

UGANDA / JUDGMENT

Kaddu and Another v Kazibwe and 2 Others (Civil Suit 648 of 2020) [2025]

UGHCLD 31 (6 February 2025)

[2025] UGHCLD 31

COURT

HC: Land Division (Uganda)

BEFORE

Nkonge, J

CASE / FILE NUMBER

Civil Suit 648 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DMSroNl

cIvIL SUIT NO.648 OF 2020

2. AAMUZADDE AMIINA NAKIBUULE

VERSUS

1. FIONAH KAZIBWE

2. MWANJERONALD

10 3. HENRY LAKOR..... DEFENDANTS

JUDGMENTS:

Introduction:

The piaintiff,s action jointly and severally against the def is for trespass on the 1"t plaint land comprised in Kibuga block 72, plot 722 in Kampala; ^a permanent injunction; an ord.er of cviction against 1"t and 2"d defendant; ^a declaration that the defendants arc trespassers on thc suit land; general, special and punitive damages against defendant.

Brief facts:

The 2^d plaintiff purchased land from Yusuf Ssemugabi on 17^u March, 2015 who gave vacant possession to her. The 2^d plaintiff had the certificate of title transferred into her names on 8th May, 2015.

she took steps to develop the said land but later decided to sell it to 1st plaintiff on 11^e March, 2020 who made part payment, upon which the 1st plaintiff took possession.

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It was the 2nd plaintiffs, claim that by the time she sold the land to the 1st plaintiff there were neither tenants nor people claiming interest on the said land and all local authorities had been effectively consulted on the same'

The plaintiffs however later learnt that a one Faridah Mayanja, Resident city Commissioner of Kampala Central (RCC) in June, 2020 helped the 1st and 2nd defendant to forcefully trespass on the suit land without any court order or just cause and directed the 1st and 2^d defendant to remain on the suit land.

It was also further claimed that the 1st plaintiff had peacefully purchased from the 2nd plaintiff but that the 1st plaintiff declined to the full purchase price when the defendants trespassed and grabbed the said land, which frustrated the execution of the contract between both plaintiffs.

The plaint originally had four defendants but was amended to remove Farida Mayanja who was the RCC Kampala Central. The plaintiff later settled with the 3^d defendant Lakor defendants. Henry, which left the suit against only 1st and 2^d

Defence by 1st defendant:

In her defence, the 1st defendant claimed that the plaintiffs had no cause of action against her as she was the lawful owner of a portion of a kibanja, measuring 71ft x 51ft, comprised in Kibuga Block T2 plot T22, land at Kisenyi along Butikiro Road, which was acquired by her father Christopher Kazibwe from Hajji Burhan Ssekibenge in April, 1992'

Ssekibenge had settled on the kibanja with consent from the original registered owner, one Rsemary Mulyanti in the 1970s before it was transferred to M/s Sapoba Bookshop Press Ltd in 1977.

25 That she lived on the land from 1992 with her father as lawful occupants and without challenge from the registered owners anyone. However on 13th March, 2015 her mother Pross Kazibwe who was not staying with her on this land

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attempted to sell it to one Mwesigwa Charles without her consent, which attempt she rejected at first.

After two weeks the same Mwesigwa came with the 2nd plaintiff and an agreement dated 17th March, 2015 claiming to be the new owner and promising to compensate her which was not done and this forced her to pull out of the sale, thus retaining her land to date.

It was also her claim that neither the plaintiffs nor their predecessors in title have ever occupied or utilized the suit land as her occupation is well known and recognized in law.

10 Defence by the 2nd defendant:

The 2nd defendant formerly 3rd defendant, also denied having committed any trespass on the suit land claiming that he was thereon as a lawful tenant under a contract of tenancy; and purely on business.

According to him therefore, the plaintiffs were not entitled to any remedies sought. 15

Representation:

The plaintiffs were represented by M/s Mugarura Kuarisiimo & Co. Advocates, The 1st defendant was represented by M/s Ouogesigire, Muhereza & Co. Advocates. The 2nd defendant was represented by M/s Baggend. & Co. Advocates.

Issues.

At scheduling, the following issues were framed:

- 1. Whether the 1st and 2nd defendant are trespassers to the suit land;
- 2. Whether the 1st and 2nd plaintiffs are bona fide purchasers for value of the suit land;
- 3. What are the remedies for parties.

Article 3

Section 107 of the Evidence Act, (currently, Cap. 8) provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and the burden of proof lies on that person. (Pakzad Ali Reza vs. Kiuanuka

5 And. & Anor Civil Suit No. 780 of 2015).

Section 103 further stipulates that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. It was therefore incumbent upon the plaintiffs in this suit to prove that they were the rightful owners of the land in dispute.

Trespass to land occurs when a person makes unauthorized entry upon land, and thereby interferes, or purports to interfere with another person's lawful possession of that land. 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. (Justine E. M. N Lutaagwa, s. Sterling Civil Bng Co. Ltd SCCA No. 77 of 2002). 10 15

An action for the tort of trespass to land is therefore for enforcement of possessory rights rather than proprietary rights. (Odegk Alex & Anor as Gena 4 others: Civil Appeal No. 9 of 2077)

At the trial the plaintiff had four witnesses: Enock Kaddu, as Put1; Tamuzadde Amina Nakibuule, as Put2, Kalanda Joseph Pur3, Katongole Gerald Put4. Ainamaani Allan, Pro5 was discharged following the objection upheld by court concerning his qualifications as a surveyor. 20

Mr. Mwanje Ronald, the 2nd defendant never appeared for the hearing and court therefore proceeded ex parte against him.

The 1st defendant Nanyonjo Fiona Kazibwe on her part testified as Dar1. She had two other witnesses, Mulindwa Livingstone, the LC II Chairman of the area, as Dut2, and Kazibwe Christopher, her father as Dut3. 25

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Resolution of the issues:

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During the hearing, Enock Kaddu testifying **Pw1** told court that he purchased the suit land comprised in **Kibuga Block 12, plot 722** on the 11th March, 2020 from the 2nd plaintiff, Tamuzadde Amina Nakibuule, **Pw2**.

He tendered in court, the sale agreement, **PExh3** and out of the price as indicated in the agreement he had made part payment. That he made due diligence through inquiries from the area LC, one Gerald Katongole, who testified as **Pw4**.

- The plaintiffs also tendered in court a letter from the LC Serwanga village, dated 10th March, 2020, marked **PExh 5**. In that letter, Tamuzadde Nalubuule Amina was introduced as a land lord in respect of the suit land, having bought the same from Yusufu Semugabi in 2015. The letter also stated that the land was free from 'inconveniences' and was not occupied by any sitting tenant.
- Amina Tamuzadde as **\$Pw2\$** informed court that the land she sold to the 1st plaintiff was purchased by her from Yusuf Ssemugabi after consulting the area LC1, and the neighbours to the suit land, who confirmed that it belonged to Ssemugabi as the registered proprietor.

She presented a purchase agreement dated 17th March, 2015, marked PExh 1

which indicated the total amount of consideration as *Ugx 380,000,000/=*. A 20 number of other documents were presented by Tamuzadde as proof of such legal ownership and possession.

PExh 6, a search certificate addressed to the \$1st plaintiff Enock Kaddu, confirmed that as at 9th July, 2020 Tamuzadde Nalubuule Amina became the registered owner of the land on 28th May, 2015.

It showed that the title had been issued as a special certificate of title and that the suit land had been mortgaged to Centenary Rural Development Bank Ltd.

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It was further revealed that a caveat had been lodged on the land on 19th June, 2020 under inst. No. KCCA-OO71287, by a one Henry Nyeko Lakor who had been the 3rd defendant but who, following a consent between him and the plaintiffs had his name withdrawn from the suit.

5 As proof of her title registration, Tamuzadde presented PExh 2, a copy of the certificate of title for an area of 0.40 acres for the land comprised in Kibuga block 72, plot 722.

The title indicated that she got registered thereon on 8th May, 2015, while Yusufu Ssemugabi who sold the land to her became the registered owner on 28th January, 2015.

In the events that followed the said transaction, Tamuzadde had applied to KCCA seeking approval of her plans to develop the land. PExh 4 was tendered in court as a KCCA letter dated 4th August, 2017, addressed to her, signifying its approval of the development plans for the suit land.

Before starting on any development however, Tamuzadde went on to rent out the suit land to Joseph Kalanda in 2015, as per a tenancy agreement, PExh 8, at a monthly rent of Ugx 2,000,000/=.

Joseph Kalanda testifying as Par3 confirmed his relationship to Tamuzadde as his former land lady. His further testimony was that in March, 2020 she introduced to him the 1st plaintiff as the new owner/landlord.

After the sale transaction between the two plaintiffs for the suit land executed on 11th March, 2020 as per the sale agreement, PExh 3. the 1st plaintiff conducted a search on the title on 9th July, 2020.

The search results in PExh 6 revealed that although the 2nd plaintiff was the registered owner, the land already had an encumbrance, namely, a mortgage obtained by her from Centenary Rural Development Bank Ltd, registered on 15th April, 2019. A caveat was also lodged by Lakor Henry Nyeko on 19th June, 2020, though this was after the 1st plaintiff had already purchased the land.

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The plaintiffs also presented to court a letter, PExh 5 from the area LC dated 56 March, 2020 which confirmed that Tamuzadde had bought the suit land from Yusufu Ssemugabi.

From the contents of that letter, the land was free from encumbrances and was not occupied by any sitting tenant. It was on that basis that Tamukedde therefore claimed she had no knowledge of the 1st defendant's interest as a bonofide occupant,

The 1st defendant on her part claimed to be the lawful owner of a kibanjo gifted to her in 2006 by her father, Christopher Kazibwe, who testified as Dur3' The two relied on documents of sale and transfer, the authenticity of which was however challenged by the plaintiffs.

The 1st defendant's father Kazibwe, Dut5 told court that he had purchased the kibonja from Hajji Burhan Ssekibenge in 1992. He presented DExh7, ^a handwritten Luganda agreement between him and Burhan Ssekibenge by which the land adjacent to a water channel was shown in a sketch, measuring 47.8 ft x ⁷¹ ft x 51.8 ft. x 71 ft. TL, the first name appearing for the purchaser were 'Tofa'not (Christopher) but which according to the 1st defendant was also his father's name

20 In his evidence he stated that he had lost the first agreement he made with Haji Ssekibenge in 1992, and that the two had agreed to sign another agreement, bearing the same date of 15th April, 1992.

On 20th June, 2006 in the presence of Pnt4, the father gave his daughter what he referred to as a potuer of attorney, marked DExh 3, to deal with the land and houses thereon.

Upon his return from Nairobi in 2009 he handed over the entire property to her. (Ref: paragraph's 7-11 and DExh 4 (gift deed), dated 2nd November, 2009). That he was however surprised to return later to find both his houses demolished. 25

DExh 4 which was endorsed by the area LC, Gerald Katongole, Put4' as one of the witnesses reads:

IKazibweChistopherwithsoundmindondoslllitingbelou(sic!)

On this day of Nov.2-2009 I have fully given my daughter Nangonjo Phiono Kazibu.tetLeplotoffLubagaRoad.ssertltangaZone,block12andblock 722(sic!) lubaga road u.tith at its belongings (buildings) and unfinished Jlat block the plot measurements as belottt: '

The sketch thereon reflected the same measurements as those in the purported sale agreement.

- counsel for the plaintiffs' however raised several issues relating to these documents. In the first place, that the 1st defendant, Du7 never showed any document or consent from Sapoba Bookshop Press Ltd, which company, from the certificate of title marked PExh 2 was the registered owner at that time, allowing her father, Dug to transfer his interest to DutT in 2009 ' 10

- That there was no evidence that- sapoba Bookshop Press Ltd the then registered owner ever recognized Burhan Ssekibenge, DutS or DutT as the successive kibanja owners. 15

Butalsofoundmissingontheagreementitself,DEXhlwastheactualpurchase price and terms of payment as well as details of the actual plot and block number

on which the kibanja was seated. 20

counsel also pointed out that the 1st defendant signed the agreement as one of the witnesses yet as pointed out by the plaintiffs' counsel, (and admitted by the 1st defendant herself), she was still a minor tn 1992'

In her attempt to explain away this anomaly, she told court that this agreement replaced the original one which had been misplaced but that at the time she signed the one currently on record shc was 18 years' 25

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With due respect to her explanation however, it is a general rule under the law of evidence that the best evidence of contents of a document is the document itself and no extrinsic evidence is to be introduced to vary such evidence.

The evidence sought to be added in this instance was oral, which violated the parole evidence rule, (sectTon 97 and 92 oJ the Etidence Act) and which therefore affected not only the admissibility of the 1st defendant's oral evidence on that point, but also tainted the authenticity of such an agreement.

The said attempt to vary the document, variation coupled with the rest of the anomalies as identified by the plaintiffs on the face of DExh I thus rendered the entire agreement null and void.

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The questions at hand are pegged on the nature of the interest claimed by the 1st defendant on the one hand, that is whether or not her father from whom she alleged to have derived her interest was a lawful/ bonafide occupant

For the plaintiffs, this court had to resolve the question as to whether the 2nd plaintiff obtained the certificate of title fraudulently and il so, whether or not the plaintiffs were bonafide purchasers for value; and whether or not therefore the 1st plaintiff could acquire good title from the 2nd plaintiff. 15

The law governing the land tenure system is laid out clearly under the Constitution. 20

Article 237(8) of the Constitution provides:

'Upon the coming into force of this Constitution and until Parliament enacts appropriate law under clause (9) of this article, the lawful or bonafide occupants of the Mailo Freehold or leasehold land shall enjoy security of occupancy on the land'.

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Article 26 (2) of the Constitution of the Republic of Uganda also states that every person has a right to own property either individually or in association with others.

5 By virtue of section 29(7) and (b) of the Land. Act, Cap 236, a lawful occupant includes a person who entered the land with the consent of the registered owner, and includes a purchaser; and 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.

Under section 29(2) of the same Act: a bona fide occupant means a person who before coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more.

Thus for a person to successfully claim to be bonafide occupant, she/he must have been in occupation or possession of the suit land for more than 12 years

before coming into force of the Constitution. (Iampala District land board & Chemical Distributors as National Housing & Construction Corporation, SCCA IV. 2 of 2004). 15

Since their purported interest arose in 1992 just three years before the coming into force of the Constitution the 1st defendant and her father could only fall under that category of bona fide occupants if they could satisfy court that section 29(5) of the same Act applied to them.

The section reads

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 bonafide occupant for the purpose of this Act.

In the case of Ouenembazi Enid as Guarantee Trust Bank & 2 Ors Civil Suit IV. 63 of 2019 cited by counsel, court defines kibanja as a form of land holding or tenancy that is subject to the customs and traditions of the Baganda,

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characterized by user rights and ownership of developments on land in perpetuity, subject to payment of an annual rent (busuulu) and correct social behavior, distinct and separate from ownership of the land on which the developments are made and in respect of which the user and occupancy rights exists.

By virtue of section 34(2) of the said law, a tenancy by occupancy is protected and may be inherited.

Such weight and protection accorded to unregistered interests is demonstrated through the various enactments/ sections and authorities a number of them binding to this court. I will list but a few:

Although the general principle is that a certificate of title is conclusive evidence of ownership and that a title can only be impeached or defeasible in cases of fraud, section 64(2) of the Registration of Titles Act, Cap. 240, comes in clearly to show that any land included in any certificate of title is subject to the subsisting rights of (among others) of any tenant of the land, notwithstanding the same are not specifically notified as encumbrances on the certificate or instrument.

Under section 36(9) of the Land Act, any change of ownership of title effected by the owner by sale grant, and succession or otherwise therefore does not in any way affect the existing lawful interests or bona fide occupant; and the new owner is obliged to respect the existing interest.

Section 36 (3) of the Act also makes it a mandatory requirement for the owner of the land who wishes to sell his or her interest in land to give the tenant in occupation the first option of buying that interest.

That is why therefore in the case of *Serunjogi vs Katabira* (1988-90) HCB 744 the court ordered the defendant to surrender possession to the plaintiff and in so doing gave an explanation that where equitable interest exists, court will enforce it as if it were a legal interest. 25

11 ibid

In the present case, the 1st defendant in her specific reply to paragraph 4 of the plaint the 1st defendant relied on peaceful entry and uninterrupted possession on the kibanja and pleaded thus:

- a)that since 1992 when 7th defendant started living on the suit land. .. neither Sapoba Bookshop Press Limited nor Yusufu Ssemugobi the subsequent registered proprietor ever challenged her lawful occupation nor consulted her consent to transact over this piece of land;

In paragraph 7:

10 ..that she is a lawful occupant who has lived, utilised her parcel of land without challenge from anybody until this suit against her

In paragraph B:

... that neither the plaintiffs nor their predecessors in title has ever occupied or utilized the suit land as her occupation is well-evidenced known and recognized in law.

In reply to 1st defendant's WSD, the plaintiffs who also claimed to have been bonafide purchasers for value maintained that the 1st defendant was a trespasser on the land as the sale agreement relied on by her as the basis of her claim was a forgery.

20 That the 2nd plaintiff had purchased the suit land in 2015 and was given vacant possession and therefore never found Hajji Sekibenge or the 1st defendant on that land by time of purchase. The 1st defendant was forcefully and unlawfully brought to land by the RCC of Kampala Central, which amounts to trespass.

25 In addition to the sale agreement, the 1st defendant presented a picture of her father's old house which was on the suit land at the time, ref: DExh 2, which (in absence of other evidence to make court think differently), had been the family home, even when Dar3 left the country to seek for a job elsewhere.

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Section 39 (4) of the Land Act, Cap 236 (7th Edn) in addition also offers some guidance as to what constitutes family/matrimonial property.

"family land" means land—

- (a) on which is situated the ordinary residence of a family;
- (b) on which is situated the ordinary residence of the family and from which the family derives sustenance;
- (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or
- (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family.

The law also defines "ordinary residence" to mean the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place where he or she intends to make that place his or her home for an indefinite period.

- The ordinary residence of a family may include the matrimonial home as well as 15 the habitual home, places where both spouses take steps to set up a regular household together with a shared, settled, mutual intent that the stay lasts indefinitely, the period need not be long. (Ref: Lanyero Ketty vs Okene Richard & Hellen Abwola Civil Appeal No. 0029 of 2018).
- **Section 40 of the same Act** is critical. It precludes the sale or lease of land that 20 constitutes family land, without prior consent of the spouse.

In another oft-cited case of Muwanga vs Kintu HC Divorce Appeal No. 135 of 1997 (unreported) court described matrimonial property as that property to which each spouse should be entitled.

It is property which parties choose to call home; and to which they jointly make 25 substantial contribution, direct or monetary or indirect and non-monetary. (Katuramu vs Katuramu MA No.026 of 2017).

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The 1st defendant supported by her father claimed that the kibanja had their family home on which they had resided as a family for years.

Counsel for the plaintiffs submitted correctly, that during cross examination Du3 gave contradicting evidence when he said that he used to pay busuulu to

5 the land lord called Rosemary Mulyanti and yet the said Rosemary Mulyanti was last registered on the title as shown on PExh 2 in 1969, after which the land was transferred to Sapoba Bookshop Press Ltd in 1977.

It is also a correct observation made by counsel for the plaintiffs that since Dur3 allegedly purchased the kibanja in 1992 he ought to have paid busuulu to Sapoba Bookshop Press Ltd.

That DutT claimed the kibanja had been given to her as a gift, as per gift deed dated 2nd November, 2009 yet with an LC stamp of 2079 and that the original deed was not presented.

This court could not also fault with the argument that the purported powers of attorney from her father, marked DExh 3 which though dated 24th June, 2006, and witnessed by the LC, bear a stamp of 8th October, 2019, which made its validity questionable.. 15

It is also true as already noted earlier, that the purported instrument of power does not show any block or plot number of the subject land and was not registered with the URSB.

However as already noted the land qualified as jointly owned family home/property and any transactions thereon ought to have had the consent of both spouses.

Accordingly, the wife could not enter into any valid sale transaction as she purportedly did with Charles Mwesigwa, on 13th March, 2015 without the prior consent of her husband. 25

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Likewise, the husband Dur3 could not give away the home (however valid the reasons were for doing so), without prior consent of his wife. That therefore also include the alleged 'power of attorney' and 'gift deed' to his daughter.

Even if therefore this court were to consider or believe these documents as having been properly made, the restriction was on section 40 of the Land Act which forbids any transaction made on family property, without the consent of the spouse.

In addition, going by the provisions of section 29 of the Land Act which as noted, accords protection to unregistered/ equitable interests, the manner of acquisition of such protectable interest is not restricted to only the purchased interest. It is flexible enough to include by will, inheritance, or by long stay and occupation, with the knowledge and consent of the land owner.

The law as it is, therefore envisages a person entering, settling, occupying and utilizing the land, regardless of whether or not he/she holds a sale agreement with the land owner.

The key qualification to this protection are entrance with the knowledge and consent of the owner, which consent includes acquiescence. Therefore, for as long as one remained unchallenged by the registered owner or his/her agent for 12 years or more, the occupant derives protection by law as an equitable owner.

- The plaintiffs in this case had a duty to discharge, that is, to prove to this court that this was not their actual family home; or that the family had not lived for that long or at all, on the land and therefore failed to meet the criteria of lawful/bonafide occupants; or that indeed they were mere squatters or licensees and/or had received compensation by Yusufu Ssemugabi. 20
- 25 Katongole Gerald, the area LC testified as Put4 confirmed that the family had two houses on the kibanja and in paragraphs 6 and 10 of his witness statement, (and contrary to what he told the plaintiffs), that the suit land had occupants).

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He also knew the 1st defendant as a daughter of Christopher Kazibwe who used to occupy the land. Even at locus he showed court where the two houses of Kazibwe were located; and confirmed that one of those had been the family home.

The plaintiffs did not discredit the evidence of the 1st defendant's childhood friend village mate in Serwanga village, also the LCII chairperson, one Livingstone Mulindwa, Du3 who informed court that he was approached by one Abbey Serwadda, whose intention was to find a buyer for the suit land.

Serwadda informed him that the said land had 'squatters' and that the title was in the bank. It was also Du3's evidence that the 1st defendant had been living on that land with her mother, Prossy Kazibwe.

Furthermore, that in 2015 he found a gang of men with the 2nd plaintiffs, demolishing the houses on the kibanja. By that time the 1st defendant was away but her mother was still residing on that land.

It is important to note that all these matters and developments touching on this land happened even before the 2nd plaintiff acquired legal interest in the suit land. 15

Whereas as pointed out by the plaintiffs that the 1st defendant and her father did not present any proof that the family ever paid busuulu to any of the previous registered owners, there is no doubt that they had constructed a family home; lived on that land as a family for years; even put up a foundation for another house, while the successive registered owners and LCs all looked on.

The previous owner of the kibanja interest was Hajji Ssekibenge who himself had entered on that land with the knowledge or acquiescence of the registered owner and even sold off portions to third parties, more probably than not, without securing consent of the owner.

At common law, acquiescence of a degree that amounts to passive encouragement, may by itself of a proprietary estoppel, deprive an owner of land in favour of an occupier of land in possession under a mistaken belief in his or her own title.

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inconsistent legal right, when it is unconscionable for the owner to reassert his or her title (see *Willmott v. Barber* (1880) 15 Ch D 96 and *Taylor's Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1982] QB 133).

This requires proof in the first place that:

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- a. *The occupier made a mistake as to his legal rights.*
- b. *The occupier must have expended some money or must have done some* act (not necessarily upon the owner's land) on the faith of his or her *mistaken belief.*
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- c. *The owner of the legal right, must know of the existence of his or her own* right which is inconsistent with the right claimed by the occupier.
- d. *The owner the legal right, must know of the occupier's mistaken belief of his or her rights.*
- e. *The owner of the legal right, must have encouraged the occupier in his or her expenditure of money or in the other acts which he or she has done, either directly or by abstaining from asserting his or her legal right.*
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The principle requires an approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to deny that which, knowingly or unknowingly, he or she has allowed or encouraged another to assume to his or her detriment (see *Willmott v. Barber* (1880) 15

25 Ch D 96).

> Thus if the legal owner stands by and allows the claimant to, for example, build on his or her land or improve his or her property in the mistaken belief that the claimant had acquired or would acquire rights in respect of that land or property then an estoppel will operate so as to prevent the legal owner insisting upon his strict legal rights.

It applies where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal

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rights, knowing or intending that the other will act on that belief, and that other does so act.

Deduced from the documents on the record, there is clear evidence of knowledge by the LC of the several occupants on the ground and the several goings on concerning this land before the plaintiffs purchased the land, none of which could have gone undetected.

The suit land including two other plots, 720 and 723, had been mortgaged in the bank by the previous registered owners before the plaintiffs picked interest in one of them, plot 722. Documents within the custody of the LC, particularly specifically showed that the mortgaged plots were due to be sold.

DExh 9, a letter of introduction dated 2nd November, 2014, by Serwanga Village LC 1, addressed to the Manager of SIL INVESTMENTS LTD, Ssemugabi Yusufu was introduced as a person who was mandated by the occupants of block 72, plot 722, Mengo Kibuga, to bid for the land.

The four occupants whose photos and names were clearly shown on that letter were Prossy Kazibwe, the mother to the 1st defendant, Lakor Henry (caveator/3rd defendant); Hajati Yudaya, and Mwesigwa. 15

In the spirit of section 40 of the Land Act as cited earlier, Prossy Kazibwe never obtained prior consent to commit her husband in this transaction part of which constituted her family land.

Secondly, the plaintiffs did not produce any documentary evidence to prove that she or any of the four occupants received compensation from Yusufu Ssemugabi as the previous owner or later through the 2nd plaintiff as the next registered owner

The same record reveals that SIL INVESTMENTS LTD on 17th March, 201¹ together with PEARL INTER AGENCIES on 31st March, 2011 had written to occupants of the land, to notify them of a pending eviction- years after the family had been in occupation of that land as residents. 25

The two agents of the previous owners thus going by the above, recognized the existence of the 1st defendant's interest as a family together with those of other occupants like Henry Lakor, whose interest in that land was later settled by the plaintiffs themselves.

5 Lakor had filed a caveat on the suit land, and during cross examination the 2nd plaintiff admitted having paid him a sum of Ugx 40,000,000= 10, his kibanja interest, after which the suit against him had been withdrawn by the plaintiffs.

Upon receiving the notice of the pending evictions, Hajji Sekibenge had, on 27th November 2013 on behalf of himself and other occupants on plots 720' 722

and, 723 and through his lawyers written a protest letter against the two companies/ agents warning them against disregarding their various interests as bona fide occupants. 10

The letter by M/s Sebanja Malende & Co, Advocates: titled: KIBAGA BLOCK ¹² PLOTS NOS. 720 722 AND 723 LAND AT NAMIREMBE RUBAGA ROAD was addressed to SIL INVESTMENTS LTD AND PEARL INTER AGENCIES AUCTIONEERS, referring to their letters dated 17th March, 2011 and 31st March 2011 respectively, ordering the occupants to vacate their plots of land.

Hajji Burhan Ssekibenga and 10 others in that correspondence claimed to be bonafide occupants of the property, presumed to be free from any encumbrances by time it was purchased. There is no response on record against that claim.

Ssekibenge who, (from the contents of that correspondence), had eventually sold some of his interests to other occupants who were at that time still on that land. He himself claimed to have bought the land from one Lutaaya Daudi who acquired the same from Mrs. Rosemary Namuwaya Mulyanti, the registered proprietor.

The lawyers warned that the notice of eviction was misconceived and untenable given that the interests in the said land were not catered for by the registered

tenants.

proprietors, SAPOBA BOOKSHOP PRESS LTD and Rosemary Mulyanti when securing the loan facility and therefore could not vacate the land before compensation. The contents of those letters were never challenged.

Although therefore the 1st defendant's name was not specifically mentioned in that letter, there was no denying the fact that at the time all this was happening the land had occupants and his family was one of such. At no point did Ssekibenge deny having sold the kibanja on plot 722 to the 1st defendant's father.

In his evidence in chief Put4 told court that he first got to meet Tamuzadde in 2015 when she came to inquire about the suit land, and whether there were any encumbrances thereon. 10

Contrary to what he gave as his evidence, that the suit land was vacant at the time and not occupied by any sitting tenants. That she was later introduced to the office as the new owner by Yusufu Ssemugabi who was the former owner of

the suit land. 15

He further claimed that Ssemugabi had compensated the occupants, a claim which he however failed to prove. That he saw them demolishing their buildings and taking away the materials, another claim which was challenged by the evidence of Dut2.

Pu4 also referred to an advrt in Red Pepper newspaper of 17e Junc, 201 1 by which as noted by this court, the notice of sale, was in respect of mortgaged property comprisd in p lots.' 720, 722 and 723. 20

The notices came in following the registered owner (SAPOBA's) failure to pay Ugx 7,460,909, O34l=, it owed to the bank, which loan had been secured by the said plots.

Put4 further told court Yusufu Ssemugabi had bought the land from the bank through the PEARL INTER AGENCIES AUCTIONEERS. Thus around the time he, Ssemugabi sold to the 2.d plaintiff, the land obviously had encumbrances.

tl*rt

Pur4's credibility was unfortunately dented in onc key area. If what he stated during the trial is true, then he had all this information within his custody including the pending evictions but decided to keep it to himself and not reveal it to the 2nd plaintiff when she was introduced to him by Ssemugabi. Instead he had assured her that the land was vacant, at the time when she bought it. But this was her own witness, with all due respect.

If the 2"a plaintiff had taken the trouble to inquire from the neighbours before purchasing the land, they would have revealed to her that some wrangles between the occupants and the registered owners had come up decades later, starting off in 201 1; and that the genesis of those wrangles was the unpaid mortgage over the suit land.

It was also around that time (late 2014) that Katongolc as LC had written to the manager SIL INVESTMENTS to introduce Ssemugabi Yusufu, (the 1st plaintiffs her predecessor in title) as the person who had been mandated by th,e occupants

¹⁵ ol block 72, plot 722 block 72 Mengo Kibuga to bid for the above land.

This mandate cannot have been construed to mean that the occupants had abandoned their properties or freely handed over to him their respective interests in the suit land to dispose of.

My understanding of that document is that the occupants were trying to protect their interests by creating the trust under a single person Ssemugabi, which evidently never worked, for soon thereafter Prossy Kazlbwe without consent of the registered owner at that time, purported to sell off her share in 20 15 to another occupant, Charles Mwesigwa as per an agreement dated 13ft March, 2015. 20

This happened some four days before Ssemugabi had sold the entire plot on which the kibanja was seated to the 2"d plaintiff. It is worth noting that neither of these two agreements however had Pu4's stamp and endorsement or that of any other area leader. 25

The conviction by this court therefore also that there was no actual sale of the respective interests by the occupants is based on the fact that from the record there is no documentary proof that money had exchanged hands either by way of consideration or compensation. Had that been the case, Put4 himself would have been involved and would have kept the records in his custody as the LC.

It is reasonable to think, as I do now, that the transfer of that land from Ssemugabi to Tamuzadde could not have been that of an exclusive owner but rather as a Presumed trustee.

The only person who could have proved that Prossy Kazibwe had been compensated, just as Lakor was, (leave alone Put4 who did not) would have been Ssemugabi himself.

He was a key witness for the plaintiffs and one wonders why (if he was still alive) he had not been summoned by the plaintiffs as one of their key witnesses. 10

When the 2nd plaintiff therefore purchased the land comprised in plot 722, she was under an obligation to compensate the occupants in the same way she did for Lakor, the caveator, whose interest had been settled through compensation. 15

When Ssemugabi therefore sold the suit land to Tamuzadde he ought to have secured prior consent from the occupants who entrusted him with their interests in that land, as shown under DExh 9.

It is a correct assessment of facts made by the plaintiffs, counsel that being an occupant does not necessarily mean that one holds a lawful kibanja interest. But also equally true is the fact that the absence of structures on the land or other evidence of occupation would not necessarily mean that the land is vacant or without claimants/ owners. 20

25 In conclusion:

It therefore goes without saying that within the spirit of section 6A of the Registration of Titles Act, Cap 240, the land included the title was subject to

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the subsisting rights of Kazibwe's family which were not specifically notified as encumbrances on the certificate or instrument.

Secondly, as spelt out under section 36(9) of the Land Act, the change in proprietorship effected by the 2nd plaintiff through the sale/transfer did not in any way affect the existing interests on plot 722, where the interest of the 2nd plaintiff as the new owner was obliged to respect.

In response therefore to the issue as to whether the 1st defendant was a trespasser to the suit land, the answer is in the negative.

Wrrs the 2"d defendant a tresoasser ?

On this question, court did not find any reason as to why he was sued in the first place. As he himself pleaded, he could not have committed any trespass on the suit land which was rented out to him under a tenancy agreement' 10

He never turned up in court. Rightly so. He was under an honest belief that the 1"t defendant was the lawful owner and as a tenant, occupied the land and

utilized it purely for business. The plaintiffs therefore had no cause of action against him. 15

Issue No. 2: Whether the 7st and 2^<' lain ^sdre bona de urchasers r aalue of the suit land:

The Black's Laut Diclton rry 9th Editlon at Page 1335 defines a bonafide purchaser as one who buys something for value without notice of another's claim to property and without actual or constructive notice of any defects or inquiries against the sellers' litlc. 20

In the case of Hannington l{iukl us. George william Musisi (1999) KAI-R 794 court stated the four ingredients of a bonofide purchaser, that is, that the

defendant holds a duplicate certificac of title; that the purchaser purchased the property for valuabl consideration; that she/he bought in good faith without 25

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any such defect in title; that the vendor was the former registered owner of the property.

In David SelJaka Nol na Vs Rebecca Musoke SCCA 12/7985 it was also held that for a purchaser to claim protection as a bonafide purchaser without notice of fraud he or she must act in good faith. If he or she is guilty of fraud or sharp practice, that person ceases to be innocent and therefore loses the protection.

Mere knowledge of unregistered interest cannot bc imputed as fraud, except where it is accompanied by a wrongful intention to defeat such existing interest. (Katarikaue us Katulrentu (1974 HCB 188).

It is also true that knowledge of other person's rights or claim over land and deliberate acquisition of a registered title in the face of protests amounts to fraud. (Marko Matorru us Mohammed Sserruiri & Anor (1979) HCB 174 as approaed in Bazirake as Mutaba Barisa Ephraim HCCA No. 43 oJ 200B). 10

As the law now stands a person who purchases an estate which he/she knows or ought to know that it is in use of another other than the vendors without carrying out the due inquiries from the person in occupation and use, commits fraud. 15

Actual notice of fraud refers to a situation where one party does have knowledge about the circumstances surrounding the land while constructive notice is defined as the knowledge of facts which if one acted prudently, he or she would have known. (Uganda Post & Telecommunications Vs Lutaaga C.A. 36/1ee6).

Thus also by virtue of section 59 of the Registration of Titles Act, a certificate of title is conclusive evidence that the person named therein is the proprietor with the power to appoint or dispose of the land described in the certificate of title.

That read together with section 176 (c) of the same Act implies that no action of ejectment or other action for the recovery of any land lies or can be sustained

*3

against the person registered as proprietor under the Act, except where there is fraud.

The law on fraud is settled in the case of Fredrick J. K, Zaabue Vs Orient Bank Ltd & 2 Others, SCCA 1/10. 04 of 2006. The Supreme Court adopted the definition of the term "fraud" in Black's Law Dictionary 6th Edition page 660.

Fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

It is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury?" 10

Further, in Kampala Bottlers Ltd vs Damanico (U) Ltd SCCA No. 22 of 1992, it was held that for an allegation of fraud to succeed in impeaching the title of the registered proprietor, it must be actual fraud or constructive and must be attributed to the transferee who must have known or participated in the fraud or known of it and taken advantage of the fraud.

Being a serious allegation, it is a mandatory requirement of law that where the cause of action against the proprietor is fraud, it must specifically be pleaded and the particulars set out in the plaint, Order 6 rules 3 CPR, Hannington

Wassuta & Anor Vs Maria Ongango Ochola SC. CA No. 22 of 1993, 20

It must also strictly be proved, to a standard of proof higher than the usual balance of probabilities in civil matters though not so high as to require proof beyond reasonable doubt. (Ilogt Abdu Nasser Katende Vs Ithalidas Haridas & Co. Ltd C. A. C. A No. 84 of 2008).

In the present case, this court finds that the 1st defendant neither specifically pleaded fraud nor did she file a counterclaim. 25

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Be that as it may, the evidence reveals that the 2nd plaintiff never carried out a sufficient inquiries or search on the title from the land office. She never mentioned the neighbours whom she consulted in relation to the occupants on that land.

She never carried out a survey possibly for fear of knowing the actual boundaries and occupants. It was not until 15th June, 2020, after selling the plot to the 1st plaintiff that the survey was done.
5

The relevant information pertaining to this land including the fact that it had been a subject of a huge mortgage prior to the purchase which was readily available ought to have been a red flag.

As for the 1st plaintiff, he is presumed to have had prior knowledge of the mortgage on existing on the title at the time he purchased it from the 2nd plaintiff. He only conducted a search on 9th July, 2020, after signing the agreement with the 2nd plaintiff on 11th March, 2020.

If, as claimed by the 1st defendant that her father's kibanja had been derived from that of her father, who acquired his from Hajji Ssekibenge and who in turn also derived from others tracing the root of ownership back to the original registered owners, Mulyanti Rosemary and SAPOBA BOOKSHOP PRESS LTD, this long and uninterrupted chain of ownership and possession could have been easily verified by the plaintiffs, with minimum effort by both plaintiffs. 15 20

A due diligence search would also have revealed that none of the successive owners ever occupied that land. Yet this was prime land and location which was good and ready for business; and all that was required were extra efforts by prospective purchasers to search for the truth, as there was no way such land

could have been "unoccupied" for decades.

Even when the 1st defendant and his daughter left to work outside the country the actual owners never evicted the family or in other way challenge his continuous uninterrupted stay on the land.

Ut. D'-f

Having endorsed several documents for the 1st defendant's family, Par4 had full knowledge about the history of the land and kibanja dispute and was therefore partly to blame if he kept that vital information to himself.

As noted by court, the 1st defendant did not file a counter claim against the plaintiffs, whose action however fails against both defendants.

By implication, fraud was committed by the 2nd plaintiff against the 1st defendant, following her failure to conduct due diligence.

Remedies:**Orders of court:**

- 1. Since this court finds that the 1st defendant's family did not occupy the entire plot 722, there would be no need to cancel the title but to give the 1st defendant's family compensation due to them, based on the current value of the area covered by the kibanja. 10
- 2. The value of the kibanja shall be assessed by the office of the Chief Government valuer which will give its report to court, within 45 days from date of delivery of this judgment. 15
- 3. The 2nd plaintiff shall compensate the 1st defendant the value of the land based on the assessment made by the office of the Chief Government valuer, within a period of 45 days after its report has been filed in court. 20
- 4. The 2nd plaintiff shall pay the defendants for the costs of this suit, which will include the costs of the Chief Government Valuer.
- 5. The 1st plaintiff may recover the sum paid by him as part of the consideration to the 2nd plaintiff.

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\$I\$ so order Alexandra Nkonge Rugadya

Judge

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6th February, 2025.

Delivered on 6/2/2025

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