THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 0026 OF 2020

(ARISING FROM CIVIL SUIT FPT – 00 – CV – LD – CS 040 OF 2010)

ANDREW KAWAMARA :: APPELLANT

VERSUS

BYAMUGISHA ADONIA :: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The Appellant brought this appeal seeking to set aside the judgment of His Worship Muhumuza Asuman, Magistrate Grade One, Kyenjojo Chief Magistrate's Court dated 20th August 2020. The Appellant asked court to have the judgment set aside on the following grounds:

1. **The learned trial Magistrate Grade One erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision which error occasioned a miscarriage of justice.**
2. **The learned trial Magistrate erred in law and in fact by failing to apply the evidence on record to the position of the law and thus came to a**

wrong conclusion that the Respondent was a bona-fide occupant of the suit land.

3. **The learned trial Magistrate erred in law and fact by treating the Respondent's evidence as the gospel as opposed to the more credible evidence of the Appellant and thus came to a wrong conclusion that the Respondent is the rightful owner of the suit land.**

Background:

The Respondent instituted Civil Suit No. 40 of 2010 against the Appellant for a declaration that he is the owner of the suit land located at Katambale Village, Katambale Parish, Kyarusozi Sub County, Kyenjojo District; a permanent injunction, general damages, an order for vacant and quite possession and costs of the suit. It was contended by the Respondent that originally the suit land was owned by his father and upon his death, he left it with the plaintiff. That the plaintiff has been in occupation and use of the suit land un-disturbed since 1978 where he has several developments to wit, a banana plantation, eucalyptus trees, pine trees and other gardens.

That sometime in August 2010 or there about, the Appellant, in the process of boundary opening shifted boundary mark stones from where they were and enclosed the Respondent's land and threatened to evict him. That the actions of the Appellant amounted to trespass and asked in the alternative without prejudice to the prayers in the pleadings to be declared a bona-fide occupant on the suit land since he has been in possession of the same undisturbed since 1978 until the cause of action arose.

The Appellant filed a defense in which he included a counter claim. In the defense, the defendant contended that he was the owner of the suit land and the tea

plantation thereon which he bought from a one Frank K. Gasasira in 1972.That prior to the purchase, Frank K. Gasasira who was the first occupant maintained quite possession and use of the said land for over 12 years. That at the time of purchase, the suit land was surveyed and delineated by mark stones. That upon purchase, hetook immediate possession of the suit land and has been developing the same with a tea plantation without any disturbance or third party claims.

That sometime in 2003, the Respondent unlawfully entered the suit land and removed the Appellant's mark stones with an intention to shift the same and alienate the Respondent's land. That when the Appellant protested the Respondent's unlawful acts, the Respondent made a write up where he offered to compensate the Appellant for his wrong doing, that is of trespass and removal of boundary marks. That further in 2006, the Respondent again stealthy removed the Appellants mark stones and shifted the boundary line thereby alienating a large chuck of the Appellant's land upon which he planted eucalyptus trees and a banana plantation among other crops. That the Appellant made constant demands unto the Respondents to stop his illegal acts in vain.

That sometime in August 2010, the Appellant opened the boundaries and discovered that the Respondent had encroached on and developed the large portion of his land by planting eucalyptus trees and a banana plantation and when the Appellant demanded that he vacates his land, the Respondent opted to take legal action and filed the case at hand claiming ownership of the suit land; that the Respondent is a trespasser and not a bona-fide occupant on the suit land.

The Appellant added a counter claim in which he sought a declaration that he is the owner of the suit land, an order of eviction and vacant possession, a permanent injunction, mesne profits, general damages for trespass, inconveniences and mental anguish and costs of the suit. In reply to the counter claim, the Respondent

disputed the Appellant's claim and contended that he is the one who has been in possession of the suit land. That the agreement annexed as annexure A to the counter claim was made under duress and it was not honored and the case was referred to the tribunal.

The Respondent denied removing boundary mark stones and averred that he planted the trees and bananas on the land which were planted in 2004 on his land. That the suit land was acquired by his father in 1978 and died in 1998 and was buried on the same land and thereafter in 2003 the defendant started claiming that the suit land was his. The Respondent thus asked court to have the counter claim dismissed with costs.

After trial, the trial magistrate made a judgment in favor of the Respondent and dismissed the counter claim with costs. The Appellant being aggrieved lodged the current appeal.

Representation and Hearing:

Counsel Mugabi of M/s Acellam Collins & Co. Advocates appeared for the Appellant while Counsel Kesiime Mirriam of M/s Kesiime & Co. Advocates appeared for the Respondent. The parties filed written submissions which I have considered.

Resolution:

Appellant's submissions:

Ground 1: The learned trial Magistrate Grade One erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision which error occasioned a miscarriage of justice.

Ground 3: The learned trial Magistrate erred in law and fact by treating the Respondent's evidence as the gospel as opposed to the more credible evidence of the Appellant and thus came to a wrong conclusion that the Respondent is the rightful owner of the suit land.

Counsel for the Appellant argued grounds 1 and 3 jointly. He submitted that the trial magistrate heavily relied on the evidence of the Respondent/plaintiff without taking into account the version of the Appellant. That the trial magistrate omitted to consider vital pieces of evidence and testimonies of witnesses of the Appellant which if he had done so, would have had an impact on the decision made. That whereas the Respondent claimed to be the lawful owner of the suit land and invited court to declare him as such, that in his plaint, he did not state the exact size of the land and only stated in cross examination that the purchase agreement had been burnt which was clearly an afterthought. It was pointed out that PW1 and PW2, that is the Respondent and his mother stated in their evidence in chief that whereas the Respondent's father had bought the suit land in 1978, no sale agreement existed. That they contradicted themselves during cross examination claiming that there was a sale agreement but the same got burnt. That these contradictions in the Respondent's evidence as regards title to the suit land received no judicial comment and counsel invited court to take these into account.

Counsel further argued that the Appellant supplied ample evidence in support of his claim of ownership of the suit land. That he presented DE1 which was a purchase agreement and DE2, the sketch of the land bought describing the land as 60 acres. Counsel argued that DE1 was wrongly considered by the trial magistrate without taking into account DE2 and that the parole evidence rule under Section 91 and 92 of the Evidence Act were erroneously applied. That DE1 included a phrase *"includes assets and liabilities of the tea estate"* which meant the whole land in

DE2 which was 60 acres. That to hold otherwise as was done by the trial magistrate would infringe the doctrine of freedom of contract. That further evidence was in the boundary opening report dated 28/09/2011 which was received on court record on the 1/12/2011 which confirmed the total acreage as 60 acres and showed 11.14 acres as the one in dispute; that if anything, the report confirmed the Appellant's claim of the entire 60 acres notwithstanding the disputed portion.

That the Respondent admitted that he did not plead that his father purchased the suit land. That this meant that the Respondent could not adduce evidence to that effect since it contradicted the rule against departure from pleadings as laid down in the case of ***Semalulu Vs. Nakitto, HCCANo. 4 of 2008*****.** That accordingly the decision in ***Ojwang Vs. Wilson Bagonza CACA No. 25 if 2002*** would not have benefited the Respondent as it did. This was because the claim of acquisition of the said land by the Respondent's father was not pleaded and the same could not be relied upon.

That in the alternative to the position in ***Ojwang (supra)***, for one to claim interest in land, he or she must show that he or she acquired it from someone who previously had an interest in that piece of land. it was submitted that the Respondent ought to have adduced cogent evidence about his father's acquisition of the suit land. That this was not pleaded and no evidence was adduced to that effect.

That the Respondent is a mere neighbor to the suit land and admitted removing the boundary mark stones and offered to compensate the Appellant. That turning around to claim the same suit land is an afterthought which the lower court should have seen. It was submitted that to the contrary the trial court never paid due regard to the said fact and counsel invited court to take into account this fact in coming to its decision. That the other pieces of evidence which were neglected by

the trial magistrate are DE8 and DE9 which is a survey and valuation report; that these showed the Appellant's developments on the suit land and the fact that the Respondent started tree planting on the suit land in 2006 contrary to his claim that he had started using the suit land 30 years back. That had the trial court give due attention to such evidence, it would have had a bearing on the outcome of the main suit.

That the evidence of DW2 the Appellant's manager on the suit land from 1990 to 2002 and that of DW3, the wife of the Respondent's brother and an immediate neighbor and DW4who all testified that the suit land belonged to the Appellant and even the father of the Respondent never protested the Appellant's ownership and use of the same. It was submitted that the omission to consider this evidence occasioned a miscarriage of justice to the Appellant. That all these issues were included in the Appellant's evidence but the same was ignored by the trial magistrate.

Ground 2: The learned trial Magistrate erred in law and in fact by failing to apply the evidence on record to the position of the law and thus came to a wrong conclusion that the Respondent was a bona-fide occupant of the suit land.

For ground 2, learned counsel for the Appellant submitted that section 29 (2) of the Land Act defines a bona-fide occupant being a person who has used or developed the land for 12 years prior to the coming into force of the 1995 Constitution. It was submitted that the trial court erroneously considered the period between 1978 and 1995 without taking into account the overwhelming evidence on record. That the Respondent admitted that he did not plead the fact that he was a bona-fide occupant and did not substantiate how his father acquired the suit land thus making his claim primaficie questionable.

It was contended that the evidence on record about the Respondent using the suit land since 1978 was incredible. That for instance the place where the Respondent's late father was buried and where the house was constructed suggest that the suit land was never owned by the Respondent. That the trial court should have relied on DE9 which clearly indicated that the Respondent started using the suit land in 2006 which fact it was submitted, was corroborated by the age of the trees at the time of locus visit. That all the evidence in totality lead to the conclusion that the Respondent started encroaching on the suit land in 2006 many years after the coming into force of the 1995 Constitution as such he was not a bona-fide occupant.

Respondent's written submissions:

Ground 1: The learned trial Magistrate Grade One erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision which error occasioned a miscarriage of justice.

In response counsel for Respondent submitted in relation to the first ground that the trial court properly evaluated the evidence on record. That the Respondent who testified as PW1 rightly informed court that the suit land formerly belonged to his late father Edward Bitanihirwe who bought the same from a one Batibuka in 1978 and after his father's death, he inherited the same. That the family occupied the suit land undisturbed and had several developments thereon to wit; a banana plantation, gardens of seasonal crops which got destroyed since the Respondent was stopped from using the suit land on 14th March 2011 through a temporary injunction and what survived are the eucalyptus and pine trees which were still on the land. That it was in 2003 when the Appellant started disturbing the Respondent over the land in dispute. That his family buried several members on the suit land including his father who died on 24th/8/1998 and his grave was visible and as identified by DW5

while at locus who was at the time of his burial the area chairperson. There was also a house a few meters from the grave and a homestead and land was about 11 acres and a half. He also indicated that the agreement as regards compensation was made under duress and he never paid the sum indicated therein.

Counsel submitted that the evidence of PW1 was supported by that of his mother who testified as PW2 who confirmed that the suit land was bought by the plaintiff's late father, the late Edward Bitanihirwe from Batibuka during Amin's regime and paid a sum of Ugx 10500/=. That her late husband assumed possession of the same and used it for agriculture and planted trees later. That she also named the neighbours to the same as at the time of purchase as Benedicto in the North, Road to Katambale in the East, Stream in the West and late Kibirige in the South and confirmed that she never crossed the said boundaries.

That in defense, the defendant contended that he bought the suit land in 1972 from Frank Gasasira which was surveyed and delineated with mark stones. The defendant adduced a purchase agreement which was admitted as DE1 showing that the vendor sold to the purchaser a tea estate of approximately 10 acres. However, the Appellant told court that they were 60 acres by virtue of DE2 because it was indicated in the agreement that the sale included assets and liabilities of the estate which included the entire 60 acres.

Counsel relied on the decision of ***Kitgum Co-operatives Savings and Credit Society Limited Vs. Okanya John Calvin, Civil Appeal No. 0085 of 2018*** where his the Hon. Justice Stephen Mubiru observed thus:

"According to section 91 and 92 of the Evidence Act, when the terms of a contract have been reduced to the form of a document, no evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or

subtracting from its terms may be admitted or given in proof of the terms of that contract except the documents itself, or secondary evidence is admissible. Furthermore, according to section 21 of the Evidence Act, oral admissions as to the contents of a document are not relevant, unless the party proposing to prove them shows that he or she is entitled to give secondary evidence of the contents the document."

Learned counsel submitted relying on the above authority that the agreement relied upon by the Appellant talks about 10 acres of a tea estate and there is no way the Appellant would have faulted the trial magistrate for properly evaluating the evidence. That the evidence on record is cogent and the trial magistrate properly evaluated the same and found that the Appellant was not the rightful owner of the suit land.

Ground 2: The learned trial Magistrate erred in law and fact by failing to apply the evidence on record to the position of the law thus came to a wrong conclusion that the Respondent was a bona-fide occupant on the suit land.

Counsel submitted that the Respondent clearly indicated in the pleadings that the suit land was acquired by his father in 1978 which fact was confirmed by PW2, the wife of the late and mother of the Respondent who confirmed that the land was acquired during Amin's time by the late Husband Edward Bitanihirwe from Batibuka and the entire family stays on the same land. That by the time the Appellant acquired his land the Respondent had been on the same land for about 12 years. That the defendant also admitted knowing the Respondent's father and the fact that at the time he bought his land, the Respondent's late father was already in occupation of his land.

That the Respondents pleaded facts in the pleadings indicating that he was a bona-fide occupant and thus had been on occupation of the land for more than 12 years prior to the coming into force of the 1995 Constitution per the definition of a bona-fide occupant under Article 237(8) of the 1995 Constitution and section 29(2)(a) of the Land Act. Counsel submitted that the Respondent had been in use of the suit land for 17 years prior to the coming into force of the 1995 Constitution and that as such he qualified as a bona-fide occupant and the trial magistrate rightly found him as such.

Ground 3: The learned trial Magistrate erred in law and fact by treating the Respondent's evidence as the gospel truth to the more credible evidence of the Appellant thus came to a wrong conclusion that the Respondent is the rightful owner of the suit land.

Learned counsel submitted that the Respondent rightfully discharged his burden under section 101 and 103 of the Evidence Act by proving his case on the balance of probabilities required in civil cases as was stated in the case of ***Bahirirwe Getrude Vs. Tukore David and 2 others, Land Claim No. 0032 of 2018*** which quoted the decision in ***Miller Vs. Minister of Pensions [1947]2 ALLER 372*** thus:

"that the degree is well settled. It must carry a reasonable degree of probability but not too high as required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not the burden of proof is discharged but if the probabilities are not equal it is not."

Counsel submitted that the Respondent proved his case on the balance of probabilities against the claim by the Appellant who claimed to have acquired the suit land in 1972 by virtue of DE1. That the agreement talked about a tea estate of 10 acres and DE3 was a lease offer which had expired as such the Respondent's

case was more credible than that of the Appellant and the trial magistrate rightly found in favour of the Respondent. Counsel asked court to uphold the decision of the trial court and dismiss the appeal with costs.

Duty of the First Appellate Court:

As a first appellate court, my duty is to subject the evidence of the lower court to a fresh and exhaustive scrutiny and draw fresh and independent inferences and conclusions. In doing so, I will apply the law strictly and consider the evidence adduced in the lower court. I will bear in mind the fact that I didn't have the opportunity to see the witnesses testify and I will therefore make the necessary due allowance in that regard. ***(See Panday Vs R (1967) E.A 336 and Narsensio Begumisa& 3 others Vs. Eric Kibebaga, SCCA NO. 17 of 2002***.

CONSIDERATION BY COURT:

I will resolve all the three grounds of appeal concurrently since they relate to the manner in which the trial magistrate evaluated the evidence in relation to the applicable law.

Parole Evidence Rule:

The Parol evidence rule is a rule that preserves the genuinity or integrity of a written document. The rule is to the effect that where a transaction is recorded in a document, it is not generally permissible to adduce other evidence of (a) its terms or (b) other terms not included, expressly or by reference, in the document or (c) the intention of the writers or the parties to the same. The essence of the rule was summarized in the early case of **Bank of Australasia v. Palmer [1897] A.C. 540, 545,** per **Lord Morris** thus:

"Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract."

Innes J in **Mercantile Bank of Sydney v Taylor (1891) 12 LR** noted that the rule prohibits parties from amending the meaning of the written document through the use of previous oral declarations that are not stated in the document itself. When parties have discussed and negotiated the terms of a contract, in this process it means that they have integrated the entire understanding in the contract. The best case scenario is in **Hutton v Watling (1948) 1 Ch. 26,** where a written agreement was drawn up and signed by the vendor. In an action to enforce one of the clauses in the agreement, the vendor claimed that it did not represent the whole contract. It was held that the vendor was not entitled to introduce evidence at this point, because the written document represented a true record of the contract. It was further noted that its existence is to safeguard the terms of a contract. The rule helps to secure the originality of the written document. This is to exclude extrinsic terms where the document was agreed by both parties that the document was agreed to be a complete record of the entire contract and all prior oral or written agreements merge in the writing. (See **Hutton v Watling supra).**

However, with time, courts developed exceptions to the rules to address some of the injustices that could be caused by the strict application of the rule and taking into account the different trade usage and customs that had a bearing on written contracts executed by the parties. The exceptions include (a) where the contract is partly oral and partly written, (b) Fraud or misrepresentation or factors that vitiate a contract, (c) rectification, (d) collateral agreements/contracts (e) terms implied through trade usage or custom, (f) suspension of operation rule. I find it unnecessary to discuss these exceptions in detail.

Sections 91-100 of the Evidence Act Cap. 6 provide for the exclusion of oral by documentary evidence. In particular, Section 91 of the Evidence Act provides for Evidence of terms of contracts, grants and other dispositions of property reduced to form of document and states as follows:

> *When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.*
>
> *Exception 1 — When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he or she is appointed need not be proved.*
>
> *Exception 2 — Wills admitted to probate in Uganda may be proved by the probate.*
>
> *Explanation 1 — This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.*
>
> *Explanation 2 — Where there are more originals than one, one original only need be proved.*

Explanation 3 — The statement, in any document whatever, of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact.

Section 92 of the Evidence Act that provides for exclusion of evidence of oral agreement states as follows:

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which that contract, grant or disposition of

property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

The above sections have been considered in a number of cases. In ***Sine pay (u) Ltd Vs. Sarah Kagoro& Anor, Civil Suit No, 0548 of 2004, Bamwine J*** (as he then was) observed thus:

The parol evidence rule is to the effect that evidence cannot be admitted (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, it means that where a contract has been reduced to writing, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, that is, not contained in it.

The above sections and authorities lay down the parole evidence rule and the exceptions thereto. In this case, the Appellant contends that the trial magistrate wrongly interpreted the provisions of Section 91 and 92 of the Evidence Act as he considered only exhibit DE1 and made no reference to Exhibit DE2 and all the other evidence on record.

DE1 is a sales agreement dated 1st March 1972 between Frank K. Gasasira and Andrew Kawamara. In the recitals it is indicated thus:

WHEREAS the Vendor is the owner of a tea estate of approximately 10 acres situate on public land at Kinoni Village, MulukaKyemboga, Gombolora Kyarusozi, Mwenge County in Tooro District.

AND WHEREAS the Vendor has agreed to transfer ownership of the land and the said tea estate together with all his interests therein.

Further under clauses 1 and 2 of the agreement, it was agreed as follows:

1. ***The Vendor agree to sell and the purchaser agrees to buy the said tea estate together with all the assets and liabilities existing and or accrue hereafter.***
2. ***Nothing in these presents shall be construed as a representation or warranty on the part of the Vendor that he has title to the land on which the said tea estate is situate.***

From the above, clearly, the land that Frank K. Gasasira was selling was a tea estate of approximately 10 acres. This was the subject matter and the Respondent bought the said estate with all its assets and liabilities. The known assets of the tea per the agreement was the 10 acres of land on which the tea estate was and the tea plantation itself. There is nothing in the said agreement that suggest that Frank K. Gasasira claimed interest in land beyond the 10 acres constituting the tea estate. The agreement does not make reference to exhibit DE2 as being the assets of the estate. In addition, it is also deducible from the agreement that the land in issue was public land and that Gasasira only claimed interest in only 10 acres on which he had a tea estate and he made it clear that the land on which the tea estate was situate was public land and he had no title to the same.

It is thus my considered view that under Section 91 and 92 of the Evidence Act, the Appellant could not be permitted to adduce or rely on evidence outside the

agreement because the agreement in my view represented a full understanding between the parties. The Appellant did not plead any exceptions in his written statement of defense and counter claim that would warrant him being permitted to adduce any additional/extrinsic or oral evidence under the known exceptions to the parole evidence rule, to explain, clarify or add on the contents of DE1. There is nothing in the agreement to suggest that Exhibit DE2 was meant to be part of or to explain Exhibit DE1. Therefore, I find that the trial magistrate rightly evaluated the evidence and properly applied section 91 and 92 of the Evidence Act.

In addition, under clause 2 of the agreement, it was clearly indicated that the Vendor who was Mr. Frank K. Gasasira had no title to the land on which the estate was but claimed interest in the tea estate of approximately 10 acres. Therefore, since the Appellant under his written statement of defense and counter claim largely contended that he acquired the suit land from Gasasira who had no title to the land, as such he could not transfer title of the land to the Appellant. Therefore, his claim of ownership also fails on the basis that the person from whom he acquired the land had no title to transfer to the Appellant. Further, there was no evidence that the suit land falls within the 10 acres that were acquired by the Appellant. I find that, going by the Appellant's written statement of defense and counter claim, and in the light of Exhibit DE1, the Appellant failed to establish his interest to the land outside of the 10 acres that he bought from Gasasira. He never pleaded any additional facts regarding how he acquired the extra 50 acres of land.

In terms of evaluation of evidence, it is my considered view that the trial magistrate did evaluate the evidence and rightly found that the Appellant failed to substantiate on his claim of ownership of the suit land. If the Appellant desired to rely on the lease offer and the valuation report, he would have pleaded the same in his written statement of defense and counter claim on how he acquired the extra

acres and how he became the owner of the same. As regards the claim by the Respondent that he was a bonafide occupant on the suit land. It was contended by the Appellant that the Respondent did not plead the same and the trial magistrate exhaustively evaluate the evidence to that effect. It is trite law that parties are bound by their pleadings and this is contained under Order 6 rule 7 of the Civil Procedure Rules. This means that a party cannot be permitted to adduce evidence to prove facts which were not pleaded in the pleadings and this is commonly referred to as the rule against departure from the pleadings.***(See Jani Properties Ltd Vs. Dar- es Salam City Council (1966) E.A 281 and Kitaka Peter and 12 others Vs. MuhamoodThobani, Civil Appeal No. 20 of 2021).***

In paragraph 6 of the plaint, the Respondent indicated that he shall without prejudice contend that he is a bonafide occupant on the suit land since he has been in occupation of the same since 1978 to the time of filing the suit undisturbed and thus could not be evicted. In the reply to the Appellant's defense and counter claim, the Respondent contended under paragraph 2 that he does not claim the tea estate but land which he owns and has been using since 1978 as family land. He further contended under paragraph 3 that he had been in use of the said land for over 30 years un-interrupted. It is therefore my considered view and finding that the Respondent pleaded that he was a bonafide occupant on the suit land.

The Appellant testified in court that the suit land was bought by his father Edward Bitanihirwe from a one Batibuka in 1978 and the agreement got burnt in the house. That since then, his father lived on the suit land to which he had a homestead and the rest was used for cultivation. That after the death of Bitanihirwe, the Respondent inherited the land from him and he continued use of the same for cultivation and later planted eucalyptus trees around 2003. The Evidence of the Respondent was supported and or corroborated by that of his mother who testified

as PW2. She informed court that the suit land was bought by his late husband Bitanihirwe from Batibuka at shs 10,500 during Amin's regime. That after purchase, the late used the same for agriculture and later planted trees. That the entire family stays on the shot land. She also added that the agreement got burnt.

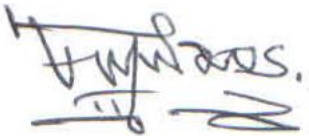
I find that the above evidence was not challenged in cross examination. The contention by the Appellant that there were contradictions which were grave specifically on the existence of the purchase agreement for the suit land has not merit. The Respondent and PW2 did not state that no agreement was made at the time of purchase during examination in chief. The Respondent was not actually examined about the agreement. It was brought out in cross examination where he indicated that:*"The agreement was burnt in the house. I don't have the agreement. It got burnt in the house in 1996 but it was never reported to police but the chairman knows. The chairman L.C.I was Ishaka Munyarubuga.The house was burnt in Feb 1996and that he never pleaded that fact"*

PW2 was equally not examined in chief about the purchase agreement but the issue arose in cross examination and he stated thus: *"It is my late husband who bought the suit land. The sales agreement was burnt in the house in the year I do not know. We reported to the issues to the chairman of Katabale Village Isaac Munyarubuga. The sale agreement was burnt in the house".* I have not found any contradictions in the evidence of the Respondent and PW2. They were both consistent that the agreement got burnt in house and that the incident was reported to the area L.C1 Chairman. Therefore, there was no such contradiction as submitted by the Appellant's counsel.

Since the Appellant did not plead in his written statement of defense and counterclaim and failed to establish how he acquired the extra 50 acres on which the alleged trespass occurred, the Respondent's claim of being bona-fide occupants

on the suit land remained more credible and unchallenged. Under Article 237(8)of the 1995 Constitution and Section 29(2)(a) of the land Act, the Respondent qualified as a bona-fide occupant having lived on the suit land since 1978 un-interrupted making a total of 17 years prior to adoption of the 1995 Constitution. Therefore, the learned trial Magistrate rightly held that the Respondent was a bona-fide occupant on the suit land being land comprised in Mwenge Block 5.

The Appellant's grounds of appeal therefore fail and consequently the appeal fails and it hereby dismissed with costs awarded to the Respondent.



Vincent Wagona

High Court Judge

FORT-PORTAL

11.01.2023