later as proprietor.

32. Section 59 of the Registration of Titles Act guarantees that a title deed is conclusive evidence of ownership of registered land and cannot be invalidated save for specific reasons, essentially relating to fraud or illegality in procuring the registration (**John Katarikawe v. William Katwiremu & Anor [1977] HCB 187; Olinda De Souza v. Kasamali Manji [1962] EA 756**).

33. In **Fredrick J. K Zaabwe v. Orient Bank & 5 Ors, S.C.C.A.No. 4 of 2006** (page 28 of the lead judgment) Justice Katureebe (JSC as he was), relied on the definition of fraud in **Black's Law Dictionary, (6th Ed) page 660** that includes anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture



and comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another.

**34. In Loum Kennedy & Anor. Vs. Obwoma Charles, Civil Suit No. 021 of 2016**

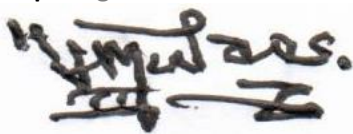
Hon. Justice Stephen Mubiru held that that in seeking cancellation or rectification of the title on account of fraud, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents. (See: **Sebuliba v. Cooperative bank Limited [1987] HCB 130** and **M. Kibalya v. Kibalya [1994-95] HCB 80**).

**35. In Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992,** it was

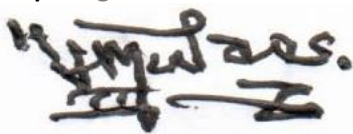
held that: “*fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters, it was further held that; ‘The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.’*”

**36. In this case the evidence of the sequence of events and the entries on the title (PEh.1) reveal the following:**

(a) **Burahya Freehold Block 39, Plot No. 5 land at Butulya** originally belonged to the late **Edward Greig Winyi Rusongoza** who got registered on the title on 20<sup>th</sup> October 1944 under Instrument No. 02793.



- (b) Under the will (**PEXh2**), the testator **Edward Greig Winyi Rusongoza** under paragraph 4 (b) bequeathed the suit land to **Stephen Edward Winyi** and **Gladys Kabajwisa Winyi**.
- (c) On 23<sup>rd</sup> September 1983, **Stephen Winyi**, **Naume Winyi** and **Joseph Kairumba** got registered on the title as administrators of the estate of the late **Edward Greig Winyi Rusongoza** by virtue of the letters of administration in Administration Cause MFP 3 of 1981.
- (d) The plaintiff under paragraph 8 of his witness statement stated that upon the death of his father **Edward Greig Winyi Rusongoza**, his executors, the late **Joseph Kirumba** and late **Princess Komuntale** distributed his estate to his children as per the will and each child got their share and the suit land was given to **Stephen Edward Winyi**.
- (e) The plaintiff stated under paragraph 11, 12 and 13 of his witness statement that the late **Stephen Edward Winyi** continued using the suit land without any third party claim on it and that in 1989 his brother **Stephen Edward Winyi** died and was not survived by any wife or child and that upon his death, the family members of the late **Edward Greig Winyi Rusongoza** resolved and gave him the estate of **Stephen Esward Winyi** including the suit land.
- (f) The plaintiff exhibited **PEXh3** being the grant of probate over the estate of the late **Edward Greig Winyi Rusongoza** in Probate Cause No. 47 of 2008 which was admitted together with the administration bond. In the grant, the plaintiff is indicated as the executor of the estate of the late **Edward Greig Winyi Rusongoza**.
- (g) On 7<sup>th</sup> October 2008 under Instrument No. FP 5749, the plaintiff **Christopher Nikodemus Winyi**, got registered on the certificate of title of **Burahya**

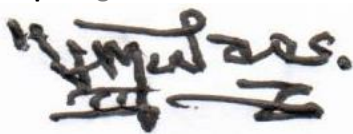
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**Freehold Block 39, Plot No. 5 land at Butulya** as the executor of the late **Edward Greig Winyi Rusongoza** under Administration Cause No. 0047 of 2008 under Instrument No. FP 100395.

(h) On 7<sup>th</sup> June 2012 under Instrument No. FP. 101678, the plaintiff **Christopher Nikodemus Winyi** got registered as proprietor of **Burahya Freehold Block 39, Plot No. 5 land at Butulya** that included the suit land.

37. The burden of proof to prove fraud lay on the 4<sup>th</sup> defendant who brought the counter claim in this regard, and the burden is above a mere balance of probabilities, although that burden falls below proof beyond reasonable doubt.

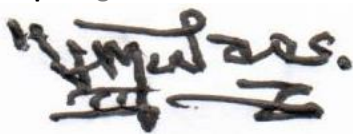
38. The plaintiff stated under paragraph 11, 12 and 13 of his witness statement that the late **Stephen Edward Winyi** continued using the suit land without any third party claim on it and that in 1989 his brother **Stephen Edward Winyi** died and was not survived by any wife or child and that upon his death, the family members of the late **Edward Greig Winyi Rusongoza** resolved and gave him the estate of **Stephen Edward Winyi** including the suit land. This evidence is not sufficiently controverted by the 4<sup>th</sup> defendant. In particular, the 4<sup>th</sup> defendant did not adduce evidence to prove his claims to the effect that the late **Stephen Edward Winyi** did not die childless and that the plaintiff was not the only suitable survivor of **Stephen Edward Winyi** to obtain authority over his estate. There was no evidence that any of the beneficiaries of the estate of the late **Edward Greig Winyi Rusongoza** had come up to challenge or dispute the plaintiff's claim over the estate of his late brother **Stephen Edward Winyi**. In my view, any irregularity in the manner of obtaining the letters of administration



did not affect the plaintiff's evidence that the family had sat and allocated to him the estate of his brother the late **Stephen Edward Winyi**.

39. The 4<sup>th</sup> defendant contended that the plaintiff had acted fraudulently in obtaining probate and registering himself on the title as executor of the estate of **Edward Greig Winyi Rusongoza** and later as proprietor. I am aware that under Section 234 of the Succession Act Cap. 162, the grant of probate or letters of administration may be revoked or annulled for just cause, including where the proceedings to obtain the grant were defective in substance; where the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case; and where 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. In this case however, I have not been asked to revoke or annul the letters of probate that the plaintiff relied upon to register himself on the title as the executor of the estate of the late **Edward Greig Winyi Rusongoza**.

40. At the same time the 4<sup>th</sup> defendant did not provide me with evidence upon which I could rely to effectively determine whether or not the plaintiff's applications for probate, and registration as executor and proprietor, were characterized by fraud. Such evidence would include the petition for grant of probate and other documents that the plaintiff would have supplied to court and to the land registry that were relied upon to grant probate and to register the instruments complained about.

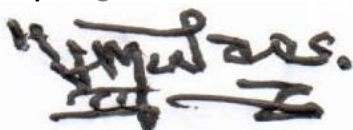
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41. It is clear from the face of the title that on 7<sup>th</sup> October 2008 under Instrument No. FP 5749, the plaintiff got registered as the executor of the late **Edward Greig Winyi Rusongoza** under Administration Cause No. 0047 of 2008 under Instrument No. FP 100395. It is also clear that on 7<sup>th</sup> June 2012, the plaintiff got registered as proprietor of the land originally registered in the names of his late father **Edward Greig Winyi Rusongoza** that included the suit land, under Instrument No. FP. 101678. I however find in the absence of the supporting background evidence that this alone is insufficient to enable me make a determination as to whether the process leading to the entries complained of was fraudulent.

42. Furthermore, it was not up to the 4<sup>th</sup> defendant as tenant to question the title of the registered proprietor. In his counter claim, the 4<sup>th</sup> defendant averred that his claim is derived from his being a customary tenant. On the part of the 1<sup>st</sup> defendant, he stated that the plaintiff was his land lord. In my opinion, in the circumstances of this case, a tenant's claim to the suit land could only extend to the rights granted to the 4<sup>th</sup> defendant as a tenant. The 4<sup>th</sup> defendant's rights as a customary tenant if proved are merely rights of peaceful occupation, such rights being guaranteed on certain conditions. A tenant cannot in law challenge the rights of a registered owner, even where they suspect that the title is questionable, except to the extent that the title or lack of it affected his customary tenancy or lawful occupancy.

43. I therefore find based on the above analysis that the 4<sup>th</sup> defendant has on a balance of probabilities failed to prove his counter claim in this suit that the plaintiff got

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fraudulently registered on the title of the suit land and as such the plaintiff remains the lawful owner of the suit land.

**ISSUE NO. 2: WHETHER THE 3<sup>RD</sup> DEFENDANT IS DUTY BOUND TO COMPLETE THE GRADING OF THE SUIT LAND.**

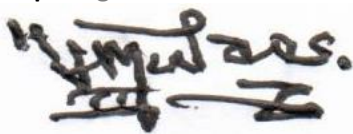
**Submissions for the Plaintiff:**

**44.**It was submitted that the plaintiff's pleadings under paragraphs 6, 7, 8, 9 and 17 of the plaint showed that on 12<sup>th</sup> October 2010 entered into an agreement with the 3<sup>rd</sup> defendant allowing the 3<sup>rd</sup> defendant was to dump soil on the plaintiff's land and later grade the area. That the 3<sup>rd</sup> defendant later graded the site but failed to complete the job after being stopped by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. It was pointed out that the 3<sup>rd</sup> defendant had in their written statement of defense under paragraphs 6, 7 and 8 admitted to grading only a part of the site. It was further pointed out that the 3<sup>rd</sup> defendant's witness DW7 had testified that they did not complete the job because they were stopped by the 1<sup>st</sup> defendant.

**Submissions for the 3<sup>rd</sup> Defendant:**

**45.**It was submitted that the 3<sup>rd</sup> defendant was not liable to the plaintiff in respect of the agreement they had entered into mainly on the basis that the plaintiff had fraudulently procured the registration of **Burahya Freehold Block 39, Plot No. 5 land at Butulya** that contained the suit land.

**CONSIDERATION BY COURT:**



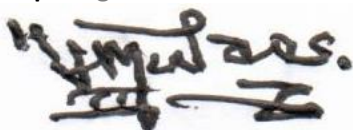
**46.**It was the evidence of the plaintiff that in 2010 the plaintiff during the construction of Fortportal-Bundibugyo road signed an agreement (**Exhibit P.Exh. 7**) with the 3<sup>rd</sup> defendant allowing them to dump debris on the land, for which he was paid UGX 7 million. That upon expiry of the agreement, the 3<sup>rd</sup> defendant was to grade and restore the land to cultivable and habitable form, but the 3<sup>rd</sup> defendant breached the agreement by grading only a part of the land.

**47.DW7: Hasakimana Joseph** who testified on behalf of the 3<sup>rd</sup> defendant stated that the 3<sup>rd</sup> defendant had entered into an agreement with the plaintiff and paid the plaintiff UGX 7m for the dumping and agreed with the plaintiff that they would level the place and leave it in a cultivable and habitable state; that the 3<sup>rd</sup> defendant did the leveling before being stopped by the 1<sup>st</sup> defendant.

**48.**The evidence on both sides shows that there was an agreement allowing the 3<sup>rd</sup> defendant to dump debris on the suit land and requiring the 3<sup>rd</sup> defendant to level the site afterwards; that the 3<sup>rd</sup> defendant did start the leveling, but was prevented among others by the 1<sup>st</sup> defendant from completing the job. I therefore find that the 3<sup>rd</sup> defendant is duty bound to complete the grading of the suit land.

**ISSUE NO. 3: WHETHER THE 1<sup>ST</sup>, 2<sup>ND</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANTS HAVE LAWFUL INTERESTS IN THE SUIT LAND.**

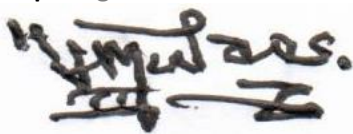
**Submissions for the plaintiff:**

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49. It was contended that the plaintiff had paid the 1<sup>st</sup> defendant in appreciation of his work as overseer over the suit land while the 2<sup>nd</sup> was paid for overseeing the lower part of the suit land; and that the plaintiff had adduced evidence to prove that the 1<sup>st</sup> defendant was a mere overseer over the suit land but not a bona-fide occupant. It was pointed out that **PExh** dated 12.9.1997 a letter from the plaintiff's mother referred to the 1<sup>st</sup> defendant as one who had been a caretaker of the suit land. That the 1<sup>st</sup> defendant had prior to the plaintiff's agreement with the 3<sup>rd</sup> defendant, demolished his house and shifted his cows and family paving way for the use of the suit land by the 3<sup>rd</sup> defendant. That for the 1<sup>st</sup> defendant, having been paid for his role as overseer and left the suit land, to have later returned to set up a quarry, was unlawful. It was pointed out that the 1<sup>st</sup> defendant had his own *kibanja* where he lived with his family elsewhere apart from the suit land. It was further pointed out that the 2<sup>th</sup> defendant had acknowledged the plaintiff's ownership of the suit land when he entered into a consent judgment (**PExh. 12**) with the plaintiff. That the 5<sup>th</sup> defendant had acknowledged that he had purchased a part of the suit land from the 2<sup>nd</sup> defendant only in 2013 the year this suit was filed.

50. It was submitted that the 1<sup>st</sup>, 2<sup>th</sup>, 4<sup>th</sup> 5<sup>th</sup> defendants' claim to bona-fide or lawful occupancy on the suit land did not pass the test of the governing laws (See Sections 29 and 35 of the Land Act and **Isaya Kalya & 2 ors versus Moses Masekenyu Ikagobya, CACA No. 82 of 2012**). It was pointed out that at the locus visit, it was clear that none of the defendants was in occupation, or had any developments or activities on the land such as houses or farming.

**Submissions for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants:**



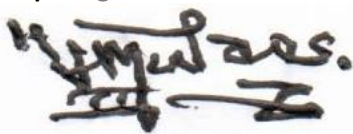
51. It was contended that the interest of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants was based on long occupation of the land while the 5<sup>th</sup> defendant had bought from the 2<sup>nd</sup> defendant and that the rights of the plaintiff were subject to the customary interests of the defendants who were entitled to compensation before terminating their interests; and that the compensation agreements **PExh 7** and **DX8** demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not mere overseers over the suit land.

52. It was contended that the consent judgment (**Exhibit P.Exh. 12**) made between the plaintiff and 2<sup>nd</sup> defendant was null and void because the plaintiff had concealed his illegal registration of his proprietorship of the suit land.

## CONSIDERATION BY COURT

### *(i) The Consent Judgment (PExh. 12)*

53. The record of proceedings shows that on 19/09/2017 when the case came up for hearing, the 5<sup>th</sup> defendant was present in court. The plaintiff reported that the 2<sup>nd</sup> defendant had entered a consent judgment with him (**PExh. 12**) prior to his death, declaring that the whole land that the 2<sup>nd</sup> defendant was claiming including what he had sold to the 5<sup>th</sup> defendant, belonged to the plaintiff and that he had no interest therein and that the 5<sup>th</sup> defendant had also said that he had left the suit land and claimed no further interest therein. The court thus struck out the 2<sup>nd</sup> and 5<sup>th</sup> defendants from the suit as had been agreed by the parties.



54. The consent judgment (**PEXh. 12**) dated 8<sup>th</sup> January January 2016 and entered on 9<sup>th</sup> March 2016 stated as follows:

*BY CONSENT of the parties, enter Judgment for the Plaintiff as against the 2<sup>nd</sup> Defendant on the following terms.*

- 1. The 2<sup>nd</sup> Defendant relinquishes any claim to the land in issue and for avoidance of doubt declares the land to belong to the Plaintiff.*
- 2. The Suit against the 2<sup>nd</sup> Defendant is herein discontinued.*
- 3. Each party to bear his own costs.*

55. I note that as a result of the consent judgment, the 2<sup>nd</sup> and 5<sup>th</sup> defendants were struck off from the suit and ceased to be parties. The correct thing for the 5<sup>th</sup> defendant to have done was to object to the consent judgment during trial, in which case, the court would have had an opportunity to determine the matter and probably set aside the consent judgment, and restore the parties to the position that prevailed before the consent judgment to enable Court determine all questions in issue inter-parties.

56. The consent judgment was presented in court in the presence of the 5<sup>th</sup> defendant who did not protest, following which, the 2<sup>nd</sup> and 5<sup>th</sup> defendants were struck out from the suit. The 2<sup>nd</sup> defendant having died and having been struck out from the suit on the basis of the consent judgment, no evidence was presented on his behalf. The 5<sup>th</sup> defendant testified although he had been struck out from the suit on the basis of the consent judgment. The 2<sup>nd</sup> and 5<sup>th</sup> defendants having been struck, I can no longer address their claims as they are no longer parties to this

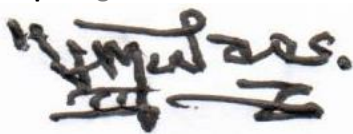
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suit. As for the 5<sup>th</sup> defendant who testified, I will consider his evidence as a defence witness but not as a party to the suit.

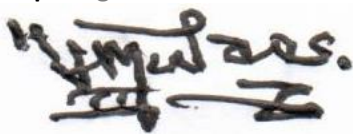
**(ii) Whether the 1<sup>st</sup> Defendant Has a Lawful Interest in the Suit Land:**

**57.**It was evidence of the plaintiff that in the 1980s due to draught, his father allowed the community to temporarily cultivate food on the land, who included the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that the plaintiff's mother made the 1<sup>st</sup> defendant overseer over the suit land. The plaintiff stated under paragraph 11, 12 and 13 of his witness statement that the suit land had been bequeathed to the late **Stephen Edward Winyi** who used it without any third party claim until his death in 1989. That the suit land was always unoccupied and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants had nothing there and never lived on the land.

**58.**It was the evidence of the 1<sup>st</sup> defendant that the plaintiff was his land lord. The 1<sup>st</sup> defendant however averred that he owned the suit land as a bona-fide occupant, having inherited it in 1954 from his father. That his father and other relatives were buried on the suit land but that the graves got covered with debris dumped by the 3<sup>rd</sup> defendant; that his wife was buried elsewhere, where he too intended to be buried. That he was currently staying at his wife's place at Mukuku since 2011. On the other hand the plaintiff contended that the 1<sup>st</sup> defendant was only an overseer over the suit land, a role for which the 1<sup>st</sup> defendant was compensated to pave way for the 3<sup>rd</sup> defendant's use of the land.



**59.DW2: Mbabazi Teopista** stated that in 2009 the 1<sup>st</sup> defendant demolished his house and relocated his cows to another place; that when his wife died she was buried elsewhere; that the suit land has no graves; and that the 1<sup>st</sup> defendant had left the land when the 1<sup>st</sup> defendant started dumping there and was now living in Kitaka where he had another wife. **DW3: Rwamwaro Joseph** stated that there were graves on the disputed land but that no one had been buried there during his life time. **DW4: Kahwa Joseph** stated that in 2009 the 1<sup>st</sup> defendant voluntarily removed a small house that had been used by his herdsmen and relocated his cows to pave way for the 3<sup>rd</sup> defendant's use of the land. That the 1<sup>st</sup> defendant had not been living in that house with his herdsmen as he was staying in Kitaka in Kazingo from 2009 where he bought land. DW4 told court that since 1992, when he came in the area, the 1<sup>st</sup> defendant's family never buried their dead on the suit land and that by the time the 3<sup>rd</sup> defendant was going to use the land he did not see any graves there; that the wife of the 1<sup>st</sup> defendant was buried at Mutulya on the clan burial grounds. **DW5: Kiiza Everesto** stated that he had known the 1<sup>st</sup> defendant since the 1970s when he lived with them on the suit land because the 1<sup>st</sup> defendant had married his sister. That they cultivated different crops and reared cows, goats, sheep and chicken. That when his sister died, she was buried on the suit land. In cross examination, the witness said that the 1<sup>st</sup> defendant had another piece of land in Mutulya where they would bury their people and that during the time he lived there, he did not see any graves on the suit land. **DW6: Bright Patrick Rwankwenge** stated that the 1<sup>st</sup> defendant and his son demolished their houses in 2009 and the 1<sup>st</sup> defendant relocated his cows because the 3<sup>rd</sup> had wanted to deposit soil on the suit land. That the 1<sup>st</sup> defendant voluntary left the suit land to allow the 3<sup>rd</sup> defendant dump murum. **DW7:**





**Hasakimana Joseph** who testified on behalf of the 3<sup>rd</sup> defendant stated that at the time they started dumping on the suit land, it contained eucalyptus trees.

**60.** From **Section 1 (e)** of the **Land Act (Cap 227)**, ‘*bona-fide occupants and lawful occupants,*’ have the meanings assigned to them in **Section 29** of the Act. **Section 29(1) (b)** of the **Land Act** defines lawful occupant as: ‘*A person who entered the land with the consent of the registered owner; and includes a purchaser..*’. **Article 237(8) of the Constitution, Sec 31 of the Land Act, (supra), and Section 64 (2) of the Registration of Titles Act Cap 230**, recognize the security of tenure of a bona-fide occupant on land. Such tenant is deemed to be a tenant of the registered owner. The security of this tenancy was discussed in *Kampala Distributors versus National Housing and Construction Corporation SC CA No. 2 of 2007* where the **Supreme Court** postulated that a bona-fide occupant was given security of tenure and his interest could not be alienated except as provided by the law, and that while land occupied by a bona-fide occupant could be leased to somebody else, the first option would be given to the bona-fide occupant, and if it is not done, it means the suit land would not be available for leasing.

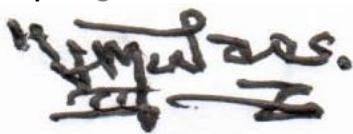
**61.** In this case the 1<sup>st</sup> defendant in a bid to prove that he was a bona-fide occupant on the suit land adduced evidence to demonstrate that his family had been in occupation of the suit land for a very long time, and brought evidence among others, that he had a home on the suit land; and that his relatives including his wife had been buried there. The 1<sup>st</sup> defendant’s evidence was however contradicted by the evidence of some of his other witnesses to the effect that no



graves had ever been seen on the suit land; that no burials had ever been seen taking place on the suit land; that the wife of the 1<sup>st</sup> defendant was buried elsewhere; that the family of the 1<sup>st</sup> defendant had their family burial grounds elsewhere where they buried their dead. **DW7 Hasakimana Joseph** who testified on behalf of the 3<sup>rd</sup> defendant made no mention of the presence of graves at the time when the dumping started. In addition, there was evidence that the 1<sup>st</sup> defendant voluntarily demolished his workers' house that he had on the suit land and left with his cows and workers and he went to live on his own land to-date, to pave way for its use by the 3<sup>rd</sup> defendant. Further, it was clear from locus, and evidence of past pictures presented by the plaintiff (**Exhibits PExh 10 and PExh 13**) that the 1<sup>st</sup> defendant had no developments on the land or any sign of settlement or occupation.

**62.** It is recalled that it was the evidence of the plaintiff supported by the evidence of the 4<sup>th</sup> defendant that the suit land had been bequeathed to the plaintiff's brother the late **Stephen Edward Winyi**. It was the evidence of the plaintiff that the suit land was used by the late Stephen Edward Winyi without any third party claims until his death in 1989. It was therefore impossible that 1<sup>st</sup> defendant had owned, settled on, and used the land as a bona-fide occupant since 1954 when he inherited it from his father, when after the plaintiff's father's death in 1981 the land had been bequeathed to **Stephen Edward Winyi** who used it until his death in 1989.

**63.** Based on the above considerations and analysis, I find the evidence of the plaintiff more believable, that the 1<sup>st</sup> defendant lawfully came on the suit land with the consent of the registered owner only as an overseer as opposed to



occupier, who also used the land together with other members of the community, and that when the need rose for the plaintiff to rent out the land to the 3<sup>rd</sup> defendant, the plaintiff paid him a token of appreciation for his role as overseer and to stop using the land and leave, which the 1<sup>st</sup> defendant voluntarily did. Thus, any kind of bona-fide occupancy on the part of the 1<sup>st</sup> defendant, that may have existed prior, had ceased by the time of this suit.

64.I therefore find that the 1<sup>st</sup>Defendant has on a balance of probabilities failed to prove his claim that he has a lawful interest in the suit land by virtue of being bona-fide occupant on the land.

(iii) *Whether the 4<sup>th</sup> Defendant Has a Lawful Interests in the Suit Land:*

65.In his counter claim, the 4<sup>th</sup> defendant averred that his possession and proprietary interest derived from a legal right that, vests in him as a customary tenant of a part of the suit land that falls partly in the land of the late Stephen Winyi and partly in the land of the Gladys Winyi. The 4<sup>th</sup> defendant stated that he was a holder of customary land and that Gladys Winyi had by agreement (DEX8) offered him UGX 26,500,000/= as compensation for terminating his customary interest. That Gladys Winyi had also written a letter to court (DEX9) to defend him. The 4<sup>th</sup> defendant in cross examination accepted that the suit land was titled land and stated that his only developments on the land were some trees. That he had built a house there that he had demolished 10 years back and also sold part of the land to veterans.



66. The 4<sup>th</sup> defendant claims to be a customary tenant or lawful occupant on about 2 acres of the suit land. I am guided mainly by Sections 1 (1), 2, 3, 29, 31 (3) and 35 of the Land Act Cap 227.

67. Customary tenure applies to a specific area and specific group of people and can be established by any activity on the land. It is, however, insufficient for a person merely to carry out activities on land for however long the period; a person claiming to be a customary tenant must prove that in that area, it is a custom that whoever carries out certain activities for a specific period of time becomes a customary owner. This position was re-affirmed by the Supreme Court in the case of **Kampala District Land Board & Another vs. Venansio Babweyaka & 3 Others SCCA No.2 of 2007**.

68. Section 46 of the Evidence Act, Cap 6, provides that where a court has to form an opinion as to the existence of any general custom or right, persons who would be likely to know of its existence, are relevant. In **R. vs. Ndembera S/o Mwandewale (1947) 14 EACA 58**, it was held, inter alia, that native custom must be proved in evidence and cannot be supplied from the knowledge and experience of the trial judge. Under Section 101(1) and (2) of the Evidence Act, “he who alleges must prove”.

69. In the instant case, the burden of proving that he occupied and or utilized the suit land as a customary tenant lies on the 4<sup>th</sup> defendant who alleged the same. It was noted that no particular or specific evidence was led by the 4<sup>th</sup> defendant in this regard. The 4<sup>th</sup> defendant primarily relied on the evidence that Gladys Winyi had

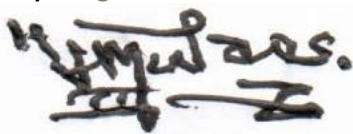


by agreement (**DEX8**) offered him UGX 26,500,000/= as compensation for terminating his customary interest and that she had also written a letter to court dated 07/01/2018 (**DEX9**) to defend him.

**70.DEX8** states that the landlord had agreed to compensate the 4<sup>th</sup> defendant to the tune of UGX 26,000,000/= for all the developments on the land and that whereas he had acknowledged receipt of UGX 7,500,000/=, he had accepted to give quiet possession of the land. **DEX9** describes the 4<sup>th</sup> defendant as a tenant who administered the land of Gladys Winyi since 1997 and that the 4<sup>th</sup> defendant was a bona-fide tenant on her land but that he had no land title.

**71.**I have observed that **DEX8** and **DEX9** were not formally proved. In the case of **DEX8** there was no evidence from a handwriting expert proving the signature attributed to the landlord. Further, neither the land lord Ms. Gladys Naome Kageye nor the witness Byanjeru Sharon who were party to the agreement provided evidence to confirm the authenticity of the said agreement and no reason was given for this omission. In the case of **DEX8** there was no proof that the handwriting contained therein belonged to Gladys Winyi and the 4<sup>th</sup> defendant himself did not testify in proof of the contents of the documents. I am therefore reluctant to give these documents any significant evidential value.

**72.**Even if I were to rely on the said documents, **DEX9** describes the 4<sup>th</sup> defendant as a tenant who administered the land of Gladys Winyi. **DEX8** states that whereas the 4<sup>th</sup> defendant had acknowledged receipt of UGX 7,500,000/=, he had accepted to give quiet possession of the land. In my analysis, it means that the 4<sup>th</sup> defendant had upon receiving the UGX 7,500,000/= accepted to vacate the suit land and



could not now turn around to return on the suit land through this suit to claim a customary interest or lawful occupancy therein.

**73.**As to whether the 4<sup>th</sup> defendant could be considered as a lawful occupant, he did not adduce any evidence to prove that he was a person occupying land by virtue of the repealed Busuulu and Envujjo Law of 1928, Toro Landlord and Tenant Law of 1937, or Ankole Landlord and Tenant Law of 1937; that he was a purchaser; that he was a person who had occupied the 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; or that he had been paying to the registered owner any ground rent.

**74.**The 4<sup>th</sup> defendant did provide some evidence that he was a person who entered the land with the consent of the registered owner (**DExh8** and **DExh9**). I have however already found that **DEX8** and **DEX9** were not formally proved and that even if I were to consider the contents of the said exhibits, the 4<sup>th</sup> defendant had upon receiving the UGX 7,500,000/= accepted to vacate the suit land and could not return through this suit to claim a customary or lawful occupancy.

**75.**Furthermore, is again recalled that it was the evidence of the plaintiff supported by the evidence of the 4<sup>th</sup> defendant that the suit land had been bequeathed to the plaintiff's brother the late **Stephen Edward Winyi**. It was the evidence of the plaintiff that the suit land was used by the late Stephen Edward Winyi without any third party claims until his death in 1989. It was therefore impossible that the 4<sup>th</sup> defendant had always occupied the suit land that was bequeathed to **Stephen Edward Winyi** after his father's death who then used it until his death in 1989.



76.I therefore find that the 4<sup>th</sup> defendant has on a balance of probabilities failed to prove that he is a customary tenant or lawful occupant on the suit land.

### **ISSUE NO. 3: REMEDIES:**

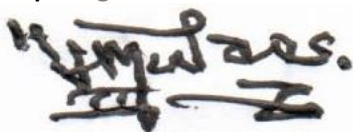
77. In line with my findings, the plaintiff's suit against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants succeeds. The counter claims of the 1<sup>st</sup> and 4<sup>th</sup> defendants fail and are hereby dismissed.

78.The plaintiff's prayer for award of general damages of UGX 50,000,000/= is unsupported by any evidence and is denied.

79.Since the 3<sup>rd</sup> defendant's failure to complete the grading of the suit land was caused by other factors, especially the acts of the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant will not be condemned in costs. In order to maintain harmony between the plaintiff and the 1<sup>st</sup> and 4<sup>th</sup> defendants who are operating within the same community or neighborhood, the 1<sup>st</sup> and 4<sup>th</sup> defendants will not be condemned in costs.

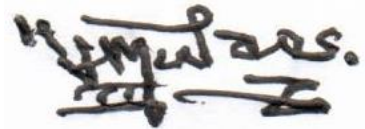
80.I therefore issue the following declarations and orders:

- 1. A declaration that the suit land contained in land comprised in Burahya Freehold Block 39, Plot No. 5 land at Butulya belongs to the plaintiff.**
- 2. An order is hereby issued directing the 3<sup>rd</sup> defendant to complete the grading of the suit land.**



3. An Order of Permanent Injunction doth issue, restraining the 1<sup>st</sup> and 4<sup>th</sup> Defendants, and any other person from committing acts of trespass or any unlawful acts on, or interference with the suit land.
4. Each party shall bear their own costs.

It is so ordered.



Vincent Wagona  
**High Court Judge**  
**FORT-PORTAL**

**DATE: 13/10/2023**

