THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 124 OF 2016

(Appeal from Judgment and decree of the High Court (Appellate Jurisdiction) at Fort Portal (The Honourable Mr. Justice Batema D.N.A dated 15th March 2016 in Fort Portal Civil Appeal No. HCT-01-CV-CA.0016 of 2014)

BETWEEN

MUHINDO GEORGE NDERU ========== APPELLANT

AND

KAMANYIRE ALI ==========RESPONDENT

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE MUZAMIRU KIBEEDI, JA

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

A. Background.

This is a Second Appeal arising from the decision of His Lordship Justice Batema NDA in High Court Fort Portal HCT-01-LD-CA-0016 of 2014 which was a first appeal from the decision of the Chief Magistrates Court of Kasese presided over by H/W Mfitundinda George, Magistrate Grade One in KAS-00-CV-LD-CS-0014 of 2013.

The Appellant herein lodged civil suit no. 14 of 2013 in the Chief Magistrate's Court of Kasese at Kasese seeking for orders that, a) a declaration that the suit land belongs to him, b) an eviction order, c) an order of vacant possession from the suit land, d) a declaration that the Respondent is a

trespasser unto the suit land, e) a permanent injunction restraining the Respondent, his agents and successors in title from ever committing further acts of trespass, f) special damages, g) General damages for trespass, h) mesne profits for non-use, costs of the suit and any other reliefs as the court may deem fit, including a recommendation from the court to the high court to direct the Registrar of Titles to cancel the Respondent's title, the same having been obtained through fraud.

The Appellant alleged that he purchased the suit land described as LWFP/3377 Volume 1572 Folio 10 Plot 2 Block 84 situated at Hima, Bunyangabu, Kabarole District measuring approximately 100 acres from a one Eziron Bintu Bwambale. However, after the purchase, the land was instead transferred into the names of Yofesi Malimani Muhindo on 31st March 1988.

The Appellant lodged a Civil suit in the High Court of Uganda at Kampala against Yofesi Malimani Muhindo and Eziron Bintu Bwambale (the vendor) together with Gabriel Rugambwa vide High Court Civil suit No. 359 of 1992. The High Court resultantly ordered that the Certificate of title registration is cancelled on account of fraud and ordered specific performance of the sale of land to the Appellant.

The Appellant alleged that he surveyed the 100 acres of land and found that the land initially sold to him was in excess of 100 acres by approximately 20 acres. The surveyor allegedly refused to add the 20 acres to his land holding. However, the Appellant developed the 20 acres with the permission of the former registered owner.

In 2008, the Appellant realized that the Respondent had allegedly moved from the opposite side of the road and trespassed into the Appellant's customary holding which was the residue of the land he had hitherto purchased from Eziron Bwambale and had remained after the survey off the 100 acres described above.

The allegations which made the particulars of fraud in the Plaint were;

a. Deliberately applying for the suit land when the Plaintiff was in occupation and possession without his permission to take over the land.
b. Acquiring the suit land without compensating the Plaintiff as required by law.
c. Deliberate inclusion of the land in the application for a freehold certificate of title over the land that never belonged to him.
d. deliberate inclusion of the land in the application for a freehold certificate of title without considering the developments carried out by the Plaintiff to defeat the interests of the Plaintiff.
e. Including the Plaintiff's registered land into his freehold title.

The Respondent herein lodged a written statement of defence on 11th July 2013 wherein it was contended that the averments made by the appellant are denied and the appellant would be put to strict proof.

After a full trial, the presiding Magistrate issued a judgment on 28th March 2014 wherein he held that the Plaintiff, having been in occupation of the suit land since 1976 without disturbance from the registered owner qualified as a bonafide occupant. For this reason, the entry on the suit land by the respondent constituted trespass. He held that the appellant was in occupation of the suit land since 1976 when he bought it from Eziron Bwambale up to 2008 when the respondent forcefully entered it. Considering that the respondent ignored the appellant's interest in land and obtained a certificate of title, this was fraudulent. The learned trial Magistrate recommended that the respondent's certificate of title FRV 570 Folio 19 in the names of Kamanyire Ali be cancelled by the High Court. (*Pages 203, 204 and 205 of the record of Appeal*)

Dissatisfied with the decision, Kamanyire Ali lodged an appeal HCT-00-CV-0016 of 2014 on 2nd April 2014 in the High Court of Uganda at Fort Portal challenging the decision on the grounds, among others, that; the learned trial magistrate erred in law and fact when he held that Muhindo George is a bonafide occupant on the suit land, the magistrate erred in law and fact when he held that the Appellant is a trespasser on the suit land and that the learned magistrate erred in law and fact when he failed to properly evaluate the evidence and thereby came to a wrong conclusion.

B. Decision of the High Court

The High Court issued judgment on 15th March 2016, wherein the learned Judge held, in summary that;

i. The Respondent was not a bonafide occupant. His occupation of the land was interrupted and challenged in 1992. He was forced to go to court vide HCCS No. 359/1992 three years before the promulgation of the 1995 Constitution and he cannot benefit from the law on bonafide occupants. The acreage that the Respondent bought and sought to protect was known and being a successful party in the previous suit, it would be an abuse of court process to come back to court on the same issue. The learned trial magistrate erred when he declared the Respondent a bonafide occupant without naming the registered owner on whose land the Appellant was a bonafide occupant.

ii. Counsel for the Respondent departed from the pleadings by bringing in arguments as to bonafide occupancy contrary to the pleadings and issues framed for resolution, which is not permissible. Court relied on *James Kahigiriza v Sezi Busasa ,(1982) HCB Kato Ag. J*

iii. The learned magistrate erred in law and in fact when he failed to consider the fact that the Respondent's rights on the suit land had been determined vide Kampala High Court Civil Suit No. 359 of 1992 where the 100 acres as purchased by the Respondent were returned to him.

The learned High Court Judge allowed the appeal and set aside the judgment and orders of the trial magistrate. Being dissatisfied with the decision, the Appellant herein lodged the present Appeal. A Notice of Appeal was duly lodged on 23rd March 2016.

C. Grounds of Appeal.

The Appellant raised 7 grounds of appeal in the memorandum of appeal lodged in this court on 1st June 2016. These grounds include:

1) The learned judge on appeal erred in law to have held that the Appellant was not a *bona fide* occupant on the suit land which error occasioned a gross miscarriage of justice on the Appellant.
2) The learned judge on appeal erred in law to have held that the appellant was a trespasser on the suit land which error occasioned a gross miscarriage of justice to the Appellant.
3) The learned judge on appeal erred in law to have failed his duty as a first appellate court to subject the entire evidence on court record to a fresh and exhaustive scrutiny and by such failure arrived at a wrong decision otherwise, he would have found for the Appellant which error occasioned a miscarriage of justice to the Appellant.
4) The learned trial judge on appeal erred in law and fact when he held that the Respondent's counsel erred by bringing arguments as to the *bona fide* occupancy contrary to the pleadings and issues framed for resolution which error occasioned a gross miscarriage of justice to the Appellant.
5) The learned judge on appeal erred in law to have held that the Respondent's rights were decided by the High Court Civil Suit No. 359 of 1992 without taking into account the law relating to limitation of actions in respect of the suit land or the claim of *bona fide* occupancy which error occasioned gross miscarriage of justice to the Appellant.
6) The learned Judge on appeal erred both in law and in fact when he held that the trial Magistrate erred in law when he declared the Respondent a bona fide occupant without naming the registered owner on whose land the Appellant was a *bona fide* occupant.
7) The learned Judge on appeal erred in law when he failed to resolve the preliminary objection on point of law against the appeal raised by counsel for the Respondent which error occasioned a gross miscarriage of justice on the Appellant herein.

D. Representation.

When this Appeal came up for hearing on 30th June 2022, the Appellant was represented by Henry Rwaganika from M/S Rwaganika, Baku & Co.

Advocates whereas the Respondent's counsel was absent. However, both parties lodged written submissions before the court which have been duly considered in the preparation of this judgment.

E. Submissions by counsel for the Appellant

Counsel for the Appellant lodged written submissions on 19th February 2021. However, on 27th June 2022, the Appellant lodged Amended written submissions, which this Court duly considered in the determination of this matter.

Counsel for the Appellant elected to argue grounds 1, 2, 3, 4, 5 and 6 together under ground 3, and informed Court that they had effectively abandoned ground 7 as indicated in the memorandum of Appeal.

Counsel submitted that the 1st Appellate Court failed in its duty to re-evaluate the evidence on record and come to its own conclusions. He stated, as I understood his submissions, that the learned trial Judge failed to execute his duty in the following ways:

a) The learned judge misdirected himself when he held that the Appellant's rights were decided by the High Court presided over by Justice C.K. Byamugisha (RIP) (as she then was) in HCCS No. 359 of 1992. The Appellant submitted that the issues before the court in this case are substantially different in nature from the ones is HCCS No. 359 of 1992. The 20 acres in dispute in this case were not the issue in HCCS No. 359 of 1992. In addition, Mr. Bwambale (the vendor) did not claim back the 20 acres. On the other hand, the Appellant has been in possession of the land at all material times fully utilizing the same and the Respondent trespassed on the land, obtained a certificate of Title without the Appellant's consent.

b) The Appellant's evidence on record, which has never been controverted shows that the Appellant bought 100 acres of land whose size was estimated as there was no surveyor during the sale. The Parties simply planted *biyenje* trees around the land, which included the 20 (extra) acres.

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c) The learned judge erred when he found that the Appellant was not a *bona fide* occupant. The uninterrupted continuous occupation of the suit land by the Appellant was never disputed in 1992. The Respondent's entry onto the suit land in 2008 amounts to trespass and cannot be categorized as interruption of the Appellant's continuous occupation of the suit land. The Appellant relied on the case of ***Kampala District Land Board v Venansio Babweyaka & Others, SCCA No. 2 of 2007*** to state that he is a *bona fide* occupant because he had been in possession of the 20 acres for more than 12 years at the time of coming into force of the 1995 Constitution.

F. Submissions by counsel for the Respondent.

Counsel for the Respondent lodged written submissions in this honourable Court on 5th March 2021. However, they later lodged amended written submissions on 30th June 2022. This Court will consider the amended submissions.

The Respondent faulted counsel for the Appellant for arguing only one ground of appeal. They contended that this Court should take it that all the other grounds of appeal, save for ground 3 have been abandoned.

Counsel further stated that the Appellant has a duty to show this honourable Court that there was material evidence which was ignored by the 1st Appellate Court, that would otherwise have changed the outcome of the appeal. No such evidence has been adduced before Court. In addition, the Respondent contended that the learned High Court Judge properly determined that the Appellant was not a *bona fide* occupant. Further, the Appellant materially deviated from the pleadings before the Court. The pleadings, issues framed contained the averment that the suit land was the Appellant's customary holding. The aspect of *bona fide* ownership was introduced in counsel's written submissions before the High Court.

Furthermore, counsel for the Respondent contended that the court judgment in High Court Civil suit No. 359 of 1992, which was delivered in 1997 determined the Appellant's interest in the suit land, including the 20 acres

which are subject to the current suit. If the Appellant believed that he owned more than 100 acres as provided under the sale agreement and confirmed by court, he ought to have either appealed the court decision or applied for review of the same, and he is therefore bound by the court judgment as to his ownership of the land.

G. Consideration of Court/ Decision.

i. Duty of the Court of Appeal as the Second Appellate Court

This is a second Appeal. The role of this honourable Court as a Second Appellate Court is set out under Rule 32(2) of the Judicature (Court of Appeal rules) Directions which provides that:

"*On any second Appeal from a decision of the High Court acting in 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*"

Furthermore, **Section 72 of the Civil Procedure Act Cap 71**, Laws of Uganda provides that:

"*Second Appeal.*

1) Except where otherwise expressly provided in this Act or by any 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-

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;

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 an error or defect in the decision of the case upon the merits.

2) *An appeal may lie under the section from an appellate decree passed ex-parte."*

In the case of ***Kifamunte Henry v Uganda, Supreme Court criminal Appeal No. 10/97***, the court held at Page 12 that:

"On second Appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided 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"
See: R v Hassan Bin Said ,(1942) 9 EACA 62

In my opinion, for this court to interfere with the findings of fact by the trial court and the 1st Appellate court, it has to be shown that the 1st Appellate court, in approaching its task to re-evaluate the evidence, failed to apply the relevant principles upon which an appeal is determined. This court must caution itself that at this stage, it is not permitted to consider additional evidence is considered, and just like the first appellate court, this court will not have the opportunity to observe witnesses and experience the trial.

ii. *Ground 1. The learned judge on appeal erred in law to have held that the Appellant was not a bona fide occupant on the suit land which error occasioned a gross miscarriage of justice on the Appellant.*

Counsel for the Appellant opted to submit on grounds 1, 2, 4, 5 and 6 as set out in the memorandum of Appeal under ground 3.

The arguments of the Appellant, as I understood them, are that the Appellant is a bona fide occupant of the suit land, a fact which was ignored by the 1st Appellate court and thereby occasioning a miscarriage of justice. On the other hand, the Respondent submitted that the Appellant's ownership was determined by the High court in a previous suit, and that the Appellant materially deviated from the Pleadings before court by introducing the arguments of bona fide occupancy contrary to the Plaint and proceedings before the Court.

The Appellant, in their written submissions in rejoinder, argued that the Plaint/ suit was for a declaration that the Appellant is the owner of the suit land, not necessarily for customary land. The order sought was wide and could include bona fide ownership. Therefore, the Appellant did not deviate from the pleadings.

Pleadings generally are governed by **Order 6 of the Civil Procedure rules SI-71-1. Order 6 rule 1** provides that:

"Pleading to state material facts

1) *Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be.*
2) *The pleadings shall, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums and numbers shall be expressed in figures."*

The law further provides that parties are bound by their pleadings. **Order 6 rule 7 of the Civil Procedure Rules SI 71-1**provides that:

" No pleading shall, not being a Petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading"

See: Jani Properties Ltd v Dar-es-Salaam city council ,(1966) EA 281
Struggle Ltd v Pan African Insurance Co. ltd ,(1990) ALR 46-47

It is a well established principle of law that a party cannot be granted relief which it has not claimed in the Plaint. See the cases of ***Attorney General v Paul Semogerere & Zachary Olum SCCA No. 3 of 2004, Hotel International Limited v Administrator of the Estate of Robert Kavuma ,SCCA No. 37 of 1995***

In **Ms. Fang Min v Belex Tours and Travel Limited ,SCCA No. 6 of 2013,** citing *Struggle Ltd v Pan African Insurance Co. ltd, (1990) ALR 46-47* stated that;

"The parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record more so, the court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings"

In ***Julius Rwabinumi v Hope Bahimbisomwe, SCCA No. 10 of 2009***, J. Katureebe, JSC(as he then was) observed that;

"This court has had occasions to pronounce itself that a court should not base its decisions on un pleaded matters....
In the case of Attorney General v Paul Semogerere, Zachary Olum, Supreme Court constitutional Appeal No. 3 of 2004, Mulenga JsC stated that:

..it is a cardinal principle in our judicial process that in adjudicating a suit, the court must base its decision and orders on the pleadings and the issues contested before it. Founding a court decision or relief on unpleaded matter or issue not properly placed before it for determination is an error of law."
Emphasis mine

The supreme Court in the decision of ***Inter-freight Forwarders (U) ltd v East African Development Bank ,CACA No. 33 of 1992*** further advised and underscored the importance of correct drafting and the dangers of departing from pleadings. The court held that:

"Order 6 rule 1 of the Civil Procedure rules provides that every pleading shall contain only a statement in precise form of the material facts on which the party pleading relies for claim or defence as the case may be, but not evidence on which they are proved.

...the system of pleadings is necessary in litigation. It operates to define and deliver with clarity and precision the real matters in controversy between the parties upon which the court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial which the court will have to determine at the trial.

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A party will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings."

I have examined the record of proceedings before this court and observed that first of all, the Plaint lodged in the Chief Magistrate's Court on 5th June 2013 contained an averment in paragraph 8 thereof (Pg. 8 of the record of proceedings) that the Plaintiff, in pursuance of High Court orders, surveyed off 100 acres from the big chunk of the former registered land. However, the 20 acres which the surveyor refused to add remained held under customary tenure as they were developed by the Plaintiff with the permission of the former registered owner (the seller). In my examination of the Plaint, I did not see any averment that the Plaintiff was a bonafide occupant of the suit land. This cannot be implied, as suggested by the Appellant, from the order in the Plaint that the Plaintiff be declared as the owner of the suit land, as this order related to facts describing the Plaintiff as a customary owner. In addition, the law (Section 29 of the Land Act) does not provide that a bonafide occupant is an owner but rather a tenant whose rights are protected under the law. Therefore, the Appellant's averment that the bonafide occupancy was catered for in a prayer that the Appellant be declared the owner of the suit land is untenable.

Secondly, I have observed the scheduling proceedings conducted in the court on 31/10/2013 (Pages 36-37 of the Record of proceedings). I observed that the issues did not include an adjudication of whether the Plaintiff was a bonafide occupant. It was agreed by the parties that the issues for determination by the court were:

"1. Whether or not the defendant trespassed on the plaintiff's land.
2. Whether the defendant obtained the certificate of title over the suit land through fraud
3. What remedies are available to the parties"

Thirdly, during the examination of Pw1 (hearing), he stated expressly that he was allowed onto the land by the seller, Mr. Bwambale and had used the same for 38 years. There was no mention of bona fide occupancy during the trial.

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However, the learned trial Magistrate indicated that he was inclined to agree with the Plaintiff that he is a bonafide occupant (Pg. 203 of the record of proceedings) although the argument was only introduced at the stage of written submissions (Pg. 57 of the record of proceedings). The 1st Appellate court however, upon re-evaluating the evidence was of the view that the Appellant is not a bonafide owner as his occupation was interrupted and challenged in 1992, which prompted him to seek redress from Court 3 years prior to the promulgation of the 1995 Constitution of the Republic of Uganda. He further found that the Appellant herein departed from its Pleadings and issues framed for resolution which is not permissible. (Pg. 285 and 286 of the record of proceedings).

I am inclined to agree with the 1st Appellate court's determination that the Appellant deviated from his pleadings, other than by way of amendment. Although bona fide occupancy of land is a matter of law, a party seeking Court to find that they are a bonafide occupant must plead as such in their Plaint and adduce the material evidence of occupancy during the trial. It is not appropriate, in my opinion to bring such an averment at the stage of written submissions, effectively denying the opposite party a chance to, through their evidence, controvert, oppose or make a reply to such averment.

Bona fide occupancy and customary ownership of land are substantially different aspects/ concepts of the law on land ownership. There is no construction of the Appellant's Plaint which could lead to the conclusion that the Appellant meant to plead bonafide occupancy as opposed to customary ownership. In my opinion, if the Appellant intended to plead that he was a bonafide occupant, he ought to have made an application for amendment of the plaint. There is no evidence in the record of Appeal that any such application was made. It was therefore erroneous for the trial Magistrate to conclude that the Appellant was a bona fide occupant. The 1st Appellate Court, in re-evaluating the evidence was therefore correct to find that the Appellant wrongfully departed from his pleadings. I will not interfere with this finding.

Counsel for the Appellant further argued that the appellate judge misdirected himself on the law governing bona fide occupancy of land. This is because the uninterrupted continuous occupation of the suit land was never disputed in 1992. The land was purchased in 1976 and boundaries set with trees which were planted. Secondly, he submitted that it was erroneous for the trial court to hold that a transaction which was declared a nullity by court could be interpreted to be interruption or challenge to the Appellant's occupation. The 1992 entry onto the land was forceful.

Bona fide occupancy rights are acquired through occupancy as distinct from ownership acquired through purchase and conveyance. Section 29(2) (a) of the Land Act defines a bonafide occupant to mean a person who, before coming into force of the 1995 constitution, had occupied and utilized or developed any land unchallenged by the registered owner for 12 years or more. Bona fide occupancy is also based on the principle of acquiescence which means that a person gets into the land, occupies it in the belief that it is part of his land or adjacent thereto. However, the land owner gets to know but does not object to such occupation.

I do not agree with the 1st Appellate Court's finding that the Appellant's possession of the 20 acres subject to this case was interrupted by virtue of High Court civil suit no. 359 of 1992. In that case, the Appellant and Mr. Gabriel Rugambwa sought for a declaration that they are the owners of land comprised in LRV 1572 Folio 10 Bunyangabu Block 84 plot 2 measuring 100 acres each. They further sought orders that the transfer to Muhindo Yofesi by Eziron Bwambale is illegal, void due to being a fraudulent conveyance. It was stated that the Appellant purchased the land in 1976 through a sale agreement but did not register the same. The vendor then elected to transfer the same land to a third party. In this case, the Court found that the Appellant had been in possession of the land at all material times and that his possession amounted to notice (Pg. 124 of the record of proceedings). The court held that the contract of sale between the Appellant and Eziron Bwambale is valid and ordered that the Defendants in that suit transfer 100 acres to each of the Plaintiffs. (pg. 125 of the record). It is not in doubt that the Appellant received his 100 acres after a survey done in execution of the Court judgment. However, I do not hold the view that this entire process changed the status of possession of the suit land so as to place the Appellant

out of the period under which he may claim to be a bona fide occupant. It is clear, in my opinion that the Appellant was in possession of the suit land and may have otherwise had the claim of being a bonafide occupant available to him.

However, as discussed above, I am of the view that the Appellant's claim that he is a bonafide occupant did not form part of the pleadings and record of trial in the case, and therefore was erroneously relied on by the trial Magistrate. The 1st Appellate Court correctly arrived at the decision to hold that the Appellant was not a bonafide occupant of the suit land.

Ground one fails and is answered in the negative.

Ground 2: the learned judge on appeal erred in law to have held that the appellant was a trespasser on the suit land which error ocassioned a miscarriage of justice.

The resolution of ground one of this Appeal makes ground two accordingly resolved.

The Supreme Court of Uganda defined trespass in the case of ***Justine E.M Lutaaya v Stirling Civil Engineering ,Civil Appeal No. 11 of 2002*** as:
"Tresspass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another's lawful possession of the land"

Further, the East African Court of Appeal has noted the elements that ought to be proved in the case of ***Sheik Muhammad Lubowa v Kitara Enterprises Ltd ,CA No. 4 of 1987***, wherein the court held that:

"In order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land belonged to him, that the respondent had entered upon that land and that entry was unlawful and it was made without his permission or that the Respondent had no claim or right or interest in the land"

In order for an action founded in trespass to be successful, one must prove ownership. It has been established under ground one of this Appeal that the Appellant is not the owner of the suit land, as he did not have the argument of bona fide occupancy available to him at the trial in the Chief Magistrate's Court.

In addition, I have observed that there is a material contradiction in the Appellant's submissions regarding the ownership of the suit land. On one hand, the Appellant submitted in the 1st Appellate court that the 20 acres were not part of the land adjudicated over in High Court Civil suit No.359 of 1992. The Appellant further submitted to this Court in their amended written submissions that the 1st Appellate judge misdirected himself as the 20 acres did not form part of the land in the suit. However, in the amended submissions in rejoinder, the Appellant states that he paid for and bought 120 acres as opposed to 100 acres, and what was on paper was different from what was sold on ground. I find this to be a material contradiction, as HCCS No. 359 of 1992 exclusively dealt with and determined what the Appellant had purchased in 1976.

I am of the view that the Appellant, in lodging this Appeal, seeks to alter the decision of the High Court in HCCS No. 359 of 1992, as to the acreage or extent of his land ownership. He claims that he owned more acres than were determined by the court. However, there is no evidence on the record that the Appellant herein sought interpretation, review or appeal of the court's decision, to bring it to court's attention that his acreage is more than what was determined by court. I hold the view that the Appellant is bound by the decision. The court indeed pronounced itself on the extent of the Appellant's ownership of the suit land as the suit related to 300 acres of land registered in the names of the former owner. The 20 Acres subject to this suit are a part of this land. The Appellant cannot claim that the court was wrong in its estimation of his land ownership in another suit, not being an appeal or review of the HCCS No. 359 of 1992. Therefore, the learned 1st Appellate Judge was correct to observe on Pg. 287 of the record that the 20 acres were not part of the Appellant's land, and he was therefore a trespasser.

Furthermore, considering that the Appellant is not a bonafide occupant, it is not possible that the Appellant owned 20 acres of land in a customary tenure yet the entire portion of the land (measuring 300 acres) was titled.

Ground Two is answered in the negative.

Ground Three: The learned judge on appeal erred in law to have failed his duty as a first appellate court to subject the entire evidence on court record to a fresh and exhaustive scrutiny and by such failure arrived at a wrong decision otherwise, he would have found for the Appellant which error occasioned a miscarriage of justice to the Appellant

The Appellant elected to argue all grounds of Appeal under ground 3. However, from the Appellant's amended submissions in rejoinder, they fault the first Appellate Judge for failing to adhere to the duty of the court in the following ways:

a) The learned judge did not consider the uncontroverted evidence on the record which shows that the Appellant planted *biyenje* trees on the boundaries, including the suit land in 1976 and they are still there. Had he done so, he would have found in favor of the Appellant.
b) The learned judge did not consider the evidence on Pg.43 of the record, wherein the Respondent stated that the Appellant did not sign, as a neighbor the forms for application for a freehold title over the suit land.
c) While the Respondent claimed to have bought the suit land from Bwambale on 16.7.1972, he did not feature in HCCS No. 359 of 1992 to claim his interest after the entire land portion of 300 acres was fraudulently transferred. Had the judge evaluated this, he ought to have found that the Respondent is a liar and is fraudulent.

It is trite law that a first Appellate court has a duty to review the evidence of the case, to consider the materials before the trial court and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it (***see the case of Kifamunte Henry v Uganda Supra***). It is further important to note that the court should take into account the fact that it did not see the witnesses nor visit the locus (***See***

the cases of Begumisa & Others v Tibabaga, (2004) 2 EA 17, Fredrick Zaabwe v Orient Bank SCCA No. 4 of 2006)

It is my view that the 1st Appellate court discharged its duty in this case. The evidence of planting of *biyenje* trees and the circumstances under which the appellant acquired a certificate of title points to the Appellant as a bona fide occupant of the suit land. In this regard, the 1st Appellate court properly directed itself on Pg. 286 of the Record of proceedings when it found that the appellant had deviated from its pleadings. It was not necessary, in my view, to delve into depth/ details of evidence which did not assist the court. The bonafide occupation was determined as a matter of law which disposed of the entire issue of the Appellant's ownership of the suit land. It was only necessary to evaluate the Plaint, the scheduling memorandum and proceedings of court to determine whether the issue of bona fide ownership was properly before the court.

This ground is answered in the negative.

Ground Four: The learned trial judge on appeal erred in law and fact when he held that the Respondent's counsel erred by bringing arguments as to the bona fide occupancy contrary to the pleadings and issues framed for resolution which error occasioned a gross miscarriage of justice to the Appellant.

Ground four of this Appeal has been dealt with in this court's assessment of ground one. I find, as discussed above, that the Appellant materially deviated from the pleadings in the Chief Magistrates Court (trial court) without lodging an application to permit or validate any such deviation in the court. It is my determination that the 1st Appellate Court was correct to hold as such and I will not interfere with this finding.

Ground Four is answered in the negative.

Ground Five: The learned judge on appeal erred in law to have held that the Respondent's rights were decided by the High Court Civil Suit No. 359 of 1992 without taking into account the law relating to limitation of

actions in respect of the suit land or the claim of bona fide occupancy by which error occasioned gross miscarriage of justice to the Appellant

The Appellant submitted to this court that the learned judge on appeal misdirected himself as HCCS No. 359 of 1992 was not a claim for 100 acres. It was submitted that in this suit, the Appellant sought transfer of all the land he had bought. However, at the stage of execution of the judgment, it was discovered that the land actually measured 120 acres as opposed to 100 Acres. The Appellant admits that he obtained a Certificate of Title to 100 acres.

I do not agree with this argument. On the one hand, there is a court decision to which the Appellant was a party limiting his interest to 100 acres. If this decision was wrong as to the Appellant's interest, it ought to have been challenged by way of review or Appeal, even if the parties only observed the problem with the decision at the stage of enforcement. There is no evidence on the record that the Appellant attempted to challenge the court's decision, except belatedly claiming that he is a bonafide occupant of the same land that he claims to have purchased. It is trite that a decision of court may be challenged or altered by way of an appeal or review. It is not up to the parties to decide how to interpret the court decision, in separate actions.

The 1st Appellate court, in my view, took into account the claim of bonafide occupancy.(see Pg. 286 of the record). However, it found, and which finding I agree with, that the claim of bonafide occupancy was not available to the Appellant, due to deviation from pleadings, contrary to the Civil Procedure Rules.

Ground Five is answered in the negative.

I will not evaluate grounds 6 and 7 of the Appeal. Ground 6 is effectively dealt with under ground 1. Considering that the Appellant abandoned ground 7, this court need not consider it.

In the result of the above assessment, I would dismiss the appeal and order as follows:

(1) Judgment of the High Court as the 1st Appellate court is upheld.

(2) The Respondent is granted costs in this Court, the High court and the trial Court.

Dated at Kampala this 30th day of January 2023

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Elizabeth Musoke, Muzamiru M. Kibeedi & Christopher Gashirabake, JJA]

CIVIL APPEAL NO. 124 OF 2016

MUHINDO GEORGE NDERU ::APPELLANT

VERSUS

KAMANYIRE ALI:::RESPONDENT

(Appeal from Judgment and decree of the High Court (Appellate Jurisdiction) at Fort Portal (The Honourable Mr. Justice Batema D.N.A dated 15th March 2016 in Fort Portal Civil Appeal No. HCT-01-CV-CA.0016 of 2014)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my Learned brother, Hon. Justice Christopher Gashirabake, JA. I concur.

Dated at Kampala this 30th day of January 2023

....

Muzamiru Mutangula Kibeedi

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 124 OF 2016

MUHINDO GEORGE NDERU::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

KAMANYIRE ALI::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Fort Portal before Batema, J. dated 15th March, 2016 in Civil Appeal No. 0016 of 2014)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the judgment of my learned brother Gashirabake, JA, and I agree with it. For the reasons which he gives therein, I would also dismiss this appeal and make the orders he proposes.

As Kibeedi, JA also agrees, the Court unanimously dismisses the appeal and grants the respondent the costs in this Court and in all the Courts below.

It is so ordered.

Dated at Kampala this ..... day of.....2023.

.....

Elizabeth Musoke

Justice of Appeal