

UGANDA / JUDGMENT

Kyeyune and Another v Nakafeero and Others (Civil Appeal 45 of 2017) [2023] UGHCLD 231 (4 August 2023)

[2023] UGHCLD 231

COURT

HC: Land Division (Uganda)

BEFORE

Bernard Namanya, J

CASE / FILE NUMBER

Civil Appeal 45 of 2017

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND DIVISION)

CIVIL APPEAL NO. HCT-00-LD-CA-0045-2017

(Appeal from the judgment of His Worship Achoka Egesa Freddy, Magistrate Grade One, Civil Suit No. 41 of 2015, Chief Magistrate's Court of Nabweru at Kasangati delivered on the 12th April 2017)

1. LIVINGSTONE KYEYUNE

2. DAVID SSEMMANDA (Administrators of the estate of the late Eriabu Makanga) ::::::::::::::::::::::::::::::

VERSUS

1. NAKAFEERO PROSCOVIA (Administrator of the estate of the *late John Kafeero)*

2. C. KATAMA 3. SHEIKH BBALE ::::::::::::::::::::::::::::::

BEFORE: HON. JUSTICE BERNARD NAMANYA**JUDGMENT****Introduction:**

1. This case considers the legal requirements for acquisition of a Kibanja by purchase under *the Busuulu and Envujjo Law of 1928*. The case was initially filed in the Chief Magistrate's Court of Mengo at Mengo as Civil Suit No. 2 of 1992. Judgment was delivered by Her Worship W. N. Nabisinde, Magistrate Grade One (as she then was) on the 30th June 2000 in favour of the plaintiff, Eriabu Makanga, and against the 1st defendant, John Kafeero. The 1st defendant, John Kafeero was dissatisfied with the decision, and appealed to the High Court under Civil Appeal No. HCT-00-LD-CA-0064-2000. When the appeal came up for hearing before His Lordship Justice Joseph Murangira on the 15th March 2013, counsel for the appellant, Mr. Joseph Zagyenda submitted that the record

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of the trial court together with exhibits went missing, and that the trial court never visited the locus in quo of the suit land. He accordingly applied for a retrial of the suit. On the 28th March 2013, Justice Joseph Murangira ordered for the retrial of the suit under another Magistrate or Chief Magistrate. The matter was then transferred to the Chief Magistrate's Court of Nabweru at Kasangati, and heard by His Worship Achoka Egesa Freddy, Magistrate Grade One who delivered his judgment on the 12th April 2017 in favour of the pt respondent, John Kafeero. The estate of the late Eriabu Makanga were dissatisfied with the decision of His Worship Achoka Egesa Freddy, hence this appeal.

2. Meanwhile, the plaintiff, Eriabu Makanga, died in February 1993. He was replaced by his sons, Livingstone Kyeyune and David Ssemmanda (administrators of the estate of the late Eriabu Makanga). The 1st defendant died on the 3rd March 2018, and was replaced by his daughter, Nakafeero Proscovia, executrix of his Will.

Background:

3. The background to this appeal is that the appellants sued the respondents in the lower court for trespass to the land comprised in Plot 3 Kasangati Trading Centre, Wakiso District (hereinafter "the suit land"). They sought an order for eviction of the respondents from the suit land, a permanent injunction restraining the respondents, general damages, and costs of the suit. The appellants' case is that their late father, Eriabu Makanga acquired the Kibanja in the year 1949 when he bought it from Besweri Katera. The late Eriabu Makanga claims to have occupied the suit land and started utilising it in 1949 until December 1991, when the pt respondent's late father, John Kafeero

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started to lay claim on the same plot of land, and went ahead to dump building materials in preparation for construction of a house.

- 4. On the other hand, the respondents through their amended joint written statement of defence and counterclaim, averred that the 1st respondent is the lawful owner of the suit land. That he purchased the suit land from Kantibhai Manibhai Patel on the 15th April 1969 pursuant to a sale agreement. That after signing the sale agreement, he occupied the suit land, and started utilizing it but the appellants' late father, Eriabu Makanga interfered with his use of the suit land. The counter claim filed by the respondents makes several allegations of fraud against the appellants, including a claim that the appellants acquired a lease over the suit land with an intention of defeating the unregistered interests of the 1st respondent.
- 5. In the lower court, the following issues were framed for determination by the court:
 - i). Whether or not the plaintiffs (appellants) are the lawful owners of the suit land?
 - ii). Whether or not the defendants (respondents) are trespassers on the suit land?
 - iii). What remedies are available to the parties?
- 6. In the lower court, the appellants called 2 witnesses, PW1 (David Ssemanda), and PW2 (Wilson Mulyanga Ssalongo). The respondents called 6 witnesses, DW1 (John Kirizostom Kafeero), DW2 (C. Katama), DW3 (Sheikh Ssebale Badru), DW4 (Musisi Vincent), DW5 (Mawulensiya Nanteza Nalongo), and DW6 (Nakandi Agnes).

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- 7. In the lower court, the appellants adduced evidence of the following documents that were admitted in evidence:
 - i). Exh. P1 a copy of letters of administration for the estate of the late Eriabu Makanga dated 9th November 1993;
 - ii). Exh. P2 a copy of the purchase agreement for the suit land between Eriabu Makanga and Katera dated 17th April 1949;
 - iii). Exh. P3 a copy of the application for the suit land by Eriabu Makanga dated 19th July 1967;
 - iv). Exh. P4 a copy of the letter by Buganda Land Board dated 2nd July 1967 in response to an application by Eriabu Makanga;
 - v). Exh. P5 a copy of the approval of the application for the suit land by the Department of Lands & Surveys addressed to Eriabu Makanga dated 12th December 1968;
 - vi). Exh. P6 a copy of the leasehold certificate of title for the suit land dated 14th February 1977;

- vii). Exh. P7 a copy of the lease between the Uganda Land Commission and Eriabu Makanga dated 3 rd February 1977;
- viii). Exh. P8 a copy of drawings (undated);
- ix). Exh. P9 a copy of the general receipt for Ushs 470 dated 3 rd June 1969 for a payment made by Eriabu Makanga; and
- x). Exh. P10 a copy of the general receipt for Ushs 2,450 dated 7th December 1976 for a payment made by Eriabu Makanga.
- 8. In the lower court, the appellants adduced evidence of the following documents that were admitted in evidence:
- i). Exh. D2 a copy of the agreement between John Kafeero and Kantibhai Manibhai Patel dated 15 th April 1969;

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- \$Exh. D3 a\$ copy of the letter by Buganda Land Board dated 28th July ii). 1967 in response to the application by Eriabu Makanga (same as \$Exh. P4\$:
- \$Exh. D4 a\$ copy of the letter by Buganda Land Board to Ggombolola. \$iii)\$. Mutuba I office dated 5th August 1967 inquiring about the suit land and its occupants;
- \$Exh. D5 a copy of the letter by Mutuba I's office dated 28th August\$ iv). 1967 addressed to Buganda Land Board informing the Board about the suit land and its occupants;
- \$Exh. D6 a\$ copy of the lease offer form to Eriabu Makanga dated 3rd \$v)\$. December 1976;
- vi). \$Exh. D7 a\$ copy of the minutes of the meeting concerning the dispute over the suit land dated 19th December 1989; and
- vii). \$Exh. D8 a\$ copy of the court proceedings in the Chief Magistrate's Court of Mengo at Mengo.
- The lower trial court conducted a locus in quo visit to the suit land on the 14th \$9.\$ day of December 2016.

Trial court's findings:

10. The lower court found that the appellants are not the lawful owners of the suit land. That the suit land is owned by the \$1^{st}\$ respondent. In respect of the \$2^{nd}\$ and 3rd respondents, the Trial Magistrate held that there was no reason why they were dragged into the case, and the court record showed that they were only executing their official duties. The Trial Magistrate awarded general damages of Uganda shillings 20 million to the 1st respondent.

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Grounds of the appeal:

- 11. Dissatisfied with the judgment of the lower court, the appellants lodged this appeal on the following grounds:
- i). The learned Trial Magistrate misdirected himself when he decided that the appellants failed to prove their ownership of the suit land, whereas the appellants adduced overwhelming documentary and oral evidence, to prove that they owned the suit land since 1949, first as customary or lawful occupants, and later as lessees with a leasehold certificate of title issued by the Government of Uganda;
- ii). The learned Trial Magistrate wrongly rejected the appellants' evidence that they had been in occupation of the suit land since 1949, and that all developments on the suit land belonged to them;
- iii). The learned Trial Magistrate failed to find that the 1st respondent did not have any evidence to prove that he ever owned and occupied the suit land;
- iv). The Trial Magistrate failed to find that the Asian Patel from whom the 1st respondent claimed to have acquired the suit land actually never owned the suit land, and that the agreement on which the respondent was trying to base his claim was false, and it was rejected by court at trial;
- v). The learned Trial Magistrate failed to find that the Asian Kantibhai Manibhai Patel from whom the 1st respondent claimed to have bought the suit land did not own the suit land, and he never made an agreement to sell the suit land to the 1st respondent, and that even if Manibhai Patel made an agreement, the corrugated iron sheets and the wood structure cited in the alleged agreement was different from the premises owned by

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the appellants, and it was not located on Plot 3, Kasangati Trading Centre;

- vi). The learned Trial Magistrate failed to find that the appellants' late father having taken possession and occupation of the suit land in year 1949, and in the year 1967, he applied for a lease over the same land which was granted by the Government of Uganda, the 1st respondent's counter claim over the same land filed in year 2013 (after a period of about 50 years) was filed out of time and could not be accepted by the court;

- vii). The learned Trial Magistrate failed to find that even if the Indians Kantilal Patel or Manibhai Patel on whom the 1st respondent based his claim to the suit land ever acquired any interest in the suit land, he did not get the consent of the Minister to take interest in land owned by the Africans (within the meaning of the then Land Transfer Act) which was still in force in the year 1969, and consequently none of the said Indians had a valid interest in the land that could be sold to the 1st respondent;
- viii). The Trial Magistrate erred when he awarded to the 1st respondent general damages of 20 million Uganda shillings whereas the 1st respondent did not prove that he suffered any damage; and
- ix). The learned Trial Magistrate failed to find that the 2nd and 3rd respondents had no power to deal with the suit land, and that they had no power to pass the suit land over to the 1st respondent.

Representation:

12. At the hearing of the appeal, the appellants were represented by M/s Lutakoome & Co. Advocates while the respondents were represented by Mis Wameli & Co. Advocates. As I was writing this judgment, Bwire Geoffrey & Co.

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Advocates wrote a letter dated the 27th July 2023 informing court that they had taken over conduct of the matter from Wameli & Co. Advocates.

Duty of the first appellate court:

13. The duty of the first appellate court is to subject the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal, before coming to its own conclusion. While doing so, the first appellate court must keep in mind that, unlike the trial court, it had no chance of seeing and hearing the witnesses while they testified, and therefore had no benefit of assessing the demeanor of the witnesses. To this effect, the first appellate court must be guided by the impression made on the judicial officer who saw the witnesses. The case of **Fr.* Narsensio Begumisa & 3 others v. Eric Tibebaga*, Supreme Court Civil Appeal No. 17 of 2002 (Coram: Oder, Tsekooko, Karokora, Mulenga & Kato JJ. S. C) sets out the duty of the first appellate court in the following words:

> "It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

14. I shall keep the above principles in mind while resolving the grounds of this appeal.

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Consideration and determination of the appeal:

- 15. The appellants raised 9 grounds of appeal but the main issue for resolution by the court is, as between the appellants and the \$1^{st}\$ respondent, who is the lawful owner of the suit land?
- 16. In the lower court, PW1 (David Ssemmanda), who is also the 2nd appellant, testified that:

"[...] my father Eriabu Makanga acquired the suit land (Kibanja) in [the] year 1949 when he bought it from Besweri Katera."

- 17. The 2nd appellant adduced Exh. P2 which is an agreement between his late father, Eriabu Makanga and Katera, showing that his late father acquired the Kibanja on the 17th April 1949.
- 18. The 2nd appellant further testified that his late father, Eriabu Makanga proceeded to occupy the suit land after purchase in 1949, and that up to the time he gave evidence in the lower court, the suit land was in occupation of the appellants in their capacity as administrators of the estate of his late father.
- 19. In the case of *Owembabazi Enid v. Guarantee Trust Bank Limited*, High Court* (Commercial Division), Civil Suit No. 63 of 2019, Justice Stephen Mubiru defined a Kibanja as follows:

"A Kibanja is a form of land holding or tenancy that is subject to the customs and traditions of the Baganda, characterised by user rights and ownership of developments on land in perpetuity, subject to payment of an annual rent (busuulu) and correct social behaviour,

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distinct and separate from ownership of the land on which the developments are made and in respect of which the user and *occupancy rights exist.*"

- 20. Under the law, a Kibanja holder is a lawful occupant (see <u>section 29(1)(a) of</u> the Land Act (Cap 227). A Kibanja holder must prove that he or she occupied mailo land in accordance with the applicable law at the material time. See the case of *Jennifer Nsubuga v. Michael Mukundane & Another*, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA) (per the Judgment of Justice Monica K. Mugenyi, JA, at page 24, paras 72 & 73).\$

- 21. Clause 2 of Practice Direction No. 1 of 2007 on the issue of orders relating to registered land which affect or impact on the tenants by occupancy provides that:

"Where you have to determine whether a tenant is a "lawful" of "bona fide" occupant evaluate the evidence carefully, and establish the origin, succession to or acquisition of the tenancy (Kibanja) by $\frac{dy}{dx}$ the tenant by occupancy, and take into consideration the various laws, such as the Busuulu and Envujjo Law 1928, the Ankole Landlord and Tenant Law 1937, or the Toro Landlord and Tenant Law 1937, the Land Reform Decree, 1975 and the Land Act, depending on the assertions of either party as to his/her rights." underlining is mine for emphasis.

- 22. In the instant case, the appellants assert that their late father, Eriabu Makanga acquired the Kibanja in the year 1949 when he bought it from Besweri Katera.

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- 23. The appellants had a burden to prove that such a Kibanja interest was acquired in accordance with the applicable law at the time. The applicable law in 1949 was the Busuulu and Envujjo Law 1928 which remained in force until 1975 when it was repealed by the Land Reform Decree, 1975. Section 8(1) & (2) of the *Busuulu and Envujjo Law 1928* provided that:

> "(1) Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the *mailo owner except –*

- (a) The wife or child of the holder of a Kibanja; or
- (b) A person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof.
- (2) Nothing in this law shall give the holder of a Kibanja the right to transfer or sublet his Kibanja to any other person."

- 24. According to the *Busuulu and Envujjo Law 1928*, there were only three ways recognised by the law in which a person could settle on mailo land. First, a person could settle on mailo land with the consent of the mailo land owner. Second, the wife or child of a Kibanja holder could settle on the land without the consent of the mailo land owner. Third, upon the death of a Kibanja holder, the successor of the deceased in accordance with the native custom could settle on mailo land without the consent of the mailo land owner.
- 25. In the instant case, the appellants proved that their late father, Eriabu Makanga acquired the Kibanja in the year 1949 when he bought it from Besweri Katera. They adduced Exh. P2 which is an agreement between their late father, Eriabu Makanga and Katera showing that his late father acquired the Kibanja on the 17th April 1949. The said agreement does not indicate that the mailo land

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owner, i.e., the Buganda Land Board or the Kabaka's Government consented to the acquisition of the Kibanja by the appellants' late father. As was held by the Supreme Court of Uganda in the case of *Muluta Joseph v. Katama Sylvano*, Civil Appeal No. 11 of 1999 (Coram: Oder, Karokora, Mulenga, Kanyeihamba and Mukasa-Kikonyogo J. J. S. C), the consent of a mailo landowner was a mandatory legal requirement for there to be a valid acquisition of a Kibanja on mailo land.

- 26. Despite the lack of an express consent by the mailo landowner to the acquisition of the Kibanja by the appellants' late father, there is evidence on court record to prove that Buganda Land Board or the Kabaka's Government or Uganda Land Commission, the registered owner of the land at the various times, consented to the occupation and utilisation of the Kibanja by the appellants' late father.
- 27. The evidence on record shows that from 1949, Eriabu Makanga dealt with the registered owner of the suit land, Buganda Land Board or the Kabaka's Government or the Uganda Land Commission in various ways.
- 28. PW1 (David Ssemanda) adduced a series of documents to prove that his late father, Eriabu Makanga occupied the suit land with the consent of the registered owner. The 2nd appellant adduced Exh. P3 (application form by Eriabu Makanga for a town plot to the Kabaka's Government dated 19th July 1967). On the said application form (Exh. P3), in the section marked "For Official Use Only", the West Mengo District Commissioner, a one Abi T. K. Hairara in notes written on the 16th October 1968 stated inter alia, that:

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"The land is occupied by the applicant who has a shop, kitchen and latrine on it. [. . .] Since there is no dispute over the land I recommend the grant of the lease. "*"

- 29. Buganda Land Board wrote to the appellants' late father, Eriabu Makanga, in a letter dated the 2^g th July 1967 (Exh. P4), acknowledging receipt of his application for the suit land dated 19th July 1967, and stating that the matter would be placed before the Board. On the 12th December 1968, Eriabu Makanga's application for a lease was approved by the Department of Lands and Surveys for an initial period of 20 years from 1st January 1969 (Exh. P5). From 1969, matters appear to have stalled but on the 14th February 1977, a leasehold certificate of title for the land comprised in Leasehold Register Volume 955, Folio 15, Kyadondo Block 187 Plot 3 at Kasangati Trading Centre was issued in the names of Eriabu Makanga for a term of 2 years (Exh. P6). Exh. P9 is a general receipt dated the 3rd June 1969 for dues of Ushs 470 paid by Eriabu Makanga issued by the Permanent Secretary, Ministry of

Mineral and Water Resources in the respect of the suit land. Exh. Pl O is a general receipt dated the 7 th December 1976 for Ushs 2,450 issued by the Permanent Secretary, Ministry of Mineral and Water Resources for a lease offer in the respect of the suit land.

- 30. The testimony ofPW1 (David Ssemmanda) was corroborated by PW2 (Wilson Mulyanga Ssalongo) who, at the time of testifying, was the Kabaka's Chief (Omutongole) in charge of Kyankima village, Gayaza parish, Nangabo subcounty, Wakiso District. He testified that by virtue of his position, he is in charge ofKabaka's land in Kyankima village, Kasangati Trading Centre where the suit land is situated. That the suit land (Plot 3 Kasangati Trading Centre) is

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part of Kabaka' s land which is under his supervision. He testified that he knew the appellants' late father, Eriabu Makanga since 1953, and he owned and was the occupant of the suit land. That Eriabu Makanga initially owned a mud and wattle building which was later demolished and a new brick building constructed on the suit land. That up to February 1993 when Eriabu Makanga died, he was living in the said building on the suit land together with his family members. That on the pt December 2015, the 2 nd appellant together with his sister, Ruth Nakirayi approached him and showed him a receipt for payment of Ushs 600,000 to the Kabaka's treasury and a Kibanja land form (Exh. Pl 1), and he recommended the appellants for registration as the owners of the suit land. Finally, PW2 (Wilson Mulyanga Ssalongo) testified that sometime in 2009, the 1 " respondent, John Kafeero approached him for a recommendation for ownership of the suit land, and when he inspected the land, he discovered that it belonged to the appellants, and he declined to recommend the 1 " respondent's late father for ownership of the suit land.

- 31. In my opinion, the evidence described above, proves that the mailo landowner, the Buganda Land Board or Kabaka's Government or Uganda Land Commission at the various times, consented to the acquisition, occupation and utilisation of the Kibanja by the appellants' late father, Eriabu Makanga. The registered owner may not have given their express consent to the acquisition of the Kibanja immediately in 1949, but in the years that followed, it was clear that the registered owner of the land impliedly consented to the occupation and utilisation of the suit land by the appellants' late father, Eriabu Makanga. There was implied consent by the registered owner of the land to the occupation and utilisation of the suit land by appellant's late father, Eriabu Makanga as demonstrated by their actions and conduct. According to *Black's Law*

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Dictionary, 2 nd Edition, "implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given."

- 32. The implied consent by the registered owner of the land to the appellants' customary occupation of the suit land can also be seen in the lease offer by Uganda Land Commission in its letter dated yd December 1976 (Exh. D6). According to this letter, the appellants' late father, Eriabu Makanga was offered a lease of2 years for his Kibanja effective from the 1 "

January 1977. On the 3rd February 1977, Eriabu Makanga and Uganda Land Commission signed a lease agreement for a term of 2 years in respect of the Kibanja (Exh. P7), followed by the grant of the leasehold certificate of title to Eriabu Makanga on the 14th February 1977. These actions prove that the registered owner of the land consented to the appellants' ownership of a Kibanja on the suit land. The grant of a lease to a holder of a Kibanja was in accordance with *section 3 (2)* of the *Land Reform Decree (1975)* which permitted the holder of a customary tenure to apply for a lease in respect of the land in his or her occupation. According to the evidence on record, the lease expired 2 years later in 1979 and was not renewed. However, the expiry of the lease did not affect the appellants' Kibanja interest in the suit land. The Kibanja interest continued to exist notwithstanding the expiry of the lease, and is protected by the *Land Act* that is in force currently.

- 33. In the lower court, the 1st respondent's late father asserted that he owns the suit land. DWI (John Kirizostom Kafeero) testified that he purchased it from an Indian, Kantibhai Manibhai Patel on the 15th April 1969 for 2,500 Uganda shillings under a sale agreement signed by both parties (Exh. D2). He testified that the Indian had lived there since the 1920s, but the plots were demarcated

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between 1954 and 1955. That in 1989, he discovered that the late Eriabu Makanga had fraudulently got a lease on the suit land. That the suit land is now managed by the Buganda Land Board, and he is already registered as the owner. That the late Eriabu Makanga owned a small plot of land adjacent to Kantibhai Manibhai Patel which is not the suit land. That Buganda Land Board is the one which surveyed, demarcated and distributed all the plots including plots 3, 4 and 5. That he lost his house which was at the ring beam level, and he has been denied the opportunity to develop and earn income from the land for over 20 years. He prayed for appellants to be evicted and for court to order vacant possession of the suit land.

- 34. The testimony of DW1 (John Kirizostom Kafeero) was corroborated by several other defence witnesses, DW2 (C. Katama), a deputy LCI of Bulamu village; DW4 (Musisi Vincent aged 90 years old and a businessman); DW5 (Mawulensiya Nanteza Nalongo, aged 82 years old, farmer and traditional herbalist); and DW6 (Nakandi Agnes, aged 79 years old, peasant farmer).
- 35. DW2 (C. Katama) testified that he was once a city superintendent, and now a deputy LCI of Bulamu village. That in 1989, a meeting concerning a dispute between the appellants and the 1st respondent over the suit land was held, and it was confirmed that the 1st respondent was the owner of the suit land. That the appellants had never owned a lease over the suit land because all the land in the area belonged to the Kabaka of Buganda. That there were no titles for land in the area as it was mostly Kibanja owners, and that if at all there was a title, then the district authorities would have known about it.

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- 36. DW3 (Sheikh Ssebale Badru) testified that he worked as the urban officer, Mpigi District Administration around 1991. That he learned from district records that the appellants and the 1st respondent were involved in a dispute over the suit land. That between 1989 and 1991, several meetings were convened by district authorities with a view of resolving the dispute over the suit land, and that it was decided that the suit land belonged to the 1st respondent. That the late Eriabu Makanga owned a different plot of land known as Plot 5 as indicated in district records. That the late Eriabu Makanga refused to accept the decision of the district authorities and went ahead to demolish the buildings constructed by the 1st respondent. That the late Eriabu Makanga was once arrested by the area police because he had taken the law into his own hands.
- 37. It was submitted for the respondents that the learned Trial Magistrate rightly directed himself when he held that the appellants failed to prove ownership of the suit land. That although the appellants claimed that their late father, Eriabu Makanga bought the suit land as a Kibanja from a one Katera, the sale agreement dated the 17th April 1949 was not one to be completely relied upon by the trial court because during cross examination, PW I admitted the existence of another agreement dated the 13th April 1949 made between Eriabu Makanga, and the same Katera and that this earlier agreement renders the entire transaction between Eriabu Makanga and Katera as being fraudulent. That this was because firstly, the agreement of 13th April 1949 makes reference to the one of 17th April 1949 which could not have been in existence by the time the agreement of 13th April 1949 was made. That in light of the above, these 2 agreements, the one of 17th April 1949 and that of 13th April 1949 show that there was an attempt by Eriabu Makanga and Katera to create for Eriabu

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Makanga ownership over a "shop building" but the same was maned with fraud, illegality and lack of capacity to sell the "shop building" on the part of Katera. That even if the above agreements were to be believed and relied upon, they clearly showed that Eriabu Makanga was buying a "shop building" and not a Kibanja. That behind this "shop building" was a Kibanja that belonged to Sekanyo. That this is the Kibanja that was on Plot 3 which Sekanyo sold to Kantibahai Manibahi Patel on 2nd February 1969. That the said Kantibahai Manibahi Patel later sold the same Kibanja on Plot 3 to the 1st respondent on 15th April 1969. That the local authorities recognized the 1st respondent as the lawful owner of the suit land.

- 38. Counsel for the respondents referred particularly to Exh. D2, a letter dated 5th August 1967 from Buganda Land Board showing that Eriabu Makanga had applied for a lease from Buganda Land Board, and that the Board wanted the sub-county Chief of Mutuba I, Kyadondo to confirm the owners of the plots in that area. That the said sub-county Chief of Mutuba I, Kyadondo replied to the Board in Exh. D3, a letter dated 28th August 1969, and stated that there were only 3 owners, who included Mr. Kantibhai Manibhai Patel, who later sold his portion to the 1st respondent in 1969; Mr. R. S Patel and Mr. Gabudyeri Sekanyo; who sold his portion to Kantibhai Manibhai Patel. That Kantibhai Manibhai Patel later handed

this portion together with its agreement to the 1st respondent. Finally, that the learned Trial Magistrate correctly awarded the 1st respondent general damages of 20 million shillings considering that the 1st respondent had litigated this matter for over 20 years, hired legal services, lost building materials, and witnessed the appellants develop part of the suit land, and rent it out for supermarket business, thus subjecting the 1st respondent to psychological torture given his advanced age of over 80 years. That the Trial

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Magistrate correctly held that there was no need to drag the 2nd and 3rd respondents in this matter as there was no evidence on record to prove that they either trespassed on the appellants' land or that they acted illegally in executing their duties as officials of the government or local authorities.

- 39. In the lower court, the 1st respondent sought to rely on Exh. D3 a copy of the letter by Buganda Land Board dated 28th July 1967 in response to the application by Eriabu Makanga (same as Exh. P4); Exh. D4 – a copy of the letter by Buganda Land Board to Ggombolola, Mutuba I office dated the 5th August 1967 inquiring about the suit land and its occupants; and Exh. D5 – a copy of the letter by Mutuba I's office dated 28th August 1967 addressed to Buganda Land Board informing the Board about the suit land and its occupants.
- 40. A closer scrutiny of these documents shows that they actually support the appellants' case. Why do I say so? Because when Eriabu Makanga lodged his application for the suit land to Buganda Land Board on the 19th July 1967, Buganda Land Board by its letter dated 28th July 1967 acknowledged receipt of the application. In a letter dated the 5th August 1967, Buganda Land Board wrote to Ggombolola, Mutuba I office inquiring about the suit land and its occupants. In a letter dated the 28th August 1967, Mutuba I office informed Buganda Land Board that the area around the suit land had three occupants – Kantbhai Manibhai Patel; R. S. Patel; and Gabudyeri Sekannyo. It seems that after doing its due diligence on the application made by Eriabu Makanga for the suit land, the registered owner of the land decided to approve his application, and this explains why in a letter dated the 12th December 1968, slightly over a year after Eriabu Makanga had lodged his application for the suit land, the Department of Lands and Surveys approved his lease application

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(Exh. P5). In my opinion, the decision by the authorities to approve the lease application must have been preceded by due diligence that Eriabu Makanga was the right occupant of the land. How else can one explain the approval of the lease application by Eriabu Makanga other than a confirmation that he indeed owned a Kibanja on the suit land?

41. In paragraph 39 of his witness statement, DWI (John Kirizostom Kafeero) asserted that:

> **"This same land is now managed by the Buganda Land Board and I am already registered as the owner."**

- 42. Despite the assertion that he is already registered as the owner of the suit land, there was no evidence whatsoever adduced by DWI (John Kirizostom Kafeero) to prove this.
- 43. Although the 1st respondent's late father asserted that after purchasing the suit land in 1969, he started using it but was challenged by the appellants' late father, he does not offer any convincing explanation as to why he never took legal action against the appellants for all this time. Instead, it was not until the appellants commenced the present court proceedings in 1992, that the respondents filed a counterclaim in 2016 as part of the adjudication process.
- 44. Accordingly, I do not believe the 1st respondent's evidence that her late father legally acquired the Kibanja in 1969 for two main reasons. First, although the 1st respondent's father testified that he bought the Kibanja from an Indian, Kantibhai Manibhai Patel in 1969, by this time, the same Kibanja had already been acquired by the appellant's late father in 1949 from Besweri Katera.

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Second, and most importantly, the 1st respondent never adduced any evidence at all that her late father acquired the Kibanja with the consent of the registered owner of the land. On the contrary, there is overwhelming evidence as I have held above, that the occupation and utilisation of the suit land by Eriabu Makanga, the appellants' late father was with the consent of the owner of the land. For these reasons, it is my decision that if at all there was ever any attempt by the 1st respondent's late father, John Kafeero to acquire the Kibanja, it was null and void ab initio for lack of consent by the registered owner of the land.

45. I am fortified in this conclusion by the Supreme Court of Uganda case of *Muluta Joseph v. Katama Sylvano* (supra) where Justice A. N. Karokora (J. S. C) held that:

> *"From the evidence on record, there is no doubt that the manner in which the appellant allegedly acquired the land in question did not conform with Section 8 of the Busuulu and Envujjo law of 1928 [...] In view of the above law which was in existence in 1969 when the appellant claimed to have acquired the Kibanja from Batulumayo, I think Batulumayo, who was not the mailo owner, had no powers to transfer the kibanja through sale or otherwise without the consent of the mailo owner. [...] So, what Batulumayo did to transfer his Kibanja to the appellant contravened subsection 2 of Section 8 of the Busuulu and Envujjo Law of 1928, because a customary tenant had no powers to transfer his Kibanja except in circumstances as provided in subsection 1(a) and (b) of Section 8 of the Busuulu and Envujjo Law (supra). Therefore, the appellant's occupation of the mailo land in question was null and void ab initio when he purchased Kibanja from Batulumayo without the consent of the mailo owner."*

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- 46. Finally, there was no evidence adduced by the 1st respondent that Kantibhai Manibhai Patel being a non-citizen of Uganda obtained the consent of the Minister in order to legally own a Kibanja as was mandatorily required by the Land Transfer Act (Cap 202). The absence of the Minister's consent meant that Kantibhai Manibhai Patel's attempt to acquire the Kibanja was null and void ab initio and he had no interest in the land to pass on to the 1st respondent's late father, John Kafeero. See the case of Mistry Amar Singh v. Serwano Wofunira *Kulubya [1963] E. A 408*
- 47. Accordingly, the appellants being holders of a Kibanja interest on the suit land, are lawful occupants under section 29(1)(a) of the Land Act (Cap 227). They enjoy security of occupancy on the land in accordance with the provisions of sections 31 & 32A of the Land Act (Cap 227) which provide that:

"31. Tenant by occupancy

- (1) A tenant by occupancy on registered land shall enjoy security of occupancy on the land.
- (2) The tenant by occupancy referred to in subsection (1) shall be deemed to be a tenant of the registered owner to be known as a tenant by occupancy, subject to such terms and conditions as are set out in this Act or as may be prescribed.
- (3) The tenant by occupancy shall pay to the registered owner an annual nominal ground rent as shall, with the approval of the Minister, be determined by the Board.

32A. Lawful or bona fide occupants to be evicted only for non payment of ground rent

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"(1) A lawful or bona fide occupant shall not be evicted from registered land except upon an order of eviction issued by a court and only for non payment of the annual nominal ground rent."

- 48. In his counterclaim, the 1st respondent alleged that the appellants had fraudulently acquired the suit land. In the case of Fam International Ltd & Anor v. Muhammed Hamid (Civil Appeal No. 16 of 1993) [1994] UGSC 12, Justice Benjamin Odoki (J. S. C) held that: "[...] in fraud cases the standard is more than a mere balance of probabilities though less than proof beyond reasonable doubt [...]". Accordingly, in the instant case, the respondents bore the legal burden to prove beyond a mere balance of probabilities, that the appellants fraudulently acquired the suit land. No such evidence was adduced by the respondents in the lower court. In this regard, the counterclaim against the appellants is dismissed with costs.

- 49. In the lower court, the appellants asserted that they have not been able to fully develop the suit land because of the dispute. Counsel submitted that the appellants have suffered substantial loss and damage. Counsel prayed for an award of general damages of Uganda shillings 20 million; interest of 25% per annum on general damages; an order of eviction against the respondents; permanent injunction; and costs of the suit.
- 50. I note that litigation over this matter has been going on for about 31 years having started in 1992. This has caused loss, inconvenience, suffering and distress to the appellants. The appellants are entitled to an award of general damages. I award Uganda shillings 20 million to the appellants as per their prayer with interest of 15% per annum from the date of the judgment until payment in full.

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- 51. I also order the respondents (Nakafeero Proscovia, C. Katama and Sheikh Bbale) to vacate land comprised in Plot 3 at Kasangati Trading Centre, Wakiso District and remove any buildings they have on the land within 6 (six) months from the date of this judgment, in default of which they shall be evicted, and any illegal buildings demolished in accordance with *The Constitution (Land Evictions) (Practice) Directions, 2021.*
- 52. A permanent injunction issues restraining the respondents, their agents, servants, workmen and all those claiming under them and/or deriving authority from them from trespassing, encroaching, interfering and/or in any way dealing with the land comprised in Plot 3 at Kasangati Trading Centre, Wakiso District.
- 53. The 1st respondent shall pay the costs of this appeal and in the lower court.

Final order of the court:

- 54. In conclusion therefore, this appeal has succeeded, and is allowed. The judgment of His Worship Egesa Achoka Freddy, Magistrate Grade One, Chief Magistrate's Court of Nabweru at Kasangati delivered on the 12th day of April 2017 is set aside, and is replaced with the following orders:
 - i). That the appellants, Livingstone Kyeyune and David Ssemmanda (administrators of the estate of the late Eriabu Makanga), are the lawful owners of land and developments comprised in Plot 3 at Kasangati Trading Centre, Wakiso District;
 - ii). That the respondents, Nakafeero Proscovia, C. Katama and Sheikh Bbale, shall vacate the suit land, and remove any buildings they have on the land within 6 (six) months from the date of this judgment, in default of which,

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they shall be evicted, and any illegal buildings demolished in accordance with The Constitution (Land Evictions) (Practice) Directions, 2021;

- iii). That a permanent injunction issues restraining the respondents, their agents, servants, workmen and all those claiming under them and/or deriving authority from them from trespassing, encroaching, interfering and/or in any way dealing with the suit land;
- iv). That the 1st respondent, Nakafeero Proscovia, shall pay general damages of Ushs 20,000,000 (Uganda shillings twenty million) to the appellants;
- That the 1st respondent shall pay interest of 15% per annum on general \$v\$). damages from the date of judgment until payment in full;
- vi). That the 1st respondent shall pay the costs of this appeal, and in the lower court.

IT IS SO ORDERED.

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BERNARD NAMANYA JUDGE 4th August 2023

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Attendance

4th August 2023 at 09:12am

Jabbo Obbo of M/s Bwire Geoffrey & Counsel for the respondents Co Advocates Nakafeero Proscovia (1st respondent) is in court David Ssemenda (2nd appellant) is in court

Allena Kire

Court Clerk

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Judgment delivered in open chambers.

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BERNARD NAMANYA JUDGE 4th August 2023

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