

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CV-CS-0707-2001

LWANYAGA LUTIMA PLAINTIFF

- VERSUS -

RUTH NNAKYEWA DEFENDANT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

RULING:-

This is a ruling in respect of an application to set aside ex-parte decree which was entered against the applicant, on the basis that the applicant had been served but had failed to apply for leave to appear and defend the suit. The application was brought by notice of motion under order 33 rule 11 of the Civil Procedure Rules. The general grounds of the application were that -

- (1) The defendant was not served with summons for leave to appear and defend.
- (2) The defendant does not speak or understand the English language.
- (3) The case improperly brought under summary procedure though the plaintiff knew or ought to have known from

correspondence that the defendant was claiming and indeed residing in the land holding in question and has a house on it as a customary tenant/owner thereof.

- (4) The defendant is not and has never been a tenant of the plaintiff as alleged or at all.
- (5) The plaintiff's claim is a fraudulent design to intended to permanently deprive the defendant of her customary land holding.

The application was supported by applicant's affidavit which clearly sets out a full history of the dispute in paragraphs 10 – 17 as follows:-

“10. That I am not and have never been a tenant of the plaintiff as claimed by him in his plaint and the affidavit attached thereto.

11. That the customary land in question was allocated to me in 1963 when it was virgin, by one Ezekiel Bukenya the Mutenda Chief of the Kabaka who was in charge of the Kabaka's land in

the area and who had authority to allot kibanja to people.

12. ***That I paid Busulu for the land for 1963 and 1964 and I was issued with tickets but unfortunately they were irrevocably lost during the second liberation war which ended in 1986.***
13. ***That I developed the kibanja and constructed on it a mud wattle/corrugated iron sheets house for my residence and have been growing crops on it including coffee trees, bananas, lubisia trees, avocado, jack fruit, tangerines, mangoes, yams (balugu, ndaggu etc), sweet potatoes, cassava and sugar cane.***
14. ***That in 1969, Deborah Kulabako, my own sister, tried to fraudulently deprive me of the ownership and possession of the customary land holding in question under Civil Suit No. 4 of 1969, between me and her, the Magistrate's Court Mukono sitting at Mukono decreed me as the rightful owner of the land and evicted her therefrom. A copy of the judgment in that case dated 12th February 1969 and duly signed by the trial***

magistrate, is attached hereto marked as annexure "c".

15. ***That between 1997 and 1999 I built a new house of baked clay bricks and corrugated iron sheets to replace my original house which was dilapidated having been damaged by termites and which I later demolished to use some of the iron sheets on it for roofing the new house.***
16. ***That being a woman of humble means I got contributions from various people for the construction of the new house. For instance ten new corrugated iron sheets which supplemented some used iron sheets from old house for the new house were donated to me by Hon. Janet Mukwaya the current Minister of Justice.***
17. ***That on 21st December 2001, I was shocked when a team of people in the company of LC Chairman of our area and some policemen came and evicted me from my house and land and threatened to arrest me if I attempted to return to my house or to harvest my crops in the kibanja."***

The above affidavit was supported by that of Alex Nsubuga Kasirye where he deposed inter alia that ever since his birth in 1934 he has been seeing the applicant cultivating on the land in dispute and that the applicant built a mud and wattle house thereon. Later on the applicant built a new house of baked clay bricks and corrugated iron sheets to replace the old house.

The above affidavits were supported further by counter affidavits deposed by Fred Ndamulira and Ben Mutyaba Sempa.

The application opposed by way of affidavit deposed by the Respondent on 10th September 2002 and that of Richard Ssebikindu dated 25th September 2002. the gist of both affidavit is that the applicant had been duly served. It was further averred that the kibanja in dispute was first brought by the applicant for Ssebikindu who later sold the same to the Respondent when he (Ssebikindu) attained majority age. After purchasing the kibanja from Ssebikindu, the applicant left the kibanja and only came

back to the kibanja pursuant to the oral agreement between the respondent and the applicant.

During the hearing the applicant was represented by Mr. Ssendege while the respondent was represented by Mr. Kajeke. Both counsel made very strong submissions in support of their respective positions, which were beneficial to this court. Order 33 rule 11 of the Civil Procedure Rules under which this application was grounded states as follows:-

“After the decree the court may, if satisfied that the service of summons was not effective or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.”

As far as service of summons is concerned, the applicant deposed that she was not duly served while defendant contended that there was due service. There is a statement as far as the

evidence on record is concerned about service. This court cannot therefore base its ruling on whether or not service of summons was effective. The next question to pose is whether there is any good cause for staying or setting aside the decree and give leave to the applicant to defend the suit. It is clear from the evidence on record that both parties are claiming ownership of the suit property. The applicant contended that kibanja in question was allotted to her in 1963 when it was virgin by the Mutenda Chief of Kabaka and that she paid Busulu for the same for 1963 and 1964 whereupon she was issued with tickets which unfortunately got lost during the liberation struggle which ended in 1986. That she developed the kibanja by building a permanent house thereon between 1997 and 1999. Earlier on, in 1969, her own sister Deborah Kulabako tried fraudulently to deprive her of ownership and possession of the kibanja in question and the matter ended up in Mukono Civil Suit No. 4 of 1969 where she was decreed the rightful owner of the bibanja. The applicant denied being a tenant of the respondent.

The respondent on the other hand contended inter alia that he bought kibanja from its lawful owner, one Richard Ssebikindu. After selling the kibanja the applicant was notified and she left the kibanja pursuant to a tenancy agreement between her and the applicant. In light of the above claim by both parties over the same kibanja, it is clear that there are some serious matters to be investigated by court as to who is the rightful owner of the kibanja.

It is trite law that summary procedure is applicable in actions for the recovery of land, rent or mesne profits where the relationship of landlord and tenant exists or existed as the rights of parties are clearly spelt out and where there are no disputes as to the title of the land or the amount of rent payable: ***See Maluku Interglobal Trade Agency Vs Bank Of Uganda [1985] HCB 65.*** In the instant case the relationship between the applicant and respondent as tenant and landlord is being denied and challenged. In fact the applicant is claiming ownership of the kibanja in dispute. Furthermore, the tenancy relationship is based on oral agreement, which have not been clearly spelt out. In light

of the above scenario it would not be fair to grant the respondent summary judgment in the absence of clear circumstances. For the above reasons I find that the applicant has shown a good cause for setting aside the decree and granting leave to appear and defend the suit. Since the applicant has already been evicted from the kibanja I make an order that the suit property be preserved not until final orders from the court. Costs of this application shall abide the results in the main suit which should be fixed as soon as this ruling is delivered.

RUBY AWERI OPIO

JUDGE

23/1/2008 at 2.30p.m.:-

Parties absent.

Both counsel absent though served.

Magala court clerk present.

Court:-

Ruling read in absence of both counsel as they were duly informed but failed/neglected to turn up.

WILSON MASALU MUSENE

REGISTRAR/LAND DIVISION

23/1/2008.