**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO. 224 OF 2021**

***(Arising from HCCS No. 77 of 2015)***

*Coram: Cheborion Barishaki, Christopher Madrama & Irene Mulyagonja JJA.*

**BEN KAVUYA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**-VERSUS-**

**1. BYARUHANGA KASIRYE**
**2. KATO GODFREY**
**(Suing as the Administrator of the Estate of the Late**
**BULASIO KAMANZI**
**3. NZABAMWITA JAMES**
**4. REBERO JAMES**
**(Suing as the Administrator of the estate of the late**
**GELVAS NYIRINGABO ::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**
**5. RUTAABA EDWARD**
**6. KAMUNINI ROBERT**
**7. MUGISHA YOSAM**
**(Suing as Administrator of the estate of the late**
**SAMWIRI RWITIRINYA**

**JUDGEMENT OF CHEBORION BARISHAKI, JA**

**Introduction**

This is an appeal from the decision of the High Court of Uganda Holden at Masaka, delivered by the Hon. Lady Justice Victoria Nakintu Nkwanga Katamba on 11th June 2021 in which the learned trial judge entered judgment in favour of the respondents against the apellant in HCCS No.17/2015. Aggrieved with the judgement and some of the orders of the trial court, the Appellant preferred the

instant appeal to this court, seeking to have the decision and orders of the High Court set aside and substituted with an order dimissing the suit.

**Background.**

The facts giving rise to this appeal are discernible from the pleadings of the parties on record and the judgment of the trial court. The respondents sued the appellant for the recovery of the land comprised in LRV 3789 Folio 17, Plot 77 and 83 Kabula Block 64 formerly Plots 11 & 14 measuring approximately 231.763 hectares and Plot 44 formerly Plot 44 formerly Plot Buddu Block 983 land at Bulimbale and Kasambya measuring approximately 482.537 hectares (measuring 714.3 Acres) later transferred to LRV MSK 171 Folio 6, Plot 82 transferred to LRV MSK 171 Folio 9, Plot 43 and LRV MSK 171 Folio 5. They further claimed relief in form of mesne profits, general damages and costs for the suit.

In their plaint, the respondents filed a joint suit against the appellant in varying capacities. The 1st, 3rd, 5th and 6th respondents instituted the suit as customary heirs of the estates of the Late Botereza Yofesi, Mikairi Ntirinduga, Paul Ntango, and Rwamizire respectively while the 2nd, 4th and 7th respondents sued as the administrators of the estates of the late Bulasio Kamanzi, Gelvas Nyiringabo and Samwiri Rwitirinya. The respondents claimed that the suit land formed part and parcel of the estates of the Late Botereza Yofesi, late Bulasio Kamanzi, late Mikairi Ntirinduga, late Gelvas Nyirangabo, late Paul Ntango, late Rwamwizire

and late Samwiri Rwitiriza who owned the land as tenants in common in equal shares.

The respondents further contended that all the transactions on the above said land by V. Bitega, S. Kalegyire, P. Rutahanwa, Y. Kanosi, Sebugomba B, Kabalungi, S. Kemitsinga, Karibwende R. Nyirabayazana, Mushi John, E. Kaje and Balunzi Co-operative Society with the appellant dated 28th June, 1994 were fraudulent, unlawful, illegal and of no legal effect and cannot vest legal interest on the suit land to the appellant. The respondents claimed that the appellant did not lawfully acquire the suit land and that all their efforts to remove him were futile.

In his defence to the suit, the appellant averred that he purchased the land comprised in Block 64 Plots 11 and 14 at Bulimbale and Kasambya from the individual occupants who had loosely organized themselves under the name Kasana Balunzi Co-operative Society and Bulimbale Balunzi Co-operative Society and took possession of the said land in the year 1994. That he also paid for additional pieces of land from other customary tenants/bibanja owners within and outside Block 64 Plots 11 and 14 which increased the acreage tremendously. He contended that since 1994 to date, he has occupied and developed the suit land into a residential family home and modern commercial farm, with the full knowledge of the respondents and their predecessors in title and therefore qualified as an owner by adverse possession.

Further, the appellant averred that subsequent to the purchase, he demanded for transfer of his interest from the persons who had registered themselves as proprietors on the certificate of title and were members of Bulimbale Balunzi Co-operative Society, which they declined, wherefore he lodged a claim in the Masaka/Rakai District Land Tribunal. The tribunal conducted a locus visit, at which some of the registered proprietors testified that they had all sold their interests to the appellant and had no claim against him. On this basis, the Tribunal gave judgment in favour of the appellant and declared him the rightful owner of land comprised in Block 64 Plots 11 and 14 land at Kabula. None of the defendants to the claim appealed against the said judgment.

Subsequently, the appellant applied to the High Court for a consequential order since the land was titled land. The High Court found that the Appellant was entitled to a consequential order in respect of 5 persons holding interests then under a tenancy in common namely; Botereza Yafesi, Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango and Rwamwizire who had confirmed in the Tribunal proceedings that they had sold their interest to the Appellant. The appellant was therefore registered on the title. One of the agreed facts set out in the joint scheduling memorandum was that the appellant entered the suit land in 1994 and has been in possession to that date. The trial proceeded by way of witness statements, whereof the witnesses were cross examined and re-examined accordingly. The trial court also conducted a locus visit to the suit land and it was found that indeed there was no boundary dispute in respect of the suit land with any of the neighbours thereto.

Upon conclusion of the trial, the learned trial Judge delivered judgment on the 11th day of June, 2021 allowing the respondents claim with costs. The learned trial judge first over ruled the objections raised by the appellant holding that the respondents did not all have to enter physical appearance as they were represented by an advocate, which representation is recognised by the Court. She further held that the plaintiffs having instituted the suit jointly on the same facts and same cause of action, there was no reason for all of them to enter personal appearance, as the matter could be determined on the available evidence. The trial judge also found that the 4th and 7th respondents' witness statements could not be vitiated by the irregularity in the jurat and were lawfully admitted in evidence.

Further, the trial court found that the suit was not barred by res judicata, that the appellant was not an adverse possessor of the suit land and that the respondents' claim was not barred by limitation. The trial court made a declaration that the suit land forms part of the estates of Botereza Yafesi, Mikairi Ntirinduga, Paul Ntago, Rwamwizire, Bulasio Kamanzi, Gelvas Nyiringabo and Samwiri Rwitirinya, and that the sale transaction between the Defendant (Appellant herein) and Bulunzi Co-operative Society, V. Bigega, S. Kemitsinga, Kalibwende R, Nyirabayazan, Mushi John and E. Kaje on the suit property of 28th June 1994, who were not the registered proprietors, was fraudulent and unlawful and that the registration of the appellant as proprietor of the suit land was fraudulent and unlawful.

On the basis of the said findings, the learned Judge made orders that; the appellant's certificate of title to the suit land be cancelled for fraud, the appellant compensates the respondents for land of 714.3 Hectares in monetary value at the prevailing market value to enable them re-settle and legally transfer the suit land to the appellant within 90 days from the date of the judgement and upon receipt of the compensation, the respondents would transfer the legal title to the Appellant. The court further ordered the appellant to pay Ugshs.200,000,000/=as general damages. The respondents were awarded costs of the suit. Aggrieved by part of the findings, decision and orders of the High Court, the appellant appealed to this Court.

Before considering the merits of the appeal, I wish to first resolve a procedural issue relating to the competence of the notice of appeal, which, though, not raised and addressed by any of the parties at the hearing, or in their respective written submissions, came to the attention of the Court in the course of preparing the judgment. Upon perusal of the appellant's notice of appeal, I noticed that the appellant indicated that he intended to appeal against part of the decision of the High Court. The form of a notice of appeal where an intended appeal is against part of the decision is prescribed for in Rule 76 (3) of the Judicature (Court of Appeal Rules) Directions, which provides that;

> '(3) *Every notice of appeal shall state whether it is intended to appeal against the whole or part of the decision, and where is it intended to appeal against a party only of the decision, it shall specify the part complained of,*

*state the address of service of the Appellant and state the names and addresses of all persons intended to be served with copies of the notice.'*

Rather than state the part of the decision to be appealed from, the appellant instead, specified the findings of the High Court that he did not intend to appeal against namely;

i. *The finding and decision of the court that the plaintiffs could not and should not have instituted the suit much earlier when they had established that the defendant was developing the suit land.*

ii. *The finding and decision of the court that the plaintiffs adduced no evidence that they and their predecessors ever challenged the defendant's usage of the land and they sat on their rights for over 20 years as the defendant developed the suit land.*

iii. *The finding and decision of the court that they plaintiffs adduced no evidence entitling them to an award of mesne profits and that no order is made as to mesne profits.*

It is apparent that there was an omission by the appellant to state the grounds of the intended appeal as required by Rule 76 (3) of the Judicature (Court of Appeal Rules) Directions. Nevertheless, the appellant filed a memorandum of appeal and set out therein, 10 grounds of appeal. The question nevertheless is, whether the omission in the notice of appeal is one of substance that should affect the competence of the appeal. In ***Nanjibhai***

***Prabhudas v. Standard Bank, Judgment, File No. 13 of 1968 (EACA, July 10, 1968),*** *it was held that;*

*"The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature...".*

In the instant matter, whereas it is prudent practice for counsel for the parties to prepare and file documents that comply with the rules, I do not think that the omission is one that should render the appeal incompetent. This is especially so, where the respondents neither sought to challenge the competence of the appeal by application under Rule 82 of the Rules of this Court nor seek leave to challenge the competence of the appeal as required under Rule 102 (b) of the Rules of this Court. It appears the omission did not occasion any prejudice to the Respondents. Secondly, the appellant subsequently filed a memorandum of appeal setting out the specific grounds of appeal against part of the decision, findings and conclusions of the lower court, which he was aggrieved with. Both parties filed submissions extensively addressing the grounds of appeal, which this court has considered. I therefore find that, in the circumstances of this case, the omission in the notice of appeal is a procedural defect curable under Article 126 (2) (e) of the Constitution, which mandates courts to administer substantive justice without undue regard to technicalities. I am therefore inclined to consider the appeal on its merits.

In the appellant's memorandum of appeal, the Appellant raised 10 grounds of appeal to wit;

i. *The Learned Trial Judge erred in law and fact in determining that the suit was not barred by limitation?*

ii. *The Learned Trial Judge erred in law in holding that the suit was not barred by the doctrine of res judicata.*

iii. *The learned Trial judge erred in law and fact when she held that the personal appearance or presence of the 1st, 2nd, 3rd, 5th and 6th Plaintiffs/ Respondents was not necessary to prove their respective claims in the suit and that their cases were duly prosecuted?*

iv. *The Learned Trial Judge erred in law and fact when she admitted in evidence non-compliant witness statements filed by the 4th and 7th Plaintiffs/Respondents?*

v. *The Learned Trial Judge erred in law and fact when she failed to properly evaluate the evidence of the Respondents' witnesses showing that the tenancy in common proprietorship had ceased.*

vi. *The Learned Trial Judge erred in law and fact when she failed to properly evaluate the evidence of the Respondents' witnesses showing the Appellant was not in adverse possession?*

vii. *The Learned Trial Judge erred in law and fact when she held that the Appellant fraudulently acquired the suit land and ordered his title to be canceled?*

viii. *The Learned Trial Judge erred in law and fact when she ordered the Appellant to compensate the Respondents in respect to the suit land.*

ix. *The Learned Trial Judge erred in law and fact when she held that the compensation for the suit land be at the prevailing market value?*

x. *The Learned Trial Judge erred in law and fact, when she awarded the Respondents general damages in the sum of UGX 200,000,000?*

The appellant prayed to this court to set aside the judgment and orders of the trial court. He also prayed for costs of the appeal and costs in the court below. The Respondents too, filed a Cross Appeal, the sole ground thereof being that the learned trial judge erred in law in not ordering for the eviction of the appellant/cross-respondent from the suit land having found that the appellant was fraudulent in the acquisition of title.

**Representation**

At the hearing of the appeal before this Court, learned counsel, Mr. Peter Nkurunziza, Mr. Joseph Kyazze and Mr. Muhumuza Mwene-Kahima appeared for the appellant/ cross respondent while Mr. Godfrey Jambo Lwalinda appeared for the respondents/ cross appellants. The appellant and the 1st, 3rd, 4th, 6th and 7th respondents were present in court.

This being a first appeal from the decision of the High Court rendered in exercise of its original jurisdiction, the duty of this Court is enshrined in Rule 30 (1) of the Judicature (Court of Appeal) Rules, which in essence requires this Court to re-hear the case by subjecting the evidence presented to the trial court

to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. The duty of this court under the said provision was succinctly explained by ***Mulenga JSC in Fr. Narcensio Begumisa & Others versus Eric Tibebaga Supreme Court Civil Appeal No. 17/ 2002*** where his Lordship held that;

> *"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appeal court, its own decision on the issues of fact as well as law. Although in case of conflicting evidence, the appeal court has to make an allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inferences and conclusion.....even where as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case and court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering it; not shrinking from overruling it if upon full consideration the court comes to the conclusion that the judgment is wrong...."*

*See:* ***Kifamunte Henry –vs- Uganda Criminal Appeal No. 10/1991 (unreported), CACA No. 147of 2012 Stanbic Bank of Uganda Ltd V. Ssenyonjo Moses and Anor*** *and* ***Civil Appeal No. 05/2005; Dr. Henry Kamanyiro Kakembo V. Roko Construction Limited.***

In the consideration and determination of the grounds of appeal and cross appeal, the Court has been alive to, and has taken into account the said principles.

**Consideration of the merits of the Appeal**

The appeal proceeded by way of written submissions in which all the 10 grounds of appeal and the sole ground in the cross appeal were conversed by counsel. I have carefully studied the record of appeal, the supplementary record of appeal and the rival submissions of counsel for the parties in support of and against the appeal and those in support of and against the cross appeal and the various authorities cited, which have been very helpful in the determination of the appeal. I have opted to consider and resolve the grounds of appeal in the manner they were argued by the Appellant by considering grounds 4, 3 and 5 first, and there-after grounds 6, 1 and 2, then ground 7, grounds 8, 9 and 10 and lastly the sole ground in the cross appeal.

**Ground 4**

The Learned Trial Judge is said to have erred in law and fact when she admitted in evidence non-compliant witness statement filed by the 4th and 7th respondent.

The gist of the appellant's objection to the competence of the witness statements filed by the 4th and 7th respondents is that the said witnesses were illiterate and that their statements did not comply with the mandatory requirements of section 2 and 3 of the Illiterates Protection Act. It was argued by appellant's

counsel that whereas the witness statements bore a certificate of transaction signed by one Matovu Charles, being the person who allegedly translated the contents to the said witnesses, the witnesses upon being cross examined materially contradicted themselves when they testified that it is their lawyer Mr. Lwalinda who read and translated the contents to them.

According to counsel, the purported certificate of translation was irregular, offended the mandatory provisions of the Illiterates Protection Act and vitiated the witness statement. In support of their argument, counsel cited the decision of this court in ***Stanbic Bank Uganda Limited versus Ssenyonjo Moses and Another CACA 147 of 2012***. It was counsel's submission that the learned judge erred in not expunging the evidence from the record, as non-compliance with the provisions of the Illiterate Protection Act could not be treated as a mere technicality. Counsel cited the ***Supreme Court Civil Appeal No 12 OF 2014 Mulindwa George William Versus Kisubika Joseph*** in support of their submission. Counsel prayed that this court finds that the witness statements were incompetent and erroneously admitted in evidence and that they be expunged from the record of Court.

Learned counsel for the respondents invited this court to uphold the finding of the learned trial judge which in his view was legally and evidentially supported. He contended that the witness statements were validly admitted on record without objection from the appellant's counsel. Further, that there was no non-compliance with the Illiterates Protection Act, sufficient to render the witness

statements incompetent. Relying on the decision in ***Stanbic Bank Uganda Limited versus Ssenyonjo Moses and Another CACA 147 of 2012***, counsel argued that section 3 of the Illiterates Protection Act relied on by the appellant was intended to protect the illiterates from endorsing a document whose contents they had not instructed the author to generate.

Respondent's counsel further contended that any non-compliance if any in the jurat of the impugned witness statements was a mere irregularity curable under Article 126 (2) of the constitution, which mandates courts to administer substantive justice without undue regard to technicalities. Counsel therefore prayed to court to uphold the finding and conclusion of the trial court.

The crux of the dispute as is discernible from the record and from the submissions of counsel for the parties is whether the two impugned witness statements of PW1 and PW2 offended the provisions of the Illiterates Protection Act and if so, whether any such non-compliance rendered them liable to be expunged from the court record. Both counsel appear to agree that the law governing documents executed by illiterate persons is the Illiterates Protection Act. The pertinent provision thereof is *Section 3 of the Illiterates Protection Act*, which provides that;

> *".....Any person who shall write any document for or at the request or on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply that a statement*

*that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her"*

This court had opportunity to extensively elucidate on the import of the provision and its rationale in ***Stanbic Bank of Uganda Ltd V. Ssenyonjo Moses and Anor CACA of 2012***, where the court upon analyzing the import of the provision concluded thus

*"The provision above clearly was meant to protect the illiterate from endorsing a document which he or she has not instructed the writing of. It protects the right to decide for one's self. Whether to endorse a contract or not. It preserves the freedom of an individual to choose what to be bound by. It is meant to overcome the misrepresentation of facts to someone who does not understand the language in which it is written" (my emphasis)*

In the instant case, the contention was that whereas the impugned witness statements contained a certificate of translation in the jurat, it was purported therein, that, the contents had been translated by one Matovu Charles, yet when the witnesses were cross examined, they testified that the contents were read and translated to them by their lawyer Mr. Lwalinda. In Appellant's counsel's view, the certificate of translation offended the mandatory provisions of section 3 of the Illiterates Protection Act. In other words, the certificate would have indicated Mr. Lwalinda as the person who had translated the contents in the witness statement and not Matovu Charles. I agree with the appellant's

submissions that, to that extent to which the witness statements purported in the jurat that the contents had been translated by Matovu Charles yet the witnesses conceded under cross examination that the contents were read and translated to them by Mr. Lwalinda, there was non-compliance.

The question that the learned trial judge was invited to determine and one which this court must interrogate is whether such non-compliance would warrant the striking out the impugned witness statement from the record or is merely an irregularity curable under Article 126(2) (e) of the Constitution. In answering the question, the learned trial judge found that both the 4th and 7th Respondents upon taking oath confirmed the witness statements as their respectively. They stated that their statements were taken in Luganda and translated to English after which they were read back and explained to them. They owned the contents therein as constituting their evidence. The statements were then admitted as their evidence in chief without objection from the Appellants counsel. The learned judge found that there was a defect in the jurat to the extent to which it was purported that the contents had been read and translated by Matovu Charles and not Lwalinda. The learned judge then held that the omission was a mere irregularity which could not vitiate the validity of witness statements, in view of the provisions of Article 126(2) (e) of the Constitution.

I am unable to fault the learned trial judge in her finding and conclusion. As was held by this Court in ***Stanbic Bank of Uganda Ltd V. Ssenyonjo Moses***

***and Anor CACA of 2012***, section 3 of the Illiterates Protection Act relied upon by the appellant was meant to overcome the misrepresentation of facts to someone who does not understand the language in which it is written. In the instant case, the 4th and 7th Respondents appeared before court, owned the contents of their witness statements as their evidence in chief and the same were admitted without objection. Under cross examination, they confirmed the contents of the witness statements and testified that the same had been read and translated to then in Luganda by their lawyer, where-after they signed. Appellants counsel cross examined them on the contents of their witness statements. The appellant did not point out any prejudice that he suffered as a result of the admission of the said witness statements. I agree with the learned trial judge that, in the peculiar circumstances of the case, exclusion or expunging the witness statements after conclusion of the trial would tantamount to closing the doors of justice to them. If this court were to uphold the objection, it would be abdicating its constitutional mandate under Article 126 (2) (e) of the Constitution, which is to administer substantive justice without undue regard to technicalities. I uphold the finding and conclusion of the learned trial judge. Ground four therefore fails.

**GROUND 3**

In ground 3 of the appeal, the learned trial judge is faulted for holding that the personal appearance or presence of the 1st, 2nd, 3rd, 5th and 6th respondents was

not necessary to prove their respective claims in the suit and that their cases were duly prosecuted

The appellant submitted that the 1st, 2nd, 3rd, 5th and 6th respondents did not participate in the suit nor did they adduce evidence at the trial. That they were not and could not lawfully be represented in the pursuit of their claims in the suit by the 4th and 7th respondents. Counsel contended that any such representation required authority in writing to the 4th and 7th respondents which had to be filed on court record as is mandatorily required under Order 1 Rule 12(1) of the Civil Procedure Rules. It was counsel's contention that the 4th and 7th Respondents could only enter appearance and adduce evidence on behalf of the 1st, 2nd, 3rd, 5th and 6th respondents on the basis of the written authority envisaged under Order 1 Rule 12(1) of the Civil Procedure Rules. Alluding to order 17 rule 4 of the CPR, counsel submitted that where no written authority was conferred by the 1st, 2nd, 3rd, 5th and 6th respondents to the 4th and 7th respondents to enter appearance on their behalf, then the onus lay on each of the respondents to adduce evidence in support their respective allegations.

Learned counsel for the appellant criticized the learned trial judge for the finding that the 1st, 2nd, 3rd, 5th and 6th respondents were represented by their advocate in accordance with the Plaint, which representation was recognized under Order 3 Rule 1 of the Civil Procedure Rules, thus rendering their personal appearance unnecessary. Counsel submitted that appearance of counsel in the

context of order 3 rule 1 of the CPR could not be stretched to substitute for the appearance by parties to adduce evidence in proof of their claims. In counsel's view, Order 3 Rule 1 of the Civil Procedure Rules relied on by the learned trial judge does not oust the duty of a party to appear and adduce their own evidence merely on account of presence/ representation of their advocate, otherwise, that would tantamount to counsel giving a testimony from the bar. That, the interpretation adopted by the learned judge has the effect of replacing counsel as a party to the suit capable of adducing evidence on behalf of their Client, which would render the provisions of Order 8 Rule 18(1) and (2) of the Civil Procedure Rules redundant.

Counsel challenged the finding of the trial judge to the effect that the cause of action of the Respondents was common amongst them and that the evidence of the 4th and 7th respondents was sufficient to prove the entire claim as having been incorrect and unsupported by the evidence on record. Counsel invited this court to consider the evidence on record that indicated that the respondents claimed variously some as customary tenants and others as administrators of the estates of their deceased persons, the rights of the respondents in the suit property and the knowledge of any alleged fraud or when the knowledge was acquired or of any adverse possession or who may have consented to the acquisition or occupation and possession of the suit land or any part thereof by the appellant would be within the personal knowledge of that respondent.

Alluding to the resolution dated 19th May 2004, which is on record, counsel submitted that the members of Bulimbale Balunzi Co-operative Society had resolved to wind up the Society and divide the Society's interest in the land in Plots 11 & 14 equally among themselves in portions of 143.66 acres each. The resolution was endorsed by the predecessors in title to the 1st, 2nd, 4th, 5th, 6th and 7th respondents i.e Botereza Yafesi, Kato Godfrey, Gelvas Nyiringabo, Paul Ntango, Rwamirize and Samwiri Rwitirinya. Counsel argued that upon the said distribution of the interests of Bulimbale Balunzi Co-operative Society, the tenancy in common was legally terminated and the individual members demarcated their respective portions and dealt with their individual shares. Consequently, each of the respondents had a distinct claim in the suit land and was required to prove their respective claims, by adducing evidence to demonstrate how they were deprived of land by the alleged fraudulent acts of the appellant. Counsel prayed that this court finds that the personal appearance or presence of the 1st, 2nd, 3rd, 5th and 6th respondents was necessary to prove their respective claims in the suit and that their cases were not duly prosecuted and that the learned judge erred in not dismissing their suit pursuant to the provisions of order 7 Rule 4 of the CPR.

Respondent's learned counsel supported the finding and conclusion of the learned trial judge. Counsel submitted that the effect of Order1 Rule 12 is in relation to giving evidence and that the personal appearance of the 1st, 2nd, 3rd, 5th and 6th respondents was not necessary since they had the same cause of action and sought the same relief with the 4th and 7th respondents.

Citing section 133 of the Evidence Act and the decision in ***Abudala Nabulere & 2 Others V. Uganda CACA No. 9 of 1978,*** counsel submitted that no particular number of witnesses is required in any case to prove any fact. Counsel further submitted that Order 3 Rule 1 gives a right to counsel to appear on behalf their client as long as they are duly instructed by clients, hence the nonappearance of the parties in civil matters when duly represented by their counsel or other authorized agents is not fatal. Counsel invited court to harmoniously construe the provisions of Order 1 Rule 12 of the CPR, Order 3 Rule 1 of CPR and Section 133 of the Evidence Act. In counsel's view, the question should be whether the two witnesses did not sufficiently prove the respondents' claims against the appellant and whether the omission occasioned a miscarriage of justice to the appellant.

The appellant faulted the learned trial judge for what they submitted to be failure on her part to correctly and harmoniously construe and apply the provisions of order 1 Rule 12 on the one hand and order 3 Rule 1 of CPR on the other hand in determining what constitutes appearance by a party in terms of prosecuting their case, especially in the peculiar circumstances of the instant case. In resolving the objection, the trial court made the following findings and conclusion; that under Order 3 Rule 1 of the Civil Procedure Rules, appearances may be made by a party either in person, by recognized agent or an advocate and that in the matter before the court, the respondents were represented by an advocate and that such representation is recognized by law. That the respondents instituted the suit jointly on the same facts and cause of

action and that there was therefore no reason for all of them to enter personal appearance. The learned trial judge noted that the cause of action remained and the court was mandated to determine them jointly or severally when they have the same cause of action and are entitled to the same reliefs. The court rejected the appellant's counsel's submission that the Respondents who did not give evidence never prosecuted their case.

I find it quite pertinent to first set out the said provision. Order 1 r.12 (I) CPR provides that;

"*Where there are more plaintiffs than one any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceedings, and, in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceedings (emphasis added)*"

Sub -rule (2) (Supra) provides that the authority shall be in writing signed by the party giving it and shall be filed in the case. In a suit where there are more than one Plaintiff or defendant, the rule gives two options to the Plaintiffs. Either, they all enter appearance and prosecute their respective claims or if some do not intend to enter personal appearance, then the Plaintiffs so represented are required to execute an authority in writing and file it on court record. See Madrama J (as he then was) in ***Hajji Edirisa Kasule Versus Housing Finance Bank Limited HCMA NO. 667/2013***. Based on the written authority, one of the Plaintiffs or defendants as the case may be would be

entitled to enter appearance and lead evidence on behalf of all the other plaintiffs or defendants. All the plaintiffs so represented would be bound by any acts and or omissions of the plaintiffs that they formally appointed to represent them.

In my view, the wording of Order 1 Rule 12 (I) CPR appears to restrict to its application to the plaintiffs or defendants in the suit and does not extend to an advocate or a non-party to the suit. Secondly, it is quite apparent under rule 12 (2) of the CPR that the requirement to file a written authority is mandatory. The rationale for the mandatory nature of the requirement is not hard to find. The Plaintiff so represented must formally consent to being represented and must undertake to be bound by the evidence presented on their behalf and by the ultimate determination of the court, as if they had personally participated in the proceedings. The need for a written authority is to avoid such Plaintiffs subsequently turning up to contest the decision against them on ground that they were not heard, or that their case or evidence was not well presented by the other plaintiffs or even claiming not to be bound by the decision of the court on account that they did not personally participate or prosecute their case.

On the other hand, order 3 of the Civil Procedure Rules provides for appearance through recognized agents. Rule 1 of order 3 deals with appearances and provides that any appearance or any act in any court required or authorized by law to be made or done by the party in such court

except where otherwise expressly provided for by any law for the time being in force, shall be made or done by the party in person or by his or her recognised agent or by an advocate duly appointed to act on his or her behalf. It appears from the wording of the rule that counsel must prove that he is a duly appointed advocate to act on behalf of the client. I am persuaded by the decision of Madrama J (as he then was) in ***Mugoya Construction & Engineering Ltd vs. Central Electricals International Ltd (Miscellaneous Application 699 of 2011)***.

I have equally considered rule 2 of order 3 which deals with recognized agents of parties by whom such appearances, applications and acts may be made or done. In my view, the kind of persons classified and referred to as recognized agents are persons holding powers of attorney authorising them to make such appearances, applications and do all such acts on behalf of the parties. The attorney can indeed lead evidence on behalf of the party to the suit, albeit to the extent to which the facts pertaining to the matter are within his/her knowledge.

In the instant appeal, my understanding of the appellant's objection is that it stems from the fact that out of the 7 Respondents who were the plaintiffs in the suit, only the 4th and 7th respondents entered appearance, prosecuted the case by leading evidence in support of their respective claims. The objection was raised in the context of failure by the 1st, 2nd, 3rd, 5th and 6th Respondents to appear and lead evidence in support of their respective claims, coupled with the absence of a written authority envisaged under order 1 rule 12(1) and (2). The

learned trial judge appears to have been alive to the import of order 3 (1) and (2) of the CPR, when she held that personal appearance or presence of all the plaintiffs is not necessary except for evidence. The matter therefore related to presence for purposes of adducing evidence and not merely legal representation by counsel. This so because the duty to adduce evidence and prove the Plaintiff's case lies with the Plaintiff throughout the trial. The duty to adduce evidence can only be assigned to one or more of the Plaintiffs in the suit by a written authority envisaged under order 1 Rule 12 of the CPR. Therefore, and with due respect to the learned trial judge, the conclusion drawn by her that representation of the 1st, 2nd, 3rd, 5th and 6th respondents by their counsel was sufficient was erroneous. In my view, had the plaintiffs complied with the aforementioned requirement under Order 1 Rule 12 of the CPR, then appearance by counsel in the context of Order 3 Rule 1 to prosecute the suit by calling the two witnesses, being the 4th and 7th respondents, would have been sufficient. There would be no need for the 1st, 2nd, 3rd, 5th and 6th Respondents to physically appear in court. It would be sufficient upon compliance with order 1 Rule 12 of the CPR for the advocate of the Plaintiffs to appear in court to prosecute the suit by calling witnesses on behalf of the Plaintiffs as a duly appointed advocate or legal representative. Obviously, the requirement under order 1 rule 12 would be inapplicable in a case which involves only one plaintiff or more plaintiffs who opt to all enter personal appearance. Only in that case would appearance by an advocate in the context of order 3 Rule 1 be considered as effectual and sufficient for purposes of adducing evidence.

I find merit in the submission that, in a suit where there are many plaintiffs, representation by an advocate does not absolve a party from their duty to enter appearance and lead evidence in support of their case, save where there has been compliance with Order 1 Rule 12, otherwise a contrary conclusion would render the provisions of Order 8 Rule 18(1) and (2) of the CPR and Order 1 Rule 12(1) & (2) redundant. To that extent and in that context, the conclusion drawn by the learned trial judge that the said respondents who had not complied with order 1 Rule 12 (1) & (2) were represented by their advocate, which in her view was sufficient is untenable and erroneous. In my view, order 3 Rule 1 was wrongly invoked by the court. Legal representation of a party by an advocate in the context of order 3 Rule 1 is not intended to constitute an advocate into a witness of a party. Appearance for purposes of adducing evidence has to be made by a party in person or through an authorized agent.

In the instant appeal, it was incumbent on the 1st, 2nd, 3rd, 5th and 6th respondents to enter appearance and prosecute their respective claims. This is more so, where the plaintiffs sued in varying capacities some as administrators and others as customary heirs. This necessarily required each to prove their individual locus standi to challenge the proprietorship of the appellant. They had to prove whether they are administrators, or executors, how some became customary heirs and when. They had to establish their individual locus to sue envisaged in Section 191 of the Succession Act. For purposes of computation of the limitation period, each of the respondents had to prove when their respective predecessors died, when they obtained authority of letters of

administration or how they became customary heirs to the individual estates and when. In the alternative, they should have complied with order 1 Rule 12 (1) & (2) of the CPR by appointing the 4th and 7th plaintiffs to prosecute their case. Their failure to appear or authorize the 4th and 7th respondents to appear on their behalf as envisaged under Order 1 rule 12 was prejudicial as the appellant as he cross examine them to establish their authenticity of their claims. The mere presence of their counsel could not absolve them of such a duty. They had the option of complying with order 1 Rule 12(1) and (2) of the Civil Procedure Rules by authorizing in writing, the 4th and 7th respondents to lead evidence and prosecute the entire suit on their behalf. There is no evidence of any such authorization. I have also looked at the witness statements filed by the 4th and 7th respondent. None stated anywhere that they were testifying in their own right and for and on behalf of the 1st, 2nd, 3rd, 5th and 6th respondents. The record of proceedings indicates that before the 4th and 7th respondents took the witness stand, the respondent's learned counsel indicated that he was calling two witnesses. He did not indicate that the said 2 witnesses were also authorised and would testify on behalf of the 1st, 2nd, 3rd, 5th and 6th respondents. The record further indicates that when the 4th and 7th respondents took the witness stand respectively, they did not state that they were testifying on behalf of the 1st, 2nd, 3rd, 5th and 6th respondents. The court admitted the witness statement of the 4th and 7th respondents as their respective evidence in chief. The record does not indicate that their witness statements were admitted as evidence in chief for all the respondents/ plaintiffs. The inescapable

conclusion drawn from the record is that only the 4th and 7th respondents prosecuted their respective claims by adducing evidence in support thereof. I have already found in this judgment that there is no evidence on record to prove that the 4th and 7th respondents were authorised in the context of order 1 rule 12(1) and (2) of the CPR to prosecute the case and adduce evidence in proof of the claims of the 1st, 2nd, 3rd, 5th and 6th respondents. The rest of the respondents abdicated their duty to enter appearance to prosecute their case and prove their respective claims.

That said, the critical question for determination by this court then is whether failure by the said respondents to enter appearance at the trial and lead evidence in support of their claims rendered the suit to the extent to which it related to their claims liable to be dismissed. The appellants invited court to apply the provisions of order 17 rule 4 of the CPR. The respondent's counsel on the other hand argued that under section 133 of the Evidence Act, no particular number of witnesses is required to prove a fact. It was counsel's submission that the evidence of the 4th and 7th Respondents was sufficient to support the conclusions drawn by the trial court. He supported the conclusion of the learned judge that the personal appearance or presence of the 1st, 2nd, 3rd, 5th and 6th plaintiffs now respondents was necessary to prove their respective claims.

I have considered the pleadings and re-evaluated the totality of the evidence on record. It is not disputed that though the 7 respondents filed a joint suit against

the appellant, each of them was described in the plaint and the distinct capacity in which each filed the suit. The 1st, 3rd, 5th and 6th respondents instituted the suit as customary heirs of the estate of the Late Botereza Yofesi, Mikairi Ntirinduga, Paul Ntango, and Rwamizire respectively. On the other hand, the 2nd, 4th and 7th respondents sued as the administrators of the Estates of the late Bulasio Kamanzi, Gelvas Nyiringabo and Samwiri Rwitirinya. Each of the respondents represented a distinct estate and claimed a beneficial interest in that estate and a distinct interest in the suit land.

The evidence on record further indicates that whereas the claimants or their predecessors in title initially owned an interest in the land as tenants in common, under Bulimbale Balunzi Co-operative Society, by a resolution dated 19th May 2004, the members of Bulimbale-Balunzi Co-operative Society resolved to wind up the Society and divide their legal interest in the land in Plots 11 & 14 equally among themselves in portions of 143.66 acres each. It is apparent from the said resolution that the predecessors in title to the 1st, 2nd, 4th, 5th, 6th and 7th respondents i.e. Botereza Yafesi, Kato Godfrey, Gelvas Nyiringabo, Paul Ntango, Rwamirize and Samwiri Rwitirinya endorsed it. This resolution was admitted in evidence without objection from the respondents.

In my view, having distributed their legal interests in Bulimbale Balunzi Co-operative Society, the individual members demarcated their respective portions and dealt with their individual shares separately. The respondents in effect terminated the hitherto existing tenancy in common. Consequently, each of the

Respondents claimed a distinct interest in the suit land and was required to prove their respective claims. Their claims against the appellant and the manner in which they arose were distinct. For example, the 7th respondent testified that his family sold their share of 143.66 acres to Keith Muhakanizi. There could be no further interest claimable by the 7th respondent jointly with the others. The respondents had to adduce evidence of what portion of the suit land was hitherto in the possession of their predecessors in title, whether their predecessors ever authorised the entry of the appellant on the land, whether their predecessors were privy to the agreement under which the appellant acquired the suit land, or were privy to the subsequent proceedings before the land tribunal and the high court and when they got knowledge of the alleged fraud, how and from whom. That could not have been collective knowledge. Indeed, that could one of the reasons why the 4th and 7th respondents filed their independent witness statements. If the claim was joint, the interest in the suit land was owned as a tenancy in common and evidence required of all the Plaintiffs was the same, then there would be no need for the 7th respondent to testify as the second witness, as the evidence of the 4th respondent would have been sufficient.

I am therefore inclined to agree with the appellant's submissions that, in the peculiar circumstances of this case, absence of any authorization by the 1st, 2nd, 3rd, 5th and 6th respondents to the 4th and 7th respondents to prosecute the claim and lead evidence on their behalf and in view of the distinct circumstances under which the respective claims arose, appearance by the 1st,

2nd, 3rd, 5th and 6th plaintiffs now respondents was necessary to prove their respective locus and the claims in the suit. I find that the learned judge erred in law and fact when she declined the appellant's prayer to dismiss the suit and the claims of the 1st, 2nd, 3rd, 5th and 6th Respondents in the suit land. This ground therefore succeeds.

**GROUND 5**

The learned trial judge was faulted by the appellant in ground 5 of the appeal for ignoring the evidence on record that showed that the alleged tenancy in common, the foundation of the respondent's joint claim against the appellant had terminated. The appellant faulted the conclusion of the learned judge that there existed a tenancy in common and that the respondents owned an interest in the suit land as tenancy in common on ground that it was not supported by the evidence on record. Counsel adopted their submissions in respect of the same issue under ground 4 and invited this court to find that the tenancy in common had been terminated.

On the other hand, learned counsel for the respondent submitted that ground 5 was not covered as an issue during trial neither did the learned trial judge make any resolution on the said issue. Counsel contended that the cooperative societies cited by the appellant vide Bulimbale- Balunzi Co-operative Society and Kasana Balunzi Co-operative Society have never owned the suit land in dispute, as the same was owned by the individuals registered

on the title in their personal capacities. It was further contended that the respondents were not party to that resolution.

I have carefully re-evaluated the evidence on record and taken into account the submissions of counsel and the judgment of the trial court. I note the submission by learned counsel for the respondent that the issue of termination of the tenancy in common was not amongst the specific issues framed for determination by the court. However, it is apparent from the plaint on record that the respondents claimed that they or their predecessors in title acquired and held interest in the suit land as tenants in common. The record further indicates that, when addressing the issue of whether the failure by the 1st, 2nd, 3rd, 5th and 6th respondents to enter physical appearance and lead evidence in support of their respective claims rendered the suit by them liable to be dismissed under order 17 rule 4 of the CPR, counsel addressed the issue of a tenancy in common. It was also considered in addressing the question of whether the 4th and 7th respondents could be said to have had authority to represent the rest of the respondents in the suit. The existence or otherwise of a tenancy in common was therefore in issue at the trial.

In her judgment, the learned trial judge noted that the respondents instituted the suit jointly on the same facts and cause of action and that therefore, there was therefore no reason for all of them to enter personal appearance. The court noted that the cause of action remained and the court was mandated to determine them jointly or severally when they have the same cause of action

and are entitled to the same reliefs. The conclusion of the court was arrived at on the premise of existence of a tenancy in common. The contention by learned counsel for the Respondent that it was never in issue and that the learned judge never made a finding on it is not supported by the evidence on record.

I have, in resolving ground 4 of the appeal, already found uncontroverted evidence of a resolution dated 19th May 2004, in which the hitherto existing tenancy in common was terminated. The resolution was proved to have been endorsed by the predecessors in title to the 1st, 2nd, 4th, 5th, 6th and 7th Respondents i.e. Botereza Yafesi, Kato Godfrey, Gelvas Nyiringabo, Paul Ntango, Rwamirize and Samwiri Rwitirinya. It appears that this evidence was not controverted by the respondents. I have not found evidence on record, where the respondents disclaim knowledge of the resolution or where the contested the same on account that they or their predecessors in title were not privy to it and that the signatures thereon were forged. The contention by counsel for the Respondents that it was not signed by any of the respondents and is thus not binding on them is legally untenable, where, by their own claims, they derive interest from Botereza Yafesi, Kato Godfrey, Gelvas Nyiringabo, Paul Ntango, Rwamirize and Samwiri Rwitirinya their predecessors in title. The record shows that the family of one Gakwerere sold 143.66 acres to the Appellant. The 7th Respondent equally testified that his family sold their share of 143.66 acres to Keith Muhakanizi.

In the judgment of the trial court, it is evident that the learned trial Judge did not consider the resolution and the evidence that was adduced to demonstrate that the tenancy in common had terminated. Throughout the said judgment, no mention is made of the resolution and the implications on the subsistence of the tenancy in common or otherwise. I find that there was uncontroverted evidence on record proving that the tenancy in common had been terminated and had ceased. It was therefore erroneous for the learned trial judge not to make a finding to that effect. This failure to evaluate the totality of the evidence on record influenced her decision and she came to a wrong conclusion that the Respondents held a joint interest in the suit land. This court finds this conclusion to be erroneous. I therefore find merit in ground 5 and the same succeeds.

**GROUND 6**

The appellant submitted in ground 6 that the learned trial Judge failed to properly evaluate the evidence on record and came to a wrong conclusion that the appellant was not in adverse possession. He contended that he had used and utilized the suit land openly since 1994 and that this was an agreed fact. It was further contended that the respondents and their predecessors in title were aware of the Appellant's undisturbed possession of the suit land. They slept on their right and did not challenge the possession and use of the land while the appellant developed the land immensely.

It was contended that the persons from whom the respondents claim to derive interest were aware of the appellant's undisturbed possession in the land. The

appellant faulted the learned trial judge for finding that the appellant fell short of being an adverse possessor of the suit land because he claims to have purchased from the registered proprietors. The appellant contended that the evidence on record showed that he had entered the suit land, occupied it and openly used it. The respondents admitted that the appellant forcefully entered upon the suit land, without their consent of their predecessors in title and that all attempts to evict him failed. Counsel contended that the appellant satisfied the criteria of an adverse possessor of land laid down by this court in the case of ***Helen Namukabya vs. Nelson Kawalya CACA N0.5 of 2014***. Counsel further cited the Supreme Court decision in ***Lutalo Moses V. Ojede Abdallah Bin Cona Bin Gulu SCCA No. 15 of 2019*** where it was held that for one to claim adverse possession, the person must be in possession of the land, must have physical control of the land as the owner might be expected to, the possession must be for a continuous period and such title must be adverse, that is, without legal entitlement or without the owner's consent. It was submitted that the appellant, having entered upon the suit land without the consent of the registered owners, used the same in an open and hostile manner adverse to the registered owner's interests from 1994 until 2015 unchallenged, the elements of adverse possession were satisfied.

Learned counsel for the respondent on the other hand supported the decision of the learned judge contending that the appellant was not an adverse owner of the suit land and cited the decision in ***Hellen Namukabya V Nelson Kawalya, Court of Appeal Civil Appeal No.5 of 2014***, where it was held that: there are

four required elements for adverse possession to be effective, to wit; the possession must have actually entered the property without the consent of the owner and must have exclusive possession of the property, the occupation must be in respect of the whole of the property and not just a portion of it, the possession must be open and notorious, the possession must be adverse to the rightful owner and claim of right, the possession must be continuous for the statutory period of twelve years.

Counsel conceded that the appellant has since 1994 occupied and utilized the suit land but that the appellant fell short of the requirement of adverse possessor, having alleged that he purchased land comprised in Plots 1 & 2 on Block 983 and Block 64 plots 11 and 14 at Bulimbale and Kasambya from the registered owners thereof and was admitted in possession of the said land in 1994 with knowledge and consent of the registered proprietors thereof. Counsel contended that the learned judge was right to conclude that the appellant fell short of being an adverse possessor because he claims to have purchased from the registered proprietors. Citing *Black's Law Dictionary, 6th edition Centennial edition (1891-1991) at page 54* and the decision in ***Lutalo Moses V. Ojede Abdallah Bin Cona Bin Gulu SCCA No. 15 of 2019***, counsel contended that adverse possession connotes a method of acquisition of title to real property by possession for a statutory period under certain conditions. That a claim for adverse possession requires proof that of non- permissive use which is actual, open, notorious, exclusive and adverse for statutory prescribed period.

Counsel submitted that the appellant`s claim of the suit land comprised of plots 1 and 2 Buddu Block 983 and plots 11 and 14 Kabula Block 64 Masaka District originated from the land transaction of 1994, whereof the appellant claimed to have purchased the land from the owners with the knowledge and consent of the registered proprietors. Counsel further submitted that the entire land measured 4.5 square miles and that the Respondents are in possession of 2 sq. miles and the rest is being used by Ben Kavuya which negates the appellant being possessor on the suit land, as he does not have exclusive possession of the suit land. Counsel invited court to find that the appellant is not an adverse possessor of the suit land and that the learned judge cannot be faulted on his conclusion.

The question to be resolved by this court is what constitutes adverse possession in law and fact. The court would then consider whether the evidence on record supports the finding by the learned judge that the appellant was not an adverse possessor of the land or whether the finding was erroneous. The claim of adverse possession is a matter of law and fact. Where there is evidence apparent on the record that the defendant claiming adverse possession has been in possession of the land and has utilized the land for over 12 years or more, the burden would lie on the person seeking recovery of the land to prove that such possession and utilization of the suit land does not constitute the defendant into an adverse possessor of the suit land. I am fortified by the decision of the Supreme Court in ***Lutalo Moses V. Ojede Abdallah Bin Cona Bin Gulu SCCA No. 15 of 2019.***

It therefore becomes pertinent for court to set out the law and legal principles relating to adverse possession and then re-evaluate the evidence on record in order to decide whether the appellant is an adverse possessor of the suit land or not. Useful guidance on what constitutes adverse possession has been provided by the Supreme Court in ***SCCA No. 15 of 2019, Lutalo Moses V. Ojede Abdallah Bin Cona Bin Gulu.*** In that case, the Supreme Court had this to say;

*"Adverse possession is defined by Black's Law Dictionary, 6th Edition Centennial Edition (1891 – 1991) at page 54 to mean:*

*A method of acquisition of title to real property by possession for a statutory period under certain conditions.*

*"... Because of the statute of limitations on bringing of actions for recovery of land, title can be acquired to real property by adverse possession. In order to establish title in this manner. There must be proof of non-permissive use which is actual, open, notorious, exclusive and adverse for the statutorily prescribed period." (Emphasis mine). In the case of* ***Jandu vs. Kirpal & another (1975) EA 225 at 323****, the court relied on the definition adopted in the case of* ***Bejoy Chundra vs. Kelly Posonno (1878) 4 Cal. 327 at p.329****; it was held that;*

*"By adverse possession I understand to be meant possession by a person holding the land on his own behalf, (for on behalf) of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run*

*for twelve years, then the title of owner is extinguished and the person in possession becomes the owner."*

From the foregoing, it is apparent that in order to succeed, the party claiming adverse possession capable of vitiating the title of the true owner must prove that the possession was actual, hostile, open, notorious, continuous, uninterrupted and exclusive in respect of the suit land, for more than twelve years. **See; *Kintu Nambalu v. Efulaimu Kamira [1975] HCB 222.*** The concept of adverse possession contemplates a hostile possession i.e. possession which is expressly or impliedly in denial of the title of the true owner to the knowledge of the true owner that the adverse possessor claiming the title as an owner in himself. Adverse possession is constituted by the actual, open, hostile, and possession of land to the exclusion of its true owner for the period prescribed by sections 5 and 16 of The Limitation Act. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. The owner of the land must have actual knowledge of the adverse possession. Where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land.

The question of whether the appellant was an adverse possessor of the land was extensively considered by the learned trial judge in her judgment. The learned judge having considered the law and evidence on record concluded that the appellant would have satisfied the preconditions of an adverse possessor but since he had alleged that he purchased the suit land from the proprietors,

he did not qualify as an adverse possessor of the suit land. I have considered the submissions of counsel on the issue of adverse possession, the evidence on record and the judgment of the trial court. In the first instance, it is not in dispute that in the joint scheduling memorandum duly signed by both counsel for the parties, the only agreed fact was that the appellant had been in occupation of the suit land since 1994. Learned counsel for the respondent in his submissions contended that the said facts were not admitted by the Respondents. However, he did not contest the joint scheduling memorandum on record, signed by himself, where the said facts are set out as agreed. The position of the law is that once facts are set out as agreed in the joint scheduling memorandum by the parties, the need to prove such facts is dispensed with. I am fortified by the decision in ***SCCA No. 7/2003, Administrator General versus Bwanika & Others.***

Secondly, the foregoing agreed facts were corroborated by further evidence from the 4th and 7th respondents, who adduced evidence to the effect that they were informed by one Boterezo Yofesi that the appellant had forcefully entered the land and taken possession thereof in 1994 without the consent and authorization of the registered owners and that the attempts to cause his removal from the suit land failed as he even caused the arrest of some of them. This was also the finding of the trial court. The learned trial judge further found that, upon taking possession of the suit land in 1994, the appellant commenced developments thereon without authorization and consent of the Respondents and their predecessors in title. That nevertheless, the respondents and their

predecessors in title watched him develop the land for 27 years. At the locus conducted by the trial court, the respondents confirmed that they were the appellant's neighbors.

The learned judge concluded, and rightly so in my view, that the respondents and their predecessors in title were aware of the appellant's undisturbed possession of the suit land but sat on their rights for over 27 years. I note that the proper computation of years from 1994 to the time of the filing of the suit in 2015 suit was 21 years and not 27 years. However, by the time judgment was delivered in 2021, it was 27 years since the appellant took possession of the suit land. It is worth noting that whereas the respondents filed a cross appeal in this matter, they did not contest the aforementioned findings and conclusion of the trial court. The evidence on record supports the conclusion of the learned judge that the appellant forcefully entered onto the suit land in 1994 without the authorization and consent of the respondents or their predecessors in title, occupied and developed the suit land with the knowledge of the respondents and or their predecessors in title for about 21 years as at the time of filing the suit.

The appellant only challenges the finding and conclusion of the learned judge that the appellant could not qualify as an adverse possessor of the suit land on account of the claim that he purchased the suit land from the registered proprietors. I note from the judgment of the trial court that the judge found that the purported agreement dated 28th June, 1994, upon which the appellant

claims to have purchased the suit land in 1994 was illegal and ineffectual, because the persons from whom the appellant purportedly purchased the suit land were not the registered proprietors.

In essence the finding of the court is that there was no valid purchase of the suit land by the appellant. His entry on to the land could therefore not have been premised on what the court had found to be an illegal agreement. Indeed, both the 4th and the 7th respondent testified that they were informed by Boterezo that the appellant forcefully entered onto the suit land and occupied it without their authorization and consent. The appellant extended his occupation to the entire land now constituting the suit land, all without consent and authorization from the registered proprietors. They saw him enter and occupy the land, cause developments thereon and did not take any action against him. In view of the fact that the appellant's entry onto the land and occupation thereof was forceful and not premised on any valid agreement of purchase with the registered proprietors, the conclusion drawn by the learned Judge that the appellant could not qualify as an adverse possessor of the suit land was erroneous. The appellant under cross examination conceded that he did not purchase the suit land from Bulasio Kamanzi, Mikairi Ntiriduga, Paulo Ntango, Rwamwizire and Boterezo, who were the registered proprietors and that there was no sale agreement with them. His claim was that he purchased from Balunzi Cooperative Society, V. Bitega, S. Kemitsinga, Karibwende R, Nyirabazana, Mushi John and E. Kaje on account of the agreement dated 28th June, 1994. These, as found by the trial court were not the registered

proprietors of the land. In my view, the court, having found that the impugned purchase agreement was null and void on ground that the appellant had not purchased from the registered proprietors could not at the same time make a finding that the appellant claimed to have purchased from the registered proprietors.

Indeed, it was the finding of the trial court that there was no purchase at all because in the trial court's view, the purchase agreement, with persons other than all the registered owners was inconsequential. This implied that the appellant could only have forcefully entered the suit land, taken possession thereof and commenced developments thereon without the consent and authorization of the registered owners. The entry on to the suit land and taking of possession could not have been premised on what court found to be an illegal agreement, otherwise that would negate the evidence of PW1 and PW2, the 4th and 7th respondents that they were informed by Boterezo, one of the registered proprietors that the appellant had forcefully entered and taken possession of the suit land. As noted by the Supreme Court in ***Lutalo Lemmy (Supra)*** the owner of land is not expected to just look on when his or her rights are either infringed or threatened by third parties such as squatters and trespassers occupying his or her land. The failure to take action would mean that the owner of the land has abandoned the property to the adverse possessor or has acquiesced to the hostile acts and claims of the person in possession.

I therefore, find that the evidence on record was sufficient to prove that the appellant, having forcefully entered and taken possession of the land in 1994 with the knowledge of the respondents or their predecessors in title and having openly remained in possession and caused developments thereon for about 27 years, was an adverse possessor of the land and therefore acquired title thereto by adverse possession. The argument by respondent's counsel that the respondents or their predecessors in title remained with title to the suit land is legally inconsequential, as adverse possession has the effect of extinguishing the title of the registered proprietor. The adverse possessor need not have acquired title. It is the undisturbed possession of the land subject to the prerequisites herein before enumerated that confer title upon the adverse possessor of the land. I must note that this finding is subject to ascertaining the acreage of the land actually in possession and which was vested in the appellant, which is the subject of determination in grounds 1 and 5 hereinafter. This Ground therefore succeeds to that extent.

**GROUND 1**

The appellant faulted the learned trial judge in ground of the appeal for finding that the respondent's claim in the suit land was not barred by limitation. It was contended that it was an agreed fact the appellant took possession of the land in 1994 and remained in possession to date. It was further contended that the 1st respondent sued as a customary heir of the late Yofesi Boterezo. The 2nd, 4th, and 7th respondents sued as the administrators of the estates of Bulasio Kamanzi Boterezo, Gelvas Nyiringabo and Samwiri Rwitirinya respectively. The

3rd and 5th Respondents sued customary heirs of the estates Mikairi Ntirinduga and Paul Ntango respectively. The respondents therefore derived their claim from the persons who were registered as proprietors of the suit land at the time the appellant entered onto the suit land. The appellant argued that the evidence adduced at the trial showed that the 4th and 7th Respondents conceded that they were informed by one Boterezo Yofesi that the Appellant had forcefully entered the land and taken possession in 1994. Counsel contended that the evidence on record showed that Boterezo Yofesi, knew that the appellant had taken over possession of the suit land in 1994 put the date upon which the respondents' cause of action arose as 1994.

In support of their submissions, appellant's counsel cited section 5 and 15 of the Limitation Act contending that the cause of action arose in 1994 and by the time the suit was filed in 2015, about 21 years had lapsed, which was outside the 12-year limitation period. Counsel contended that under section 15 of the Limitation Act in actions for the recovery of land, an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. It was further argued that section 25 of the Limitation Act only provides for postponement of limitation where there was fraud on the part of the defendant where the plaintiff was unaware of the fraud or could not have reasonably known of the fraud.

Counsel invited court to consider the decision of the Supreme Court ***Lutalo Moses (Administrator of the estate of Lutalo Phoebe versus Ojede Abdallah Bin Cona (Administrator of the estate of Cona Bin Gulu) Civil Appeal No. 15 of 2019*** where it was held that modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specific time, but also to vest the possessor with title. Counsel also cited the decision of this court in ***CACA No.42 of 2008 Mohammad Buwule Kasasa versus Jashar Buyonga Bwogi,*** where this court held that court is precluded from investigating the merits of the suit once an action is caught up by the law of limitation, as limitation is irrespective of the merits of the claim. Counsel invited court to find that the learned trial judge erred in not finding that the respondent's action was time barred.

For the respondents, it was contended that the action was for recovery of land premised on fraud which was discovered in 2012. Counsel supported the finding of the trial court that the 12-year limitation period did not apply and that under section 25 of the Limitation Act, the time started running upon discovery of the fraud. Citing the decision in ***George William Jag V. Ashy Musoke Bagirawo [1977] HCB 68*** and ***Makula International V. His Eminence Cardinal Nsubuga Wamala & Anor HCB [1982] 11***, Counsel contended that an illegality once brought to the attention of court overrides all facts and pleadings and that it should not be perpetuated and condoned.

He argued that there was no admission in the plaint that the appellant was in possession of the suit land since 1994. That the respondents became aware of the appellant's fraud in 2012 upon being told by Botereza, and thereafter conducting a search. Counsel further argued that, there is no way the respondents could have suspected fraud before 2012 because they were not party to the purported land transaction of 1994 and Misc. Application No.16 of 2005. The respondents' counsel supported the judge conclusion that the respondents discovered the transfers after the death of the last surviving original owner in 2012 and that is when they carried out a search in land office and found that the land had been transferred into the defendant's name. That the respondents had pleaded grounds of exemption to limitation by pleading when they discovered the fraud.

Before delving into the merits of this ground, I am inclined to first resolve the objection by learned counsel for the respondents to this ground. His contention is that the issue of limitation had been resolved by way a ruling on a preliminary objection raised by the appellant before the hearing of the suit and that the learned trial judge was right not to re-determine the issue in the final judgment.

Upon perusal of the record, it is evident that the appellant raised a preliminary objection to the competence of the suit arguing that on the pleadings, the suit did not disclose a cause of action as the respondent's claim was barred by the law of limitation. In the ruling delivered by the then trial judge, Hon. Lady Justice Nabisinde, the judge over ruled the preliminary objection, purely on the

basis of the averments in the respondents' pleadings reasoning that the respondents' cause of action as apparent from the plaint, having been in fraud, which the respondents pleaded to have been discovered in 2012, section 25 of the Limitation Act applied. She concluded that on the pleadings, the limitation period of 12 years did not apply.

In my view, the question as to whether the respondents' claim was barred by the law of limitation or not was one that could only be determined upon hearing evidence and not on the basis of pleadings and annextures. ***See Civil Appeal No. 180/2004 Maimuna Muye versus Metropolitan Properties Limited.*** Given the nature of objection and counter allegations between the parties, the court needed evidence in order to determine whether the alleged fraud was discovered by the respondents in 2012 as alleged or not; or whether the respondent's predecessors in title were aware of the alleged fraud that was alleged to have been originated by the impugned purchase of the suit land by the appellant in 1994. The learned judge in over ruling the preliminary objection was right in so far as determination thereof required evidence to be adduced.

The record further shows that subsequent to the ruling on the preliminary objection, the parties filed a joint scheduling memorandum and one of the issues framed for determination by the court was whether the respondent's claim was time barred. The joint scheduling memorandum was adopted by court. Additionally, in their submissions before the trial court, counsel for both parties extensively addressed court on the issue of whether the respondent's

claim was barred by limitation and alluded to evidence which had been adduced on record. It was therefore, apparent that the ruling of Justice Nabisinde did not conclusively determine the issue of limitation. The issue was reserved for determination after adducing evidence, which in my view, was the proper course.

I note that in dealing with this issue of whether the respondent's claim was barred by limitation, the learned judge in her judgment merely glossed over it ruling that it had been determined by Justice Nabisinde. She equally ruled that the claim having been in fraud, section 25 of the Limitation Act applied and that the 12-year limitation period did not apply. She did not evaluate the evidence on record before coming to that conclusion. The parties having reserved the issue for determination after hearing of evidence, having led evidence on the issue and made submissions in respect of the issue, the learned judge erred in not considering the law and evidence before coming to the conclusion she made. Therefore, in compliance with its duty under rule 30 (1) of the Rules of this Court, this court is duty bound to re-appraise the evidence on record, consider the applicable law and determine whether or not the respondent's claim was time barred.

In my view, the claim of limitation must in the context of this matter be considered together with the claim of adverse possession. This view derives support from the definition of adverse possession. According to ***Black's Law***

*Dictionary, **6th Edition Centennial Edition (1891 – 1991)*** at page 54 adverse possession is defined to mean:

> *A method of acquisition of title to real property by possession for a statutory period under certain conditions.*
>
> *"... Because of the statute of limitations on bringing of actions for recovery of land, title can be acquired to real property by adverse possession.*

I find the foregoing principle applicable to the facts of this case. This is so, because the respondents' action against the appellant as is discernible from the plaint was for recovery of land from which they had been dispossessed by the appellant. The appellant in defence to the claim contended that he had acquired title by adverse possession, having occupied, developed the suit land and remained in possession since 1994 and that the respondents' claim was barred by the law of limitation.

The question for determination would then be; in an action for recovery of land from a person who claims to be in adverse possession of the land, when is the cause of action deemed to arise and when should the suit be deemed been commenced. It is pertinent to first analyse the law and legal principles applicable to limitation in an action for recovery of land where the defendant invokes the defence of statutory limitation.

The law that governs claims of adverse possession and limitation of causes of action for recovery of land, where the defendant claims to be in adverse possession thereof is to be found in sections 5, 6, 11(1) 16, 25 and 29 of the

Limitation Act Cap 80. In the context of claims by administrators of an estate of successors in title, section 15 of the said Act is equally relevant as shall herein-after, be demonstrated. I should possibly emphasize from the onset that the principle of adverse possession and accrual of a cause of action for recovery of land is applicable to both registered and unregistered land. This is the import of *section 29 of the Limitation Act,* which in essence renders the Act applicable to land registered under the Registration of Titles Act in the same manner and to the same extent as it applies to land not so registered.

In actions for recovery of land, there is a fixed limitation period stipulated by section 5 of The Limitation Act. This limitation is applicable to all suits in which the claim is for possession of land, based on title or ownership. The section provides that;

> *"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person".*

Whereas *section 5 of the Limitation Act* provides for the limitation period of 12 years, the time from which the said period begins to run is derived from *section 11 (1) of the Act* provides that;

> *"No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favor the period of limitation can run (hereafter in this section referred to as "adverse possession") and*

*where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue until adverse possession is taken of the land".*

An action for recovery of land connotes an action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title. This is the position enunciated in the case of ***Bramwell v. Bramwell, [1942] 1 K.B. 370*).** It would follow from the foregoing, that an action for recovery of land being essentially a claim by a claimant who was dispossessed from their land, and who asserts his or her title or ownership and seeks to eject the defendant and regain possession of the land, the cause of action would ordinarily accrue from the date the Defendant took adverse possession of the land. This position is supported by the provisions of *section 6 of the Limitation Act,* which provides that the right of action is deemed to have accrued on the date of the dispossession.

It would follow therefore that the cause of action accrues when the act of adverse possession occurs. The position of the law is that the period of limitation begins to run as against a Plaintiff from the time the cause of action accrued until when the suit is actually filed. I am fortified by the decision in ***F.X. Miramago v. Attorney General [1979] HCB 24.*** It is also trite law that once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the Plaintiff.

In the instant case, the suit involved different plaintiffs who sued in varying capacities. It is therefore necessary to analyze the law and the evidence, and ascertain, whether the claim of each individual Respondent/ Plaintiff was barred by limitation or not. The position of the law is that, no right to the estate of an intestate shall be established in any court of law without grant of letters of administration. This is the import of *section 191 of the Succession Act*. By virtue of the same section, nobody can commence an action in a court of law without a grant of letters of administration. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The conclusion is that an action can only be commenced against the estate of the intestate if brought against the legal representative. No one can institute an action on behalf of the estate of an intestate unless supported by authority of court pursuant to section 191 of the Succession Act. There is thus need to ascertain which of the plaintiffs had letters of administration, and for those who did not have letters of administration, the inescapable conclusion would be that they did not have the necessary locus standi to deal with the formal title by seeking for cancellation or to prove the estate of the deceased in respect of which the issue arose.

In the premises, it is necessary to consider the period of limitation by considering when letters of administration were granted, whether there was a Will, whether in the Will, there was an executor. This is so because it is only an executor, who can prove the Will and who can derive authority from

the Will to commence an action, otherwise any other person has to first obtain letters of administration with the will annexed subject to the authority of the court. It is also pertinent to note that nobody can be sued without being the legal representative of the intestate duly appointed by the court. In that context, the cause of action accrues for the remainder of the limitation period after death of the deceased until when letters of administration have been granted. Conversely, the action by the plaintiff against the estate cannot be time barred when he or she sues the estate of the intestate after they have obtained letters of administration, provided the time was still running before the death. It would follow therefore that; between the death of the intestate and the grant of letters of administration, the limitation period does not apply. This view derives support from the decision of the House of Lords in ***Chan Kit San and Another vs. Ho Fung Hang (1902) AC 257*** where the Privy Council inter alia held that:

> *"But their Lordships think that there is nothing in this section to which they have been referred to overrule the established rule of law that no action can be maintained in respect of the estate of a deceased person except by the duly constituted administrator or executor. The sections referred to seem to place the registrar, pending the grant of letters of administration, in the position of a receiver, and to give powers incident to an office, but nothing more. And the result of the inquiry made by the Chief Justice as to the practice under section 39 of the Ordinance of 1860 confirms this view".*

A similar decision was reached by the House of Lords in ***SMKR Meyappa Chetty vs. SN Supramanian (1916) AC 606 (HL)*** it was stated inter alia that:

> *'It is quite clear that an executor derives his title authority from the will of his testator and not from any grant of the probate. The personal property of the estate, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves their will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of because his title depends on probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of Court, he is*

The foregoing position of the law calls for consideration of when the cause of action in the instant case arose, when the respondent's respective predecessors died, whether at the time of the death, there was a remainder of the period of limitation before it expired, so that time is reckoned for any remaining period from the time letters of administration were granted.

I have carefully considered the pleadings and evidence on record. The capacity in which the respondents sued the appellant is categorized into two; those with letters of administration and those claiming to be customary heirs. The capacity in which the respondents sued was pleaded in

paragraphs 1-7 of the amended plaint. What is discernible from the amended plaint and the testimony of PW1 and PW2 is that the 1st plaintiff/respondent herein sued as the customary heir of Botereza Yafesi. There is no evidence on record of the 1st Plaintiff having obtained a grant of letters of administration or of being an executor of the Will of the late Boterezo. The evidence on record shows that Boterezo died in 2012. PW1 and PW2 all testified that Boterezo is among the original proprietors who told them that the Appellant forcefully took over the land in 1994. The finding of the trial court was that Boterezo was aware of the impugned purchase transaction by the appellant, the entry onto the land by the appellant and developments caused on the land by the Appellant since 1994. Up to the time of his death in 2012, Boterezo never took any legal action against the Appellant and sat on his rights. The claim by the 1st Plaintiff derives from Boterezo and is thus affected by limitation. In any event, by virtue of section 191 of the Succession Act, the 1st Plaintiff would have no locus to commence an action on behalf of the estate of Boterezo, as he was not the legal representative of the estate, having never obtained letters of administration.

On the other hand, the 2nd plaintiff/respondent herein was described in paragraph 2 of the amended plaint as the heir and administrator of the estate of Bulazio Kamanzi by virtue of Administration Cause Number 0052 of 2002. The grant tendered in evidence was issued by Court on 12th March 2003. The 2nd Plaintiff did not lead any evidence and no proof was adduced as to when Bulazio Kamanzi died. What was stated in paragraph 2 of the witness

statements filed by the 4th and 7th respondents is that some of the registered proprietors died in the early 1990s or late 2000. Bulasio Kamanzi was one of the original proprietors of the land by 1994 when the appellant is said to have dispossessed them from the suit land. It is therefore inconceivable that he could have died in the early 1990s. However, going by the evidence of PW1 & PW2, that some of the proprietors died in late 2000, the inference drawn from that evidence is that from 1994-2000 during the lifetime of Kamanzi, six years had lapsed. The Letters of Administration were granted on 12th March 2003. If the two years between late 2000 and March 2003 are excluded, it would follow that; from March 2003 when the grant of letters of administration was issued, the 2nd Plaintiff had to file the suit within 6 years thereafter, which period expired in 2009. The suit was filed in 2015 way outside the limitation period.

The 3rd plaintiff/respondent was stated to be the son and customary heir of Mikairi Ntirinduga. No evidence was adduced to prove the claim that he was the customary heir of Mikairi Ntirinduga. The record indicates that he did not lead evidence at the trial. There is no evidence on record of the 3rd Plaintiff having obtained a grant of letters of administration or of being an executor of the Will of the late Ntirinduga. The evidence on record does not specify exactly when Ntirinduga died and when the 3rd Plaintiff was installed as the customary heir. PW1 and PW2 all testified that Ntiriduga is among the original proprietors who were dispossessed of the land by the appellant in

1994. It is equally inconceivable that he could have died in the early 1990s as testified by PW1 & PW2. The reasonable inference drawn from the testimony of PW1 and PW2 is that he died in late 2000. By then, 6 years had lapsed from 1994. The suit was filed by the 3rd respondent in 2015, 15 years since the death of Ntirinduga and 21 years since the entry on to the land by the appellant. The claim by the 3rd Respondent was clearly barred by limitation. The claim would equally be barred by Section 191 of the Succession Act as the 3rd plaintiff would have no locus to commence an action on behalf of the estate of Ntirinduga. Without a grant of letters of administration, the 3rd plaintiff could not challenge the appellant's proprietorship as a legal representative of the estate of Ntiriduga.

The 4th plaintiff sued as the administrator of the estate of the late Gelvas Nyirangabo by virtue of Administration Cause No. 0025 of 2004. At the hearing, he, under cross examination testified that his father, Nyirangabo died in 1997. It is on record he was confirmed as the customary heir by family resolution dated 13th January 2004 and obtained the grant of letters of administration on 21st July 2004. By 1997, 3 years had lapsed since the appellant dispossessed the registered proprietors from the land. If the period 1998-2004 is excluded, it would follow that 12-year limitation period expired in 2013. By the time the suit was filed in 2015, the 12-year limitation period had lapsed, rendering the suit barred by limitation.

The 5th Plaintiff sued as the customary heir of Paul Ntango. The record indicates that he did not lead evidence at the trial. There is no evidence on

record of the 5th Plaintiff having obtained a grant of letters of administration or of being an executor of the Will of the late Paul Ntango. A Will attributed to Ntango Paulo dated 18th April 2002 was adduced in evidence and appears at page 28 of the record of appeal. The 5th Plaintiff appears therein as the appointed heir but not as the executor of the Will. The evidence on record does not specify exactly when Ntango Paulo died. PW1 and PW2 all testified that Ntango is among the original proprietors who were dispossessed of the land by the Appellant in 1994. It is thus inconceivable that he could have died in the early 1990s as testified by PW2 & PW2. The reasonable inference drawn from the testimony of PW1 and PW2 is that he died in late 2000. This would equally cast serious doubts about the purported Will dated 18th April 2002. Be that as it may, by 2000 or 2002, a period of 6-8 years had lapsed from 1994 within which Ntango should have taken action. The suit was filed by the 5th Respondent in 2015, about 13-15 years since the death of Ntango and 21 years since the entry on to the land by the appellant. The finding of the trial court was that all the Plaintiffs' predecessors in title were aware of the Appellant's acquisition of the land and never took any action. The claim by the 5th Respondent was clearly barred by limitation. The claim would equally be barred by section 191 of the Succession Act as the 5th Plaintiff would have no locus to commence an action on behalf of the estate of Ntango. Without a grant of letters of administration, the 5th Plaintiff could not challenge the appellant's proprietorship as a legal representative of the estate of Ntango.

The 6th Plaintiff sued also a customary heir of one Rwamizire. There was no proof whatsoever relating to the claim that he was the customary heir of Rwamizire. No evidence was adduced prove the claim that he was the customary heir of Rwamizire. The record indicates that he did not lead evidence at the trial. There is no evidence on record of the 6th plaintiff having obtained a grant of letters of administration or of being an executor of the Will of the late Rwamizire. The evidence on record does not specify exactly when Rwamizire died and when the 6th plaintiff was installed as the customary heir. PW1 and PW2 all testified that Rwamizire is among the original proprietors who were dispossessed of the land by the appellant in 1994. It is equally inconceivable that he could have died in the early 1990s as testified by PW2 & PW2. The reasonable inference drawn from the testimony of PW1 and PW2 is that he died in late 2000. By then, 6 years had lapsed from 1994. The suit was filed by the 6th respondent in 2015, 15 years since the death of Rwamizire and 21 years since the entry on to the land by the appellant.

The 7th plaintiff sued as the administrator of the estate of Samwiri Rwitirinya by virtue of Administration Cause Number 0061 of 2004. No evidence was adduced by the 7th respondent as to when Rwitirinya died. However, going by the testimony of the 7th Respondent that some of the original registered proprietors died in early 1990s and some in late 2000, the most probable date is 2000. Evidence was adduced of a grant of letters of administration issued on 26th August 2004. Rwitirinya was one of the original registered

proprietors dispossessed by the appellant in 1994 and took no action for 6 years till 2000. If the period of 2000 when he probably died and August 2004, when letters of administration were issued is excluded, it would mean that the 7th respondent ought to have filed the suit by 2010. His claim too was barred by limitation.

There is no doubt that in the instant case, the respondent's action was for recovery of land from the appellant. They essentially sought to eject him from the suit land on account that he acquired it fraudulently. The fraud was rooted in the fact that he did not purchase the suit land from the registered proprietors who were the respondent's predecessors in title. They contended that since the appellant did not purchase the suit land from the registered proprietors of the suit land, the alleged purchase of 1994 was fraudulent. They contended that the entry on to the suit land by the appellant, taking over of possession and continued occupation and development of the suit land was all grounded in the fraudulent purchase of the suit land. The evidence by PW1 and PW2, the 4th and 7th respondents respectively was that the appellant forcefully entered onto the suit land without the consent and authorization of the then registered proprietors. They therefore sought orders to have the appellant evicted from the suit land. The forceful entry by the appellant and occupation of the suit land without authorization and consent form the respondents was an assertion of rights over the land by the Appellant in hostility to the Respondent's ownership. The contention by Respondent's counsel that the respondents' legal interest was not threatened

as they possessed an unchallenged certificate of title in respect of the suit land in dispute is untenable. They had been dispossessed from the suit land. In response to the respondent's claim, the appellant contended that the respondents' action was time barred, as they, or their successors in title ought to have brought their action within 12 years from 1994, when the appellant took over possession of the suit land. He claimed that he was an adverse possessor of the suit land, having dispossessed the respondents or their predecessors in title in 1994. As held by the Supreme Court, adverse possession is proved by evidence of non-permissive use which is actual, open, notorious, exclusive and adverse for the statutorily prescribed period. See; ***Lutalo Moses (Administrator of the estate of Lutalo Phoebe versus Ojede Abdallah Bin Cona (Administrator of the estate of Cona Bin Gulu) Civil Appeal No. 15 of 2019.*** I have already upheld the finding of the trial court that the appellant entered onto the suit land in 1994, albeit without the consent and authorization of the registered proprietors. The trial court equally found and rightly so, that, the Respondents and their predecessors in title, who were neighbours to the appellant were aware of his unauthorized occupation and sat on their rights. The learned trial judge stated that;

> *"I find that the Plaintiffs' predecessors in title were aware of the Defendant's undisturbed possession of the suit land. They slept on their rights and did not challenge the possession and usage of the land while the defendant developed it immensely. For an agreement that was made in 1994 in the presence of some of the registered proprietors, the plaintiffs were aware of*

*the defendant's usage and occupation of the land and never challenged his possession.*

The learned trial judge further stated;

> *"this Court finds that the Plaintiffs could have and should have instituted this suit much earlier when they established that the Defendant was developing their land without authorization nor consent. The Defendant had already elevated the interest in the suit land to freehold. The Plaintiffs and their predecessors watched him develop the land for 27 years and when this Court visited locus, the Plaintiffs confirmed that they are the Defendant's neighbours"*

The learned judge further noted that the respondents acted against the appellant in 2015 after 21 years. She found that;

> *"However, the plaintiffs did not adduce any evidence to show that they or their predecessors in title ever challenged the defendant's usage of the suit land and they sat on their rights for over 21 years while the defendant developed the suit land. For that reason, they were not vigilant and equity aids the vigilant not the indolent.*

I note that the above findings were quite adverse to the respondents' case. Indeed, aggrieved with part of the decision of the trial court, the respondents filed a cross appeal in this matter. However, nowhere in the notice of cross appeal did the respondents contest any of the aforementioned findings of fact by the trial court. I have also found that the factual findings of the trial court

are supported by evidence on record and the inescapable conclusion drawn from the said findings is that the respondents and their predecessors in title ought to have challenged the unauthorized occupation, possession, use and development of the suit land by the appellant within 12 years from 28th June 1994. As found by the trial court, the suit was filed in 2015 after the lapse of about 21 years. The respondent's claim was therefore time barred and the suit against the appellant ought to have been dismissed on that account.

Learned counsel for the respondents argued that the respondents' claim was founded on fraud and that, under section 25 of the Limitation Act, where the claim is founded on fraud, the time starts running from the date of discovery of the fraud. He contended that the respondents pleaded grounds of exemption from limitation and asserted that they discovered the fraud in 2012 when they caused a search and found that the appellant had processed a certificate of title for the suit land. In counsel's view, the cause of action arose in 2012 when the fraud was allegedly discovered by the respondents. I also note that, notwithstanding the findings of the trial court quoted verbatim herein above, the learned judge equally held that pursuant to section 25 of the Limitation Act, the limitation period of 12 years did not apply to a claim founded on fraud. The conclusion of the learned judge that section 25 of the Limitation Act applied was clearly not in tandem with the overwhelming evidence on record that the respondents and their predecessors in title were, from 1994, aware of the alleged fraudulent acquisition of the suit land by the appellant and sat on their rights for over 21 years.

I am therefore neither persuaded by the arguments of learned counsel for the Respondent nor the conclusion of the trial court, which I find erroneous in law and fact, for the following reasons; the claim by the Respondents was rooted in what they asserted to be the fraudulent purchase of the suit land by the appellant from persons other than the registered proprietor; it was also rooted in the purchase of interest of customary tenants on the suit land by the appellant, which they contested as there was no consent from the respondents or their predecessors in title. They contended that the subsequent processing of a title over the suit land by the appellant was premised on the fraudulent purchase of the land in 1994. This clearly negates the contention by the Respondents that they were not privy to the impugned agreement. The trial court was alive to the relevant evidence on record and found that;

> *".....For an agreement that was made in 1994 in the presence of some of the registered proprietors, the plaintiffs were aware of the defendant's usage and occupation of the land and never challenged his possession".*

As earlier noted, the respondents did not contest the finding of fact by the trial court in their cross appeal, yet they appear to be adverse to their claim. The attempt to challenge the findings of the trial court in counsel's submission is legally and procedurally untenable, where the respondents filed a cross appeal and opted not to challenge such findings. They are bound by the findings of the trial court.

Further, in resolving the issue of whether the appellant fraudulently acquired the suit land or not, the learned judge found that the fraud was rooted in the execution of the agreement of purchase executed by the appellant 1994 with persons other than the registered proprietors and in the appellant taking over possession without the authorization and consent of persons he knew or ought to have known to be the registered proprietors. The learned Judge found that the appellant had notice of the registration status of the suit land but failed to exercise due diligence prior to the purchase of the suit land and that even with notice of the registered proprietors, he chose to buy from persons without interest. She noted that the appellant having fraudulently acquired his interest proceeded to convert the interest he acquired into a freehold and used court to enforce his actions in order to enable himself register a fraudulently acquired interest.

I have gone to great length to demonstrate that the alleged fraud against the appellant originated from the impugned purchase agreement dated 1994 and the forceful entry onto the suit land. As found by the trial court, the respondents or their predecessors in title knew about this alleged fraudulent purchase. They equally knew about what they considered to have been a fraudulent acquisition of their land by the appellant. They saw the appellant enter the suit land without their consent or authorization, occupy it, develop it without taking any action. They did not adduce evidence of having tried to evict the appellant. They ought to have taken out an action to enforce their rights within 12 years from 1994, when they were dispossessed of their land

by the appellant. The contention by counsel for the Respondents that the Respondents were not privy to the agreement of 1994 is without merit.

Conclusively, I agree with the finding of the learned trial judge that the Respondents or their predecessors in title were aware or ought to have been aware of the alleged fraudulent acquisition of the suit land and unauthorized entry on to the suit land by the Appellant in 1994 or thereabout. They cannot seek refuge in section 25 of the Limitation Act, simply because they were aware or ought to have been aware of the alleged fraud in 1994 or within the 12-year statutory limit. By the time they filed the suit in 2015, the limitation period of 12 years had lapsed. In the context of section 5, 6, 11 and 15 of the Limitation Act, the cause of action is deemed to have accrued in favour of the respondents and their predecessors in title in 1994.

For completeness, I am inclined to consider the effect of limitation on the respondent's claim vis-à-vis the rights of the appellant who has since 1994 occupied and immensely developed the suit land, especially in light of the earlier finding of this court that the appellant satisfied the conditions precedent for the claim of adverse possession of the suit land. It is trite law that where the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim. ***See; Iga v. Makerere University [1972] EA 65).*** The trial judge erred in not dismissing the suit on account of the claim being barred by limitation.

Regarding the effect of limitation and the claim of adverse possession, the law was clarified in the case of ***Jandu vs. Kirpal & another (1975) EA 225 at 323,*** cited by the supreme court in ***Lutalo Lemmy (Supra)*** the court relied on the definition adopted in the case of ***Bejoy Chundra vs. Kelly Posonno (1878) 4 Cal. 327 at p.329;*** where it was held that;

> *"By adverse possession I understand to be meant possession by a person holding the land on his own behalf, (for on behalf) of some person other than the true owner, the true owner having immediate possession. If by this adverse possession, the statute is set running, and it continues to run for twelve years, then the title of owner is extinguished and the person in possession becomes the owner."*

In my view, the uninterrupted and uncontested possession of land for over 21 years by the appellant, hostile to the rights and interests of the respondents or their predecessors in title conferred title by adverse possession upon the appellant. It is one the legally recognized modes of acquisition of ownership of land. This position was enunciated in the case of ***Perry v. Clissold [1907] AC 73, at 79).*** Further, once the time period limited by the Limitation Act expires, the plaintiff's right of action will be extinguished and automatically becomes unenforceable against a defendant. As noted by the Supreme Court in the ***Lutalo Lemmy case***, where a claim of adverse possession succeeds, it has the effect of terminating the title of the original owner of the land. The effect of the expiration of the period

prescribed for any person to bring an action to recover land is provided for under Section 16 of the Limitation Act, which provides that;

> ***"Subject to sections 8 and 29 of this Act and subject to the other provisions thereof, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action), <u>the title of that person to the land shall be extinguished."</u> (Emphasis mine)***

I find merit in the principle re-iterated by the supreme court in the ***Lutalo Lemmy case*** that; modern statutes of limitation operate, as a rule not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. Applying the said principles to the facts of this case, I find that by their inaction, the respondents' allowed their right to be extinguished to the extent that they could not recover the suit land from the appellant as the person in adverse possession. When the respondents' title to the land was extinguished, their ownership of the land passed on to the appellant, whose adverse possessory right got transformed into ownership by operation of the law. The appellant acquired title to the suit land by adverse possession. This ground therefore succeeds.

**<u>GROUND 2</u>**

Regarding ground No. 2 of the appeal, the appellant raised a preliminary objection to the effect that the issue of proprietorship of the suit land was determined by the Land Tribunal, upon whose decision the High court issued

a consequential order against the registered proprietors. Counsel contended that the claim by the 1st, 5th and 6th respondents/plaintiffs had been determined by the Rakai District Land Tribunal in claim Application No. 13 of 2003 and High Court Misc. Application No. 16 of 2005 Ben Kavuya versus Botereza Yofesi and Others wherein the persons from whom the 1st, 5th and 6th respondents claimed interest confirmed that they had sold their interest to the appellant. Counsel faulted the learned trial judge for her finding that the conditions precedent for res judicata had not been satisfied. The Learned Trial Judge is faulted for making a finding that the question to be determined was whether the matter had earlier on been presented to Court of competent jurisdiction and whether the same had been adjudicated.

For the respondent, it was contended that that the question of proprietorship and lawful acquisition of the suit land was never adjudicated on its merits by the court. That the respondents and their predecessors in title were not party to the proceedings before the Land Tribunal and before the High court and were never heard.

The plea of res judicata is founded under section 7 of the Civil Procedure Act which provides that:-

"No *court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in*

*a court competent to try the subsequent suit or the suit in which issue has been subsequently raised, and has been heard and finally decided by that court."*

It is pertinent to note that the key words are whether the matter was directly or substantially in issue. The Court of Appeal in ***Ssemakula versus Magala & Others (1979) HCB 90*** held that; in determining whether a suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of new cause trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of res judicata will then not only apply to all issues upon which the first court was called upon to adjudicate but also to the very issue which properly belonged to the subject of litigation and which might have been raised at the time,

The legal position is further affirmed in ***Kamunye and Others vs. The Pioneer General Assurance Society Ltd, (1971) E.A 263,*** where the Court of Appeal LAW, Ag. V-P with the concurrence of Spry Ag. P. and Mustafa J.A at page 265 paragraph F- G gave the test of whether a matter is res judicata as follows:

*"The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has*

*already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time Greenhalgh v. Mallard, (1947) 2 ALL E.R. 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply Jadva Karsan v. Harnam Singh Bhogul (1953), 20 E.A.C.A 74".*

The appellant contends that his ownership of the suit land was confirmed by the District Land Tribunal in *Application No. 16 of 2005 between Ben Kavuya vs. Botereza Yofesi and others* and later by the High Court in the application for consequential orders. He further argued that neither the Respondent's predecessors in title nor the respondents have ever appealed against the said decisions. It is on this basis that he invited the court to find that the Respondent's claim is res judicata.

In order to determine whether the Respondents' claim is res judicata, it is important to scrutinize the proceedings and the decision of the land tribunal to ascertain, who of the Respondents is affected by the said decision. The decision of the Tribunal is at page 44 of the record of appeal. The names of the respondents against whom the appellant filed the action before the District Land Tribunal were the following: Boterezo Yafesi, Bulasio Kamanzi, Mikari

Ntimunduga, Paulo Ntango, Kasana-Balunzi Co-operative Society and Rwamizire. The cause of action according to the judgment was the failure to honour a land transaction by signing of the transfer forms to enable the claimant formally be transferred title to the land he bought. The record indicates that the defendants failed to submit their defences within the time, in spite of extension of time. The claimant thus prayed that the matter proceeds ex parte. The prayer was granted.

The record further indicates that the Tribunal convened at the village and notwithstanding the failure to file a defence, the defendants to the claim appeared together with local elders. The Tribunal indeed, interviewed the defendants whereupon, the following were the findings; Mr. Y Botereza submitted that the complainant had bought the land and had carried out considerable developments and construction of the valley dams thereon. Secondly, he had no objection to the transfer of the land. Further, that they had all along been intimidated and threatened with violence by some squatters who had no legitimate claim. Secondly, Mr. Ntango and Mr. Rwamizire had the same testimony and also had no objection to the transfer of the land. However, for whatsoever reason, out of the three names of registered proprietors who appeared as witnesses, some others were mentioned in the claim but were not mentioned by the Tribunal when they went on site. The tribunal's decision was that the defendants admitted the claim of ownership by the appellant.

Nevertheless, the record shows that the 1st, 2nd, 3rd, 5th and 6th respondents predecessors were parties to the claim before the District Land Tribunal and were offered an opportunity to be heard in the matter. The conclusion drawn by the learned trial judge that the said respondents' predecessors were never summoned to the Land Tribunal nor given an opportunity to be heard or to attend the hearing before the tribunal and High Court was erroneous. No evidence was adduced as to why they opted not to defend the claim even when time to do so was afforded to them.

In the application for consequential orders, the learned trial Judge ordered the execution of the judgment and decision of the land Tribunal by transferring the title and interest of the following persons to the appellant. The persons named were; Botereza Yofesi, Bulasio Kamanzi, Mikairi Ntirunduga, Paul Ntango and Rwamwizire. However, at the time, and going by the proprietorship on the certificate of title before the implementation of the order, the following are the names of proprietors as tenants in common registered thereon; Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Tisan Gakwererc, Samuel Rwitirinya, Rwamwizire, Yofesi Botereza, John Ramushasha, Paulo Bahonangenda, Gelvas Nyiringabo and Claver Kagenge as tenants in common. The persons whose names appear as tenants in common and whose names are underlined were not included in the claim before the Tribunal and were not parties to subsequent proceedings. Further, the subject matter of the claim related to the ownership of land comprised in plots 11 and 14 Kabula Block 64 Masaka District

On the other hand, the 1st plaintiff was affected by the decision of the Tribunal and the consequential order of the High Court by virtue of claiming to derive his interest from the estate of Botereza Yofesi. Secondly, the 2nd plaintiff claiming to derive interest from the estate of the estate of Bulasio Kamanzi was equally affected by the decision of the tribunal and the consequential order. The 3rd Plaintiff claiming to derive interest from the estate of Mikairi Ntirinduga was affected. The 4th Plaintiff is not affected by the decision of the Tribunal and the consequential order because he claims to derive interest from the estate of Gelvas Nyirangabo. The 5th plaintiff is affected because he claims to derive interest from the estate of Paulo Ntango. The 6th Plaintiff is also affected because he claims to derive interest from the estate of Rwamwizire and lastly, the 7th plaintiff is not affected because he claims to derive interest from the estate of Samwiri Rwitirinya. It follows therefore that the 4th and 7th plaintiffs were not affected by the decision of the Land tribunal and should consequently have been affected by the consequential order of the High Court.

It is worth noting that the respondents never filed an appeal against the decision of the land tribunal and the consequential orders of the High Court. The two decisions conferred proprietorship of the suit land to the appellant. It is true that the claim before the District Land Tribunal proceeded ex parte against the respondents, upon their failure to enter appearance. Similarly, the consequential orders sought pursuant to the decision of the district land tribunal proceeded ex parte before the High Court. It is the appellant's position that the judgment of the Tribunal was not appealed. No appeal was ever

preferred by them against the said decisions. Section 87 (1) of the Land Act, Cap 227 prescribed an automatic right of appeal from the decision of the district land tribunal to the High Court. The question though, is whether an appeal lies from an ex parte decree. Section 67 (1) of the Civil Procedure Act provides that an appeal may lie from an original decree passed ex parte. No evidence was adduced as to why the said defendants never entered appearance before the District Land Tribunal or the High Court and why no appeal was preferred. I therefore find that the claims of the 1st, 2nd, 3rd, 5th and 6th Respondents are affected by the plea of res judicata. However, res judicata does affect the separable interests of the estates of Gelvas Nyiribabo (represented by the 4th respondent/ plaintiff and the estate of Samwiri Rwitirinya represented by the 7th respondent provided the representatives of those estates had locus standi and further, provided that their claims are not time barred.

I have pointed out that there were some errors in the decision of the Land Tribunal and the consequential orders of the High Court. Any such errors ought to have been challenged on appeal. This court would not have the jurisdiction in this appeal to correct them. It was thus erroneous for the learned trial judge to pronounce herself on the correctness or otherwise of the decision of the Land Tribunal and the ruling and consequential orders of the High Court. She could not sit in appeal from the decision of a fellow judge. The position of the law appears to be that the plea of res judicata applies even where the decision is alleged or found to have been erroneous, as long as the court that determined the dispute was vested with the jurisdiction to do so. I find useful guidance in

the decision in ***Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR,*** where the court summarized the legal position in the following terms;

*" A decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. To this end, it is helpful to refer back to the reasons for the principle of finality including those decisions of the court, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict. The Court reaches this conclusion on an orthodox application of the principle. In the plea of res judicata, only the actual record, that the issue has been decided upon, is relevant. Not matter what material was before the Court. Even if the reasoning given in the earlier Decision was wrong, the matter cannot be re-opened by way of a similar Application..."*

I therefore find that save for the claim by the 4th and 7th respondents, whose predecessors in title were not party to the proceedings before the District Land Tribunal and the Consequential order application and orders thereof, the claim by the 1st, 2nd, 3rd, 5th and 6th Respondents was res judicata. This ground therefore succeeds as against the 1st, 2nd, 3rd, 5th and 6th respondents and fails against the 4th and 7th respondents.

**GROUND 7**

The appellant faulted the learned trial judge in ground 7 of the appeal for holding that he had fraudulently acquired the suit land, whereof she ordered for cancellation of his title. The appellant contended that he had acquired the land lawfully and for value with no notice of the respondent's alleged claims having paid off all the customary tenants thereon prior to registering it in his names. The appellant submitted that in the absence of any evidence to deny the purchase or any evidence of a single neighbour or occupant contesting his ownership, occupation and acquisition of interest in the suit land, his title could not be impeached.

Further, appellant's counsel submitted that it was undisputed fact that the appellant is the registered proprietor of the suit land formerly comprised in Plot 11 & 14 Block 64, whose registration is still intact. The claim by the respondents/plaintiffs that they occupied part of the suit land was lame since the appellant's land was well demarcated and fenced off with no boundary disputes. That the appellant had already been declared as registered proprietor thereof by the Rakai District Land Tribunal as well as the Court in Misc. Application No. 16 of 2005 which could not be re-investigated on account of Res Judicata.

The Respondents on the other hand brought the suit for recovery of suit land from the appellant on ground that he had fraudulently acquired the land by purporting to purchase it from person he knew were not the registered

proprietors. They contended that the appellant did not acquire a lawful title of the suit land and the proceedings commenced by the appellant for consequential orders, upon which he obtained the title were based on fraud and illegality.

In her judgment, the learned Trial Judge found that the appellant had purchased the suit land from cattle keepers although he knew that they were not registered proprietors to the same. She further held that the Appellant had constructive and actual notice that the suit land did not belong to the sellers and yet proceeded to purchase the same. She noted that the appellant purports to have purchased 150 hectares of land, yet he occupied 714.4 hectares and that though the appellant knew that the land was registered, he did not conduct due diligence.

I have considered the evidence on record and the submission of counsel in respect of this ground. The crux of the allegation is that the appellant's purported purchase of the suit land was fraudulent because he transacted with persons who were not the registered proprietors and extended his occupation from the initial 150 acres to the current occupied 714.4 hectares by acquiring interests of customary tenants and bibanja owners. The acquisition, entry on to the entire suit land and continued use and development was notorious and open. There was nothing concealed from the respondents who were aware of the facts pertaining to the appellant's entry onto the suit land and its use. The uncontroverted evidence on record shows that some of the registered

proprietors from whom the respondents derive their claims attended the locus hearing conducted by the Land Tribunal. There is no evidence on record that they protested the occupation of the land by the appellant nor evidence that they raised the allegation of fraudulent acquisition. The respondents and their predecessors in title had nothing concealed from them in so far as the acquisition of the land by the appellant was concerned. The tribunal declared the appellant as the lawful owner of the land, which decision was adverse to the interests of the respondents and their predecessors in title. I also note that the District Land tribunal declared the appellant as the lawful owner of the suit land that was all at the time in his possession. Subsequently, the High court issued a consequential order upon which the appellant acquired title. He later converted the leases into a freehold interest. The respondents' predecessors in title having been privy to proceedings before the tribunal, ought to have raised the allegations of fraudulent acquisition at the locus hearing. On the contrary, the evidence on record is that they had no boundary dispute and recognized the fact that the appellant was within his boundaries and hade developed the land. Indeed, there is no evidence on record that any of the respondents' predecessors in title ever tried to raise the issue of fraud or challenge the decision of the Land tribunal or the High Court. The learned judge's attempt to declare the proceedings and decision of the land tribunal and the consequential orders of the high court as being an unlawful avenue of what she referred to as sanitizing the alleged fraud would amount to her sitting in appeal from a decision of the Land Tribunal and the orders of the High court. In the absence

of an appeal or proceedings to review or set aside the orders of the Land Tribunal and the consequential order issued by the High Court, the learned judge exceeded the purview of her jurisdiction.

Be that as it may, as already found in this judgment, the appellant entered the entire suit land, occupied it and developed it with the knowledge of the Respondents and their predecessors in title. The court found as a fact that the appellant was in full possession of the entire suit land and that there were no boundary disputes. The respondents were all along aware that the appellant was occupying more than the 714.4 hectares of the suit land and not merely the 150 acres of land contained in the impugned purchase agreement of 1994. The appellant explained that he settled customary tenants on land in excess of the 150 acres and occupied it. His occupation of the entire suit land was so notorious that it could have aroused suspicion for any vigilant owner to take action. The respondents and their predecessors in title never took any action.

Whereas, there were some flaws in the manner of acquisition of the suit land by the appellant, as found by the trial court, a finding upheld in this judgment, the appellant, who had not acquired the suit land from the registered proprietors entered, occupied and developed the land without authorization and consent of the respondents or their predecessors in title. The inaction by the respondents within the statutory limitation period conferred title by adverse possession upon the appellant. His title could not be impeached by the subsequent delayed claims of fraud, which dated back to 1994.

The question is whether in light of the finding of this court that the respondent's claim was barred by the law of limitation, it is permissible in law for the court to investigate the merits of the claims and the allegations of fraud. The position of the law was succinctly re-iterated by this court in ***CACA No.42 of 2008 Mohammad Buwule Kasasa versus Jasphar Buyonga Bwogi,*** where it was noted that the purpose of the law of limitation is to put an end to litigation. This law is applied by courts strictly. The court cited and relied on **Re Application by Mustapha Ramathan for Orders of Certiorari, Prohibition and Injunction, Civil Appeal No.25 of 1996,** where Barko, JA, (as he then was) stated –

*"The application was in fact made on 25th day of April 1996. That was obviously more than six months after the Minister's order or decision. We are not persuaded by learned counsel's argument that the judge ought to have based his calculation on the time the Minister's decision was communicated to the appellant. Statutes of limitations are in their nature strict and inflexible enactments. Their overriding purpose is interest reipublicae ut sit finis litum, meaning that litigation shall be automatically stifled after fixed length of time, irrespective of the merits of the particular*

*case. A good illustration can be found in the following statement of* ***Lord Greene M. R in Hilton vs. Sutton Steam Laundry [1946] 1 KB 61 at page 81*** *where he said-*

*"But the statute of limitations is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights."*

In that case, this court faulted the trial judge for attempting to consider the merits of the matter on ground that there was need to investigate the merits of the allegations of fraud in the acquisition of the suit land by the appellant. Applying the same principle, having found that the respondent's claim was barred by the law of limitation and that the appellant acquired title by adverse possession, any attempt to investigate the merits of the allegations that the appellant acquired the suit land fraudulently would be superfluous. The right of the respondents to recover the suit land and eject the appellant from the suit land was extinguished by operation of law. Their claims regardless of the merits were stifled. This rendered the title of the appellant prima facie incapable of being impeachable under the law.

The above notwithstanding, there is one pertinent question that this court considers necessary to resolve. The court is not only dealing with the issue of authority to institute an action but also with the question of which portion of the land is being referred to. Can it be said that the entire interest in the land comprised Plots 1 and 2 Buddu Block 983 and Plot 11 & 14 was all lawfully vested in the appellant by virtue of the decision of the District Land Tribunal and the consequential order of the High Court inclusive of the interest of the

tenants in common, who were not affected by the said decision? For that reason, I have considered the transactions leading to the registration of the appellant.

In 1994, the appellant executed an agreement for the purchase of 150 hectares of land. It was in respect of the land comprised in Block 64 Plots 11 and 14 land at Kabula. The agreement was not executed with the registered proprietors, though some of them appeared as witnesses thereto. The appellant later filed a claim against some of the registered proprietors being; *Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, Yofesi Botereza* for failure to honour their obligation to effect a transfer of the land into his names. These did not file a defence, despite extension of time afforded to them to do so. However, as already noted herein, during the tribunal hearing, three of them conceded to the claim. The tribunal thus made a finding that the said defendants admitted the claim. The tribunal thus held;

> *"In the circumstances, judgment is hereby entered by Tribunal in favour of the complainant and it is declared that the complainant Mr. Kavuya Ben is the owner of Plot 11 and 14 Block 64 Kabula which is comprised in LRV 1253 Folio; Secondly, the registrar of titles is also ordered to enter the said Ben Kavuya as the registered proprietor of the above stated land. Lastly, the costs in this matter (are) awarded to the complainant".*

The District Land Tribunal declared the appellant as the owner of Plot 11 and 14 Block 64 Kabula but did not specify the acreage thereof. The subject matter

of the Tribunal case covered only plots 11 and 14 Kabula Block 64 and 150 hectares therefrom. It is quite apparent that the decision of the District Land Tribunal dealt with plots of land without reference to the acreage. Thereafter, the complainant filed an application in the High Court, in High Court Miscellaneous Application No. 16 of 2005 arising out of the claim Application No. 16 of 2003 before the District Land Tribunal under *section 76 (3) of the Land Act as amended and section 31 (d) of the Land (Amendment) Act, 1 of 2004 and section 98 of the CPA* for consequential orders to give effect to the decision of the District Land Tribunal. The trial Judge before whom the application for consequential orders was filed, considered the certificate of title, which he noted was consistent with the names in the land Tribunal decision. Secondly, the proprietors were tenants in common in equal shares. The learned trial Judge stated that the District Land Tribunal omitted to mention Plot Nos. 1 & 2 Buddu Block 983. The learned trial judge held as follows:

"*Each tenant in common owns an individual share and all of them have unity of possession. No tenant can point to any part of the land as his own to the exclusion of the others. I think it was just a mistake on the part of the Tribunal to omit to mention plot numbers 1 and 2 Buddu Block 983. I do not think that by judgment the Tribunal intended to divide the land the subject matter of the lease. If they had wanted to do this their decision and order would have been express and clear. In my view, the Tribunal was merely concerned with the proof of sale of the interest of the persons sued, and transfer of their interest*

*and vesting of title thereto into the names of the Applicant. This is what I have done by this consequential order. The Applicant should bear his costs hereof".*

The consequential order was therefore intended to vest the interests of the five tenants in common, who were affected by the decision of the District Land Tribunal. As already noted herein, there was no appeal against the decision or the District Land Tribunal nor that consequential order of the High Court, despite the right of appeal being available. This court would have no basis to interfere with the said decision, as it is not the subject of the appeal. This is further, in view of the earlier finding that the plea of res judicata affected *Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, Yofesi Botereza*. These are the persons whose interest ought to have been transferred to the Appellant.

The title to the land in question is clear and provides that it is land at Bulimbale and Kasambya Plots 1 & 2 Buddu Block 983 and Plot No. 11 & 14 Kabula Block 64, Masaka District. The title referred to by the learned trial judge of the High Court clearly states that the land measures approximately 1036 ha. It was initially registered in the names of 11 joint registered proprietors. Out of the entire title and by virtue of the consequential order, the appellant was entitled to be registered as a co-proprietor in respect of the interests of Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, Yofesi Botereza. These were the Defendants to the proceedings before the District Land Tribunal, who would be affected by registering the Appellant and transferring their interest to the

appellant. Thereafter, the appellant would have become a tenant in common with those whose titles were not affected by the decision of the District Land Tribunal. In that context, the interest of the other six proprietors including the 4th and 7th Respondents' predecessors in title would not be affected and was not transferable to the appellant.

It would in the circumstances be erroneous not to consider the acreage that ought to have been transferred to the appellant out of the title to the whole land comprised in Bulimbale and Kasambya Plots 1 & 2 Buddu Block 983 and Plot No. 11 & 14 Kabula Block 64, Masaka District. I note that there was no survey report to establish the acreage of Plot numbers 11 & 14. However, even if this is not established, it's a question of assessing the share of each of the five proprietors affected by the decision of the tribunal being; Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, Yofesi Botereza to determine what acreage out of the entire land, was transferrable to the appellant. This would be restricted to the interest of Botereza Yofesi, Bulasio Kamanzi, Mikaire Ntirinduga, Paulo Ntango and Rwamwizire. These are the five tenants in common whose interests were transferred to the Appellant. If the certificate of title reflects this and cancels out their names. It leaves out six names which remain on the title. These are Tisisan Gakwererc, Samuel Rwitirinya, John Ramushasha, Paulo Bahonangenda, Gelvas Nyiringabo and Claver Kagenge who remained tenants in common with the appellant. The subsequent registration of the appellant seems to vest the entire estate in him and not the remaining tenants in common.

It appears the land title for the entire land comprised in Bulimbale and Kasambya Plots 1 & 2 Buddu Block 983 and Plot No. 11 & 14 Kabula Block 64, Masaka District measuring 1039 hectares was sub divided. 319 Hectares remained on Plot 2 and 714 Hectares were transferred to LRV 3789 Folio 17. This is so because the title retained by the Appellant as found by the trial court measures a total of 714 Hectares and not the entire 1039 heactares. The appellant was registered thereon under instrument No. 386235 on 21st September 2007 in respect of Plots 11, 14 & 1. The land measuring approx. 319 Hectares remained the residue title Plot 2. This evidence appears at page 336 of the record. It follows therefore, that if the initial acreage was 1039 hectares registered in favour of 11 tenants in common, when divided in equal shares, each would be entitled to 94 Hectares. Since Ben Kavuya got 5 shares hitherto owned by Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, Yofesi Botereza, he would be entitled to a transfer of 472.272 hectares. The balance of 241.728 Hectares on the title of the Appellant would have to be registered into the names of the other six proprietors namely; Tisan Gakwerere, Samuel Rwitirinya, John Ramushasha, Paulo Bahonangenda, Gelvas Nyiringabo and Claver Kagenge.

It appears therefore that the title registered in the names of the appellant exceeded the interest that was supposed to be registered in his names by 241.728 Hectares. This in my view would call for rectification of the title to exclude the excess land registered in the names of the appellant. The evidence further confirms that the land occupied and developed by the appellant is

It appears the land title for the entire land comprised in Bulimbale and Kasambya Plots 1 & 2 Buddu Block 983 and Plot No. 11 & 14 Kabula Block 64, Masaka District measuring 1039 hectares was sub divided. 319 Hectares remained on Plot 2 and 714 Hectares were transferred to LRV 3789 Folio 17. This is so because the title retained by the Appellant as found by the trial court measures a total of 714 Hectares and not the entire 1039 heactares. The appellant was registered thereon under instrument No. 386235 on 21st September 2007 in respect of Plots 11, 14 & 1. The land measuring approx. 319 Hectares remained the residue title Plot 2. This evidence appears at page 336 of the record. It follows therefore, that if the initial acreage was 1039 hectares registered in favour of 11 tenants in common, when divided in equal shares, each would be entitled to 94 Hectares. Since Ben Kavuya got 5 shares hitherto owned by Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, Yofesi Botereza, he would be entitled to a transfer of 472.272 hectares. The balance of 241.728 Hectares on the title of the Appellant would have to be registered into the names of the other six proprietors namely; Tisan Gakwerere, Samuel Rwitirinya, John Ramushasha, Paulo Bahonangenda, Gelvas Nyiringabo and Claver Kagenge.

It appears therefore that the title registered in the names of the appellant exceeded the interest that was supposed to be registered in his names by 241.728 Hectares. This in my view would call for rectification of the title to exclude the excess land registered in the names of the appellant. The evidence further confirms that the land occupied and developed by the appellant is

within his boundaries. The evidence on record both during the land tribunal proceedings and the locus visit by the trial court confirms that there is no boundary dispute between the appellant and his neighbours including the respondents. Indeed, PW1, the 7th respondent at page 327 of the record testified that the respondents/plaintiffs were in possession of one part of the land and the appellant was in possession of the other part of the land. PW2, the 4th Respondent at page 328-329 also conceded that he sold 143 Acres to Mr. Keith Muhakanizi in 2004 being part of the estate of the late Nyirangabo and had a portion of the land left. The portion of the land sold to Mr. Keith Muhakanizi was identified at the locus as per the proceedings at page 341 of the record and confirmed by the appellant.

At the locus, the record at page 339 indicates the submission by Mr. Lwalinda as follows;

> "The *matter is for locus visit, as indicated in our evidence, the Plaintiffs are aware that the defendant is occupying the entire suit land and we have no issues with his occupation from the boundaries"*

I have already found that by virtue of the decision of the District land Tribunal and the consequential order of the High Court, the interest of Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, Yofesi Botereza, and their successors in title namely; the 1st, 2nd, 3rd, 5th and 6th Respondents measuring approx. 472.272 hectares was vested in the Appellant. I have also found that their claim is res judicata and is also time barred. I have also found that the

claims of the 4th and 7th espondents are equally barred by limitation. I have also found that the appellant acquired title by adverse possession. This finding however is restricted to the land occupied by the Appellant, which is within his uncontested boundaries. That would prima facie be approx. 472.272 hectares.

It would follow that to the extent to which the appellant's title exceeds what he is entitled to, it was unlawfully registered in his name and must be rectified to exclude the excess land, without prejudice to the appellant's claim that he subsequently acquired more land from the proprietors after they shared. That claim is not the subject of the instant appeal. It was the therefore erroneous for the learned trial Judge to find that the entire suit land formed part of the estates represented by the Respondents and to order for cancellation of the Appellant's entire title. In the exercise of the powers of this Court under section 11 of the Judicature Act, the order of the learned Judge is set aside and substituted with an order directing the Commissioner Land Registration to rectify the appellant's certificate of title by adjusting the acreage thereon to 472.272 hectares.

**GROUND 8, 9 & 10**

In ground No. 8 of the appeal, the Learned Trial Judge is said to have erred in law and fact when she ordered the appellant to compensate the Respondents in respect of the suit land. In ground 9 she is faulted for holding that the compensation for the suit land be at the prevailing market value ad in ground

10 she is said to have erred in law and fact, when she awarded the Respondents general damages in the sum of UGX 200,000,000.

The single question that arises from the above grounds is whether the respondents were entitled to the reliefs that were granted by the trial court. The learned judge granted the declarations and orders premised on the various findings that have been considered in the resolution of the grounds of this appeal. The learned judge is faulted for having ordered for the cancellation of the appellant's title, having ordered the appellant to compensate the respondents in form of payment, the equivalent monetary sum of the suit land and having awarded general damages and costs of the suit to the respondents.

I have already found that the 1st, 2nd, 3rd, 5th and 6th respondent's claim in the suit was affected by res judicata. I have also found that the claims by all the Respondents were barred by the law of limitation. I have however found that the title registered in the names of the appellant extends to land beyond that which he was entitled to.

There are no boundary disputes on the land, meaning the respondents had no contention over the land actually occupied by the appellant. The respondents were not in occupation of the land and have never had any developments thereon. There was no survey report adduced by the respondents to prove that the excess land appearing on the title registered in the names of the appellant is part of he occupies. They actually conceded that that they occupy part of the land and that part was sold to Keith Muhakanizi. Part is alleged to have been

sold by the family of Gakwerere to the appellant. There was also no evidence of the exact location of the share of the 4th and 7th respondents in the excess land. It is noteworth that there were 6 unaffected proprietors namely; Tisan Gakwerere, Samuel Rwitirinya, John Ramushasha, Paulo Bahonangenda, Gelvas Nyiringabo and Claver Kagenge. The four other proprietors or their successors in title did not sue the Appellant and have no claim against him. The 4th and 7th respondents would only be entitled to compensation, if they had proved that the Appellant occupied the entire 714 Hectares inclusive of their share as tenants in common. No such evidence was adduced. The developments on the suit land were all caused by the appellant, with the respondents watching for a period of 27 years. It would therefore be inequitable to award them any compensation. There would be no legal or factual basis for an order of compensation in favour of the Respondents. There would equally be no legal and factual basis for the award of general damages. The award was premised on what this court has found to be an erroneous conclusion of the trial court that the land occupied by the Appellant forms part of the estates represented by the Respondents, and that their claims were unaffected by res judicata and limitation.

Further, the effect of limitation is that the respondents' right to maintain an action for recovery of the suit land or compensation thereof was extinguished. As already held in this judgment, the position of the law is that where the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim. **See; *Iga v. Makerere University [1972] EA 65).*** In the

instant case, the learned judge fund that the Respondents had watched the appellant from when he entered the suit land in 1994, continued in occupation, developed the suit land and woke up 21 years later in 2015 to seek to recover the suit land. The learned judge further found that the respondents were not vigilant but indolent. I find useful guidance in the quotation by the Supreme Court in the ***Lutalo Lemmy Case*** that,

> *"....sometimes it is said that if a man neglects to enforce his rights, he cannot complain if after a while, if the law follows his example"*

I therefore find that the respondents were not entitled to any reliefs sought. Their inaction had vested the title by adverse possession in favour of the appellant. Their right to recover the land or any remedy at all was extinguished by operation of law. However, to the extent to which the appellant's title exceeds by 241.728 Hectares, it was unlawfully registered in his name and must be rectified to exclude the excess land. The order for compensation at the market value does not arise in light of the above findings. The order for mesne profits in the Cross appeal equally collapses for the same reasons. The learned judge had already found that equity helps the vigilant not the indolent. It would clearly be inequitable for the court to order for compensation to the respondents for the developments on land caused by the appellant, all effected under their watchful eye. Indeed, the doctrine of adverse possession was intended to cure such inequities. The order for such compensation had no legal or factual basis.

Section 11 of the Judicature Act confers upon this court, when hearing an appeal from the High Court in exercise of its original jurisdiction, the same powers as those of the trial court to the extent that the court can make the orders that ought to have been made by the trial court. See; ***Kamba Saleh Moses V. Hon. Namuyangu Jennifer Court of Appeal Electoral Petition Appeal No. 0027 of 2011***

The findings of this court equally dispose of the Respondents' cross appeal. The ground upon which the cross appeal is premised was whether trial judge erred in law in not ordering the eviction of the appellant/defendant from the suit land having found the appellant fraudulent in the title acquisition. On the finding that the appellant acquired title by adverse possession, the remedy sought in the cross appeal is rendered redundant and legally untenable. The prayer for mesne profits by learned counsel for the respondents in the submissions was not founded on any ground raised in the cross appeal. It also falls by the wayside. The net effect of the determination of this appeal is that the appeal is substantially allowed with part of the costs.

In the result, the appeal substantially succeeds and since Madrama JA and Mulyagonja JA agree, this appeal is allowed with the following orders;

a) The appeal succeeds partially on grounds 2, 6, 7, succeeds fully on the 1, 3, 5, 8, 9 & 10 and fails on ground 4.

b) The declarations and orders of the High Court are hereby set aside and substituted with an order that the appellant retains registration and

possession of the title to the suit land to the extent only of land measuring approx. 472.272 hectares.

c) The Commissioner Land Registration is directed to rectify the Appellant's certificates of title by adjusting the acreage of 714 Hectares to 472.272 Hectares.

d) The remaining land after deducting the 472.272 Hectares forms part of the estates of Tisisan Gakwerere, Samuel Rwitirinya, John Ramushasha, Paulo Babonangenda, Gelvas Nyiringabo and Claver Kagenge.

e) The respondents shall pay ¾ of the costs in this court and in the court below. The cross appeal is dismissed with costs to the appellant/ cross respondent.

It is so ordered.

Dated at Kampala this 25th day of May 2022

Cheborion Barishaki

**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA,**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**(CORAM: CHEBORION, MADRAMA AND MULYAGONJA, JJA)**

**CIVIL APPEAL NO 224 OF 2021**

**BEN KAVUYA}**

**.....**

**APPELLANT**

**VERSUS**

**1. BYARUHANGA KASIRYE}**
**2. KATO GODFREY}**
**(Suing as the Administrator of the Estate of the Late BULASIO KAMANZI}**
**3. NZABAMWITA JAMES}**
**4. REBERO JAMES}**
**(Suing as the Administrator of the estate of the late GELVAS NYIRINGABO**
**5. RUTAABA EDWARD}**
**6. KAMUNINI ROBERT}**
**7. MUGISHA YOSAM}**
**(Suing as Administrator of the estate of the late SAMWIRI RWITIRINYA}**
**.....RESPONDENTS**

*(Appeal from the decision of the High Court of Uganda Holden at Masaka, delivered by the Hon. Lady Justice Victoria Nakintu Nkwanga Katamba on 11th June 2021)*

**JUDGMENT OF CHRISTOPHER MADRAMA, JA**

I have had the benefit of reading in draft the judgment of my learned brother Hon. Justice Cheborion Barishaki, JA.

I agree with him that the appeal be partially allowed with the orders proposed and for the reasons he set out in the judgment. I would like to

state for purposes of emphasis that there were proceedings before a District Land Tribunal under the Land Act which gave rise to consequential orders issued by the High Court on the same subject matter of the suit which orders were never set aside.

The District Land Tribunal decision arose from **Application No 16 of 2005 between Ben Kavuya vs Botereza Yofesi and Others**. The decision of the Tribunal was against Boterezo Yafesi, Bulasio Kamanzi, Mikairi Ntimunduge, Paulo Ntango, Kasana Balunzi Co-operative society and Rwamizire. The Tribunal held that the defendants failed to submit their defence within time. The matter proceeded ex parte and the following orders were issued:

> in the circumstances judgment is hereby entered by Tribunal in favour of the complainant and it is declared that the complainant Mr. Kavuya Ben is the owner of plot 11 and 14 block 64 Kabula which is comprised in LRV 1253 folio... Secondly, the registrar of titles is also ordered to enter the said Mr Ben Kavuya as the registered proprietor of the above stated land. Lastly, the costs in this matter (are) awarded to the complainant.

Thereafter, the complainant who is now the appellant filed an application in the High Court in High Court Miscellaneous Application No 16 of 2005 arising out of the District Land Tribunal Claim Application No 16 of 2003 under section 76 (3) of the Land Act as amended and section 31 (d) of the Land (Amendment) Act, 1 of 2004 and section 98 of the CPA for consequential orders to give effect to the decision of the District Land Tribunal.

That learned trial judge of the High Court issued consequential orders after finding that certificate of title was consistent with the names in the Land Tribunal decision. Secondly the proprietors were tenants in common in equal shares. Finally, the learned trial judge held as follows:

> Each tenant in common owns an undivided share and all of them have unity of possession. No tenant can point to any part of the land as his own to the exclusion of the others. I think it was just a mistake on the part of the Tribunal to omit to mention plot numbers 1 and 2 Buddu Block 983. I do not think that by the judgment the Tribunal intended to divide the land the subject matter of the lease. If they had wanted to do this their decision and order would have been express

and clear. In my view, the Tribunal was merely concerned with the proof of sale of the interest of the persons' sued, and transfer of their interest and vesting of title thereto into the names of the Applicant. This is what I have done by this consequential order. The applicant should bear his costs hereof.

The learned trial judge ordered the execution of the judgment and decision of the land Tribunal by transferring the title and interest of the following persons to the appellant. The persons named are: Botereza Yofesi, Bulasio Kamanzi, Mikairi Ntirinduga, Paul Ntango and Rwamwizire.

The certificate shows that the land was partly registered in the names of Bulasio Kamanzi, Mikairi Ntirinduga, Paulo Ntango, Rwamwizire, and Yofesi Botereza as tenants in common. These were the persons who were affected by the Tribunal proceedings and bound by the orders unless set aside.

On the other hand, the other tenants in common namely Tisisan Gakwerere, Samuel Rwitirinya, John Ramushasha, Paulo Babonangenda, Claver Kagenge and Gelvas Nyiringabo were not parties and not affected by the orders issued by the High Court and the District Land Tribunal.

The first plaintiff was affected by the decision of the Tribunal and the consequential order of the High Court by virtue of deriving his interest from the estate of Botereza Yofesi. Secondly the second plaintiff derives interest from the estate of Bulasio Kamanzi and is affected by the decision of the Tribunal. The third Defendant is similarly affected by virtue of deriving interest from the estate of Mikairi Ntirunduga. The fourth plaintiff is not affected by the decision of the Tribunal because he derives interest from the estate of Gelvas Nyiringabo who is not a party to the Tribunal proceedings. The fifth plaintiff is affected because he derives interest from the estate of Paul Ntango. The sixth plaintiff is affected because he derives interest from the estate of Rwamwizire. Lastly the seventh plaintiff is not affected because he derives interest from the estate of Samwiri Rwitirinya.

The central issue for those affected is why they chose to file an original suit and not an appeal or file an application to set aside the Tribunal Decision and the consequential orders. It is material for this purpose that the claim before the District Land Tribunal proceeded ex parte against the affected

tenants in common. Similarly, the consequential orders sought pursuant to the decision of the District Land Tribunal proceeded ex parte before the learned trial judge who issued the consequential orders. Further the plots affected were specified and any other parties was affected by the orders if they have claims in the names plots.

An appeal lies from ex parte decrees under section 67 (1) of the Civil Procedure Act. Further under the Land Act Cap 227, section 87 (1), an appeal lies from a decision of the District Land Tribunal to the High Court.

**87. Right of appeal.**

(1) An appeal shall lie from the decision of a district land tribunal to the High Court.

The state of affairs is the superimposition of an order over another valid order which had not been set aside leads to a conflict of orders to be enforced by the Registrar of Titles. Such conflict ought to be dealt with by appeal or other proceedings to set aside the District Tribunal orders. This does not depend on consideration of the merits of the claim in this appeal and is a matter of due process.

In the final result, I have read the judgment of my learned brother Hon. Justice Cheborion Barishaki, JA on the issues in this appeal and I agree with it and I further have nothing useful to add to the orders he has issued.

Dated at Kampala the 25th day of May 2022

**Christopher Madrama Izama**

**Justice of Appeal**

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*Coram: Cheborion Barishaki, Christopher Madrama & Irene Mulyagonja, JJA*

**CIVIL APPEAL NO. 224 OF 2021**

***(Arising from HCCS No. 77 of 2015)***

**BEN KAVUYA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**-VERSUS-**

**1. BYARUHANGA KASIRYE**
**2. KATO GODFREY**
**(Suing as the Administrator of the Estate of the Late BULASIO KAMANZI)**
**3. NZABAMWITA JAMES**
**4. REBERO JAMES**
**(Suing as the Administrator of the Estate of the late GELVAS NYIRINGABO**
**5. RUTAABA EDWARD**
**6. KAMUNINI ROBERT**
**7. MUGISHA YOSAM**
**(Suing as Administrator of the Estate of the late SAMWIRI RWITIRINYA)**

**::::::RESPONDENTS**

**JUDGEMENT OF IRENE MULYAGONJA, JA**

I have had the benefit of reading in draft the judgment of my learned brother Cheborion Barishaki, JA. I agree that the appeal should succeed for the reasons that he has given and with the orders that he has proposed.

Dated at Kampala this 25th day of NOV 2022.

**Irene Mulyagonja**

**JUSTICE OF APPEAL**