THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON JUSTICE S.G. ENGWAU, JA

HON JUSTICE S.B.K. KAVUMA, JA

CIVIL APPEAL NO. 112/2003

JOHN BUSUULWA :: APPELLANT.

VERSUS

1. JOHN KITYO

2. MUHAMED LUBUUKA

3. SSALI E:: RESPONDENTS.

[Appeal arising from judgement, Decree and Order of the High Court at Kampala by Mr. Justice J.B.A. KATUTSI dated 3-12-2002]

JUDGMENT OF HON JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

This is a second appeal from the judgment of the High Court at Kampala (Katutsi J) dismissing the appellant's appeal on 3-12-02.

John Busuulwa, hereinafter referred to as the appellant, appealed to the High Court against the judgment and orders of the Grade 1 Magistrate, His Worship Gadenya Paul Walimba, dated 4-10-98, at Mpigi.

The appellant unsuccessfully sued John Kityo, Muhamed Lubuuka and Ssali, hereinafter referred to as the 1st, 2nd and 3rd respondents respectively, in the Magistrate's Court, for trespass on to his land comprised in Mailo Register Block 270 Plots 23, 25 and 33, hereinafter referred to as the suit land. He sought a permanent injunction restraining the respondents from any further acts of trespass on the suit land, a declaration that they were trespassers, an order of eviction, general damages and costs of the suit.

The learned magistrate dismissed the suit against the 1st respondent. He declared that the 2nd and 3rd respondents were not trespassers, that the 2nd and 3rd defendants are not customary tenants on the suit land and issued an eviction order and a permanent injunction against them. He awarded costs of the suit to the plaintiff.

The facts were that the appellant had bought the suit land during 1988 when it was vacant. After doing some cultivation he let it to fallow during 1991-1992. It was during this period that it was encroached upon by strangers including the 3 respondents who started cultivating it without his consent. After consultations with the LCs he served them with notice to vacate which they declined to do and instead asked him to produce the person who had sold him the land. This he could not do as the vendor was in the US, so he claimed. He, however, produced his certificate of title. The three respondents claimed to have been on the suit land as Bibanja holders before he bought it. He thus filed a suit in the Magistrate Grade 1 court at Mpigi. In a remarkably confused judgment, the Magistrate dismissed the suit against the 1st respondent. He declared that the 2nd and 3rd defendants were not trespassers nor were they customary tenants on the suit land. He, however, issued a permanent injunction and an eviction order against them. The appellant was awarded cost of the suit.

The appellant, by his amended Memorandum of Appeal dated 30-11-2000, appealed to the High Court advancing the following grounds:

1. **THAT the learned trial Magistrate erred in law and in fact when he contradicted himself with regard to the ownership and possession of the Kibanja by the first defendant and as a result came to a wrong conclusion.**

2. **THAT the learned trial Magistrate erred in fact and in law in holding that the first defendant had proprietary interest in**

the suit Kibanja and that the defendant acquired such interest before the plaintiff acquired the Kibanja and or the plaintiff acquired the said Kibanja subject tot he 1st defendant's proprietary interest.

3. THAT the trial Magistrate erred in fact and in law in holding that the first defendant was NOT A TRESPASSER.

4. THAT the learned trial Magistrate erred in failing to order any remedies for the plaintiff against the first defendant i.e.

(a) General damages for trespass and

(b) Costs of the suit.

5. THAT the learned trial Magistrate erred in fact and in law with the second and third defendants in respect of ownership and possession of the respective Bibanja in question and be right to stay thereupon.

6. THAT the learned trial Magistrate erred in fact and in law when he contradicted himself and held that the 2nd and 3rd defendants cannot be said to be trespasser on the plaintiff's land and as a result arrived at a wrong decision.

7. THAT the learned trial Magistrate erred in fact and in law when he failed to award general damages against all the defendants and as a result came to a wrong decision.

8. THAT the learned trial Magistrate erred in fact and in law when he failed to find that the defendants' defence of customary tenancy did not apply to a situation where Kibanja/Bibanja was/were purportedly acquired under mailo land.

9. THAT the learned trial Magistrate erred in fact and in law when he contradicted himself in his judgement and thus came to a wrong decision.

Dismissing the appeal, the learned judge held:

> **"… On a balance of probability. The three defendants had established the fact that they had Bibanja on the land, which was later purchased by the plaintiff. There is no doubt that in law the land belongs to the plaintiff. But the same law protects Bibanja holders. They cannot simply be evicted at the whim of the plaintiff. He must follow and satisfy the law before he can do that. There is no doubt that the trial Magistrate did "contradict himself with regard to ownership and possession of the Kibanja by the first defendant as complained by the plaintiff. Indeed he did. Despite that contradiction or to be exact confusion, in as far as he held: "certainly, when the plaintiff acquired this land, he acquired it subject to the proprietary interest of the defendant." Although I would not have used the word proprietary, he came to a record decision.**
>
> **He was definitely wrong to dispossess the other defendants of their Bibanja. As I said above the two defendants did not cross-appeal. If they had in my humble opinion they would have succeeded. Plaintiff in his wisdom joined them in his appeal. I have no hesitation in dismissing his appeal with costs I order accordingly."**

Before us, Mr. Muguluma E. Ddamulira appeared for the appellant while Mr. Charles Mbogo was for all the three respondents.

The conferencing was not very helpful as each party filed their own notes. There was no consensus on anything.

The Memorandum of Appeal to this court comprises the following grounds:

1. **That the learned judge erred in fact and in law when he ordered and decreed that the decree (in the Magistrate's Court at Mpigi) is silent about the 1st defendant/1st respondent and that the appeal is incompetent and dismissed it with costs.**

2. **That the learned judge erred in fact and in law when he further ordered and declared that the appellant got registered on the land subject to the encumbrances/Bibanja interests of the respondents.**

3. **The learned judge erred in fact and in law when he held that when the plaintiff acquired the land, he acquired it subject to the proprietary interests of the defendant/defendants.**

4. **The learned judge erred in fact and in law when he held that the 1st defendant owned and was in possession of the Kibanja before the plaintiff.**

The learned judge erred in fact and in law when he failed to find and order and declare that all defendants were trespassers and as such ought to pay general damages and costs to the plaintiff.

6. **That the learned judge erred in fact and in law when he failed to issue a permanent injunction against all defendants stopping them from interfering with the suit land.**

Regarding ground No.1 that the learned judge erred in fact and in law when he ordered and decreed that the decree (in the Magistrate's Court at

Mpigi) is silent about the 1st defendant/1st respondent and that the appeal is incompetent and dismissed it with costs, the record indicates the learned judge having stated at page 136, thus:

> **"As I have indicated herein above the decree is silent about the 1st defendant. It can legitimately be said therefore, that the appeal against the 1st defendant is not grounded on a decree and is therefore incompetent. I will nevertheless examine the merits of this appeal…"**

With respect the rest of record does not bear out the learned judge's observation as both learned counsel concurred.

The Decree at page 102 reads inter alia:

> **"…It is ordered and Decreed that the suit against the 1st defendant be dismissed and it is hereby dismissed…"**

The learned judge seems to have misread or merely glossed over the Decree. The suit was dismissed against the 1st respondent.

Ground No.1 therefore fails.

Grounds 2, 3 and 4 were argued together by Mr. Muguluma.

For a reminder these aver:

2. That the learned judge erred in fact and in law when he further ordered and declared that the appellant got registered on the land subject to the encumbrances/Bibanja interest of the respondents.
3. That the learned judge erred in fact and in law when he held that the plaintiff acquired the land, he acquired it subject to the property interest of the defendant/defendants.
4. The learned judge erred in fact and in law when he held that the 1st defendant owned and was in possession of the Kibanja before the plaintiff.

Mr. Muguluma reviewing all the evidence on record submitted that the respondents were not on the suit land at the time the appellant bought the land in 1988 from one Mrs. Mfamba, the daughter of the first proprietor, Mrs. Kirre. There were no coffee trees nor bananas or any sign of habitation. He pointed out that this absence of human habitation was confirmed by the surveyor Francis Bukulu, PW4, who opened up the boundaries. The respondents did not establish their existence on the land before the appellant bought it. In counsel's view the learned trial judge did not evaluate the evidence. He prayed court to allow grounds 2, 3 and 4.

Mr. Mbogo for the respondent contended that the respondents had Bibanja on the suit land before the appellant bought the land. It is the war which drove them away. He pointed out that the court should take judicial notice of the NRA bush war. He asserted that the Registration of Titles Act Section 92(2) protects the respondents as Bibanja holders found on the land by the appellant.

The learned appellate judge held as pointed out above:

> **"In this judgement the learned trial magistrate does not say that he doubted the veracity of these witnesses. On a balance of probability. The three defendants had established the fact that they had Bibanja on the land, which was later purchased by the plaintiff. There is no doubt that in law the land belongs to the plaintiff. But the same law protects Bibanja holders. They cannot simply be evicted at the whim of the plaintiff. He must follow and satisfy the law before he can do that…"**

It is well settled that a second appellate court should accept the findings of fact as determined by the trial court and confirmed by the Court of

Appeal unless it can be shown, that either court or both erred in law or in fact or mixed law and fact.

In this case, the learned trial magistrate seems to have had immense difficulty in writing his judgment. It is so full of inconsistencies and contradictions. He got terribly mixed up with the law and facts as rightly pointed out by the learned judge.

The evidence on record is as follows.

The 1st respondent testified that on 5th May 1990, when the LC1 chairman, Mr. Kanyike (RIP), invited the Bibanja holders on the suit land to meet the appellant, Mr. Busuulwa, who had purchased the suit land, there were 13 Bibanja holders in all. The 3 respondents were some of them. The appellant wanted to introduce himself as the landlord. The appellant produced a photocopy of the Certificate of Title. (His title/ownership however, was not disputed by either court.)

He contended that the respondents were not on the land when he bought it. They were trespassers. The respondents insisted that they were there long before him. They were therefore not trespassers.

John Kityo, the 1st respondent narrated how in 1974 one Mubiru Desiderio informed him that there was a Kibanja at Kona which was going for sale. On making inquires he found that one Charles Nyombi was looking after it and was charged with collecting busuulu for the owner of the land, Sarah Kiire. Nyombi eventually introduced the 1st respondent to Kiire; they all met at the Kibanja. Kiire agreed to give the Kibanja to the 1st respondent in consideration of the traditional ‘kanzu’ (purchase price). He paid 14,000/= in lieu of ‘kanzu’. He also paid 10/= to get registered in the books of Bibanja holders on Kiire’s mailo land. Both Nyombi and Kiire were dead by the time of the trial.

The 1st respondent’s neighbours were Muhamed Lubuuka (lower part) the 2nd respondent, Ssali (RIP) was on the left hand side and Mrs. Ssali on the

lower side, the 3rd respondent, (Ssali had two homes with 2 wives). Mr. Kafeero's Kibanja was on the other side. The 1st respondent started cultivating the Kibanja until he was forced to flee during the war in 1982. He returned after the war, in 1987 when the entire Kibanja was over grown with bush. The houses had been looted. The appellant, too, came in during 1989 to slash the over grown bush. He only stopped when the LCs told him that there were Bibanja holders on the land. The 1st respondent further testified:

"I know that a Kibanja owner has got to cooperate with the landlord. I lost the agreement of this land and tickets of Busuulu relating to this Kibanja. I did not attempt to find duplicates of these agreements and tickets. Because the people were scattered due to war. I did not trace my former land lord, because the busuulu had been removed. Assuming there was no war, I would have been requested to prove ownership of the Kibanja by producing busuulu tickets for this land…"

The foregoing evidence was not challenged.

Concerning the 2nd respondent, Lubuuka Muhamed aged 85, first met the appellant at a meeting of Bibanja holders on the suit land, called by the LC 1. He told court that he was born at Kona and was given his Kibanja on the suit land by Sarah Kiire in 1945. He was introduced to the care taker of Kiire's land, Charles Nyombi, by Forradina Ndaula (RIP). After ascertaining the availability of the Kibanja, Sara Kiire directed Nyombi to show the 3rd respondent his boundaries. It was 2 acres. He paid 60/= to Nyombi as per Kiire's directions and thereafter shs 8/= per annum until Amin stopped the payment of busuulu. He testified:

'I duly paid the busuulu to Nyombi Charles who was the representative of the landlady. I got this Kibanja in 1944. I first visited the land in 1943. Nyombi gave me tickets (busuulu). I do not know when Sarah Kiire died. I last saw Sarah Kiire in 1944. I never learnt of Sarah Kiire's death.

…I am still cultivating the suit land. I am not a trespasser. I was given this land by Sarah Kiire, the person who should have taken us to the heir of Sarah Kiire died and nobody else would have taken us there...'

The evidence of the 2nd respondent was straightforward as well.

The 3rd respondent Ssali claimed to have got the Kibanja in 1963. It was her husband's (Manuel Ssali) who died in 1974. He got this Kibanja from his father. His father was called Yozefu Kafeero. Yozefu Kafeero had bought this land in 1953. She testified:

"…..my husband was paying busuulu for this Kibanja. I paid busuulu for three years when my husband fell sick and was unable to pay it. I do not have the busuulu tickets. I lost these tickets during the war. The house was destroyed and so were the tickets. This was the 1980 war… during the war I sought refuge at Mawokota. I went to Mawokota in 1981. I first saw the plaintiff in 1989. I saw him on the way. He had parked his vehicle at Lumansi. Lumansi was I think a member of the LC but he died…. He too attended the same meeting as the 1st respondent which was called by the LC in 1995."

Her testimony further reveals that she was using this Kibanja for cultivation of crops. Her porter was staying on it in a mud and wattle house. It is about 3½ acres. Her residence was about ½ mile away. The Kibanja was overgrown with bush during the war when everybody had to run away. She came back from hiding in Mawokota during 1986.

She added:

"I do not have documentary proof to prove that the Kibanja belonged to my husband. All that I have are the elders of the area….. I am care taking the property of my dead husband and children.

…. Before my husband died I had known the landlord. She was called Princess Sarah. She died in 1990. I do not have busuulu tickets these were destroyed during the war."

The 3rd respondent's evidence too was unassailed.

Lawrence Lubega, (DW4) was a committee member of the LC1 whose chairman was Livingstone Kanyike (RIP) when the appellant asked to meet all Bibanja holders on the suit land. He confirmed the meeting was held on 2-04-89 at Kona village. There were 13 Bibanja holders on the suit land. The three respondents were some of them. He himself settled at Kona in 1968. He knew the respondents' Bibanja which became - overgrown with bush during the war when everybody was in hiding. His evidence confirmed the evidence of the respondents.

As against the above evidence the appellant's story was as follows:

"I got the title to the land in February 1988 … This land was looked after by Mr. Nkwanga on behalf of the owner. Before I purchased it, this representative of the owner of the land showed it to me… <u>He took me to the top of the hill and showed me the geographical impression of the land</u>. There was not a single house and there was no sign if cultivation as it was only a forest… (sic)

…. I had known the RC Chairman in that area. I used to park my car there before proceeding to the area. I asked the RC Chairman (RIP) whether there were any people owning Bibanja on this land as I wanted to meet them. I specifically told him that whoever comes should come with the letter giving him the Kibanja from the landlord…"

From the appellant's own observation which tallies with the respondents' evidence, the land became overgrown with bush and forest during the war. Clearly, any sign of abandoned Bibanja could not be visible from the

top of a hill but they were there – looted houses and coffee trees etc. This could only be seen by somebody physically moving on the ground. Furthermore, Nkwanga was a mere land agent who did not mind much about the locality but was only interested in selling.

It was held in **Taylor v Stibbert(1803)-13 ALL ER 432 Loughborough L.C** that if a vendor is not in possession of the land he is selling, the purchaser must make inquires of the person in possession or otherwise the property purchased will be subject to that person's right. It can be safely inferred in this authority that it is incumbent upon the purchaser to make exhaustive inquires as to the status of the land he is purchasing. The appellant did not discharge this duty.

With such clear evidence before him, it is not clear why the learned magistrate muddled himself up so much to the extent which forced the learned judge who never minces his words to comment thus:

> **"The judgement of the learned trial magistrate is not only contradictory but also shows a confused mind at work. The trial magistrate appears not to have been in control of his mental faculties when he was writing his judgement."**

I, however, with respect would not subscribe to the use of such language in reference to a colleague, however junior, not even to a litigant. Justice is to be always administered with grace, regardless of one's personal feelings. I need not reproduce these careless contradictions and inconsistencies. They are not relevant to the judgment but were all reproduced in the learned judge's judgment. The Decree itself is a clear manifestation of the quality of that judgment.

There is thus no doubt that the evidence as to how the respondents came to acquire their respective Bibanja was impeccable. Therefore since the appellant acquired his certificate of title to the land in February 1988, he indeed acquired it subject to the respondent's Bibanja. It is noteworthy

these Bibanja were not deliberately abandoned in which case they would have reverted to the landlord. They were temporarily vacated because of the insecurity brought about by the NRA bush war in the area. After the end of the war, the respondents returned only to find that the appellant had started cultivating their Bibanja without notice or compensation to them.

The law on this is very clear. Section 92(2) of the Registration of Titles Act provides:

> **"(2). Upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument or which he or she is entitled or able to transfer or dispose of under any power, with all rights, powers and privileges belonging or appertaining thereto, shall pass to the transferee and the transferee shall thereupon become the proprietor thereof, and while continuing as such shall be subject to and liable for all the same requirements and liabilities to which he or she would have been subject and liable if he or she had been the former proprietor or the original lessee or mortgagee."**

As correctly pointed out by the learned judge, the appellant cannot arbitrarily deny the respondents their rights without following the law.

This would dispose of the entire appeal. I would not hesitate to endorse the learned judge's finding and dismiss the appeal with costs here and below.

Since my Lords Engwau and Kavuma JJA both agree the appeal stands dismissed as above indicated.

Dated at Kampala this …15th ….day of ……June….2007.

A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL.