

THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NO 240 OF 2013

(ARISING FROM HIGH COURT CIVIL APPEAL NO 27 OF 2010 AND ALSO ARISING FROM ENTEBBE  
CHIEF MAGISTRATES COURT CIVIL SUIT NO. 10 28 OF 2007)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

PROF. GORDON WAVAMUNNO} .....APPELLANT

VERSUS

SEKYANZI SEMPIJJA} .....RESPONDENT

(Appeal from the judgment of Hon. Justice Ruby Aweri Opio in High Court Civil Appeal No 27 of  
2010 dated 5th March 2013)

**JUDGMENT OF JUSTICE GEOFFREY KIRYABWIRE**

I have had the opportunity of reading the Judgment of Brother the Hon Justice Christopher  
Madrama in draft and I agree with the findings and final decisions and Orders and have nothing  
more useful to add.

Dated at Kampala this 19<sup>th</sup> day of June 2020



---

**Justice Geoffrey Kiryabwire J.A.**

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 240 OF 2013**

**PROF. GORDON WAVAMUNNO** ..... **APPELLANT**

**VERSUS**

**SEKYANZI SEMPIJJA** ..... **RESPONDENT**

*(An Appeal from the judgment of Hon. Justice Rubby Aweri Opio in High Court Civil Appeal No. 27 of 2010 dated 5<sup>th</sup> March, 2013)*

**CORAM:     Hon. Mr. Justice Kenneth Kakuru, JA**  
**Hon. Mr. Justice Geoffrey Kiryabwire, JA**  
**Hon. Mr. Justice Christopher Madrama, JA**

**JUDGMENT OF JUSTICE KENNETH KAKURU, JA**

I have had the benefit of reading in draft the Judgement of my learned brother Hon. Christopher Madrama, JA.

I agree with him that this appeal ought to succeed for the reasons he has set out in his judgment.

As Hon. Kiryabwire, JA also agrees.

It is hereby ordered as follows;-

(1) This appeal is hereby allowed

(2) The Judgment of the High Court is hereby set aside and substituted with this judgment.

(3) The respondent shall pay costs at this Court and at both Courts below.

Dated at Kampala this 19<sup>th</sup> day of June ..... 2020.

.....  


**Kenneth Kakuru**

**JUSTICE OF APPEAL**

5

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 240 OF 2013

(ARISING FROM HIGH COURT CIVIL APPEAL NO 27 OF 2010 AND ALSO  
ARISING FROM ENTEBBE CHIEF MAGISTRATES COURT CIVIL SUIT NO.  
28 OF 2007)

10

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

PROF. GORDON WAVAMUNNO} .....APPELLANT

VERSUS

SEKYANZI SEMPIJJA} .....RESPONDENT

15

(Appeal from the judgment of Hon. Justice Ruby Aweri Opió in High  
Court Civil Appeal No 27 of 2010 dated 5<sup>th</sup> March 2013)

**JUDGMENT OF CHRISTOPHER MADRAMA**

20

This is a second appeal arising from the decision of Aweri Opió J, judge of  
the High Court, as he then was, in High Court Civil Appeal No 27 of 2010  
dated 5<sup>th</sup> of March 2013. In the judgment the learned first appellate court  
judge upheld the decision of the trial magistrate that granted the Plaintiff's  
suit and accordingly dismissed the Appellant's appeal with costs.

25

The background to the appeal is that the Respondent to this appeal filed a  
suit in the Chief Magistrates Court of Entebbe vide Civil Suit No. 28 of 2007  
alleging unlawful grabbing and alienation of the *kibanja* (which term applies  
in law to land tenure deriving it's origin under the repealed Busuulu and  
Envujjo Law 1928 in the former Buganda Kingdom existing within *Mailo*  
freehold title and having the registered *Mailo* owner as the landlord and the

*Decision of Hon. Mr. Justice Christopher Madrama Izama. Truly maximum security 2020 style KYOPUCH COURT OF APPEAL  
Opikoleni*



5 *kibanja* owner as the customary tenant. The *kibanja* tenure is recognised under article 237 (8) of the Constitution of the Republic of Uganda 1995 as lawful occupancy) belonging to him in Vubufu Village, Kitabi sub County, Wakiso district and for redress by way of an order for vacant possession, general damages, interests and costs of the suit. The Plaintiff (who is now the  
10 Respondent) claimed to be the customary owner or a bona fide occupant of the disputed land measuring about 3 acres having inherited it. The word *kibanja* was also used in the lower courts as meaning *customary tenant*. The Respondent's case in the trial court was that he was forced to sign a document by the Defendant (now the Appellant in this court and the High  
15 Court) and agents virtually surrendering his stated interest to the Appellant who unlawfully took possession of the same. Secondly, the Appellant was the registered owner of the disputed land.

In his defence the Appellant maintained that he was the registered proprietor of the suit property since 24<sup>th</sup> of December 1984 and at all times the land  
20 was unoccupied until the Respondent started illegally extracting soil from it. He contended that it is not true that the Respondent lawfully acquired or occupied the suit property. He denied any duress meted against the Respondent. Furthermore, he asserted that he had since sold his registered title to the disputed land.

25 The issues framed by the learned trial magistrate Her Worship Babirye Magistrate Grade1 were as follows:

- 1) Whether the Plaintiff is the lawful customary tenant or bona fide occupant of the suit land.
- 2) Whether the undertaking signed between the parties constituted a  
30 legally binding contract.
- 3) Whether the Plaintiff is entitled to the remedies sought.



5 On the question of whether the Plaintiff was a customary tenant or a bona fide occupant of the suit land, the learned trial magistrate found that the Plaintiff had produced evidence that he had an interest on the land and was a bona fide occupant.

10 On the 2<sup>nd</sup> question of whether the undertaking signed between the parties constituted a legally binding contract, the learned trial magistrate found that the undertaking in the contract could not override the provisions of the law and therefore the contract was illegal.

15 The learned trial magistrate granted the remedies sought in the plaint. She awarded the Plaintiff **Uganda shillings 59,879,350/=** as the value of the interest of the Plaintiff in the suit land and further awarded **Uganda shillings 3,000,000/=** as general damages.

The Appellant was aggrieved and appealed to the High Court on 5 grounds of appeal namely:

- 20 1. The learned trial magistrate erred in law and fact when she held that the Respondent was a bona fide occupant.
2. The learned trial judge erred in law and fact when she did not properly evaluate the evidence thereby arriving at wrong conclusions.
- 25 3. The learned trial magistrate erred in law and fact when she held that the contract entered between the Appellant and the Respondent was not a legal.
4. The learned trial magistrate erred in law and fact when she awarded payment of compensation at a government rate that was ambiguous.
5. The learned trial magistrate erred in law and fact when she awarded general damages that were not justifiable and excessive.

30 The first appellate court judge found as a matter of fact that the father of the Respondent used to cultivate coffee on the suit property and the Respondent



5 inherited the property upon the death of his father. He found that it was a question of fact whether the Respondent was a bona fide occupant. The Respondents father had occupied the property for over 12 years and the Respondent inherited it in 1986 after the death of his father in 1985.

The 1<sup>st</sup> appellate court judge held that the Plaintiff/Respondent is a bona fide  
10 occupant of the suit property. Secondly, that the contract for removal of bricks from the said property executed between the parties was for removal of bricks and was not about compensation of the Respondent and was an illegal contract whose purpose was to override the provisions of the law. Thirdly, that the Appellant sold the Respondent's land illegally and the  
15 Respondent is entitled to general damages of Uganda shillings 3,000,000/= . He further ordered that the Appellant compensates the Respondent the equivalent of the *kibanja* interest at a rate to be determined by the government valuation surveyor. The learned 1<sup>st</sup> appellate court judge expunged from the record 'a directive' by the trial court decree that the  
20 Appellant pays Uganda shillings 59,879,350/= . Whereupon he dismissed the Appellants appeal with costs to the Respondent.

The Appellant was also aggrieved by the dismissal of his appeal and lodged a second appeal in this court on 4 grounds of appeal that:

1. The learned judge erred in law in holding that the Respondent filed his  
25 suit in the trial court to protect the interest in the suit property as beneficiary thereof thereby arriving at a wrong conclusion.
2. The learned judge erred in law when he held that the Respondent illegally inherited/acquired an interest in the suit land from his late father without proof that his father's estate was administered.
- 30 3. The learned judge erred in law when he failed in his duty to re-evaluate the evidence on record thereby arriving at the wrong conclusion that the Respondent was a bona fide occupant of the suit land.



5 4. The learned judge erred in law when he confirmed the award of the  
general damages to the Respondent without justification for the same  
before the trial court.

The Appellant seeks for an order to set aside the judgments of the lower  
courts with costs.

10 This appeal had been scheduled for hearing on 24<sup>th</sup> of March 2020 but due  
to the global pandemic described as Covid 19, the court issued directives  
through the registrar for the parties to file written submissions and judgment  
would follow. Upon expiry of the time set by the Registrar for the parties to  
have completed filing their written submissions, none of the parties  
15 complied. However, upon earlier directions of the registrar of the Court, the  
lawyers of the parties had filed conferencing notes of the parties with  
skeleton arguments for and against the appeal. The Appellant is represented  
by Messieurs Ligomarc Advocates and the Respondent is represented by  
Messieurs Luzige, Lubega, Kavuma & Co. Advocates.

## 20 **Submissions of Counsel**

The Appellants Counsel relied on **Kifamunte Henry v Uganda; Criminal  
Appeal No 10 of 1997**, a decision of the Supreme Court on what the duties  
of a 1<sup>st</sup> appellate court and that of a 2<sup>nd</sup> appellate court respectively is. A first  
appellate court has to consider all the evidence before the trial court and  
25 make its own findings with caution that it did not have an opportunity of  
observing the witnesses testify and has to rely on the findings of the trial  
court on the question of demeanour of witnesses. In a second appeal, the  
second appellate court has to decide whether the 1<sup>st</sup> appellate court in  
approaching its task, applied or failed to apply the principles that are  
30 relevant.

## **Ground 1**

Decision of Hon. Mr. Justice *Christopher Madrama Izama* *Truselly maximum 735 security 2020 style XTOMHER COURT OF APPEAL*  
*Opikoleni*




5 **The learned trial judge erred in law in holding that the Respondent filed his suit in the trial court to protect the interest in the suit property as beneficiary thereof thereby arriving at the wrong conclusion.**

The Appellant's Counsel contended that the 1<sup>st</sup> appellate court's findings was neither supported by the pleadings or the evidence on record. Further that  
10 the Respondent sued claiming an interest in the suit property but not merely as a beneficiary seeking to protect the estate. The Respondent by pleadings and evidence claimed that he was a lawful customary owner or bona fide occupant of the suit property and claimed that he inherited the property from his deceased father. It was therefore not a suit by beneficiary seeking  
15 to preserve the estate of a deceased person but a party seeking to enforce what he claimed to be his right or interest.

In reply, the Respondent's Counsel submitted that both the trial magistrate and the appellate judge appropriately evaluated the evidence on record and reached a just decision that:

- 20
1. The Respondent was a bona fide occupant.
  2. The Respondent was coerced into signing a compensation agreement.
  3. The Respondent was entitled to compensation.

In reply to arguments on ground 1 of the appeal, the Respondent's Counsel submitted in reply that the learned appellate court judge's finding that the  
25 Respondent filed his case to protect his interest in the suit property as a beneficiary thereof is supported by evidence, the pleadings as well as the law. Particularly in issue number 1 the trial court decided whether the Plaintiff is a lawful customary tenant or a bona fide occupant of the suit property. The issue clearly came up during the hearing at the trial court and the  
30 Respondent testified to that effect. PW2 also testified that he knew the Respondent's father and that after his death the Respondent inherited the suit *kibanja*.





5 In the premises, the Respondent's Counsel submitted that the appellate court judge properly addressed himself to the evidence on record and came to a correct decision. The Respondent's Counsel further submitted that a lawful customary owner or bona fide occupant have beneficial interest capable of or meriting legal protection.

10 **Ground 2:**

**The learned 1<sup>st</sup> appellate court judge erred in law when he held that the Respondent illegally inherited/acquired an interest in the suit land from his late father without proof that his father's estate was administered.**

15 The Appellants Counsel submitted that ground 2 of the appeal is based on the premises of *locus standi* of the Respondent to claim a right/interest in the property of his deceased father who died intestate without proof that the father's estate was ever legally administered. The Respondent filed a suit seeking to enforce his right as owner of the suit property and not merely as a beneficiary seeking to protect and estate pending distribution of the same  
20 to the beneficiaries. The question therefore is whether such a beneficiary to an estate that is not administered can legally claim acquisition of an interest in the property of the deceased's estate? Further the Appellants Counsel wondered whether such a person can legally enforce the right before a court of law. He relied on section 191 of the Succession Act for the proposition that  
25 no right to any part of the property of a person who has died intestate shall be established in any court of justice until letters of administration have 1<sup>st</sup> been granted by a court of competent jurisdiction in respect to the estate. He submitted that the Respondent ought to have produced the letters of administration (see **Aisha Nantume Tifu v Damulira Kitata James HCCS  
30 No 77 of 2007** and **Vincent Tumukadde v Serunjogi HCCS No 85 of 1995**). He sought to distinguish the Supreme Court decision in **Israel Kabwa v Martin Banoba Musiga; Civil Appeal No 52 of 1995** as well as the High



5 Court decision in **Solo David & another versus Pagali Abdu HCCS No 27 of 2009** where it was held variously that a beneficiary of an estate has *locus standi* to sue in his own name to preserve the estate without having to wait for grant of letters of administration. He submitted that the principles are only applicable where a beneficiary seeks to protect an estate which has not  
10 been distributed and not one in which he or she is claiming a right of ownership.

He submitted that the Respondent filed a suit in his own capacity as a customary tenant/*kibanja* holder or bona fide occupant of the suit property. Nowhere in the pleadings is it stated that he was filing the suit as a  
15 beneficiary to protect the estate of the deceased. The basis of his right is that he had inherited the suit property and therefore it implied that the estate had been distributed though he did not prove that the estate had been administered. He submitted that the decision in **Israel Kabwa** (supra) did not do away with section 191 of the Succession Act. Finally, he contended that  
20 the learned trial judge erred in law when he held that the Respondent had illegally inherited/acquired an interest in the estate of an intestate's property and proceeded to uphold it without prove that letters of administration had been issued in respect of the estate.

In reply to the submissions of the Appellant on ground 2 of the appeal, the  
25 Respondent's Counsel submitted that the Respondent has had the right to sue on behalf of the estate of his late father even without letters of administration. The law only barred sale of the property of the intestate.

Secondly, he submitted that evidence was that the Respondent inherited the property from his father and which right or inheritance is enforceable by  
30 courts of law. Further, the authorities cited by the Appellant of **Aisha Nantume Tifu v Damulira Kitata James; Civil Suit No 77 of 2007** and



5 **Vincent Tamukedde v Serunjogi HCCS No 85 of 1995** were quoted out of context. Instead the authorities support the Respondent's case.

The Respondent's Counsel further submitted that a beneficiary seeking to enforce rights over an estate that has not been distributed is in effect enforcing rights of ownership over an intestate property like in the instant  
10 case. Further, one has to first inherit property in order to go to the second step of administration. He submitted that in the particular case before the court, the inheritance occurred when the Appellant acquired an interest in the suit property and does not have to have taken place after administration of an estate. He contended that inheritance is different from administration  
15 of an estate. Inheritance is not proved by letters of administration but rather by an express Will, or express wishes of the deceased person or degree of consanguinity.

### **Ground 3:**

20 **The learned judge erred in law when he failed in his duty to properly evaluate the evidence on record thereby arriving at the wrong conclusion that the Respondent was a bona fide occupant of the suit land.**

The Appellant's Counsel submitted that, had the learned 1<sup>st</sup> appellate court judge properly re-evaluated the evidence on record, he would have  
25 established that the Respondent did not discharge the burden on him to prove the *bona fide* occupancy of his late father so as to entitle him to an interest in the property. That he would not have arrived at the conclusion that the Respondent was a bona fide occupant of the suit property.

30 The Appellants Counsel submitted that in order to determine whether the 12 years or more period of possession and utilisation before the coming into force of the 1995 Constitution had been satisfied, one has to adduce



5 evidence to prove the commencement of the occupancy and utilisation or  
development. Without such evidence, court cannot just assume and would  
have no basis to find the claimant as a bona fide occupant. The only reference  
to a period of time that the Respondent's evidence disclosed in the relation  
to the suit land was the year of 1985 when he claimed that his father died  
10 and thereafter, he claimed that in 1986, he inherited the suit property. The  
Appellant's Counsel submitted that the Respondent failed to discharge his  
burden of proof in respect of his father's alleged *bona fide* occupancy and  
he had no legal interest to inherit. He contended that the learned 1<sup>st</sup>  
appellate court judge presumed that the Respondents father was a *bona fide*  
15 *occupant* of the suit property and did not properly evaluate the evidence  
before him otherwise he would have noted that the evidence required proof  
of the *bona fide* occupancy but this had not been furnished. Counsel  
submitted that in coming to the conclusion that the Plaintiff's father was a  
*bona fide occupant*, the 1<sup>st</sup> appellate court judge relied on the testimony of  
20 PW2 that the Plaintiff's father had left two pieces of land, one at the Lakeside  
and another one where the Plaintiff lives. Further in finding that the  
Respondent's father was a *bona fide occupant* the learned 1<sup>st</sup> appellate court  
judge stated that the Respondent testified that he inherited the interest in  
the disputed land from his deceased father who had occupied it for over 12  
25 years. Secondly, he testified that he had inherited the land from his father in  
1986 after his father had died in 1985.

None of the witnesses testified that the Respondents father had occupied  
the suit property for over 12 years prior to his death. Further none of the  
witnesses stated when the Respondent's father started occupying the suit  
30 property.

The Appellant's Counsel submitted that the fact that PW3 knew the  
Respondent during his childhood did not mean that his deceased father  
owned the suit property and had occupied it for more than 12 years.

5 The Appellant's Counsel further submitted that the learned trial judge erred  
in law when they failed to properly re-evaluate the evidence on record to  
establish whether the Respondent's burden to prove the previous period of  
occupation prior to the coming into force of the Constitution was in his own  
right or by the right of his deceased father. Under section 92 of the Evidence  
10 Act, whoever desires any court to give Judgment as to any legal right or  
liability dependent on the existence of facts which he or she asserts must  
prove the existence of those facts. He submitted that the Respondent did not  
prove the 12 years' period required for one to satisfy the test of being a bona  
fide occupant.

15 The Appellant's Counsel further submitted that the learned trial judge erred  
in law when he held that the utilisation of land was sufficient proof of bona  
fide occupancy as utilisation cannot occur without occupation. He submitted  
that the mere utilisation of land without occupying the same does not satisfy  
the test of bona fide occupancy. The criteria for bona fide occupancy under  
20 section 29 (2) of the Land Act includes; a person who had before the coming  
into force of the Constitution occupied and utilised or developed land.  
Secondly, he must have occupied or utilised the land or developed it  
unchallenged by the registered proprietor. Thirdly, the occupancy must be  
for a period of 12 years or more prior to the coming into force of the  
25 Constitution of the Republic of Uganda 1995. He relied on **Dr William  
Kaberuka & Julius Muhuruzi versus NK Investments Ltd and Kampala  
District Land Board; Civil Appeal Number 80 of 2008** where the Appellant  
grew seasonal crops on the land in issue and claimed an interest as a bona  
fide occupant. The Court of Appeal held that for one to qualify to be a bona  
30 fide occupant, the person must have occupied and utilised the land in issue,  
or must have developed it. The utilisation or occupation alone would not  
suffice. Both must be present.



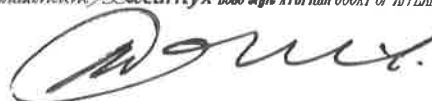
5 Appellants Counsel submitted that the Respondents father only cultivated (utilised) the suit property and did not occupy it or reside on it. He resided on another piece of land which was not in dispute in the case. As such, he did not satisfy both tests of occupation and utilisation.

10 In reply to the Appellant's submissions on ground 3, the Respondent's Counsel submitted that the Respondent was a bona fide occupant of the *kibanja* and that the issue of whether or not he was a bona fide occupant is not determined from the period his father died, that is; 1985 but rather, from the date his father occupied the suit property. That is whether it was before or after the coming into force of the 1995 Constitution and the appellate  
15 judge was very much alive to that and therefore came to a correct decision.

Further, the Respondent's Counsel submitted that the appellate court judge correctly evaluated the evidence of the trial magistrate that the inheritance of interest in the estate of the Respondent's father qualify him to be a bona fide occupant since his father lived on the suit land for over 12 years prior to  
20 his death in 1985.

The Respondent's Counsel submitted that the authority of **Dr William Kaberuka and Julius Muhuruzi v N.K. Investments Ltd and Kampala District Land Board; Civil Appeal No 80 of 2008** were quoted out of context and are distinguishable from the circumstances of this appeal. He  
25 submitted that in the circumstances of this appeal, the Respondent inherited his father's interest, his father had occupied the suit land unchallenged by the previous registered proprietor Bulaga who later sold the suit property to the Appellant.

#### Ground 4:



5 **The learned judge erred in law when he confirmed that the award of general damages to the Respondent without justification for the same before the trial court.**

10 The Appellant's Counsel submitted that damages is compensation in monetary terms through a process of law for loss or injury sustained by the Plaintiff and caused by the Defendant (See **Ahmed Ibrahim Bholm v Car and General Ltd; Civil Appeal Number 12 of 2002 (SC); Uganda Revenue Authority versus Wanume David Kitamirike; Civil Appeal No 43 of 2010** and **Hadley v Baxendale (1854) 9 Exch 341**).

15 The Appellant's Counsel submitted that the learned 1<sup>st</sup> appellate court judge upheld award of damages on grounds that the Respondent suffered injury or loss for being deprived of his *kibanja*. The learned 1<sup>st</sup> appellate court judge also based his decision to confirm the award on the basis that the Respondent was evicted from the land. However, he submitted that the learned 1<sup>st</sup> appellate court judge erred when he failed to reappraise the  
20 evidence in respect of how the Respondent vacated the suit land. There was no eviction of the Respondent. According to the undertaking signed between the Appellant and the Respondent exhibit D1, and according to the evidence of the Respondent in cross examination, the Respondent left the land freely and took his bricks without being forced. In exhibit D1 the Respondent  
25 agreed to vacate the land and never work on it again. There was no evidence of eviction for it to form the basis of loss and suffering allegedly occasioned to the Respondent by the Appellant.

30 In the premises, the Appellant's Counsel submitted that the Respondent was not entitled to any damages since he was not a bona fide occupant of the suit property. The Respondent suffered no loss or inconvenience but instead benefited from utilising the Appellants land free of charge and was even allowed to take his bricks out of the land. He was even facilitated



5 transportation of the bricks from the land. In the circumstances the award of general damages to the Respondent was unjustified.

The Appellant's Counsel prayed that the judgment and orders of the learned first appellate court judge be set aside and the appeal allowed with costs to the Appellant in this court, in the High Court and in the trial court.

10 In reply to the arguments on ground 4 of the appeal, the Respondent's Counsel submitted that the learned judge rightly and properly awarded general damages and was alive to the principles governing the award of the same. He submitted that the trial judge appropriately evaluated the evidence on record and reached the correct finding and decision whereupon he  
15 prayed that the appeal is allowed with costs to the Respondent in the lower courts and the Court of Appeal.

### **Resolution of appeal**

I have carefully considered the grounds of appeal, the pleadings of the parties in the trial court, the record of the trial court, the decision of the 1<sup>st</sup>  
20 appellate court, the submissions of Counsel and the law.

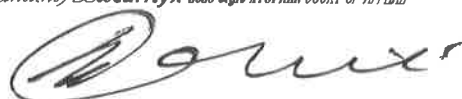
As a second appeal, the decision of the first appellate court can only be challenged on points of law. Section 72 of the Civil Procedure Act provides that:

#### **72. Second appeal.**

25 (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;

30 (b) the decision has failed to determine some material issue of law or usage having the force of law;





5 (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. ...

Section 72 is further entrenched by section 74 because it provides that no second appeal shall lie on any ground other than those provided for in section 72: Section 74 of the Civil Procedure Act stipulates that:

**74. Second appeal on no other grounds.**

Subject to section 73, no appeal to the Court of Appeal shall lie except on the grounds mentioned in section 72.

There are limited grounds to reconsider findings of fact of the trial court. Particularly, Rule 32 (2) of Rules of this Court stipulates that this court may appraise inferences of fact drawn by the trial court:

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

On any second appeal from the 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.

In **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No 10 of 1997** the Supreme Court extensively considered the powers of the second appellate court and held that they could interfere with the conclusions of the Court of Appeal (first appellate court) if it appears that in its consideration of the appeal as the first appellate court; they misapplied or failed to apply the principles set out in **Pandya v R (1957) EA 336** and **Kairu v Uganda (1978) HCB 123** among other precedents. The Supreme Court held inter alia that:

On second appeal it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principles.



5 ...This Court will no doubt consider the facts of the appeal to the extent of  
considering the relevant point of law or mixed law and fact raised in any appeal. If  
we re-evaluate the facts of each case wholesale, we will assume the duty of the first  
appellate court and create unnecessary uncertainty. We can interfere with the  
conclusions of the Court of Appeal if it appears that in its consideration of the  
10 appeal as the first appellate court, misapplied or failed to apply the principles set  
out in such decisions as...

...Once it has been established that there was some competent evidence to  
support a finding of fact, it is not open, on second appeal to go into the sufficiency  
of that evidence or the reasonableness of the finding. Even if a court of first  
15 instance has wrongly directed itself on a point and the court of first appellate court  
has wrongly held that the trial court correctly directed itself, yet, if the court of first  
appeal has correctly directed itself on the point, the second appellate court cannot  
take a different view R Mohamad Ali Hasham vs R (1941) 8 E.A.C.A. 93.

On second appeal the Court of Appeal is precluded from questioning the findings  
of fact of the trial court, provided that there was evidence to support those  
20 findings, though it may think it possible, or even probable, that it would not have  
itself come to the same conclusion; it can only interfere where it considers that  
there was no evidence to support the finding of fact, this being a question of law:  
R vs Hassan Bin Said (1942) 9 E.A.C.A. 62

25 The 1<sup>st</sup> ground of appeal in the first appellate court was that the learned trial  
magistrate erred in law and fact when she held that the Respondent was a  
bona fide occupant. The question of whether there was occupancy in the first  
place is a question of fact. The finding of the trial magistrate that the  
Respondent was a bona fide occupant was confirmed and upheld by the 1<sup>st</sup>  
30 appellate court judge. There are therefore concurrent findings on a matter of  
fact by the trial court and the first appellate court. As stated above, the  
question of whether the Respondent was bona fide occupant is a question  
of fact though it is partially a question of law in terms of definition under the  
relevant law. Following the precedents cited above, the question is whether  
35 there was no evidence to support the finding of fact of bona fide occupancy.



5 The above notwithstanding, the Appellant's grounds of appeal and argument  
are founded on the law of succession and answer the question of whether  
the Respondent had the right to commence an action and prove an interest  
of occupancy in the trial court. Further, the real controversy in which the three  
grounds of appeal revolve is whether the Respondent occupied the suit  
10 property unchallenged for a period of 12 years or more before the coming  
into force of the Constitution of the Republic of Uganda 1995 in October  
1995.

The first three grounds of appeal are that:

- 15 **1. The learned judge erred in law in holding that the Respondent  
filed his suit in the trial court to protect the interest in the suit  
property as beneficiary thereof thereby arriving at the wrong  
conclusion.**
- 20 **2. The learned judge erred in law when he held that the Respondent  
illegally inherited/acquired an interest in the suit land from his  
father without proof that his father's estate was administered.**
- 25 **3. The learned judge erred in law when he failed in his duty to re-  
evaluate the evidence on record thereby arriving at the wrong  
conclusion that the Respondent was a bona fide occupant of the  
suit land.**

An analysis of these three grounds of appeal show that they are intertwined  
in that they deal with the question of what kind of interest the Respondent  
had and the issue of whether the learned trial judge erred to hold that the  
30 Respondent filed a suit to protect an interest in the suit property as a  
beneficiary. The issue of whether the Respondent was a beneficiary directly  
relates to whether he acquired the interest of his father's estate or acted on

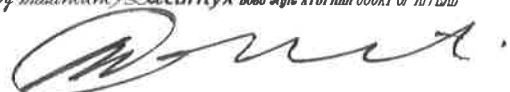


5 his own behalf as beneficiary. This issue is further narrowed to the number  
of years that the Respondent occupied the suit property as to whether it  
amounts to 12 years prior to the promulgation of the Constitution of the  
Republic of Uganda for him to qualify as a bona fide occupant. Secondly, the  
second ground of appeal essentially deals with the question of standing of  
10 the Respondent to prove an interest in the estate of his father or to prove  
that the estate had been administered and interest had passed to him as a  
beneficiary and revolves on whether letters of administration had been  
granted to establish an interest in a court of law on behalf of the estate of  
the deceased (the Respondent's father who died in 1985). Thirdly, the 3<sup>rd</sup>  
15 ground deals with that interest namely the interest of bona fide occupancy.  
However, grounds 1 and 2 of the appeal also relate to whether the interest  
of bona fide occupancy under section 29 (2) of the Land Act and article 237  
(8) of the Constitution were established. All the grounds seek to establish  
what right the Respondent had inclusive of whether he was a bona fide  
20 occupant. In any cause the main issue is whether the Respondent was a bona  
fide occupant and all other issues follow from a resolution of that.

Before considering these intertwined three grounds of appeal, it is essential  
to bring out the salient facts giving rise to and the issues arising from the  
pleadings of the parties before the trial court.

25 The plaint clearly avers that the Respondent's case against the Appellant in  
the trial magistrate's court was for unlawful grabbing, alienation of the suit  
property belonging to the Plaintiff. The Plaintiffs suit is clearly reflected in the  
paragraphs 3, 4 and 5 of the plaint as follows:

30 3. The Plaintiff's case against the Defendant is in respect of unlawful grabbing and  
alienation of the suit *kibanja*, belonging to the Plaintiff, located in Vubufu  
village, Katabi sub county, Wakiso district. Consequently, the Plaintiff seeks  
justice and redress from this honourable court by way of judgment, vacant  
possession, general damages, interest and costs of the case.



4. The Plaintiff states that he is the lawful customary owner, or a bona fide occupant of the suit *kibanja*, measuring about 3 acres, and located at a place above-mentioned. The Plaintiff lawfully acquired the same through inheritance and Uganda custom in 1995, from his late father Sempijja George. Right from that time, hitherto, the Plaintiff has basically been using the suit *kibanja* for production of food and cash crops.

5. The Plaintiff further states that on 23<sup>rd</sup>/01/07, the Defendant, assisted by some unpatriotic LC officers of the area, and through duress, undue influence, and, indeed, outright intimidation, the Defendant forced the Plaintiff to sign a document – virtually surrendering the suit *kibanja* to the Defendant. And worst of all, free of charge. Armed with that document, the Defendant went ahead, cleared the suit *kibanja*, or part of it, and, finally, unlawfully took possession of the same, or attempted to do so.

In the written statement of defence, the Appellant denied the averments of the Plaintiff and averred *inter alia* that until recently, he was the registered proprietor of the suit land since 24<sup>th</sup> of December, 1984 and attached the title deed thereof. Secondly, he averred that at all material times the suit land was unoccupied until the Plaintiffs started illegally extracting soil from the land. Further, that the Appellant averred that it is not true that the Plaintiff lawfully acquired or occupied the land. Lastly, the Appellant averred that the allegations of duress are denied and the Plaintiff shall be put to strict proof thereof. The Appellant relied on the undertaking of the Respondent which was attached to the written statement of defence. Last but not least he also averred that he had sold the property in issue and a copy of the sale agreement was attached to the written statement of defence.

Issues arise from pleadings and it is clear from the pleadings that what was in dispute was whether the Respondent was the owner of the suit property as alleged in the plaint. It is alleged in the plaint that he is the customary owner or alternatively, the bona fide occupant.





5 otherwise acquired the interest of the person qualified to be a bona fide occupant.

The first appellate court judge considered the contention that the Respondent based his right to the property on inheritance from his deceased father who occupied the suit land for over 12 years. The Respondent  
10 inherited the suit land in 1986 after the death of his father in 1985. He noted that the *kibanja* belonged to the Respondent's father since the childhood of the Respondent. By 1995 the Respondent had been on the *kibanja* for 10 years and on the balance of probabilities the earlier interest of the deceased was more than 12 years according to the testimony of PW2 and PW3. He  
15 found that the Respondent had discharged the legal burden to prove the claim and it was up to the Appellant to prove otherwise. On several other grounds he found that the Respondent was a bona fide occupant.

The question is whether this finding is not supported by any evidence because it is a concurrent finding of the trial court and the first appellate  
20 court or whether it is contrary to law.

Before resolving that question, it is necessary to set out the provisions of the law which defines who a bona fide occupant is. The Constitution of the Republic of Uganda, article 237 (3) thereof provides that land in Uganda shall be owned in accordance with the following land tenure systems:

- 25 (a) customary;  
(b) Freehold;  
(c) *Mailo*; and  
(d) leasehold

Further the Constitution provides for the protection of the interests of lawful  
30 or bona fide occupants. These interests are recognised under article 237 (8) of the Constitution of the Republic of Uganda which stipulates that:







5 (c) the Government shall pay compensation to the registered owner within five years after the coming into force of this Act.

(4) For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section.

10 (5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.

Because of the use of the conjunctive "and" under section 29 (2) (a) of the Land Act, it was argued for the Appellant that the Respondent had to occupy and also utilise the property to qualify to be a bona fide occupant. The meaning adopted by the Appellant is that to occupy means to reside at. The Appellant asserted that the Respondent only utilised but did not occupy the suit property. That proposition is that a bona fide occupant must have been a resident of the suit property and that it was not enough to just utilise it i.e. by cultivating or planting crops. I do not agree. It would be absurd if the interest of a bona fide occupant is restricted by a requirement to be a resident at the place of occupancy. Is it not sufficient to be in effective occupation or possession of the suit property? Occupation and possession are on the same side of the same coin. The cultivation of coffee or crops and the utilisation of property may in appropriate cases amount to effective occupation. Occupation is a question of fact. The occupant can put machinery or fence off the property without being resident. Effective occupation is having control over the property. According to the **Cambridge International Dictionary of English** to "occupy" means:

30 to fill, use or exist in

**Osborne's Concise Law Dictionary Eleventh Edition** defines "occupation" as:

*Decision of Hon. Mr. Justice Christopher Madrama Izama* *Trangilly maximum 735 securityx 2020 style XT0PHER COURT OF APPEAL*  
*Opiroteni*



5 (1) The exercise of physical control or possession of land; having the actual use of land.

(2) Taking possession of enemy territory by the Armed Forces.

Planting coffee trees and cultivating the land may amount to occupation if there is the exercise of physical control or possession of the Land. I have  
10 further considered the equitable doctrine of laches and acquiescence which is that failure to challenge occupancy for twelve years or more which bars, by equitable estoppels, a suit to remove the occupant. However, in the case of bona fide occupancy, there is a specific statute that defines what it is. I am also mindful of the fact that it is the occupant who filed a suit alleging *inter*  
15 *alia* trespass to the property.

Section 29 of the Land Act recognises the right of a bona fide occupant only in so far as is defined in the statutory law.

That takes me to the next point in issue which is whether it is sufficient for the physical control over the land to have continued after the demise of the  
20 Respondent's father. What if it is the entire family of the deceased that continued in occupation? Would the occupation be defined through the head of the family or be only in the name of the head of the family such as the father of the Respondent? My conclusion is that each case should be considered on the basis of its own facts. Where it is through a head of the  
25 family, that head of the family must have qualified as a bona fide occupant as recognised by article 237 (8) of the Constitution of the Republic of Uganda as defined under section 29 (2) (a) of the Land Act. In other words, one must specify the interest of the deceased that could be inherited. If the deceased does not qualify to be a bona fide occupant as in the Respondent's father's  
30 case because he died in 1985, then the question of inheritance of bona fide occupancy interest does not arise. A bona fide occupancy as defined is that of a person who had been in occupation for 12 years or more prior to the

5 promulgation of the Constitution of the Republic of Uganda in 1995. So it is  
reckoned by the time of promulgation of the Constitution of the Republic of  
Uganda on 8<sup>th</sup> October 1995. It could be sufficient to state that the  
Respondent's father did not qualify to be a bona fide occupant and that his  
interest could only have arisen as a *kibanja* holder. There was no finding of  
10 the trial court about the interest of the Respondent's father as a *kibanja*  
holder and no evidence was adduced to that effect. There is therefore no  
evidence to come to a conclusion that the Respondent inherited such a  
*kibanja* interest from his father when he passed away in 1985.

15 Before concluding the matter, my attention was drawn to the decision of this  
court in **Civil Appeal No 0080 of 2008; Dr William Kaberuka and Julius  
Muhuruzi versus N.K. Investments Ltd and Kampala District Land Board**.  
I have carefully perused the decision of this court and the facts are clearly  
distinguishable from the facts in the current appeal. This is because the  
property in question in that appeal was a road reserve and eventually it was  
20 de-gazetted in the year 2000 and then was granted as a lease to the 1<sup>st</sup>  
Respondent by the 2<sup>nd</sup> Respondent. This was way after the promulgation of  
the 1995 Constitution. Section 29 (2) (a) of the Land Act clearly defines a bona  
fide occupant as a person who had occupied and utilised the land  
unchallenged by the registered owner for a period of 12 years or more before  
25 the coming into force of the Constitution of the Republic of Uganda. The  
Constitution of the Republic of Uganda 1995 came into force on 8<sup>th</sup> October,  
1995. Further the point that a road reserve cannot be lawfully utilised should  
not be missed. The issue of bona fide occupancy therefore did not arise in a  
lease which was granted after 1995. In any case, the question of the grant of  
30 the lease was a matter that could be considered between the lessee and the  
claimant on the basis of other law and not under the bona fide occupancy  
envisaged in section 29 (2) (a) of the Land Act. Specifically, section 29 of the  
Land Act envisages land that was either leasehold, freehold or *Mailo* land in



5 which a bona fide occupant could be found prior to the promulgation of the  
1995 Constitution of the Republic of Uganda. This is even clear from the  
decision of the Court of Appeal in that case where they held at pages 13 and  
14 of their decision that:

10 It follows therefore that for one to qualify as a bona fide occupant he or she must  
have been in occupation of land registered under the RTA.

There is no evidence on record to prove that the suit land was prior to May 2000  
registered under the RTA. This fact was not even pleaded by the Appellants.

15 In the premises, the decision in **Dr William Kaberuka and Julius Muhuruzi  
versus N.K. Investments Ltd and Kampala District Land Board** (supra) is  
distinguishable and not binding or applicable to the facts and circumstances  
of this appeal.

20 The facts which were accepted by the learned trial magistrate as well as the  
learned first appellate court judge are that the Respondent's father died in  
1985. That means that he died about 10 years prior to the promulgation of  
the 1995 Constitution. The court considered the earlier occupancy of the  
Respondent's father which was considered proved by the oral testimonies of  
PW2 and PW3 who knew the Respondent's father.

25 The question is whether there was continuity in the occupancy of the  
Respondent's father as well as the subsequent occupancy of the Respondent  
which commenced in 1986. To interpose the issue of whether the estate of  
the deceased was administered presupposes that one is dealing with the  
interest of a bona fide occupant which had already accrued. The Respondents  
father could not have qualified to be a bona fide occupant under a law which  
was not in force by the time he passed away in 1985. It is therefore the  
30 occupancy of the Respondent which is in issue because it is the occupancy  
considered under section 29 (2) of the Land Act and the term bona fide  
occupant was used by the trial court in application of section 29 of the Land

5 Act. This means occupancy before the coming into force of the Constitution  
of the Republic of Uganda 1995 for 12 years or more. The question of  
inheritance does not arise in the context of article 237 (8) of the Constitution  
and section 29 (2) of the Land Act. In that context, it should be the family of  
the Respondent's father and their interest which should be of concern. The  
10 real question in controversy is whether occupation can be inherited?  
Occupation is the physical act of control over the land in question in terms  
of the definition in section 29 (2) of the Land Act.

The first appellate court judge found that the Respondent occupied the suit  
property for 10 years after the demise of his father. Because the occupancy  
15 of his father was considered in evidence when he was still a young boy  
according to the testimony of PW2 and PW3, the occupancy must have been  
more than 12 years before the death of the Respondent's father. The  
occupancy of the Respondent plus that of his deceased father were added  
up and computed up to the time of promulgation of the Constitution of the  
20 Republic of Uganda 1995 to amount to more than 12 years. In other words,  
the learned first appellate court judge considered the occupancy of the  
Appellant's father together with the occupancy of the Respondent and came  
to the conclusion that it was a more than 12 years' occupancy.

I have already held that the Respondents father did not qualify to be a bona  
25 fide occupant having passed away in 1985. Secondly as a matter of fact, the  
learned first appellate court judge agreed with the trial magistrate that the  
Respondent occupied the suit property for 10 years prior to the  
promulgation of the 1995 Constitution of the Republic of Uganda. It follows  
that in terms of section 29 (2) (a) of the Land Act, the Respondent does not  
30 qualify to be a bona fide occupant. He could only have inherited an interest  
that his father had by the time he passed away in 1985, but as submitted by  
the Appellant's counsel, the Respondent's right to the estate of the deceased  
father has not been established. I would add that, in any case the interest of



5 the estate was not established in the lower court as a matter of fact. Bona fide occupancy only arises in the context of section 29 (2) (a) of the Land Act. By proceeding under the law of bona fide occupancy, there is no basis for finding for the Respondent in the lower court.

10 There need not have been inheritance for the Respondent to occupy the suit premises for a period of 12 years or more prior to the promulgation of the Constitution of the Republic of Uganda 1995.

15 Before taking leave of this matter, the expression *kibanja holder* has a specified definition under section 29 of the Land Act and cannot be used interchangeably with the expression of *bona fide occupant*. 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.**

20 (1) ...

(2) ...

(3) Land in Uganda shall be owned in accordance with the following land tenure systems—

(a) customary;

(b) freehold;

25 (c) *Mailo*; and

(d) leasehold. ...

30 A *kibanja* holding is not a customary holding under the above clause and has a different definition from that of a customary holding. A *kibanja* is a lawful occupancy within the registered land defined as *Mailo* land. A *kibanja* falls under *Mailo* tenure and is separately recognised under article 237 (8) of the



5 Constitution as lawful occupancy protected and enjoying security of  
occupancy upon the coming into force of the Constitution of the Republic of  
Uganda in 1995. Article 237 (8) of the Constitution of the Republic of Uganda  
stipulates that:

10 (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.

The Land Act which was enacted under the Constitution Republic of Uganda  
1995 defines *bona fide occupant* and *lawful occupant* separately though  
15 falling under the general category of "tenant by occupancy". A tenant by  
occupancy may mean a 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 Section 1  
of the Land Act provides as follows:

20 (e) "bona fide occupant" and "lawful occupant" have the meanings assigned to  
them in section 29;

...

(dd) "tenant by occupancy" means the lawful or bona fide occupant declared to be  
a tenant by occupancy by section 31.

25 Finally, section 29 (1) separately defines a lawful occupant in the category  
under which is a kibanja holder as follows:

29. Meaning of "lawful occupant" and "bona fide occupant".

(1) "Lawful occupant" means—

(a) a person occupying land by virtue of the repealed—

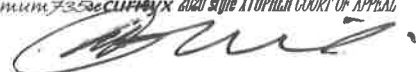
30 (i) Busuulu and Envujjo Law of 1928;



- 5 (ii) Toro Landlord and Tenant Law of 1937;
- (iii) Ankole Landlord and Tenant Law of 1937;
- (b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or
- 10 (c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

A *kibanja* holder is a lawful occupant who occupied land by virtue of the repealed **Busuulu and Envujjo Law of 1928**. This is normally proved through evidence of the payment of *Busuulu* which is the rate payable to the *Mailo* landlord prior to 1975 before it was abolished by the repealed Land Reform Decree 1975. Such evidence is normally in the form of receipts or any other credible evidence acceptable to the court. The trial court and the first appellate court erroneously and interchangeably used the expressions "customary holding" or *kibanja* as well as *bona fide occupancy* without due regard to their statutory meaning. Customary holding and customary tenure, *bona fide occupancy* and a *kibanja* holding are separate interests as clearly defined in the statute. It is clear that no evidence was adduced of a *kibanja* holding in the trial court. The trial court erroneously held that the Respondent had a *bona fide occupancy*.

25 In the premises, I find merit in the Appellant's appeal to the extent that the learned first appellate court judge as well as the trial court erred to find that the Respondent was *bona fide* occupant without considering the clear evidence which they referred to that the Respondent had occupied the premises for 10 years prior to the enactment of the 1995 Constitution of the Republic of Uganda. It follows that there was no basis for any order of compensation of the Respondent and I would allow grounds 1, 2 and 3 of the appeal.





5 Ground 4:

**The learned judge erred in law when he confirmed that the award of the general damages to the Respondent without justification for the same before the trial court.**

10 The Appellant's grievance on this ground is that the learned first appellate court judge upheld award of general damages from the ground that the Respondent suffered injury or loss for deprivation of his *kibanja* and for eviction. He submitted that the learned trial judge erred in law not to reappraise the evidence in respect of how the Respondent vacated the suit property. There was no eviction of the Respondent according to exhibit D1.  
15 He submitted that there was no evidence of eviction to form the basis of the loss and suffering allegedly occasioned to the Respondent by the Appellant. The Respondents Counsel supported the decision of the learned 1<sup>st</sup> appellate court that damages were correctly awarded on the basis of principles for the award of general damages.

20 Having found no basis for the awards and judgment of the trial court, this ground of appeal also succeeds.

In the premises, I would allow the Appellant's appeal and set aside the judgment and orders of the High Court and that of the court below with costs to the Appellant.

25 Dated at Kampala the 19<sup>th</sup> day of June 2020



**Christopher Madrama**

**Justice of Appeal**

