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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 176 OF 2013

LAWRENCE MARTIN MUGERWA MUSISI APPELLANT
VERSUS

10 **1. RICHARD BANJA**

2. JUSTINE BANJA RESPONDENTS

(An appeal from the decision of the High Court of Uganda (Land Division) by Hon. Mr. Justice Joseph Murangira, dated 20th February, 2013 from High Court Civil Suit No. 125 of 2010).

15 **CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

20 **JUDGMENT OF JUSTICE KENNETH KAKURU, JA**

This is an appeal from the decision of Joseph Murangira, J in High Court Civil Suit No. 125 of 2010 delivered on the 20th day of February, 2013, in which judgment was entered in favour of the respondents.

25 The background of this appeal as set out in the judgment of the learned trial Judge is that:- the appellant instituted a suit against the respondents the registered proprietors of land comprised in Busiro Block 263 Plot 103 land Senge by virtue of the grant of letters of administration in respect of the estate of the late Paulo M. Banja. The appellant contended that, he had purchased the suit land from the late Paulo M. Banja on 20th September 1990 and took immediate possession of the suit
30 land. However, he did not get registered because the original certificate of title had been lost. The appellant paid for the process of obtaining a special Certificate of title

5 and when the same was obtained, the respondents refused to deliver it to the
respondent with signed transfer forms. Being aggrieved the appellant filed a suit
against the respondents seeking the following orders and declarations;-(i) the suit
land is not part of the estate of the late Paulo M. Banja, (ii) the appellant is a lawful
and *bonafide* occupant, (iii) an order directing the defendants to deliver to the
10 appellant the Certificate of title together with the duly signed transfer forms in his
favour. In the alternative (a) an order directing the Registrar of titles to cancel the
respondents' names from the Register and substitute with that of the appellant, (b)
a permanent injunction restraining the defendants from selling, entering and/or
dealing with the said land, (c) general damages (d) costs of the suit.

15 The respondents in their defence contended that, the appellant was a *Kibanja* holder
(*bonafide/* lawful occupant) on a portion of the land measuring approximately 3
acres. They contended that, he did not have any interest on the rest of the suit land.
The learned trial Judge dismissed the suit thereby entering judgment in favour of
the respondents.

20 The appellant being dissatisfied with the decision and orders of the learned trial
Judge appealed to this Court on the following grounds;-

1. *The learned trial Judge erred in law and fact when he held that the appellant never paid the balance of the purchase price to the vendor (the late Paulo M. Banja) per the sale Agreement.*
- 25 2. *The learned trial Judge erred in law and fact when he held that the appellant was in total breach of the Sale Agreement.*
3. *The learned trial Judge erred in law when he based his decision on issues that were neither framed at the trial nor which could be lawfully framed.*
4. *The learned trial Judge erred in law and fact in holding that there was no*
30 *evidence of lodging the transfer forms and related documents with the office of the Registration of Titles by the appellant.*

- 5 5. *The learned trial Judge erred in law and fact when he held that the appellant was fraudulent and that he was not entitled to court protection.*
6. *The learned trial Judge erred in law when he made contradictory findings on the purchase of the land by the appellant.*
7. *The learned trial Judge erred in law and fact when he held that the appellant*
10 *had never been in possession of the duplicate certificate of title to the suit property.*
8. *The learned trial Judge erred in law and fact when he inappropriately applied the doctrine of latches.*
9. *The learned trial Judge erred in law and fact when he held that the*
15 *respondents did not commit any dishonest dealings in the land.*
10. *The learned trial Judge erred in law and fact when he declared the respondents the lawful owners of the suit land and when he ordered the appellant to vacate the land.*
11. *The learned trial Judge erred in law and fact when he failed to properly*
20 *evaluate the evidence on record thereby reaching the wrong conclusion.*

This appeal was fixed for hearing on 31st March 2020. However, as the Country was shutting down due to the Global Pandemic of COVID 19 the Court directed the parties to file written submissions in accordance with Court directions. The notice was issued to all Advocates in this matter and in other appeals that were pending
25 hearing having been cause listed for the March 2020 Civil Session. I am satisfied that, parties to this appeal were duly notified of Court directions. None of the parties complied with the directions.

However, I note from the record that, Niwagaba & Mwebesa Advocates representing the appellant filed comprehensive conferencing scheduling notes, covering all the
30 grounds of appeal on 23rd January, 2014 and Shwekyerera, Kalera & Co. Advocates representing the respondents filed their conferencing scheduling on 31st January,

5 2014. I am satisfied that both parties have sufficiently put in their respective submissions on record, sufficient for me to determine this appeal.

I shall on that basis proceed to do so.

Appellant's case

10 The appellant raised and argued two issues in his conferencing scheduling notes for the determination by this Court. These were;-

1. *Whether the learned trial Judge properly evaluated the evidence on record.*
2. *Whether the judgment and decree ought to be side aside.*

15 It is the appellant's submission that the learned trial Judge failed to evaluate all the evidence on record and as such he arrived at a wrong conclusion. It was contended that the evidence on record clearly indicated that, the appellant purchased land comprised in Busiro Block 263 Plot 103 from the late Paulo Banja. He argued that, he fully paid the purchase price and took possession immediately after the said
20 purchase in 1990. However, he failed to obtain registration in his names, as the certificate of title and transfer forms were lost at the land office.

He contended that, he approached the respondents who were the administrators of the estate of the late Paulo Banja and they agreed to apply for a special certificate to enable his registration. He contended that, he paid for the process of registration
25 and also agreed to make an ex gratia payment of Ug. Shs. 1,000,000/= upon the respondents signing transfer forms in his favour. Further that, when the respondents acquired the special certificate of title, they refused to sign transfer forms in his favour. He was therefore unable to get registered as proprietor.

It was contended that, the learned trial Judge erred when he found that there was no
30 valid sale agreement, as the same had been rescinded by the vendor. Further that,

5 he erred when he found that, the appellant had failed to pay Ug. Shs. 1,000,000/= which was the balance of the agreed purchase price vitiated the agreement.

It was further submitted that, the learned trial Judge erred when he entirely relied on the submissions of the respondents and ignored the appellant's evidence on record.

10 In respect of issue 2, it was contended that learned trial Judge failed to carefully evaluate the evidence on record, when he failed to find that, the respondents had conceded to the fact that, the appellant was a *bonafide*/lawful occupant on 3 acres of the suit land. Had he done so, he would not have made an order of eviction against the appellant. It was contended that the judgment and decree ought to be set aside.

15 Counsel prayed Court to allow the appeal and set aside the judgment and decree passed by the trial Court.

Respondents' reply

The respondents raised and argued three issues in his conferencing scheduling notes for the determination by this Court. These were;-

- 20
1. *Whether the law firm of M/s Niwagaba & Mwebasa Advocates can continue representing the appellants in this matter.*
 2. *Whether the learned trial Judge properly evaluated the evidence on record.*
 3. *Whether the judgment and decree ought to be side aside.*

25 In respect of issue 1, it was submitted that the appellant's advocates were disqualified by the learned trial Judge at the trial because the respondents were their former client. It was contended that it was improper for them to represent the appellant.

In respect of ground 2, it was conceded that the learned trial Judge made some contradictions in respect of the sale agreement of 20th September, 1990, however he

5 correctly evaluated all the evidence on record and arrived at the right conclusion that there was no valid sale agreement between the appellant and the late Paula Banja as the sale agreement had been rescinded and terminated by the Vendor.

It was submitted that, the contradictions were minor and as such they do not affect the findings of the learned trial Judge, apart from that in respect of the 3 acres of the
10 *kibanja* (customary holding), it was admitted by the respondents that the appellant was in lawful occupation of the 3 acres of the land in issue and the learned trial Judge should have found so.

Further that, the appellant failed to properly explain why he failed to acquire registration of the suit land over a long period of time. It was argued that the
15 appellant purported to have bought the suit in 1990, however he failed to get registered when the vendor was still alive. The vendor had died in 2003, 13 years after signing the purchase agreement, the basis of the appellant's claim.

It was the respondents' case that, the appellant approached the respondents in 2008 in order to buy a *malio* (freehold) interest in respect of the 3 acres he occupied and
20 as such he had conceded to the fact that he was a lawful occupant.

It was conceded that, the learned trial Judge made an order of eviction and vacant possession in error

Counsel prayed Court to dismiss the appeal with costs.

Resolution

25 I have carefully read the record of appeal and written arguments of the parties. I have also read the authorities cited and relied upon by Counsel. 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. See: *Rule 30(1)* of the Rules of this Court , *Fr. Narsensio Begumisa and 3 others vs Eric Tibebaga, Supreme Court Civil No. 17 of*

5 *2002 and Ephraim Ongom Odongo vs Francis Binega Donge Supreme Court Civil Appeal No. 10 of 2008* (unreported).

I have kept above principles in mind while resolving this appeal.

Issue 1.

Whether the learned trial Judge properly evaluated the evidence on record. It is the
10 appellant's contention that, he bought the suit land approximately 10 acres from the
late Paul Banja in 1990. However, he was unable to obtain its registration into his
name due to the fact that, the duplicate certificate and transfer forms were
misplaced at the land Registry. In support of his claim he adduced the land purchase
agreement exhibit P.2 During the trial, the signature of the late Paul Banja was
15 questioned by DW1, Kakelewe Yusufu, the Registrar of Titles attached to Kampala
Land Office. During his testimony he testified at page 62 of the record of appeal as
follows;-

*"The transfer instrument by Daniel Kaweesa to Paul M. Banja bears the
signatures of Paul M. Banja. There is a copy of sale agreement between Paul M.
20 Banja and Lawrence Martin Mugerwa Musisi on our file. It is a photocopy. This
is the copy, it is just on our file and there is no application made to put it in on
the file. The parties signed each and every page of the sale agreement. There is a
mortgage instrument and an instrument for change of postal address which
bears the signature of Paul M. Banja. In my opinion these signatures differ to
25 the signature attributed to Paul M. Banja on the Memorandum sale agreement.
On the instruments we have the start appears as "K" then on the sale agreement
it appears to be a "B"."*

Further, he stated that;-

*"I pray that the original copies of ID1, ID2 & ID3 and the sale agreement
30 between Paul M. Banja and the plaintiff be subjected to the handwriting expert*

5 to compare the signature of the late Paul Banja whether he actually put his
signature on the sale agreement which had been put on the record as an exhibit.

Following the above testimony, the learned trial Judge ordered that the original agreement between the plaintiff and the late Paul M. Banja and 1D1, 1D2 and 1D3 be submitted to a handwriting expert for an opinion.

10 Mr. Ezati Samuel, the handwriting expert made a report and testified. In his report dated 16th February 2012, he stated as follows;-

15 *"I have very carefully and thoroughly examined and compared the signatures of PAULO M. BANJA on the original agreement document and its attachments, I.D 1, I.D 2 and I.D.3 and found the following. The specimen signatures range from 1986 to 1999. Therefore I consider them to be a fair representation of the writer's normal range of writing and the questioned documents were made in 1990.*

20 *Based on the current samples provided I have observed fundamental differences between the questioned signatures on the sale agreement and those on the attachments and the samples in the following areas;*

- 25 1. *There is a major difference in the design and manner of execution of the 1st character reading as P.*
2. *There are clear differences in the size of the initial P.*
3. *The connection between the 1st character and the subsequent character B seen in the questioned sale agreement its attachments is not seen in the samples.*
4. *There are further differences in the spacing between characters P and B*
- 30 5. *There are differences in size of letter Z and the manner of its combination to the previous stroke and the subsequent character reading as "a".*
6. *The design and manner of execution of letter B is clearly different.*
7. *The i-dots seen in the samples are absent in the questioned signatures.*
8. *There is difference in the direction of finish of the terminal character.*
- 35 9. *Some of the signatures e.g. on S3, S4 and S5 are in short form that have some pictorial resemblance with the 1st character in the questioned signatures.*

5

However I have not found significant similarities between the initial P and these samples in manner of execution and designs. They are actually different.

10

In conclusion I have not found sufficient evidence to suggest that the author of the specimens listed above wrote the questioned signatures in the questioned sale agreement and its attachments.”

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The report of the handwriting expert reproduced above raised an aspect of the authenticity or genuineness of the land sale agreement between the plaintiff and the late Paul M. Banja. The seller’s signature was put in serious doubt.

A questioned signature renders the agreement doubtful to say the least. See: *KewiTek Chao (trading as Zung Fu Co) v British Traders and Shippers Ltd [1954] 1All ER 779.*

20

The agreement of purchase on its own, in this case was therefore insufficient to prove that, the appellant purchased the suit land in question from the late Paul M. Banja. There was no other evidence to corroborate it. No independent evidence was provided to prove the said purchase. The onus was upon the appellant to prove his case on a balance of probabilities. He would have adduced more cogent evidence to support his claim. He failed to do so. Sections 101,102 and 103 of the Evidence Act, requires he who alleges a fact to prove it. The appellant had the burden to prove that the authenticity of the land purchase agreement by adducing supporting evidence, such as witnesses to the agreement, receipts of payment and acknowledgments. There was no evidence to prove that the genuineness of the land purchase agreement. See: *Jovelyn Barugahare vs Attorney General Supreme Court Civil Appeal No. 28 of 1993.*

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5 A peculiar fact I have observed on the land sale agreement is that, the purchaser and vendor signed in the presence of the one witness. He was the appellant's advocate. The appellant at the trial testified as follows;-

10 *"...I refer to the agreement of sale. I can identify it. I signed on it. It was made by my lawyers Nicholas Lwanga & Co. Advocates... It was signed by Paul Banja and myself as the purchaser and witnessed by Mr. Nicholas Lwanga, the then my lawyer."*

This does not help the appellant's case in the least. It is always prudent to have a different witness for each party. The witness to the agreement did not testify. The seller as we know had died at the time of the trial. All this rendered the claim weak.

15 The manner in which the appellant came to be entered on the white page at the land registry remained unclear, since the entry was cancelled, it could not have been used as evidence in his favour. On the contrary, it points to irregularities and *mala fides* on his part.

In that regard DW1, Kakelewe Yusufu stated as follows;-

20 *"There was an entry of transfer under the names Lawrence Martin Mugerwa on 26/7/91 under instrument no. KLA 148421 but this entry did not have any endorsement by the Registrar and the former Commissioner Ms. Sarah Kulata Basanga cancelled it on grounds that it had been erroneously printed on the Register. By erroneously printed on*
25 *the register because there was no endorsement by the Registrar of Titles which is a legal requirement under the Registration of Titles Act."*

The appellant attempted to apply for a special certificate of title to the suit land. He had no legal authority to do so as he was not the registered proprietor or his successor in title. He testified as follows:

5 “This is the application for the special certificate of the title I made to the
Commissioner Land Registration as a purchaser and registered owner of
the suit land.”

This was a futile exercise and could not have proved his claim to the land in anyway.
The appellant tried all avenues to get himself registered on the certificate of title
10 without success. This rendered his case weak as it was based on evidence that was
clearly wanting.

I note that, PW3, Milly Mubiru who bought land at about the same time as the
appellant from the late Paul M. Banja had her names registered on the Certificate of
title during the life time of the seller. The appellant’s inability to get himself
15 registered as proprietor between 1990 and 2003 when the late Banja was alive was
not sufficiently explained by the appellant. This leads to a negative inference on his
part. I find that the appellant failed to prove his claim on a balance of probabilities.
The learned trial Judge rightly dismissed his claim as a purchaser of *mailo* (freehold)
interest. This ground of appeal fails.

20 In respect of issue 2, it was conceded by the respondents, the learned trial Judge
when he made an order of eviction and vacant possession against the appellant as
he was rightly entitled to only 3 acres of the *kibanja* (customary holding) on the suit
land. I will not delve so much in this issue as it is not in dispute.

However, I find that, the appellant is a lawful occupant of the suit land and not a
25 *kibanja* (customary) holder. In 1990 the law applicable was the Land Reform Decree
No. 3 of 1975. Sections 2 & 4 of the Land Reform Decree abolished *mailo*/freehold.
It also abolished customary tenancy. So the appellant could not have been a
customary tenant on the land in 1990. The appellant however, had settled on the
land with the consent of the registered proprietor. His interest is only restricted to
30 3 acres he occupied. He is therefore a lawful occupant under the provisions of

5 Article 237(8) and (9) of the Constitution and Section 29(1)(a) of the Land Act. The law provides him with security of tenure. He cannot be evicted by the respondents. He is not a trespasser. He is at liberty to purchase his interest and get registered in respect of only 3 acres of the suit land with the agreement of the registered proprietor. See:-*Mr. Isaaya Kalya & 2 others vs Moses Macekenyu Ikagobya, Court of*
10 *Appeal Civil Appeal No. 82 of 2012*

This appeal therefore succeeds in part. The judgment and orders of the High Court are hereby set aside and substituted this judgment and orders therein.

I would make the following orders and declarations

- 15 (1) The appellant's claim to the suit land as purchaser has no basis and is dismissed.
- (2) The appellant is a lawful occupant of 3 acres of the suit land that he has occupied since 1990.
- (3) The appellant is entitled to ½ of costs at this Court and the Court below.

It is so ordered.

20 **Dated at Kampala** this 18th day of March 2021.

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Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 176 OF 2013

LAWRENCE MARTIN MUGERWA MUSISI ===== APPELLANT

VERSUS

1. RICHARD BANJA

2. JUSTINE BANJA

=====RESPONDENTS

(An appeal from the decision of the High Court of Uganda (Land Division) by Hon. Mr. Justice Joseph Murangira, dated 20th February, 2013 from High Court Civil Suit No. 125 of 2010)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Kenneth Kakuru, JA.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this.....16th..... day ofMarch.....2021.

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 176 OF 2015
(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)**

LAWRENCE MARTIN MUGERWA MUSISI}APPELLANT

VERSUS

- 1. RICHARD BANJA}
2. JUSTINE BANJA}RESPONDENTS**

(An appeal from the decision of the High Court of Uganda (Land Division) by Hon. Mr. Justice Murangira, dated 20th February, 2013 from High Court Civil Suit No 125 of 2010)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA.

I agree with the facts and analysis of the issues set out in the said judgment. I concur with decision and orders of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA that the appeal only partially succeeds with the orders he has proposed in his judgment and I have nothing useful to add.

Dated at Kampala the 18th day of March 2021



Christopher Madrama

Justice of Appeal