

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL SUIT NO. 380 OF 2002**

SUMUEL GODSENT MIRIMUGYE ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ALLEN NASSANGA ::::::::::::::::::::::::::::::::::::::: DEFENDANT

**BEFORE: THE HON. MR. JUSTICE R.O. OKUMU WENGI**

**JUDGMENT:**

The Respondent/Plaintiff in an amended plaint filed in court on 3/10/2002 sued the Appellant/defendant over Land comprised in LRV 2973 Fol. 18 Plots 566 - 567 situate at Ndeeba. In his prayers he sought the following "orders that:-

- (a) The defendant is a trespasser
- (b) The defendant her agents workers employees vacate the suit land.
- (c) The defendant pays damages for trespass.
- (d) The Plaintiff be allowed to re open the boundaries on the suit land.
- (e) The defendant pays costs of this suit."

In his said plaint in paragraph 4 thereof he had sued the defendant for a declaratory order that he is the owner of “Land situated at Ndeeba known as plot 566-567 Vol. 2973 Fol. 18.” Then in paragraph 4 (a) he averred that he “was and is still the registered owner of Land situated at Ndeeba and comprised in Kibuye Block 16 Plot No. 566-567 Fol. 18 Vol. 2973.” He annexed a copy of a title deed. He then contended that “around 2002 the defendant ...trespassed on his said land and are erecting semi permanent structures thereon and have resisted the plaintiffs attempts to open up boundaries thereon.”

For the defendant in a WSD filed on 3/9/2002 she denied the plaintiff’s claim and stated that since 1960 her mother one Nalongo Dolotyia was the owner of a Kibanja on land known as Plot 567 Block 6 at Ndeeba Nsiike. That thereafter she had constructed thereon some commercial buildings. She further contended that the mailo landowner one Kalule Mukasa sold and executed a transfer of the land to her on 21/12/2001. Then on 15/3/2002 the same Kalule Mukasa leased the land to the plaintiff. Her case therefore is firstly that she was a Kibanja holder deriving title from her mother since the 1960s. Secondly that the mailo land owner subsequently sold to her his mailo interest in 2001. And finally that therefore she is not a trespasser and the lease to the plaintiff was ineffectual as against her interest and title.

In his Judgment delivered on 10/7/2003. His worship R.W. Komakech granted all the remedies prayed for in the plaint. The trial court had framed two issues on namely:-

1. Whether the defendant is a trespasser to the suit land
2. Remedies.

It is from this Judgment that the appellant has brought this appeal and framed four grounds namely:-

1. The learned trial Magistrate misdirected himself on the law regarding indefeasibility of title thus his coming to an erroneous decision.
2. The learned trial Magistrate erred in law and in fact when he found the defendant guilty of trespass contrary to the evidence on record.
3. The learned trial Magistrate misdirected himself on the law relating to trespass was in possession of the suit land prior to the defendant's acquisition of title found that the defendant was a trespasser.
4. The learned trial magistrate erred in law and fact when he decided that the defendant failed to prove ownership of a Kibanja and lawful and bona fide occupant whereas not."

From the very outset it was an agreed fact that the defendant was in possession of the land under dispute. It was also an agreed fact that the plaintiff was the registered leaseholder of the land

and exhibited the title deed as P.1. In his own evidence the plaintiff told the trial court that at the time he acquired the leasehold the defendant was in occupation of the land. He said:-

“I went to the physical location of this land. I found there temporary stalls of the market and market shop houses small and they were shanty. I established that they belonged to a lady called Nassanga who claimed to be a customary owner... I notified her of my interest in the land. She said I was an imposter and I was not the true owner of the land. She told me she was the one in occupation of the land and it belonged to her.”

As the stand off deepened at the scene it was clear that none of the parties was willing to budge. The plaintiff went on:-

“The defendant claimed that all the developments (on the land) are hers. I intend to construct on the land a storeyed building of about 5 - 6 storeyes, a commercial building. The structures are temporary in nature I would be in position to compensate the defendant in case court finds that she is not a trespasser.”

In cross-examination the plaintiff conceded that there were developments on the land when he had gone to look at the land before buying it. He said:-

“There were market stalls and there were more than one stall. Temporary shops there were cemented houses and

some were not. Others were still on the ground being built of bricks... At the time I never found out the status of the people on the land... I asked Mr Kalule about the market stalls and the shanty structures and he said they were not his. He was aware of the temporary market.”

The developer plaintiff then went on in cross-examination to concede that he had not carried out local due diligence. He said:-

“I contacted LCs through Mr Kamyia to enable me evict the people and they said I was not the rightful owner and that those were so many people who had claimed the same land and they asked me to prove whether I was the rightful owner. I never contacted the LCs before I paid for the land. I did not think it was prudent to find out from the LCs. I had gone to the LCs to help me open boundaries and they told me I had to go through the LCs. I went to the police for purposes of protection versus those occupying the land. Before I went to police I never introduced myself because it was risky.”

For the defendant three witnesses testified including herself as DW1. She stated that she recognized one Kalule as the registered landowner but that her parents had lived on the land and put up the unworthy developments on it. She also told court that she was raised in the disputed land. She tendered as exhibit some busulu tickets and a sale agreement and transfer in her favour

over the same land. She told court that she could not register the transfer on account of an adverse caveat lodged by the plaintiff and one Benard Kanala. The evidence of succession or one evidencing the title of her parents are said to have been secured in 1952. Her testimony in my view remained consistent in cross-examination. Mr Eriab Kyagaba the LC1 Chairman of the area testified on behalf of the defendant. He told court that he has been resident in the area for 15 years. She knew the mother of the defendant and her death. His evidence was not shaken in cross-examination. The third witness Stephen Nyanzi DW3 told court that he knew the defendant as his neighbour. He further stated that he was the registered owner of Plot 566 while the disputed one 566 is occupied by the defendant. He also recognized that the late Dolotia Nalongo occupied the disputed land. According to DW1 Dolotia died in 1998.

The learned trial magistrate did attempt to evaluate the evidence on both sides. He however placed great weight on the fact that the plaintiff had become the registered lease owner over the land. On the other hand he was of the view that failure by the defendant to provide credible or other documentary evidence relating to the original acquisition of the land and the succession to her late mothers interest was fatal. He consequently found that the defendant was a trespasser.

But a review of the evidence on the record indicates prior occupation of the suit land as far back as 1998 when Dolotia died

and beyond. Thus by the time the plaintiff became lease owner in 2001 or 2002 the defendant was already in possession. Her possession was not shown to be illegal. On the contrary she demonstrated an interest in the land which interest may be unregistered but is quite registrable in my view. From the plaintiffs own testimony, he admitted the defendants occupation of the land at the time. Whatever title he would take would in my view be subject to the unregistered, but registrable interest of the defendant: **UP & TC Vs AKPM Lutaaya** CA 36 of 1995 (S.C). I may say that, and here I agree with counsel for the Appellant, that the doctrine of indefeasibility of title is not absolute and has been tamed by the recognition of stout unregistered but registrable interests of third party possessors for a period of time. See also **Mawenu and Ors Vs Kiu Ranching & Co- operative Society.**

From the evidence in this case the defendant would not be a trespasser at all. In the result I allow this appeal set aside the Judgment decree and orders of the trial court with costs there and here to the appellant.

**R.O. Okumu Wengi**  
**JUDGE**  
**23/9/2004.**

**5/10/2004**

Kiboneka for Appellant

None for Respondent  
Senabulya Court Clerk.

Judgment read in open court in presence of above.

**R.O. Okumu Wengi**

**JUDGE**

**5/10/2004.**