

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 65 OF 2011

5 **1. NDIMWIBO SANDE**

2. NDIMWIBO

.....**APPELLANTS**

3. NDIMWIBO SUSAN

4. NDIMWIBO ANNET

DEBORAH

VERSUS

10 **ALLEN PEACE AMPAIRE.....RESPONDENT**

(Appeal from a decision of the High Court (Land Division) at Kampala, before the Hon. Mr. Justice Joseph Murangira J, delivered on the 1st day of March 2011. Arising from Land Division Civil Appeal No. 42 of 2010 itself arising from Chief Magistrate 's Court of Makindye at Makindye C.S No. 216 of 2005).

CORAM: HON. MR. JUSTICE A.S. NSHIMYE, JA

HON MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

25 The appellants were defendants in Civil Suit No. 007 of 2007 at the Chief Magistrate's Court at Makindye Kampala. That suit originated from Kampala Land Tribunal Case NO. 216 of 2005.

In that suit the respondent had sued the appellants for recovery of a property she had purchased from one Gorretti Nantandu who was the 6th defendant at the trial court and who is stated to be their step mother. The Chief Magistrate's Court found in favour of the respondent in this appeal who was the plaintiff at that court.

The Court issued an order of eviction against the appellants herein and also issued an order for specific performance against the 6th respondent.

Being dissatisfied with the decision of the Chief Magistrate the appellants appealed to the High Court of Uganda, Land Division *vide* High Court Civil Appeal No 42 of 2010.

That appeal was dismissed by the Hon. Justice Joseph Murangira J, on 1st March 2011.

The appellants were not satisfied and filed this second appeal on the following grounds.

1. THAT the Learned Judge erred in law when he upheld the Learned Trial Magistrate's finding that the Respondent was a bonafide purchaser for value without notice whose title or interest could not be impeached.

2. THAT the Learned Judge erred in law in holding that the Appellants had neither pleaded nor proved that the sale of the suit land to the Respondent was fraudulent.

5 **3. THAT the Learned Judge erred in law in holding that the Appellants' evidence in respect of their father's ownership of the suit land was based on hypothetical presumptions, speculation and conjecture which the trial**

Court could not have believed to be true when there was abundant evidence to the contrary.

10 **4. THAT the Learned Judge erred in law in upholding the order of specific performance of the sale agreement between the Respondent and one Goretti Nantandu , the 6th Defendant in the Magistrate's Court.**

15 **5. THAT the Learned Judge as the 1st Appellate Court erred in law by failing to subject all the evidence on record to thorough scrutiny thereby arriving at a wrong conclusion.**

20 **6. THAT the Learned Judge erred in law when he held that he could not interfere with the discretion of the Learned Trial Magistrate in awarding the remedies to the Respondent when the award for mesne profits was grossly misconceived and the award of General Damages of Ushs. 15,000,000/- was excessive, inordinately high and unjustifiable.**

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7. THAT the Learned Judge erred in law when he failed to pronounce himself on the propriety of the order as opposed to a final decree, the basis of the Respondent's reliefs which contravened O.21.r. 13 of the Civil Procedure Rules S.1. 71.1 thereby occasioning miscarriage of the justice to the Appellants.

10 At the hearing of this appeal **Mr. John Mary Mugisha** appeared for the appellants while **Mr. David Ssempala** appeared for the respondent.

Both counsel sought leave of this court to adopt their respective conferencing notes as submissions. Leave was duly granted.

15 They also sought to address Court orally by highlighting specific aspects of their written arguments contained in their respective conferencing notes. They were granted leave to do so.

Mr. J. M. Mugisha learned counsel for the appellants narrated the background to this appeal as follows;-

20 That the respondent instituted the original suit for trespass to land and breach of contract against the appellants and one Gorette Nantandu respectively. Nantandu never filed a defence the respondent prayed for specific performance of her contract to

purchase the suit land from the said Nantandu she also prayed for eviction of the appellant's from the suit land and general damages for trespass. It was the respondent's case that she was a *bonafide purchaser for value without notice* of a *Kibanja* at
5 Luwafu Makindye Kampala which is the suit land purchased from one Nantandu. The respondent contended that her enjoyment of the suit land had been frustrated by the appellants who had refused to vacate the suit land and resisted her taking it over. The appellant's defence to the action was that the said *Kibanja* is part
10 of the estate of their late father Paddy Ndimwibo and that Nantandu had fraudulently held out that it was her property and that the appellants had lived on the said suit land when it was acquired by their late father Paddy Ndimwibo and that they were surprised to discover the same had been purportedly sold to the
15 respondent by the said Nantandu.

The appellants contended that the respondent had notice of the irregularities of the said Nantandu's documents of ownership. After the trial, the learned trial Magistrate entered judgment in
20 favor of the respondent holding that she was a *bonafide purchaser without notice* of the appellants' interest. She granted orders, among others, specific performance by Nantandu who had not appeared in the proceedings she granted orders evicting the

appellants from the residential house forming part of the suit land and awarded a sum of 15million as general damages for trespass and costs.

- 5 The appellants appealed to the High Court which dismissed the appeal and upheld the orders of the Chief Magistrate.

The above facts are generally not in dispute. Mr. Mugisha submitted that this court has a duty as a second appellate court
10 to re-evaluate the evidence in exceptional circumstances.

He called upon this court to find that there existed special circumstances in this appeal that required this court to re-evaluate the evidence.

He cited the case of ***Mpungu & Sons Transporters Limited vs Attorney General (Civil Appeal No. 17 of 2001)*** (Supra Court)
15 and ***Celtel Uganda Limited vs Uganda Revenue Authority Court of Appeal Civil Appeal No. 22 of 2005.***

Mr. Mugisha then went on to submit on ground one as follows;-

That the appellants had an equitable interest in the suit land as
20 beneficiaries of a customary holding (*Kibanja*) over mailo land comprised in Block 272, Plot 4416, Land registered in the name of the Kabaka of Buganda.

This land was subsequently sold by the one Goretti Nantandu to the respondent.

He submitted that both the trial Magistrate and the learned appellate Judge erred when they held that the respondent was a

5 *bonafide purchaser for value without notice*. He submitted that the doctrine does not apply to unregistered land. That it was erroneous to submit that all the interests in land are registerable or can be brought within the Registration of Titles Act (RTA)(CAP 230).

10 In alternative, he submitted that even if the doctrine was applicable the respondent had a duty to go behind the register in order to investigate the history of the author's title and to satisfy himself of its validity which he submitted the respondent had failed to do.

15 He submitted that since the doctrine of *bonafide purchaser for value* is a legal defence, the party putting up such a defence has the burden of proving it. He cited the authority of ***David Sejjaka vs Nalima Musoke Supreme Court (Civil Appeal No. 12 of 1985)***.

20 He further submitted that the said Goretti Nantandu had no genuine title to the suit land and as such she could not pass on any to the respondent.

He called upon this court to find that the concurrent findings of the two lower courts that the doctrine of *bonafide purchaser for value* without notice was applicable in this case and that the respondent's title could not be impeached was erroneous.

5 For the respondent, it was submitted that for a second appellate court to interfere with the concurrent findings of the trial court and the first appellate court, it must be convinced that there was no evidence to support the concurrent findings of the two lower courts. That there is no evidence on record to justify the second
10 appellate court's interference with concurrent findings of the lower courts.

Learned counsel Mr. Sempala submitted that both lower courts had correctly found that the respondent was a *bonafide* purchaser for value without notice. That the appellant's counsel's assertion
15 that the doctrine is inapplicable where all the competing interests in the land are unregistered is not the position of the law. That all interests in land are registrable as long as the said land is or can be brought within the operation of the RTA.

He cited ***Andrea Lwanga vs Registrar of Titles 1980 (HCB) 24 and Mpagenzihe*** and ***Baryabishumbamu versus Nchunsi (1992-1993) HCB 144***. According to counsel, the above
20 authorities suggest that the doctrine is applicable to unregistered land.

He further submitted that the evidence on record clearly indicates that the respondent proved to court that she was a *bonafide* purchaser for value. That she discharged her obligation when she properly investigated the title and could not be faulted on the
5 other eventualities she could not reasonably ascertain.

He contended that a *bonafide* purchaser is one who buys in good faith, honesty, without fraud, collusion or participation in wrong doing. He cited ***Daniel Sempa Mbabali vs W.K Kiiza and others (1985) HCB.***

10 He concluded that just like there is a *bonafide* purchaser of a legal estate so there is a *bonafide* purchaser of an equitable estate in land.

He prayed to this court to up hold the concurrent findings of the lower courts.

15 On issue two, Mr. Mugisha learned counsel for the appellants submitted that the learned appellate Judge misdirected himself on the law governing the standard of proof. He submitted that the appellants had duly proved fraud and that there was no legal requirement for the particulars of fraud to be compartmentalized.
20 That rules of procedure are hand maidens of justice and are not intended to clog or frustrate the ends of justice.

Mr. Sempala learned counsel for the respondent on this issue, submitted that both lower courts had correctly found and held

that not only had the appellants failed to prove fraud, they had not even pleaded it. He submitted that the learned appellate Judge did not raise the burden of proof to that beyond reasonable doubt, but he put it below it. That he had correctly held that in 5 fraud the burden of proof is heavier than one on a balance of probabilities. He cited ***Kampala Bottlers LTD vs Damanico (U) LTD (1992) LLR (p.555) Supreme Court.***

He asked this court to up hold the findings of both lower courts on this ground.

10 On ground three it was submitted for the appellants that both lower courts had erred when they granted an order of specific performance of the contract of sale of the suit land to the respondent. That the respondent had not partially performed the contract as she was not in possession. That the respondent could 15 only have had recourse to damages or compensation from seller Gorette Nantandu.

For the respondent it was submitted in reply that the respondent was entitled to an order of specific performance because the contract was partly performed. He called upon this court to 20 uphold findings of both lower courts on this ground.

The submission of both counsel in respect of the 4th ground of appeal were substantially covered in the first ground and we shall not repeat them here.

The last ground of appeal regards the award of general damages awarded to the respondent by the trial Magistrate, which award was upheld by the High Court on appeal.

It was submitted for the appellants that the trial court wrongly exercised its discretion when it awarded to the respondent as general damages shs. 15,000,000/- which was inordinately too high. That this court as a second appellate court has a duty to intervene and with the discretion of the lower court and reduce the award. He cited the case of **Software Distributors (Africa) LTD and Another vs Kambaho Perez Court of Appeal (Civil Appeal NO 76 of 2006)**.

For the respondent it was submitted in reply that by interfering with award of general damages this court as a second appellate court would be in violation of a well laid down principle of law in the case of **Crown Beverages LTD vs Sendu (2006) 2 EA 45**.

The Supreme Court held that the assessment of general damages is a discretion that is exercised by the trial court and an appellate court is not justified to substitute the award simply because it would have awarded a different figure if it had tried the matter in the first instance. Mr. Sempala submitted further that the award of shs 15,000,000/- as general damages was not inordinately high and that the trial court had properly exercised its discretion.

Counsel implored this court to dismiss the appeal.

We have listened very carefully to the oral submissions of both counsel. We have also read their written submissions and authorities submitted to us. We have perused the court record
5 and carefully read the Judgment from which this appeal emanates.

We agree with both counsel that it is settled law that on a second appeal, such as this one, court is only required to decide on matters of law or mixed law and fact. It is not required to re-
10 evaluate the evidence, but may do so if it is necessary. In the case of ***Kifamunte Henry vs Uganda Criminal Appeal No. 10 of 1997 (Sc) The Supreme Court*** held as follows on this issue;-

“Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the court of first appellate Court has wrongly held that the trial Court correctly directed itself, yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view R. Mohamed All Hasham vs. R (1941) 8 E.A.C.A. 93.”
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On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: R. vs. Hassan bin Said (1942) 9 E.A.C.A. 62.

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10 However, whenever a question arises as to whether a Judgment can be supported on facts as found by the trial court and the first appellate court, such a question may be resolved by the second appellate court purely as a question of law.

15 It appears that the concurrent findings of fact by the two lower courts are generally not in dispute here. What is in dispute is whether Judgment can be supported on those facts.

The first issue here is whether or not the respondent is a *bonafide purchaser for value without notice*. This is a question of mixed fact and law.

20 It was submitted for the appellant that the doctrine of *bonafide purchaser without notice* is not applicable where the dispute is between two competing unregistered interests.

In the case of **Hajji Abdu Nasser Katende vs Vithalidas Haridas & Co. LTD** Court of Appeal (Civil Appeal NO. 84 of 2003) this Court while discussing the doctrine of a *bonafide* purchaser for value without notice stated the position of the law as follows at pages 21-22 of the lead Judgment of L.L M. Mukasa –Kikonyogo DCJ;-

“It suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bonafide doctrine as was held in case of HANNINGTON NJUKI VS WILLIAM NYANZI H.C.C.S NO. 434 /1996 must prove that;

(1) he holds a certificate of title

(2) he purchased the property in good faith

(3) he had no knowledge of the fraud

(4) he purchased for valuable consideration

(5) the vendors had apparent title

(6) he purchased without notice of any fraud

(7) he was not party to the fraud

A bonafide purchaser of a legal estate for value without notice has absolute, unqualified and answerable defence against the claims of any prior

equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can.” (Emphasis added)

In the same Judgment the learned DCJ had observed at Pages 20-21 of her Judgment (Supra) that the doctrine is a complete defence to allegations of fraud. Noting that the law does not define the doctrine, which is incorporated under Section 176 (c) of the RTA.

That section provides as follows;-

176. ***“Registered proprietor protected against ejection except in certain cases.***

No action of ejection or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases -

(a) ***the case of a mortgage as against a mortgagor in default;***

(b) ***the case of a lessor as against a lessee in default;***

(c) ***the case of a person deprived of any land by fraud a against the person registered as proprietor of that land through fraud or as***

against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;

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(d) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of the other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide for value;

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e) the case of a registered proprietor claiming under a certificate of title prior in date of registration under this Act in any case in which two or more certificates of title may be registered under this Act in respect of the same land,

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and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar

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and estoppel to any such action against the person named in that document as the grantee, owner, proprietor or lessee of the land described in it, any rule of law or equity to the contrary notwithstanding."

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It appears clearly to us that the doctrine of *bonafide purchaser for value without notice* is a statutory defence available only to the person registered as proprietor under the RTA. It is not an equitable remedy although its history stems from the common

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law. It would not even qualify as a remedy for it is only a defence, by a person registered as proprietor under the RTA.

We do not agree with counsel for the respondent that the High Court case cited to support his proposition, **Mpagenzihe** and **Baryabishumbamu versus Nchunsi** (Supra) held that the doctrine applied to unregistered land. The term innocent purchaser was used in a different context in that case. Be that as it may, that authority is not binding on this court.

10 In this appeal it was the concurrent finding of both lower courts that none of the parties here and below is or has ever been a registered proprietor of the suit land. It was determined by both lower courts and it is undisputed by the parties that the suit land
15 is *mailo* land registered in the name of the Kabaka of Buganda and managed by the Buganda Land Board.

The appellant's claim is that they inherited a '*Kibanja*' or a customary interest from their late father, while the respondent
20 claims to have first purchased a '*Kibanja*' and latter a lease offer from one Gorette Nantandu.

The statutory defence of a *bonafide purchaser for value without notice*, was therefore not available to the respondent as held by
25 the trial court and upheld by the appellate court.

The first ground of appeal is therefore upheld.

On the second ground of appeal, the appellants contended that learned appellate Judge erred when he found that the appellants
5 had neither pleaded nor proved that the sale of the suit land to the respondent was fraudulent.

Having determined that the claims of both the appellants and the respondent was based on unregistered interests, it was imperative that court determines the nature of those competing
10 interests. Apparently the court found that the appellants had failed to prove that they had any interest in the suit land. In this regard the appellate Judge held as follows at page 15 of his Judgment.

“The deceased, Paddy Ndimwibo, left no will indicating that the property was his, he left no sale agreement, and the appellants did not adduce admissible evidence of the sale or at least witnesses to the transaction between Naluyima Topista and Paddy Ndimwibo. It is therefore, my considered opinion that the appellants' evidence in respect of their father's ownership of the suit land was based on hypothetical presumptions, speculation
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and conjecture which, as it were, the trial Court could not have believed it to be true.”

We have no reason to fault the lower courts’ concurrent finding on
5 this issue of fact.

The learned appellate Judge went on to hold as follows at page
[17-18] of his Judgment.

10 ***“In the premises, I find no reasons to fault the trial magistrate when she held that the 6th defendant was the sole owner of the suit land who lawfully sold it to the plaintiff/respondent and further that whatever dispute regarding the authenticity of her ownership; the appellants led no evidence that was proved on a balance of probabilities that the respondent was not a bonafide purchaser for value without notice of any fraud. For the appellants to succeed in this issue, they had to go beyond two hurdles first, that there was fraud which they failed to prove and second, that the respondent was not a bonafide purchaser for value which hurdle they also failed to jump over. Therefore, I cannot find fault in the holding of the trial Magistrate in her judgment.”***

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With all due respect to the learned appellate Judge, our considered view is that the matter ought to have been resolved differently.

- 5 Having held as we have above, that the doctrine of *bonafide* purchaser for value without notice was not applicable in this case, the issue remains as to which of the parties to this appeal has a valid claim to the suit land.

10 Both parties in their pleadings in Kampala District Land Tribunal complaint No. 216 of 2005 contended that the suit property is comprised in unregistered '*Kibanja*', or customary land situate at Luwafu LCI Makindye Division Kampala District.

Both the trial Magistrate's Court and the appellate court accept this as an agreed fact.

- 15 However, the question as to whether the suit land was in fact a *Kibanja* or whether any of the parties held a *Kibanja* interest in the suit land was never resolved by any of the lower courts. The trial court should have ascertained whether or not indeed, the suit property was a *Kibanja* holding or not. A '*Kibanja*' is a form of
20 customary tenure. A '*Kibanja*' holder is a customary tenant.

While dealing with a similar issue, this court in the case of ***Isaaya Kalya And 2 Others Versus Moses Macekenyu***

Ikagobya (Civil Appeal No. 82 Of 2012) (Unreported) held as follows of that:-

“Customary tenure is defined in the Section 1 (1) of the Land Act as follows;-

5 ***“Customary tenure is a system of land regulated by customary rules which are limited in their operation to a particular description or class of persons of which are described in Section 3”***

10 ***The Supreme Court in Kampala District Land Board and George Mutale Vs Venansio Babweyaka and others Supreme Court Civil Appeal No. 2 of 2007 held that customary tenancy must be proved.***

In that case Odoki, CJ who wrote the lead judgment held as follows;

15 ***“I am in agreement with the learned justice of appeal that the respondents failed to establish that they were occupying the suit land under customary tenure. There was no evidence to show under what kind of custom or practice they occupied the land and***
20 ***whether that custom had been recognized and regulated by a particular group or class of persons in the area”***

In that case the Supreme Court held that the respondents therein were not customary tenants but were in fact bona fide occupants clearly making a distinction between the two kinds of land tenure.”

- 5 No evidence was provided whatsoever by any of the parties in this case at the trial to prove that any one of them held the suit land under customary tenure. Not everyone who says “I am a ‘Kibanja’ holder or customary tenant” is in fact and in law one. That fact requires proof.
- 10 There was no proof by the appellants that their father, the late Paddy Ndimwibo was a customary tenant. There was no evidence from the respondent to show that Goretti Nantandu or whoever else she is said to have acquired the suit land from a customary tenant.
- 15 Our finding is that the suit land was not being held as a ‘Kibanja’ or as a customary tenancy. The lower courts should have found so.

It appears that suit land was at all material times being held either as a lawful or *bonafide* occupancy.

- 20 Under **Section 29(2)** of the **Land Act (CAP 227)** a *bonafide* occupant is that person who occupied the land in issue for 12 or more years before the coming into force of the Constitution.

There is no evidence on record to indicate that the late Paddy Ndimwibo or the person from whom the appellants claim was his predecessor in title had occupied the suit land for 12 or more years before the coming into force of the 1995 Constitution as to
5 qualify Paddy Ndimwibo to be a *bonafide* occupant of the suit land.

This leads us to conclude that Topista Naluyima who is said to have been the original owner of the suit land, from whom it is claimed that both Goretti Nantandu and Paddy Ndimwibo
10 acquired the suit land was simply a lawful occupant. We find so because there is no evidence on record to show that the Buganda Land Board had ever challenged the legality of her occupancy or that of her predecessors. She had developed that land by erecting thereon a permanent house without ever being challenged by the
15 '*mailo*' holder, the Buganda Land Board.

The respondent's claim is that she bought the suit land on 12th April 2005 from Goretti Nantandu who had bought it from Topista Naluyima in July 2000.

The case for the appellants is that the suit land belonged to their
20 late father Paddy Ndimwibo who bought it from the same Topista Naluyima in 1999. No evidence was adduced by any of the parties that Topista Naluyima being a lawful occupant had sought and obtained consent to sell the suit land from the Buganda Land Board on behalf of the land lord, the registered

proprietor who is the Kabaka of Buganda or that she had given him as the land owner the first option to purchase.

Section 35 of the Land Act stipulates as follows;-

“35. Option to purchase

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(1) A tenant by occupancy who wishes to assign the tenancy, shall subject to this section, give the first option of taking the assignment of the tenancy to the owner of the land.”

10 It appears therefore that Topista Naluyima’s attempt to sell the suit land was in contravention of the above cited provision of the law. It is trite law that any agreement entered into in contravention of the law is null and void. See **Active Automobile and Another vs Crane Bank and Another Supreme Court (Civil Appeal No. 21 of 2001)** Unreported.

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All parties agree and it was also a concurrent finding of both lower courts that both the Late Paddy Ndimwibo and Goretta Nantandu were in occupation of the suit land undisturbed and uninterrupted between sometime in 1999 until the death of Paddy Ndimwibo in

20 July 2004.

It is our finding that when the said Paddy Ndimwibo died he ceased to be a tenant by occupancy and as such his tenure ended. A tenancy by occupancy cannot be inherited. The suit land

therefore could not have formed part of the estate of the late Paddy Ndimwibo as claimed by the appellants.

On other hand, Goretti Nantandu, had been in occupation of the suit land from 1999 to July 2004 together with Late Paddy Ndimwibo. When Paddy Ndimwibo passed away she remained in occupation and went ahead to apply for a lease in that capacity from Buganda Land Board on 12th April 2005.

The Buganda Land Board offered her a lease.

The lease offer reads in part as follows;-

**"BUGANDA LAND B'OARD
P.O. BOX 14205,
Tel: (Gen) 031263741/2(Dir) 031263744
KAMPALA-UGANDA**

12th April, 2005

**BLB/01/4175
Min:02/30/04/2005.06
04.2005**

**Ms. Gorette
Nantandu,
P.O.Box
L.C.1 Nakinyuguzi. '**

LEASE OFFER

**RE: YOUR APPLICATION FOR RESIDENTIAL
Plot 4416 Block 273 at Luwafu measuring 0.052
hectares**

Your application for the above land refers.

Subject to the necessary consents and approvals being given to you as required by law or otherwise as a prerequisite to your acquisition of the above, We are prepared to offer you a lease on the following terms and conditions on to payment of the legal, survey and registration fee together with the premium and advance rent as notified in the following paragraphs:-

1. Lease for a term of 49 years from 1st May 2005.

2.

3.”

Clearly the lease offer was granted to Goretti Nantandu in person and not as a widow or administratrix of the estate of late Paddy Ndimwibo. The lease was to run from 1st May 2005. There is evidence that the offer was accepted and the requisite fees paid and receipts issued in her name. It is this interest that was actually purchased by and transferred to the respondent.

Our findings and holding above therefore dispose of grounds 2, 3 and 5 of this appeal in favour of the respondent.

With respect, we agree with learned counsel for the appellant on ground 4 that the learned trial Judge erred when he upheld the trial court’s order of specific performance of the sale agreement, between the respondent and Goretti Nantandu. This is because the evidence on record indicates that Goretti Nantandu handed

over vacant possession of the suit property to the respondent, who was later evicted by the appellants.

In cross examination at page 146 of the trial court's record of proceedings the respondents states as follows;-

5 ***“After paying for the Kibanja, I took vacant possession of the house. I got the keys to the house between 10-12pm on 10/12/2005 in the presence of Mr. Kaddu (LC Chairman)”***

10 We found that the seller had performed her part of the contract and as such respondent was not entitled to an order of specific performance.

This ground succeeds.

15 Under ground 6 the appellant contends that the award of mesne profits was misconceived and the award of general damages of sh. 15,000,000 was excessive, inordinately high and unjustifiable.

At page 4 of his Judgment the learned trial Magistrate states as follows in respect of remedies:-

20 ***“Issues 5 and 8. These issues deal with remedies. I have answered that the plaintiff transacted with the 6th defendant for the suit property an did not get good titles as a result of the actions of the***

defendants. She is entitled to all the remedies claimed and I so order”

On his part the learned trial Judge concluded the appeal as follows at pages 30-31 of his Judgment.

5 ***“In the result and for the reasons given hereinabove in this judgment this appeal has no merit. It is' accordingly dismissed. Judgment is therefore entered in favour of the respondent in the following terms:-***

10 ***a) The appeal is dismissed.***

b) The judgment of the trial court is hereby confirmed.

15 ***c) The remedies granted by of the lower court in favour of the respondent are hereby confirmed.***

d) The appellants be evicted from the suit property immediately after the delivery of this judgment.

20 ***e) Cost Costs of litigation of the suit here and in the lower Court are awarded to the respondent.”***

The remedies sought by the respondent in her amended plaint are set out herein as follows;-

“Wherefore the plaintiff prays that this Honourable Tribunal be pleased to enter Judgment against the defendant in the following terms;-

- a) ***A declaration that the Complainant is the bonafide purchaser of the suit land whose security of tenure is protected by law.***
- b) ***A declaration that by not fulfilling her part of the bargain the 6th Defendant is in breach of the contract she entered with the Plaintiff.***
- c) ***An order of specific performance to issue against the 6th Defendant to Perform her part of the bargain (sale agreement) having been paid all the consideration)***
- d) ***General damage arising out of the 6th defendant’s breach.***
- e) ***Costs of the suit.***
- f) ***General damages, for the loss and inconvenience occasioned as against the 1st -5th defendants***
- g) ***Interest at court rate on (c) above from the time of the Judgment till payment in full.***
- h) ***Costs if this suit.***
- i) ***Any further or alternative relief.”***

Instead of a decree being extracted as required under Order 23 Rules 13 of the Civil procedure Rules the respondents counsel extracted an order.

A decree is defined by the civil procedure Act as follows;-

5 ***“a decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include***

10 ***i. Any adjudication from which an appeal lies as an appeal from an order ; or***

15 ***ii. Any order of dismissal for default.”***

Since the Judgment of the trial court finally determined the dispute between the parties a decree and not an order ought to have been extracted.

20 The order extracted, is set out as follow;-

a) The Plaintiff is hereby declared to be and to have been a bonafide purchaser of the suit and for value without any notice of fraud whose

security of tenure is protected by law and the Defendants should thus vacate the suit premises forth with.

5 **b) It is hereby declared that by not fulfilling her part of the bargain in failing to ensure that the Plaintiff peacefully utilizes the land sold to her, the 6th Defendant is in breach of the contract she entered with the Plaintiff.**

10 **c) It is hereby declared that the suit land does not belong to the Estate of the late Paddy Ndlmwibo but was a personal property of the 6th defendant and as such the defendant /counter claimant have no basis for denying the Plaintiff access to the same.**

15 **d) An order of specific performance doth issue against the 6th Defendant to Perform her part of the bargain (sale agreement) having been paid all the consideration.**

20 **e) An order payment of general damages doth issue against the Defendants for the loss and inconvenience suffered by the Plaintiff in the following terms;**

25 **(i) Payment of Uganda Shillings Fifteen Million (Uganda Shs. 15,000,000/=) as general' damages for the un lawful arrest and detention of the Plaintiff and all inconveniences she suffered.**

30 **(ii) Uganda Shillings Two Hundred Fifty Thousand Only (Uganda Shs. 250/000/=) per month as mesne profits for illegally occupying the Plaintiff's house from the**

12th day of December, 2005 when the Defendants forcefully took over the suit premises till they grant vacant possession of the same.

5

f) Interest on all pecuniary awards above at Court rate from the date of judgment till full payment.

10

**g) The Defendant's/Counterclaimants' counterclaim is hereby dismissed with costs.
h) The Plaintiff is entitled to the costs of the suit**

We find that the order which in fact is a decree is at variance with
15 Judgment of the court that passed it. It ought to have reproduced the remedies as set out by the respondent in the amended plaint set out above.

We have not found anywhere in the Judgment of the trial court, where an award of shs.15,000,000/- as general damages for
20 unlawful arrest and detention of the plaintiff was made.

This was never an issue in this case. In any event the respondent was arrested and detained by police and not by the appellants.

The respondent neither prayed for nor was she awarded mesne profits by the trial court.

25 We find however, that the trial court ought to have awarded the respondent general damages for trespass and inconvenience. We

accordingly award the shs. 18,000,000/- as general damages to the respondent.

In the result grounds 6 and 7 succeed.

This appeal substantially fails and is hereby dismissed.

- 5 The decision of the High Court is hereby upheld with necessary adjustments as set out in this Judgment.

Accordingly we make the following orders and declarations.

(1) A declaration that the respondent is the lawful owner of the suit property.

10 **(2) An order of eviction against the appellants granting the respondent vacant possession of the suit property.**

(3) An order granting shs. 18,000,000/- as general damages to the respondent.

15 **(4) The appellants shall pay cost of this appeal and in the two courts below.**

Dated at Kampala this 10th day of October 2014.

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HON. MR. JUSTICE A.S. NSHIMYE

JUSTICE OF APPEAL

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HON MR. JUSTICE RICHARD BUTEERA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL