

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT N. 511 OF 2001

1. VENANSIO BABWEYAKA]
2. JOHNSON MWIJUKYE]
(Administrator of the Estate of]
the ROBERT TUMUSIIME] :..... PLAINTIFFS
3. SEMPALA SENGENDO]
4. APOLLO NABEETA]

VERSUS

1. KAMPALA DISTRICT LAND BOARD
2. GEORGE MUTARA :..... DEFENDANTS

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

JUDGMENT:

The four Plaintiffs have come to this court claiming an interest in a piece of land, since surveyed and comprised in LVR 2847 Fol. 9 and known as Block 7 Plot 1028, situate at Ndeeba Kampala. They claim to have been in occupation of this land from 1998 or thereabouts and in 2000 the same land was leased by the first defendant to the second defendant. The property has some temporary structures from where the Plaintiffs have and still operate timber yard business. It is the claim by the Plaintiffs that each of them had acquired pieces of the land from the previous occupants by purchase or otherwise. It is further the Plaintiffs claim that the lease of the land to the second defendant was

contrary to their interest in the same land whatever such interest was, and they have since protested to all manner of bodies and now to this court. It is not disputed by the second defendant and according to the submissions filed on his behalf on 24/1/2005

“The Plaintiffs are occupants of the said land having come onto the land between 1998 and 2000 and derive their occupancy from Misaeri Nsubuga and Robert Kikomeko. They bought the structures consisting of timber shades roofed with papyrus and polythene from the said Misaeri Nsubuga and Robert Kikomeko.”

There were agreed facts recorded, namely:-

1. The plaintiffs are the occupants of the suit property.
2. The second defendant is the registered proprietor of the suit property known as LRV 2847 Fol 9 Plot 1028 Block 7 at Ndeeba in Kampala City.
3. The second defendant is the statutory owner of the suit property.

Four issues were then framed for the trial as follows.

1. Whether the plaintiffs are customary owners of the suit land.
2. Whether the land was available for leasing to the 2nd defendant at the time of the grant of the lease.
3. Whether the second defendant obtained the certificate of title lawfully.
4. Remedies.

The defendants denied the Plaintiff's claims and prayed that the suit be dismissed with costs. During the trial the Plaintiff presented 26 exhibits and called 8 witnesses while the defendant called five (5) witnesses and tendered nine (9) exhibits.

The first issue presented some difficulty as all the plaintiffs' witnesses justifiably expressed some degree of lack of knowledge of land tenure and the legal technicalities. Nsubuga (PW1) told court that he got the land in question in 1970 from one Tom Kibirige. The latter had been operating a garage on the site. He testified that he sold the same property situated in Kasumba Zone, Ndeeba to Babweyaka in 1998. He also sold a part to Tumusime, a plaintiff who died in the course of hearing this case. The octogenarian told court that he had been trading in the premises, paying income tax and trading licenses. He exhibited a bundle of receipts for local government rates dating back to 1987

(Exhibits P.2). He agreed that he was an occupant and not an owner of land when he stated:-

“Tom Kibirige sold me business premises but on the land. Yes it was on land. He sold to me where he worked. He wasn’t selling the land but business premises. I sold the business on the land to Babweyaka. If it were selling land I would have given a certificate of title. He also saw that he was buying business only. Babweyaka still trades on those premises. I can confirm to court that it was not land that I sold to Babweyaka. I have never had a title deed to the land in question. Not land but business on the premise and that is what he bought. I never had Kibanja on that land. There was no customary interest over that land. No customary law governing the land.”

But the understanding of the quality of tenure over the land was not common to all the witnesses. In his evidence Tumusime Robert (deceased) PW2 told court.

“When I bought that place and entered in 1997 there was a garage. I started paying rent to Mr. Kizito who was Nsubuga’s son looking after the place... I paid rent for the place I was occupying. It was a garage enclosed with concrete blocks and roofed with iron sheets. I entered first as a tenant. Then in 1998 Mr. Kizito told me he wanted to

sell half of that place. I took possession of that land when I bought it, as there was no controversy. I started being there customarily with my timber business up to today... I was convinced that Nsubuga was the owner of the land. After buying the land it is Misaeri Nsubuga who was paying the rates to Kampala City council (Exhibit P.2)”.

The witness went on to emphasize that he had bought the land and or the interest of the people who had been there. He asserted that he had been a customary tenant. He died shortly after giving his testimony. Mr. Sempala Sengendo P.W.3 gave similar evidence. He told court that he had purchased a shop building and offices that were on the land, which later became Plot 1028 Block 7 situate in Kasumba Zone Ndeeba. He told court:-

“Kikomeko was not the owner of the Plot but only of the land. He was not a Mailo owner. He did not have a lease. He did not have a freehold title. He had land. He had a Kibanja which we translated into land.”

Venansio Babweyaka (PW4) gave the same story. He said

“....Since I acquired the land I have been paying busuulu (exhibits P.2).To me Nsubuga owned it when I bought it.

He had been there 40 years on the land. Nsubuga is the very one who sold it to me as it was his.”

From the above as well as the statements of other Plaintiffs’ witnesses it became clear that the Plaintiffs told court what they believed to be land ownership. Theirs was not a legal definition but a question of possession and occupation without reference to the legal issues of land tenure and land ownership. For this court their evidence establishes the fact that they became lawful occupants and had lawful possession without legal title. They were also not customary tenants as the land in question was under a statutory lease. I agree that they held the land under some kind of license and they had established a usufruct interest in the occupation and possession of the land in question. They were not in the category of customary tenants as such. They were occupants by whatever title and this was an agreed fact. In this respect I agree with Mr. Nerima learned counsel for the first defendant that under the law, customary tenure was not applicable to the plaintiffs. It was excluded by earlier statutory provisions. This exclusion was to be found in Section 24 of the Public lands Act 1969 and. Section 5(1) the land Reform Decree 1975. The Land Act 1998 is Silent on the prohibition of customary tenure in urban land and perhaps this is in line with its general tendency to enfranchise occupants with usufruct rights and enable them to secure their interests in the land by securing either a certificate of occupying or a leasehold. The silence on

the prohibition in my view removes it and also diminishes any illegality in the occupation.

I am not sure but the Land Act 1998 attempts in some ways to emulate the socialist paradigm of giving land to the user. I would answer the first issue in the negative. But this would not serve the purpose of settling the dispute between the parties. I would go further to say that the Plaintiffs were licensed occupiers of the land in question and could be referred to as tenants at sufferance or of some other sort if I were to revert to nomenclatures in land law, but they were in lawful occupation.

The second and third issues relate to the availability of the land in question for leasing and if the lease to the 2nd defendant was lawfully obtained. Clearly the land was in an urban area and was available for leasing to any applicant including the parties in this case. The Plaintiffs did not apply for a lease. The second defendant did. It is the case of the Plaintiffs that they were jolted to learn that surveyors were scanning their land for the purpose of its being given to the second defendant. Robert Tumusime (PW2) told court that he confronted the surveyors who were searching for land in Wilson Zone whereas his land was in Kasumba zone. The LCs got involved as compensation cheques were already made out. He rejected the cheque. Sempala Sengendo (PW3) repeated the same story whereby the surveyors had documents relating to a piece of land in Wilson and not

Kasumba Zone. However it turned out that his land was the subject of the survey and leasing. Neither witness had ever known the second defendant either as a neighbour or occupant of the land before the lease. On his part Venansio Babweyaka told court:-

“I filed a case against Mutara as I was in the land in 2000. When I saw a gang of people claiming they had come to survey water. I asked what they were really doing. They told me they had come to survey as Mutara had a land title over the land. They showed me a copy.”

The witness realized then from the documents that the lease had been issued on recommendation of the LCs of Wilson Zone and not Kasumba Zone. He stated:

“When Mutara got his land title our land was not free for occupation. My business and house were there...”

Mukundane Apolo Nabeta another witness told court:-

“...The District land Board leased my land to Mutara without my knowledge and yet Mutara had no right over it. He has never been on the land. If they had told me I would have taken some measures before the leasing as I was in possession of the property.”

Mr. Semakula Steven (PW6) also told court of some confusion over the LC locality as between Wilson and Kasumba zones in which the suit land was. He then told court how the entire LCs I, II and III covering both Kasumba and Wilson zones met over issue on 22/6/2004. The LCs in their omnibus meeting ruled that the leasee (2nd defendant) pays compensation to the Plaintiffs.

Sarah Namakula testified as D.W.1. She told court that she was the LC I chairperson Wilson zone. She explained that the land was at first located in Wilson Zone that was later subdivided in 1996. She denied any knowledge of the Plaintiffs. On the other hand she professed knowledge of the second defendant whom she stated was the owner of land in Wilson Zone. In her rather contradictory testimony she told court that she is the person who signed a recommendation in favour of the 2nd defendant to get the lease. She did so by letter dated 18/11/1999. (Exhibit D4). She then conceded that at the time the land had gone under Kasumba Zone. She went on

“Both LC Committees of Kasumba and Wilson agreed to recommend Mutara who was present... there was no dispute at all... Chairman Kasumba Zone did not sign (the minutes).”

The evidence of Namakula, while explaining the subdivision of the 1996 bigger Wilson Zone into two, hints at an omnibus meeting of two LCs. It also shows that the LC of Kasumba Zone did not recommend the lease. The witness surprisingly denies any

knowledge of the occupants of the land (the Plaintiffs) at the time. She asserts that there was no dispute over the issue or over the land. In another surprise Ssalongo John Matte DW2 at first told court that he had never known any of the Plaintiffs. Only to say he knew Misaeri and Kikomeko.

The second Defendant testified as P.W.4. He told Court that he bought the land from Sangalyambo in 1996 (exhibit P.7) He then proceeded to acquire a lease. He conceded that the occupants of the land were squatters on the land. He also conceded that it was the LC of Wilson Zone that had recommended his application for a lease. Whereas the land is located in Kasumba Zone. He told Court that he led KCC Valuers to the land in December 2000 and that the timber sheds on it were valued and that he was willing to compensate for them. He asserted that the land was free from dispute and was available as there was no owners. Mr. Ahmed Kabuye (DW5) told Court that the land had no owner and only Mr. Mutara had applied for a lease. He stated that before the grant the Board verified the land with the LCs of Wilson Zone. He said:-

“We did not find out or verify who was in occupation of this land. The land at the time was located in Wilson Zone. Since then we have be established that the land lies in Wilson Zone.”

In essence the Defendants have staked the certificate of title as conclusive evidence of ownership to defeat the Plaintiff's claim. It is also argued that there was no illegality or fraud in the leasing of the land. The first Defendant cited Articles 24(1)(a) and 237(3) of the Constitution of Uganda as giving paramount powers to the Land Board of a District to allocate land. It also cited sections 2 and 5 of the Land Act on the same point. There is no doubt that the 1st Defendant was entitled to grant a lease to the 2nd Defendant. The case of **Marko Matovu 1 and 2 Others Vs. Mohammed Sseviri and Uganda Land Commission (1979) HCB 174 (C.A)** is instructive on the issue. It underscores the powers to give grants. However it also sets down the parameters for such grants emphasising that in so giving the grant the Judicial or Administrative Tribunal or authority must observe the principles of natural justice failing to do which it would exceed powers conferred upon it by Parliament. The Court of Appeal emphasised fair play so that the administrative body does not overstep the principles of natural justice and arrive at a valid decision. An action to defeat any interested persons just right would constitute prima facie evidence of unfair play. Such action could include a faulty inspection schedule and failure to entertain objections by any party with an unregistered interest. The Supreme Court has in more recent times stated that a licensee with a proprietary interest is protected by equity and estoppel to prevent revocation of an acquired interest of which the parties **Ronald Kayara Vs. Hassan Ali Ahmed C.A NO 1 of 1990, (reported in (1993) V.**

KALR 63 also held that the Constitution disallowed expropriation of property.

From the evidence in the present case it is clear that the process of leasing the land by the 1st Defendant to the second Defendant eclipsed the Plaintiffs. They were not involved let alone consulted or recognised as existing in fact and as interested parties. True they had not applied. However in granting the lease the Board selectively consulted the LCI of Wilson Zone and not Kasumba Zone where the land is located. Although the LCs are not a legal requirement they have acted as Local Land Committees according to Elizabeth Laker (P.W.8.) They are used in ascertaining the occupants of land and this practice usually helps to establish if land is free.

In the **Ronald Kayara** case, citing **Chandler Vs. Kerley (1978) 2 AER 942** the Court stated that where a party occupies premises under a license implied or otherwise, equity will protect him. The Court held that the Tororo Tow Council while having powers to grant leases could only do so to a third party by exercising its powers in a fair and reasonable manner so that the public does not lose confidence in it.

It may be argued that in the present case the Plaintiffs did not apply for a lease. The question would be if there was a proper inspection and verification of the state of occupation of the land

and also of any disputes and objections and if these had been permitted to emerge and to be dealt with fairly and conclusively. There is also the question of the erstwhile prohibition of customary tenures in urban statutory leases. That prohibition seems to have fizzled out from the purview of the Land Act 1998 but even if it has persisted the possibility that some squatters, as they are ideologically labeled, could be actually tenants of a tentative nature or licensees implied or otherwise and are protected from administrative injustices. In the present case the occupation of the land had persisted for several years and the present claimants took over the land from the original ones. The City Council authorities did not disturb them.

The Land Regulations (No 16 of 2001) lay down the procedure for the alienation of freehold and leasehold. These regulations are made under section 93 of the Land Act 1998. Once an application for leasehold is made a hearing is expected and the Land Committee is enjoined to comply with the rules of natural justice and observe transparency, openness and fairness and allow any other person to be heard. The Committees are required to involve neighbouring Committees in case the land falls partly in their area. And allocations of land require inspections. All these safeguards are intended to ensure fairness in the allocation of land rights. The issue is that questions of fairness are not merely matters of mere informality or irregularity.

True, the Plaintiff has presented a certificate of title. However, the doctrine of indefeasibility of title has been qualified in a number of cases. As I understand it, there are instances in which a title may be questioned and for this matter the process of bringing land under the Act is significant where interests of third party occupants in possession are involved. Where also a person has been in adverse possession, his unregistered interest may defeat a title on account of limitation: See **Kisee Vs. Maweu and Others Vs Kile Ranching and Cooperative Society Ltd. (1982) 1 KLR 746**. In most circumstances a leaseholder's title would be subjected to an acquired right to possession with consent of the landlord prior to the lease: **UPTC VS. AKPM Lutaaya (CA 36 of 1995)**.

The procedure for possessing a grant of a lease of land in occupation of third parties would therefore have to take into account these parties' interests. In other words the occupants of statutory leases in urban areas, are entitled under the law and under Article 42 of the Constitution, to be heard prior to the lease over their land being granted to any applicant if they are not such applicants. This is essential to the legitimacy of the grant and goes to lawfulness. The rules of natural justice ought not to be violated by sidelining the persons directly affected by the administrative decision of the District Land Board. That is why such persons would be protected from deprivation of their property unless they are given prompt payment of fair and

adequate compensation **prior** to the taking of possession or acquisition of the property. This envisages entertaining of objections from existing occupants which would follow from a due inspection and verification exercise in the presence of local authorities and any individuals directly affected. The recommendation if any by the Local Land Committee (read Local Council Committee) would provide supportive proof that the proposed grant has the blessing of the community and once the objections if any have been entertained and dealt with the District Land Board would proceed to legitimately allot the land in question. In other words, the procedures including the question of handling potential disputes or objections actual or about which there is knowledge or even those which the applicant and the Board would easily have established to exist must be dealt with prior to and not after the lease has been issued. The essence is to deal with any dispute and the land is therefore available for lease with or without compensation or other adjustments.

In the present case there is no evidence that the Kasumba Zone gave any recommendation. If what Namakula (PW1) says is correct that the original Wilson Zone was subdivided in 1996 then she had no right even if historically she had known of the land to make a recommendation over this Kasumba Zone land. In doing so she did not at all recognize the factual existence of the occupants and thus the opportunity to resolve the dispute before the lease, was lost. When eventually the occupants were

confronted with their new situation this sparked off the present dispute. I do not also think that the LC I - III omnibus meeting that supported the lease and compensation to the occupants corrected the problem as there is no such body that encompasses all the Local Councils into one for the purpose of the Land Committee even if a consensus could have been imputed to have envisaged a ratification. In any case this meeting of the omnibus LCs came after the lease and its role was to quell the emergent dispute by the occupants of the land. It is clear that all these events and actions operated to subdue, exclude and defeat the empirical or even latent interests of the Plaintiffs in the land. The Plaintiffs were not given a hearing or recognition of their occupation beside the post facto offer of compensation which came as a shock to them. They were then submerged in a popular uprising staged in the omnibus L.C rally.

I have come to the conclusion that the Plaintiffs were lawful occupants of the disputed land and as such were like tenants of some sort even if they are like what Land Lawyers derogatively refer to as squatters. They had developments and property and worked on the land. They had usufruct interest over it as they were continuing to occupy and use the land. Theirs was an unregistered but registrable interest in the land. They could have secured a lease or if it were to be given to other persons their interests should not have been overshadowed the way it was done giving the impression that none disputed the leasing of the

land. The Land Board (1st Defendant) did not verify the fact of their occupation of the land. It relied on the Wilson Zone LC I, which did not want to know of the Plaintiffs. It later combined all the LCI to LC III to override the interests of the Plaintiffs in the land. By not recognizing the occupants directly or through the LCI of Kasumba Zone the Board acted in a high handed and oppressive manner. According to the Secretary to the Board (PW5) the Land Board considered the Land development potential of the 2nd Defendant. It ignored the human element, the fact of occupation and possession by the Plaintiffs and failed to observe due process. They ignored the consent of these people and ignited this dispute thereby. By so doing they robbed the lease process of legitimacy, fairness and equity in so far as it proceeded on the basis that the Plaintiffs did not exist, that there was no dispute to the leasing of the land to the 2nd Defendant, and that the LCI of Wilson Zone and later the omnibus LCs had okayed the grant. To this extent the action of the 1st Defendant to lease the land to the second Defendant was wrongful and I would hold so. I would say that the land was not properly rendered available for leasing to the 2nd Defendant unless with the prior consent and prior offer of or actual compensation to the Plaintiffs as persons with unregistered interests in it. Further that in suppressing the existent interests in the land the grant proceeded unlawfully. Therefore that the second Defendant did not obtain the title lawfully. As a result I would enter judgment for the Plaintiffs against the Defendants for:

- (a). A declaration that the Plaintiffs are the owners of a hitherto unregistered but registrable interest in Land comprised in Block 7 Plot 1028 situated at Ndeeba, Kasumba Zone.
- (b). A declaration that the 2nd Defendant was wrongfully and unlawfully granted a lease and registered as owner thereof.
- (c). An injunction would issue to restrain the Defendants from alienating and or evicting the Plaintiffs from the said land.
- (d). An order would issue to direct the deregistration of the 2nd Defendant who is directed to deliver up the certificate of title to the Registrar for cancellation.
- (e). An award is made against the 1st Defendant for general damages of Shs. 6,000,000/= (Six million shillings only) to each of the Plaintiffs for unlawful and wrongful deprivation of property or interest in land of his entry as owner.
- (f). Interest on (e) at the rate of 20% from the date of filing till payment in full, and economic user.
- (g). Costs with a certificate for two Counsel.

DATED at Kampala this 29th day of June 2005

R. O. Okumu Wengi

JUDGE

29-06-2005

Paul Muhimbura for Plaintiff

Nerima for 1st Defendant

Mukasa Jackie for 2nd Defendant

Second Defendant present

Court:

Judgment read in open Court in the presence of all above.

R. O. Okumu Wengi

JUDGE

29-06-2005.