THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 169 OF 2017

(APPEAL FROM THE JUDGMENT OF THE HIGH COURT OF UGANDA AT MASAKA BEFORE JUSTICE JOHN EUDES KEITIRIMA IN CIVIL APPEAL NO 037 OF 2012 DELIVERED ON 4TH APRIL 2017)

(CORAM: KAKURU, MUHANGUZI, MADRAMA JJA)

PONSIANO KATAMBA} .....APPELLANT

VERSUS

COTILDA NAKIRIJJA} .....RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

This is a second appeal from the Judgment of the High Court on appeal from a decision of the Chief Magistrates Court at Masaka in which the respondent's suit was allowed. The respondent had sued the appellant in the Chief Magistrates court at Masaka seeking declarations that the appellant had no right to interfere with the developments of the respondent on his "*Kibanja*" (a customary holding located in registered *Mailo* land recognised under Art 237 (8) of the Constitution), for an eviction order, a permanent injunction, general damages for trespass and interest. This suit was allowed by Her Worship Magistrate Grade 1 Doreen Ajuna who entered Judgment in favour of the plaintiff now respondent in which the Court declared that, the appellant has no right to interfere with the plaintiff's developments on his *Kibanja*. Secondly, the respondent herein was awarded general damages of Uganda shillings 10,000,000/= and costs of the suit. The appellant being aggrieved appealed to the High Court at Masaka and in a Judgment delivered by his Lordship Justice John Eudes Keitirima, the appellants appeal was dismissed with costs. The appellant further appealed to this court on the following grounds:

1. The honourable Judge erred in law and in fact when he dismissed the appellant's appeal without properly evaluating the appellant's legal rights under the law that governs the relationship between the *Mailo* owner and a customary tenant/*Kibanja* holder.

2. The honourable Judge erred in law and in fact when he failed, as the appellate court of first instance, to properly re-evaluate the evidence on record and thus made the wrong conclusions against the appellant.
3. The honourable Judge erred when he wrote a Judgment for a matter that he had not heard or handled at all at any stage.

At the hearing of the appeal the appellant was represented by learned counsel Mr Noah Sekabojja while the respondent was represented by learned counsel Mr Lutakome. With leave of court learned counsel adopted their conferencing notes as their written submissions.

At the scheduling conference the following issues were agreed:

1. Whether the customary occupant or *Kibanja* holder has a right to put up permanent commercial structures on the land without the consent of the *Mailo* owner?
2. Whether the trial High Court rightly found that the appellant stopped the respondents developments and to award damages.
3. Whether the trial Judge was right to give Judgment in the matter he had not handled at trial during proceedings.
4. Remedies

The appellant's submissions

On the first issue agreed in the scheduling memorandum, the contention of the appellant is that the respondent before carrying out serious commercial developments comprising several multi-storey commercial buildings did not seek the consent of the appellant. Mr. Sekabojja relied on section 35 of the Land Act Cap 227 and submitted that it was applicable in cases of consent. He contended that particularly section 35 (3) of the Land Act, provides for prior consent of the landlord. He further submitted that under the Land Act the interests of the tenant by occupancy are subject to the interests of the land owner.

Mr Sekabojja further submitted that the proposition that a tenant by occupancy is free to undertake serious commercial developments without the consent of the landlord would result in an absurdity as their registered titles to the land would be rendered useless. Further that as a matter of public policy, this has several undesirable ramifications. Titles are acquired for value while tenancy by occupancy is by physical

possession without any investment. He prayed that this court should not allow this kind of anomaly to continue.

In relation to issue 2 Counsel submitted that it is not true that the appellant stopped the respondent from developing the *Kibanja*. The respondent had over time constructed storied commercial buildings on the land and not residence for residential purposes of the respondent and her family. What the respondent is carrying out are serious commercial developments. On the other hand the appellant who has the certificate of title cannot in the circumstances put up such developments or any development at all.

He submitted that the award of Uganda shillings 10,000,000/= as general damages was unjustified in the circumstances and the court had no legal basis of awarding it.

On the third issue counsel submitted that section 25 of the Civil Procedure Act and Order 21 rules 1 and 3 (1) of the Civil Procedure Rules, do not cover a situation where a case is heard by one Judge and Judgment written and delivered by another.

Submissions in reply of the respondent

In reply to the first issue, and after setting out detailed facts, Mr Lutakome submitted that, the learned trial magistrate's decision was affirmed by the High Court and is that the appellant has no right to interfere with the respondents developments on a *Kibanja* by imposing a condition of prior consent before undertaking developments of a permanent nature. Such a condition is not provided for under any law. He contended that it would be illogical for instance to require a lawful *Kibanja* owner who has security of tenure and perpetual ownership to always first apply to the registered *Mailo* owner to get his consent before he embarks on the erecting a permanent building on his *Kibanja*. Further, it would bear no sense in a modern society to expect a lawful *Kibanja* holder to live in a mud and wattle grass thatched hut because the *Mailo* owner has not allowed him to erect a permanent building on his *Kibanja*. Yet he can plant plantations such as coffee and bananas which are also valuable crops. It implies that if the registered owner declines to grant the consent, the *Kibanja* owner cannot live in a decent house.

On issue two, counsel submitted that the court found that the appellant had stopped the respondent from constructing permanent buildings on the suit land. This fact was admitted by the appellant and the appellant is bound by his own admission. Both the trial magistrate and the appellate court Judge did not err in holding that the appellant was responsible for illegal interference with the respondent's developments.

On issue three, counsel submitted that the first judge had directed both parties to file written submissions which they did. The written submissions were on record and in accordance with section 25 of the Civil Procedure Act and Order 21 rules 1 and 3 (1) of the Civil Procedure Rules and the next Judge prepared a judgment on the basis of what he found on record and this did not violate any law.

On issue 4 on remedies, the appellant is not entitled to any remedy against the respondent. The respondents counsel prayed that the appeal be dismissed with costs to the respondent.

Resolution of appeal

The appellant lodged a second appeal, the original jurisdiction having been exercised by a Magistrate Grade 1 whereupon the appellant appealed to the High Court. The court was addressed by way of written submissions in the conferencing notes of the counsel. The respondent filed conferencing notes first and so the appellant responded to the conferencing notes of the respondent. The correct procedure is for the appellant to file submissions first and for the respondent to respond to the same. The above notwithstanding, I shall consider the issues as addressed in the written submissions of counsel.

As an appeal from a decision of the High Court in the exercise of its appellate jurisdiction, the jurisdiction of this court as a second appellate court is limited to determining questions of law. Section 72 of the Civil Procedure Act, Cap 71 provides that:

> **"72. Second appeal.**
>
> (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—
>
> (a) the decision is contrary to law or to some usage having the force of law;
>
> (b) the decision has failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits. ..."

Secondly Rule 32 (2) of the Rules of this court provides that:

"(2) On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."

The issue of whether there is a requirement for a *Kibanja* holder to seek the consent of the *Mailo* owner before embarking on the construction of permanent structures of a commercial nature is a question of law. Secondly, the question of whether the learned first appellate court Judge erred in law to decide the appeal when the parties had not appeared before him and the matter had been before another Judge who had retired, is also a question of whether there is a substantial error or defect in the procedure provided by the Civil Procedure Act or any other law for the time being in force that may possibly have produced an error or defect in the decision of the case upon the merits and falls under section 72 (c) of the Civil Procedure Act.

Several issues were agreed upon by the parties before the registrar of this court but only three grounds of appeal were lodged. Issue number one as to whether a customary occupant or *Kibanja* holder has a right to put a permanent commercial structure on the land without the consent of the owner arises from ground one of the appeal. Issue number two of whether the trial High Court Judge rightly found that the appellant stopped the respondent's development and to award damages is a question of mixed law and fact. There are concurrent findings on this issue and I will not delve into the issue of fact.

Lastly the question of whether the law permitted a Judge to deliver judgment in a matter he had not handled at the stage of hearing is a matter of procedure and law arising from ground three of the appeal.

I will confine myself to the grounds of appeal as set out in the memorandum of appeal even though agreed issue one arises from ground one. The matter to be decided on ground one of the appeal is: Whether the learned first appellate court Judge erred in law when he dismissed the appellant's appeal without properly evaluating the appellant's

legal rights under the law that governs the relationship between the *Mailo* owner and a customary tenant/*Kibanja* holder.

The issue set out in the submissions of counsel arises from the holding of the first appellate court whose effect is that a *Kibanja* holder does not require the consent of the *Mailo* holder before he constructs a permanent structure on his *Kibanja*. The question of law is whether the law requires a *Kibanja* holder to seek consent of the *Mailo* owner prior to erecting a permanent structure on the *Kibanja*. The learned first appellate court Judge held that:

> "I must add, that as properly pointed out by learned counsel for the respondent, in reply to the appellant's counsel's submissions, the paramount issue that required the decision of the court was whether the appellant had a right to stop the respondent from constructing permanent buildings on her *Kibanja*. The decision on the issue lies upon the law than upon evidence. Even if the learned trial magistrate had failed to evaluate the evidence on record, which was not the case, still upon the basis of the law, her decision would be correct."

The learned first appellate court Judge relying on section 31 of the Land Act read together with the definition section 1 (dd) found that the respondent was a lawful occupant and therefore a tenant by occupancy enjoying security of occupancy on the suit property. It was not mandatory to apply for a certificate of occupancy but optional. Further the only requirement for prior consent before any activity or transaction is carried out by the *Kibanja* holder is found under section 34 (1), 34 (3), 39 (1) and section 35 of the Land Act. He found no law which requires the consent of the landlord before a *Kibanja* holder can construct a permanent structure on the *Kibanja*.

The point of law raised is of public importance and a decision of this court would have far reaching effects beyond the rights of the parties in this appeal. The point of law requires establishing the rights of a *Kibanja* holder and that of a *Mail* holder under the Constitution of the Republic of Uganda and the Land Act. Starting with the four major premises of land tenure systems in Uganda, the question for consideration is whether a *Kibanja* holding is a customary holding. This is because the respondent's counsel submitted *inter alia* that a *Kibanja* holder holds land in perpetuity under the provisions of section 3 (1) (h) of the Land Act. This presupposes that the *Kibanja* holder and the *Mailo* owner both hold the same land in perpetuity which proposition is an impossible legal proposition. One interest has to be of the dominant tenement and the other the

subservient tenement. We are required to determine whether a *Mailo* owner has the dominant tenement in relation to a *Kibanja* owner.

Article 237 (3) of the Constitution of the Republic of Uganda provides that land in Uganda shall be held in accordance with the land tenure system provided in the Constitution namely:

> **"237. Land ownership.**
>
> (1) Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.
>
> (2) ...
>
> (3) Land in Uganda shall be owned in accordance with the following land tenure systems—
>
> (a) customary;
>
> (b) freehold;
>
> (c) mailo; and
>
> (d) leasehold. ..."

A *Kibanja* holding does not fall under the tenure system known as "customary" under Article 237 (3) (a) of the Constitution but fall under article 237 (3) (c) that recognises *mailo* tenure. It is a special form of tenure known as a *Kibanja* that is recognised within another tenure of a registered owner known as *mailo* owner. A *Kibanja* is by definition under the Land Act, Cap 227 a lawful occupancy falling within registered land particularly described as *Mailo* land. The first basis for holding that customary tenure is different from *Kibanja* which is a lawful occupancy is the Constitution itself which provides in article 237 (4) (b) that: "land under customary tenure may be converted to freehold land ownership by registration." Furthermore putting it in a clearer context, article 237 (8) of the Constitution envisages and provides for lawful or bona fide occupants of *Mailo* tenure, freehold tenure or leasehold tenure to enjoy security of occupancy within the registered land. Article 237 (8) of the Constitution of the Republic of Uganda provides that:

> "(8) Upon the coming into force of this Constitution and until Parliament enacts an appropriate law under clause (9) of this article, the lawful or bona fide

occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land."

In addition to the above, article 237 (9) (a) of the Constitution of the Republic of Uganda required Parliament elected under the Constitution 1995 to enact a law regulating the relationship between the lawful or bona fide occupants of land referred to in clause (8) and the registered owners of the land. Further, the Land Act which was enacted under the Constitution of the Republic of Uganda 1995 has a different definition for "bona fide occupant" and "lawful occupant" as distinguished from "customary tenure". Specifically it has a definition of "tenant by occupancy" to mean the lawful or bona fide occupant declared under section 31 of the Land Act. More detailed definitions under the Land Act make the distinction between the lawful occupant and bona fide occupants who are classified as tenants by occupancy on the one hand and customary tenure very clear. Section 1 of the Land Act provides as follows:

> "(e) "bona fide occupant" and "lawful occupant" have the meanings assigned to them in section 29;
>
> (l) "customary tenure" means a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which are described in section 3;
>
> (t) "Mailo land tenure" means the holding of registered land in perpetuity and having roots in the allotment of land pursuant to the 1900 Uganda Agreement and subject to statutory qualifications, the incidents of which are described in section 3;
>
> (dd) "tenant by occupancy" means the lawful or bona fide occupant declared to be a tenant by occupancy by section 31"

From the above definitions, customary tenure is regulated by customary rules which are limited in the operations as defined above but a tenancy by occupancy means a lawful or bona fide occupant declared to be a tenant by occupancy. Furthermore, the Constitution is explicit that the rules regulating the relationship between the occupant and the registered owner would be made by Parliament and it is therefore the statutory provisions which would regulate the relationship between the tenant by occupancy such as the *Kibanja* owner and *Mailo* owner who is the registered owner. Section 3 (1) of the Land Act further refines the incidents of customary tenure as:

"3. Incidents of forms of tenure.

(1) Customary tenure is a form of tenure—

(a) applicable to a specific area of land and a specific description or class of persons;

(b) subject to section 27, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;

(c) applicable to any persons acquiring land in that area in accordance with those rules;

(d) subject to section 27, characterised by local customary regulation;

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

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

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

(h) which is owned in perpetuity."

The submission that *Kibanja* tenure is held in perpetuity has no statutory basis unless it can be traced under any residual customs which are proved in a court of law. On the other hand customary tenure like mailo tenure is clearly defined by section 3 of the Land Act as a form of tenure that is held in perpetuity. Section 3 (4) of the Land Act recognises that mailo land is owned in perpetuity and provides that:

"3. Incidents of forms of tenure.

(4) Mailo tenure is a form of tenure deriving its legality from the Constitution and its incidents from the written law which—

(a) involves the holding of registered land in perpetuity;

(b) permits the separation of ownership of land from the ownership of developments on land made by a lawful or bona fide occupant; and

(c) enables the holder, subject to the customary and statutory rights of those persons lawful or bona fide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all the powers of ownership of the owner of land held of a freehold title set out in subsections (2) and (3) and subject to the same possibility of conditions, restrictions and limitations, positive or negative in their application, as are referred to in those subsections."

The first provision that arrests attention is the stipulation that mailo title is held in perpetuity. There is no similar provision for the specific definition of a bona fide or lawful occupant. Secondly, the form of mailo tenure permits the separation of ownership of land from the ownership of developments on the land made by a lawful or bona fide occupant. In other words a bona fide or lawful occupant such as the *Kibanja* holder owns the developments on the land he or she makes. Thirdly, section 3 (4) (c) of the Land Act makes the rights of the mailo holder subject to the customary and statutory rights of those persons lawful or bona fide in occupation of the land at the time the tenure was created and their successors in title. It further provides that the *mailo* owner has the same rights applicable to the rights of a freehold title holder under subsection 2 and 3 of section 3 of the Land Act. These rights include using and developing the land for any lawful purpose; taking and using any and all produce from the land; entering into any transaction in connection with the land, including but not limited to selling, leasing, mortgaging or pledging, subdividing creating rights and interests for other people in the land and creating trusts of the land as well as disposal of the land to any person by will. Those rights are subject to the rights of the bona fide or lawful occupants which are reserved in the statute and which *inter alia* include the right of security of tenure.

The rights of a tenant by occupancy which include that of a *Kibanja* holder are stipulated in section 31 of the Land Act. Section 31 (1) of the Land Act provides that such an occupant shall enjoy security of occupancy on the land. Such a tenant by occupancy is deemed to be a tenant of the registered owner (the *Mailo* owner in this case). Consequently, a *Kibanja* holder is required to pay rent to the registered owner being an annual nominal ground rent as determined by the board. Of particular interest is that section 31 (9) which provides that the security of tenure of the lawful or bona fide occupant shall not be prejudiced by reason of the fact that he or she does not possess a certificate of occupancy. Other provisions deal with the failure to pay rent and the powers of the board and orders which the board may issue in relation to the issue of

payment or non-payment of ground rent. Section 33 of the Land Act permits a tenant by occupancy to apply to the registered owner to be issued with a certificate of occupancy. As noted above, this requirement is not mandatory.

Last but not least, the most relevant provision relating to the rights of a tenant by occupancy vis a vis the rights of a landlord to give consent under specified instances is section 34 of the Land Act which provides as follows:

> "34. Transactions with the tenancy by occupancy.
>
> (1) A tenant by occupancy may, in accordance with this section, assign, sublet, pledge, create third party rights in, subdivide and undertake any other lawful transaction in respect of the occupancy.
>
> (2) A tenancy by occupancy may be inherited.
>
> (3) Prior to undertaking any transaction to which subsection (1) refers, the tenant by occupancy shall submit an application in the prescribed form to the owner of the land for his or her consent to the transaction.
>
> (4) The registered owner shall, within six weeks from the date of receipt of the application or such longer time as may be prescribed, either grant a consent to the transaction in the prescribed form, with or without conditions, or refuse consent to the transaction.
>
> (5) Where the registered owner refuses to grant consent to the transaction or grants consent subject to conditions which the tenant by occupancy objects to or fails within the prescribed time to give any decision on the application, the tenant by occupancy may appeal to the land tribunal against the refusal.
>
> (6) For the purposes of appealing under this section, the conditions or, as the case may be, the failure to give a decision referred to in subsection (5) shall be taken to be a refusal.
>
> (7) The land tribunal shall, in the exercise of its functions under this section, grant the consent, with or without conditions which may include or depart from conditions imposed by the owner, or refuse consent to the transaction or may adjourn the proceedings to enable the parties to reach an agreement on the matter.

(8) A copy of every consent, signed by the owner or, where the consent has been granted by the land tribunal, by the secretary of the tribunal, shall be delivered or sent to the recorder who shall keep a record in the prescribed form of all such consents.

(9) No transaction to which this section applies shall be valid and effective to pass any interest in land if it is undertaken without consent as provided for in this section, and the recorder shall not make any entry on the record of any such transaction in respect of which there is no consent."

The above section deals with transactions in land held *inter alia* by a tenant by occupancy such as a *Kibanja* holder as far as the facts in this appeal are concerned. The question is whether having developments of a "commercial nature" on a *Kibanja* can be considered to be a transaction within the purview of section 34 of the Land Act. Specifically section 34 (1) of the Land Act refers to the kind of transactions envisaged in the following words namely to: "assign, sublet, pledge, create third party rights in, subdivide and undertake any other lawful transaction in respect of the occupancy". The section deals with assigning, subletting, pledging, creating third party rights in, subdividing or undertaking of any other lawful transaction in respect of the occupancy. I must point out from the very outset that section 34 of the Land Act has a difficulty in the head note because it reads: "transactions with the tenancy by occupancy". Would it not to be "transactions by the tenant" by occupancy? By using the term "transactions with the tenancy", it implies any transaction involving the occupation or the tenancy. What is a transaction involving the occupation or the tenancy?

On the face of the provisions, section 34 of the Land Act permits the *Kibanja* holder who is a tenant by occupancy to undertake any developments on the land in terms of the right of occupancy without the consent of the landlord/*Mailo* owner provided he or she does not thereby do a transaction which creates third party interests. Section 34 (3) of the Land Act requires the *Kibanja* holder or any other tenant by occupancy prior to undertaking any transaction mentioned in section 34 (1) to submit an application in the prescribed form to the land owner for his or her consent to the transaction. Developments in land of a commercial nature do not alone involve the creation of third-party interests. Third party interests may involve the creation of leases, mortgages, sub leases, etc. Because a *kibanja* can be inherited it can be bequeathed in a will. For instance, construction of buildings for sale is an intention to create third party interests. It is therefore a question of fact as to whether any of the transactions set out under

section 34 (1) of the Land Act has been undertaken. From those premises, it can be stated that so long as they *kibanja* holder, does not assign or transfer his interests to third parties or create third-party interests on his land, he or she cannot be stopped from constructing permanent structures or developments on the land. That also means that he or she does not require the prior consent of the landlord or *mailo* owner before undertaking construction of the permanent structures or developments on his or her land. Because we are dealing with the property rights of the *kibanja* holder, which rights can be inherited, the provisions of section 34 (1) of the Land Act have to be strictly construed so as not to undermine the rights of occupancy of the *kibanja* holder as well as to maintain his or her security of occupancy. For emphasis, the transactions which require prior consent are; assignment, subletting, pledging, creating third party rights in, subdividing an undertaking any other lawful transaction. The word "transaction" must be restricted to a transaction which creates the above written interests but cannot mean construction or developments. A transaction by necessary implication involves a contract, assignment, pledging or any other creation of interest in another party.

Where any of the transactions under section 34 (1) of the Land Act is undertaken by the *kibanja* holder, he or she such has a safeguard inbuilt in the section itself. When she or he intends to carry out any of the transaction stipulated under section 34 (1) of the Land Act, he or she shall first apply to the landlord for consent. Thereafter, if the landlord refuses to give the consent or unreasonably withholds consent, the *Kibanja* holder has a right to apply to the land tribunal for the requisite consent. After all, the *Kibanja* interest can be inherited and so long as the *Kibanja* holder is paying rent, he or she enjoys security of tenure on the land.

The several safeguards are provided for in clear terms. The first is the time within which to grant the consent by the landlord is six weeks. Upon failure to give the consent, or providing for unreasonable terms for such consent, the *Kibanja* holder can appeal to the land tribunal. The tribunal shall grant the consent with or without conditions or depart from the conditions imposed by the landlord. For ease of reference, section 34 (4) – (8) of the Land Act provide for the safeguards as follows:

> "(4) The registered owner shall, within six weeks from the date of receipt of the application or such longer time as may be prescribed, either grant a consent to the transaction in the prescribed form, with or without conditions, or refuse consent to the transaction.

(5) Where the registered owner refuses to grant consent to the transaction or grants consent subject to conditions which the tenant by occupancy objects to or fails within the prescribed time to give any decision on the application, the tenant by occupancy may appeal to the land tribunal against the refusal.

(6) For the purposes of appealing under this section, the conditions or, as the case may be, the failure to give a decision referred to in subsection (5) shall be taken to be a refusal.

(7) The land tribunal shall, in the exercise of its functions under this section, grant the consent, with or without conditions which may include or depart from conditions imposed by the owner, or refuse consent to the transaction or may adjourn the proceedings to enable the parties to reach an agreement on the matter.

(8) A copy of every consent, signed by the owner or, where the consent has been granted by the land tribunal, by the secretary of the tribunal, shall be delivered or sent to the recorder who shall keep a record in the prescribed form of all such consents".

I must emphasise that where the permit of an urban authority relating to the user of the property is required, the purpose for which the property will be used will be contained in the application for the permit. The *Kibanja* in this appeal is in an urban area subject to the rules for development of the urban area. The question of what user is intended will indicate whether there is an intention to create third-party interests. Furthermore, the kind of transaction which is envisaged for which the consent of the landlord is required is further clarified by section 34 (9) of the Land Act which provides that:

"(9) No transaction to which this section applies shall be valid and effective to pass any interest in land if it is undertaken without a consent as provided for in this section, and the recorder shall not make any entry on the record of any such transaction in respect of which there is no consent."

The conclusion is that the transaction envisaged under section 34 of the Land Act is a transaction which involves the passing of interest in land. This is consistent with section 34 (1) of the Land Act which includes any transaction involving assignments, subletting, pledging, creating third-party rights in, subdividing and undertaking any other lawful transaction in respect of the occupancy. Any other lawful transaction should create or

transfer to any third-party interests in the land to fall within the category of transactions which require consent.

Notwithstanding the above holding, it is purely a question of prudence for a *Kibanja* holder to, among other options that he or she may have, try to buy the *Mailo* title before undertaking to develop any high-value commercial undertaking by construction on the property. It is a matter of negotiations. In any case, the *Kibanja* holder would still require the consent of the landlord to sublet the property to other people. Where the consent is withheld, the *Kibanja* holder has a right to apply to the tribunal for the requisite consent. It is a mandatory requirement for the tribunal to grant the consent. However, certain conditions are envisaged to be imposed by the tribunal or the landlord. Parliament in its wisdom has not stipulated the kind of conditions which may be imposed for purposes of the consent of the landlord. The requirement for consent supports the right of the *Kibanja* holder to assign, sublet, pledge, create third-party rights in, subdivide and undertake any other lawful transaction in respect of the occupancy. A subdivision by its nature may involve the construction of buildings to be let out to other tenants on lease. A subdivision by necessary implication is the separation of occupancy. Would the commercial building complex be occupied by the *Kibanja* holder and his or her family alone?

In the premises, the blanket holding that the *Kibanja* holder does not require the consent of the landlord is erroneous in law. There are instances where consent is required for transactions falling under section 34 (1) of the Land Act. Whether or not consent is necessary would depend on the circumstances of each case as to whether the *Kibanja* holder intends to carry out a transaction as defined by section 34 (1) of the Land Act.

The development of a commercial building per se does not squarely fall under the definition of a transaction under section 34 (1) of the Land Act.

For emphasis the *Mailo* owner remains the landlord of the *Kibanja* holder and has the power of consent to transactions undertaken by the *Kibanja* owner. This is consistent with his right of first option under section 35 of the Land Act to purchase the *kibanja* holding. The option to purchase includes the option to be assigned the *Kibanja* should the *kibanja* holder wish to assign the same. Section 35 of the Land Act provides that:

> "35. Option to purchase.

(1) A tenant by occupancy who wishes to assign the tenancy shall, subject to this section, give the first option of taking the assignment of the tenancy to the owner of the land.

(2) The owner of land who wishes to sell the reversionary interest in the land shall, subject to this section, give the first option of buying that interest to the tenant by occupancy.

(3) Any offer made under this section shall be on a willing buyer willing seller basis.

(4) Where an option to buy is offered to any party under subsection (1) or (2), the party who makes the offer must set out the terms of the offer with sufficient detail and clarity for the party to whom the offer is made to understand the offer and make an appropriate response to it.

(5) A party to whom an offer to buy is made under subsection (1) or (2) shall, within three months after the receipt of the offer, either refuse the offer or make such a response as will enable meaningful negotiations to take place between the parties.

(6) Either party to the negotiations to which subsection (5) refers may, at any time after three months have elapsed since the negotiations commenced, refer the matter to the mediator for him or her to assist the parties to reach an agreement.

(7) Where the mediator is unable, after three months of negotiations, to assist the parties to reach an agreement on the option to buy, he or she shall make a declaration to that effect; and the party who made the offer of the option to buy shall thereupon be enabled to assign the tenancy by occupancy or, as the case may be, sell the reversionary interest free of the option to buy, to such other person as he or she thinks fit."

Section 35 of the Land Act has two elements of section 34 (1) of the Land Act. Firstly, it deals with the right of assignment of the tenancy and expressly provides that the first option of taking the assignment of the tenancy shall be given to the owner of the land. Secondly, it provides that the owner who wishes to sell the reversionary interest in the land shall subject to the provision give the first option of buying that interest to the tenant by occupancy. Furthermore any of the parties should give the first option to buy to any party in the landlord/tenant relationship. Last but not least, it provides for

negotiations or mediation before further interests stipulated therein are transferred or transacted. Section 34 (1) of the Land Act therefore becomes clear in terms of the kind of interest which can be dealt with only with the prior consent of the landlord. The transaction has to involve the transfer of interest in land in terms of the pledging, assignment, subletting, creating third-party rights in, subdividing or any other transaction. Unless the landlord can prove that there would be a transfer of interest of the *kibanja* holder in terms of section 34 (1) of the Land Act, he cannot stifle any permanent development of the property by the *kibanja* holder.

The landlord should be involved as a stakeholder rather than a bystander only in transactions falling under section 34 (1) of the Land Act. This is not to hold that the *Kibanja* holder cannot build his residence without the consent of the landlord. Neither can the *kibanja* holder be barred from developing permanent structures on his *kibanja*. Lastly as a matter of prudence as noted above, if negotiations are not done prior to such developments, it can complicate the relationship between the landlord and tenant when such consent is required eventually.

Subject to the limitations stated above ground 1 of the appeal has no merit because there is no evidence that the *kibanja* holder intended to create the kind of interest envisaged under section 34 (1) of the Land Act. I would disallow ground 1 of the appeal.

With regard to ground 2 of the of the appeal, it is averred that the Honourable Judge erred in law and in fact when he failed, as the first appellate court of first instance, to properly re-evaluate the evidence on record and thus made wrong conclusions against the appellant. The question is whether the appellant stopped the respondent's development on the land.

The ground is of interest because it implies that the respondent can go ahead with the developments in issue. The evidence in the trial court was that the respondent was stopped from construction of the 7th building. Other buildings had already been in existence since the 1960s. The learned trial magistrate agreed with the testimony of the plaintiff who is the respondent to this appeal that they were given orders to stop construction in 2009. If they had not been stopped, they would not have lost 30 bags of cement which they had already bought, iron bars and sand which was washed away. The plaintiff suffered losses as a result. The finding of the trial magistrate was upheld by the High Court on appeal. This Court has no mandate to interfere with the concurrent findings of fact of the trial court and the first appellate court. The question of whether

damages were erroneously awarded does not automatically follow. Damages are awarded following the event of establishing fault and will be considered on the issue of remedies. I would disallow ground two of the appeal.

As far as ground 3 of the appeal is concerned, the learned first appellate court Judge is faulted for having written a Judgment in the appeal when he was not present when there were hearing proceedings. I agree with learned counsel for the respondent that the record is clear that the High Court was addressed in written submissions. The appellant wrote the written submissions and so did the respondent. The registrar's letter forwarding the record of proceedings of the High Court certifies that it is the true copy of the proceedings in Civil Appeal No 37 of 2012. It however does not have any other record other than the fact that the parties appeared before Hon Mr Justice Kibuuka Musoke on the 3rd September, 2013 whereupon the court ordered the lawyers present to file written submissions not later than 7 October 2013. The next record shows that Judgment was delivered on 4th April, 2017 by Justice John Eudes Keitirima in open court. It was delivered in the presence of a representative of Dr Katamba as well as counsel for the appellant and the respondent was absent.

Section 25 of the Civil Procedure Act Cap 71 laws of Uganda provides that the court after the case has been heard, shall pronounce Judgment. In this case the address of court was the hearing which was by way of written submissions since there was no oral address of the court. It follows that the learned first appellate court Judge considered the submissions of the parties and therefore literally 'heard' the appeal and the submissions of the appellant that he delivered a judgment in a matter he had not heard is erroneous. Court was addressed by way of written submissions and thereafter Judgment was delivered. I have further considered Order 21 rules 1 and 2 of the Civil Procedure Rules (CPR) and I do not find any bar to the learned first appellate court Judge, having read the submissions of counsel and therefore having heard the appeal, to write a Judgment and deliver it. It was not a Judgment written by another Judge but his Judgment. In any case Order 21 rule 2 of the CPR allows another Judge to deliver a Judgment written by a different Judge. In the premises, ground 3 of the appeal has no merit and is disallowed.

I must note that the appellant could not and did not have power to stop developments without an order of the urban authority or the court. For that reason, I would set aside the damages awarded against the appellant by the trial court.

Save for setting aside the order for the award of general damages, I would dismiss this appeal with costs.

Dated at Kampala the 8th day of ~~June~~ July 2019

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 169 OF 2017

PONSIANO KATAMBA ..... APPLELLANT

VERSUS

COTILDA NAKIRIJJA ..... RESPONDENT

(An Appeal from the Judgment and orders of the High Court of Uganda at Masaka before Hon. Justice John Eudes Keitrima dated 4th April, 2017 in Civil Appeal No.037 of 2012)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother The Hon. Mr. Justice Christopher Madrama Izama.

I agree with him that this appeal ought to fail for the reasons he has set out in his Judgment. I also agree with the orders he has proposed.

I wish however, to state my own position regarding the law on a *"Kibanja"* holding. It is imperative to trace the legal history of *"Kibanja"* tenure in order to fully understand its meaning and nature. The Buganda agreement of 1900 signed between the British Colonial Administration and the Kingdom of Buganda followed the British Colonial Policy of indirect rule. The Colonial Government was to govern and exploit the colony of Buganda through Buganda's own established social and

political structures with necessary modification and adaptations. Buganda had been declared to be a British Protectorate. As a colonial policy the British had decided not to allow or encourage white settlers to take over land in Buganda, unlike the case in Kenya. The colonial economy in Buganda therefore was to be driven by the *"natives"*. They were the ones to grow the newly introduced cash crops, upon which the economy was to be based. The British therefore introduced a land tenure system that was designed to foster and promote that economy. It became known as the *"mailo tenure system"*.

Freehold titles were issued to Kabaka of Buganda, his immediate family and chiefs. Those freehold titles also known as *"mailo"* were issued over occupied land in Buganda, in order to create some sort of feudal structures of landlords and tenants. The inhabitants of those lands referred to as *"Bakopi"* literally translated as surfs or commoners. Individuals who had lived on land for generations were overnight designated as *"Bakopi"* tenants on the lands they had previously owned in perpetuity.

This land policy was designed to encourage Africans embrace colonial money economy and force them to abandon peasant subsistence farming that had no economic value to the colonial administration.

In Buganda therefore there emerged two land owners. *"Nanyini taka"* (The owner of the *"mailo"* land or the freehold) and *"Nanyini Kibanja"* (The owner of the customary holding upon which the freehold was imposed).

Therefore in my view there are two overlapping interests both held in perpetuity. The *"kibanja"* holding can be inherited under both customary law and the statutes of succession. Under kiganda custom every household has an heir and as such the land he or she inherited is owned in perpetuity as it is always passed on in succession. I

do not therefore accept the notion that a *"kibanja"* holding cannot be owned in perpetuity. It is by its very nature a perpetual tenure.

Buganda culture is embodied in its land. The land is called *"Etaka"* or *"Obutaka"*. Those who are born on that land and have lived on it for time immemorial are known as *"Abataka"* the land owners. All the land in Buganda is vested in the Kabaka who is also known as *"Ssabataka"*. He is the head of the land owners in Buganda and holds the land in trust for the whole nation of Buganda. The Baganda are by custom buried in Buganda with each family, sub-clan or clan owning a specific burial ground known as *"Ebija"*.

There is a category of persons referred to as *"basenze"*. These are people who entered on the land in Buganda from elsewhere or from one part of Buganda to another where they did not previously live. Such persons may be clarified as licencees or *bonafide* occupants. Their rights are restricted to occupancy and they cannot transfer their interest to others by sale or through succession without consent. They may change their interest by purchasing the land they occupy from the *"kibanja"* holder or a *mailo* holder.

See:

A B Mukwaya: Land Tenure In Buganda Present Day Tendencies Eagle press Kampala 1953,

Joseph Bossa: Land Conflict in Buganda. The Independent Magazine September 2013 Kampala,

Kenneth Kakuru: Land Compensation Policy "A Case for Uganda" (Unpublished Paper) prepared for The Africa Biodiversity Collaborative Group 2003 Arusha Tanzania,

Geoffrey Mulindwa: Understanding Mailo land and dual ownership (Unpublished paper) Feb 2019 Kampala,

Nicholas Muyomba: The 'Kibanja' interest in mailo land tenure in Uganda. A land economist's perspective (Unpublished Paper) June 2013 Kampala,

Peter Mulira: Three ways a person can occupy another's land under the Land Act (Unpublished Paper) August 2018 Kampala,

Christopher Bwanika: Uganda Law Society: Law Review March 1998 Kampala.

Be that as it may, I agree with Justice Madrama that an individual under the current legal regime can own a *"kibanja"* in an urban area. Urban areas were and are still being created over customary holdings. The nature of the holding must by implication change according to urban planning laws and policies.

The Urban Planning Act recognises customary holdings in those areas. A holder of *"kibanja"* in an urban area is at liberty to develop it in accordance with the urban planning law without seeking consent of the *mailo* owner. This in my view would not effect the right of the *mailo* owner guaranteed under Article 126 of the Constitution.

In the result I agree with the decision of Madrama, JA and the orders he has proposed as Muhanguzi, JA agrees, it is so ordered.

Dated at **Kampala** this ....8th....day of ....July.... 2019.

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Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 169 OF 2017

PONSIANO KATAMBA.....APPELLANT

VERSUS

COTILDA NAKIRIJJA.....RESPONDENT

(Appeal from the Judgement and orders of the High Court of Uganda at Masaka before Hon. Justice John Eudes Keitirima dated 4th April 2o17 in Civil Appeal No. 037 of 2012)

Coram: **Hon. Mr. Justice Kenneth Kakuru, JA**

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGEMENT OF HON. JUSTICE EZEKIEL MUHANGUZI, JA

I have had the benefit of reading in draft the judgment of my learned brother, the Hon. Mr. Justice Christopher Madrama Izama, JA.

For the reasons he has set out in his judgment, I agree that this appeal ought to fail. I also agree with the orders he has proposed.

Dated at Kampala this .....8th.....day of .....July.....2019

EZEKIEL MUHANGUZI
JUSTICE OF APPEAL