THE REPUBLIC OF UGANDA

IN THE HIGHCOURTOF UGANDA AT JINJA

CIVIL SUIT NO. 122 OF 2002

BUMERO ESTATES LIMITED…… PLAINTIFF

-VERSUS-

1. **KITOSI CHARLES)**
2. **BUKUBUBA LUBANGA HASSAN**)
3. **WAISWA DEN1S**)
4. **OLAPA JAMADA AND 1,263 OTHERS)**

BEFORE: JUSTICE DAVID K. WANGUTUS1

JUDGEMENT:

The Plaintiff Bumero Estates Ltd. is a registered Company. Its claim is for recovery of land, due to trespass, unlawful detention of property and damages

The defendants are alleged to have unlawfully moved on to the plaintiffs land and refused to vacate.

The background to this suit can be summarised as here under.

The plaintiff claims that in early 1980 it wanted to enter into development of land through agriculture, fishing, timber sales and mining.

On 1.4.1982 it applied for a lease of land from Uganda Land Commission.
The Uganda Land Commission in response made a lease offer to the plaintiff on the 12.8.1982 and an instruction to survey issued.

The Jinja Land Surveyor then caused the survey and on 4.1.1984 a Land Title was issued in favour of the plaintiff which was followed by an extension to a full term lease on 16.4.1986.

The plaintiff claims that at the time they got the lease, the land measuring 5900 acres was neither inhabited nor developed.

That beginning of 1988, people begun moving onto the land in question and in 1991 a big influx of people unlawfully moved on to the land settled, allocated land to themselves and refused to vacate when asked to do so. Thus this suit.

The defendants on their other part deny that they are trespassers. They claimed that by the time the plaintiff got title, they were already on the land the first one having settled in 1975.

That they were bonafide occupants and or customary holders of the land.

They in a counterclaim sought the dismissal of the suit and alleged that the Land title that the plaintiff had was fraudulently obtained.

That the plaintiff had acquired title over the defendants' bonifide/customary interest. It mmitted useful information in the application for the lease and acquisition of title through

political influence. Lastly misinformation in the inspection report.

They sought a declaration that the certificate of title was fraudulently obtained. That the certificate be cancelled or in the alternative that the defendants were lawful and bonafide occupants and or customary tenants.

Either party prayed for costs of the suit.

The issues that emerged and were agreed upon by both the parties were:

1. Whether the defendants were bonafide occupants of the suit property.

2. Whether the defendants held the suit property customarily at the time the plaintiffs acquired the land.

3. Whether the suit property was available for leasing at the time it was leased.

4. Whether the plaintiff obtained the certificate of title fraudulently.

5. What remedies are available to the parties.

Whether they were Bonafide Occupants:

Bonafide occupants are defined in section 29 (2) (a) of the Land Act as:

“Persons who before the coming into force of the Constitution

a) **had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more"**

Sec 29(2)(b) is not applicable in the circumstances because it refers to being resettled by government or by its agent.

The relevant definition in this case is therefore 29(2) (a) since the defendants were not settled by government or its agent.

Section 29(2)(a) of the Land Act clearly shows that the requirements for a bonafide occupant to subsist there must be leased land, that this land must be occupied without permission from the lease owner, the land must be occupied or developed and lastly the occupant must have used the land without interruption for 12 years prior to the coming into force of the Constitution. The Constitution came into force on 22.9.1995. For one to be a bonafide occupant, he must have been on the land by 22.9.1983. More so the land must have been registered by that time and the occupant must have used it undisturbed by the registered owner.

In this case there was no registered owner until 4.1.1984. That alone put it out of the armpit of sec 29(2) (a). Furthermore evidence is abundant from both the plaintiff's and defendants' witnesses that the defendants did not stay on the land unchallenged. Since it was a requirement under sec 29(2)(a) of the Land Act that an occupant must stay unchallenged for 12 years prior to the coming into force of the Constitution, and since the defendants' stay was in this case challenged and they were summoned to local council five, the defendants cannot be said to have been bonafide occupants.

Whether the Defendants held the Suit Property Customarily:

The defendants claimed that they held the land customarily since it belonged to their forefathers. They also contended that at the time the plaintiff acquired title, they (defendants) were already in occupation. DWI Hassan Bukusuba told court that before his father died in 1945, he told him (DWI) that their land was on the shores of Lake Victoria. That in 1975 he moved and settled in Lubanga and in 1980 he invited and received other settlers.

The other defendants gave various years in which they settled on the land in dispute. DW2 Cranes Kitosi said his mother settled in 1980 while he joined her in 1986. DW3 Kasalubama told court that he settled on the land in dispute in 1980. While DW4 Charles Bulawula told court that he settled on the disputed land in 1985. DW5 Denis Waise Lubanga told court that he got land from his father in 1985.

They said they were customary holders and that their tenure was in existence before the plaintiffs got title.

The plaintiff on its part told court that it found an unoccupied land. That there was thicket and forest and wild animals but no human habitation. And that having got title under those circumstances, the defendants were trespassers.

Customarily tenure is provided for under section 3(1)(a) of the Land Act as

“that tenure applicable to a specific area of land and a specific description or class of persons”.

Section 3(1) (a) of the Land Act provides one of the ways land may be administered by saying

“in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution”

From the foregoing it is clear that there cannot be customary tenure established on registered land. Customary tenure only arises on former public land which at the time the Constitution came into force, was not alienated and was occupied under customary tenure.

In the present case, therefore, customary tenure had to be in existence by the time the plaintiffs acquired title. In that case they would have interest and the plaintiffs could only get title by involving them.

One of the things that the defendants have brought to show that they were on the land by the time the plaintiffs acquired title was the entry in the Application for Rural Land Ex P2.

In that form one of the things to be answered is the requirement to **"state whether the land or part thereof is occupied by customary tenure or otherwise and if so give details". Who ever filled the form wrote the words "customary tenure".**

The form expected the applicant to say whether there were people on the land and if they were, to give details of their presence and occupation of the land. The words customary tenure as they stand would n my opinion mean that there was someone or people holding the land. If they were holding the land, their consent had to be sought. The form does not say whether such consent was sought.

PW3 who filled in the application form told court that he was assisted by a Clerical Officer to fill the form. And that he was told customary tenure meant public land not lease to anyone or not inhabited.
Since the application form is filled before inspection, it's in my opinion necessary to look at all the relevant documents together case of ambiguity to establish the exact position.

After the application an inspection was carried out by the District Land Committee. in its inspection report EX P5 the committee filled as follows:

On whether the land was or not available for leasing, the committee said the land was available because “there was no dispute”

Under entry ‘C’ the form sought to show whether there were any houses or permanent crops and it was answered in the negative as “Nil”.

Under C (ii) of the form EX P11 whether the land was occupied by customary tenants the committee wrote “Land”. This in my opinion goes far to explain why the applicant wrote “customary tenure” when asked the type of tenure in the application form.

The explanation is that there must have been a grammar problem.

In entry E where the question was whether there were any disputes on the land, the answer was “no”. In (f) the question was whether land was used communally, the answer was “no”.

If all the entries are read together the answer one gets is a negative one. The question that one asks is if there were people on the land in question would there be no dispute, would they not face hardship? Were disputes absent because there were no people on the land at the time of inspection? A further look at the evidence of the plaintiff and defendants might throw some light on those questions.

PWI, PW2, PW3, all told court that at the time they inspected and the land was surveyed, there were no inhabitants on the land. EX P5 under (f) was to the effect that the whole land was both forest and thicket and was not developed yet. PWI said they first ascertained that there was free land, before it was surveyed. PW2 Gordon Byaruhanga who surveyed the land told court that he spent 2 months surveying the land in question but he did not see any one there. It was all bush and forest. That there were no schools, roads or any infrastructure.

PW3 the Chairman Land Committee who headed the committee said the place was not inhabited. There were no people except tsetse flies and animals. That they chose the highest peak of the land and scanned right down and there was no one or home. PW4 Rumano Masiga also described the land as devoid of human beings at the time of inspection, survey and registration. On their part the defendants said they had been on the disputed land before the plaintiff came. DWI said he settled there in 1975. That by 1982 when the plaintiffs came he was there. In this he was supported by DW3 Kasulubama who said he was informed of land in Lubanga by a visitor Adoki Benjamin in 1980.

I have carefully gone through the evidence of both DWI and DW3 and I find that the two either did not know when they went to the disputed land or were keeping the real dates to themselves. The reason for this deduction is that first both of them agree that the place was infested with tsetse flies and that there was no way one could go there without the clearance of the tsetse control authorities. DWI told court that it was these tsetse flies that had kept people away from the land. He said as follows “I went there after informing the officer in charge of tsetse fly control”. He adds that the sleeping sickness was longer there. Ahead he said “before I went to settle in Lubanga the officer in charge of tsetse fly control Abdullah came and checked and after confirming that the tsetse flies were no longer there, he allowed me to settle and also to call others. That was in 1985”.

Although at one point he said he was informed of the necessity go to the tsetse control office in 1980, he still went in 1985.
When you scrutinise his evidence of permission being a must before one settled, one cannot resist concluding that he could not have settled before 1985.

As for DW3 he told court that the inspection by tsetse control guards was done in 1982. He said further that sleeping sickness was there between 1920 — 1980. And that people were not allowed to go there.

During cross examination, he changed and said tsetse flies were there from 1920-1974. The change form 1980 to 1974 must have been just to accommodate DW1 who had told court that

he had gone there 1n1975. This very DW3 had told court that he was nephew to DWI and that he used to go with him (Bukusuba) to Lubango. Later under cross examination he told court that he did not know where DWI was. He further told court that he first met him in 1978 and followed it with Benjamin introduced me to (DWI) Bukusuba in 1980.

From their own evidence that one could not settle in the area without permission from the tsetse fly control office, and further that it was not until 1985 that the tsetse fly control officer permitted them to settle in the area, there is no doubt that the two could not have settled before 1985.

What even strengthens this finding is the fact DWI and DW3 and also DW2 told court that they did not see the inspection team. They also told court that they did not see the surveyor. While one may not see the inspection team because it came only for a day, the survey team on the other hand should certainly have been seen. PW2 Gordon Byaruhanga who surveyed the land, told court that it took him two months to survey the 5900 acres.

PW7 was also clear in his evidence like PW2 that there were no people, homes or developments at the time of survey in 1983. It's not in doubt as I said that the survey took place. It's not disputed. PW2 who surveyed the land told court what he found on the land. He had nothing to gain by telling lies being a civil servant at that time who had been instructed to carry out the survey. I do believe his evidence. The defendants could not have seen the survey because they (defendants) were not there. A survey of that length of time and magnitude must have involved cutting of trees and bushes for line clearance to such magnitude that whoever was on site would have made a very big effort not to see PW2 and his men at work.

The other piece of evidence that shows that the defendants were not on the land in question came from PW5 Oundo Makoha and PW8 Gerald Wanyama.

PW5 in his evidence which remained unshaken told court that in 1987 he was elected RC III Information Secretary and then Chairman. That he was chairman RC III Buyinga Sub-County

up to 1995. That in 1988 he received a security report that some people had settled along the shores of Bumero. He immediately sent his security secretary PW8 Gerald Wanyama to check. That PW8 returned and reported that they were mere fishermen who had settled along the shores of Bumero.

On receipt of this information he, the sub-county chief, PW8 and military personnel went there and they found the fishermen were on the land in dispute. There were no houses in the forest he said. That in 1991 he went back and he found a number of huts. The people who had settled were from Tororo, Buganda, Mbale and Pallisa because they produced introductory letters from their places of origin.
A meeting was subsequently held in which PW5 addressed and advised the defendants to vacate the land and warned them against removal of mark stones.

PW8 in support said he was RC Defence Secretary III and in 1988 he was sent to Bumero to inquire on a report on insurgency. He went and found some settlers. They had grass and polythene paper huts. They were only at the shore. He did not see any human settlement in the interior.

From PW5 and PW8 it's made clear that it was not until 1988 that human beings begun to settle on the shores of Bumero. It's because the area had had no people before 1988 that the sudden appearance of people cause panic to local administration.

All in all looking at the negative responses in the inspection report EX P5, the evidence of survey PW2 and his team, the clear evidence that the defendants did not see the surveyor yet he was on site for two months, the evidence from the local leadership all saying there was just bush and no settlement, this increased by the grave inconsistencies and discrepancies in the evidence of DW1 and DW3 and eventually their evidence that there was no way one could settle without clearance by the tsetse fly control, which clearance came in 1985, clearly indicated that at the time the plaintiff acquired the title to the land, DW1, DW2 and DW3 had not settled in that piece of land.

This is the position with all the settlers. The reason for such deduction is that DWI told court that he was the first to go to the area. All the defendants said they acquired the land after DWI had settled. In fact some of them said they bought the land from DW1. Others like DW2, DW4, and DW5 obtained it from their parents who had been given by DW1. Since these defendants could only have got the land after DWI had settled, and since DWI settled after title had been acquired by the plaintiff, the remaining defendants must also have settled after the plaintiffs had acquired title.

Under the land Act you can only hold customary tenure if you are already on land that had not yet been alienated.

In this present case since the land had already been registered in the names of the plaintiff, the defendants can not be said to hold the land under customary tenure.

Whether the Land was Available at the time for Leasing:

The third issue is to the effect of whether at the time the plaintiffs surveyed and acquired the land was available for leasing.

I have gone through the evidence on record. It's been found and a9reed between both parties that the defendants could not have been bonafide occupants.

It's also been found that there was no customary tenure and none of the defendants held land as such.
It has also been found that at the time the plaintiff applied for land, none of the defendants was staying on it nor did they possess or have any developments.
There were no encumbrances whatsoever and the plaintiffs did not require any one's consent save for the nod of the Uganda Land Commission.
In that case it's the finding here that the land was available for leasing at the time the

plaintiffs acquired title. This could still be the position even if the land had years ago been occupied and vacated because the Uganda Law Commission had powers to relocate it as long as it was public land at the time of reallocation.

Whether the Plaintiffs Obtained the Certificate Fraudulently:

In a counter claim filed by the defendants, they contended that the certificate that the plaintiffs had in respect of Bumero Estates Ltd. was obtained fraudulently and so should be cancelled.
The defendants claimed that the plaintiff had committed the following fraudulent acts namely:

(a) Acquisition of title by the plaintiff over the defendants lawful and bonafide interest and/or customary interest

(b) Failure to include in the surveyor's report that the land was occupied

(c) failure of the plaintiff to state in its application for lease that the land was so occupied

(d) acquisition of title through political influence

(e) acquisition of title in disregard of the defendants' interest

(f) misinformation in the inspection report

(g) misinformation on the application for the land by the plaintiff

(n) misdirection of the land and variance of land applied

In putting up these acts, the defendant undertook to prove them. The simple reason being the cardinal principle that fraud could not be presumed. It has to be proved strictly. And this proof is not a balance of probabilities but heavier than running in between the same to almost but short of the standard required in criminal matters. More so the fraud must as was held in **Kampala Brothers Ltd.** Vs **Damanico** (U) **Ltd SCCA 22/92** reside in the transferee to affect him.

The alleged fraudulent acts shall be handled one by one.

On acquisition of title by the plaintiff over the defendants' lawful bonafide interest and/or customary interest, the court handled this in the first and second issue. It was the finding that the defendants were never bonafide occupants nor customary holders of the land. The plaintiff could therefore not have committed the fraud.

On failure to include in the surveyor's report that the land was occupied, it's been found that the defendants were not on that land at the time the, plaintiff did the survey. The defendants' absence was amplified by their own evidence when they said they never saw the surveyors a thing that could not have happened if they had been at the land at the time of survey.

In any case it was not the duty of the plaintiff to include or omit things in the surveyor's report. For the defendants to succeed in this ground, they had to prove that the plaintiff knowingly took advantage of the omission. As it stands no fraudulent act is proved here.

The third act was to do with failure by the application to show that the lane was so occupied. 'Counsel for the defendants submitted that failure to do so constituted a fraud. The evidence as analysed has shown that at the time the plaintiff acquired title, there was no occupation.

The defendants had not yet settled on the land. To state that the land was occupied would have been untrue.

Fourthly that the plaintiff acquired the land through political influence. Apart from conceding that the plaintiff acquired land, there is no evidence on record to show that there was political peddling at any time when acquiring the land. That item of fraud is therefore not proved.

Fifthly acquisition of title in disregard of the defendants' interest.

The matter has been dealt with in detail in issue one and two. Briefly the court found that the defendant had no interest in the land at the time the plaintiff acquired title because at that time the defendant was not on the land and had no possession or any developments thereon.

Sixthly on misinformation in the inspection report, the only thing that I found strange was to put the word "land" in C (ii) of EX P5. It was not only confusing but an exhibition of misunderstanding of what was required. In that section the author was supposed to state whether there was any occupation by customary tenants.
The word "Land" therefore was misplaced. The person who did so seems not to have understood what was required of him. That not withstanding it can not be said to be fraudulent. Worse still it cannot be transferred to the transferee in as much as it was an anomaly by the inspection board and thee is no proof to prove that the plaintiffs knowingly took advantage of the same. In fact such recording could have been but a disadvantage to the plaintiff. I find no act of fraud in the circumstances.

The other act of fraud alleged is that the applicant provided misinformation in the application form. Here the author admitted that he did not know the meaning of "customary tenure" and was told by the Clerk to the District Land Committee that it meant "Public Land not leased to any one or inhabited". Again this was a innocent entry by an applicant who had been misinformed. It does not smack of any fraud in the circumstances. Neither could the applicant take advantage of such an entry.

Lastly the alleged act of fraud was that the size of land kept on changing. Counsel for the defendants submitted that while the plaintiff had applied for 13000 hc, it was changed to 13000 ac and then in the end 5900 ac. That the changing of figures was due to fraud.

PW1, PW2 and PW4 told court that the plaintiff had applied for land 13000 hc but they were doing it as lay men who just estimated the size of the land. That it was after an expert's survey that the land was found to be only 5900 acres. Going beyond that could have encroached on other people's land. People make mistakes all the time in respect of size of land. Estimations are done all the time. Not all of them are accurate. Not being accurate cannot be said to be an act of fraud unless one is shown to have knowingly done so knowing it to be wrong, which was not the case here.
All in all therefore no acts of fraud were proved by the defendants. All the particulars of fraud should have been strictly proved. It was not done. The counter claim is therefore unproved and is dismissed with costs to the plaintiffs Bumero estates Ltd.

The plaintiff having succeeded in all the issues before court namely that the defendant was not a bonafide occupant, did not hold land under customary tenure and that the land was available for leasing. Judgement is entered in its favour that the defendants and all holding under them be evicted from the land since they have all along been trespassers, that a permanent injunction restraining the defendants from entering the plaintiff's property be issued as the plaintiff is here declared the rightful owner of the suit land.

As for general damages the plaintiff did not show what damage he had suffered. He did not show that he would have by now cultivated the land in question or begun lumbering or fishing. He was still going round the banks for loans when the defendants moved in. None the less, the plaintiff was put to unnecessary trouble by the defendants' settlement and refusal to move. I find in the interest of justice general damages in a figure of 10, 000,000/= appropriate in the circumstances. So awarded.

It's as ordered that the defendants pay all the costs of this suit.

Dated this 6th day of April 2005.

CK. WANGUTUSI

JUDGE