

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MPIGI**  
**CIVIL APPEAL NO 34 OF 2017**  
**ARISING FROM CIVIL SUIT NO. 129 OF 2015**

1. **JOYCE NAKAKANDE**  
2. **MEDI KAYIWA ::: APPELLANTS**
- VERSUS**
1. **NALWANGA OLIVER**  
2. **EMMANUEL SEBUNYA ::: RESPONDENTS**

**BEFORE: HON.MR.JUSTICE W. MASALU MUSENE**

**JUDGMENT**

The Appellants/Plaintiffs instituted a suit against the Respondents/defendants for trespass, vacant possession, permanent injunction, general damages and costs to the suit in respect of the land comprised in **Busiro, Block 349 plot 218** situated at Nalumunye, Wakiso District.

The appellants' case is that the 1<sup>st</sup> appellant was the registered proprietor of the suit land who had earlier on sold it to **Kasozi Dan**. That the said Kasozi sold the same to the 2<sup>nd</sup> Appellant who got himself registered on the suit land. That the 2<sup>nd</sup> appellant failed to utilise the land because of the 1<sup>st</sup> respondent's claims that the land belonged to her having purchased the same from the 2<sup>nd</sup> respondent.

The respondents' case is that the 2<sup>nd</sup> respondent acquired the said land after an exchange with a one **Luwemba Moses** who had acquired it from his paternal aunt **Aidah Najoba** who gave her blank transfer forms signed by her. The 2<sup>nd</sup> respondent/defendant then sold the said piece of land to the 1<sup>st</sup> respondent/defendant free of any encumbrances who occupied it for 9 years and constructed a house on it until 2013 when the 1<sup>st</sup> and 2<sup>nd</sup> appellants started claiming an interest in the said land.

At trial in the lower court, the issues were whether the defendants/respondents were trespassers and remedies available to the parties. The case was decided in favour of the respondents where it

was held that they were not trespassers hence this appeal by the appellants being dissatisfied with that holding.

The grounds of appeal raised by the appellants are that;

1. The learned trial magistrate erred in and fact when she failed in her duty to subject the whole evidence of the appellants to an exhaustive legal scrutiny which led her to arrive at a wrong decision.
2. That the learned trial magistrate erred in law and fact when she fundamentally misdirected herself to the law in regard to land laws specifically section 59 RTA cap 230 which led to a miscarriage of justice and thereby arriving at a wrong decision.
3. That the learned trial magistrate erred in law and fact in holding that the disputed land belongs to the respondent whereas not.

The appellants were represented by M/S Tumwebaze, Atugonza, Kobusingye Advocates while the respondents were represented by M/S Kawanga & Kasule Advocates. Both counsel filed their written submissions.

Counsel for the appellants argued ground one and two together where he submitted about the duty of the first appellant court and went ahead to fault the trial magistrate for improper evaluation of the evidence as a whole, in particular the 2<sup>nd</sup> appellant's evidence of how he acquired and got registered on the suit land.

Counsel for the Appellants submitted that it was the 2<sup>nd</sup> Appellant's evidence on page 2 of the lower court proceedings that he bought the suit property in 2013 from Kasozi who had failed to complete the purchase price of the 1<sup>st</sup> plaintiff. That he acquired transfer forms signed and the duplicate certificate of title from the 1<sup>st</sup> plaintiff as the then registered proprietor. That he inspected the land before buying and that there was a foundation stone of a house, he inquired from one of the neighbours, Jackson Semaganyi and the LC1 who assured him that indeed the land inclusive of the foundation belonged to the 1<sup>st</sup> plaintiff/appellant. That he then proceeded to fence off the land.

Further, that the 1<sup>st</sup> appellant never received any money from the 1<sup>st</sup> defendant in respect of the suit land. That the 1<sup>st</sup> plaintiff/appellant acquired the suit land from her grandmother Aidah Najjoba and she transferred the 3 plots in her name, that she never agreed on any money nor

received the same from the 2<sup>nd</sup> respondent/defendant. Further still, that PW3 testified that Nakakande Joyce has ever sold to Nalwanga Oliver a plot but it was a different one from the suit land. That the land belonged to Kayiwa Medi as the title shows it came from Aidah Najjoba then Joyce Nakakande and then to Medi Kayiwa. Counsel also stated that the evidence of the 1<sup>st</sup> appellant was consistent while the defendant's was inconsistent and contradictory in the lower court.

It is counsel's submission that if the above evidence is properly weighed and evaluated visa viz the laws regarding land ownership, in particular counsel referred to **section 59, RTA** to the effect that certificate of title is conclusive evidence of ownership. Further, that **section 176 RTA** a registered proprietor of land is protected against an action for ejectment except for fraud. Counsel also relied on the case of **John Katarikawe V William Katwiremu [1977] HCB 187** where it was held that provisions of **Section 61 (now 59) of the RTA** are clear that once a person is registered as a proprietor of land, his title is indefeasible except for fraud.

Counsel for the Appellants contended that it was and is on record and not challenged that the 2<sup>nd</sup> appellant does possess a certificate of title and that no evidence was adduced by the respondents that the 2<sup>nd</sup> appellant's title was acquired by fraud to warrant impeachment. Further that the 2<sup>nd</sup> respondent's unregistered interest cannot be compared to or outweigh the 2<sup>nd</sup> appellant's registered interests.

Counsel thus stated that had the trial magistrate properly considered such evidence, and the law in that regard, she would have reached a different decision.

On the other hand, counsel for the respondents submitted that the trial Magistrate properly evaluated the law in regard to trespass and section 59 of the RTA. That in the case of **Lutaya V Stirling Civil Engineering Co. Ltd, C.A NO.11 of 2011, Mulenga J.SC.** At page 8 held that;

***“Trespass to land occurs when a person makes an unauthorised entry upon land and there by interferes or portends to interfere, with another person's lawful possession of that land; it is committed against a person in possession. 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”.***

Counsel also stated that the Respondents' evidence at trial was consistent compared to that of the appellants. That DW1 testified that she is a sister to the 1<sup>st</sup> appellant and the said land was given to Luwemba Moses by Aidah Najjoba who gave land to 5 people including the 1<sup>st</sup> appellant, Joyce Nakakande and the 2<sup>nd</sup> respondent, Emmanuel Sebunya. He added that the 1<sup>st</sup> appellant was not given the entire land but a portion which she developed and later sold to the 1<sup>st</sup> respondent, Oliver Nalwanga. He also testified on page 14 that Luwemba exchanged the portion he was given with Sebunya and it is now the land in dispute. Counsel further argued that the respondent acquired the land as a gift *intervivos* from his aunt Aida Najoba, and that he was given transfer forms signed by Aida Najoba to change the land into his names and thereafter he exchanged the same land with Sebunya Emmanuel the 2<sup>nd</sup> respondent.

Counsel also stated that DW4 testified that she bought the land from the 2<sup>nd</sup> respondent, cultivated on the land and later built on it. That she never transferred the land into her names. It was also stated that she discovered that the title had changed from the Aidah Najoba to Joyce Nakakande whom she asked to transfer the title into her names but was told to first pay 1.5 million shillings before she could sign for her the transfer. That by the time she brought the said amount, the 1<sup>st</sup> appellant had already sold the land to another person. That the 2<sup>nd</sup> respondent tried to lodge a caveat but he was informed that the file was missing.

Counsel stated that PW1 testified that he bought the land in 2013 with a foundation on it which he asked the neighbour who told him it belonged to the plaintiff. Further that PW3 testified that Olive Nalwanga was on the land and the house thereon was hers but the ownership belonged to someone else. That the 2<sup>nd</sup> plaintiff/appellant bought the land without making reasonable inquiries as to the ownership as the land was in occupation of the 1<sup>st</sup> respondent.

I have carefully considered the submissions of both counsels for the appellant and for the Respondent as far as grounds 1 and 2 of appeal are concerned. Both grounds basically touch on evaluation of evidence. Needless to emphasise, it is the duty of this Court as a first appellant court to re-evaluate the evidence afresh and arrive at its own conclusions as to whether the findings of the trial magistrate can be supported or not. See Uganda **breweries vs Uganda Railways Corporation S.C.C.A NO. 6 of 2014.**

The case for 2nd Appellant, Medi Kayiwa who testified as PWI was that he bought the land in dispute in 2013 after one Kasozi had failed. He added that it was Kasozi who took him to the 1<sup>st</sup> appellant (PW2), Joyce Kakande). And PWI's further testimony on page 2 of the lower court proceedings was that the 1<sup>st</sup> appellant signed transfer forms in his names and gave him the duplicate Certificate of title, in respect of Block 349 Plot 28281 which he registered in his names on 24.5.2013. The Certificate of title was admitted in evidence as **Plaintiff's exhibit No. 1** amidst no objection from counsel for the Defendants (now Respondents).

When 2<sup>nd</sup> Appellant approached the L.C I Authorities to stop the further construction of the house and trespass, the 2<sup>nd</sup> Respondent was reported to be adamant. During cross-examination by Counsel for Respondents now, PWI testified that before buying the disputed premises, he asked one Mr. Jackson Semaganyi, an immediate neighbour who confirmed the land belonged to the 1<sup>st</sup> Appellant, Joyce Nakakande. Medi kayiwa 2nd appellant added that when the L.C I Chairman confirmed the land was for 1st Plaintiff Joyce Nakakande, he believed the foundation thereon was also hers as she had the title in her names. PWI concluded that when he fenced the land, then 2nd Defendant's workers removed the fence. The 2<sup>nd</sup> Appellant was supported by PW2, Nakakande Joyce on page 5 of the proceedings. She clearly testified that she sold the land in dispute to Medi Kayiwa as it was hers and dully registered in her names. PW2 also confirmed that she signed the transfer forms for Medi Kayiwa, 2nd appellant, and during cross-examination, PW2 testified that she got the plot from her grandmother, one Aida Najoba with transfer forms.

**Joyce Nakakande** also added that other people given plots by **Aida Najoba** like Wassajja were also given transfer forms, while one Namukasa sold hers before getting transfer forms.

**Joyce Nakakande** concluded that she never got any money from 2nd Defendant, **Maweri Sebunya**.

The case of **Medi Kayiwa** was supported by PW3, **Semaganyi Jackson**, an immediate neighbour to the disputed land. On page 8 of the proceedings, PW3 confirmed that **Nakakande Joyce** was the Registered Proprietor of the disputed plot who sold it to **Medi Kayiwa**. On page 10 of the proceedings under Re examination, PW3 reiterated that it is **Medi Kayiwa** who is the owner of the disputed land and not **Oliver Nalwanga**.

This Court finds the case of the appellant consistent and straight forward. The 2nd Appellant, Kayiwa bought from the 1st appellant the disputed land which was registered in her names and she transferred it to the 2nd Appellant who is now the Registered Proprietor.

However, the case for the Defendants, Nalwoga **Oliver** and **Emmanuel Ssebunya** was uncoordinated and contradictory in material particulars. **Emmanuel Ssebunya**, the 2nd Appellant testified that the land in dispute was his, which he exchanged with one **Luwemba Moses**. On page 16 of the proceedings, **Emmanuel Ssebunya** testified as DW3 and he stated that he gave **Luwemba Moses** another portion and **Luwemba Moses** gave him the one in dispute before Court. **Luwemba Moses** testified as DW2. On page 14 of the proceedings, **Luwemba Moses** testified that the land in dispute was given to him by **Aidah Najoba**, her aunt as a gift inter vivos. DW2 added:-

*“She gave me land that was registered. She even gave me transfer to change into my name. The transfer was signed by her Sebunya Emmanuel got the land after an exchange.....”*

Then on page 15 of the proceedings, DW2, **Luwemba Moses** was emphatic that the portion or land in dispute was given to him and not Nakakande **Joyce**. The question before Court now, which was not addressed by the trial Magistrate is why didn't **Moses Luwemba** who claims to have got the land in dispute registered with transfer forms signed not registered it into his names?

And if he exchanged with **Emmanuel Ssebunya**, the 2nd Respondent, then why did **Luwemba Moses** not give him the signed transfer forms? And to make matters worse or Respondents' case questionable, **Moses Luwemba** who claimed to have got the land when registered stated during cross-examination on page 15 as follows:-

*“I do not recall the Block and Plot Number. I know them. I have been told that Nakakande is now the registered proprietor.....”*

This Court wonders how the Lower Court should have believed DW2, **Moses Luwemba** and decided in favour of Respondents when DW2 failed to tell court the Block and Plot Number of the land he was given if it was already registered as he was alleging?

Then DW1, **Jane Nakubuye Namukasa**, one of the beneficiaries of land from **Aidah Najoba** was not helpful to the Defendant/Respondents' case because her testimony on page 12 of the proceedings was that when she got her share, she sold it. She even contradicted DW2 **Moses Luwemba** who stated that it was him who exchanged the land in dispute with **Emmanuel Ssebunya** clear which land he sold through **Namukasa Janet** and which one did he exchange with Luwemba Moses. DW3 does not bring the land in dispute in picture, which land is registered and has title. That is the uncoordinated evidence on the part of the Defendants/Respondents. And whereas DW4, Nalwanga Oliver testified that she purchased land and not a Kibanja (on page 21 of the proceedings), on page 22 of the proceedings, DW4 tendered in transfer forms allegedly given to her by Ssebunya but the transfer forms had the names of **Aida Najoba** and were tendered in evidence as DIDI (defendant's identification exhibit). It is worth noting that a document tendered in for identification is not an exhibit till the author of the same or addressee has tendered it in. But to show that DW4 was confusing witness, during cross-examination on page 24 of the proceedings, DW4 stated that **Ssebunya Emmanuel** ever owned the suit land and he had a Certificate of title. The question is which part of her testimony is to be believed with regard to the disputed land? Was it the transfer forms which Ssebunya gave her (Nalwanga Oliver) but which were not in her names or was it an alleged certificate of title Ssebunya allegedly had as stated by DW4, Nalwanga which Ssebunya himself did not talk about when he testified as DW3? Given such glaring inconsistencies and contradictions as I have outlined, I find and hold that the trial Magistrate did not evaluate the evidence on record properly and exhaustively, thereby coming to a wrong decision in favour of Defendants/Respondents. On page 4 of her judgment, the trial Magistrate stated that considering the evidence on record, the submissions filed and the locus visit, she was inclined to believe the evidence of the Defendant as against the plaintiff. No clear and elaborate reasons were given for that finding.

Furthermore, the lower court did not address her mind to the law with regard to **Section 59 of the Registration of titles Act**. It is to the effect that a Certificate of title is conclusive evidence of ownership. Then under Section 176 (c ) of the same R.T.A, a registered proprietor is protected against an action for ejection except on ground of fraud.

In the present case, the 2<sup>nd</sup> appellant not only inquired from the authorities, local council leaders who confirmed the 1<sup>st</sup> appellant owned the land in question, but the 1<sup>st</sup> Appellant had the mother Certificate of Title and even went on to sign transfer forms for **Medi Kayiwa**, 2<sup>nd</sup> Appellant.

In such circumstances, there was no evidence of fraud on the part of 2nd Appellant when he got registered. If the trial Magistrate had properly directed her mind to the law R.T.A as stated above, she would have held in favour of the Appellants.

So grounds 1 and 2 of appeal are hereby allowed.

**Ground 3:**

**That the learned trial Magistrate erred in law and fact in holding that the disputed land belongs to the Respondent whereas not.**

I have considered the submissions of both sides and this issue has virtually been resolved. Since the 2nd Appellant bought the suit land genuinely and in broad day light, from the person who had a certificate of title, and in the process acquired a Certificate of title, then he was entitled to ownership thereof. The 2<sup>nd</sup> Appellant's title was superior to that of the Respondents who had blank transfer forms but could not register the land in their names for five years. It is the finding and holding of this court that the continued stay of the 1<sup>st</sup> Respondent on the land in dispute for five years or so was continuous trespass which had to be stopped. Blank transfer forms cannot in law transfer land to the 2nd Respondent. So ground No. 3 of appeal is hereby allowed.

**Cross appeal:**

The Respondent filed a cross appeal where they came up with two issues namely:-

1. Whether or not the cross-appellants are entitled to general damages?



2. Whether or not the appellants' title should be cancelled and the 1<sup>st</sup> respondent registered as the registered proprietor?

I have noted from the pleadings, particularly the Written Statement of Defence that the Respondents/Defendants prayed for the dismissal of the suit with costs. They never pleaded in their defence the prayer for General damages.

In any case, the law with regard to general damages was considered inter-alia in the case of **UCB vs Kigozi [2002] 1 E.A 305**. It was held that damages may be awarded for inconvenience caused by the Defendant. And the plaintiff should have suffered loss or inconvenience to justify the award of general damages.

In the present case, since I have allowed the main appeal and decided in favour of the Appellants, then the respondents, being trespassers are not entitled to general damages. On the other hand, it is the second appellant, **Medi Kayiwa** who despite holding a valid Certificate of ownership to the land in dispute, has been denied and enjoyment of the land, so the cross-appeal is hereby dismissed.

In conclusion therefore having allowed all the grounds of appeal in the main appeal I do hereby allow the main Appeal, set aside the Judgment and orders of the lower court, and find that the Respondents are trespassers who are to be evicted from the disputed land.

Since the Respondents are to be evicted, I shall exercise this Court's discretion to spare them from costs. So each party will meet their own costs.

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**W. Masalu Musene**  
**Judge**  
**01/11/2017**