THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

CIVIL APPEAL NO. 37 OF 2021

(ARISING FROM CHIEF MAGISTRATE'S COURT LAND CIVIL SUIT NO. 048 OF 2016)

1. ZAWEDDE KAMUYATI
2. KAFERO SHABAN :: APPELLANTS

VERSUS

1. RWANTALE GILBERT NELSON
2. NSUBUGA ASUMAN
3. NABBANJA NASULA :: RESPONDENTS

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

Background

1. This appeal arose out of the judgment of the Chief Magistrate of Mukono Chief Magistrate's Court delivered by Her Worship Juliet Harty Hatanga in Civil Suit No. 048 of 2016. The 1st Respondent who was the Plaintiff in Civil Suit No. 048 of 2016, instituted the suit against the Appellants, the 2nd and 3rd Respondents on 11th April, 2016, seeking for the following orders:

    (a) a declaration that he is the rightful owner of the whole land comprised in Kyaggwe Block 82, Plot 22;

(b) a declaration that the 1st and 2nd Defendants are trespassers on part of the above-described land and that they have no interest and or claim therein.

(c) an order for specific performance as against the 3rd and 4th Defendants and in the alternative an order indemnifying the Plaintiff;

(d) a declaration that the Plaintiff is entitled to quiet enjoyment of his property;

(e) an order of permanent injunction restraining the 1st and 2nd Defendants, their agents, servants or any person claiming under them from making further and or future trespass and or making any claim on any part of the above-described land;

(f) general damages for inconvenience, disturbance, psychological torture;

(g) costs of the suit and any other relief as court deems fit to grant.

2. The Plaintiff's claim was that he was the registered owner of land comprised in Kyaggwe Block 82, Plot 22 at Kabunga in Kyampisi Sub-County, Kyaggwe, Mukono District, measuring approximately 1.20 hectares, having purchased it from the 3rd and 4th Defendants. That after a period of about three (3) months, when the Plaintiff went to visit his land, he found the 1st and 2nd Defendants cultivating part of it covering an area of about one (1) acre and when he confronted them, they told him that they were the owners of the land and that they didn't

know him, prompting the Plaintiff to file the above mentioned suit against the Defendants.

3. The 1st and 2nd Defendants filed a joint written statement of defence and a counter claim denying the allegations and claiming ownership of the suit land. Their contention was that the 1st Defendant is the rightful, legal and lawful owner of the suit land which her husband the late Kafeero (the 2nd Defendant's biological father) bought from a one Yokana Lugonvu in the late 1973. That the suit land was never sold to anybody and that the 1st Defendant has been on it for more than 30 years. The 3rd and 4th Defendants conceded to all the claims by the Plaintiff but added that they sold land comprised in Kyaggwe Block 82, Plot 22, land at Kabunga to the Plaintiff free from any third -party claim.

4. The learned trial Chief Magistrate delivered judgment in favour of the Plaintiff (1st Respondent) on 16th August, 2021, with the orders that:
   (a) the Plaintiff is the rightful owner of the whole land comprised in Plot 22, Block 82 situate at Kabunga Kyaggwe;
   (b) the 1st and 2nd Defendants are trespassers on the suit land;
   (c) the Plaintiff is entitled to quiet enjoyment of the suit land, therefore an eviction order is issued against the 1st and 2nd Defendants;
   (d) a permanent injunction is issued restraining the Defendants, their agents, workmen or any person claiming under them from continued and further trespass on the suit land;
   (e) general damages of UGX. 20,000,000/= and costs of the suit at the rate of 8% per annum from the date of judgment until payment in full were awarded to the Plaintiff.

The Appeal

5. The Appellants being dissatisfied with the judgment and orders of the trial Chief Magistrate, filed this appeal. The Memorandum of Appeal filed on 6th October, 2021, contains three grounds, which are that:

(1) The trial Magistrate erred in law and fact when she failed to properly evaluate evidence when she held that the Appellants are trespassers on the suit land;

(2) The learned trial Magistrate erred in law and fact when she failed to consider evidence on record that the 1st Respondent did not conduct adequate or carryout the necessary due diligence before purchase of the suit land; and

(3) The trial Magistrate erred in law and fact when she held that the sale between the 1st, 2nd and 3rd Respondents was lawful.

6. During the hearing of this appeal, the Appellants were represented by Counsel Justine Nakajubi from M/s Nabukenya, Mulalira & Co. Advocates. The 1st Respondent was represented by Counsel Shwekyerera Philemon from M/s Shwekyerera Advocates & Solicitors and Counsel Wanyama John from M/s Nsubuga Mubiru & Co. Advocates appeared for the 2nd and 3rd Respondents.

7. I have perused the above grounds of appeal and I will analyze them in the order of the parties' submissions. The 1st ground shall be considered separately while the 2nd and 3rd grounds shall be jointly considered.

8. The duty of the first appellate court, like this court, was properly emphasized in the case of **Selle & Anor v. Associated Motor-Boat Ltd & Others [1968] E.A 123 at page 126,** where Justice Clement De Lestang stated as follows:

> *"An Appeal..... is by way of retrial.....the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect."*

I now proceed to determine the grounds of the appeal.

Ground 1:

The trial Magistrate erred in law and fact when she failed to properly evaluate evidence when she held that the Appellants are trespassers on the suit land;

9. The Appellants' counsel submitted that through their evidence, the Appellants illustrated their possession of the suit property since 1973 as averred by the 1st Appellant in her evidence in-chief that her husband purchased the suit land in 1973 that her husband died in 1987 and she remained in possession. The Appellants' counsel submitted that the above evidence was corroborated by D.W.2 who affirmed that he is 26 years old, grew up from the suit land and that they have been cultivating thereon for a very long time. Further, that D.W.3 testified

that he was a casual laborer who was employed by the 1st Appellant to work on the suit land

10. It was further argued for the Appellants that through their evidence, it was illustrated that they owned the suit property and that their physical possession of the land and exerting their rights of ownership was never challenged by any contrary evidence. That the Appellants' possession of the suit property was confirmed by the Respondents themselves through their witnesses.

11. The Appellants' counsel submitted that during cross examination of P.W.1, the 1st Respondent confirmed that the 1st Appellant occupies about one acre of the suit land and that the 1st Respondent has never used the suit land. That the 1st Respondent further confirmed that at the time of his purchase, the 1st Appellant and her family were in occupation of the suit land and that he found the 2nd Appellant on the land as well.

12. Counsel added that the 1st Respondent's 2nd witness P.W.2 confirmed that she is 30 years old, that she grew up in the area and that the 1st Appellant owns her land which is different from the suit land but she shifted to the suit land in a year she could not recall when even her father was still alive. That P.W.2 further confirmed that the 1st Respondent found the 1st Appellant on the land.

13. The Appellants' counsel further argued that during the hearing of the 2nd and 3rd Respondents' case, the 2nd Respondent testified as

D.W.4 and during his cross examination by learned counsel for the 1st Respondent, he testified that he had not made any attempt to resolve the claim of the Appellants on the suit land. That during his cross examination by counsel for the Appellants, he testified that the Appellants have cultivated on the land he sold to the 1st Respondent, that he is aware of the suit between his father Ali and the 1st Appellant but he never followed up and that for them they have never utilized the land.

14. The Appellant's counsel argued that when D.W.4 was examined by court as to what the suit property was used for during the time when their late father was alive, he testified that the land was not utilized but it had many trees, that it was a forest. That all the Respondents in their evidence confirmed the utilization of the suit land by the Appellants and further confirmed that the 2nd and 3rd Respondents never utilized the suit property, not even during the lifetime of their predecessor in title, their late father.

15. Counsel claimed that these were admissions made by the Respondents and their witnesses. The Appellants' counsel argued that admissions in law create estoppels and that there cannot be better evidence against a party than an admission by such a party. Counsel referred to sections 28 & 57 Evidence Act and the case of **John Nagenda v. The Editor of Monitor Publications & Anor S. C. Civil Appeal No. 05 of 1994**.

16. Furthermore, the Appellants' counsel stated that the suit between the 2nd and 3rd Respondent's father Ali Kayemba and the 1st Appellant was heard by the Local Authorities from Local Council 1 to 3 where the 1st Appellant was claiming trespass on her *kibanja* and all the Local Council Courts ruled in favour of the 1st Appellant. That the Appellants' evidence at trial court was the same as was affirmed before the Local Authorities as it was confirmed before the Local Council Courts that her husband purchased the *kibanja* in 1973 and that the Local Councils' decisions confirm the same issue.

17. The Appellant submitted that the fact of possession of the suit land by the Appellants was proved and that proof of possession is not only by documentary evidence but also by objective physical possession and the subjective intent of the possessor. That the learned trial Magistrate erred in determining trespass when she observed that the Appellants did not prove possession since they had no agreement.

18. The Appellants' counsel asserted that the Appellants' occupation or utilization of the suit land since 1973 was not challenged by the Respondents, their predecessors in title as the certificate of title on record illustrates Yusuf S. Lule as the first proprietor registered in 1978. That the 1st Appellant in her evidence testified that her husband purchased the suit land in 1973 and utilized the suit land. That her husband died in 1987 and the 1st Appellant remained in occupation with the family. That the first proprietor on the certificate of title for the suit property found the Appellants in occupation of the suit property.

19. The Appellants' counsel contended that the interruption or challenge of the Appellants' occupation or utilization of the suit land came in 2000 when a suit was instituted in the Local Council Courts and subsequently in the Chief Magistrate's Court of Mukono at Mukono. That for the interruption and challenge in occupation to qualify a person as a *bonafide* occupant, it has to be before the coming into force of the Constitution and challenged within the 12 years but not after.

20. That according to the 1st Appellant, her husband purchased the land in 1973 and that by the time the 1995 Constitution came in force, they had occupied the land for over 12 years. That there was no challenge from all the predecessors in title to the Respondents. That the only challenge to their occupation and utilization by the registered proprietor was in 2000.

21. The Appellants' counsel added that, the law protects interests of persons who were in occupation of the land before the coming into force of the Constitution and grants them security of occupancy. That adverse possession seeks to protect persons who have been in occupation for 12 years without interruption or challenge from the registered proprietor.

22. The Appellants' counsel contended that the learned trial Magistrate in her judgment acknowledged the Appellants' occupation and utilization of the suit land but she held that the same was

interrupted and challenged and thus they could not qualify as *bonafide* occupants and concluded that they were trespassers. Learned counsel claimed that this was an error both in law and fact.

23. The Appellants' counsel also argued that the cause of action for trespass is designed to protect possessory, not necessarily ownership interests in land from unlawful interference. That an action for trespass may technically be maintained only by one whose right to possession has been violated. That the gist of a suit for trespass to land is not a challenge to title, that such possession should be actual and this requires the Plaintiff to demonstrate his or her exclusive possession and control of the land. That the entry by the Defendant onto the Plaintiff's land must be unauthorized.

24. The Appellant contended that the evidence before the trial court illustrated that the Appellants were in occupation and utilization of the suit property at the time of purchase of the same by the 1st Respondent and trespass cannot occur against a person you have found in occupation and utilization of the suit property. That if the learned trial Magistrate had carefully evaluated the evidence, she would have found that the 1st Respondent's claim of trespass could not stand against the Appellants as they were in occupation of the suit land before the 1st Respondent's purchase and thus the 1st Respondent could not prove the Appellants' unlawful entry as an ingredient of trespass when he found them on the land.

25. The Appellants' counsel submitted that throughout the pleadings and evidence of the Appellants, the Appellants contended that their interest is a *kibanja* which was acquired by the late husband of the 1st Appellant from a one Yokana Lugonvu in 1973. That a *kibanja* holder cannot appear on the ownership page of the certificate of title as the ownership page portrays registered proprietors of legal interests.

26. The Appellants' counsel submitted that it is a cardinal principle of our land law that 2 interests in land cannot vest in one person as thus a *kibanja* holder from whom the Appellants' predecessor acquired their interest cannot as well have legal interest to appear on the certificate of title. Counsel referred court to the case of **Bank of Africa v. Ganyana Edna & Anor HCCS No. 477 of 2011**. Learned counsel concluded that it was therefore in error for the learned trial Magistrate to rely on a certificate of title to prove existence of a *kibanja* interest. Counsel prayed that the 1st ground of the appeal be allowed.

27. On the other hand, the 1st Respondent's counsel contended that the trial court captured the Appellants' evidence. That the Appellants stated in paragraph 6 of their joint written statement of defence that a copy of the agreement would be availed at the trial but during her testimony, D.W.1 stated that the sale agreement was destroyed in 1980 when her house collapsed and that she also re- echoed this at the locus visit.

28. The Respondent's counsel submitted that the trial Magistrate captured this evidence of D.W.1 who stated that she took possession of the *kibanja* when her husband died in 1987 and that 2 or 3 months later, the late Ali

Kayemba approached her claiming he had purchased the land. That the said Ali cut all the trees and later fenced off the land. That D.W.3 also testified that he was employed as a casual laborer by D.W.1, that the late Kayemba stopped him from cultivating the land and reported the matter to police at Nagalama where D.W.3 was summoned.

29. The Respondent's counsel further submitted that the trial Magistrate based on the above evidence and made her conclusion that the 1st and 2nd Defendants didn't have uninterrupted or unchallenged possession of the suit land to qualify them as *bonafide* occupants entitled to security of occupancy. That in their written submissions, the Appellants are coming up with a defence of adverse possession which was never discussed in the lower court. That this defence too is not available to the Appellants.

30. The 1st Respondent's counsel argued that possession must be held openly and peacefully. Counsel argued that possession can never begin by a violent act or if it is started with acts of violence, the prescription starts only the day when the violence stopped. That limitation period only begins to run from the date on which forcible occupation ceased. The 1st Respondent's counsel added that if the possessor cannot prove that he or she had the material control of the land on a regular basis, at least with the same regularity that a real owner would have, then possession is regarded as discontinuous. That where the land is for a type ordinarily occupied only during certain times, the adverse possessor may need to have only exclusive, open and hostile possession during those successive useful periods, making the use of the property as an owner would for the required number of years. That in order for possession of

land to ripen into ownership, it must be adverse, actual, open, notorious, exclusive and continuous for the prescribed statutory period.

31. The 1st Respondent's counsel claimed that the Appellants in their joint written statement of defence admitted that they have never peacefully settled on the suit land since 1978 when the husband of the 1st Appellant late Kafeero died. That throughout their evidence in court, the Appellants told court that they have never peacefully settled on the suit land since they have been involved in many court battles from Local Council Courts, RDCs and Chief Magistrate's Court of Mukono before the 1st Respondent came into the picture. The Respondent's counsel argued that adverse possession is only available to a party who has occupied and used land uninterrupted for a continuous period of twelve (12) years which is not the case in the instant appeal. Counsel averred that the defence of adverse possession is not available to the Appellants.

32. The 1st Respondent's counsel invited court to look at paragraph 6 (a) of the written statement of defence and counter claim where the Appellants claimed to be in possession of a purchase agreement of 1973 and pleaded that the same shall be availed at trial. That during the hearing of the case in the lower court, the Respondents herein were denied a chance of looking at the purported purchase agreement of the suit *kibanja* because it was never produced.

33. Furthermore, that the 1st Appellant during the hearing of the case in the lower court reached an extent of telling court that the purported purchase agreement got lost in 1980 when the house they were living in got

destroyed. In paragraph 3 of the witness statement of the 1st Appellant, she told court that in 1973, her husband the late Kafeero Asuman bought the *kibanja* from late Yokana Lugonvu and that she has been in uninterrupted physical occupation, possession and utilization since then though she could not find the sale agreement since she has been taking it to various places regarding this matter.

34. The 1st Respondent's counsel further submitted that the 1st Appellant has three sharp contradictions on the existence of the purported purchase agreement. Firstly, in her pleadings, she stated that she would produce it at the trial of the case which never happened. Secondly, she filed a witness statement claiming that she had used it in different offices and therefore it went missing and she could not know where it was and thirdly, during her cross examination, she told court that it got destroyed in the house which collapsed in 1980. Counsel stated that it is clear from the above facts that the 1st Appellant is a liar. The 1st Respondent's counsel simply concluded that such an agreement has never existed and that the 1st Appellant's husband never purchased any *kibanja* from Yokana Lugonvu in 1973 as alleged. It was the Appellants' evidence that Yokana Lugonvu who purportedly sold a *kibanja* to them had no address in the area. That the 1st Appellant told court that before they purchased the *kibanja*, the place was bushy. That Walugembe Sepulia who appeared as a witness for the Appellants told court that he didn't know where Lugonvu was buried and that he also didn't know of any surviving relatives of Yokana Lugonvu.

35. Counsel argued that Yokana Lugonvu is a fictitious person being used by the Appellants to take people's land. That if the suit *kibanja* was a forested area as seen from the evidence of both parties and the alleged Yokana Lugovu was not the land owner or a registered proprietor in 1973, when did he come to own and possess a *kibanja* that he was able to pass over to the Appellants which *kibanja* he had never possessed or utilized? That it is extremely hard to believe the version of the Appellants that Yokana Lugonvu had any *kibanja* interest to pass over to them.

36. Additionally, the 1st Respondent's counsel contended that the Appellants had a duty to convince court that they started occupying and using the suit *kibanja* in 1973 to be able to benefit from the protection of the law. That this obligation was not discharged and that the principle of law is very clear that he who asserts a fact has the burden of proving it. Counsel relied on the case of **Dr. Karugaba v. Nic & Anor [2008] HCB 152**.

37. It was the 1st Respondent's contention that by the time he purchased the suit land, the land was vacant and that the land only had a few scattered banana plantations in a bushy land. That no contrary evidence came up from the Appellants to show that by the time the 1st Respondent purchased the suit land, there were any gardens, structures or activities being carried out on the suit land.

38. That the pleadings and the evidence of the 2nd and 3rd Respondents also point to the fact that by the time the 1st Respondent purchased the suit land, it was vacant and they handed over to him land free from any

squatters or tenants. That the 1st Respondent told court that after 3 months of purchase of the suit land, when he went back to visit his land, that's when he found the Appellants had cultivated a portion covering an area of 1 acre and this is where the trespass started from. That at the time of his purchase, the suit land was free of any activities, that it was bushy and the trespass came in after three months of taking possession when the land title was even transferred in his names. So, it's not true as submitted by the Appellants' counsel that the Appellants were in occupation and possession of the suit land at the time of purchase. That the Appellants have never constructed any house or structures on the suit land and the trespass being referred to here is of cultivation.

39. It is the evidence of the 1st Respondent that he is the registered proprietor of the suit land with a certificate of title. That he has never authorized or permitted the Appellants on to his land thus they are trespassers. Counsel referred to the case of **Moya Drift Farm Ltd v. Theuri (1973) E.A 114 at 115**. That the 1st Respondent who is the registered owner of the suit land can sue for trespass.

40. Counsel further argued that at the time the 1st Respondent discovered that the Appellants had trespassed on his land by cultivating a portion thereof, he stated both in his pleadings and evidence that the Appellants had trespassed on an area measuring approximately 1 acre. That during the cross examination of the 1st Appellant, she told court that the size of her purported *kibanja* was slightly over an acre.

41. During the cross examination of D.W.3 Walugembe Sepulia, he told court that he didn't know the size of the suit *kibanja* because he was not a surveyor. That however by estimate, he told court that it was more than a football pitch. That the evidence of both the 1st Respondent and the Appellants herein was uniform and so corroborative that the portion of land in dispute which was trespassed on or which was under contention by the time the case was filed and during the hearing of the case was approximately 1 acre. But when court went to visit locus, the Appellants had extended boundaries and had unilaterally taken over the whole land as comprised in Kyaggwe Block 82, Plot 22 measuring approximately 1.20 hectares (equivalent to 2.965 acres). The Respondent's counsel argued that the Appellants are in this court with dirty hands and deserve no protection of the law at all.

42. The 1st Respondent's counsel submitted that the Appellants have no legitimate claim or interest in the suit land. Counsel entirely agreed with the trial Magistrate that the Appellants are trespassers on the suit land. He prayed that the 1st ground of the appeal fails.

43. The 2nd and 3rd Respondent's counsel informed court that the Appellants attempted to smuggle into court matters that were ruled against them at preliminary stages. That the Appellants raised two preliminary objections that Civil Suit No. 048 of 2016, from which the instant appeal arises, was *res judicata* as it had been handled and determined by L.C.1 Court in Kalagala, Kyampisi Sub-County in Mukono District in 1996. Secondly, that the plaint disclosed no cause of action against the Appellants. Counsel submitted that the preliminary objections

were overruled by the lower court. Counsel contended that it is unfortunate that the Appellants' counsel still refers this honourable court to the purported evidence that was overruled by court and the Appellants chose not to challenge the said ruling in a higher court. Counsel prayed that the offending paragraphs be expunged from the Appellants' written submissions.

44. It was averred for the 2nd and 3rd Respondents that D.W.5 testified that D.W.1 started trespassing way back in 1990 when the late Ali Kayemba was still living and when he died she hired D.W.3 to cut down trees. That D.W.1 has not been on the alleged *kibanja* uninterrupted. That during cross examination by counsel for P.W.1, it was the 1st Appellant's evidence that the late Ali Kayemba started disturbing her in 1987 after the death of her husband. That D.W.3 Walugembe Sepiriya confirmed the same.

45. That the learned trial Magistrate stated that from the above evidence, D.W.1 and D.W.2 did not have uninterrupted or unchallenged possession of the suit land to qualify them as *bonafide* occupants entitled to security of occupancy. That the registered proprietor interrupted the 1st Appellant and never acknowledged her alleged *kibanja* interests on the suit land as way back as in 1987 before the coming into place of the Constitution of the Republic of Uganda, 1995.

46. Counsel stated that the suit land according to the land title belonged to the late Paul Segane, the son of the late Yusuf Lule, before the late Ali Kayemba Nsubuga bought it and registered himself thereon and that

upon his death D.W.4 and D.W.5 got registered thereon. That it was the evidence of D.W.1 that the late Ali Kayemba never recognized her alleged *kibanja* interest. That section 29 (2) of the Land Act does not protect the Appellants as well.

47. Counsel added for the 2nd and 3rd Respondents that the principle of the law is that in purchasing of a *kibanja* on a titled land, the consent of the land lord is mandatory. That the Appellants never led any evidence recognizing any of the registered proprietors as their landlord and to which landlord was the 1st Appellant's husband as a purchaser of the purported *kibanja* get introduced?

48. That they failed to produce a sale agreement to back up the alleged purchase of their *kibanja* interests even when they indicated in their joint written statement of defence that they would produce it at the hearing. That there was no evidence of payment of Busulu, which left the trial court in a dilemma. That D.W.1 testified in court that the size of the purported *kibanja* was slightly over an acre but during locus visit the Appellants had extended their purported *kibanja* interest to the entire land of three acres. That such confusion from people who claim *kibanja* interests must be treated with caution.

49. It was further argued for the 2nd and 3rd Respondents that section 29 (2) of the Land Act does not cover the Appellants as they never received recognition from the registered proprietor the late Ali Kayemba and that secondly, their claim that the 1st Appellant's husband purchased the suit *kibanja* could not be proved without any documentary evidence. That no

report from police or local authorities was brought to court to support their claim that the agreement got lost neither did they mention even one witness to the alleged missing agreement.

50. That it was the evidence of the Appellants that they lodged a caveat on the land where they stay but they had no caveat on the land in dispute. That why they did not find it necessary to lodge a caveat on the land where they claim to have occupied and utilized amidst interruptions from the late Ali Kayemba, for over a jubilee but found it necessary to lodge a caveat on where they own a home, where, apparently there is no dispute, leaves a lot to be desired. The 2nd and 3rd Respondents' counsel submitted that the trial court was alive to the facts and law and correctly declared the Appellants trespassers.

51. In rejoinder, the Appellants' counsel emphasized that ownership of a *kibanja* can as well be proved by other ways other than by the agreement which is lost and cannot be traced. That ownership can as well be proved by possession. That whereas in the pleadings it was highlighted that the agreement shall be availed at trial, it was to give a chance to the Appellants too keep searching for it with a possibility of obtaining the same before trial but they failed to obtain the same. That this is a document of 1973 which could not be traced and the 1st Appellant gave some accounts as to where it could have been lost from.

52. The Appellant's counsel argued that it is double standards when learned counsel for the 1st Respondent is faced with the same fact that the 1st Respondent was not in position to avail his search statement

before the purchase of the suit land if at all he carried it out. That the 1st Respondent testified that he could not trace his search statement of 2015 and the learned counsel for the 1st Respondent appreciates that whilst denying a document of 1973 being untraceable.

53. The Respondent's counsel submitted that the Appellants led evidence to show their possession and occupation of the suit land which was clear even before the 1st Respondent's purchase in 2015. That the Appellants' occupation was unchallenged for 14 years from 1973 - 1987. That even though the Appellants failed to produce a sale agreement on where the 1st Appellant's husband the late Kafeero Asumani purchased the suit *kibanja* as it could not be traced, the Appellants led congent evidence to show that they had been in possession of the suit land since 1973 which was used for cultivation to-date.

54. In rejoinder, the Appellants' counsel concluded on the 1st ground of the appeal that the Appellants are not trespassers on the suit land and that the 1st Respondent's claim of trespass against the Appellants cannot stand as the essential ingredients were not proved.

Court's consideration

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

"Every unlawful entry by one person on the land in possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses on land if he

wrongfully sets foot on it, rides or drives over it, or takes possession of it or expels the person in possession of it, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it or places or fixes something on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land."

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

"Trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land".

57. It is therefore vital to note that one's physical presence on the land or use of it *perse* is not in itself sufficient to bring an action of trespass. The claimant for trespass must prove ownership or an interest in the subject land to bring an action for trespass. The East African Court of Appeal noted in the case of **Sheik Muhammed Lubowa v. Kitara Enterprises Ltd C.A No.4 of 1987**, as follows:

"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 the entry

was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land".

58. Interests in land include registered and unregistered interests. Accordingly, for one to claim an interest in land, he or she must show that he or she acquired an interest or title from someone who previously had an interest or title thereon. In the instant case, whereas the Appellants claim to be the *kibanja* holders with unregistered interest on the suit land, the Respondents deny that the Appellants have *kibanja* interest thereon and they further claim that the sale transaction between them was effected without any encumbrance on the suit land.

59. Under mailo tenure system of land ownership, a person may hold a *kibanja* on a registered land where another person is the legally registered owner. Section 1 (dd) of the Land Act, Cap. 227 as amended defines tenant by occupancy to mean the lawful or *bona fide* occupant declared to be tenant by occupancy by section 31. Vital to this appeal is also section 29 (1) of the Land Act, which defines lawful occupant to mean:

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

(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

(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".

60. Section 31 (1) of the Land Act referred to by section 1 (dd) of the Land Act, provides that a tenant by occupancy on registered land shall enjoy security of occupancy on the land.

61. The 1st Respondent who testified as P.W.1 stated in his witness statement that he bought a titled land on 1st September, 2015, free from any encumbrance, which land was thereafter transferred and registered into his name. The land sale agreement between him and the 2nd and 3rd Respondents and the certificate of title showing the 1st Respondent as the current registered proprietor were admitted in evidence as Plaintiff's Exhibits P1 and P2. This position was confirmed by P.W.2, D.W.4 and D.W.5 who all testified that the suit land belonged to their late father Ali Kayemba Nsubuga.

62. The 2nd Respondent who gave evidence as D.W.4 testified that the suit land comprised in Block 82, Plot 22 initially belonged to late Paul Segane (son of late Yusuf Lule) from whom his father bought the land, which land reverted to him and his sister D.W.5 after their father's death. He added that the Appellants have a home on land comprised in Block 82, Plot 20, which borders the suit land and which has its own title. That the suit land does not have a squatter or *kibanja* holder on it

and that before his father purchased it, even the previous owners never had any squatter or *kibanja* holder.

63. On the other hand, the 1st Appellant who testified as D.W.1 stated in her evidence that her husband purchased the suit land from Yokana Lugonvu and left it to her. In paragraph 6 (a) of the 1st and 2nd Defendants' joint written statement of defence, the Appellants stated that a copy of the sale agreement between the late Kafeero and Yokana Lugonvu would be availed to court at trial. However, during trial, the Appellants neither adduced any sale agreement between her late husband and the said Yokana nor did she produce any of Yokana's family members before court to confirm the alleged sale. The 1st Appellant instead claimed that the sale agreement was destroyed when their house collapsed in 1980. In the absence of the sale agreement, the Appellants ought to have presented any of the witnesses to the alleged sale between her late husband and Yokana to corroborate her testimony of ownership. However, she failed to do so.

64. During cross examination, D.W.1 testified at page 110 of the record of appeal that the suit land is Kabaka's land and that the size of her *kibanja* is slightly over an acre, and that she did not know the plot number of the disputed *kibanja*.

65. D.W.2 whose name was clarified as Kafeero Shaban and not Sentongo Shaban and the 2nd Appellant in this appeal stated during cross examination at page 113 of the record of appeal that he could

not remember the year his father purchased the suit land and that he did not have any documentary proof to show that his father bought the *kibanja*. At the time of giving his testimony, D.W.2 testified that he is not aware that the disputed land is titled land. Despite claiming *kibanja* ownership of the suit land by his late father Kafeero, the 2nd Appellant stated that he did not know who their landlord is and that they do not pay any Busuulo to anybody for the suit land.

66. D.W.3 who claimed that the suit land was bought from Lugonvu by Kafeero Asuman in 1973, stated during cross examination at page 114 of the record of appeal that Lugonvu was not the registered owner of the suit land and that he was not a party to the sale transaction between Yokana and Kafeero.

67. Having carefully examined the certificate of title for land comprised in Block 82, Plot 22 the disputed land herein, I did not find the name of Yokana Lugonvu from whom the Appellants claim to derive interest on the title. The evidence in the title which is undisputed clearly indicates that the land was first registered in the name of Yusufu S. Lule in 1978, then transferred in the names of his administrator a one Seggane Paul in 2008, who within the same year transferred it in the name of Ali Nsubuga Kayemba - father of the 2nd and 3rd Respondents. The land was subsequently transferred to the 2nd and 3rd Respondents in 2012 who lastly transferred the same to the 1st Respondent in 2015.

68. Having mentioned the above proprietors on the certificate of title, one therefore wonders in whose capacity the suit land was sold to late Kafeero by Lugonvu. Moreover, the Appellants did not in any way link any relationship between the said Yokana Lugonvu with any of the above-mentioned proprietors.

69. Furthermore, there is also undisputed evidence on the certificate of title that land comprised in Block 82, Plot 22, which measures 1.20 hectares is a private mailo and not Kabaka's land as alleged by the 1st Appellant. I have also noted that whereas land comprised in Block 82, Plot 20 belonging to the late Kafeero is caveated by the 2nd Appellant, the certificate of title for the disputed land has no caveat or encumbrance whatsoever by anyone.

70. From the above analysis, it is my judgment that the Appellants have failed to prove that the suit land belongs to them and yet they admit having had possession of the suit land by cultivating on it. During locus in quo, the lower court noted that there were bananas, cassava and maize plants that were just growing. The 1st Appellant also admitted having hired the suit land to two people who had planted those crops. This is a clear act of trespass on the part of the Appellants who in my opinion, had a misconception that their land extended from Plot 20 to Plot 22 of Block 82 whereas not.

71. Based on the foregoing, I find that the trial court rightly held that the Appellants are trespassers on the suit land having failed to prove ownership of it. Therefore, the first ground of the appeal fails.

Grounds:

2. **The learned trial Magistrate erred in law and fact when she failed to consider evidence on record that the 1st Respondent did not conduct adequate or carry out the necessary due diligence before purchase of the suit land; and**

3. **The trial Magistrate erred in law and fact when she held that the sale between the 1st, 2nd and 3rd Respondents was lawful.**

72. Learned counsel submitted for the Appellants on the 2nd and 3rd grounds of the appeal that the Appellants' written statement of defence and counter claim, the facts of the Appellants' ownership of the suit land and the failure of the 1st Respondent to carry out necessary due diligence required in law were pleaded and thus, the issue of court investigating the lawfulness of the sale transaction between the 1st Respondent with the 2nd and 3rd Respondents.

73. That for any purchaser to be taken to be a lawful and or *bonafide* purchaser, he or she must prove seven (7) elements which are that; 1) he or she holds a certificate of title, 2) he or she purchased the property in good faith, 3) he or she had no knowledge of the fraud, 4) he or she purchased for valuable consideration, 5) the vendor had appropriate valid title, 6) he or she purchased without notice of fraud and 7) was not party to fraud. Further, counsel submitted that failure to make reasonable inquiries of the persons in possession and use of the land

or the purchaser's ignorance or negligence to do so formed particulars of fraud.

74. That the 1st Respondent as a purchaser of the suit property in issue clearly knew and was put on constructive notice of the 1st and 2nd Appellants' utilization of the suit property but chose not to inquire from them despite the fact that before purchase as per his evidence he got to know and noticed that the 1st Appellant was utilizing 1 acre of the land he was purchasing but still chose to ignore that indicator as he clearly knew that any inquiries would point to the 1st and 2nd Appellants' interest in the land. That the 1st Respondent was caught up by the doctrine of constructive notice in land law.

75. The Appellants' counsel argued that due diligence are key issues and form the base of lawfulness of transactions. That the 1st Respondent chose not to make any inquiries from any of the neighbors so that he pleads ignorance or even the Local Authorities who had for a long time had engagements of disputes between the Appellants and the 2nd and 3rd Respondents as well as their predecessors in title.

76. That it's now trite that investigations before purchase are carried out from the local authorities to ascertain the clear ownership of the suit property. That the Plaintiff only clearly stated that he did not need to inquire from the Local authorities of the area, but basically that is where he would have found out about the *kibanja* interest of the Appellants as they are not placed on the certificate of title. That the suit was instituted due to lack of carrying on the necessary due diligence

envisaged under the law by the 1st Respondent. That the law is quite clear that if a person purchases an estate which he knows to be in the occupation of another other than the vendor, he is bound by all the equities which the parties in such occupation may have in the land.

77. It is the Appellants' submission that the sale of the suit land between the Respondents was unlawful and that the learned trial Magistrate erred when she concluded that the sale between the 1st Respondent and the 2nd and 3rd Respondents was lawful without actually investigating the evidence on record pointing to lawfulness of the transaction. Counsel prayed that the 2nd and 3rd grounds of the appeal are upheld.

78. Conclusively, the Appellants' counsel prayed that the appeal is allowed, the judgment and orders of the learned trial Magistrate be set aside, costs of the suit both in this court and in the trial court be granted to the Appellants and any other order that this honourable court deems fit.

79. The 1st Respondent's counsel contended on the 2nd and 3rd grounds that the Appellants' counsel misdirected herself on the grounds of appeal before this court when she submitted on fraud which is not one of the grounds. That fraud was never pleaded in the lower court, that no evidence was adduced on fraud and the judgment of the lower court doesn't talk about fraud. That the Appellants' counsel is simply importing fraud in this appeal which is prohibited by the law. That the Appellants are not challenging the title of the 1st Respondent.

That the Appellants' counsel went astray. Counsel submitted that grounds 2 and 3 will automatically be answered in ground 1 of the appeal if this honourable court agrees with the submissions of the 1st Respondent and upholds the findings of the trial Magistrate.

80. The Respondent's counsel argued that it is evidence of the 1st Respondent that after inspecting the suit land and being availed with a copy of the land title, he carried out a search in the Lands Office and found the land registered in the names of the 2nd & 3rd Respondents. That he was availed with a search statement which got misplaced because he only tried to look for it when this matter came up but couldn't find it. In his witness statement, the 1st Respondent told court that on 27th August, 2015, he contacted the 3rd Defendant (now 2nd Respondent herein) and told him that he wanted to be shown the mark stones and the exact location of the suit land and they met at the suit land on 29th August, 2015, in the company of the 3rd Respondent and a one Moses Musoke an elder and resident of that village and he was shown the land which had some banana plantations in the bushy area and there was no homestead.

81. That from paragraphs 8 to 12 of his witness statement P.W.1 told court how he purchased the suit land and duly got registered on the title as the registered owner. That he told court that he followed the normal steps and lawful process until the land was finally registered in his names on 7th September, 2015 under instrument number MKO-00020391 as a *bonafide* purchaser for valuable consideration.

82. That P.W.2 - Nambiro Zafaran in her witness statement told court how the 1st Respondent purchased the suit land from the 2nd and 3rd Respondents with the full consent of all the family members of the late Ali Nsubuga her father. That she further told court that the 1st Respondent bought the suit land genuinely without any sitting tenant or squatter and is the rightful owner of the suit land. That the trial Magistrate in her judgment analyzed this evidence, and concluded that the evidence adduced indicates that the Appellants are neither lawful nor *bonafide* occupants as defined in the law to accord them the protection that are accorded under the law. That it is also a misconception that mandatory consent was required.

83. The 1st Respondent's counsel contended that having found the Appellants trespassers on the suit land, they don't have any locus to start questioning the genuineness of the land transactions entered into between the Respondents. That the land sale agreement transaction between the 1st Respondent and 2nd together with the 3rd Respondents was genuine and lawful. Counsel prayed that the 2nd and 3rd grounds of the appeal fail. Counsel concluded that no ground was formulated challenging the remedies granted by the lower court, he prayed that the appeal is dismissed with costs here and in the court below.

84. The 2nd and 3rd Respondents' counsel contended that D.W.4 testified that he took P.W.1 to the land for inspection. That he showed him the boundary marks and also informed him that D.W.1 was trespassing on D.W.4's land because D.W.1 did not know where her boundary passes. Further, that P.W.1 testified that he searched at the

Registry of titles and there were no encumbrances. That absence of encumbrances was corroborated by D.W.1 and D.W.2 who testified that they put a caveat on the land title where they stay but the land in question has no caveat.

85. That during cross examination by counsel for P.W.1, it was D.W.1's evidence that the late Ali Kayemba started disturbing D.W.1 in 1987 after the death of her husband. That it is clear that the late Ali Kayemba, father to the D.W.4 and D.W.5, never acknowledged her alleged *kibanja* interests on the suit land as way back as in 1987 before the coming into place of the Constitution of the Republic of Uganda, 1995.

86. Counsel invited this honourable court to take judicial notice of the fact that advocates draft sale agreements for *bibanja* from their chambers without the local authorities witnessing them and such agreements have never been declared to be invalid on account of not having been witnessed by local authorities. That a sale agreement for a *kibanja* not witnessed by the local authorities is invalid. (See the case of **Kawuki Andrew v. Jackson Semaganyi, Civil Appeal No. 19 of 2014**).

87. That the 1st Appellant's *kibanja* claims are neither recognized nor protected by laws governing *bibanja* interests. That the learned trial Magistrate having decided that the Appellants were trespassers, there was no need to investigate a non-existent right. Counsel asserted that the certificate of title shows that the 2nd and 3rd Respondents were the

registered proprietors at the time they sold to the 1st Respondent. That P.W.1 carried out a search and revealed the land to be free from any encumbrances. That the purported *kibanja* claims are not recognized under the law. It is prayed for the 2nd and 3rd Respondents that the 2nd and 3rd grounds of the appeal be held in the negative and further that the appeal be dismissed for lack of merits.

88. The Appellants' counsel rejoined on the 2nd and 3rd grounds of the appeal that the 1st Respondent is not a *bonafide* purchaser for the suit land and that this is clearly shown in the evidence led during cross-examination of the 1st Respondent where he stated that he did not inquire from the neighbors nor Local Authorities of the area where the suit land is situated and about any adverse interests in the land he was purchasing.

89. It is the Appellants' contention that the 1st Respondent never carried out the necessary due diligence before the purchase as he ought to have got notice of their interest in the suit land. That all facts that dispose the 1st Respondent *bonafide* in transacting with the 2nd and 3rd Respondents were pleaded in the Appellants' written statement of defence, counterclaim and were proved at trial. Counsel prayed that this honourable court finds merit in the appeal. Counsel reiterated the Appellants' earlier prayer and maintained that the appeal be allowed, the judgment and orders of the trial court be set aside with costs of this appeal and in the lower court and any other orders that this honourable court deems fit.

Court's consideration

90. The principles of law in respect to conducting due diligence or thorough investigations before purchase of any land have been well explored by various courts of record and decided upon. The Court of Appeal in the case of **Haji Nasser Katende v. Vithalidas Halidas & Co. Ltd., CACA No. 84 of 2003**, held that:

> *"Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations; not only of the land but of the sellers before purchase".*

91. It is therefore important for a purchaser to make reasonable inquiries of the persons in possession and use of the land he or she intends to purchase. According to the case of **Ibaga Taratizio v. Tarakpe Faustina Civil Appeal No. 4 of 2017**, the standard of due diligence imposed on a purchaser of unregistered land is much higher than that expected of a purchaser of registered land.

92. In his testimony during trial, the 1st Respondent told the lower court that in June, 2015, as he was looking for land to buy along Gayaza Road, one of the brokers took him to the suit land with whom he inspected the land. That after appreciating and expressing interest to buy the land, the broker took him to the 2nd Respondent who told him that he wanted to sell the suit land to get money for their mother's treatment and to organize their late father's last funeral rites.

93. P.W.1 further testified that when the 2nd Respondent told him that the suit land was a titled land, he asked for a copy of the title to enable him carry out the search in the Lands Office to authenticate its status which he did and he indeed carried out a search at Mukono Lands Office and found that the land was registered in the names of the 2nd and 3rd Respondents and that it had no encumbrances.

94. D.W.4 also testified at page 116 of the record of appeal that the 1st Respondent searched the land and confirmed their ownership. That he first took the 1st Respondent to the land for inspection wherefrom he showed him the boundary marks. That at that time, the Appellants were not cultivating the land. Both D.W.4 and D.W.5 testified that they sold the suit land to the 1st Respondent free from any encumbrance. This is evidenced by Plaintiff's exhibit P2 admitted in evidence which clearly indicates no encumbrance thereon.

95. In light of the above, I hold that the 1st Respondent conducted reasonable due diligence prior to the purchase of the suit land and hence the sale transaction between the 1st Respondent on one hand and the 2nd and 3rd Respondents on the other hand was lawful. Therefore, the 2nd and 3rd grounds of appeal fail.

96. Pursuant to the foregoing, I find no merits in this appeal and it is hereby dismissed with costs to the Respondents. The orders of the lower court are hereby confirmed except that the costs of the lower court are also awarded to the 2nd and 3rd Respondents. The interest on costs at the rate of 8% per annum from the date of judgment by the

lower court until payment in full is hereby awarded to all the Respondents I so order accordingly.

This judgment is delivered this 19th day of April, 2024 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Muhumuza Edwin from M/s Nabukenya, Mulalira & Co. Advocates, for the Appellants;

(2) Counsel Shwekyerera Philemon from M/s Shwekyerera Advocates & Solicitors, for the 1st Respondent;

(3) Counsel Wanyama John from M/s Nsubuga Mubiru & Co. Advocates, for the 2nd & 3rd Respondents;

(4) Mr. Kafeero Shaban, the 2nd Appellant;

(5) Mr. Rwantale Gilbert Nelson, the 1st Respondent;

(6) Mr. Nsubuga Asuman, the 2nd Respondent;

(7) Ms. Pauline Nakavuma, the Court Clerk.