

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 60 OF 2008

1. REHEMA KIIZA NALUBEGA

2. KARIM LUBEGA

APPELLANTS

VERSUS

1. SEMPA MUWANGA

2. KABAALÉ JOSEPH

3. KAKONGE JACKSON

4. SAKU ROSE

15 5. SSEKAKONI LUTALO

RESPONDENTS

CORAM: Hon. Lady Justice Solomy

Balungi Bossa, JA Hon. Mr. Justice

Kenneth Kakuru, JA Hon. Mr. Justice

Geoffrey Kiryabwire, JA

JUDGMENT OF THE COURT

This is an appeal arising from the decision of *His Lordship Vincent T.*

Zehurikize J, delivered on 28th August, 2006 in which he entered

Judgment in favour of the respondents.

Brief background

The appellants sued the respondents in the High Court of Uganda at

Kampala 25 seeking the following orders

- (a) A declaration that the 1st respondent illegally sold their land to the 2nd, 3rd, 4th and 5th respondents who are thus trespassers.
- (b) An eviction order against the respondents.
- (c) General damages for trespass
- (d) Permanent injunction to restrain the respondents, their servants or agents from any further trespass
- (e) Mense profits and costs of the suit

The appellants contended that, they had inherited the suit land from their late grandfather one Ason Kakowekowe who had bought the same from one Enoka Muwanga who was the registered proprietor in 1938. The suit land measuring 135 acres is part of Bulemezi Block 227 Folio 28 Plot 28 FC 18183. It was contended further that, the appellants had been in occupation of the said land since 1938 without interference

The respondents, in their defence denied liability. The 1st respondent contended that, the suit land was his as the registered proprietor in his capacity as the administrator of the estate of the late Enoka Muwanga who was his grandfather and the original registered proprietor. He admitted having sold parts of the suit land to the 2nd, 3rd, 4th and 5th respondents contending that, he had a right to do so.

The trial Judge found that, the appellants were lawful occupants within the meaning of Section 29 of the land Act, as customary tenants (*bibanja* holders) by virtue of long occupation and use of the suit land. He however found that they were not entitled to be registered as proprietors thereof. He further found that the appellants had at the trial failed to prove how much land they occupied and how much had been sold by the 1st respondent.

The appellants being dissatisfied with the decision of the trial Judge appealed to this Court on the following grounds;-

1. The learned trial Judge erred in fact and law when he failed to properly evaluate the evidence on Court record and came to a wrong decision that the

appellants were mere lawful occupants on the suit land without any registrable interest

- 2. The learned trial Judge erred in fact and law when he relied on hearsay evidence, his own speculation and imaginations not supported by evidence and considered documents as exhibits which had been tendered in evidence and considered evidence which had not been adduced in Court and came to a wrong decision .*
- 3. The learned trial Judge erred in fact and law when he relied on the Registrar of Titles' letter of 14th December 1954 refusing to register the appellant's predecessor in title and held that the appellants had no registrable interest in the land.*
- 4. The learned trial Judge erred in fact and law when he ignored the overwhelming evidence on record that the appellants' land was 135 acres and just simply held that it was hard to establish how big the appellants' land was.*
- 5. The learned trial Judge erred in fact and law when he rightly held that part of the appellants land was sold off by the 1st defendant but failed to make appropriate orders.*

6. The learned trial Judge erred in fact and law when he dismissed the appellants' case and failed to grant the reliefs sought whereas the appellants had proved their case that they were entitled they were entitled to be registered as proprietor of the suit land measuring 135 acres and vacant possession thereof.

Representations

At the hearing of this appeal *Mr. Maxim Mutabigwa learned Counsel* appeared for the appellants. Neither the respondents nor their Counsel were present in spite of the fact that they had been duly served at their last known address.

Counsel sought and was granted leave to proceed in their absence under *Rule 56 15 (1)* of the Rules of this Court.

Appellants' case

Counsel for the appellants' argued grounds 1, 2 and 3 jointly, ground 4 separately and grounds 5 and 6 jointly.

In respect of grounds 1, 2 and 3, Counsel submitted that, the testimony of PW3 Umaro Matovu and the exhibits on record showed that Ason Kakowekowe (grandfather of the appellants) had purchased land measuring 135 acres from Enoka Muwanga (grandfather of the respondents) in 1938. He faulted the learned trial Judge for having relied on the Registrar of Titles' letter which indicated that, the seller had died before 1938 and on that basis had rejected to grant the appellants a Certificate of Title.

Counsel argued that since there was an agreement of sale between the late Ason Kakowekowe and the late Enoka Muwanga in 1938, the learned trial Judge ought to have found that the appellants were entitled to the portion of the land their grandfather had bought as indicted in that agreement.

In respect of ground 4, Counsel contended that, the learned trial Judge ignored the evidence on record, when he held that the appellants' land was not ascertained, whereas evidence of PW4 and the purchaser agreement which was exhibited clearly indicated that the late Ason Kakowekowe purchased 135 acres of land which he had surveyed and demarcated with mark stones and is not occupied by the appellants. Further that, there was a letter from the *Lukiiko* Land Office dated 17th December, 1937 confirming that, the late Ason Kakowekowe had purchased 135 acres of land from the late Enoka Muwanga which is part of Bulemezi Block 227 Folio 28 Plot 28 FC18183.

On grounds 5 and 6, Counsel submitted that, the learned trial Judge failed to provide any remedy to protect the appellants whom he found to be lawful customary tenants (*bibanja* holders) on the suit land having dismissed the

suit entirely. He asked Court to allow the appeal and grant the remedies sought in the plaint.

Resolution

This is a first appeal and as such this Court is required to re-evaluate the evidence and come up with its own inferences on issues of law and fact. In *Father Narsensio Begumisa and 3 others Vs Eric Tibebaga Supreme Court Civil No. 17 of 2002*, Court held as follows;-

“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has 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 inference and conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In Coghlan vs. Cumberland (1808) 1 Ch. 704, the Court of Appeal (of England) put the matter as follows -

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

In Pandya vs. R (1957) EA 336, the Court of Appeal for Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction. ”

See also: -Rule 30(1) of the Rules of this Court and Ephraim Ongom Odongo Vs Francis Binega

Donge Supreme Court Civil Appeal No. 10 of 2008 (unreported).

We shall keep the above principles in mind while resolving the grounds of appeal. We have listened to the submissions of Counsel and carefully perused the Court record, we now proceed with our duty of evaluating the evidence.

In respect of grounds 1, 2, 3 and 4, the appellants fault the learned trial Judge for relying on the Registrar of Titles' letter which indicated that, Enoka Muwanga the Registered Proprietor of the suit land had died before 1938 and on that basis rejected to grant the appellants a Certificate of Title.

We have carefully perused the High Court Judgment and found that the learned trial Judge dealt exhaustively with issues before him at the trial. In order not to repeat ourselves, we are constrained to reproduce in extenso the pertinent parts of his Judgment.

While resolving the issues raised in grounds 1, 2, 3 and 4 of the appeal the learned trial Judge stated as follows at page 10 of his Judgment;-

“The question that arises therefore is what right or interest did the late Ason Kakowekowe have in the disputed land. According to the plaintiffs, the late Kakowekowe had bought the 135 acres from the late Enoka Muwanga. He had it surveyed in preparation for obtaining a certificate of Title for it. The plaintiffs therefore claim they are entitled to a Certificate of Title for the suit land.

In order to fortify their claim the plaintiffs exhibited an agreement dated 30/9/38 which is supposed to be evidence of the fact that the late Enoka Muwanga sold the suit land and not kibanja to the late Kakowekowe...

What is striking and revealing, is a letter from the Registrar of Titles to the District Commissioner Mengo, Kampala. It is dated 17th December 1937. It is in reference to Mailo Register Volume 261 Folio 23 for 324.0 acres of land at Tebalyala, Bulemezi and the registered proprietor is Enoka Muwanga. It states in part "The Following Purchasers of parcels of the above land have had their land surveyed' and I shall be glad if you will instruct them to produce their agreement." The purchasers referred to were on Nakemeya Kimbugwe 20 acres and Ason Kakowekowe 135.00 acres.

It should be remembered that the agreement (exhibit P2) on which the plaintiffs rely to claim that their grandfather Ason Kakowekowe bought the suit land is dated 30/9/1938. It is not explained how he had the 135 acres of land surveyed from the late Enoka Muwanga's Malio land by 17/12/37 before any sale agreement had been executed between them...

It should further be noted that by 9th October 1954 no sale agreement had been received in the Land office regarding the 135 acres that had been surveyed for the benefit of Ason Kakowekowe then deceased. It is not explained as to who was by the time pursuing the matter since Ason Kakowekowe was already dead and why no sale agreement had been made available to the Land Office.

It is, therefore, not surprising that when eventually an agreement was produced, the Registrar of Titles rejected it for the reasons that he gave in his letter of 14th December, 1954 (exhibit D3). His reasoning that Enoka Muwanga, according to the records, died on 8/7/27 and therefore could not have entered into an agreement of 30/9/38 cannot be rubbished as counsel for the plaintiffs would want court to treat it True, there is no any other evidence to support the

⁵ Registrar's assertion, but one thing is clear. That by 17/12/37 this agreement of sale did not exist and yet the 135 acres had already been surveyed for Ason Kakowekowe. On what account had they been surveyed for him.

The only inference of facts I can make from all this is that Ason Kakowekowe having settled on this Malio, he had the 135 acres surveyed for him although he had not bought it. I believe he was able to do this because the Malio owner was no longer available. He had died on 8/7/271 do not find it hard to believe it... ”

We agree with the learned trial Judge that there was no basis upon which Court could have made an order granting the descendants of the late Ason Kakowekowe a Certificate of Title to the land of the late Enoka Muwanga or any part thereof.

It appears clearly from the evidence on record that by 1937 the late Enoka Muwanga was the registered proprietor of the suit land comprised in Malio Volume 261 Folio 23 measuring 324 acres, located a Tebalyala Bulemezi (suit land). He had died on 8th July, 1927.

Sometime in 1937 the late Ason Kakowekowe applied as a purchaser to the Lands and Survey Department seeking permission to survey the suit land with the intention of parceling and alienating therefrom 135 acres which he stated to have bought from the late Enoka Muwanga. The Survey was carried out by Messrs Boazman and Gee of P. O Box 103 Kampala.

Upon being notified that the survey had been completed Mr. D. L Gwynne William the Registrar of Titles wrote to the District Commissioner Mengo requesting him to notify one Nakemeya Kimbugwe who had surveyed off 20 acres of the suit land and Ason Kakowekowe who had surveyed off 135 from the suit land, to produce their respective purchase agreements. Apparently no such agreement was produced by Ason Kakowekowe.

The Registrar of Title made a minute on the file of the suit land as follows

“Mr. Ason Kakowekowe is tracing for 135 acres, Survey by H. G is in the office. He holds no interest in the land, ”

On 8th June 1945 the Registrar of Titles wrote to Boazman and Gee (Surveyors) inquiring whether they were in possession of the agreement between Ason Kakowekowe and Enoka Muwanga requesting them to forward to him if they did. No agreement was produced and nothing apparently happened until 9th October 1954 when the Registrar of Titles wrote to the Survey Mailo Titles Section **15** regarding this matters as follows; -

“Messrs: Boazman & Gee have surveyed 135 acres of this land (plot 1) for Ason Kakowekowe, deceased, who holds no registered interest in this land.

A letter from the Lukiko Land Officer dated i^b February, 1954, shows him to be a purchaser as to 135 acres from Enoka Muwanga, deceased, but no agreement has been received. This should be sent to me by the successor of

the purchaser. They should also explain how their predecessor claims the other 100 acres. If no agreement can be received, please advise them to obtain approval of this claim from the Head of Enoka Muwanga, deceased’s clan to enable me prepare to prepare a transfer. ”

By the time the above letter was written Ason Kakowekowe had also died. It appears following the above letter an agreement of sale between the late Enoka Muwanga and the late Ason Kakowekowe was produced and delivered to the Registrar of Titles. It was forwarded by a letter dated 2nd December 1954, written by the Acting Senior Surveyor. On 14th December, 1954 the Registrar of Titles responded to that letter as follows

“As regards paragraph 6 of your field report the agreement between Enoka Muwanga and Ason Kakowekowe dated 30th, September 1938, is returned as unacceptable because;-

- 1. Enoka Muwanga according to my records died on the 8th July, 1927 and it is therefore impossible for him to have entered into that agreement Please hand the agreement back to Ason Kakowekowe with the above explanation. ”*

The Registrar of Titles rejected the application to have the 135 acres of the suit land transferred to the late Ason Kakowekowe.

It appears clearly to us that the same agreement which was rightly rejected by the Registrar of Titles in 1954

5 was the same agreement used by the appellants as the basis for the suit from which this appeal arises.

The learned trial Judge rightly rejected the appellants claim as it was based on a forged agreement. We find as he did that, the appellants had no interest in the suit land on the basis of the evidence set out above.

We uphold the trial Judge's decision in that regard. We find no merit whatsoever in grounds **1, 2, 3** and **4** which we accordingly dismiss.

In respect of grounds 5 and 6, we find that, the learned trial Judge, having dismissed the suit entirely he had no basis upon which to find that the appellants were customary tenants (*bibanja* holders) of the suit land.

Firstly ownership of land by customary tenure is both a question of law and fact. A party that claims to hold land under any custom has a duty to prove his or her claim. There is nothing in the plaint to indicate that the appellants claimed, let alone proved, that they were customary tenants on the suit land.

Paragraph 3 of the plaint stipulates as follows;-

“The plaintiffs’ claim against the defendants severally and jointly is for declaration that the plaintiffs are lawful owners of the suit land situate at Tebalya, Luwero District; an order that the 2nd defendant hands over the duplicate certificate of title to the suit land to the plaintiffs who are the rightful owner and that the suit land be registered in the names of the plaintiffs, a declaration that the purported sale of portions of the suit land by the 1st defendant to the 2nd, 3rd, 4th and 5th defendants was null and void and of no legal effect, mesne profits, a permanent injunction restraining the defendants from further trespassing on the suit land, an eviction order against the 2nd, 3rd, 4th and 5th defendants from the suit land, general damages for trespass and costs of the suit The cause of action arises out of the facts as hereunder stated. ”

25 The appellant in their plaint sought the following remedies;-

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a) A declaration that the plaintiffs are owners of the suit land now comprised in Bulemezi Block 635 Plots 1 and 14.

b) An order that the suit land Bulemezi Block 635 Plot 1 and 14 be registered in the names of the plaintiffs.

c) That the 1st defendant hands over the certificate of title for Bulemezi Block 635 Plots 1 and 14 to the plaintiffs.

d) An order that the defendant hands over vacant possession of the suit land to the plaintiffs.

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e) A permanent injunction restraining the defendant and or their servants/ agents/ employers from selling and/or evicting the plaintiffs from the suit land and/or committing other acts of trespass.

f) Mense profits

15 *g) Costs of the suit.*

Clearly the appellants never claimed to hold the suit land as customary tenants neither did they adduce any evidence at the trial to prove that fact.

Customary tenure is defined in Section 1 (i) of the Land Act (Cap 227) 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 and under customary

5 *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.*
”

The trial Judge with all due respect erred when he held that the appellants by 10 virtue of the long occupancy were customary tenants on the suit land, when no evidence had been produced before him to prove that fact.

It is apparent from exhibit P3 (V)a letter from the Office of Titles Entebbe dated 17th December 1937 to The District Commissioner Mengo, that it was signed by the Land Office that, Kakowekowe had no interest at all in the land he sought to have registered in his name. That letter reads in part as follows;-

“Mr. Ason Kakowekowe who had surveyed 135 acres of land part of 324 acres of land Mailo Register Volume 261 Folio 23, Registered in the name of Enoka Muwanga holds no interest in the land”.

This evidence was alluded to by the trial Judge at P.15 of his Judgment. The trial Judge having evaluated the evidence found that;-

“It was difficult to determine the interest of the late Ason Kakowekowe had in the suit land which would pass over to his descendants, the plaintiffs”

Having found so, there was no basis upon which the learned trial Judge could have held as he did that the appellants were customary tenants on the suit land. Had Kakowekowe been a customary tenant, the District Commissioner would have found so.

We find that the appellants were licensees or tenants at will, in which case the 1st respondent may eject them from the land but only upon giving them sufficient notice.

For the reasons we have given we find that this appeal has no merit and it therefore fails. It is accordingly dismissed with no orders as to costs since none of the respondents or Counsel on their behalf appeared in Court at the hearing of this appeal.

Dated at Kampala at 24th day of May 2018

Solomy Balungi Bossa

JUSTICE OF APPEAL

Kenneth Kakuru

JUSTICE OF APPEAL

Geoffrey Kiryabwire

JUSTICE OF APPEAL

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