THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 82 OF 2012

1. **MR. ISAAYA KALYA**
2. **GEORGE KATOORO**
3. **RABWONI JOHNSON ==========**

APPELLANTS

VERSUS

MOSES MACEKENYU IKAGOBYA ==========

RESPONDENT

CORAM: HON. MR. JUSTICE A.S. NSHIMYE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. LADY JUSTICE PROF. L. E.TIBATEMWA, JA

(*Appeal arising from the Judgment of High Court at Fort Portal before His Lordship Mr. Justice Alphonse Chigamoy Owinyi-Dollo, J, dated 15th/6/2012 in High Court Civil Case No. 14/2009)*

JUDGEMENT OF THE COURT

This appeal arises out of a judgment of the High Court of Uganda at Fort Portal delivered by the **Hon. Mr. Justice Alphonse Chigamoy Owinyi-Dollo, J, in High Court Civil Case No. 014 of 2009**.

The brief back ground to this appeal is as follows:

The 1st appellant who is the father of the 2nd and 3rd appellants instituted a suit against the respondent seeking to evict him from land comprised in Bunyangabu Block 16 Plots 14, 15 and part of Plot 10 of the land is situate at Bukolekole, Omunangara sub-county, Bunyangabu County, Kabarole District, on account of the respondent being a trespasser thereon. The appellants were also seeking a permanent injunction restraining the respondent from entering the said land.

It is undisputed that the suit land is a freehold tenure, and previously comprised one piece of land registered in the names of 1st appellant. He later subdivided the land and created plots 10, 14, 15 and 16. He transferred proprietorship of plots 14 and 15 to the 2nd and 3rd respondents respectively.

It is also undisputed that the respondent inherited part of the said suit land from his father one Selvester Ikagobya who had occupied it since 1964, and died in 1980.

The appellants later sought to evict the respondent from a disputed part of the land and the Respondent resisted. The appellants then filed the suit at the High Court, from which this appeal arises. The respondent counter claimed for the same land.

The issues agreed upon at the trial by the parties are as follows:

1. **Whether Selvester Ikagobya (the Defendant's father) owned any land; and if so, whether the Defendant acquired any land from him.**

2. **Whether the Defendant bought land from persons mentioned under paragraph 4(viii) of the written statement of defence.**
3. **Whether the Defendant is a trespasser on the land comprised in Block 16, Plots 14 and 15 and part of Plot 10.**
4. **Whether the Plaintiffs are entitled to the remedies prayed for under paragraph 8(a) – (e) of the plaint.**
5. **Whether the Defendant is entitled to the remedies sought in the counterclaim.**

The learned trial judge dismissed the suit and upheld the counterclaim and made the following orders.

i. ***The Defendant is the lawful, and or bona fide, occupant of the suit land in his possession and located in Block 16, Plots No. 14, No. 15 and part of Plot No.10; and situated in Bukolekole, Omuhangara Sub-county, Bunyangabu County, Kabarole District.***
ii. ***The Defendant is entitled to have his interest in the suit land described in (i) herein, registered in accordance with the law.***
iii. ***The head suit is hereby dismissed; while the counterclaim is allowed.***
iv. ***Each party shall bear their respective costs of the head suit and of the counterclaim.***

The appellants being dissatisfied with the judgment and decree of the High court then filed this appeal.

At the hearing of this appeal Mr. Muhumuza Kahwa and Mr. Ambrose Tibyasa learned counsel appeared for the appellants, while learned counsel Mr. Johnson Musana and Geoffrey Komakeck appeared for the respondent.

Counsel for both parties sought leave to file written submissions, which was granted by court. They also sought and were allowed to make brief oral submissions to supplement their written submissions.

Since this appeal emanates from a decision of the High Court exercising its original jurisdiction, this court as a first appellant court has a duty to reappraise the evidence and draw its own inferences.

This duty is set out in **Rule 30(1) (a)**

> ***"30: Power to reappraise evidence and take additional evidence.***
>
> ***(1) On any appeal from a decision of the High Court acting in its original jurisdiction, the court may;***
>
> ***(a) reappraise the evidence and draw inferences of fact"***

As Hon Justice Mulenga JSC put it in **FR. Narsansio Begumisa & others Vs Eric Tibebaga Supreme Court Civil Appeal No. 17 of 2002** (unreported)

> *"It is a well settled principle that on the first appeal parties entitled to obtain from the appeal court its own decision on issues of fact as well as law. Although on conflicting evidence the appeal court ought to make due 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 conclusions"*

As we resolve the issues before us in this appeal therefore we shall take into account the principle set out above.

It was submitted for the appellant that there was no evidence of sale of land between original freehold owner Yowasi Bamuloho and Selvester Ikagobya the respondent's father in 1964.

That there was no evidence adduced of purchase of the said land as no sale agreement had been tendered in court. That the respondent failed to furnish any further and better particulars of the agreement when he was requested to do so by the appellants' counsel. That the evidence submitted by the respondent was contradictory and ought not to have been believed by the learned trial judge.

On the other hand counsel for the respondent submitted that the judge rightly upheld the evidence of the respondent. He believed DW2 who was present when the sale of the suit land took place in 1964, and when the purchase price was paid. He also submitted that this witness was believable as his disception of the suit land matched the exact demarcations of the land. Counsel also submitted that at all material times the land in dispute was occupied by the respondent without any challenge from the appellants.

The way issue 1 was framed in our considered view is not helpful in resolving the dispute between the parties.

The issue is not whether respondent bought the land or *Kibanja* from the original freeholder. What is undisputed is that the respondent's father was in occupation of part of the suit land from 1964 until his death in 1980 and never had his interest registered.

It is also undisputed that the 1st appellant had the original freehold land registered in the names of Yowasi Bamuloho subdivided and part of it transferred into his own names by 1975.

The part transferred into the names of the 1st appellant encompassed the respondent's father's land.

It is again not in dispute that the respondent's father continued to occupy the part of the freehold interest that was registered in the name of the 1st appellant after 1975, until his death in 1980 without ever having his interest on that land registered.

The issue is therefore not whether the respondents' father bought the land or was simply permitted to occupy and use it. What is in issue is the size of this land and the nature of the tenure interest held by the respondent.

We find the evidence in respect of the purchase of land by the respondents' father from Yowasi Bamuloho in 1964 irrelevant in resolving the dispute between the parties.

The learned judge appreciated this when at page 5 of his judgment he observes as follows:

> *"The parties to the instant suit are in full agreement that indeed Selevster Ikagobya (The defendants late father) did occupy land in the area and that the defendant took over this land after his father's death and is using it. <u>What is however in contention as I understand it is the size of the land and the nature of the interest the late Ikagobya had in it, which he passed to the defendant upon his demise</u>" (Emphasis added).*

The learned trial judge then went on to find that the defendant was a customary tenant of the suit land and that he was also a lawful and a *bonafide* occupant of the land and not a trespasser. The learned trial judge concluded that:-

> ***"it was an occupancy (Kibanja) interest which Selvester Ikagobya acquired from Yowasi Bamuloho in 1964***"

Whereas we are in agreement with conclusion reached by the learned trial judge on this issue we find that he did not exhaust all the questions he had first raised *to wit*

> *"What was the size of land and what was the nature of the respondent's interest in that land?"*

In other words, court ought to have determined what exactly constituted that occupancy of the 1st respondent, in terms of the size, description and tenure.

It was the 1st appellant's testimony that the respondent's father Ikagobya never bought any land from the original freehold owner Bamuhoro in 1964. That in 1964 the respondent's father fled the Rwenzururu rebellion from a place called Kibota. He came with his family seeking refuge. It appears that during the Rwenzururu crisis, which is a well known historical event, which this Court takes judicial notice of, the respondent's father a Mutooro fled the rebellion and sought safety with his relatives one of whom was the 1st appellant's father. He was then allowed by Bamuhoro the freehold owner to occupy land from which a Mukonzo one Mukirane had fled. It appears the Bakonzo were fleeing from Batooro dominated areas and the reverse was happening to the Batooro. The freehold owner then allowed the 1st appellants father to occupy the '*kibanja*' of Mukirane, who had fled hence abandoning it.

The 1st respondent testified that he bought the *kibanja* that belonged to Mukirane, the Mukonzo. This does not appear to be

credible. We agree with learned counsel for the appellant that no proof was provided for such a sale.

Be that as it may, it appears from the evidence of the respondent that his father remained in occupancy of that land which formerly belonged to Mukirane until his death in 1980.

In his own testimony in chief he states as follows:-

> *"The land we are in court over, the biggest part was bought by my father from Yowasi Bamuhoro in 1964. The rest was bought by me in pieces from occupants over the past 20 years"*

It therefore means, that the appellant acquired more land only after his father's death in 1980 and may have started acquiring more land after 1990 which is 20 Years to the date of his testimony in court which was given in 2010.

There is no evidence whatsoever that the respondent or his father ever acquired or occupied more land in addition to that from which Mukirane had fled prior to the respondent's father's death in 1980.

The respondent testified that after his father's death he bought more land from neighbours and he named them as Nyakairu, Eribankya, Kiiza, Kantu, Kasaija and others. But none of the above persons was called to testify that indeed they had sold their land to the respondent.

In cross examination the respondent stated as follows;

> *"The land my father bought from Bamuhoro and the land of Makirane and the ones I bought total to about 60 acres"*

There is no evidence that the respondents father ever bought any land or occupied land other than the land (kibanja) from which Mukirane fled.

The land the respondent's father occupied was included in the 1st appellants title when the sub-division was carried out in 1975. There is no dispute that the 1st appellant recognized that the respondent owns this land. Indeed it is this land that the 1st appellant sought to demarcate and grant a freehold title to the respondent in 2009.

The respondent rejected the offer as he contended that he infact owned more land, than was being offered to him.

We have found no evidence to support the finding of the trial judge that the respondent's father Selvester Ikagobya bought more land from "*Bibanja*" holders. The only evidence on record points to the fact that it was the respondent who bought several *Bibanja* after the death of his father Selvester Ikagobya in 1980.

We find that the evidence adduced by the respondent was not sufficient to prove that he ever purchased any of the said land as contended and as found by the learned trial judge.

We have found no evidence to support the finding of the trial judge that the respondent bought land from 1980 to 1983.

Indeed there is no evidence at all as to exactly when the respondent bought the said *Bibanja*, how much the purchase price was or the size of the land bought from each of the individuals he named.

In his own testimony he states he bought the land in the last 20 years. As already stated this puts the date of purchase to 1990 and not 1983 as stated in the judgment of the learned trial judge.

Indeed the learned trial judge at page 18 of his judgment observes correctly as follows.

> *"He has however not given the specific years he bought each of the lands or when the occupants he bought from had entered the lands. His purchase of the 20 acres covered over the last 20 years, which is too wide and not helpful in compiling the statutory 12 years"*

Having found as above the learned trial judge would have gone on to find that the said land purchases had not been sufficiently proved. The Respondent would also have gone on to prove the date of purchase of the Bibanja. It was essential to bring the respondent within the ambit of Section 29(2) (a) of the Land Act which stipulates as follows;

(2) **"*Bona fide* occupant means a person who before the coming into force of the Constitution**

(a) had occupied and utilized or developed any land unchallenged by the registered owner or a first of the registered owner for twelve years..."

It was necessary in our view for the respondent to prove that he had bought the '*bibanja*' in issue before 1983, and occupied them unchallenged for twelve years before the coming into force of the Constitution.

The evidence on record is that the respondent started occupying the land in issue around 1986 and not earlier.

Even if therefore, the respondent had been in occupation of the disputed extra land after 8th October 1983 – 1993 he would not qualify to be a *bona fide* occupant, under ***Section 29*** of the Land Act.

The respondent did not prove and there was no evidence to show that he had occupied and or utilised the land unchallenged by the registered owner for 12 years or more before 8th October 1995, when the Constitution came into force.

In order for one to qualify as a *bona fide* occupant that person must satisfy the conditions set out in ***Section 29 (2)*** of the Land Act, that is;

1) Must have occupied and utilized the land in issue for 12 or more years before the coming into force of the Constitution on 8th October 1995 unchallenged by the registered owner or
2) Must have developed the land in issue unchallenged by the registered owner for 12 or more years before 8th October 1995, when the Constitution came into force.
3) Must have acquired interest of a person who satisfied the above conditions.

This is what the respondent was required to prove in his counter claim. In this particular case the exact dates as to when the respondent started occupying and utilizing the land in issue were therefore essential in proving his counter claim. As already noted above this was never proved.

The respondent was also required to prove that the persons from whom he purchased the land (*Bibanja*) were themselves *bona fide* occupants. Save for their names no evidence was adduced in this regard.

The learned trial judge in fact came to the same conclusion when at page 16 of his judgment he states;

> *"The defendants is also certainly not a licensee of the plaintiffs on the suit lands. The root of his title stems either from that of his father or from those whose interest he bought out while his father's interest dates back to 1964, <u>no evidence was adduced as to the root title of those whose interest he personally bought out</u>"* (emphasis added)

With all due respect to the learned trial judge, having held that there was no evidence as to the interest and title of the occupants the respondent bought out and also having found that there was no evidence as to the dates the said purchases took place he would have found that the respondent had failed to prove on a balance of probabilities that he is a lawful or *bonafide* occupant of the said lands.

The learned trial judge made a finding of fact that, both the respondents and the persons whose interest in land they purchased were customary tenants on the 1st appellants freehold land.

At page 16 of his judgment he states as follows;

> *"I have already made a finding that the defendant is no trespasser to the suit land, but instead a customary tenant"*

However at page 17 of his judgment the learned trial judge describes the respondent differently when he states as follows:

> *"The provisions of the law cited above place the defendant in the status of both lawful and bonafide occupant of the disputed lands. There was no claim that the customary tenants he purchased land from had occupied such land without the consent of the registered owner hence owing to the purchase his interest in such land is rooted in theirs; which is lawful occupancy*"

Finally the learned trial judge concluded the case by making the following order:-

> *"In the result, I allow the counter claim and make the following declarations and orders:-*
>
> *1) The defendant is the lawful and bonafide occupant of the suit land in his possession..."*

It appears the learned trial judge made a finding that the respondent was a customary tenant, that he was a lawful occupant and he was also at the same time a *bonafide* occupant without making any distinction to what kind of interest the respondent held in the suit. The terms customary tenant, lawful occupant and *bona fide* occupant are used interchangeably through the judgment as if they mean one and the same thing.

Respectfully, we do not agree. A customary tenancy is a distinct tenure different from *lawful occupancy* and *bona fide* occupancy.

Customary tenure is defined in the last Section 1 (1) of the Land Act as follows;

> *"Customary tenure is a system of land regulated by customary rules which are limited in their operation to a particular description or class of persons of which are described in Section 3"*

The Supreme Court in **Kampala District Land Board and George Mutale Vs Venansio Babweyaka and others**

Supreme Court Civil Appeal No. 2 of 2007 held that customary tenancy must be proved.

In that case **Odoki, CJ** who wrote the lead judgment held as follows;

> *"I am in agreement with the learned justice of appeal that the respondents failed to establish that they were occupying the suit land under customary tenure. There was no evidence to show under what kind of custom or practice they occupied the land and whether that custom had been recognized and regulated by a particular group or class of persons in the area"*

In that case the Supreme Court held that the respondents therein were not customary tenants but were in fact *bona fide* occupants clearly making a distinction between the two kinds of land tenure.

In this case therefore the learned trial judge erred when he failed to make a proper distinction between customary tenure, lawful occupancy and *bonafide* occupancy and thus arrived at a wrong conclusion. The wrong conclusion was that the lands respondent had acquired and occupied were previously held by customary tenants and that the respondent himself as a result was also a customary tenant. There was no proof of this. As already held there was no proof either that the previous occupants of the suit land were *bona fide* occupants. They seem however, to have been lawful occupants as the 1st plaintiff in his testimony which was

unchallenged stated that he had compensated them and they had left the land.

Even if the previous occupants had been found to be lawful or *bona fide* occupants as the learned trial judge did we would still have found that they passed no interest to the respondent. At least in respect of the lands purchased after the coming into force of the Land Act in 1998. This is so, because ***Section 35*** of the Land Act requires that a tenant by occupancy who wishes to assign or sell his interest must give the first option to the owner of the land. Therefore if the respondent purchased the interest of the previous tenants by occupancy he did so in contravention of Section 35 of the Land Act which stipulates as follows:-

> "**35 (1) Option to purchase**
>
> ***A tenant by occupancy who wishes to assign the tenancy shall, subject to this section, give the first option of taking the assignment of the tenancy to the owner of the land"***

It is trite law that any contract entered into in contravention of the law is null and void. See **Active automobile & Another Vs Crane Bank & Another**, Supreme Court Civil Appeal No. 21 of 2001 (unreported).

It appears from evidence of both the 1st appellant and the respondent that the respondent was in occupation of the suit land

between 1980 – 1993 with the knowledge and consent of the 1st appellant.

Following what we have held above, it is immaterial as to whether the respondent had bought the land from the former occupants or the 1st appellant had compensated them and appointed the 1st respondent and 2 others as caretakers. This period between1980 – 1993 would not bring the respondent into the ambit of Section 29 of the land Act as to qualify to be a lawful occupant or a bona fide occupant.

Since we also have already held that he was not a customary tenant the only inference we can make is that the respondent was a "tenant at will" in respect of the land he occupied after the death of his father in 1980 which he claims to have acquired from former customary tenants.

The respondents tenancy at will ended in 1993 when the 1st respondent ordered him to vacate the suit land and hand it back to him. Having refused to do so he became a trespasser.

We agree with the learned trial judge that trespass being a continuing tort, the action brought by the appellant was not barred by limitation.

However the 1st appellant could only recover damages for trespass only in respect of the period unaffected by limitation. That is 6 years preceding the date of filing the suit.

The evidence on record that is undisputed is that the respondent was using the suit land for grazing cattle only.

In summary the issues raised in this appeal as first set out in this judgment have been resolved as follows;

Issue 1:

We find that the respondent failed to prove on a balance of probabilities that his father the late Selvester Ikagobya had bought land from the original freehold owner the late Yowasi Bamuhoro.

We found no evidence to prove that the said Selvester Ikagobya owned or occupied and utilized more land than that previously owned or occupied by Mukirane.

We find that Selvester Ikagobya occupied only the land left by Mukirane and it is this land that was inherited by the respondent in 1980 when the said Selvester Ikagobya died.

Issue 2:

We find that the respondent failed to prove on balance of probabilities that he had bought land from persons named in paragraph 4(viii) of his written statement of defence. We also find that even if he had bought these lands such contracts would have been illegal, null and void *abnitio* on account of contravening ***Section 35*** of the ***Land Act (CAP 227***). In respect of those lands purchased after 1998.

Issue 3:

We find that the respondent is neither a *bona fide* occupant nor a lawful occupant as his occupancy does not fall within the definition set out in **Section 29** of the **Land Act. (CAP 227**)

We also find that the respondent is not and has never been a customary tenant on the suit land.

Issue 4:

We find that the appellant's failure to call the evidence of Joshua Kafumu and Yohana Kairu had no impact in this case.

Issue 5:

We find that the learned trial judge erred in dismissing the suit and in allowing the counter claim.

We also find that the respondent is a trespasser on the land he occupies which land is outside the original land first occupied by Mukirane, later by Selvester Ikagobya which he now occupies.

We find that the respondent is entitled to and has a right over the land first occupied by Mukirane and later by his father Selvester Ikagobya.

Accordingly this appeal succeeds and is hereby allowed.

Since the learned trial judge did not assess damages for trespass for the six years having dismissed the suit, we would award general damages of 6,000,000/=for trespass against the respondent in favour of the 1st appellant, as trespass is actionable *per se* without a need to prove damages.

We now make the following orders:-

1) **That the appeal is hereby allowed, and the judgment of the High Court is hereby set aside and substituted with the judgment of this Court.**

2) **That the respondent is a trespasser on all that land he occupies which land is outside the land first occupied by Mukirane and later by Selvester Ikagobya and an order of eviction is hereby issued against the respondent in respect of that land.**

3) **That the respondent is entitled to and has right to all that piece of land he occupies which land was first occupied by Mukirane and later by Selvester Ikagobya.**

4) **The respondent is ordered to pay to the 1st appellant 6,000,000/= being general damages for trespass.**

5) **The respondent shall pay to the appellants the costs of this appeal and in the court below.**

Dated at Kampala this 16th day of April **2014**.

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HON. A.S NSHIMYE

JUSTICE OF APPEAL

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HON. KENNETH KAKURU

JUSTICE OF APPEAL

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HON. PROESSOR L.E. TIBATEMWA

JUSTICE OF APPEAL