

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 09 OF 2012

1. MUGERWA MULIISA PAUL
2. NABAKKA ELIZABETHAPPELLANTS

VERSUS

TWAHA KIGANDA RESPONDENT

(Arising from Mpigi Chief Magistrates Court Civil Suit No. 74 of 2008)

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The brief facts of this appeal are as follows. The appellants were the registered proprietors of land comprised in Block 265 plot 5775 at Bunamwaya – Kyadondo, which is hereinafter referred to as the suit land. Sometime in 2006 the respondent allegedly trespassed onto the suit land and constructed a structure on it. The respondent is further alleged to have demarcated portions of the suit land and sold them to 3rd parties including a one Hassan Kirunda. The respondent disputed the appellants’ alleged ownership of the suit land, contending that it was procured fraudulently while, conversely, he was the rightful proprietor to the same land having purchased and occupied it way before the purported registration by the appellants. He further contended that the appellants’ suit before the trial court was intended to frustrate the enforcement of an earlier High Court decision in Civil Suit No 185 of 2005 in respect of the same land, and to which he was party.

The appellants subsequently amended their plaint, adding Hassan Kirunda as a 2nd defendant to the suit and alleging that while the suit land was accessed by plot 2849, the present respondent encroached upon that plot and subsequently sold a portion thereof to the said Kirunda. In his written statement of defence the 2nd defendant contended that the appellants were not in occupation of the suit land when he acquired and entered into occupation thereof; that his title to the suit land was derived (purchased) from a one Beat Namuli who had been a *bona fide* occupant to the suit land for more than 12 years prior to the enactment of the 1995 constitution; and that the access road to the suit premises was not blocked as alleged as there was another

access road thereto that had always been in use. However, the 2nd defendant subsequently executed a consent judgment dated 10th October 2011 in which he *inter alia* conceded to having blocked the appellants' access road and agreed to give them vacant possession of the suit land; he admitted to having been a trespasser on a neighbouring plot – Block 265 plot 2849; and finally, conceded that all the agreements between himself and the present respondent in respect of that plot of land were null and void *ab initio* and as such he had no proprietary interest in that plot.

I shall state at the onset that this court did not come across any judgment in respect of Civil Suit No 185 of 2005 in reference. What was on record and annexed to the respondent's written statement of defence (WSD) were pleadings in respect thereof. Further, the fraud alluded to in the same WSD was premised on the purported intention by the appellants to frustrate the decision in that unseen judgment. It is trite law that fraud should be specifically pleaded, particulars thereof provided and these particulars must be strictly proved. Be that as it may, fraud is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud, it is not necessary to explicitly allege the fraudulent intent; from the acts fraudulent intent may be inferred. See **Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC)** and **B.E.A Timber Co. vs Inder Singh Gill (1959) EA 463.**

This court has carefully perused the pleadings in the present appeal. The fraud alluded to was never particularised in the respondent's WSD, the judgment in question was not appended to the said pleadings and as such the alleged fraud cannot be inferred there from. I therefore find that fraud has not been properly pleaded or sufficiently proved before the trial court.

The trial court decided the dispute in favour of the respondent, hence the present appeal by the appellants. The grounds of appeal under consideration presently can be summed up as follows:

- 1. The trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and held that the appellants had no interest in the suit land while the respondent was a *bona fide* occupant on a *kibanja* holding thereon.**
- 2. The learned trial magistrate erred in law and fact when he believed that in 2001 there could have been a legally valid sale of *kibanja* by a tenant to any other person without giving first option of purchase to the registered proprietor of the land as provided by the then section 36 of the Land (Amendment) Act, 1998.**
- 3. The trial magistrate erred in law and fact when he decided the matter without visiting the locus in quo to ascertain whether or not the respondent's predecessors in title were *bona fide* occupants of the suit premises.**
- 4. The trial magistrate erred in law and fact when he ignored the contents a High Court decision in Civil Suit No. 128 of 2009 dated 30th September 2009.**

At the hearing of the appeal Mr. Sam Kiwanuka appeared for the appellants while Mr. Farouk Sebunya represented the respondent.

In his written submissions, Mr. Kiwanuka referred this court to the cases of **Father Nasensio Begumisa & 30 others vs. Eric Tibebaga civil appeal No. 19 of 2002** (SC) and **Zaabwe vs Orient Bank & 5 others (2007) HCB Vol. 1, 25** in support of his argument that a first appellate court was enjoined to re-evaluate the evidence on record in appeal. He then went on to simply restate grounds 1, 2, 3, 4, 5, 6, 7 and 9 of the memorandum of appeal as the instances that, in his opinion, illustrate the trial courts omissions as far as evaluation of evidence is concerned. Counsel treated the outstanding grounds of appeal, 8 and 10, in similar flippant manner. On his part, learned counsel for the respondent raised 2 preliminary points of law, first, that the present suit had been filed out of time and, secondly, that the memorandum of appeal offended the provisions of Order 43 rule 2 of the CPR. With regard to the merits of the appeal, Mr. Sebunya supported the findings of the trial magistrate, contending that he had properly evaluated the evidence and arrived at the right conclusions.

This court proposes to consider the preliminary points of law raised by learned respondent counsel prior to a determination of the re-phrased grounds of appeal.

First, as rightly stated by Mr. Sebunya, section 79(1)(a) of the CPA provides for appeals to be lodged within 30 days from the date of extraction of the judgment decree that gives rise to the appeal. Section 79(2) of the same Act enjoins courts to take into account the period taken in preparation of the record of proceedings in respect of which the appeal arises. In the present appeal this court's record bears a letter from the assistant registrar of the High Court's Land Division ref LDCA/09/12 and dated 10th July 2013 that seeks certified copies of the judgment and record of proceedings in question from the trial court. It would appear that this request, appearing more than 1 year after the extraction of the judgment decree dated 20th February 2012 could have occasioned the delay in having the judgment and lower court record prepared for this appeal. The record does not indicate when the certified documents sought were received by the High Court so as to enable a deduction of whether indeed the present appeal was lodged out of time.

Be that as it may, learned appellant counsel referred this court to the decision in **Sarah Asimwe vs. Festo Byenkya civil appeal No. 94B of 1994** (HC) where Mukasa-Kikonyogo J. (as she then was) held:

“In the absence of evidence showing that the record of proceedings was availed to the appellant within 30 days of the date of judgment, it would not be proper to hold that the appeal was lodged out of time.”

I do respectfully agree with that position.

Section 102 of the Evidence Act places the burden of proof on such party as would fail if no evidence at all were given by either party. That is precisely the position presently; neither the appellant nor respondent have furnished evidence in proof, either way, of when time for appeal started to run. Under such circumstances, section 102 places the burden of proving his

allegations of time-bar upon the respondent. The respondent has not furnished any evidence in proof of the alleged late filing of this appeal. I would therefore over-rule him on this preliminary objection.

Secondly, Order 43 rule 2 of the CPR does indeed provide for the contents of a memorandum of appeal. This court has considered the memorandum of appeal in issue presently against the provisions of this rule and does not agree with the submission of learned counsel that the grounds enumerated therein are either argumentative or narrative. In my view, the grounds do outline the appellant's points of dissatisfaction with the decree appealed against, simply breaking down item by item the specific instances of the appellant's complaint with regard to non-evaluation of evidence by the trial magistrate. Learned counsel could very well have argued each ground in more detail but inexplicably chose not to do so. Nevertheless, his preferred approach would not render the memorandum of appeal defective. I would therefore over-rule the second objection as well.

I now revert to the merits of this appeal.

As quite rightly stated by Mr. Kiwanuka, a first appellate court does have a duty to subject the evidence adduced before a trial court to fresh scrutiny and arrive at its own independent conclusions on each ground of appeal. See **J. Muluta vs S. Katama Civil Appeal No.11 of 1999 (SC)**. It is also well settled law that an appellate court will always be loath to interfere with a finding of fact arrived at by a trial court and will only do so when, after taking into account that it has not had the advantage of studying the demeanour of the witnesses, it comes to the conclusion that the trial court is plainly wrong. See **Kasifa Namusisi & Others vs Francis M.K. Ntabaazi Civil Appeal No. 4 of 2005 (SC)**, **Jiwan vs Gohil (1948) 15 EACA 36** and **R.G.Patel vs Lalji Makaiji (1957) EA 314**. Stated differently, a first appellate court has a duty to re-appraise or re-evaluate evidence, save for the manner and demeanour of the witnesses where it must be guided by the impression made on the trial judge. See **Banco Espanol vs Bank of Uganda Civil Appeal No. 8 of 1998 (SC)**.

The allegedly improper evaluation of the evidence on record is at the heart of the first ground of appeal under consideration presently. The appellants' interest in the suit land was attested to by the appellant (PW1), the vendor from whom he allegedly purchased the suit land (PW2) and a long serving Chairman LC1 of the area where the suit land is situated (PW3). In a nutshell PW1 testified that he and the 2nd appellant were the registered proprietors of the suit land, which they bought from PW2 in 1999. This evidence was corroborated by PW2, who acknowledged selling to the appellants 2 acres from his land described as Block 265 plot 2850 in Bunamwaya. This court has seen the copy of the land title that was apparently tendered into court without objection from respondent counsel, but curiously was not given an exhibit number by the trial magistrate.

PW1 further testified that the original 2 acre land was described as Block 265 plot 2850 in Bunamwaya Gombe B; included an access road and, at the time of purchase, was only occupied

by a one Lazaro Membe whom the appellants duly paid off. This, too, was supported by the evidence of PW2, who testified that he originally owned 40 acres of land comprised in Block 265 plot 148 in Kyadondo; he later sold off 10 acres to a church and carved out other plots of land leaving plot 2850 from which the suit land was demarcated. It was also PW2's evidence that although there were a few *bibanja* holders on plot 2850 the 2 acres described as plot 5775 that he sold to the appellants was unoccupied at the time. PW3 did also attest to the suit land having been empty when it was sold to the appellants although there was an old man cultivating part of the residual land comprised in plot 2850.

Finally, it was PW1's evidence that in 2006 the respondent trespassed onto the suit premises; constructed a permanent structure on it and sold part of the outstanding land to the then 2nd defendant, who has since executed a consent judgment with the present appellants. The witness further testified that the structures constructed by both gentlemen were on the suit land, as well as an adjoining access road, depriving the appellants of their property and access thereto. This evidence was corroborated by PW3, who attested to the respondent and the then 2nd defendant constructing houses on the suit land. It was not denied by the respondent either.

The respondent testified that he was a *kibanja* holder on the suit land having purchased the same from a one Namuli Biti, who in turn 'acquired' it from her mother, now deceased. He further testified that he had been introduced to PW2, his landlord, by DW2. The respondent contended that the appellants appeared to have had a grudge against him as they had settled the present dispute with the 2nd defendant but ignored his overtures for an out-of-court settlement. Under cross examination the witness stated that at the time he purchased his alleged *kibanja* he did not inquire from Namuli Biti how long she or her mother had been on the land or whether she (Namuli) occupied the land with the consent of the landlord; while under re-examination he averred that when he first came to the village in the 1970s he used to see Namuli's mother's gardens on the suit land. DW2, on her part, testified that Namuli's mother had inherited the suit land from a one Lucia who allegedly died 'around 1969'. The same witness attested to having found the said Lucia on the same piece of land in the 1970s! Further, she initially testified that the said Lucia left a will bequeathing the suit land to Namuli's mother, but subsequently stated that the will was oral although she was not there. The witness, an alleged witness to the respondent's sale agreement with Namuli, testified that at the time of the purchase there was a potato garden on the suit land.

Section 59 of the Registration of Titles Act (RTA) provides as follows:

“No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or

power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.” (*emphasis mine*)

Clearly, therefore, a certificate of title is conclusive evidence of the registered proprietor's ownership thereof. It can only be impeached on account of fraud in registration, which was never in issue in the present appeal. I do therefore find that the appellants did discharge the onus of proof of their proprietary interest in the suit land. The trial magistrate plainly erred when he ruled that they had no proven interest in the suit land.

The question, then, would be whether the respondent was a *bona fide* occupant and/ or *kibanja* holder on the appellants' land as alleged and, if not, whether the appellants are entitled to a remedy against him for trespass to land as pleaded before the trial court.

The facts of the present case are that the appellants are the registered proprietors of private mailo land comprised in Block 265 plot 5775 at Bunamwaya, Kyadondo. Mailo land is held in perpetuity '**subject to the customary and statutory rights of those persons (in) lawful or bona fide occupation of the land at the time the (mailo) tenure was created and their successors in title.**' See section 3(4) (c) of the Land Act as amended. In the present case the respondent claims to be a *kibanja* holder on the same land, having acquired his interest therein from his predecessors in title, Namuli Biti and her deceased mother, a one Thereza. Therefore, the appellants may enjoy their proprietary rights over the suit land, subject to the respondent's purported customary and statutory rights, if it is proved that his predecessors in title were indeed in lawful or *bona fide* occupation of the land at the time a mailo interest was created thereon. The respondent would enjoy such customary and statutory rights over the suit land as the 2 ladies' successor in title.

The terms 'lawful occupant' and 'bona fide occupant' are defined in sections 29(1) and (2) of the Land Act as amended. For present purposes, 'lawful occupant' would mean a person owning land by virtue of the Busuulu and Envujjo Law of 1928; a person who entered the land with the consent of the registered owner and includes a purchaser, or a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title. See subsections (a), (b) and (c) of section 29(1) of the same Act. The first and last components of this legal provision are applicable to the respondent's predecessors in title as clearly he was not in the picture at the time. It has been posited that the persons envisaged under section 29(1)(a) are customary *bibanja* owners on mailo and other native freehold land. See **Mugambwa, John T., 'Principles of Land Law in Uganda', Fountain Publishers, 2006 reprint, p.10.** I do agree with this position. Therefore, essentially persons, such as the respondent's predecessors in title, that claim under section 29(1) (a) and (c) would be *bibanja* holders and customary tenants respectively and must be proven as such.

Customary tenure is defined in section 3(1) of the Land Act (as amended). By virtue of section 3(1)(b) of the Act, customary tenure is regulated by customary laws and/ or practices of a particular grouping of people to which it applies. Section 3(1)(c) of the same Act extends the applicability of such customary law and practices to persons acquiring land in such area.

In the case of **Ernest Kinyanjui Kimani vs. Muira Gikanga (1965)EA 735 at 789**, it was held:

“As a matter of necessity, the customary law must be accurately and definitely established. ...The onus to do so is on the party who puts forward the customary law. ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.”

Conversely, section 8(1) of the Busuulu and Envujjo Law provides as follows on *kibanja* holding:

“Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner except –
(a) the wife or child of the holder of a *kibanja*; or
(b) a person who succeeds to a *kibanja* in accordance with native custom upon the death of the holder thereof.”

The requirement for proof of a landlord’s consent was reiterated in **Muluta Joseph vs. Katama Sylvano** (supra) where it was held that that an agreement purporting to sell and transfer a *kibanja* holding was not sufficient proof of acquisition of a lawful *kibanja* holding in the absence of proof of the essential fact that would have constituted creation of the *kibanja* holding, namely consent of the mailo owner.

It is apparent from the foregoing precedents and legal provision that customary tenure must be proved by proof of applicable customary laws and practices; while *kibanja* holding on mailo land is dependant on proof of consent by the landlord for such occupation of his/ her land, or proof of succession to the conceded *kibanja* holding in accordance with applicable customary practices. The latter aspect also requires proof of customary practices.

I have carefully re-evaluated the evidence on record on this issue. No evidence was adduced by the respondent as would sufficiently prove that his predecessors in title were indeed customary tenants or *kibanja* holders. No attempt was made to establish the tenure-related customary laws and practices applicable in Bunamwaya, Kyadondo where the suit land is situated; neither was any evidence adduced to illustrate compliance with those established practices by the respondent’s predecessors in title. Instead, the respondent’s evidence portrayed a disarming indifference to the proprietary interest of the persons he allegedly found in occupation of the suit premises. He attested to not having inquired into their proprietary interest or, indeed, whether they had occupied the suit premises with the land lord’s consent. Such consent cannot be presumed by this court but must be proved. Consequently, I do hold that the respondent did not prove that he was a successor in title to lawful occupants or *kibanja* holders within the precincts of section 29(1)(a) or (c) of the Land Act.

Be that as it may, the respondent did allude to a claim of lawful occupancy under section 29(1)(b) of the same Act. He attested to having purchased his *kibanja* on the suit premises and purportedly occupied that land with the knowledge of the registered owner. His evidence in this regard was that after he had purchased his *kibanja*, PW2 (his landlord) discovered that he was in occupation thereof whereupon he was taken to the latter's home by DW2 and introduced to him. According to the respondent, upon being introduced to PW2, the latter told him that he had to sort out some things pertaining to the land. PW2, however, testified that he did not know the respondent, having only seen him when he was brought to his house by DW2, a resident of land neighbouring the suit land. It was PW2's evidence that when he came to his land, the respondent was looking for a way to stay on the suit land but he (PW2) informed the respondent that he was unable to assist him.

It would appear to me that the provisions of section 29(1)(b) are such that a claimant thereunder should have entered onto the land in question with the *consent* of the registered owner. Occupation of land with the alleged knowledge but NOT consent of a registered owner would not prescribe a claimant as a lawful owner within the meaning of that legal provision. There was no evidence adduced in the present case that the respondent entered onto the land in question with the consent of PW2, whom he chose to acknowledge as the owner thereof; certainly there was no evidence to prove that he entered onto the suit land with the consent of the appellants, the proven registered proprietors thereof. In any event, the person recognised by the respondent as having been his 'landlord' was not the registered proprietor of the suit premises; neither was any consent forthcoming from either him or the actual proprietors after the event. I therefore find that the respondent was not a lawful occupant of the suit premises, neither have his predecessors in title been proven to have been lawful occupants of or *bibanja* holders on the suit land.

I now revert to a consideration of whether or not the respondent or his predecessors in title were *bona fide* occupants on the suit land. In his judgment the trial magistrate held the respondent to have been a *bona fide* occupant on the suit land. This finding is in issue in the present appeal under grounds 1 and 3 hereof. The term '*bona fide* occupant' is defined in section 29(2) of the Land Act. For present purposes it would entail '**a person who before the coming into force of the Constitution had occupied and utilised or developed any land unchallenged by the registered owner (or agent of the registered owner) for 12 years or more.**'

The onus to prove this claim fell upon the respondent. *See sections 101 and 102 of the Evidence Act.* His evidence fell short of sufficient proof that Namuli Biti, from whom he claimed to have derived interest in the suit land, was indeed a *bona fide* occupant. The evidence with regard to the circumstances under which the said Namuli inherited the alleged *kibanja* was laced with numerous contradictions. DW2, the sole defence witness on this issue, contradicted herself as to whether the said Namuli's mother was alive and tilling the land in the 1970s or had passed on earlier in 1969, or indeed, whether she left an oral or written will bequeathing the disputed land to the respondent's alleged predecessor in title. To compound matters, like DW2, the respondent's evidence was similarly laced with blatant falsehoods and contradictions that

negated its cogency. For instance, the respondent who attested to being 34 years when he testified before the lower court, meaning he was born in 1977, then went ahead to state under re-examination that he used to see a one Thereza, mother of Namuli from whom he allegedly derived title, tilling the land in the 1970s. This was rather ‘interesting’ evidence coming from a witness that, at most, would have been a 2 year old toddler in 1979! In this regard, the defence evidence was neither credible nor cogent. In so far as they relate to proof of the respondent’s interest in the suit land, the credibility questions hanging over this evidence go to the root of this matter and cannot be ignored by this court. They point to the non-authenticity of the respondent’s claim over the suit land.

On the other hand, the respondents’ evidence was fairly consistent save for the discordance as to whether Lazaro Membe was on the suit land when it was sold or the suit land was completely unoccupied at the time. This would appear to me to be an immaterial disparity given that the net effect of the evidence was that the respondent’s alleged predecessors in title were not in occupation of the suit land at the time. I would therefore find the appellants’ evidence comparatively more cogent and credible than that of the respondent. On a balance of probabilities, therefore, I find that the evidence before the lower court did not sufficiently establish either the respondent or his alleged predecessors in title as *bona fide* occupants of the suit land. The trial magistrate erred when he held to the contrary. In the result ground 1 hereof is allowed.

Having so found, the question of the validity of the sale transaction between the respondent and Namuli as raised in ground 2 hereof would appear to be redundant. I so hold.

With regard to the third ground of appeal hereof, the question would be whether or not visits to *locus in quo* are mandatory and, if not, the circumstances under which they would reasonably be required. This question was addressed quite persuasively in the case of **Safina Bakulimya & Another vs. Yusufu Musa Wamala Civil Appeal No. 68 of 2007**. In that case, Mulyagonja Kakooza J held:

“Visits to the *locus in quo* are (also) provided for by Practice Direction No. 1 of 2007, where guideline 3 provides that during the hearing of land disputes the court should take interest in visiting the *locus in quo*, and lays down what should happen when it does so. However, a visit to the land in dispute is not mandatory. The court moves to the *locus in quo* in deserving cases where it needs to verify the evidence that has been given in court, on the ground. It is my view that such visits are necessary to enable the court to determine boundaries of the land in dispute or the special features thereon, especially where this cannot be reasonably achieved by the testimonies of the witnesses in court.” (emphasis mine)

In the present appeal the boundaries of the suit land do not appear to have been in dispute. This is neither reflected in the pleadings before the trial court nor in the framed issues, neither can it

be inferred from the dispute under consideration. What was primarily in dispute was the interests of either party in the suit land. The land in issue was duly registered and demarcated, and the appellants had legal title thereto. The issue was whether or not the appellants' proprietary interest was subject to the respondent's alleged customary and statutory rights viz the suit land as provided under section 3(4)(c) of the Land Act. This issue has been resolved in the negative by this court. Consequently, I would hold that visits to *loci in quo* are not mandatory, and the omission to visit the *locus in quo* in the present case did not occasion a miscarriage of justice. In any event, the evidence on record was to the effect that the respondents' alleged predecessors in title had since died or otherwise left the suit land. Therefore, a visit to the suit land purporting to establish whether they were *bona fide* occupants would have been superfluous. Ground 2 hereof is, therefore, disallowed.

Finally, as ground 4 hereof, it was contended for the appellants that the trial magistrate erred by ignoring a High Court decision in Civil Suit No. 128 of 2009. This court has perused the judgment in question. It provides reasons of the court in an apparently consent judgment dated 4th December 2009. The plaintiffs in that suit were the present appellants and PW2. They successfully sought a declaration from court that they were the rightful proprietors to numerous plots of land that were sub-divided from land described as Kyadondo Block 265 plot 148 at Bunamwaya. The plots in question include plot 2850, out of which the present suit land was demarcated. The ownership of this plot of land was never in dispute in the case before me presently. The respondent did concede to PW2 being his landlord with regard to the suit premises. Thus, he implicitly acknowledged PW2's proprietary interest in the original plot 2850. What was in contention before the trial court was the appellants' interest in the plot 5775 that had been curved out of plot 2850. Consequently, with respect to counsel, this court fails to deduce the relevance of the judgment in question to the dispute that was before the trial magistrate. This ground of appeal, therefore, also fails.

For completion, before I take leave of this appeal I shall briefly address the issue of whether or not the respondent was a trespasser on the suit land, which question the trial magistrate answered in the negative.

The tort of trespass to land was aptly re-stated in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)**. In that case, Mulenga JSC held:

“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass.” (*emphasis mine*)

His lordship cited with approval the decision in Moya Drift Farm Ltd vs. Theuri (1973) E.A. 114 at 115, and further held:

"I think the decision in Moya's case represents what the law should be in Uganda. It is an authority. I therefore, hold that a person holding a certificate of title has, by virtue of that title, legal possession, and can sue in trespass."

Having found that the present respondent has not been sufficiently proved to have any legally recognised interest in the suit land, it would follow that his unauthorised entry upon the suit land constituted the tort of trespass to land. Further, given that the appellants have been found to be the duly registered proprietors of the suit land they did have locus to institute the legal proceedings in the trial court. I so hold.

In the final result, I would allow this appeal with the following orders:

1. A declaration is hereby granted that the respondent is a trespasser on the land comprised in Kyadondo Block 265 plot 5775 in Bunamwaya.
2. A declaration is hereby granted that the respondent obstructed and blocked an access road to the suit land, which road is comprised in Kyadondo Block 265 plot 2849.
3. It is hereby ordered that the respondent be evicted from the suit land.
4. A permanent injunction does issue against the respondent restraining him, his servants and/ or agents from continuing in occupation of the suit land or disturbing the appellants' enjoyment of the same.
5. A permanent injunction does issue against the respondent restraining him, his servants and/ or agents from continuing in occupation of the access road comprised in Kyadondo Block 265 plot 2849; or disturbing the appellants' enjoyment of the same.
6. General damages for trespass to the appellants in the sum of Ushs. 40,000,000/=.
7. Costs in this and the trial court are awarded to the appellants.

I so order.

Monica K. Mugenyi
JUDGE

20th September, 2013