

**THE REPUBLIC OF UGANDA,  
 IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
 CIVIL APPEAL NO 135 OF 2014  
 (ARISING FROM HCT – 03 – CV – CA – 0108 – 2010)  
 (CORAM: KAKURU, MUSOTA, MADRAMA, JJA)**

10 **KAMADI LOGONVU} .....APPELLANT**

**VERSUS**

- 1. SAUDA NANDAWULA}
- 2. HALIMA NAMUGA}
- 3. REHEMA NAMANDE} .....RESPONDENTS
- 15 4. MUMINU KITAKA}
- 5. NAGGAI MWAJUMA}

**JUDGMENT OF COURT**

20 This is a second appeal from the judgment of the High Court Hon. Lady Justice Flavia Senoga Anglin sitting as an appellate court in an appeal that emanated from the decision of the magistrate grade 1 his worship Johnson Karemani.

25 The appellants at the High Court were the plaintiffs in the lower court and had sued the respondent, the registered proprietor of the disputed land seeking for general damages for unlawful interference with their rights as tenants by occupancy. They sought a permanent injunction to prevent unlawful threats of eviction made against them by the respondent/the appellant in this court. The first respondent advanced the case that she and her late husband had lived on the property as a matrimonial home since 1971 and the rest of the respondents are their children. The appellant is a stepson of the first respondent and his stepbrother to the rest of the respondents. The suit in the Magistrate's Court was dismissed with costs to the appellant. In the High Court, the 30 respondents appeal was allowed and the decision of the magistrate court set aside. The appellants were declared lawful occupants of the disputed land who are entitled to compensation of their interest in the land before they can vacate the suit property. General damages awarded against the third and fourth respondents were set aside and

- 5 general damages granted to the appellant in the counterclaim were also set aside. The file was to be returned to the lower court to determine the adequate compensation due to the respondents for the development and interest they have in the land with the assistance of a valuation surveyor. The appeal was allowed with costs in the High Court and in the Magistrate's Court.
- 10 The appellant being dissatisfied with the decision of the High Court on appeal, further appealed to this court against the whole of the decision on three grounds namely:
1. The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thus reaching a wrong conclusion.
  - 15 2. The learned Judge erred in law and fact when she held that failure to visit the *locus in quo* occasioned a miscarriage of justice.
  3. The learned Judge erred in law and fact when she held that the respondents acquired beneficiary interest in the development on the suit land and were lawful  
20 occupants.

At the hearing of this appeal learned Counsel Mr. Hudson Segamwenge appeared for the appellant and learned Counsel Mr. Byron Mwanje appeared for the respondent. With leave of court, both counsel relied on their written submissions and also gave oral highlights thereof. The appellant's counsel abandoned grounds 1 and 2 and submitted  
25 only on ground 3 of the appeal.

A perusal of the written submissions of the appellants counsel indicates that he submitted only on grounds 1 and 2 and not on ground 3. Submissions on ground 3 were mainly in the oral submissions.

30 The third ground of appeal is; **whether the learned first appellate court Judge erred in law and in fact when she held that the respondents had acquired beneficial interests in the developments on the suit property and were lawful occupants?**

The appellant's counsel submitted that what must be firstly noted is that the appellant is the registered proprietor of the suit property and has a certificate of title which was proved in evidence. Secondly, the appellant tendered a structural plan that was  
35 approved by the Mukono District Council in his name. The appellant testified that he constructed the commercial buildings on the suit property. He submitted that it was

5 erroneous for the first appellate court to hold that the respondents were lawful  
occupants within the meaning of section 29 (1) (b) of the Land Act Cap 227 when the  
registered proprietor of the land who is the appellant did not give any consent for them  
to stay on the property. While the appellant was living in the United Kingdom, the  
respondents started collecting rent from his premises and that is how they got  
10 possession of the property. Initially it was the appellant's agent who was taking care of  
the commercial property.

The appellant's counsel invited the court to consider the evidence on record which  
shows that the respondents came to the land in 1993 and the law was enacted in 1995.  
They therefore cannot fit within the definition of lawful occupant. Secondly, the  
15 respondents claim that they came into possession by virtue of their father being the  
owner of the suit property but this is not true. The argument that they had beneficial  
interest arising from their relationship with their late father who is also the father of the  
appellant is erroneous. Appellant's counsel conceded that this was not a succession  
dispute and the respondents were claiming by virtue of their father being the owner of  
20 the property. The children acquired interest as children of the deceased and the first  
respondent as a spouse of the deceased. On the other hand the appellant gave  
evidence to the effect that the property was given to him *inter vivos* before his father  
passed away. He went ahead and had it registered into his names. Furthermore, the  
appellant constructed a commercial building. After his father passed away, the  
25 respondents started coming up and claiming the property as their father's property  
whereas the alleged father had given them land on another piece of property. On the  
issue as to whether magistrates had jurisdiction to entertain a suit with regard to  
registered proprietorship, learned counsel for the appellant submitted that what was in  
the lower court was a case of trespass. He prayed that the appeal is allowed.

30 In reply, the respondent's Counsel adopted his written submissions and responded to  
ground 3 of the appeal. He contended that the learned appellate court Judge clearly  
explains the circumstances under which the respondents came on the suit property. The  
first respondent came into occupation by virtue of marriage in 1971 and continued to  
stay on the suit property until the threat to evict her and there is evidence of trials  
35 arising from the local Council courts between her and the appellant. The respondent's  
counsel submitted that the evidence is clear that the first respondent who was the  
spouse of his father by virtue of marriage was brought on the suit property and never

5 knew about the registration of the appellant. The father of the appellant died in 1991 and the appellant got registered on the land in 1993.

While the appellant claimed that the property was given to him in 1973, the first respondent in her evidence stated that she never knew about the gift. Moreover the appellant was registered in 1993. Furthermore, it was the appellant who relied on the certificate of title and had it produced in the lower court. Learned counsel for the  
10 respondent conceded that the respondent's case was that they were lawful occupants. On the issue of whether the respondents were receiving rent, it is submitted for the respondents that they were occupying part of the rooms and part of the rooms were occupied by their own tenants. Furthermore the first respondent testified that the house  
15 was built by the late Kagoro (her husband).

In conclusion learned counsel for the respondents on the question of how to resolve the registered proprietorship of the appellant submitted that the respondents began occupying the suit property and were lawful occupants. If the appellant had acquired a registrable interest, he got that interest with all the equities of occupation of the  
20 respondents. He prayed that the appeal is dismissed.

### **Resolution of appeal**

This is a second appeal and as such is governed by section 72 of the Civil Procedure Act which provides that a second appeal can only be on a point of law. Section 72 of the Civil Procedure Act provides that:

#### **25 "72. Second appeal.**

(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—

- 30 (a) the decision is contrary to law or to some usage having the force of law;
- (b) the decision has failed to determine some material issue of law or usage having the force of law;

5 (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte."

10 Section 72 is further entrenched by section 74 which provides that no second appeal shall lie on any ground other than that provided for in section 72 and provides that:

**"74. Second appeal on no other grounds.**

Subject to section 73, no appeal to the Court of Appeal shall lie except on the grounds mentioned in section 72."

15 As a second appellate court, we are restricted to determination of questions of law only. **Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions** allows this court in the exercise of the jurisdiction to determine questions of law in a second appeal court, to appraise the inferences of fact drawn by the trial court. Rule 32 (2) of the Rules of this court provides that:

20 "(2) On any second appeal from the decision of the High Court acting the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."

25 The trial court is the court which heard the suit originally because "trial court" is not defined by the Rules of this court. Section 2 (b) of the Civil Procedure Act, defines the word "court" as "any court exercising civil jurisdiction." The expression "trial court" is not defined. Similarly section 1 of the Judicature Act Cap 13 does not define the word "court" or "trial court." The ordinary meaning is that it is the court which exercised original jurisdiction. This appeal arises from a decision of the High Court in the exercise of its appellate jurisdiction from the decision of a Magistrate Grade 1 and we have  
30 power to draw inferences of fact from proceedings of the Magistrate Grade 1.

In the case of **Kifamunte Henry v Uganda; S.C.C.A No 10 of 1997** the Supreme Court of Uganda held that once there is evidence in support of a finding of fact, it is not open  
35 to a second appellate court to go into the sufficiency of the evidence or reasonableness of the finding. The second appellate court will not interfere with concurrent findings of

5 fact of the trial and first appellate courts. Questions of fact are therefore not for trial in this appeal as we are only concerned with questions of law.

The question addressed is whether the learned trial Judge erred in law when she held that the respondents acquired beneficiary interest in the development of the suit land and were lawful occupants.

10 The question of whether the respondents were lawful occupants is the tied up with the issue of whether they acquired any beneficial interest. The beneficial interest flows from a finding on a point of law as to whether the respondents are lawful occupants within the meaning of the law.

15 Starting with the Constitution of the Republic of Uganda, article 237 (3) thereof provides that land in Uganda shall be owned in accordance with certain land tenure systems namely:

- (a) customary;
- (b) Freehold;
- (c) Mailo; and
- 20 (d) leasehold

The term lawful occupant is first of all found in article 237 (8) of the Constitution of the Republic of Uganda which provides as follows:

25 "Upon the coming into force of this Constitution and until Parliament enacts an appropriate law under clause (9) of this article, the lawful or bona fide occupants of Mailo land, Freehold or leasehold land shall enjoy security of occupancy on the land."

30 As a matter of law, the operation of the above article is upon the coming into force of the Constitution of the Republic of Uganda which was promulgated on 8<sup>th</sup> October, 1995. Secondly, the article deals with occupants who are described as lawful or *bona fide* occupants of Mailo land, Freehold or leasehold land. The article is not concerned with customary tenure but with registered property. Thirdly, it was envisaged that Parliament would enact an appropriate law to regulate the relationship between the lawful or bona fide occupants of Mailo land, Freehold land or leasehold land under clause 9 of article 237. Article 237 (9) of the constitution provides that Parliament shall  
35 enact a law regulating the relationship between the lawful or bona fide occupants of

5 land referred to in clause (8) and the registered owners of that land. Secondly it would provide for the acquisition of registrable interest in the land by the occupant.

This law was enacted and is known as the Land Act 1998 which is the Land Act Cap 227 under the revised laws of Uganda 2000. Article 237 (3) is reproduced in part by section 2 of the Land Act Cap 227 on the forms of land ownership in Uganda. The terms "lawful  
10 occupant" and "bona fide occupant" are defined by section 29 of the Land Act Cap 227 (hereinafter referred to as the Land Act) and is reproduced herein for ease of reference:

"29. Meaning of "lawful occupant" and "bona fide occupant".

(1) "Lawful occupant" means—

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

15 (i) Busuulu and Envujjo Law of 1928;

(ii) Toro Landlord and Tenant Law of 1937;

(iii) Ankole Landlord and Tenant Law of 1937;

(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or

20 (c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

(2) "Bona fide occupant" means a person who before the coming into force of the Constitution—

25 (a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or

(b) had been settled on land by the Government or an agent of the Government, which may include a local authority.

(3) In the case of subsection (2)(b)—

5 (a) the Government shall compensate the registered owner whose land has been occupied by persons resettled by the Government or an agent of the Government under the resettlement scheme;

(b) persons resettled on registered land may be enabled to acquire registrable interest in the land on which they are settled; and

10 (c) the Government shall pay compensation to the registered owner within five years after the coming into force of this Act.

(4) For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section.

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

We will specifically refer to the meaning of a lawful occupant which is the specific category and finding that is being challenged in this appeal. First of all a lawful occupant is a person occupying land by virtue of the repealed Busuulu and Envujjo Law of 1928. Secondly, it is a person occupying land by virtue of the Toro Landlord and Tenant Law of 1937. Thirdly, it is a person occupying land by virtue of the Ankole Landlord and Tenant Law of 1937. The above definition would only apply if the respondents are kibanja holders within the meaning of the repealed Busuulu and Envujjo law of 1928, which affects the land in Mukono district. The second category of the lawful occupant is the person who entered the land with the consent of the registered owner, and includes a purchaser or a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

30 Going to the evidence on record, the respondents’ plaint in the Magistrate’s Court at pages 5 – 7 of the record of appeal and paragraph 4 thereof is that the claim of the respondents against the appellant was for an action of unlawful interference with the rights of the plaintiffs as tenants by occupancy. The claim was to prevent the unlawful threat of eviction issued against the plaintiff’s tenants by the appellant as the proprietor of the land in dispute. The action was also to prevent the continued misuse and abuse  
35 of power by the registered proprietor of the land in dispute and also for recovery of



5 general damages, interests and costs of the suit. The facts in support of the plaint need  
not be repeated here but specifically and briefly indicate that the first respondent and  
the deceased one Hajji Swaliki Kagoro, the husband of the first respondent and the  
father of the rest of the respondents acquired proprietary rights on the suit property  
10 where they had resided before the demise of the deceased. Thereafter, the clan of the  
deceased decided that each of the wives of the deceased would remain where they used  
to live with the deceased meaning that each of the wives (not named) lived in different  
homes. It was averred that the appellant was also a child of the deceased who died in  
November 1991. It was further averred that after 1992, the appellant acquired  
15 proprietary rights to the land. Thereafter the appellant threatened to evict the plaintiff's  
tenants on the disputed property and interfered with the management of the property.  
They sought a declaration that they were tenants by occupancy. In his written statement  
of defence the appellant averred inter alia that the property was not part of the estate of  
the deceased and that he lawfully owns the suit property which is registered in his name  
and is described as block 149 plot 83. The appellant's case in the written statement of  
20 defence was that the property was given to him by his late father Hajji Swaliki Kagolo  
during his lifetime.

It was an agreed fact before the magistrate grade 1 that the appellant is the registered  
owner of the suit property and that the second, third, fourth, and fifth respondents are  
children of the deceased. The issues framed were whether the plaintiffs have any interest  
25 in the land in dispute. Secondly, the issue was whether the plaintiffs are trespassers on  
the suit property and thirdly the remedies available.

At page 80 of the record the learned trial magistrate found that there was no evidence  
on record nor was it agreed that the respondents were persons occupying the land by  
virtue of the repealed laws mentioned in section 29 (1) of the Land Act. On the question  
30 of whether the respondents entered the property with the consent of the appellant, the  
learned trial magistrate considered the evidence that the plaintiffs who are the  
respondents to this appeal claimed to have been born while their mother was living on  
the suit property. They were raised up in this suit property. The first respondent who is  
the spouse of the deceased was brought there by her late husband in 1971. He held that  
35 at that time she was not entering as someone simply coming on another person's land.  
She was a wife of the proprietor. She agreed that the proprietor purchased for her  
another piece of land where she currently lives before the same proprietor gave the land  
in issue to the defendant/appellant who later was registered in 1993. The learned trial

5 magistrate considered section 29 (1) (b) of the Land Act and held that the legislature never intended it to include a husband consenting to his wife entering his registered land so as to qualify as a lawful occupant. He held that the provision catered for people who enter other people's land with their consent but not a husband and a wife. He therefore held that the plaintiff did not qualify under section 29 (1) (b) of the Land Act  
10 to be lawful occupants. For the same reasons he held that the respondents who were the plaintiffs before him were not customary tenants whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title. He further held that the plaintiffs do not qualify to be referred to as lawful occupants.

15 As to whether the respondents were bona fide occupants, he came to the same conclusion that the respondents were not bona fide occupants as defined by section 29 (2) of the Land Act. The learned trial magistrate further found as a matter of fact that the same land was given to the defendant by the deceased in his lifetime. The appellant had registered the land in 1993 and there was no challenge to his title. He considered the  
20 building plan approved in 1985 in the names of the appellant and held that the building on the premises was built in his name. He concluded that the respondents had no claim to the property in issue and ordered their eviction. He allowed the counterclaim of the appellant and held that the respondents were trespassers. He awarded general damages of Uganda shillings 500,000 against the third and fourth respondents. He also awarded  
25 Uganda shillings 500,000/= against each of them for trespass.

When the matter went on appeal to the High Court, the first appellate court Judge lady justice Flavia Senoga Anglin considered the appeal on three grounds namely:

1. The trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion.
- 30 2. The magistrate erred in law and fact when he declared that the appellants were trespassers on the respondents land.
3. The trial magistrate erred in fact when he failed to conduct a visit to the locus in quo thereby occasioning a miscarriage of justice.

35 The issue of failure to visit the locus in quo is not a matter for consideration in this appeal though it was the basis upon which the High Court faulted the trial magistrate for relying on the building plan when there was a discrepancy in evidence as to whether

5 the building plan had 8 rooms and what was on the ground had 13 rooms. She found that failure to visit the locus in quo occasioned a miscarriage of justice.

On the question of whether the respondents were trespassers on the appellants land, the learned High Court Judge held that the first respondent possessed the land by virtue of marriage to the deceased and the rest of the respondents because they were children  
10 to the deceased and siblings of the appellant. She found no evidence in support of the submission that the property was not part of the estate of the deceased or that the respondents did not occupy it during the lifetime of the deceased. She also found that the first respondent is a widow of the deceased and was not aware of the gift of the  
15 land to the appellant. The respondents had structures on the land and there was no evidence that this belonged to the appellant in this appeal. She held that the children obtained a beneficial interest in the developments of the property and were lawful occupants and beneficiaries and could not be called trespassers.

Lastly on the issue of whether they were lawful occupants the learned first appellate court Judge held that because the first respondent claimed as a spouse to the then  
20 proprietor, and the other respondents were her children with the deceased proprietor, they were lawful occupants under section 29 (1) (b). She found that the right of the respondents accrued from the right the deceased had on the suit property and therefore they were lawful occupants under section 29 of the Land Act. Last but not least she held that the appellant's title to the suit property was not challenged and therefore  
25 he had to buy the respondent's interest in the land and adequately compensate them for their development therein. The High Court set aside the decision of the magistrate and declared the respondents to be lawful occupants. It was further ordered that in the suit shall be remitted to the Magistrate's Court to ascertain adequate compensation to the respondents for the developments and interest they had in the property with the  
30 assistance of a valuation surveyor.

We have carefully considered the above proceedings and evidence which is not in issue. The conclusion of the two courts is that the appellant was the registered proprietor. He was registered after the death of the deceased one Hajji Swaliki Kagolo which occurred in November 1991. The appellant was registered in 1993 after that event. The title of the  
35 appellant is not in issue. It is also not in dispute that the first respondent is the widow of the deceased and lodged a claim by virtue of marriage and occupancy as a wife or

5 spouse of the deceased. Thirdly, the claim of the rest of the respondents is by virtue of being children of the deceased having acquired interest in his estate.

10 It was erroneous to read into section 29 (1) (b) of the Land Act a right of occupancy by virtue of marriage or that of lineal descendants of a deceased person by virtue of the law of succession. The rights of a widow and lineal descendants of a deceased person are provided for by the Succession Act, Cap 162 laws of Uganda. The problem encountered by the trial court and the first appellate court is obvious. The appellant is the registered proprietor of the suit property and is the lawful owner thereof. The respondents did not challenge his title and in any case, his title could only be impeached in the High Court in an original trial under section 176 and 177 of the  
15 Registration of Titles Act Cap 230 of the laws of Uganda (RTA). Moreover, section 59 of the RTA provides that a certificate of title shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate shall be received in all courts as conclusive evidence of such particulars set forth in the certificate.

20 The matter ought to have been handled under the law of succession but was complicated by the fact that the respondents did not seek to impeach the title of the appellant. It was material for the right to the estate of the deceased to be established by the legal representative of the estate. Apparently the relevant law was not referred to in the trial court or the first appellate court. The relevant law can be found under the  
25 Succession Act Cap 162 laws of Uganda under sections 188 and 191 thereof. Section 188 is applicable to a deceased person who has left a valid will or died testate. It provides as follows:

“188. Right as executor or legatee, when established.

30 No right as executor or legatee shall be established in any court of justice, unless a court of competent jurisdiction within Uganda has granted probate of the will under which the right is claimed, or has granted letters of administration under section 181.”

The above provision assumes that there was a will. Where the deceased died intestate, section 191 of the Succession Act is applicable and provides that:

35 “191. Right to intestate’s property, when established.

5 Except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction."

10 The right to the estate of the deceased could only be established after the appointment of a legal representative of the estate. It could not be established in the proceedings before the trial court. Last but not least, it was erroneous to hold that the right to succession was a right of occupancy under section 29 (1) (b) of the Land Act. We agree with the learned trial magistrate that the respondents do not fall in the category of persons protected by that provision because they derived their interest by virtue of  
15 being a spouse and children of the late Hajji Swaliki Kagoro. Furthermore, the learned trial magistrate did not deem it necessary to inquire into the issue of how the appellant got registered on the title. If indeed there was a gift *inter vivos*, was there an instrument of transfer? Who transferred the property to the appellant? The suit could not be resolved without considering the crucial matters of fact and law.

20 In the premises, the trial proceeded on wrong premises of law. The actual rights of the parties were not determined in accordance with the existing law. The right of occupancy of a widow to the principal residential holding of a deceased person for instance is preserved by section 29 (1) of the Succession Act Cap 162 laws of Uganda provided the property belonged to the estate. Section 21 (1) and (2) provides as follows:

25 "29. Reservation of a principal residential holding from distribution.

(1) No wife or child of an intestate occupying a residential holding under section 26 and the Second Schedule to this Act shall be required to bring that occupation into account in assessing any share in the property of an intestate to which the wife or child may be entitled under section 27.

30 (2) No person entitled to any interest in a residential holding under section 26(1) shall be required to bring that interest into account in assessing any share in the property of an intestate to which that person may be entitled under section 27."

In other words the principal residential holding of a deceased person is not subject to distribution. While the learned trial magistrate found that the widow had been given a  
35 separate residential holding where she resides, the issue of right to the estate of the deceased could not be tried without the appointment of a legal representative of the

5 deceased. Secondly, the question of whether the property belonged to the estate of the  
deceased could likewise not be tried without a legal representative appointed and being  
a party to the suit. The issue of the gift *inter vivos* required establishing the instrument  
used to transfer the property to the appellant. In the premises, the appeal is allowed  
10 because the judgment of the High Court reversing the judgment of the trial magistrate  
cannot stand on the grounds above. Likewise, the judgment of the trial magistrate  
proceeded on erroneous grounds. We allow the appeal and hold that the respondents  
failed to disclose in their pleadings and to prove an interest in the land. However they  
are at liberty to institute fresh proceedings in the High Court Family Division subject to  
15 the law of limitation. Each party shall bear his or her own costs of the appeal in this  
court, the High Court and the original suit in the trial court below.

Dated at Kampala the 29<sup>th</sup> day of March 2019



**Kenneth Kakuru**

**Justice of Appeal**

20



**Stephen Musota**

**Justice of Appeal**

25



**Christopher Madrama**

**Justice of Appeal**