

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 187 OF 2014

[From the decision of the High Court of Uganda at Jinja delivered on the 29th September 2014 by his Lordship Godfrey Namundi, J]

1. KYAGWE COFFEE CURING ESTATES LTD

2. COMMISSIONER LAND REGISTRATION ::::::.APPELLANTS

VS

EMMANUEL LUKWAJJU:::::::::::RESPONDENT

Coram: Hon. Justice Augustine S. Nshimye, JA Hon. Justice Solomy
Balungi Bossa, JA Hon. Justice Geoffrey Kiryabwiere,
JA

DISSENTING JUDGMENT OF HON. A.S NSHIMYE, JA

The High Court sitting at Jinja, ordered the 1st appellant's freehold Land title comprised FRV 3 Folio 13 to be cancelled. The 2nd appellant was directed to issue a mailo certificate of title to the respondent for the same land. Both appellants being aggrieved appealed to this court.

The Background of the ease;

In his plaint dated 7th November, 2012, the respondent (then plaintiff) claimed to be the Administrator of the estate of his late grandfather Erasito Mazinga. Upon grant of letters of Administration by Nakawa High Court on 31st January 2013, he embarked on a search for his grandfather's land. He discovered that on 4.3.1909 by annexure PA to the plaint, the Katikiro of Buganda had certified that the Kabaka had offered the said Erasito Mazinga Mailo land at Lwanyonyi Kyagwe and that upon survey, it would be handed to the said Erasito Mazinga (page 7 of the record).

The respondent also discovered that by a lease agreement dated 20th April 1911, the said Erasito Mazinga leased 258 Acres of mailo land Register V01 11 Foili 7 to Uganda Rubber and Coffee Estates Ltd of P.O.BOX 93 Kampala for 99 years (page 11 of the record).

He annexed to the plaint evidence of payment of rent by the said Uganda Rubber and Coffee Ltd for the years 1915 and 1916. That he also made a search in Mukono land office which revealed that Erasito Mazinga was still the proprietor of that same Land but now comprised in Mailo Kyagwe Block 191 plot 14.

A search in Kampala Land office also revealed that a certificate of freehold tenure of the same land was issued on 20th March 1926 to the Uganda Rubber and Coffee Estates Ltd under Crown Grant NO. 11467. That company transferred the freehold to Kyagwe Curing Company on 14th May 1946: the same land was transferred to the 1st Appellant on the 21st July 1972 and re-registered to it as repossession under Expropriated properties Act on 2.12.1998.

That on further search at the Uganda Registration Service Bureau URSB, Uganda Rubber and Coffee Estates Ltd and Kivuvu (Uganda) Rubber and Coffee Estates Ltd were not on the Company Register is reports of 1.11.2012 and 19.2.2013 respectively refers. (Page 108 of the record).

Armed with the said information, the respondent confronted the 1st appellant alleging that it inherited a title tainted with illegality among other defects that its predecessors in title did not exist in law. And that the 1st defendants' predecessors Kivuvu (Uganda) Rubber and Coffee Estates repossessed the land in Uganda in 1998 when it was not existing in law.

That further, the 1st appellant and its predecessors were trespassers on the land of the late Erasito Mazinga. The respondent claimed among other remedies general damages, and mesne profits, and several declarations.

The respondent alleged that his grandfather's Mailo certificate of title was illegally transformed into a freehold title and registered in Kivuvu (Uganda) rubber and coffee estates in 1926 which was legally nonexistent and then in 1946 transferred to Kyagwe Coffee Curing Company Ltd and to the 1st appellant in 1972 and the land is now known as FRV 3 Folio 13.

In their respective statements of defence dated 10 December 2012 and 12th February 2013 respectively, the 1st and 2nd appellants denied the respondent's claim. The parties filed written statements on oath and were subjected to cross examination. In their joint conferencing memorandum dated 6 February 2014 (page 40 of the record) the parties agreed on the issues to be decided by court namely;

1. Whether the land originally covered by registration under MR V 11 Folio 7 is the same land as the one later registered under FRV 3, Folio 13.

2. Whether the clean copy of a certificate of title to MRV11 Folio 7 is the same as the copy of the certificate annexed to the plaint.

3. Whether the crown grant NO. 114 67 had effect and the former mailo registration.

4. Whether the plaintiff can now challenge the 1st defendant's certificate.

5. Reliefs.

After hearing both sides, the learned trial judge decided in favour of the respondent as earlier stated.

The appellants jointly faulted the trial judge on 12 grounds namely;

L The learned trial judge erred in law and in fact in holding that the respondent had locus standi to institute the suit.

2. The learned trial judge erred in law and in fact in holding that the suit was not barred by limitation.

3. The learned trial judge erred in law and in fact in considering the joint scheduling

memorandum.

4. *The learned trial judge erred in law and in fact in holding that the land originally covered by registration under MRV11 Folio 7 is the same land as registered under FRV3 Folio 13.*

5. *The learned trial judge erred in law and mis-directed himself on the burden of proof when he held that;*

“It is clear that the defence tried to capitalise on the weaknesses in the plaintiff’s case rather than providing credible evidence to discredit the plaintiff’s claims.”

6. *The learned trial judge erred in law and in fact in holding that;*

“Issue NO. 2 is also resolved in favour of the plaintiff

7. *The learned trial judge erred in law and in fact in holding that the suit land has always been private Mailo land.*

8. *The learned trial judge erred in law and in fact in holding that the plaintiff’s predecessors in titles’ Mailo interest was interfered with by well-coordinated illegalities.*

9. *The learned trial judge erred in law ordering cancellation of the 1st appellant’s certificate of title and issuance to the respondent with a Mailo land certificate of title.*

10. *The learned trial Judge erred in law and in fact in not taking into account and consideration the expert evidence of the 2nd appellant about the procedures and practices of Land Registration in Uganda from 1908 to date.*

11. *The learned trial Judge erred in law and in fact in permitting the plaintiff to set up and prove a case which was different from his pleadings.*

12. *The learned trial judge erred in law and in fact in his evaluation of the evidence.*

I will now deal with the grounds of appeal. I am alive to the duty of the

1st appellate Court as provided in Rule 30 of the Rules of this Court

Held in numerous cases in the court and the Supreme Court but to mention one of them, Kifamunte Vs Uganda Criminal Appeal NO. 10 of 1997. That is to re-hear and re-consider the case and materials that were before the trial court, re-evaluate it and come to its own conclusion.

Case for the appellants:

Grounds 1, 5, 7, 8, and 9 were argued together by learned counsel J.B Byamugisha. His arguments were ably stated in the lead judgment of my brother Justice G. Kiryabwire and I needed not repeat them.

Case for the 2nd appellant:

The second appellant was not represented at the hearing though dully served as per affidavit of service on the file sworn by Paul Kaziba and filed in Court on 24th February 2015. However, the 2nd appellant filed his conferencing notes on 16th January 2015. The trial judge was faulted for failure to properly evaluate the evidence and relying on a forged document that the respondent relied upon namely;- the certificate comprised in MRV 11 Folio 7.

The 2nd appellant also faulted the trial judge for ignoring the commissioner's letter ref T. 57 dated 11. 3. 2013 which was informing the respondent that the search results he had got from Mukono Land office were not authentic and false (*see page 132 of the record*).

The 2nd appellant also faulted the trial judge for not appreciating in his evaluation of evidence that FRV 3 Folio 13 designated “**G4467**” emanated from final certificate No. 9852 which indicates that it was a purely freehold certificate not a mailo title. It was the 2nd appellant’s case that the trial judge did not give reasons under Section 176 and 178 of the Registration of Titles Act (RTA) for ordering cancellation of the 1st appellant’s title and how a closed Registration MRV 11 Folio 7 is should be re-opened to issue the respondent with a Mailo title contrary to the Registration of Titles Act.

The 2nd appellant also faulted the judge for ignoring the expert evidence of the commissioner Land Registration.

Lastly the 2nd appellant faulted the learned trial judge for holding that the 1st appellant being a non-citizen could not hold a title designated as freehold.

Case for the respondent:

Counsel Eric Muhwezi represented the respondent like he did in the lower trial Court. A summary of his written submissions were also ably reproduced in the lead judgment. I need not reproduce them too.

Decision:

Upon consideration of the submissions by both counsel and reading the record and authorities referred to us ,I will deal first with the issue of locus standi raised by counsel for the 1ST Appellant

In the case of *Auto Garage Vs Motorkov* (1971) EA 514

“ a cause of action was held to be disclosed in a plaint where it is shown that the plaintiff enjoyed a right, the right was violated by the defendant and the plaintiff suffered the loss. ”

Section 176 of the Registration of Titles Act cited to us by counsel J Byamugisha provides;

“No action of ejection or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases;

(a).....

(b) The case of a lessor as against a lessee in default;

(c) The case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bonafide for value from or through a person so registered through fraud;

(d).....

The case of a registered proprietor claiming under a certificate of title prior in date of registration under this Act in any case in which two or more certificates of title may he registered **under** this act in respect **of** the same **land**”.

The respondents’ claim under paragraphs 3(a) (b) of the plaint was based on illegality and fraud which claim fits squarely in the exception to the protection accorded to a registered owner of land under Section 176 of the Registration Titles Act. (RTA)

The respondent is still the holder of the letters of Administration to the Estate of the late Erasito Mazinga who is said to have granted a lease of 99 years over his Mailo land at Lwanyunyi Kyagwe to Uganda Rubber and Coffee Estate Ltd the 1st appellant’s predecessor in title on 20th April, 1911.

According to learned counsel J.B Byamugisha, the 1st appellant, the respondent without an original certificate of title could not challenge his client’s ownership. He faulted the trial Judge for having

shifted the burden of proof and adopted the photocopy as proof of the certificate of title.

I agree with counsel that the legal burden of proof never shifts from the plaintiff, to prove his or her case on the balance of the probabilities.

However, it is my considered opinion that where the defendant makes an allegation in his or her defence, the evidential burden rests upon him or her

to adduce evidence in line with his or her defence in order to tilt balance of probability in his favour.

Counsel for the respondent submitted that the respondent was entitled as the administrator of the Estate of the deceased to recover the Estate's land whether registered or not. He emphasised that under Section 192 of the Succession Act and with the force of the Supreme Court authority of *Israel Kabwa Vs Martin BANOBA MUSIGA* SCCA NO. 52 of 1995, the respondent as a beneficiary could sue without letters of Administration.

In this case the respondent is armed with the authority of letters of Administration, which gave him the legal right to a cause of action. Anyone wishing to challenge his authority would have to go to court that issued them and apply to have them revoked. That person would have to be one of those persons entitled to apply for the said letters under *section 202 of the Succession Act*,

Having considered submissions of both sides, I agree with the trial judge that the respondent had prima facie, a right *to* the suit property and that right had been violated by the continued possession of the same by 1st appellant and was therefore entitled to a relief.

Limitation,

It was specifically pleaded for the 1st and 2nd respondents in their written statements of defence that the suit was time barred. Counsel for the 1st Appellant raised the same issue in his submissions while faulting the trial judge in ground 2 of the appeal.

It is a good practice that, where a suit is alleged to be time barred, a preliminary objection is taken before trial commences so that the objection is disposed first. If the objection is sustained, the trial would end there and save the court's valuable time. Secondly, because the appellants did not raise the issue of limitation among agreed issues, the trial judge could not have specifically pronounced himself on it and therefore cannot be faulted now on appeal.

Be it as it may, upon perusal of the court record as a 1st appellate court, I find that the respondent got Letters of Administration to the Estate of late Erasito Masinga on 31/1/2012 and the cause of action arose thereafter when he discovered the suit property which was allegedly unlawfully and illegally occupied by the 1st appellant and commenced a suit against the two appellants on 2/11/2012. A suit based on a tort of trespass or recovery of Land may be brought under Section 3 of the Limitation Act within 6 and 12 years time respectively. This ground based on limitation has no merit and therefore fails.

Is the land occupied by the 1st appellant (FRV 3 Folio 13) the same land as that which belonged to Erasto Mazinga? (MRV 11 folio 7).

I have re- evaluated the evidence on the two issues 1 and 3 appearing on pages 6 to 8 of this judgment.

In his sworn statement the plaintiff (now the respondent) by reference to annexures to the plaint introduced Exhibit PA (page 7 of the record) which shows that Erasito Mazinga was granted 256 acres by the Kabaka and instructions were made to survey the granted land. Exhibit **“PD”** (page 11) shows that there was an informal agreement between the said Mazinga and Uganda Rubber and Coffee Estate Ltd P.O Box 93, Kampala, where-by 256 acres were leased to the said company. There is also evidence that the said lessee Uganda Rubber and Coffee Estate Ltd paid rent as evidenced by receipts Exhibit RD1 and RD2 (see pages 32 and 33) of the record.

On top of these payment receipts the same postal address of P.O Box 93, Kampala was repeated.

In his sworn statement appearing on page 70 of the record Mohammed Alibhai stated in paragraph 2 as follows:

“The 1st defendant is the registered proprietor of the property described as FRv3 folio 13 Lwanyonyi Estate Land at Lwanyonyi

5 *which is the subject matter of this suit. A copy of the certificate of title attached hereto and marked Annexure DIE. ”*

This Exhibit appears on page 106 of the record. It is the 1st appellants Certificate of Title. The 1st owner appearing on the certificate is The Uganda Rubber and Coffee Estate which tallies in paramateria with the payment receipts tendered by the respondent (page 32 and 33 of the record). The Postal Address of P.O. Box 93 Kampala on the above receipts is the same postal address appearing on the top cover of the 1st appellant’s exhibited title.

Further Exhibit RD 4 and RD 3 (page 113) which appear in the sworn evidence of the respondent (page 67 Para 4VI) shows that a search in Mukono Land Office on 4/2/2013 revealed a mailo title comprised in Block 191 plot 14 measuring 258 Acres situated at Lwanyonyi Kyagwe in the names of Erasito Mazinga and was issued on 21/6/1910. The Kabaka’s grant of the same land was granted on 4/3/1909 (Exhibit PA Page 7).

This land according to a copy of the certificate of title (page 128 of the record) shows that Erasito Mazinga’s land is incumbered with 99 years to Uganda Rubber and coffee Estate Limited P.O Box 93, Kampala. It was registered on 19th March 1912. (See page 129 of the record). According to my calculation, the lease expired in 2011.

This evidence in my view goes to corroborate the evidence of the respondent that Erasito Mazinga's land was originally leased to Uganda rubber and coffee estate ltd. I find that Kivuvu (Uganda) rubber and coffee estates ltd is the same as Uganda rubber and Coffee estates Ltd.

. .
In her sworn in statement (para 7) DW2 Sala Kulata Basangwa witness to the 2nd defendant stated that:-

“During the colonial period it was common for the crown Government to buy mailo land from mailo owners and grant it in freehold to commercial farmer.”

25 This evidence was in my view speculative and did not contradict the evidence of the respondent in respect of a search that was made at Mukono land office. As I stated earlier in this judgment, it would have been the evidential responsibility of the 2nd appellant to lead the evidence of the officer who signed the search letter to come and repudiate what he had earlier stated.

Secondly if the proposition of DW2 that Erasto Mazinga's land could have been bought by the Crown Government and granted as freehold to the 1st owners, such a grant should have been endorsed on Erasito Mazinga's title as was done for the 99 years lease and that information would have been available upon search at Mukono Land.

Thirdly even if the Commissioner Land Registration (DW2), is the overall in-charge of land registration in Uganda, it would be superfluous

To imagine that she knows and can testify with accuracy to all documents in all land registries in the country.

Fourthly the trial court had no chance of seeing the said grant documents in order to know how the freehold title was created. I have also seen none and like the trial Judge, I do not accept the evidence of DW2. In my view, the respondent was on the balance of probabilities able to establish the legal trail of Erasito Mazinga from March 1909 to the is search results in Mukona land office of 4.2.2013.

The search results from Mukono Land Office corroborates with, the informal lease agreement, rent payment receipts and the certificate of title of the 1st appellant with regard to the name of the original lessee and a common postal address of P.O Box 93, Kampala (pages 11,32,33 and 106 of the record). To the Contrary, to the origin and legal trail of the freehold grant allegedly granted to the 1st appellant's original predecessor in title is obscure. My own conclusion is that the land occupied by the 1st appellant is the same land as that that belonged to Erasto Mazinga. The consistent postal address of P.O Box 93, Kampala appearing from the lease agreement to the current certificate of the 1st appellant puts the 1st appellant and its predecessors on Erasto Mazingas' land and that gives the respondent a right to claim as the administrator of

the lessor in succession. The lease expired in 2011 and in my view there were two options available to the 1st appellant. To pay earliers of rent and mesne profits and negotiate for a fresh lease.better still,subject to law negotiate an outright purchase of the head title.

25 I am therefore unable to fault the trial judge on his finding in favour of the respondent on issues 1 and 3 as they were framed before him.

Illegality:

Paragraph 5 of the respondent's plaint stated as follows;

“The plaintiff contends that even when the suit land was at all material times of mailo land tenure, the 1st defendant or his

predecessors’ in concert with the 2nd defendant illegally transformed the suit land into Freehold land tenure without the plaintiffs predecessor’s transfer instrument duly executed and not entered in the Register and also without the consent of the Governor and Buganda Lukiiko as required by possession of Land Law applicable then”.

Particulars of illegality:

(a) The 1st defendant’s predecessor, Kivuvu (Uganda) Rubber & Coffee Estates Limited transacting in land when it did not exist in law in Uganda.

(b)The 1st defendant’s predecessor, Kivuvu (Uganda) Rubber Estates repossessing land in Uganda in the year 1998 when it did not exist

(c)The 1st defendant acquiring a Freehold title when it is a foreign company without the requisite Governor and Buganda Lukiiko’s consent or ministerial consent.

(d)The 1st defendant acting on repossession from the Custodian Board by its predecessor, Kivuvu (Uganda) Rubber & Coffee Estate Ltd to secure the suit land for itself when it did not exist in law.

(e)The 1st defendants predecessor in concert with the 2nd defendant creating a freehold from a mailo title when the 1st defendant only held a lease thereon, albeit illegally.

(6)The plaintiff avers and contends that the 1st defendant’s occupancy of the suit land amounts to ²illegality and trespass and transactions on it between Late Erasito Mazinga, Uganda Rubber & Coffee Estate Ltd and its successors in title including the 1st defendant are invalid and void abinitio.

(7)The plaintiff further avers and contends that as a result of the 1st defendant’s continued occupation in trespass, he has suffered loss of income , trauma and psychological torture to which

he claims general damages and mesne profits denied to him by the predecessor since default in contractual rent payments since 1916 to date of giving vacant possession and interest

In paragraph 6 of its defence, the 1st appellant denied any allegation of illegality and stated as follows;

“Further and in the alternative, but without prejudice to the foregoing, the 1st defendant will say and contend that it acquired its freehold tenure bona fide and for value and its title cannot be impeached at this stage and plaintiffs allegations and particulars of illegality are denied”.

In its defence, the 2nd appellant stated in paragraphs 5 and 6 as follows; Paragraph 5:

In response to paragraphs 3 and 4 of the plaint, which are denied in total but without prejudice to the foregoing, the 2nd defendant shall aver at the trial of this suit that;

(a) *The Land described as FRV 3 Folio 13 was granted in freehold by the Crown on 20 March, 1926 to the 1st defendant’s predecessor in title.*

- (b)** *That the Land comprised as FRV 3 folio 13 is currently registered in the names of the 1st defendant.*
- (c)** *That the land described as FRV 3 Folio 13 has never been owned by a one “Kivuvu Uganda Rubber and Coffee Estates limited”*
- (d)** *That the 2nd defendant has never in any way connived with the 1st defendant to “transform any mailo certificate of title into a freehold” as alleged in paragraph 4(c) of the plaint and the suggestion to that effect is only but absurd.*
- (6)** *In response to paragraph 5 of the plaint, which denied in total, the 2nd defendant shall content that;*
- (a)** *the 2nd defendant has never illegally transformed land described as FRV 3 folio 13 from mailo to freehold; and the plaintiff shall be put to strict proof of the allegations and assertions made thereof.*
- (b)** *That the land described as FRV 3 folio 13 was repossessed by the 1st defendant and not a one Kivuvu (Uganda) Rubber & Coffee Estate ltd as alleged in paragraph 5 (d) of the plaint and the plaintiff shall be put to strict proof thereof .*

After considering the evidence of the respondent contained in his own after considering the evidence of the respondent contained in his own statement appearing on pages 66-69 of the record and that of the 1st appellant appearing on pages 70-74 of the record, the trial judge held as follows on the alledged illegality.

Page 350 line 10

"That the freehold title was therefore null and void right from the beginning of the issuance in 1926 to date. Section 40 (4) of the Land Act according to the plaintiff bars the 1stdefendant from acquiring or holding mailo or free hold.

That according to exh. P.2, the 1st defendant was incorporated on 26/2/1986".

It was held in the case of **Cardinal Emanuel Nsubuga v Mukula International 1982 ..** That the issue of illegality supersedes all pleadings and can be raised any time. In this case it was raised in the pleadings and the appellant had an opportunity to respond and traverse it. Also see Supreme Court decision in M/S Fang Min V Balex Tours and Travel Ltd, Civil Appeal Nos. 6/2013 and 1/2014.

In his sworn statement among other averments stated in para 8, that:

In the courts below of and make no order as to costs with regard to the imagined crosses appeal.

Decision:

By majority decision of 2 against 1, the appeal is allowed in terms proposed in the majority judgment.

Dated at Kampala this 4th day of January 2016

Hon. Justice.A.S.Nshimye

Justice of appeal

