THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

LAND DIVISION

CIVIL SUIT NO. 312 OF 2013

DR. PAUL BUSINGE.....PLAINTIFF

(suing through his duly appointed attorney Gladys Rwamwamba)

VERSUS

SSAKA KADDU.....DEFENDANT

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

Introduction:

The plaintiff Dr. Paul Businge through Gladys Rwamwamba his lawful attorney instituted this suit claiming to be the rightful owner of the land comprised in ***LRV 2709 Folio 6,*** known as ***plot 2847 block 203 at Namungoona Kigobe*** Kampala (suit property) which the defendant is currently occupying.

The plaintiff contended that he had purchased the land on 28th June, 2006 from National Housing and Construction Corporation Ltd, (NHCC) and at the time it was free from all encumberances.

In April, 2011 he obtained a certificate of title to the suit land. However that in March, 2012 the defendant made attempt to sell the suit land and later constructed structures thereon.

The defendant filed a defence however denying the plaintiff's claims of ownership of the land which according to him originally belonged to Prince Kimera Ssemakokiro having inherited it from his grandmother, as per her will.

That he had bought the land as a *kibanja* from one Salongo Semanda Gerald who had acquired the same from Sebadduka in 1994. The ownership by Salongo Semanda was duly recognized by the beneficiaries of the estate of the rightful owners.

Initially the hearing of this suit proceeded *exparte* against the defendant and this court presided over by J. E. K Kabanda on 18th October, 2013 in a default judgment ruled in favour of the plaintiff and made several orders against the defendant.

On 29th April, 2016 the said judgment was however set aside and the matter proceeded inter partes.

Representation:

The plaintiff was represented by ***M/s A. Murangira Advocates.*** The defendant was represented by ***M/s Kangaho & Co. Advocates***.

Issues for determination:

1. ***Whether the plaintiff is the registered proprietor of the suit land;***

2. ***Whether the defendant owns a kibanja/ customary interest over the suit property;***

3. ***Whether the defendant is a trespasser over the suit property.***

I will consider both the issues jointly since they are all interrelated.

Analysis of the law:

By virtue of ***section 101 (1) of Evidence Act, Cap. 6,*** whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist.***(George William Kakoma v Attorney General [2010] HCB 1 at page 78).***

The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contends, on a balance of probabilities. ***(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004).***

In this instance, the plaintiff had the burden to prove that trespass had been committed by the defendant.

In the case of: ***Justin Lutaya v Stirling Civil Engineering Company, Supreme Court Civil Appeal No. 11 of 2002, the Supreme Court*** trespass was defined as an unauthorized entry upon land that interferes with another person's lawful possession.

A tort of trespass to land is committed, not against the land, but against the person who is in actual possession of the land. Such possession may be physical or constructive.

In order to prove trespass, it is the party alleging so to prove that the disputed land indeed belonged to him; that the other party had entered upon that land; and that the entry was unlawful in that it was made without his permission or had no claim or right or interest in the land. ***(Sheikh Mohammed Lubowa vs Kitara Enterprises Ltd SCCA No. 04 of 1987).***

Consideration of the issues:

The plaintiff in this case testifying as ***Pw1*** relied on the supporting evidence of ***Pw2,*** Gladys Rwamamba his sister and appointed attorney; and ***Pw3,*** Brian Baguma the land surveyor, who filed a survey report. The defendant who was not represented at the time, chose however not to cross examine ***Pw2.***

It was the plaintiff's claim that he had left the country to work abroad having purchased the suit land. He introduced his sister ***(Pw2)*** to the NHCC officials and left her in charge of the suit property and to ensure its safety.

His plan was to find money and begin construction of a residential house for rent and possibly for him to use as his home in future. However, that around 2012 his sister called to inform him about the illegal entry and occupation of the suit land by the defendant.

The said information was gathered in 2013 through a neighbor, one Naome Ruhombe who claimed that the defendant had offered to sell to her the suit land.

That when ***Pw2*** went to the suit land she found complete structures. She also met the defendant who admitted that he was the owner of the residential house where he currently resides.

She reported the matter to the police and later filed this suit as the plaintiff's attorney for.

It is not in dispute that the plaintiff is the registered owner of the suit land, comprised in ***LRV 2709 Folio 6***, known as ***plot 2847 block 203 at Namungoona Kigobe Kampala.*** The certificate of title was tendered in as ***PExh 1***.

The defendant on his part relied on the evidence of three witnesses: ***Dw1*** Semanda Gerald Salongo. ***Dw2*** Kabuye Gonzaga as the LC Chairman and ***Dw3,*** Ssemakokiro Muhamed Kimera the purported holder of the mailo interest.

As duly submitted by his counsel the defendant did not turn up to have his own statement admitted and subjected to cross examination. In his submissions therefore, counsel referring to ***order 17 rule 4 of the CPR*** requested this court to proceed and decide the suit immediately based only on that evidence as availed to court.

Going by those provisions of the law where a party to a suit to whom time has been granted fails to produce his/her evidence or cause the attendance of his/her witnesses, or perform any other act necessary to the further progress of the suit for which time has been allowed, court may notwithstanding that default proceed to decide the suit. Court in agreement took into consideration the defence evidence together with all other evidence and all submissions as presented from each side.

In his written statement of defence he claimed that the certificate of title was procured by the plaintiff, well knowing of his prior interest and possession of the *kibanja* interest which he had enjoyed without interruption.

That with the knowledge of plaintiff he had been fully utilizing that land located at Lugala LC 1 Lubya Parish Lubaga Division which he had acquired way back in 2009. As such therefore the said title had been fraudulently acquired by the plaintiff.

Fraud is such grotesque monster that courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all transactions. ***(Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994] KARL 307).***

It is also trite law that that fraud that vitiates a land title of a registered proprietor must be attributable to the transferee and that fraud of a transferor not known to the transferee cannot vitiate the title. ***See: Wambuzi C.J, Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 2012.***

In the instant suit, the defendant's interest in the suit land purportedly arose from a sale transaction, as evidenced in the ***DExh 1,*** an agreement between him and one Ssemanda Gerald Salongo***, Dw1***.

Another handwritten Luganda agreement between Salongo and Sebadduka was also tendered in as ***DExh 2(a)***. *(English version:* ***(DExh 2b)*** for the *kibanja* located at Lugala in Lubya measuring *105 ft by 112 ft,* dated 15th February, 1994.

It was his proof that ***Dw1*** Semanda Gerald Salongo had lawfully acquired an equitable interest from another *kibanja* owner as early as 1994 which was later lawfully transferred to him. The year of this transaction was indicated as 2009 as per his WSD; and I shall come to this later.

The said sale agreement of 1994 shows the defendant's neighbours as Serwadda on the right, Ssemuju below and Nankya on the left hand side. None of these however came to court as witnesses, to confirm the defendant's claims.

Dw1, Semanda Gerald Salongo a resident of Lugala LC 1, Lubya Parish confirmed to court that he had sold the *kibanja* to the defendant in 2010. During cross examination he made it clear that what he had sold was *50ft x 100 ft.* Yet the sale agreement attached to his statement as ***annexture A,*** exhibited in court as ***DExh 1))*** showed an area of *70ft x 100 ft.*

From the same cross examination ***Dw1*** also revealed to court that the agreement he entered into in 1994 was for land in Lugala Lubya which area was different from that in Namungoona. He informed court that he had no land in Namungoona where the suit land is located.

Court also observed other discrepancies in the documents relied on by the defendant. The agreement ***DExh 1*** was endorsed by Mr. Kabuye Gonzaga, ***Dw2*** who in *paragraph 3* of his witness statement claimed to have been the chairperson of the LC 1 Lugala since 1998.

The said agreement which had been drawn by ***M/s Magala Mutyaba & Co. Advocates*** and the execution of which ***Dw2*** claimed he had witnessed had a stamp of the office of the chairperson, dated 18th April, 2010.

Court noted that the purchase price of ***Ugx 12,000,000/=*** had been paid and receipt of the entire sum acknowledged as received on that day. But also noted was the fact that ***DExh 1*** which was a crucial document to the defendant's defence had not been signed by him as buyer.

Court further observed that there was another agreement, bearing an earlier date *(annexture AA, attached to the WSD)*, the contents of which were not dissimilar to that attached onto ***Dw1's*** statement.

It was for the very same *kibanja*. However, the person who signed the agreement as the chairperson was not ***Dw2,*** but one Augustus Lusiba who was not brought as a witness in court.

This agreement dated 18th January, 2009 had been drawn by the firm of ***M/s Sabiiti & Co. Advocates***. The defendant as per that agreement had purportedly bought the same *kibanja* land from ***Dw1*** (the same vendor) at ***Ugx 12,000,000/=.***

Curiously, although the land in both agreements covered an area of *100ft x 70 ft.* the terms of payment appeared to have been different. Another term which was not included in the agreement of 2010 ***(DExh 1)*** was that a *kanzu* payment of ***Ugx 5,000,000/=*** had been made on 18th January, 2009, to acknowledge occupancy.

Those were grave discrepancies identified by this court bearing on the actual date and year on which the *kibanja* had been purchased. But that was not all. The agreement attached to the WSD was witnessed by chairperson Augustus Lusiba and other three witnesses: Kuteesa William, Sembatya John, Willy Macinuzi, none of whom however appeared in court.

Kabuye Gonzaga ***Dw2,*** had not been a witness to that agreement yet from his evidence he had been the chairman since 1998, thus raising serious doubt about the truthfulness of his testimony, as there could not have been two chairmen in the same area at the same time.

Also noted was the fact that Kabuye Gonzaga, had not been a witness to the agreement of 15th February, 1994 between Sebadduka Joseph the vendor, alleged by the defendant to have been the original *kibanja* holder, and Gerald Semanda Salongo where the latter purportedly bought the *kibanja* of *105 ft x 112 ft,* at a sum of ***Ugx 950,000/=.***

The assumption therefore was that although he had been on the land as a leader from 1998 as alleged, he knew nothing about the original ownership of this *kibanja.* As a matter of fact he told court that he met the defendant in 2010.

In *paragraph 4 (b)* of the WSD it was the defendant's claim that he had bought the land in 2009 and started utilizing it without interruption. As noted earlier, the agreement attached to the WSD was that of 2009 and it was not the same agreement that Gonzaga ***Dw2*** had witnessed. He had signed ***DExh 1,*** the one of 2010, which as noted the defendant never signed.

These were two agreements one in 2009 and another in 2010, drawn by two different firms for the same parties and same suit property, signed and witnessed by different people, within a period of one year with varying conditions of payment.

All this therefore left court wondering which of the two agreements was the correct one. It did a lot of damage to the credibility of the defendant's evidence.

On the question of acquisition/ownership, in *paragraph 4 (d)* of his defence, the defendant averred:

> *Further inquiries about legal ownership of the suit kibanja at the LC and neighbours also confirmed that the land belonged to the estate of His Highness the late Sir Daudi Chwa II. (emphasis added).*

In *paragraph 4 (f) of the WSD,* that he met the beneficiaries in 2009 (including ***Dw3)*** and they requested him to pay the *kanzu*/ground rent for recognition as tenant of their late grandfather.

The defendant further claimed that he had bought the *kibanja from* Salongo, ***Dw1*** who was fully recognized by the landlords in Buganda kingdom and as per the contents of the warranty clause in the agreement, ***DExh 1***, had full authority to sell the *kibanja* as his property.

Dw3 who was a key witness for the defence, while claiming to be a beneficiary, land owner and administrator of the estate of the late Daudi Chwa II however had nothing to show for it.

He did not present any letters of administration or certificate of title or prove to court that he was one of the beneficiaries under the estate of the late Daudi Chwa who from the WSD was the original mailo owner.

Among the documents presented by him to court was a document referred to by ***Dw3*** as a will, which dates as far back as 19th October, 1967, indicating that the land originally belonged to Nalinya Masitula Nkinzi Tajuba and given to ***Dw3***, her grandson.

There is nothing to prove that probate was ever applied for and granted to ***Dw3*** or anyone else for that matter. Indeed, ***Dw3*** was neither the executor nor the administrator of the estate of the late Chwa II.

Additional to that was that no attempt was made to explain the relationship between ***Dw3*** and the late Chwa II on the one hand and between Nalinya Masitula Nkinzi Tajuba and the late Chwa II on the other hand.

One therefore wonders what authority ***Dw3*** had relied on to collect the *busuulu* payments on land which belonged to his predecessors, land over which he had no title or letters of administration so as to authorize the defendant or any of his predecessors to buy, sell and occupy the *kibanja.*

In search of the answers court carefully perused through the rest of the documents presented by the ***Dw3*** and noted that the land which he claimed as owner was comprised in Keed/71/1/16/12/NE/2/3030/FC land at Lugala. The said Final Certificate (FC) issued by the office of the Administrator General was however not presented in court, to support such inheritance/ownership.

In any case ***section 32 of the RTA Cap. 230*** provides for the closing of the 1908 register. This was the register for FCs and PCs. It is common knowledge that such can no longer be used as evidence of ownership.

Counsel for the defendant in his submission maintained that a letter dated 19th October, 1990 by Commissioner for housing had listed 23 occupants who were authorized to stay and remain on the land and had to be issued with the title deeds in respect of the lands occupied.

Another letter dated 13th November, 2013 addressed to the Chairman Uganda Land Commission (ULC) indicated that ***Dw3*** Prince Kimera Ssemakokiro had obtained letters of administration. As noted earlier the letters were not availed in court.

The said letter written by Prince Bemba Samuel Peter Chairman, Cultural norms/traditions committee in the abalangira clan requested the ULC to issue the titles to the owners of the various plots. The actual plot numbers, block numbers and the respective owners of those plots were not listed.

As submitted by counsel for the plaintiff, the author of this letter was not a witness in court. It was neither addressed to the defendant, to ***Dw3*** who presented it, or copied to either.

Reference was also made to a letter by BLB dated 27th August, 1996 and an earlier one from Sabalangira dated 28th September, 1967, and a consent judgment, documents claimed to be within the custody of the ULC but which were not availed to court.

In the assessment by this court, the said documents within the custody of the ULC evidence were so crucial to the determination of ownership of the disputed land and to the defendant's claim of interest thereon but were conspicuously missing.

Besides, there was nothing to prove the authenticity of the said correspondences since no original or certified copies were produced for verification. There was no proof that they were duly received by those for whom they were intended.

Court therefore also had to proceed with caution given that the plaintiff's side was never given a chance to fully cross examine the witness ***Dw3*** who had presented them, following his demise in the course of the trial.

Accordingly, no value could be attached to any of those documents which were reserved for identification pirposes, or those in respect of which ***Dw3*** was never cross examined following his death.

Whether the defendant owns a kibanja/customary interest over the suit property.

On the issue as to whether or not the defendant's interest was of a customary tenure, counsel for the plaintiff submitted that the ***Public Lands Act of 1969 and Land Reform Decree of 1975*** prohibited ownership of customary interests. That on the basis of those laws, the defendant and the vendor, Gerald Semanda could not have legally obtained/owned customary land on public land.

The defendant however denied any claim that he was a customary interest holder as the claim did not appear anywhere in his pleadings or in any of the pieces of evidence led by the defendant. He claimed that his was a *kibanja* interest out of which he derived protection under the ***1995 Constitution and the Land Act, Cap. 227.***

Counsel referred to ***section 54 of the Public Land Act*** which defines customary tenure as a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons.

He also referred to the definition and incidents of such tenure under ***sections 2 and 3 of the Land Act, Cap. 227***, which provisions I need not reproduce here since neither of them was applicable to the defendant in the present case.

Analysis by court:

A *kibanja* has been perceived as a form of a customary land tenure to be found mainly in the Buganda region and held according to long established rules developed along Kiganda customs and to fall within the meaning of ***section 3*** of the Act.

The court in ***Kampala District Land Board & George Mutale vs. Venansio Babweyala & Ors (SCCA 2/07),*** declared that a customary tenancy must be proved.

Such proof would entail for example long occupation, recognition of the owner of the reversion or landlord (and vice versa) and payment of ground in the case of land in Buganda in some instances payment of a type of land tax or rent.

The Land Reform Decree 1975, declared all land in Uganda to be public land, to be administered by the Uganda Land Commission in accordance with the ***Public Lands Act 1969,*** subject to such modifications as may be necessary to bring that Act into conformity with the decree.

The system of occupying public land under customary tenure was to continue, but only at sufferance and any such land could be granted by the Commission to any person including the holder of the tenure in accordance with the decree.

In the view of this court however, and more relevant to this instant case was the law on the ***Traditional Rulers (Restitution of Assets and Properties) Act, Cap. 247,*** enacted in 1993 to give effect to ***article 118A of The Constitution of 1967,*** with the objective of, among other things restoring to the traditional rulers' assets and properties previously owned by them or connected to their offices.

Listed in the schedule to that Act was the Kabaka's official 350 square miles. The law (which was never challenged) did not make any distinction between what properties belonged to the estate of the late Daudi Chwa II and what was entrusted to the Kabakaship.

The defendant's claim was premised on the ownership of the land by ***Dw3. Dw3*** claiming to be a grandson and beneficiary under the late Nalinya's will was presumably also a beneficiary of the Daudi Chwa II, though this did not clearly come out from the defendant's evidence.

One of the correspondences he brought to the attention of court was addressed to Her Royal Highness Nnalinya Edith Nabweteme Chwa II, dated 11th December, 2009 from the Ministry of Lands and Public Buildings.

It refers to a list of the properties owned by the late Kabaka Chwa II in his individual capacity. Another letter dated 8th January, 1988 was written by the Secretary BLB addressed to the chairman LC1 Kasubi II Kilundu zone. In that correspondence, reference was made to the will of Nalinya Masitula Nkiinzi Tajuba as owner of ***plot No. 15 block 2003 (sic!).***

The land which according to that letter covered an area of 99 acres and 87 decimals belonged to ***Dw3.*** Indeed, as per the purported will dated 19th October, 1967 of Nalinya Masitula Nkiinzi Tajuba ***Dw3*** had been bequeathed 308 acres.

He was free to get a surveyor and curve off his share. Going by what is stated in those correspondences, it would appear that by the time of his death, ***Dw3*** had not done so.

Dw3 in his evidence claimed that the title ***PExh 5*** issued by the Kabaka to NHCC was fake. That the Kabaka had fraudulently leased his ***(Dw3's)*** land. These were serious allegations, however since neither the Kabaka not ***Dw3*** were party to this suit, court chose to disregard them.

In addressing the issue of the original ownership of this land, court takes judicial notice of the fact that from the 1900 agreement, the late Chwa was handed over hundreds of square miles of land.

Dw3 in his evidence kept referring to various suits over that estate, which according to him were pending hearing and determination in this division. As established from the record however, ***Civil Suit No. 433 of 2017 Prince Muhammad Kimera Semakokiro vs Kabaka*** had been dismissed by Justice Bashaija on 13th September, 2017. ***Civil Suit No. 705 of 2014 Prince Muhammad Kimera Semakokiro vs Kabaka*** was withdrawn on 6th July, 2020 by Justice Keitirima.

Another suit, ***Civil suit No. 537 of 2017*** was filed by ***Kimera Muhamad Semakokiro vs Prince Kalemera & Nalinya Nandaula (Administrators of the estate of the late H. R. H Sir Daudi Chwa II) vs Kabaka of Buganda, Buganda Land Board; Commissioner Land Registration & Attorney General.***

This also followed an earlier suit: ***Civil Suit No. 180 of 2017*** which had been filed by that same plaintiff. In that suit he sought to protect the property that he claimed was wrongfully returned and was in possession and in control of the Kabaka of Buganda and BLB.

In respect to ***Civil Suit No. 537 of 2017,*** this was transferred to this division. On 11th July, 2018 however, it was dismissed for want of prosecution, with costs to the defendants. It was reinstated under ***MA No. 1136 of 2019***.

From the information availed on ECCMIS, no other suits or appeals were pending regarding the estate of the late Chwa II as ***Dw3*** had wanted court to believe.

In ***Civil Suit No. 537 of 2017*** the suit that had been reinstated, court found that the plaintiffs had no *locus standii* to file that suit; and furthermore that the suit was barred by the statute of limitation.

That since the period of limitation started running in 1939, the 12 years had lapsed in 1951.

Court further held that in 1993 when Government expropriated properties of the kingdom, the limitation had long set in. Returning them to the Kabaka could not therefore amount to fraud committed by the defendants in that suit.

Court concluded that given the nature of the estate, the beneficiaries could not therefore claim they only heard about the fraud in 2017, the year in which they filed the suit. The said decision which was made by the Hon. Principal Judge on 28th September, 2020 has never been challenged.

I have laboured to go through this history to show that following the said findings and orders of court and the law on restitution on properties, the purported beneficiaries of the Chwa II estate (which properties the defendant believed included the land in dispute), no longer had any direct and valid claim/interest in that land, as it had all been entrusted to the institution of the Kabaka and currently under the management of the BLB.

Dw3's evidence was therefore only intended to mislead this court as he himself was fully aware of or had constructive knowledge of all these developments on the concluded cases before he came in to testify.

For that reason, the defendant could not rightfully claim that his entitlement emanated from the estate of Chwa II. His land lord could not have been ***Dw3*** or the administrators of the late Kabaka Chwa II or Nalinya under whom they claimed to have derived ownership, as the defendant wished court to believe.

The law under ***section 29 of the Land Act, Cap. 227*** defines a lawful occupant to include a person who entered the land with the consent of the registered owner and includes a purchaser.

It also includes a person who had acquired land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at

the time of acquiring leasehold certificate of title. Neither ***Dw3***, not his alleged predecessors in title were the registered owners of the property in dispute.

As noted earlier in the holding of ***Kampala District Land Board & George Mutale vs. Venansio Babweyala & Ors (supra),*** a customary tenancy must be proved and such proof would entail long occupation, recognition of the owner of the reversion or landlord (and vice versa) and payment of ground in the case of land in Buganda in some instances payment of a type of land tax or rent.

The defendant and his predecessors to the defendant never showed any such proof to court. The *busuulu* therefore had to be paid to the Kabaka, no***t*** to ***Dw3*** who in any case admitted in cross examination that he had no title to that land.

Court's attention was also drawn to two specific areas found crucial to the determination of the ownership of the disputed area:

1. Uncertainty in the location and measurements of the disputed land:

Location of the kibanja:

The plaintiff relied on a copy of the survey report for the boundary opening of the suit land, dated 16th July, 2019 filed by Baguma Brian, ***Pw3,*** a land surveyor to support his claim that the *kibanja* in dispute is seated on a substantial portion of that land as reflected on ***PExh 8.***

As per the findings in that report, the entire plot was built up with two residential homes, occupying 0.035 acres and 0.093 acres respectively, making a total area of 0.128 acres. No physical marks stones were found on the ground during the exercise.

The computed area of the entire plot was 0.051 hectares, which matched with what was indicated on the lease title. The said title had been created on 29th March, 1999 and transferred into the names of the plaintiff in 2011.

It was also the surveyor's evidence and findings that the developments on the ground overlapped the cadastral boundaries, thus partly encroaching onto the

neighboring plots. The said structures were seen by court during the *locus* visit conducted on 19th June, 2019.

On *page 3* of the report it is clearly stated that *the land was located in Kigobe cell, Namungoona, Kampala district. The plot was approximately 800m from Kasubi Lungujja tarmac road within the former National Housing estate. As per cadastral map, the plot boarders with access roads in either directions.*

A perusal of ***DExh 2 A/B*** shows that the transaction for the *kibanja* was endorsed by Lugala RC 1 on 15th February, 1994. However, Sebadduka, the party who sold to Gerald Semanda Salongo was not presented as a witness to court.

But secondly, nowhere in the unchallenged report was the village of Lugala referred to.

The above distinct features on location and available access roads did not come out in any of the agreements relied on by the defendant in respect of the *kibanja*. As established during the *locus* visit, p***lots 2844, 2846, 2848 and 2849,*** all of them surrounding the area in contention ***(plot 2847)*** belonged to NHCC, not ***Dw3***.

Dw2 Kabuye Gonzaga had been the chairperson of Lugala LC 1 since 1998 and presumably knew the area well. He admitted however that had never seen a certificate of title in ***Dw3's*** names.

During cross examination he was asked about whether he was chairman of Namungoona Kigobe, where the land was located. His response was in the negative and indeed the document he endorsed was not for Namungoona where, as admitted by him NHCC had land.

Dw1 who sold to the defendant had also admitted that he had no land in Namungoona but had land in Lugala Lubya Parish. Nowhere in his testimony did he indicate that the land he had sold to the defendant was in Namungoona.

This can only mean that the defendant relied on the agreement for the land located in Lugala LC to prove ownership and acquisition of *kibanja* in Namungoona.

In effect, the defendant's attempt to use ***Dw2***'s evidence to misled court into believing that he was the LC chairman of Namungoona failed, as the *kibanja* clearly fell within the area of Lugala L.C1, (***DExh 2a.***)

The measurements of the kibanja:

It also caught this court's eye that a sketch that was drawn for the *kibanja* purchased at ***Ugx 950,000/=*** had measurements of *112ftx 105 ft;* and the neighbours on either side were mentioned.

The measurements however did not tally with those appearing in the sale agreement ***DExh 1*** mentioned as *70ft and 100ft,* alleged to have been bought by the defendant.

His own witness ***Dw1*** during cross examination denied having sold *70ft and 100ft* to him, maintaining that he had only sold to him an area of only *50ft x 100ft.* No sketch was availed to court for verification during the *locus* visit by court. The unsubstantiated and contradictory statements and documentary evidence of the defendant were therefore quite revealing.

In conclusion therefore, viewed jointly with ***Pw3's***, (the surveyor's report), it is clear that the defendant bought land in one area, trespassed into another relying on an agreement from a different location and in the process of construction encroached on the neighbouring plots. None of the neighbours were brought as witnesses in court.

It was also noted by this court that in each of the sale agreements which the defendant sought to rely on there was no full description of the land in dispute. There was neither plot number nor block number.

The actual area, size or neighbourhood did not appear in the documents ***DExh 1a/b***; and because the measurements and location were not similar, the defendant could not convince court that this was the exact portion of the *kibanja* which ***Dw1***, Salongo had actually sold to him.

The *busuulu* receipts themselves did not indicate the actual plot No, block No. or name of the village where the *kibanja* was located. This was crucial given the fact that the letter dated 8th January, 1988 from BLB presented by the defence side as proof that 99 acres inherited by ***Dw3***, was addressed to another LC 1 Kasubi II Zone, not the Lugala LC where the *kibanja* was situated.

The said letter on record also seems to suggest that in 1988 the 'LCs' had already been created and that in 1994 what was in place were the RCs'. Suffice to note and indeed this court takes judicial notice that LCs are in operation up to today, having replaced the RCs, but not the other way round.

That only seemed to suggest that some of these correspondences relied on by the defence were concocted. As such therefore, in light of the above discrepancies the defendant's evidence could not have provided sufficient back up for his defence.

The general principle is that in order for a party to claim interest in the land, his title ought to be derived from someone who had a recognized right and title on land. (***Godfrey Ojwang Vs. Wilson Bagonza CA No. 25 of 2002). Dw3*** and his predecessors and Salongo Semanda and Joseph Sebadduka had no recognized or provable rights on the land in Namungoona claimed by the plaintiff.

2. Requirement for consent:

Dw1 when put to ask about the *kibanja* he acquired land in 1994 stated that he went to *omulangira* who was the owner to seek permission to sell. He admitted however that he never found out if Ssebadduka (purported original *kibanja* holder) had before selling the *kibanja* to him secured any consent or permission from the owner.

He presented ***DExh 3*** *busuulu* payment receipts from May, 1996; 12th July, 1998; 5th February, 2008; 25th March, 2011; and 3rd February, 2018 which were issued in the names of ***Dw3,*** one of the purported beneficiaries/administrators of the estate of the late Daudi Chwa II (as listed in *paragraph 4(e)* of the WSD).

Dw3 confirmed to court that his family recognized the predecessors of the defendant; and also acknowledged him as the rightful owner of the *kibanja* which he occupied having paid money to him for the *kkanzu* and therefore legally occupied the *kibanja*.

Section 34 (1) of the Land Act requires the tenant by occupancy who wishes to assign, sublet or otherwise deal with the land to do so with the consent of the land owner. The same principle equally applies to an owner who wishes to dispose of the *kibanja* interest.

By virtue of ***section 35 of the land*** the first option of taking the assignment of the tenancy is given to the rightful owner, which is what Salongo should have done before selling the *kibanja* to the defendant.

The Kabaka at the time of leasing that land to NHCC had the right to do so since the beneficiaries of Sir Daudi Chwa II had no title to that land, letters of administration or valid claims as would allow them to transact in that land.

The claim by the plaintiff that at the time of purchasing it, it was vacant land was disputed raising the question as to whether the land was therefore available for leasing by the Kabaka to NHCC and thereafter by NHCC to the plaintiff.

In ***Suleiman Adrisi v Rashida Abul Karim Halani & Anor Civil Suit No. 008 of 2017*** court observed that land is available for leasing when it is:

i) vacant and there are no conflicting claims to it;

ii) occupied by the applicant and there are no adverse claims to that occupation;

iii) where the applicant is not in occupation but has a superior equitable claim to that of the occupant; or

where the applicant is not in occupation but the occupant has no objection to the application.

PExh 2 is an application by the plaintiff for the lease which was addressed to the Managing Director of NHCC. It is dated 20th August, 1999. ***PExh 3*** is a sale agreement for the suit land between NHCC and the plaintiff. It is dated 28th June, 2006, some four years before the defendant purportedly bought the *kibanja* and started construction that land.

In *paragraph 1* of the plaintiff's agreement, reference was made in the submissions to a *dwelling house* which he found on that plot. It should be noted that parties are bound by their own pleadings.

Thus in response to counsel's argument that the plaintiff was not a *bonafide* purchaser, and with all due respect, nowhere in the WSD did the defendant claim to have put up any structure before 2006, (year in which plaintiff entered the agreement) as counsel would have liked court to believe.

It is also trite law that he who alleges must prove. Whereas as argued therefore no witnesses were presented from NHCC the certificate of title issued to the plaintiff in 2011 remained unchallenged by the defendant or the NHCC or the Kabaka for that matter.

The defendant had a burden to discharge to prove forgery against the plaintiff and justify the cancellation of his title, which burden he did not discharge as nowhere in his defence did he seek orders for the cancellation of the plaintiff's title.

He failed to present any such proof of forgery of the letter received by the plaintiff from NHCC, ***PExh 6***, dated 21st June, 2013 which gave him the assurances that the land was unencumbered at the time the plot was leased to him; or ***PExh 4*** (transfer by NHCC of the suit land to the plaintiff in 2006); or the lease title ***PExh***

5. In ***PExh 6,*** as noted by court, NHCC had duly confirmed to the plaintiff that it had no knowledge of the defendant.

It has been stated that there is need for caution in the application of the provision of ***section 29 (2) (a)*** which provides that an occupant of land seeking a benefit from the provision of *bona fide* occupant has to prove that he had been in such possession for a minimum of 12 years, without any challenge to such occupation before the coming into force of 1995 Constitution.

That provision was not available to the defendant's predecessors or the defendant who in any case had admitted that he had entered onto the land in 2010.

It is quite apparent that that the intention of the ***Constitution and the Land Act*** is to protect the occupancy of those who are not licencees but *bona fide* upon their adverse possession within the meaning of the Act. (***Civil Suit No. 857 of 2000: Jonathan Masembe and 3 others vs. Makerere University & 2 others. (Owiny Dollo).***

NHCC had acquired the lease from Kabaka as early as 1996 and since then enjoyed quiet and uninterrupted occupation which neither the Kabaka nor the defendant or his predecessors who claimed to be the legal interest owner ever challenged.

The beneficiaries of Chwa II's estate ought to have brought their claim against Kabaka ownership as early as 1993 where the property was restored by law to the kabakaship, which apparently they never did.

Trespass is committed not against the land but against the person who may be either in physical or constructive possession of the land. The plaintiff in this suit obtained an equitable interest which later translated into a legal interest at the time of his registration as proprietor of the land ***(Ref. Edward Nelson Serunjogi vs Sewava Katabire [1988-1990] HCB***)

If the defendant had prior to the purported purchase carried out due diligence with the help of the chairperson of Lugala and duly obtained confirmation from neighbors about the ownership of the land, he would have established that NHCC had already acquired its interest therein; and that ***Dw3*** to whom he claimed to have paid *busuulu* had no valid title or other documents to prove ownership or authority over that land.

Section 59 of the RTA provides that every certificate of title issued under the Act is conclusive evidence that the person named therein is the proprietor of the land. ***(Yekoyasi Mulindwa vs Attorney General [1985] HCB80).***

The evidence led by the plaintiff in this case was sufficient to prove that he was the rightful owner of the suit land

The defendant who is in physical occupation entered and occupied the land without the consent of the actual owner. He has no valid interest in the land and therefore, a trespasser to that land. The above findings accordingly resolve ***issues 1, 2, and 3.***

Remedies:

The plaintiff prayers were for among others:

a) *a declaration that he is the rightful legal owner of the suit property;*
b) *An order for vacant possession against the defendant;*
c) *A demolition order for the destruction and removal of the defendant's illegal structures on the suit property;*
d) *A permanent injunction against the defendant restraining him or any person claiming under him from trespassing onto the suit property*
e) *An order of damages for trespass and for inconvenience and mental anguish;*
f) *Mesne profits;*
g) *Interest on sums awarded above 24% p.a from the date of the trespass till date of the judgment;*

h) Costs of the suit

General damages:

General damages are those that the law presumes to arise from direct, natural or probable consequences of the act complained of by the victim. These follow the ordinary course or relate to all other terms of damages whether pecuniary or none pecuniary, future loss as well as damages for paid loss and suffering. ***See; Uganda Commercial Bank Vs Deo Kigozi [2002] EA 293.***

Black's Law Dictionary 9th Edn at page 445 defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong.

It is trite law that damages are the direct probable consequence off the act complained of. ***(Ref: Storms versus Hutchison (1905) AC 515.)***

In the case of ***Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35*** it was held that the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering.

The evidence led by the plaintiff given the circumstances under which the defendant committed trespass on the suit land is sufficient to support an award of ***Ugx 50,000,000,/= (shillings fifty million only),*** as general damages.

Mesne Profits:

It is settled law that mesne profits are assessed on the basis of value of the premises assessed at the current market value. Since the plaintiff did not any basis for the assessment I decline to grant mesne profits based on actual loss suffered.

The final position is that judgment is entered in favor of the plaintiff in the terms below:

a) a declaration issues that the plaintiff is the rightful owner of the suit land comprised in LRV 2709 Folio 9, plot 2847, block 203, land at Namungoona Kigobe Kampala;

b) the defendant who is in occupation of the suit land entered and occupied it without the consent of the actual owner. He has no valid interest in the land and therefore, a trespasser to that land.

c) the defendant is to pay a sum of Ugx 180,000,000/= (shillings one hundred and eighty million only) as estimated value of the land within a period of four months from the time of delivery of this judgment;

d) Upon failure to pay the said sum, the defendant and those claiming under him shall give vacant possession after the four months have elapsed; and a permanent injunction and a demolition order shall automatically issue against him or those claiming under him, for the removal of the illegal structures on the suit property;

e) an order issues for an award of Ugx 50,000,0000/= (fifty million) as general damages for trespass and for the inconvenience and mental anguish caused to the plaintiff.;

f) interest of 15% per annum shall be payable to the awards granted in c) and e) above, from time of delivery of this judgment until payment is made in full.

Costs of the suit to the plaintiff.

I so order

Alexandra Nkonge Rugadya

Judge

24th May, 2023

Delivered by eCil
Nkonge
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24/5/2023