THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA HELD AT MENGO

(CORAM: ODOKI, C.J., TSEKOOKO, MULENGA, KANYEIHAMBA & KATUREEBE JJ. S.C)

CIVIL APPEAL NO. 2 OF 2007

BETWEEN

1. **KAMPALA DISTRICT LAND BOARD }**
2. **GEORGE MITALA }:::::: APPELLANTS**

AND

1. **VENANSIO BABWEYAKA }**
2. **JOHNSON MWIJUKYE }**
3. **SEMPALA SENGENDO } :::::::::::::::::: RESPONDENTS**
4. **APOLLO NABEETA }**

(*Appeal from the judgment and orders of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ, Mpagi-Bahigeine and Kitumba JJ.A) dated 21 December 2006 in Civil Appeal No. 57 2005)*

JUDGEMENT OF ODOKI, CJ

This second appeal arises from the judgment and orders of the Court of Appeal of Uganda whereby the appellants' appeal against the respondents was dismissed with costs.

The brief facts of the case are that the respondents brought an action in the High Court claiming an interest in a piece of land comprised in LVR 2847

Fol. 9 known as Block 7 Plot 1028 situated at Ndeeba, Kampala. They claimed to have been in occupation of this land from about 1998 having purchased their interests from previous occupiers who had acquired it as far back as 1970. The respondents owned temporary structures on the land wherein they operated timber yard business.

On 31 October 1999, the 1st appellant which was the statutory owner of the suit land allocated the land to the 2nd appellant who obtained a certificate of title to the land on 20 November 2000. The respondents who were in occupation of the land were among the 20 plaintiffs who originally filed HCCS No. 511 of 2000 to challenge the allocation. The rest of the original plaintiffs have since withdrawn from the proceedings. The respondents sought declarations that they were bona fide/lawful occupants and/or customary owners of the suit land.

On 21 December 2001, Katutsi J, held that the respondents were not lawful occupants or ***bona fide*** occupants or customary owners of the suit land and dismissed the suit with costs. The appellants being dissatisfied with the judgment of Katutsi J, filed Civil Appeal No. 20 of 2002 in the Court of Appeal. On 6 August 2002, the Court of Appeal held that the respondents were not lawful or ***bona fide*** occupants but were customary owners of the suit land and ordered cancellation of the 2nd appellant's lease.

The appellants appealed to the Supreme Court against the finding that the respondents were customary owners ***vide*** Civil Appeal No. 16 of 2002.

On 17 December 2003, the Supreme Court allowed the appeal on the basis that oral evidence was required to prove the parties claims. The Court set aside the judgment of the Court of Appeal and ordered a retrial of the suit.

The retrial was held before Okumu-Wengi J. The issues framed at the trial were as follows:

> ***"1. Whether the plaintiffs were customary owners of the suit land.***
>
> 2. ***Whether the land was available for leasing to the 2nd defendant.***
>
> 3. ***Whether the second defendant obtained the certificate of title lawfully.***
>
> 4. ***Remedies."***

The retrial Judge held on the first issue that the respondents were not customary owners of the suit property but were lawful occupants. He answered the 2nd and 3rd issues in the negative. He ordered the cancellation of the certificate of title of the 2nd appellant. The 1st appellant was ordered to pay general damages of shs.6,000,000/= to each of the respondents.

The appellants appealed to the Court of Appeal against the judgment of the High Court and the respondents filed a cross-appeal against the finding that they were not customary owners of the suit land. The Court of Appeal dismissed the appeal and allowed the cross-appeal.

The appellants have appealed to this Court on the following grounds:

1. The learned Justices of Appeal erred in law and fact when they held that the respondents are customary owners of the suit land.

2. The learned Justices of Appeal erred in law and fact when they held that the allocation of the suit land to the 2nd appellant was unlawful.

3. The learned Justices of Appeal erred in law and fact when they held that the certificate of title to the suit land had been obtained fraudulently.

4. The learned Justices of Appeal erred in law and fact when they upheld the award of general damages.

M/s Sendege Senyondo & Co. Advocates represented the 1st appellant and M/s Kavuma Kabenge & Co. Advocates represented the 2nd appellant. The respondents were represented by M/s Bamwe & Co. Advocates and M/s Muhimbura & Co. Advocates. Both counsel filed written submissions.

In their first ground appeal, the appellants complain that the learned Justices of Appeal erred in law and fact when they held that the respondents are customary owners of the suit land. Counsel for the appellants submitted that the holdings by Mukasa Kikonyogo, D.C.J., with whom Kitumba JA agreed, that the respondents were customary owners because the Land Act is silent about customary ownership in urban areas, the controlling bodies acknowledged the respondents' claims, and

customary tenure can be established by any activity on the land, were grave misdirections of law and fact.

Learned counsel for the appellants pointed out that the learned Deputy Chief Justice agreed with the appellants submissions that Section 24 of the Public Land Act 1969 and Section 5(1) of the Land Reform Decree 1975 prohibited customary tenure in urban areas. He referred to the decision of this Court in ***Tifu Lukwago vs Samwiri Mudde Kizza and Nabitaka*** Civil App. No. 13 of 1996 which cited the decision in ***Paul Kisekka Ssaku vs Seventh Day Adventist Church*** Civil Appeal No. 8 of 1993 (unreported) where it was held that customary occupation without consent of the prescribed authority was unlawful. He argued that the respondents acquired the land between 1998 and 2000, deriving their interest from Misaeri Nsubuga (P.W.1) who acquired the land in 1970 and since it was illegal for Nsubuga to hold a customary tenure in the city, the respondents could not acquire an interest which he did not have. He contended that although the Land Act does not prohibit customary tenure in urban areas the Act is not retrospective and cannot apply to pre-1998 customary occupation.

As regards the holding that the controlling bodies acknowledged the respondents' claim of customary ownership, learned counsel for the appellants submitted that there was no evidence to that effect. They contended that payment of rates under the then Local Governments (Rating) Act, Cap 242 levied on owners hereditaments including building structures did not amount to acknowledging customary ownership.

On the holding that customary tenure can be established by any activity on the land, learned counsel submitted that the respondents did not adduce any evidence to prove the custom of the area in order to establish their claim of customary ownership. Counsel contended that the respondents' witnesses either disowned customary tenure or expressed ignorance about it. They pointed out that Misaeri Nsubuga (PW1) said he acquired business premises, not land. He also stated that there was no customary interest over the land. The second witness Tumusiime Robert testified that he did not know the custom governing the occupancy of land in the area. And the Land Officer, Elizabeth Laker stated that she was not an expert in customs of the area or any area in Uganda.

Learned counsel argued that the learned Deputy Chief Justice misdirected herself in holding that construction of timber sheds and offices and operation of different types of businesses made the respondents lawful customary tenants. Counsel referred to the definition of customary tenure in Section 1(1) of the Land Act as ***"a system of land tenure regulated by customary rules which are regulated in their operation to a particular description or class of persons"*** the incidents of which are described in Section 3. They contended that whoever relies on a custom must prove it, citing ***Tifu Lukwago vs Samwiri Mudde Kizza and Justina Nabitaka***, (supra) in support of their contention.

It was counsel's submission that it is not enough to carry out activities on land for however long the period, but the claimant must prove that in that area it is a custom that whoever carries out certain activities for a specified period of time becomes a customary owner. Counsel contended that the

case of ***Marko Matovu and 2 others vs Mohammed Sseviiri and 2 others***, CA No. 7 of 1978 is distinguishable from the instant case because the appellants in that case were pastoral people who could claim rights over land by construction of wells and clearing land for cultivation and customary tenants were protected under both the Public Lands Act and the Land Reform Decree.

On proof of custom, learned counsel for the appellants submitted that Section 46 of the Evidence Act provided that where a court has to form an opinion as to the existence of any general custom or right of persons who would be likely to know of its existence, are relevant. He relied on the case of ***R. V. Ndembera s/o Mwandawale*** (1947) 14 EACA 85 where it was held that native custom must be proved in evidence and cannot be obtained from the assessors or supplied from the knowledge and experience of the trial Judge.

Learned counsel for the respondents argued all the grounds of appeal together but I shall first consider their submissions on the first ground of appeal in view of its importance. Counsel supported the holding by the majority Justices of Appeal that the respondents were customary owners of the suit land. Their main argument was that the respondents and their predecessors had been in exclusive possession of the suit land since 1970, and had utilized it for business of selling timber and motor garage, on structures they constructed to facilitate their trade. The respondents also paid taxes and rates to the Kampala City Council.

Counsel submitted that the instant case was an all fours with the case of ***Kampala District Land Board and Another vs National Housing and Construction Corporation*** Civil Appeal No. 2 of 2004 where it was held that the respondent who had been in possession of the suit land for a long time and utilized it was entitled to have its interest recognized and protected by the first appellant.

In reply to the submission that previous statutory provisions prohibited the holding of customary tenure in urban areas, learned counsel for the respondent contended that the respondents would rely on exclusive possession and usage for a long time without interruption or challenge citing the decision of this Court in ***Kampala District Land Board and Another vs National Housing and Construction Corporation*** (Supra) as authority for their proposition. Counsel also submitted that the 1995 Constitution and Land Act enhanced the rights of persons claiming ownership of customary land in urban areas.

Learned counsel referred to the case of ***Marko Matovu & 2 Others vs Mohammed Sseviiri & Another*** Civil Appeal No 7/788 (CA) where it was held that customary tenure can be established by the cultivation of seasonal crops or grazing cattle and related construction of wells to water cattle, and submitted that the decision supported the respondents' claim of customary ownership. Counsel conceded that the respondents' interest was not derived from mailo land or under the Busuulu and Envujjo Law 1928, but was established by their activities on the suit land. It was the contention of counsel that what is customary in a particular place depended

on the use to which the land is put by the occupants as well as the duration it has taken.

Counsel submitted that there was proof of how the respondents had acquired the land and utilized it. They relied on a passage in ***Marko Matovu vs Mohammed Sseviiri & Another*** (Supra) where the Court of Appeal observed,

> ***"There is no definition of customary tenure perhaps because it is so well understood by the people. Where a person has a kibanja, it is generally accepted that he thereby established customary tenure on public land. But not all people live on a kibanja. In many areas people grow seasonal crops on the land they occupy and in other places some use the land for grazing cattle only. Yet all these people also enjoy customary rights over land they use."***

In the leading majority judgment on the question whether the respondents were customary tenants, the learned Deputy Chief Justice supported by Kitumba J.A. accepted the submission of counsel for the appellants that the respondents were customary tenants on the suit land. On the issue of prohibition of customary tenure in urban areas, the learned Deputy Chief Justice said,

> ***"On the submission of counsel for the 2nd appellant that the respondents could not have had customary tenure in urban areas due to prohibition in my view they do not affect the respondents' claim in this case. I am mindful of Sections 24 of the Public Land Act 1969 and S. 5(1) of the Land Reform Decree 1975 which prohibited customary tenure in urban areas.***

For some reasons not known, the 1998 Land Act is silent on the said prohibition. This could be seen perhaps as a general tendency in the Act to enfranchise occupants with usufruct rights to enable them secure other interests in the land by either obtaining a certificate of occupation or a leasehold.

In the instant case the silence of the Act coupled with the facts of this case including acceptance of payment of taxes and rates by the Kampala City Council, in respect of activities carried out on the suit land, support the respondents' claim of customary tenure. It is not disputed that prior to 1998 Land Act, Kampala City Council had a statutory lease over the suit land which passed over to the Kampala District Land Board its successor in title. By the conduct of both those controlling authority bodies, they acknowledged the respondents' claim."

As regards proof of customary law, the learned Deputy Chief Justice held that in accordance with Section 2 of the Land Act, it was an accepted practice in the area comprised of the suit land for the people there to carry out the various types of businesses which the respondent carried out in the area. The Deputy Chief Justice acknowledged that the respondents' claim was not traced to mailo land under the Busuulu and Envujjo Law 1928.

On the other hand, Mpagi-Bahigeine J.A. differed with the majority decision on this issue and agreed with the trial judge that the respondents were not customary tenants within the definition of Section 3 of the Land Act, but they were licensees with possessory interest in the suit land who should have been given priority over anybody else. In coming to this conclusion, she held that payment of rates does not establish title to land but establishes user of land or property, and that the respondents' claim does

not answer to the definition of customary tenure under Section 2 of the Land Act or its incidents or features under Section 3 of the Act.

The first point to deal with is whether there was a prohibition of customary tenure in urban areas. I think it is common knowledge that the Public Land Act 1969 abolished customary tenure in urban areas. Section 24(1) (a) of the Act provided,

> ***"24(1) subject to the provisions of subsection (5) of this Section it shall be lawful for persons holding by customary tenure to occupy without grant, lease or licence from the controlling authority unalienated public land vested in the Commission, if***
>
> (a) ***the land is not in urban area."***

Subsection (5) stated as follows:

> ***"The Minister may by statutory order specify any area of Uganda to be an area in which public land is not occupied by customary tenure at the commencement of such order shall not thereafter be occupied otherwise than by virtue of an estate interest or other right of occupancy granted by the controlling authority or upon such conditions as the Minister may specify."***

The prohibition of customary tenure in urban area is clear from Section 24(1)(a) of the Public Lands Act. The provisions of subsection (5) merely enabled the Minister to extend the prohibition to other areas especially the rural areas as can be seen from the Public Land (Restriction of Customary Tenure) Order 1969 (SI 103/1969). Therefore, at the time the predecessors

of the respondents occupied the suit land in 1970 they could not do so under customary tenure.

The Land Reform Decree 1975 declared all land in Uganda to be public land to be administered by the Uganda Land Commission in accordance with the Public Land Act 1969, subject to such modifications as may be necessary to bring that Act into conformity with the Decree. The system of occupying public land under customary tenure was to continue, but only at sufferance and any such land could be granted by the Commission to any person including the holder of the tenure in accordance with the Decree. Under Section 5 it was provided,

> ***"5(1) With effect from the commencement of this Decree, no person may occupy public land by customary tenure except with the permission in writing of the prescribed authority which permission shall not be unreasonably withheld:***
>
> ***Provided that the Commission may, by statutory order specify areas which may be occupied by free temporary licence which shall be valid from year to year until revoked."***

Subsection (2) provided,

> ***"(2) Any agreement or transfer purporting to create a customary tenure of land contrary to Subsection (1) of this Section shall be void and of no effect and, in addition the person purporting to effect such transfer shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand shillings or to imprisonment for a***

term not exceeding two years or to both such find and imprisonment."

Under the Land Reform Regulations 1976, any person wishing to obtain permission to occupy public land by customary tenure had to apply to the Sub County Chief in charge of the area where the land was situated. After processing the application, it had to be sent to the Sub-county Land Committee for approval.

The question is whether the respondents did acquire the customary ownership following the enactment of the Land Reform Decree. The answer to this question appears to be in the negative. Restrictions on acquisition of customary tenure under the Public Lands Act seem to have continued as the law continued to govern all types of public land including customary tenure subject to the provisions of the Decree. In order to acquire fresh customary tenure one had to apply to the prescribed authorities and receive approval of his or her application. There was no evidence that such prescribed authorities existed nor that the respondents or their predecessors acquired fresh customary tenure in accordance with the Land Reform Decree. I would therefore hold that the respondents could not have legally acquired customary tenure in an urban area of Kampala City prior to the enactment of the Land Act 1998.

It was held by the Court of Appeal that the Land Act is silent on the holding of customary tenure in urban areas. It was submitted on behalf of the respondents that the respondents were therefore free to hold land under customary law. That may well be so, but as counsel for the appellants

submitted, the provisions of the Land Act could not apply retrospectively to legalise acquisition of customary tenure in urban areas before 1998.

The next question is whether the respondents proved that they occupied the suit land by customary tenure. Customary tenure was first defined in S.54 of the repealed Public Land Act as ***"a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons."*** The Land Act now gives an elaborate definition of customary tenure. Section 1 (l) defines customary tenure as follows:

> ***"Customary tenure is a system of land regulated by customary rules which are limited in their operation to a particular description or class of persons of which are prescribed in Section 3."***

The incidents of forms of customary tenure are described in Section 3 in these terms:

> ***"(1) Customary tenure is a form of tenure-***
>
> (a) ***applicable to a specific area of land and specific description or class of persons;***
>
> (b) ***subject to Section 27, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;***
>
> (c) ***applicable to any persons acquiring land in that area in accordance with those rules;***
>
> (d) ***subject to Section 27 characterized by local customary regulation;***

(e) ***applying local customary regulation and management to individual and household ownership the use and occupation of, and transaction in, land;***

(f) ***providing for communal ownership and use of land;***

(g) ***in which parcels of land may be recognized as subdivision belonging to a person, a family or a traditional institution; and***

(h) ***which is owned in perpetuity."***

Section 46 of the Evidence Act Cap 6, provides that the opinion of experts is relevant in establishing the existence of a custom or customary law. The Section states:

> ***"When a Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right of persons who would be likely to know its existence if it existed are relevant."***

It is well established that where African customary law is neither well known nor documented, it must be established for the Courts' guidance by the party intending to rely on it. It is also trite law that as a matter of practice and convenience in civil cases relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties. In ***Ernest Kinyanjui Kimani v. Muira Gikanga*** [1965] E.A. 735, Duffus J. A. said at page 789:

> ***"As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in my view, especially, of the present apparent lack in Kenya of authoritative text books on the subject or of any relevant case 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."***

No expert in customary land tenure was called and the Courts below relied on the evidence adduced by the parties. The evidence adduced was inconsistent and contradictory and in my view inconclusive in establishing a system of customary tenure over the suit property. For instance Misairi Nsubuga (P.W.1) admitted that Tom Kibirige (the previous occupier) sold him a business premises, but not the land. He denied having a kibanja on that land, or any customary interest on the land. The second witness Robert Tumusiime who also bought land from PW 1 through Edward Kizito (PW1's nephew) claimed to be a customary occupant of the land because he had been living on the land without title. He conceded that he did not know the custom governing the occupancy of the land in the area. The third appellant Sempala Sengendo claimed he bought the land according to customary practice in the area. He asserted that he was a ***bona fide*** occupant as a customary owner.

On the other hand Edward Kizito who was the nephew or **"son"** of the original occupier Nsubuga claimed that Nsubuga did not own land but only business in Ndeeba. He also asserted that he and his **"father"** Nsubuga

had not had bibanja in the area, nor were they customary tenants on the land. It should be noted that this witness had been one of the original plaintiffs but who had withdrawn his claim against the appellants.

The respondents called Ms Elizabeth Laker a Senior Land Officer whose duties include processing lease offers. In her evidence, she admitted that she was not an expert of Ndeeba area customs nor was she a customary law expert of any customary area of Uganda, and therefore did not know customs governing occupation of land in Ndeeba.

On the basis of this evidence the learned trial judge concluded:

> ***"From the above as well as the statements of other plaintiffs' witnesses it became clear that the plaintiffs told Court what they believed to be land ownership. That was not a legal definition but a question of possession and occupation without reference to legal issues of land tenure and land ownership. For this Court their evidence establishes the fact that they became lawful occupants and had lawful possession without legal title. They were also not customary tenants as the land in question was under a statutory lease. I agree that they had land under some kind of license and they had established a usufruct interest in the occupation and possession of the land in question. They were not in the category of customary tenants as such. They were occupants by whatever title and this was an agreed fact."***

In her judgment, Mpagi-Bahigeine J.A. agreed with the finding of the learned judge when she held that the respondents claim to the suit land did not answer the definition of customary tenure in Section 2 of the Land Act nor the incidents stipulated in Section 3 of the said Act. She observed,

> ***"It is clear that the appellants enjoyed uninterrupted use of the land for a long time, their right to such possession stemming from Misaeri Nsubuga (PW1) who bought it from Tom Kibirige who used to operate a garage on it. PW1 was emphatic that he had no interest in the land though Kampala City Council had a statutory lease granted by the Uganda Land Commission in 1920 and which ceased to exist when the 1995 Constitution came into force, the respondents' possession remained uninterrupted as much as the land remained unsurveyed. Thus the first appellant the Kampala District Land Board which came into existence under the Land Act 1998 should have recognized the respondents whom it found on the land."***

The learned Justice of Appeal concluded,

> ***"I would thus agree with the learned Judge that though the respondents are not customary tenants within the definition of Section 3 they are licencees with possessory interest in the suit land who should have been given priority over anybody else."***

I am in general agreement with the learned Justice of Appeal that the respondents failed to establish that they were occupying the suit land under customary tenure. There was no evidence to show under what kind of custom or practice they occupied the land and whether that custom had been recognized and regulated by a particular group or class of persons living in the area. I therefore find merit in the first ground of appeal which should succeed.

In the second ground of appeal the appellants complain that the learned Justices of Appeal erred in law and fact when they held that the allocation

of the suit land to the 2nd appellant was unlawful. Counsel for the appellants criticized the Justices of the Court of Appeal for holding that the 2nd appellant did not obtain the certificate of title lawfully, on the grounds that the respondents were entitled to a first offer of the lease to the 2nd respondent and that there was a breach of the principles of natural justice.

Learned counsel for the appellants contended that there was no illegal act or omission proved. Counsel submitted that the respondents were not lawful occupants, bona fide occupants or customary tenants protected by the Land Act. It was the contention of counsel that it was surprising that the Justices of Appeal agreed with the finding of the trial Judge that the respondents were lawful occupants of the disputed land yet the respondents had cross appealed alleging that they were customary tenants. Counsel argued that since the law does not recognize their occupancy, the question of natural justice could not arise.

Citing Section 178 of the Registration of Titles Act which was relied on by the Court of Appeal, counsel for the appellants submitted that the learned Justices of Appeal misapplied the Section which protected only a person who was deprived of land or any estate or interest in land which the respondents did not own, nor had any legally recognized interest therein. It was their submission that where a person is deprived of land or interest in land the remedy provided under the same Section is damages not impeachment of title.

Counsel for the appellants also relied on Article 241(1) (a) of the Constitution and Section 59(1) (a) of the Land Act for the submission that a

District Land Board has power to allocate land in the district which is not owned by any person or authority. It was contended that since the respondents were not owners of the suit land, no law was violated in allocating the suit land. Moreover, counsel submitted, the Land Regulations 2001 (SI 16/2001) were not applicable to the suit land because they were published on 23 March 2001 well after the allocation of the suit land on 31 October 2000.

The second ground of appeal seems to cover the 2nd and 3rd issues framed at the trial namely.

> ***"2. Whether the land was available for leasing to the 2nd Defendant.***
>
> 3. ***Whether the second defendant obtained the certificate of title lawfully."***

As pointed out earlier the learned Judge answered both issues in the negative. He stated his conclusion as follows:

> ***"I have come to the conclusion that the plaintiffs were lawful occupants of the disputed land and as such were like tenants of some sort even if they were like what land-Lawyers derogatively refer to as squatters. They had developments and property and worked on the land. They had usufruct interest over it as it were continuing to occupy and use the land. They could have secured a lease or if it were to be given to other persons their interests should not have been overshadowed the way it was done giving the impression that some disputed the leasing of the land."***

Mpagi-Bahigeine J.A. agreed with the conclusion of the trial Judge. She held that the 1st appellant should have recognized the respondents' interest in land whose possession has been uninterrupted over the unsurveyed land. She also held that the respondents were licencees with possessory interest in the suit land who should have been given priority over anybody else. She therefore held that the suit land was not available for leasing to the 2nd appellant.

The learned Justice of Appeal further held that the failure to give the offer of a lease to the 1st appellant before anybody else amounted to a breach of natural justice. She observed,

> ***"The second appellant was deliberately dishonest when he proceeded to obtain a title without consulting with the occupants and authorities of the area. The surveyors they sent to survey the land had the audacity to deceive the respondents that they were looking for water pipes for the neighbouring Wilson Zone whereas not. Most surprisingly even the compensation cheques for the respondents were made out long before the respondents had been heard and listened to over the matter."***

The learned Justice of Appeal referred to the authority of ***General Medical Council vs Spackman*** (1943) 2 All E.R. 337 where it was held that a decision arrived at in the absence or departure from the essential principles of natural justice must be declared no decision at all. She concluded that the 2nd appellant had not obtained the certificate of title lawfully.

The learned Deputy Chief Justice supported the conclusions reached by Mpagi-Bahigeine J.A. on these issues. She observed,

> ***"In this appeal, clearly the failure to follow the prescribed procedure for registration of the 2nd appellant's interest in the land was a trick to deceive the relevant authority that the land was available when it was not. The registration was hence unlawful and cannot be left to stand. As it was rightly pointed out by Bahigeine J.A. the respondent had the first option to the lease. The offer to the 2nd appellant would have been considered if the respondents had declined to take it for one reason or another. This was a breach of the rules of natural justice and Section 178 of RTA (Supra)."***

She concluded that therefore there was no land available to allocate to other people as long as the respondents continued to use the disputed land or had been taken away from them lawfully which was the case here. She held that the respondents would be entitled to the first offer or be given adequate compensation.

With respect I am unable to fault the conclusions reached by the learned Justices of Appeal on the issue whether the 2nd appellant obtained the lease lawfully. It was an admitted fact that the respondents were in occupation of the suit land at the time the lease was granted to the second appellant. The predecessors in occupation to the respondents had been in possession of the suit land since 1970. Although it is my view that they were not customary tenants, they were described variously in the lower Courts as squatters, tenants of a tentative nature, licencees with possessory interest, or ***bona fide*** occupiers protected from administrative injustice.

It seems to me that the finding that the respondents were bona fide occupants of the suit land was not seriously challenged in this Court. The attack by the appellants appears to concentrate on the finding that the respondents were customary tenants. I agree with the lower Courts that the respondents were bona fide occupants as defined in Section 29(2) of the Land Act which states:

> ***"(2) "Bona fide occupant" means a person who before the coming in force of the Constitution –***
>
> (a) ***had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more."***

The respondents purchased the suit land in 1998 from persons who had occupied and utilised the land since 1970, and were therefore deemed to be bona fide occupants in accordance with subsection (5) of Section 29 of the Act which provides:

> ***"(5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this Section shall be taken to be a bona fide occupant for the purposes of this Act."***

In my view the respondents were not licensees on the suit land as they had not been granted such licences by the controlling authority, or the 1st appellant. Therefore the provisions of subsection (4) of Section 29 of the Act which state that a licence of a registered owner shall not be taken to be a lawful or bona fide occupant, does not apply to the respondents.

In ***Kampala District Land Board and Chemical Distributors vs National Housing and Construction*** Civil Appeal No. 2 of 2004, the facts of the case were similar to the present case. The respondent in that case had occupied the suit land since 1970 and had used the land as a play ground for children residing in its adjoining estate, among other uses. It had fenced the land and constructed a toilet on it. The 1st appellant granted a lease over the suit land to the 2nd appellant ignoring the objections of the respondent and local council officials of the area. The respondent sued the appellants claiming that the grant of the lease to the 2nd appellant was unlawful and fraudulent. The respondents' claim was upheld. In my leading judgment, I observed,

> ***"I have already held that the respondent had been in occupation or possession of the suit land for more than twelve years at the time of coming into force of the 1995 Constitution. The respondent had not only occupied the land but also utilised it, without any challenge from Kampala City Council. The respondent was entitled to enjoy its occupancy in accordance with Article 237(8) of the Constitution and Section 31(1) of the Land Act, if the suit land was registered land."***

Since the respondents were lawful bona fide occupants, their interest in the suit land could not be granted or transferred to a third party without affording them the protection provided in the Land Act. As this Court was held in ***Kampala District Land Board and Chemical Distributors vs National Housing and Construction Corporation***, (supra):

> ***"A bona fide occupant was given security of tenure and his interest could not be alienated except as provided by the law. For instance the bona fide occupant could apply for a certificate of occupancy under Section 33(1) of the Land Act. A bona fide occupant could apply for a lease under Section 38 of the Land Act. While the land occupied by a bona fide occupant could be leased to somebody else, I think the first option would have to be given to the bona fide occupant. As this was not done in this case, the suit land was not available for leasing to the 2nd appellant."***

The holding in ***Kampala District Land Board vs National Housing Construction Corporation*** (Supra) applies with equal force to the present. Moreover the rules of natural justice were not followed in the instant case as the respondents were not given a fair hearing before they were deprived of their interest in land. This was in violation of the principles of natural justice contained in the Constitution of Uganda, the Land Act and regulations made there under. In the result I find no merit in ground 2 which should fail.

I shall now consider the third ground of appeal which is to the effect that the learned Justices of Appeal erred in law and in fact when they held that the certificate of title to the suit land had been obtained fraudulently. Learned counsel for the appellants submitted that fraud was not one of the issues framed for determination by the court but both the High Court and Court of Appeal dealt with it amid protests by counsel. Counsel conceded that the amended plaint contained particulars of fraud but contended that fraud was not strictly proved.

It was argued on behalf of the appellants that the respondents had no recognized interest in the suit land, and in any case failure by the District Land Board to give a hearing to the occupants did not amount to fraud on the part of the allocatee because fraud must reside in the transferee. Counsel further submitted that even if the appellant was deliberately dishonest when he obtained a title without consulting with the occupants and the authorities in the area, sending surveyors to the land and deceiving the respondents that they were looking for water pipes, and making compensation cheques before the respondents were heard did not amount to fraud. Counsel also argued that there was no legal requirement for consulting anyone and that it was not the 2nd appellant who sent the surveyors, but the Kampala City Council to open up the plot boundaries.

Finally counsel for the appellant submitted that according to Section 136 of the Registration of Title Act, mere knowledge of unregistered interest shall not of itself be imputed as fraud. It was also submitted that a certificate of title is conclusive evidence of ownership under Section 59 and cannot be impeached except for fraud under Section 176 of the same Act. Counsel contended that the respondents had no protected interest in land which could be said to have been defeated and that the respondents' remedy was to seek adequate compensation for their structures, not cancellation of the title of the 2nd appellant.

Learned counsel for the respondents submitted that it was fraudulent for the 1st appellant to have leased out the suit land to the 2nd appellant well knowing that the land was being occupied and utilised by the respondents who were paying taxes and rates in respect of the land. They pointed out

that the 2nd appellant was aware of the respondents' occupation and utilization of the suit land as evidenced by his obtaining recommendations from a different Local Council and attempting to compensate the respondents arbitrary. Counsel contended that the respondents' interest was protected by Section 178 of the Registration of Titles Act which was considered in the case of ***Marko Matovu vs Mohammed Sseviiri & Another*** (supra) where it was held that knowledge of other person's rights or claims over land and deliberate acquisition of a registered title in the face of protests amounts to fraud.

Counsel submitted that the 2nd appellant was deliberately dishonest when he proceeded to obtain a title without consulting the occupants and authorities of the area. Counsel argued that the surveyors of the 2nd appellant deceived the respondents that they were looking for water pipes for a neighbouring zone.

As regards the issue of fraud, counsel for the respondents contended that the particulars of fraud were property set out in the amended plaint and that failure to frame a specific issue of fraud was not fatal so long as the parties to the proceedings knew what the real question between them was and evidence was taken on it and the Court duly considered it. Counsel cited the case of ***Norman Overseas Motor Transport (Tanganyika) Ltd*** (1959) EA 131 in support of his submission.

Learned counsel for the respondents further submitted that a certificate of title can be impeached for flouting the principles of natural justice by failing to inform the respondents of the application and giving them an option to

apply for it. Counsel relied on the case of ***Marko Matovu vs Mohammed Sseviiri (supra) and Kampala District Land Board & Another vs National Housing and Construction Corporation*** (supra) in support of his submission.

Fraud was pleaded in the amended plaint, and its particulars stated. The respondents adduced evidence to prove fraud by the appellants and counsel addressed the issue in their submissions. The trial Judge considered the matter and held that it had been established. The Court of Appeal upheld the finding of the trial Judge on the issue.

It is true that there was no specific issue framed on fraud as it ought to have been done but it seems it was presumed to be part of the third issue namely ***"whether the second defendant obtained the certificate of title lawfully."*** It is common knowledge that a certificate of title obtained by fraud cannot be said to have been obtained lawfully, and such a certificate is defeasible and liable to be cancelled in accordance with Sections 64 and 176 of the Registration of Titles Act. Under Section 64, the estate of a registered proprietor is paramount except in the case of fraud. Similarly, Section 176 provides that a registered proprietor is protected against ejectment except in certain cases including where a person has been deprived of any land by fraud by the registered proprietor.

Fraud has been defined to include dishonest dealing in land or sharp practice intended to deprive a person of an interest in land, including unregistered interest. See ***Kampala Bottlers Ltd. vs Damanico Ltd*** Civil Appeal No. 22 of 1992 (SC) ***Sajjaka Nalima vs Rebecca Musoke*** Civil

Appeal No. 2 of 1985 (SC) and ***Uganda Posts and Telecommunications vs Lutaaya*** Civil Appeal No. 36 of 1995 (SC).

In ***Kampala District Land Board and Another vs National Housing and Construction Corporation*** (supra), this Court observed that it is now well settled that to procure registration of title in order to defeat an unregistered interest amounts to fraud. The Court quoted with approval the case of ***Katarakawe vs Katwiremu*** (1977) H.C.B 187 where it was held that:

> ***"Although mere knowledge of unregistered interest cannot be imported as fraud under the Act, it is my view that where such knowledge is accompanied by a wrongful intention to defeat such existing interest that would amount to fraud."***

In her lead judgment Mpagi Bahigeine J.A. held that fraud had been established because the suit land was not available for allocation to the 2nd appellant, and that the respondents were entitled to the first offer of the lease before anybody else could be considered. The learned Justice of Appeal held that this action amounted to a breach of the principles of natural justice and brought into play the provisions of Section 178 of the Registration of Titles Act. The learned Justice of Appeal observed:

> ***"The second appellant was deliberately dishonest when he proceeded to obtain a title without consulting with the occupants and authorities of the area. The surveyors they sent to survey the land had the audacity to deceive the respondents that they were looking for water pipes for the neighbouring Wilson Zone whereas not. Most surprisingly even the compensation cheques for the respondents were***

made out long before the respondents had been heard and listened to over the matter."

In her supporting judgment Mukasa-Kikonyogo D.C.J., agreed with the conclusions reached by the learned Justice of Appeal and added:

"Further, I agree with Bahigeine J.A. that there was evidence of fraud. Clearly the grant of the lease to the 2nd appellant was intended to defeat the unregistered existing interest of the respondents. The appellant knew the respondents' interest in the land but the latter were not given opportunity to be heard on the matter which amounted to fraud."

I entirely agree with the conclusions reached by the Court of Appeal on the issue of fraud. There was a deliberate effort by the appellants to sideline the respondents as bona fide occupants or tenants at sufferance of the suit land. The respondents were not informed of the 2nd appellant's interest in leasing the land and given an option to lease the land or to make any representations to protect their interest. The appellants seem to have consulted officials of a different Local Council and ignored the views of the proper Local Council. The communication from the relevant Local Council of Kasumba Zone clearly indicated that the suit land had been occupied by the respondents for a long time. The respondents were even offered compensation packages without negotiation or consultation. In addition the relevant law and procedure were not observed. I am therefore unable to fault the decision of the Court of Appeal on this issue. I find no merit in ground 4 which should also fail.

In the final ground of appeal, the appellants complain that the learned Justices of Appeal erred in law and in fact when they upheld the award of general damages. Learned counsel for the appellants relied mainly on their submissions in the Court of Appeal which in my view is a bad practice. Counsel submitted that the Court of Appeal did not reevaluate the evidence before summarily rejecting the grounds of appeal. They also contended that the Court of Appeal ignored the complaint that the interest of 20% on general damages from the date of filing was too high, yet counsel for the respondents conceded that the interest on general damages should be between 6 – 8% from the date of judgment.

In reply counsel for the respondents submitted that the general damages awarded were fair in the circumstances of wrongful alienation of prime land located within the city whose value was high. Counsel contended that the matter had taken a long time in Court and the respondents had their structures on the suit land destroyed by the 2nd appellant on a number of occasions. It was counsel's submission that an award of damages is in the discretion of the trial judge who gave reasons for the award and an appellate Court should be slow to interfere with the award. Counsel relied on the decision of this Court in the case of ***Byabalema & 2 Others vs UTC (1975) Ltd*** Civil Appeal No. 10 of 1993 (SC) in support of his submission.

With regard to the rate of interest, learned counsel for the respondents pointed out that it was conceded in the Court of Appeal that it should be 8% and that the interest should run from the date of judgment until payment in full, and that this had already been corrected by the Court of Appeal under the slip rule.

It is my opinion that no valid grounds have been advanced for interfering with the award of damages made by the trial Judge and confirmed by the Court of Appeal. As was held in the case of ***Byabalema & 2 Others vs UTC (1975) Ltd***. (supra):

> ***"It is now a well settled principle that an appellate Court may only interfere with an award of damages when it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on the wrong principle or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low."***

The complaint regarding the rate of interest and when it should run has no merit as the same was dealt with by the Court of Appeal and corrected through the slip rule. Accordingly, ground 4 should also fail.

In the result, this appeal should substantially fail and I would dismiss it with costs here and in the Courts below.

As the other members of the Court agree, this appeal is dismissed with the orders I have proposed.

Dated at Mengo this 11th Day of February 2008

B J Odoki
CHIEF JUSTICE

JUDGMENT OF TSEKOOKO, JSC

I had the benefit of reading in draft the judgment prepared

by my Lord the learned Chief Justice which he has just delivered. I agree with it and with the orders which he has proposed.

Delivered at Mengo this 11th day of February 2008

J. W. N TSEKOOKO
JUSTICE OF THE SUPREME COURT

JUDGMENT OF MULENGA, JSC

I had the advantage of reading in draft, the judgment prepared by my Lord The Chief Justice and I agree with him that for the reasons he has given, I also would dismiss the appeal with costs.

Dated at Mengo this 11th day of February 2008.

J. N. Mulenga
JUSTICE OF SUPREME COURT

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft, the judgment of My Lord Odoki, C.J. and for the reasons he has ably given, I agree with him that this appeal has no merit and ought to be dismissed. I also agree with the orders he has made.

Dated at Mengo, this 11th day of February 2007

G.W. Kanyeihamba

JUSTICE OF SUPREME COURT

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading in draft the judgment of my Lord the Chief Justice. I agree with him and the orders he has proposed therein.

Dated at Mengo this 11th day of February 2008.

Bart M. Katureebe
Justice of The Supreme Court