

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi, Gashirabake JJA]

Civil Appeal No. 13 of 2014

(Arising from High Court Civil Appeal No.17 of 2007)

BETWEEN

Muwulize Growers CO-OP Society Ltd ===== Appellant

AND

Robert Rwenzigye ===== Respondent

(On appeal from the judgment of the High Court of Uganda, (Kwesiga, J)., delivered on 20th August 2013)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] The appellant instituted claim No. KBG/N013/2003 in the Kiboga District Land Tribunal against the respondent for trespass. The appellant sought the following orders:

(1) An order stopping the defendant from trespassing on the claimant's land.

(2) An order to Kiboga District Land Board to recommend the claimant to get a land tittle to the suit land.

(3) Costs of the suit

(4) Any other relief, the honourable court shall deem fit.'

[2] The District Land Tribunal decided the matter in favour of the respondent and dismissed the claim with costs. The tribunal found that the suit property belongs to the respondent because he had been in effective occupation and possession of the suit property since 1992. This finding was based on the evidence adduced in court that the respondent had fenced off the suit property, rears cattle on the property and had built three houses and watering points on the land. Dissatisfied with the decision of the tribunal, the appellant appealed to the High Court on the following grounds:

'1. That the tribunal Chairman erred in law and fact to hold that the land belongs to the Defendant/Respondent.

2. That the Chairman erred in law and fact when he failed to evaluate the evidence properly.'

[3] The first appellate court confirmed the decision of the tribunal. It found that the respondent is the customary tenant of the suit property and that he was free to bring the land under the operation of the Registration of Titles Act by applying for a leasehold tenure in accordance with the provisions of the law. The appellant has now appealed to this court on the sole ground that:

'The learned appellate judge erred in law when he failed to address his mind to the provisions of the Land Reform Decree No. 3 of 1975.'

[4] The respondent opposed the appeal.

Submissions of Counsel

[5] At the hearing, the appellant was represented by Mr. Arinaitwe Peter. The respondent did not appear in court. Counsel for the appellant opted to adopt the submissions on record.

- [6] It was counsel for the appellant's submission that since the respondent contended that he acquired the suit land in 1991 before the coming into force of the 1998 Land Act, his occupation was governed by the Land Reform Decree No.3 of 1975 which prohibited the acquisition of fresh customary tenancy without written permission from the sub-county chief and as such, the respondent does not qualify as a customary tenant on the suit land. That it was erroneous for the trial judge to only apply section 24 of the Land Act. That the section should have been read together with section 5(1) of the Land Act which prohibits creation of customary tenure on any public land except with the permission of the prescribed authority. Counsel relied on Kampala District Land Board and Another v Venansio Babweyaka & others [2008] UGSC 3 for his submissions.
- [7] It was also counsel for the appellant's submission that the respondent did not adduce any evidence to show the custom or the customary practice under which he acquired the suit property to prove his customary tenancy. He also relied on Kampala District Land Board & Anor v Babweyaka & 3 Ors (supra) for this submission.
- [8] Counsel concluded that since the respondent's purported occupation of the suit property was illegal, the appellant rightly and legitimately acquired a valid lease offer for the suit property.

Analysis

- [9] This being a second appellate court, it has no duty to re-evaluate the evidence unless the first appellate court had failed in its duty to do so. See Narsensio Begumisa and Ors v Eric Tibebaga [2004] UGSC 18. Section 72 of the Civil Procedure Act also limits second appeals to this Court to only questions of law.
- [10] Counsel for the respondent contended that it was erroneous for the first appellate court to rely on the provisions the Public Lands Act to hold that the respondent was a customary occupant of the suit property in exclusion of the provisions of the Land Reform Decree of 1975. While determining the question of ownership of the suit property, the first appellate court stated:

'In 1991 when the facts of this case started unfolding the land in issue was public land which fell under the control and management of Uganda Land Commission under provisions of the Public Lands Act, Act 13 of 1969.

Section 1 of the Act vested in the Commission all rights, titles, estates and interest in land and other obligations. Section 17 of the Act gave Uganda Land Commission the powers to grant leases. Section 19, and 24 protected and gave the customary tenants priority to being granted lease over the land they occupied. Section 24(1) made it lawful for a customary tenant to occupy public land without grant, lease or licence from the controlling authority while Section 24(2) prohibited leasing any public land which or part of which was occupied by a customary tenant without their consent. Section 24(3) provided that failure to disclose that the land applied for was occupied by customary tenants was a ground for withdrawal by the controlling authority any grant made.

Bekunda Pw1 conceded that the land was occupied and under use of the Respondent for grazing and had established cattle wells. He conceded these were the facts when he applied to lease this land now in dispute. Pw3 confirmed that the Respondent had occupied and developed the land and continued being in occupation since 1991. In my view failure to disclose these facts in the application for lease by the appellant was done in bad faith to defeat the interest of the Respondent's unregistered interest and the offer based on this application is invalid. I am satisfied that the Respondent was a customary tenant on public land that was protected by section 24 of the Public Lands Act (Act 13 of 1969) as a whole. It is hereby ordered that the lease offer given to the Appellant be and is hereby struck off for being null and void for failure to disclose the Respondent's interests.

The evidence constituting proof of this customary tenure include the following: -

- (i) The Respondent occupied this land since 1991 with the consent of the LC 1 Chairman the local authority and nobody else occupied the land or part of it.
- (ii) The Respondent cultivated part of the land and grazed cattle on the land.
- (iii) The Respondent had alienated the land by clearly fencing the land.

(iv) The Respondent had developed three cattle watering wells or dams and built houses on the land.

In my view the above evidence provides answers as to who is the owner of the land. I have found it was the Respondent who occupied, possessed and used the suit land to the exclusion of other people and was recognized by the local authorities, the L C I Chairman, as the customary tenant of the land therefore he is the owner of the land.'

[11] It is not in contention that before the parties started laying their respective claims on the suit property, the land was free public land. The respondent's claim over the land arose in 1991 and at the time, acquisition of interests in land was governed by the Public Lands Act of 1969 subject to the Land Reform Decree of 1995 and the regulations thereunder.

[12] However, the point of law the appellant is raising now was neither raised in the court of first instance nor in the first appellate court. This is the question of whether or not section 5 of the Land Reform Decree applied to the suit land. Notwithstanding that this was irregular without seeking leave of this court, I will nevertheless, consider this sole ground.

[13] I agree with the learned judge's interpretation of section 24 of the Public Lands Act of 1969. I will set out Section 24 of the Public Lands Act 1969 in its entirety. It stated:

'24(1) Subject to the provisions of subsection (5) of this Act, it shall be lawful for persons holding by customary tenure to occupy without grant, lease or licence from the controlling authority any unalienated public land vested in the Commission, if,
(a) the land is not in an urban area; and
(b) no tenancy or other right of occupancy has been created in respect of it.
(2) A controlling authority shall not make a grant of freehold or leasehold of public land which or part of which is occupied by persons holding by customary tenure without the consent of such persons.
(3) Without prejudice to anything provided under section 49 of this Act an applicant for an estate in

freehold or leasehold of public land which is occupied by customary tenure at the time of application shall,
(a) state in the application that the land is so occupied;
and
(b) Furnish to the controlling authority evidence of the consent of the occupier required under the immediately preceding subsection,
And failure to comply with paragraph (a) of this subsection shall be a ground for the withdrawal by the controlling authority of any grant made in respect of such application.

(4) where, in accordance with the provisions of this section, a controlling authority makes a grant in freehold or leasehold of public land, any person occupying such land by customary tenure shall be entitled to be paid such compensation as the Minister may, in writing, approve.

(5) the Minister may, by statutory order, specify any area of Uganda to be an area in which public land which is not occupied by customary tenure at the commencement of such order shall not, thereafter, be occupied otherwise than by virtue of an estate, interest, or other right of occupancy granted by the controlling authority or upon such conditions as the Minister may specify in such order.'

[14] Under this section, it was lawful for a customary occupant to occupy free public land without a lease, grant, or licence from the government. The government was prohibited from granting in freehold or leasehold any public land that was lawfully occupied under customary tenure without the consent of the customary occupants. Applicants for land occupied by customary tenants had to furnish the controlling authority with evidence that the occupants consented to the application and the compensation payable to them. Failure to provide such evidence, or to pay the customary occupants compensation approved by the Minister, was a ground for revocation of the grants.

[15] However, the right enjoyed by the citizens to occupy unalienated public land by customary law without prior permission from the government

was abolished by the Land Reform Decree of 1975. The Land Reform Decree declared all land in Uganda public land to be administered in accordance with the Public Lands Act.

[16] Section 5 of the Land Reform Decree stated:

‘5(1) With effect from the commencement of this Decree, no person may occupy public land by customary tenure except with the permission in writing of the prescribed authority which permission shall not be unreasonably withheld:

Provided that the Commission may, by statutory order, specify areas which may be occupied by free temporary licence which shall be valid from years to year until revoked.

(2) Any agreement or transfer purporting to create a customary tenure of land contrary to subsection (1) of this section shall be void and of no effect and, in addition, the person purporting to effect such transfer shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding two years or both such fine and imprisonment.

(3) Upon the conviction of any person under subsection (2) of section 4 or subsection (2) of this section, the court shall, in addition to the penalty prescribed in each sub-section, order the refund of anything paid as purchase price to the person by whom such payment was made.’

[17] The Land Reform Regulations of 1976 stipulated the procedure to be followed by persons who wished to occupy public land by customary tenure. In Kampala District Land Board and Another v Venansio Babweyaka and Others [2008] UGSC 3, Odoki CJ (as he then was) stated:

‘The Land Reform Decree 1975 declared all land in Uganda to be public land to be administered by the Uganda Land Commission in accordance with the

Public Land Act 1969, subject to such modifications as may be necessary to bring that Act into conformity with the Decree. The system of occupying public land under customary tenure was to continue, but only at sufferance and any such land could be granted by the Commission to any person including the holder of the tenure in accordance with the Decree. Under Section 5 it was provided,

“5(1) With effect from the commencement of this Decree, no person may occupy public land by customary tenure except with the permission in writing of the prescribed authority which permission shall not be unreasonably withheld:

Provided that the Commission may, by statutory order specify areas which may be occupied by free temporary licence which shall be valid from year to year until revoked.”

Subsection (2) provided,

“(2) Any agreement or transfer purporting to create a customary tenure of land contrary to Subsection (1) of this Section shall be void and of no effect and, in addition the person purporting to effect such transfer shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.”

Under the Land Reform Regulations 1976, any person wishing to obtain permission to occupy public land by customary tenure had to apply to the Sub County Chief in charge of the area where the land was situated. After processing the application, it had to be sent to the Sub-County Land Committee for approval.

The question is whether the respondents did acquire the customary ownership following the enactment of the Land Reform Decree. The answer to this question appears to be in the negative. Restrictions on acquisition of customary tenure under the Public Lands Act seem to have continued as the law continued to govern all types of public land including customary tenure subject to the provisions of the Decree. In order to acquire fresh customary tenure one had to apply to

the prescribed authorities and receive approval of his or her application.’

- [18] Considering the above, a fresh customary interest could not accrue from merely occupation, possession and use of free public land as was held by the learned appellate judge. I find that the respondent did not acquire a customary interest in the suit property in light of the then prevailing law. However, that is not the end of the matter. The question then remains as between the appellant and the respondent whose interest in the suit land had priority, given that both of them had received lease offers from Uganda Land Commission.
- [19] PW1, Mr. Bekunda Claver Francis, the Secretary General to the appellant testified that at a time he does not recall, the appellant applied to the Uganda Land Commission for a lease on suit property. The appellant was granted a lease offer on 23rd September 1994 and the District Land Board allowed the appellant to survey the land in 1995. That the appellant was subsequently informed by the District Land Board that it cannot process the land title to the land because the respondent was doing the same. He stated that the respondent told them that he had also been offered a lease on the same piece of land. PW1 testified that the appellant has no developments. On cross examination, he stated that he was aware of the respondent’s developments on the suit land.
- [20] PW2, Mwesigye Sam’s evidence was to the same effect as that of PW1. He testified that the members of the association led by PW1 approached him in 1994 and told him that they wanted land in Kyampagi village. That they identified the suit property and the LC1 chairman of the village (PW3) told them that it was free. The chairman gave him a recommendation that he took to Mityana Land office. That the district land Committee Kiboga went to the suit land and recommended that it was free from dispute and thereafter a lease offer was granted. The appellant adduced documentary evidence to that effect. He stated that the appellant paid premium and thereafter the land was surveyed. A copy of the deed plan was produced in court. When the association was in the process of getting a certificate of title, it was stopped by the respondent who claimed to have an interest in the suit property.

- [21] PW3, Semyalo Livingstone was the LC1 chairperson Kyampagi village from 1991 to 1996, he stated that he recommended both parties for the application of a lease on public land on different pieces of land. His evidence corroborated the evidence of the respondent that he applied for the land in 1991 and started carrying out developments on the land in 1992.
- [22] It was the respondent's testimony that when he bought his three bibanja in Kyampagi village, he was informed by the people he purchased from that there was free public land in the area and upon establishing that the suit land was indeed free public land, he went to Kyampagi L.C.1 and a got a recommendation endorsed by all the 9 executive members to use the land . This was in the year 1991. That he was also told by the land officers in Mityana to use the suit property until the enactment of the 1995 Constitution. He stated that he started cultivating on the land in 1992 and started grazing his cows on the land in 1993. Between those years, he constructed three houses and three watering wells on the land. He instructed Robert Kakumba to survey the land in 1995 before being transferred to the 4th infantry division and that when he came back in 1998, he discovered that the appellant had surveyed the same land. Upon cross examination, the respondent stated that he got permission to use the land by the land Board at Mityana.
- [23] DW2, the LC1 chairman of Kyampagi village since 2001 corroborated the evidence of DW1. He stated that the appellant's land is different from the disputed property. That the forwarding letter for acquisition of land and the lease offer that the appellant got were regarding a completely different piece of land.
- [24] From the evidence on record, both parties applied for a lease on the suit property and had been granted offers by the Uganda Land Commission. This is confirmed by the letter on record dated 6th October 2003 from Kiboga District Local Government to the Secretary, Kiboga District Land Tribunal and the letter dated 14th May 2003 from Kiboga District Local Government to the parties.

[25] It is not in dispute that the respondent has been in occupation and using the suit property since 1991 which grants him a possessory interest in the suit property. On the other hand, the appellant was not in possession of the suit land. In his application for a lease the appellant did not disclose that the land was occupied by the respondent though its officers knew that to be the case. The appellant wrongfully claimed in its application that the land was vacant whereas not. This was fraudulent conduct. As between the appellant and the respondent it is only fair and just to recognise the interest of the respondent, given that he was in occupation of the land and had developed the same, to take priority in consideration of the grant of a leasehold and registrable interest from the controlling authority.

[26] In arriving at this decision I take comfort in the provisions of section 10 (3) of the Magistrates Courts Act, which empower the Magistrates Court, which has the same jurisdiction as the Lands Tribunal in relation to land matters, even if only by analogy, which require the court where no particular rule applies to be guided by principles of justice, equity and good conscience. It states,

‘In civil causes or matters where no express rule is applicable to any matter in issue, a magistrate’s court shall be guided by the principles of justice, equity and good conscience.

[27] There is no particular rule that applies to a case where there are 2 competing claimants of a portion of public land. One in undisturbed occupation of the public land, for 12 years or more, and had developed it. And the other not in occupation, when both of them have applied to be granted a leasehold interest in the said property from the controlling authority. Principles of justice, fairness and good conscience would dictate in my view that the party in occupation, who has developed the same, be given priority.

[28] I would direct the Kiboga District Land Board to continue processing the respondents’ application for the issue of a leasehold title to the suit land and would quash the offer made to the appellant. I would uphold the orders of the High Court of Uganda in respect to the suit land.

[29] Much as the appellant succeeded on his sole ground it is a pyrrhic victory. I would not grant the appellant any costs on appeal. The respondent did not turn up for hearing this appeal and much as his success in the courts below remains undisturbed, I would not allow him costs in this court. I would grant the respondent costs in the courts below.

Decision

[30] As Kibeedi and Gashirabake, JJA, agree, this appeal is technically allowed with no order as to costs. The appellant's claim to the suit land is dismissed. The respondent is confirmed as the beneficial owner of the suit land entitled to process a grant from Kiboga District Land Board and register the same.

Dated, signed and delivered at Kampala this 9th day of Dec 2022.


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi, Gashirabake JJA]

Civil Appeal No. 13 of 2014

(Arising from High Court Civil Appeal No.17 of 2007)

BETWEEN

Muwulize Growers CO-OP Society Ltd ===== Appellant

AND

Robert Rwenzigye =====Respondent

(On appeal from the judgment of the High Court of Uganda, (Kwesiga, J), delivered on 20th August 2013)

JUDGEMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my Lord, Fredrick Egonda-Ntende, JA. I concur with the reasoning and conclusions made.

Dated at Kampala this ^{20th} day of ^{July} 2022



**Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL**

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

Coram: [Egonda-Ntende, Kibeedi, Gashirabake] JJA

CIVIL APPEAL NO. 13 OF 2014
(Arising from High Court Civil Appeal No. 17 of 2007)

BETWEEN

MUWULIZE GROWERS CO-OP SOCIETY LTDAPPELLANT

AND

ROBERT RWENZIGYE..... RESPONDENT

On appeal from the Judgment of the High Court of Uganda, [Kwesiga, J] delivered on 20th August 2013.

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

I have had the benefit of reading in draft the Judgment prepared by My Lord, Hon. Justice Egonda-Ntende JA. I concur with the reasoning and conclusions therein. I have nothing useful to add.

Dated at Kampala this.....^{20th} day of^{July}.....2022


Christopher Gashirabake,
JUSTICE OF APPEAL