

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

CIVIL SUIT NO.1 OF 1993

YOWERI KAKUBAKUBE..... PLAINTIFF

Vs.

GEORGE WILLIAM KATURA..... DEFENDANT

JUDGMENT.

INTRODUCTION.

The plaintiff filed this suit, in this court, seeking an order directing the Registrar of Titles to cancel the defendant's certificate of title upon the ground of fraud.

The defendant holds a certificate of title in respect of plot 14, Rwampara, Block 53, at Kakanja, Nyabuhikye, Rukoni. The land measures 29.2 hectares. The defendant was registered as leasehold proprietor, for a term of 49 years on 19.3.1987.

THE RESPECTIVE CASES.

The plaintiffs claim is that the defendant's father secretly and fraudulently included, in his certificate of title, the plaintiff's kibanja (customary holding) which is adjacent to the defendant's own kibanja. The defendant holds letters of administration for his father's estate. His father, Joshua Katura died in 1990.

The plaintiff claims that he and the defendant's father had been land neighbours for a long time but that the defendant had been in land dispute with him. In 1975 the plaintiff sued the defendant's father in the Grade II magistrate's court at Ruhama. The court decreed the

land in dispute as his in civil suit No. 30/75. The defendant appealed to the chief magistrate's court at Mbarara in Civil Appeal MMB 152/75. But the appeal was dismissed. Subsequently, the defendant's father tried to fence the plaintiffs land but the plaintiff complained to police and the fencing was stopped.

In 1992, however, the plaintiff was surprised to receive a notice issued under the then Land Reform Decree, 1975, (since repealed) requiring him to vacate the defendant's land. The plaintiff then discovered that the defendant had secretly obtained a certificate of title over the disputed land.

The defendant's case is that the land covered by the certificate of title was obtained by the defendant through normal procedure and that no fraud was committed by the defendant. The defendant also claims that the plaintiff was all along aware that the defendant had applied for a lease over the disputed land but failed to lodge a caveat to stop the registration of the defendant as proprietor.

ISSUES:

Three issues are for judgment:

- a) whether the disputed land is covered by the title deed of the defendant, comprised in plot 14 Rwampara, Block 53;
- b) whether the defendant brought the disputed land under the RTA through fraud; and
- c) what remedies are available to the parties.

FIRST ISSUE.

Both parties agree that the land in dispute is covered by the certificate of title of the defendant. Learned counsel, in his final submissions stated, "On whether the disputed land is within the defendant's title, the answer is yes." It, therefore, appears to me that I must answer the first issue in the affirmative.

SECOND ISSUE

The second issue is what constitutes the heart of this case.

There are several principles which have been developed as part of Uganda's jurisprudence in relation to judicial analysis aimed at determining whether or not a certificate of title held by a

party to a case should be cancelled.

It is, thus, trite law that once fraud has been proved on the part of a registered proprietor, the certificate of title may be cancelled by the court under section 185 of the Registration of Titles Act. Nazarthli Hassanali Senyan Vs Edward Mperesse Nsubuga HCCS No.364 of 1993.

A party relying upon fraud must plead it and particularize it in the party's pleadings. An allegation of fraud must be strictly proved. The standard of proof is, however, does not go to the level of proof beyond reasonable doubt as is required in criminal proceedings. It is higher than that required ordinarily in civil cases. J.W.Kazoora Vs. MLS Rukuba. SCCA No. 13 of 1992.

It appears to me that the second issue has two components. The first is to establish whether the plaintiff owns any kibanja (customary holding) on disputed land and is merely not there as a trespasser. The second is whether the defendant fraudulently included the plaintiff's customary holding under his certificate of title.

To prove that the plaintiff owned a kibanja on the disputed land, the plaintiff's appointed attorney, who is his nephew, gave evidence as PW1. PW2 was one Muntuyera Eric. He was 60 years old. He was born in the same village. He knew that the plaintiff owned a kibanja adjacent to that of the defendant. He was a witness in the grade II court at Ruhama in 1975 when the plaintiff sued the defendant over the same kibanja. PW3, Nathan Natemba was also a village mate and land neighbour to both the plaintiff and the defendant. He was born in the same village. He was 51 years when he testified in court. He had lived in his kibanja continuously. He was certain that the plaintiff owned a kibanja over the disputed land. The plaintiff was already owning the kibanja by the time of the witness's birth. PW4 was Jackson Mwiru. He was aged 56 when he testified. He was the LCIII chairperson of Rukoni sub county. His kibanja bordered that of the defendant and the plaintiff. He knew that the plaintiff owned a kibanja on the disputed land. He knew the boundaries between kibanja of the plaintiff and the defendant. He had seen the plaintiff reside and cultivate his kibanja for many years. He was 56 when he testified.

On the other hand, the defendant gave evidence in person as DWI. His evidence was that the

land in dispute is and has always been his. Although he resided in the same village with the plaintiff, they shared no land borders as far as the disputed land was concerned. He acknowledged that in 1975 a dispute, in Civil Suit No.30/75, the parties disputed over the land and he was defeated and the court ordered boundaries to be erected. Court divided the land into two. In 1975, the defendant applied for the land decreed for him. Then in 1988/9 the plaintiff started grazing in the defendant's land and erected a cattle crash in 1989. When the plaintiff started building on the land, the defendant served him the notice to vacate.

DW2, Erifasi Tibirenga, 60 years of age testified that the defendant in 1980 wanted to fence the land which the court had decreed to him in 1975 but the plaintiff involved police who arrested and detained him. Then the plaintiff took over the disputed land. The plaintiff never had any kibanja over that land. The evidence of DW2 was supported by that of DW3 Yoweri Mutahi.

I have analysed the evidence of both sides. I find the plaintiff's witnesses to be straight forward and largely truthful as opposed to the defendant and his witnesses whose version that the plaintiff moved upon the defendant's land in 1988 and simply took it over is, certainly, an incredible lie. If that had been the case, the matter would certainly, have gone back to court. The parties had been to both court and the police on earlier occasions. DW4, Margaret Kanabi, an ADC at Mbarara in 1977, visited the defendant's land for inspection. She found the entire land fenced. It is, therefore, not true that the defendant wanted to fence his land in 1980. It was already fenced.

On a balance of probabilities, therefore, the plaintiff has proved that he owns a kibanja customary tenure upon the disputed land.

The second part of the second issue is about fraud. Was the inclusion of the plaintiff's kibanja in the certificate of title of the defendant the result of fraud on the defendant's part?

The plaintiff in his pleadings particularized the alleged fraud as under:

- a) failing to disclose to the Uganda Land Commission in his application of 11/8/75 the fact that part of the land applied for was occupied and used by the plaintiff as a customary tenant;
- b) failing to disclose to the District Land Committee on inspection of the land that the

plaintiff was a land neighbour and should sign the land inspection form;

- c) conducting the survey of the land secretly without informing the land neighbours to be present and verify the correct boundaries;
- d) surveying the land beyond his fenced boundaries and thus grabbing the plaintiff's land;
- e) causing the plaintiff's land to be included in the deed plans and subsequently in his certificate of title, plot 14, Rwampara, Block 53.

On particular number one, the defendant's application dated 11/8/75 is exhibited D1. In it, the applicant applied to lease 40 hectares. He specifically stated that "the land is my kibanja". It is, therefore, clear that the application covered only the defendant's kibanja and not of the plaintiff. This tallies squarely with the evidence of Margaret Kanabi, the ADC who carried out the inspection, as that was then the practice after Idi Amin had resolved the District Land Committees.

Ms Kanabi's evidence was that the land which she inspected on 6th July, 1977, was all fenced. It also shows that no disputes existed over that land. The inspection report is Exh P2. The land had a cultivated and a grazing part. This proves that the defendant showed the inspection team his own Kibanja which he, indeed, had applied for. There is no evidence that there was a second inspection. The inclusion of the plaintiff's kibanja subsequently was clearly intended to defeat the plaintiff's customary tenancy. It appears to me to amount to clear fraud. Matovu & 2 Others Vs. Sseviri & Another (1979) HCB 174.

I will not deal with particulars number two and three. I will move to particular number four.

Particular number four relates to surveying the land beyond the defendant's fenced boundaries so as to include the plaintiff's kibanja.

Exhibit P2 shows that after inspection, the ADC recommended 40 hectares which the defendant has applied for to be leased by him. However, the evidence of Meddy Tumwesigye, Lands Officer Ntungamo District, who produced the file for plot 14 Rwampara Block 53, before this court, shows that the Uganda Land Commission allocated the applicant 40 acres or 16.16 hectares and not 40 hectares which the District Land Commission had recommended.

The instructions to survey were given on 9th January, 1984, for surveying 16.16 hectares. Messers G.W Bakibinga and partners, carried out the survey. It appears that the survey of the defendant's kibanja yielded just 16.16 hectares, which was much less than the 40 hectares he had applied for and which was recommended by the ADC. However, some eight months afterwards, an application for excess, made presumably by the defendant, was granted by Uganda Land Commission. Instructions were, on September, 1984, issued to the senior surveyor at Mbarara to survey an extra 13.84 hectares in order to make up the 29.2 hectares that the defendant's certificate of title now covers. There is no evidence that an inspection preceded the survey. The date upon which the second survey was conducted is also not known.

It is, therefore, clear to me that it was the second survey that covered the plaintiff's kibanja and that it was done without his knowledge. It appears to me to have been a clear case of a deliberate scheme to defeat the plaintiff's customary interest in his kibanja. It is fraud.

For the reasons set out in the short analysis above, I find that, indeed, the defendant included the plaintiff's kibanja in his certificate of title for plot 14, Rwampara Block 53 by fraud.

THIRD ISSUE

The plaintiff has proved his case on a balance of probabilities. He is entitled to the order directing the Commissioner, Land Registration, to rectify the certificate of title of the defendant in accordance with section 185 of the RTA, so as to reduce the acreage by that covered by the plaintiff's kibanja. The plaintiff is also entitled to an order awarding to him the costs of this suit.

CONCLUSION.

I enter judgment for the plaintiff against the defendant. I make the following orders:

- a) an order directing the Commissioner, Land Registration, to rectify the certificate of title of YOSUA KATURA OF P.O.BOX 102, MBARARA, in respect of Plot 14, Rwampara Block 53, by reducing the acreage covered by the certificate of title by the acreage of the plaintiff's kibanja, and
- b) an order awarding the costs of this suit to the plaintiff.

V. F.MUSOKE-KIBUUKA

(JUDGE)

27.10.2003.