

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO. 170 OF 2006

AHMED KIBINGE & 2 OTHERS :::::::::::::::::::: PLAINTIFFS
VERSUS
ABUDALLAH MUBIRU SEMBAJJWE :::::::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The Plaintiffs brought this suit against the Defendant who is their father for an order restraining him and all his agents from occupying, selling, transferring, mortgaging, collecting rent and in any way dealing with the Plaintiffs' houses situated at Kibuga Block 3 Plot 512 Makerere.

The brief background and facts of this case are that the Defendant is the registered proprietor of the suit land composed in Kibuga Block 3 Plot 512 at Makerere. The Defendant had occupied the land since 1960s as a customary tenant and then in 1989 he obtained a Mailo Certificate of title from one Ezekiel Nsubuga Mubiru, the original owner of the Mailo interest. The Defendant constructed thereon a mud and mattle house which he together with his family occupied until the construction of permanent houses.

The Plaintiffs contended that the Defendant donated the land to them as his children in 1992 and expressly authorized them to construct permanent houses

on the land. Following the said consent the Plaintiffs proceeded to construct there permanent houses after obtaining approved plans from the City Council of Kampala. However in a turn of events the Defendant in the year 2001 decided to leave his rural home at Mukubungo, Butambala, Mpigi District and forcefully take over the plaintiffs' houses and started occupying one of the houses and collecting rent from the rest.

It was the contention of the Plaintiffs that the Defendant on several occasions threatened to sell their houses despite the fact that they had equitable interest in the suit land as owners of the houses thereon. They contended that the Defendant should be stopped from denying them their interest in the suit land.

The Defendant in his statement of defence denied the allegations put by the Plaintiffs and contended that the land was his and produced a special Certificate of title. He contended that in 2003 the Plaintiffs chased him away from his land with the intention of wanting to forcefully grab his land without any compensation which he had demanded and set at 15 million. The Defendant further counter claimed for trespass against the Plaintiffs and contended that they be chased away from his land without compensation. He claimed for order of eviction and demolition of the illegal structures erected by the Plaintiffs, an order of account for rent and general damages for trespass.

At the beginning of the trial the following were agreed upon:

Agreed facts:

- (1) The Defendant was the registered proprietor of the suit property.
- (2) The Plaintiffs were biological children of the Defendant.

(3) The Plaintiffs have constructed houses on the suit property.

Agreed Issues:

(1) Whether the Plaintiffs have any interest in the suit land.

(2) Whether the Defendant's counter claim have any merits.

(3) Remedies available to the parties.

The Plaintiffs called five witnesses while the Defendant called three witnesses in proof of their respective cases. Thereafter both Counsel filed written submissions.

Evidence:

Kibingo Ahmed Pw1, testified inter alia that the Defendant was his biological father. He stated that he went to work in Sweden in 1986 and left his parents living on the suit land in a mud and wattle house (exhibit P1). Later in 1989 his father acquired the suit land whereupon the Defendant requested him to pay for the survey and pay off the squatters which he did. He stated that he decided to demolish the mud and wattle house and constructed another one in its place (exhibit P2). After that the Defendant requested him to build a house on the suit land for rent but he declined because that place was by then a slum. However because the Defendant kept on pestering him to build there he conceded and built there a house (exhibit P3). During the construction of that house his parents and sister Mary Nakilyowa supervised the construction. During that time they were enjoying good relationship with the Defendant. However problems began in 2001 when the Defendant wanted to bring his wife from the

village which he resisted hence the Defendant's threat to sell of their houses hence this suit. In cross-examination, he claimed that the house which replaced the mud and wattle house belonged to him (exhibit P2). He stated that he completed building the big house (exhibit P3) in 2005. He stated that in total he has three houses on the suit land.

Sophia Ndagire Pw2 testified inter alia that she grew up on the suit land until 1991 when she left to live in Sweden. She stated that the Defendant called Kibinge Pw1 and told him to construct a house exhibit P2, and later on told him to construct the second house (exhibit P3). While Kibinge was constructing the second house the Defendant called her and informed her that someone in the neighbourhood was selling a plot whereupon she sent to the Defendant Shs. 8 million. However that deal failed and the Defendant requested her to construct her house on the suit land and after consulting with her brothers she started constructing there and used the Shs. 8 million to start on the construction. During the construction the Defendant was the one supervising the construction. By the commencement of the construction, there was good relationship in the family. Problems however began when the Defendant wanted to bring his wife from the village to the suit land. She stated that the Defendant had sold off the suit land but it was the Plaintiffs who recovered the same. She concluded that the Defendant was staying in Butambala in a house bought for him by one of the brothers.

Abdu Malik Mayeku Pw3 testified that he knew the parties to the suit. He stated that he came to know the Defendant because he took for him some medicine. On one visit the Defendant disclosed to him that the 2nd Plaintiff was the one who was constructing a house on the suit land and that the 1st Plaintiff had constructed on the other two houses including the one the Defendant was occupying.

Mariam Nakiryowa Pw4 testified that 1st Plaintiff used to send money to her through Haji Bumba for her to purchase building materials for the construction and the Defendant used to supervise the construction works. She stated that during the construction there was no dispute. However the dispute arose in 2001. She testified that currently the Defendant was residing in Butambala.

Amos Wasswa Walukuku Pw5 testified that he met the Defendant in 1999 when he went to build houses at Makerere and the Defendant told him that the houses were for his children. Later he saw the children whom the Defendant introduced to him.

The Defendant Abudallah Sembajjwe Dw1 testified that he was sued by his biological children who chased him away from his land registered in his names. He had bought the land from Nsubuga Mubiru in 1988 without any assistance from any of the children (Plaintiffs). He stated that the Plaintiffs sought to construct and did construct on his land without his permission. He stated that he used to have a mud and wattle house on the plot (exhibit 1) until after he bought the Mailo interest when he put there a permanent house (exhibit P2). He stated that the 1st and 3rd Plaintiff put up permanent structures on that land (exhibit P2 and P5 respectively). The said houses were completed in the year 2006. He testified that he tried to stop the Plaintiffs from building on his land but they went ahead forcefully. When the Plaintiffs insisted on constructing there he demanded Shs. 15 million from them in compensation but they refused. He stated that the 1st Plaintiff demolished the mud and wattle house and constructed there his own house without his permission. He concluded that he no longer has access to his property.

Lwanga James Dw2 told court that he was the area LC Chairman and knew the Plaintiffs well as children of the Defendant. He told court that he saw the

Defendant in 1971 when he was staying in mud and wattle house (exhibit P1). That in early 1990 the Defendant constructed a house on the land (exhibit P2) while 1st Plaintiff constructed exhibit P3 and 3rd Plaintiff exhibit P5. He stated that a dispute arose between the Plaintiffs and the Defendant as a result of the said construction which led the parties to seek legal redress. He concluded that the Defendant in 2002 had demanded compensation of Shs. 15 million from each of the Plaintiffs.

Aisha Nakato Dw3 testified that she was one of the Defendant's daughters. She confirmed that 1st Plaintiffs demolished the mud and wattle house of the Defendant without his consent. After demolishing it he built a house there (exhibit P2) which is now being occupied by grand children of an aunt. She told court that the Plaintiffs chased the Defendant in 2003. That the Defendant demanded Shs.15 million from 1st and 3rd Plaintiff. She confirmed that the Defendant does not have access to his land.

Resolution of Issues:

From the above evidence and submissions of both Counsel two issues are very pertinent for the determination:-

- (1) Whether the Plaintiffs have any interest in the suit land.
- (2) What remedies are available to the parties.

On the first issue it was submitted on behalf of the Plaintiffs that the Plaintiffs were protected by the doctrine of equitable estoppel by the fact that the Defendant convinced his children not to buy other plots and allowed them to construct their houses on his land, the consideration being family home and

affection that the Defendant could not go otherwise since his assurances that his children should not buy houses anywhere else rendered him estoppel. It was further contended that the Defendant did not stop the children from constructing their houses on the suit land and they changed after there were disagreements.

The Defendant on the other hand contended that he was a registered proprietor of the suit land and that he never gave permission to the Plaintiffs to build on his land.

It was the evidence by the Plaintiffs that they had lived on the suit land since childhood with their parents. By that time the Plaintiffs' mother was still alive. The Plaintiffs further testified that the Defendant left the suit land and went to settle in his village home. Trouble came when after the death of the Plaintiffs' mother, the Defendant tried to come back and resettle with his second wife on the suit land.

Taking the circumstances of this case I find that the Plaintiffs were given license to build on the suit land by the Defendant. It was the Defendant who supervised all the Plaintiffs' construction. Dispute erupted only when the mother of the Plaintiffs died and the Defendant purported to resettle his second wife on the suit land. Although the Defendant purported that he reported to the LC there is no evidence of action which was taken against the Plaintiffs. If anything it was the Plaintiffs who took up the matter to court. In the premises I find that the Plaintiffs are protected under the doctrine of equitable estoppel. They were lured by the Defendant who is their biological father to build on the suit land which the Plaintiffs knew to be their biological home and after resettling the old man in the village they might have assumed that the Defendant was going to be contended until his death. A case similar to the current one is *RUNDA Coffee Estates Ltd. V UJAGAR SINGH* [1906] EA 564.

In the instant case licence to build was granted by the father on a family land. In my view the Plaintiffs might have assumed that their licence was as a result of a father's love and affection more especially by the fact that the land was a family land. They might have thought rightly in my view that the licence could not be terminated.

In yet another case in *INWARDS & Others v Baker* [1965] 2QB 29 the Plaintiff wanted to buy land on which to build his house but could not afford to buy land. Encouraged by his father the Plaintiff constructed a house on the father's land and for several years, while his father was alive he lived in that house. Thereafter his death, his father devised the land to his widow. Subsequently the Plaintiff instituted proceedings for possession. It was held inter alia, that the Plaintiff's father allowed an expectation to be created in the Plaintiff's mind that the house he built was to be his home, at least for his life. In light of that equity, the father could not have revoked the licence nor could his successors in title.

The above authority is very pertinent to the instant case. From the evidence on record, both parties have testified that they had lived on the suit land since childhood with their parents without discord until the death of their mother. At that time the Defendant had shifted to his rural home. However trouble came when the Defendant purported to return to the suit land and settle with another woman. This time the Defendant and his daughter asserted that he had not given the Plaintiffs permission to construct houses on the suit land. However, the evidence on record shows that the Defendant watched the children building on the suit property without raising any dust. Above all it was the Defendant who was supervising the construction as the Plaintiffs were remitting money from Europe. If the Defendant had not sanctioned the actions of his children he would not have for sure waited from the year 2001 when the construction was at

infant stage until the year 2006 when he started complaining against them. It is not also possible that the Defendant reported the conduct of the Plaintiffs to the LC officials as there is no record of any action done by the said local authority. The piece of evidence was a mere afterthought to show that the Defendant did not sanction the construction which he was well aware of and might have been proud of. In the premises, I find that the conduct of the Defendant clothed Plaintiffs with equitable interest in the suit land as licencees such that they were protected by the doctrine of equitable estoppel.

The Plaintiffs acquired equitable interest because Defendant's conduct suggested that he had encouraged them from the time they lived on the suit land when they lived on the suit land when they were children until construction when he allegedly reported a case of trespass in 2006.

The Plaintiffs equitable interest arose because:

- (a) The suit land is family land where he brought up the Plaintiffs from childhood after which he encouraged them to build their houses.
- (b) The Defendant supervised the construction of the houses and knew that the Plaintiffs were putting up permanent structures on the land.
- (c) The Plaintiffs have an equitable interest that is recognizable in law.
- (d) Their misunderstanding arose after the death of the Plaintiffs' mother when the Defendant decided to return from his rural home to settle on the suit land with another wife, an act which might have annoyed the Plaintiffs.

In light of the above analysis I find that the Plaintiffs have an interest in the suit land as against the Defendant.

ISSUE NO. 2: Remedies Available to the Parties.

In light of what I have found in the first issue, both parties have their hands tied behind. Although the Plaintiffs have equitable interest in the suit property, the Defendant on the other hand is a registered proprietor whose proprietary right cannot be denied without compensation. And yet the Defendant cannot be allowed to eject the Plaintiffs because of their equitable interest in the suit land. Their equitable interest is backed by the fact that they are children of the Defendant and the suit land is a family land where they were brought up from childhood. Therefore the relationship prevailing in this case cannot sustain a winner takes all situation. This is a win-win situation.

Under Section 176 of the Registration of titles Act, a registered proprietor enjoys principle of indefeasibility of title which can only be challenged for fraud among other instances: See: *Tranas Butagwa v Debora Namuksa*, 3CCA6/89. Under Article 26 of the Constitution a property owner can only be deprived of it after an adequate compensation has been paid to him. In my view therefore, the Defendant who is a registered proprietor of the suit land cannot be deprived of his property without being paid adequate compensation. However, much as the Defendant deserves compensation as of right, it must be pointed out that he watched the Plaintiffs build on the suit land thereby creating an expectation that the Defendant being their biological father would not chase them away from the family land. The said scenario created a very peculiar relationship in this matter which tainted the Defendant's conduct by turning around and denying the interest of the Plaintiffs in the suit land tantamounted to fraud. If the Plaintiffs are to be ejected they should be compensated for their

developments thereon due to their equitable interest. On the other hand if the Plaintiffs are to eject the Defendant they should be willing and able to pay him adequate compensation. In his testimony the Defendant stated that he requested the Plaintiffs to pay him each 15 million Shillings as compensation. I would think it would be easier for the Plaintiffs to pay compensation to the Defendant than the Defendant making compensation for the developments the Plaintiffs have put on the suit land. In the premises I am ordering that an independent valuer be appointed by court to value the Defendant's land for the purpose of compensating him. It also follows that the restraining orders prayed for by the Plaintiffs are granted. In the interest of good family relationship parties are to bear own costs.

**HON. JUSTICE RUBBY AWERI OPIO
JUDGE**

23/11/2009

23/11/09

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3.27 p.m.

Matovu for the Plaintiffs present.

Cherotich for the Defendant present.

Defendant present.

Plaintiffs absent.

Clerk: Mayobo

Matovu: This case is for judgment. We are ready to receive it.

Court: Judgment read and delivered in the present of the above.

A. G. OPIFENI

ASST. REGISTRAR/LAND DIVISION

/gmm.