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**THE REPUBLIC OF UGANDA**

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

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**CIVIL APPEAL NO. 0093 Of 2018**

**AMOS KARAMIRA ::  
APPELLANT**

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**VERSUS**

**KIGUNDU MOSES MUSISI ::  
RESPONDENT**

**JUDGMENT**

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**(BEFORE: LADY JUSTICE IMMACULATE BUSINGYE  
BYARUHANGA)**

This appeal arises out of a judgement of the Chief Magistrate’s Court of Nakawa delivered by His Worship Karemani Jameson in Civil Suit No. 001 of 2016. The background to this Appeal is as follows: -

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The Appellant instituted a civil suit at Nakawa Chief Magistrates on 12<sup>th</sup> January against the Respondent seeking the following Orders: -

- a) A declaration that the Defendant is a trespasser on the Plaintiff’s land.
- b) An eviction order/order of vacant possession.
- 30 c) Mesne profits.
- d) General damages.
- e) Interest on ‘c’ at the rate of 25% per annum from the date of accrual, and on ‘d’, at court rate from the date of judgement till payment in full.

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The Respondent/Defendant filed a written statement of Defence on 25<sup>th</sup> January 2016 denying the contents of the plaint. The Defendant, now Respondent contended that the Appellant’s/Plaintiff’s claim against him was misconceived, unfounded and baseless and prayed that the court dismisses the suit. The Respondent/Defendant further

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pleaded that the Appellant’s/Plaintiff’s suit was frivolous, vexatious

and bad in law on the basis that the Plaintiff acquired his registered interest in the suit land as registered proprietor on the 14<sup>th</sup> day of September 2011 at 12.14pm after the Respondent/Defendant had long acquired an equitable and/or unregistered interest as a Kibanja owner on 3<sup>rd</sup> February 1976 through his mother E. Nassuna and had been enjoying free and uninterrupted actual possession and or physical occupation on the suit property with his residential home thereon the land. The Defendant indicated that he built his house on the suit land in 1982. The Defendant attached the agreement entered between his mother and one Salim Okello and the Uganda Electricity Board (UEB) receipts of 1995 which were in the names of the Defendant. The Defendant indicated that by 14<sup>th</sup> September 2011 when the Plaintiff became the registered proprietor of the suit land, the Defendant had been in occupation for 29 years.

It is undisputed that the Appellant/Plaintiff in the lower court is the registered proprietor of land comprised in Kyadondo Block 29 Plot 1304 at Kamuli, in Kira Town Council, Wakiso District having been registered on the Certificate of Title on 14<sup>th</sup> September 2011 at 12.14pm.

The trial court framed the following issues for determination.

1) Whether the Defendant is a trespasser on the suit land?

2) What are the remedies available to the parties?

The learned Chief Magistrate delivered judgement in favour of the Respondent/Defendant on 20<sup>th</sup> August 2018, by dismissing the Appellant's suit for lack of merit and ordered to the Appellant/Plaintiff to pay costs of the suit.

The Appellant/Plaintiff being dissatisfied with the judgement of the His Worship Karemani Jameson, Chief Magistrate filed this Appeal.

At the hearing of this Appeal, the Appellant was represented by Dr. Tusasirwe Benson of Tusasirwe & Co. Advocates and the Respondent by Khaukha Davis of Kira Advocates and Legal Consultants. The memorandum of appeal before this Honourable Court contains the following grounds: -

1. **The Learned Trial Chief Magistrate erred in law and fact when he found that the Respondent's mother had occupied the suit land unchallenged from 1976 to the coming into force of the 1995 Constitution.**

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2. **The Learned Trial Chief Magistrate erred in law and fact when, in disregard of the law and of evidence to the contrary, he found that the respondent's mother, and through her the Respondent, was a bonafide occupant of the suit land and not a trespasser.**

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3. **The Learned Trial Chief Magistrate erred in law and fact when the disregarded, and or failed to take into consideration the findings of the locus visit, which showed that in recent years the Respondent had, without any legal basis for doing so, encroached on the Appellant's land beyond the portion he had previously occupied.**

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Before addressing the grounds of the Appeal, I have to address my mind to the role of the 1<sup>st</sup> Appellate court. The role of the first Appellate court has to be addressed since this is a first Appeal from the decision of the Chief Magistrate to the High Court. This role was properly articulated in the case of **Selle and Another Vs. Associated Motor - Boat Ltd and Others (1968) EA 123 at Page 126** where Justice Clement De Lestang as he then was stated the role of the first appellate court as follows: -

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*"An Appeal ... is by way of retrial ... the court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect."*

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The same principle role was referred to in the case of **Fredrick J.K. Zaabwe vs Orient Bank & 05 Others, SCCA No. 4 of 2006** by the Supreme Court of Uganda.

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In re-evaluating the evidence and subjecting it to a fresh scrutiny, I will keep in mind the issues raised at trial and the evidence adduced

by both parties at trial in order to resolve the grounds presented in the memorandum of appeal.

### **Ground One**

5 In ground one, Counsel for the Appellant framed the ground to the effect that the Learned Trial Chief Magistrate erred in law and fact when he found that the Respondent's mother had occupied the suit land unchallenged from 1976, before the coming into force of the 1995 Constitution.

10 In respect of the ground one, Counsel for the Appellant submitted that at trial the Respondent confessed not witnessing the agreement of 1976 since he was a minor then, that the Respondent also admitted not knowing where Salim Okello got his interest from, that the Respondent admitted that Joyce Tibetendwa was the landlady and contradicted himself in evidence by stating the he constructed  
15 the houses in 1993 at locus yet his pleadings showed that he constructed the houses in 1982 and that DW2 and DW3 did not know the Respondent's mother and how she had acquired interest in the suit land. Counsel for the Appellant stated that the Appellant's evidence was clear and not contradictory.

20 According to Counsel for the Appellant, the Respondent failed to show how his mother acquired the suit land from Salim Okello and that court made a fundamental error to rely on an identification document (Page 3) to find that there was an agreement between Salim Okello and the Respondent's mother. The said agreement was  
25 not tendered in evidence and court should not have relied on it. Counsel for the Appellant further argued that Courts of Law have to rely on evidence adduced before them and are not allowed to indulge in conjecture, speculation, attractive reasoning and fanciful theories. Counsel cited to the case of **Advocates Coalition for  
30 Development and Environment & Others versus Attorney General; Constitutional Petition No. 14 of 2011 Page 11** to that effect. According to Counsel for the Appellant, the Respondent failed to show how he acquired interest in the suit land and the Trial Chief Magistrate should not have held that he was a bonafide  
35 occupant. Counsel argued that the Respondent's evidence in respect of the suit land should be rejected for the grave inconsistencies and

contradictions which were not satisfactorily explained. Counsel cited the case of **Twinomugisha Alex and two others Vs. Uganda, Supreme Court Criminal Appeal No. 35 of 2002.**

5 In reply, Counsel for the Respondent submitted that at trial the Respondent in his witness statement stated that in 1976 his mother purchased the suit land from Mr. Salim Okello in form of a Kibanja and his mother passed on in 2006. Counsel made reference to the Respondent's witness statement where the Respondent showed how he had lived on the suit land and his mother died while living on the  
10 suit land. Counsel made reference to the grave of the Respondent's brother who was buried in 1980 on the suit land as stated in the evidence of the Respondent at trial.

In rejoinder, Counsel for the Appellant submitted that the grave referred to by the Respondent had no trace and it was not seen  
15 during the locus visit.

### **Resolution**

According to the evidence on record, the testimony of PW1 and PW2 is clear. PW2 who sold the land to PW1 stated that she knew Nassuna as one of the people who were staying on her land. She  
20 even stated that she wrote to her a letter to buy herself but Nassuna did not reply and just ignored. PW2 did not tell court when she discovered that Nassuna was occupying the suit land. According to the evidence of DW1, Nassuna started staying on the suit land in 1976 (paragraph 2 of the witness stamen of DW1). According to the  
25 testimony of DW2, he found the Respondent living on the suit land in 1987 (page 19 of the record of proceedings). PW1 testified that in 2011 when he acquired the legal title, the Respondent was on the suit land (paragraphs 6 & 7 of PW1's witness statement). The Respondent's evidence indicating that his mother acquired interest  
30 in the suit land in 1976 was not challenged since PW2 (Tebitendwa Joyce) did not inform court when she discovered that the late Nasuna was an occupant on her registered land. (Reference is made to paragraphs 2, 4 & 8 of DW1's witness statement). It is true the agreement between Nasuna and Okello was not admitted as an  
35 Exhibit. I have not seen where the Trial Chief Magistrate relied on it

as an Exhibit in his judgement as alleged by Counsel for the appellant.

5 Since PW2 (Tebitendwa) indicated that she had written to the Respondent's mother as an occupant on her land (Exhibit P3 dated 14<sup>th</sup> June 1997) and such occupants are subject to section 32(2) of the Land Act as successors, the Trial Chief Magistrate did not error in law, by finding that Respondent's mother was a bonafide occupant who lived on the suit land unchallenged since 1976 and was therefore, protected by S.29 (2) (a) of the Land Act. Ground one of  
10 the Appeal fails.

### **Ground two**

In ground two, Counsel for Appellant stated that the Trial Chief Magistrate erred in law and fact when in disregard of the law and evidence to the contrary, He found that the Respondent's mother  
15 and through her, the Respondent was a bonafide occupant of the suit land and not a trespasser.

Counsel for the Appellant submitted that it is trite law that the cardinal principle of the statute is that the register is everything and except on the account of fraud on the part of the person dealing with  
20 the registered proprietor such person has an indefeasible title against the entire world. Counsel cited the case of **De Souza vs Karmali Manji (1962) EA 758** to that effect. Counsel further submitted that a bonafide occupant is a person who, before the coming into force of the 1995 Constitution had occupied and utilized  
25 or developed any land unchallenged by the registered owner or an agent of the registered owner for twelve years. Reference was made to Section 29(2) (a) of the Land Act Cap 227 and the case of **Isaaya Kalya & 02 others vs Moses Macekenyu Ikagobya CACA No. 82/2012.**

30 Counsel argued that court is obliged to rely on evidence properly admitted on record and must consider it as a whole and must not selectively consider evidence favouring one side without any regard for that which is unfavourable. According to Counsel for the Appellant since the Respondent did not have Letters of  
35 Administration in respect of his mother's estate, the Trial Chief Magistrate erred in holding that the Respondent derived interest

from his mother's estate. In addition, Counsel submitted that since at the trial the Appellant was found to be the registered proprietor of the suit land and the respondent did not prove any fraud or illegality against the Appellant court should have declared the respondent a trespasser. According to Counsel for the Appellant, since the Respondent testified that he started to utilize the suit land in 1993 and took possession in 2006, the Respondent does not qualify as a bonafide occupant.

In reply, Counsel for the Respondent submitted that the Respondent did present facts and evidence showing that he was a bonafide occupant of the suit land having stayed on the land and developed it for a period of more than 12 years. Counsel further submitted that the Respondent did not depart from his pleadings and argued that the Appellant had failed to adduce evidence to the effect that the Respondent had not stayed on the suit land for more than 12 years before coming into force of the 1995 Constitution.

The Trial Chief Magistrate at Page 6 of his judgement held as follows:-

*"It follows that the Defendant's mother who had occupied the land in issue from 1976 by 1995 when the Constitution was promulgated she had occupied the land without a challenge from the registered owner Tibitendwa Joyce for more than 12 years. Notwithstanding whether JoyceTebitendwa had properly acquired the land in 1976, her continued occupation of the same land unchallenged made her a bonafide occupant on the same land."*

On the same page, the Trial Chief Magistrate stated that the Respondent did not adduce evidence to show that he was an administrator of his mother's estate. The Trial Magistrate went on to state as follows: -

*"However, being a son of the deceased he is a beneficiary of the deceased's interest in the land. He therefore, qualified to be a bonafide occupant under Section 29 (2) of the Land Act."*

According to the evidence on record that is pages 10 - 11 of the record of proceedings, the Appellant who testified as Plaintiff witness 1 stated in Cross-examination as follows:-

5           *“When I helped Joyce in 2005, I visited the land. I carried out a search. She showed me the boundaries. There were no people on the land. There was a house of a caretaker. The caretaker I did not see him. She only told me the name which I do not remember. The people who were staying on the land in houses which she said were hers rae Kigwe Joel, Namutebi and Nakazi. These were one family. The Defendant was not among the occupants of the land I was showed... I later found the Defendant building on the land.”*

15           According to the witness statement of PW1 dated 22<sup>nd</sup> September 2017, paragraphs 6-7, the appellant wanted to compensate the respondent as one of the occupants on the suit land but the respondent refused the said compensation and even refused to buy his portion. PW1 was not clear as to when he found the Respondent/Defendant constructing on the suit land.

20           At page 12 of the record of proceedings PW1, who is the Appellant told court that he had offered to compensate the Respondent but the Respondent refused his offer. At page 12, the Appellant told court that PW2 who sold the suit land to the Appellant had introduced the Respondent to the Appellant as one of the occupants of the suit land. PW1 stated as follows:-

25           *“Joyce Tebitendwa does not dispute transferring her interest in the land to me. When she sold the land to me she introduced the Defendant as one of the occupants.... the Defendant now has a house on his land. This house was on the land when we signed the agreement. Joyce Tibetindwa told me she knew Nasuna who is the mother of the Defendant. That she asked*  
30           *her to buy herself but she failed.”*

The above evidence is corroborated by Exhibit P3 dated 14<sup>th</sup> June 1997 where PW2 was writing to Nasuna to buy her interest in the suit land.



DW2 (Tebitendwa Joyce) who transferred land to the Appellant testified that she sold part of her land and remained with 17 decimals with 02 occupants. According to page 15 of the record of proceedings PW2 testified as follows:-

5                   *"I sold part of the land and remained with 17 decimals with 02 occupants that is Nasuna and John Namukasa. I got Nasuna and John Mukasa when I acquired the land. I introduced myself to them. I do not know Nasuna's children."*

10                   The above evidence shows that PW2 who sold the land to the Appellant had recognized the mother of the Respondent as an occupant on her land. According to Exhibit PE3, PW2 requested the mother of the Respondent through a letter to buy her interest in the suit land (witness stamen of PW2 paragraph 4).  
15                   The oral evidence of the Appellant shows that he found the Respondent on the suit land at the time of purchase/transfer. The Trial Chief Magistrate did not state anywhere in his judgement that Respondent was Administrator of his mother's estate. He only stated and held that the Respondent was a  
20                   beneficiary of his mother's estate (page 6 of his judgement).

                      Given the above evidence, it clear that the Defendant is a beneficiary to the Estate of Nasuna. In addition, the Respondent testified that he had lived on the suit land from  
25                   1976 since his childhood undisturbed (witness statement of DW1 paragraph 8). Since the transferor of the suit land (PW2) told court that she knew Nasuna and even wrote to her as one of the occupants on her land (Exhibit PE3), the Trial Chief Magistrate did not error in holding that Nasuna was a bonafide occupant in accordance with Section 29 (2) of the Land Act. In  
30                   addition, under section 34 (2) of the Land Act a tenancy by occupancy may be inherited. Since there was no evidence adduced to indicate that the Respondent was not a child of Nasuna who died in 2006, and that the respondent had not lived on the suit land since 1976 the Trial Chief Magistrate was  
35                   right in holding that the Respondent was a beneficiary of his mother's estate but not as an Administrator. Ground two of the Appeal fails.

### **Ground Three**

Under Ground three of the Memorandum of Appeal, Counsel for the Appellant stated that the Learned Trial Magistrate erred in law and fact when he disregarded and failed to take into consideration the findings of the locus visit, which showed that in recent years the Respondent had without any legal basis for so doing, encroached on the Appellant's land beyond the portion he previously occupied.

Counsel for the Appellant submitted that during locus visit, the Appellant satisfactorily demonstrated to court that the Respondent without any claim of right had constructed his wall fence and house into the Appellant's land and this was in 2013 and 2014, way after the Appellant had purchased and owned the suit land. It was Counsel for the Appellant's submission that the Respondent encroached onto the Appellant's land by constructing his wall fence and house thereon.

In reply, Counsel for the Respondent submitted that during the locus visit the Respondent did show that the acres that were shown on the agreement are the ones which the Respondent inherited from his mother. According to Counsel for the Respondent, the Trial Magistrate critically looked at the findings voluntarily obtained by the Appellant and the Respondent and rightly administered justice.

According to the record of proceedings, page 21, locus was visited on 26<sup>th</sup> June 2018 and two witnesses were recalled to clarify on their evidence. According to the evidence of PW1 (Page 22, record of proceedings), the Appellant bought the suit land in 2005/2006 and the space which was being occupied by the Respondent had mud and wattle house which was later demolished. PW1 further testified that the perimeter wall of the Defendant was constructed in 2014 and stated that the conflict was on the fence of the Respondent and that the Respondent is the one who constructed two houses where mud and wattle house had been. At locus (page 23 of the record of proceedings Dw1 (Respondent) testified that his boundary was running with

his wall. Defence witness1 told court that he built the wall fence in 2013.

It should be noted that according to the sketch map drawn by court, the Appellant did not show court the boundaries separating his land from the Respondent’s land at the time of purchase in 2011. The Appellant did not adduce evidence to show that the land where the Respondent constructed a fence belonged to him at the time of purchase. All that the Appellant told court is that the Respondent’s fence was on his land. The Appellant ought to have adduced evidence to show how the suit land looked like at the time of purchase and at the time of locus in quo visit. According to sections 101-103 of the Evidence Act, he who alleges a fact must prove the same. In the instant appeal the appellant has failed to show court that the respondent’s was is part of his land. There is no way court can prove that the land where the wall fence was constructed belongs to the Appellant. Ground three equally fails.

The Appeal is dismissed with costs to the Respondent.

Dated at **Kampala** this **22<sup>nd</sup>** day of **January 2021**.

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**Immaculate Busingye Byaruhanga**  
**JUDGE**

