

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

CIVIL SUIT NO.434 OF 2008

1. **MICHAEL MULYANTI**
2. **SAM MULYANTI (suing as**
Administrators to the Estate
Of Late Muses Mulyanti) **PLANTIFFS**
- VS-**
1. **JACKELINE BATALINGAYA**
2. **JANETTE BATARINGAYA**
3. **JULIET BATARINGAYA**
4. **GEOFFREY BATARINGAYA** **DEFENDANTS**

BEFORE HON. JUSTICE RUBBY AWERI OPIO

JUDGMENT

Background:

The Plaintiffs instituted this suit in their capacity as administrators of the estate of the late Moses Mulyanti and for the beneficiaries of the estate for a declaration that they are lawful or bonafide occupants on the suit land comprised in Kibuga Block 27 Plots 8, 17 and 126. The Plaintiffs contended that the late Moses Mulyanti and some of the beneficiaries entered on the suit land with the consent of the Defendants' predecessor in title and occupied, utilized and developed the suit land unchallenged by the registered proprietors or their agents from the early 1970s to date. The Plaintiffs claimed that the estate of the late Moses Mulyanti included a kibanja on the suit land. They further claimed that they were in possession and had developments and structures on the suit land, some of which were extensively damaged by the Defendants or their agents whereof they claim damages.

The Defendants' case was that they were the registered proprietors of the land being beneficiaries to the estate of the late Basil Bataringaya who bought and acquired the land in 1968 with all structures thereon including the current houses resided in by Nakato Medina and Susan. Besweri Mulyanti who owned the land and constructed structures thereon prior to 1970 had sold the same and transferred title to the said Basil Bataringaya. Subsequently, Moses Mulyanti challenged the said transaction and transfer but later abandoned the lawful acquisition by Basil Bataringaya. The matter of legal proceedings relating to the legal dispute of ownership and claim was in proceedings under Miscellaneous Cause 7 of 1970, Basil Bataringaya v Moses Mulyanti where a consent order was entered and extracted. The Defendants contended that Moses Mulyanti and his sister continued occupancy of the land on the permission and consent of Basil Bataringaya and the beneficiaries herein Defendants as tenants at will and licensee.

Subsequently when the Defendants became of age they requested Moses Mulyanti to vacate the land and houses so that, as beneficiaries of their father's estate, they could start using their land. However, the Mulyanti family requested for more time to relocate. Unfortunately upon the death of Moses Mulyanti, the administrators and alleged beneficiaries started claiming bonafide or lawful or kibanja ownership on the land and structures thereon. The Defendants concluded that the Plaintiffs or occupants on the land have no claim to justify before court on grounds of locus standi, resjudicata, limitation and non-compliance with the provisions of the Land Act.

Agreed Facts:

During the scheduling conference the following facts were agreed upon:-

- (1) That Besweri Mulyanti sold the suit land in 1968 to Basil Bataringaya.
- (2) That the Defendants are the registered proprietors of the suit land comprised in Kibuga Block 27 Plots 9, 17 and 126.
- (3) The Plaintiffs are the administrators of the estate of the late Moses Mulyanti, who resided on the suit land from early 1970s to 2001, when he died.

(4) The late Moses Mulyanti had no wife or children.

Agreed Issues:

The following issues were agreed:

- (1) Whether the Plaintiffs have the locus standi to bring this suit.
- (2) Whether the identified occupants namely Nakato Nakiganda and Medina Nsubuga are beneficiaries of the estate of the late Moses Mulyanti.
- (3) Whether the claim of ownership of the suit land is affected by the decision in Miscellaneous Application 7 of 1970.
- (4) Whether the Plaintiffs' claim is of Kibanja, lawful or bona fide occupancy.
- (5) Whether the Plaintiffs are entitled to the remedies and reliefs prayed for in the plaint.
- (6) Whether the Plaintiffs have a lawful claim to the structures on the suit land and are entitled to reliefs arising from damages to the structures.
- (7) Whether the Defendants are entitled to the reliefs sought in their defence.

Resolution of issues:

Issue No.I: Whether the Plaintiffs have locus standi to bring this suit.

On this issue the Plaintiff relied mainly on the evidence of Micheal Mulyanti Pw(1) and Sam Mulyanti Pw(2).

Michael Mulyanti Pw1 testified inter alia that he was the administrator of the estate of his late brother, Moses Mulyanti through Letters of Administration granted to him and his nephew Sam Mulyanti in the year 2004. A copy of the Letters of Administration was marked exhibit P1. Sam Mulyanti Pw2 confirmed that he was co-administrator of the estate of the late Moses Mulyanti together with Michael Mulyanti. Both witnesses testified that they were before this court in their capacity as administrators of the estate of the late Moses Mulyanti and for the beneficiaries of that estate. They named the beneficiaries as: Rose Mary

Mulyanti, Ronald Mulyanti, Nakakto Yudaya, Madina Nansubuga, Sam Mulyanti and Michael Mulyanti.

The suit was inter alia for a declaration that they were entitled to a declaration that they were lawful or bonafide occupants of the suit land where the late Moses Mulyanti had been occupying since 1970 until his demise in 2001. They contended that the above interest in the suit land was created by the 1995 Constitution and the Land Act in favour of the Late Moses Mulyanti before he died in 2001 and that the law having conferred upon him the right of lawful or bonafide occupancy, his death could not take away that interest since under Section 34 (2) of the Land Act, tenancy by occupancy is inheritable. I do agree that the Plaintiffs in their capacity as administrators of the estate of the late Moses Mulyanti in whatever forms, are duty bound to protect the same, including instituting suits where necessary. Indeed under Section 180 of the Succession Act an administrator of a deceased person is his or her legal representative for all purposes and all property of the deceased person vests in him or her as such. Further more under Section 192 and 193 of the Succession Act Letters of Administration vests in the administrators all rights and interests belonging to the intestate as effectually as if administration had been granted at the moment after his or her death: See **Khalid Walusimbi v Jamil Kaaya & Another [1993] IKALR 20.**

In the instant case, the Plaintiffs as administrators and beneficiaries to the estate of the late Moses Mulyanti are clothed with power to oversee the estate of the late Moses Mulyanti, including bonafide or lawful occupancy, if at all they subsisted. Prima facie therefore, the Plaintiffs capacity and the nature of their claim clearly establishes a cause of action, hence locus standi to institute and prosecute this suit. I must say that establishing locus standi is different from proving it because the latter deals with proof by evidence whereas the former involves looking at the Plaintiff's pleadings.

Issue No.2: Whether the identified occupants namely Nakato Nakiganda and Medina Nansubuga are beneficiaries of the estate of the late Moses Mulyanti.

Generally, a personal representation of a deceased person is under a duty to distribute to the persons property entitled under the deceased will or intestacy. According to the testimony of Michael Mulyanti Pw1, the late Moses Mulyanti was survived by the following beneficiaries:

(1) Rose Mary Mulyanti (sister).

- (2) Ronald Mulyanti (nephew and customary heir).
- (3) Michael Mulyanti (brother).
- (4) Sam Mulyanti (brother).
- (5) Nakato Yudaya (common law wife (mistress)).
- (6) Medina (dependant).

The above evidence was corroborated by Sam Mulyanti Pw(2). He testified that Nakato and Medina were residing in the suit property as beneficiaries of the estate of Moses Mulyanti. He clarified that Nakato was the wife of Moses Mulyanti while Medina was Nakato's daughter who was not biological daughter of Moses but was depending entirely on him. That after taking on the estate of Moses Mulyanti, they continued supporting Medina by paying her tuition and she is now a graduate with Diploma.

Nakato Yudaya Pw(3) affirmed that she had been a girlfriend of the late Moses for 30 years and that she used to depend on him. After the death of Moses Mulyanti, Michael Mulyanti and Sam Mulyanti, took over looking after her and her daughter Medina Pw(4). Medina in her testimony stated that after the death of Moses Mulyanti, Michael Mulyanti and Sam Mulyanti took over the responsibility of looking after her and her mother Nakato. She confirmed that she belonged to the family of Kiwanuka and not of Mulyanti although she was born at the home of Moses Mulyanti and was the one who looked after her.

According to **Osborn's Concise Law Dictionary, 8th Edition**, a beneficiary is defined as one for whose benefit property is held by a trustee or executor. Under Section 28 of the Succession Act when a male person dies intestate as in the instant case, those who are entitled to his property are the following:-

- (1) Customary heir
- (2) Wife (or wives)
- (3) Dependant relatives
- (4) Lineal Descendants

According to Section 3 of the Succession Act it is apparent that Medina and Nakato Yudaya do not qualify as dependants because Medina is not in any way a daughter to the late Moses Mulyanti and Nakato was not a wife of the deceased. Much as Madina was allegedly born

and raised at the home of the late Moses Mulyanti, she had her own biological father in the person of a one Kiwanuka. She is therefore not of the Mulyanti lineage but lineal descendant of Kiwanuka. There is no evidence to prove that the said Madina had been adopted by the late Moses in a manner recognized as lawful by the law of Uganda. Accordingly there is no way she can assume to be a beneficiary merely because she was raised by her mother who was cohabiting with the deceased.

As to the position of Yudaya Nakato, she does not qualify as a wife because a wife under the Succession Act means a person who, at the time of the intestates death was,

- (a) validly married to the deceased according to the laws of Uganda; or
- (b) married to the deceased in another country by a marriage recognized as valid by any foreign law under which the marriage was celebrated.

The evidence abounds that at the time of the demise of Moses Mulyanti, Nakato Yudaya was merely his mistress although she had cohabited with him for a considerable period of time. Marriage is a creation of law and not a question of sentiment. In fact to prove that the deceased never left a widow or children, it was indicated in his death report that he died a bachelor. In the same report none of the two were mentioned as among the surviving relatives. However, the Plaintiffs were shown as the surviving near relatives of the deceased and persons intending to apply for Letters of Administration of the deceased's estate.

Lastly, even in the petition for letters of administration it was not declared that the deceased had left behind a widow. However it was declared that the deceased had left no children. In view of the above circumstances I do find that Nakato and Madina are not beneficiaries to the estate of the late Moses Mulyanti. However, the Plaintiffs who are next of kin to the deceased would be entitled to inherit the deceased's estate that may be legally identified.

Issue No.3: Whether the claim of ownership of the suit land is affected by the decision in Miscellaneous Application No.7 of 1970.

According to the evidence of Michael Mulyanti Pw1 and Sam Mulyanti Pw2, they were not claiming ownership of Mailo interest in the suit land. They were merely claiming lawful or bonafide occupancy on the suit land, an interest created by the 1995 Constitution and the Land Act Cap 227 which came into force on 2nd July 1998. The issue before court in 1970

did not cover the claim of lawful or bonafide occupancy currently being made on the suit land by the Plaintiffs. As far as the doctrine of res judicata is concerned, it is not enough to rely on res judicata merely on account that one of the essential elements exists. The subject matter of the claim in the subsequent suit must have been covered by the previous suit: See **NAROTTAM BHATIA & Another vs BOUTIQUE ZHAZIM Ltd. High Court Miscellaneous Application No.505 of 2004** (unreported).

Now therefore since there is no evidence on record that the claim now being made has ever been adjudicated upon by any known competent court between the present parties or their predecessors in title, the issue of res judicate would not arise. In the premises, the decision in Miscellaneous Application No.7 of 1970 does not have any bearing on the current suit.

Issue No.4: Whether the Plaintiffs' claim is of lawful or bonafide occupancy.

It was the contention of the Plaintiffs that in their capacity as administrators of the estate of Moses Mulyanti, they qualify as lawful occupants under the law deriving their interests from the late Moses Mulyanti who had occupied the suit land since 1970 with the consent of the late Basil Bataringaya. The Plaintiffs contended that even after the order of court of 1970, the late Moses Mulyanti was never evicted from the suit properly by way of execution of that order. Therefore, his continued occupation of the suit property was with knowledge and consent of the late Bataringaya or his agents. Accordingly, the Plaintiffs concluded that since the late Moses Mulyanti was a person who entered the land with the consent of the registered proprietor within the meaning of Section 29 (1) (b) of the Land Act the qualified as a lawful occupant, an interest that passed on to the Plaintiffs as his legal representatives by operation of law.

With regard to bonafide occupancy, it was the contention of the Plaintiffs that once evidence was led to the effect that a person had occupied, utilized and developed the suit land unchallenged by the registered proprietor or his agent for twelve or more years before the coming into force of the Constitution, the claim for bonafide occupancy is made out. It was the Plaintiffs' evidence that the late Moses Mulyanti had lived and developed the suit land since 1970 up to 2001 when he passed on without being challenged or evicted by the Defendants.

According to the Defendants, the suit land was bought by their late father Basil Bataringaya in 1968 from the father of Moses Mulyanti. The transaction was effected through G. S. Lule's law firm. Subsequently the late Moses contested the sale and ownership and put a caveat on the property but the matter was resolved by court in 1970. After conceding defeat, the late Moses requested to be allowed to buy off the suit land from the late Bataringaya but that request was turned down. When the late Basil Bataringaya was murdered by Amin in 1972 there followed turbulent times in the family history forcing the family to relocate to Mbarara. After the murder of their mother in 1977 the Administrator General took over the administration of their father's estate until 1986 when their elder brother Kenneth Bataringaya acquired Letters of Administration to the estate. It was at that point that they told the late Moses Mulyanti who was caretaking the land to vacate so that they could develop the same. In response the late Moses requested for time to vacate. Because Mulyanti was such a caretaker they allowed him more time. Later on Moses Mulyanti fell sick and died before vacating the suit land. Subsequently they got correspondences suggesting that the late Mulyanti had bonafide occupancy which surprised them so much because Moses Mulyanti was not a squatter but just a mere caretaker. In conclusion, it was the Defendants' evidence that prior to his death Moses Mulyanti did not claim kibanja bonafide occupancy or lawful occupancy but that the above claims were raised later by the Plaintiffs.

Claim for lawful occupancy:

Section 29 (1) of the Land Act provides the meaning of lawful occupant to mean

- (a) a person occupying land by virtue of the repealed
 - (i) Busuulu and Envujjo law of 1928
 - (ii) Toro Landlord and Tenant Law of 1973
 - (iii) Ankole Landlord and Tenant Law of 1937

- (b) A person who entered the land with the consent of the registered owner and includes a purchaser; or

- (c) A person who had occupied land as customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the Leasehold Certificate of title.

The Plaintiffs' claim is based on the fact that the late Moses Mulyanti had occupied the suit land from 1970 until 2001 with the consent of the registered proprietor. Consent it is a question of interpretation of the status quo. From the evidence on record, the suit property was bought from the father of Moses Mulyanti in 1968. The property had a main house which the late Besweri Mulyanti had erected. The moment the suit land was sold to the late Bataringaya the Mulyanti family lost all their legal interest and those who remained in the premises became mere licencees. Under Section 30 (4) of the Land Act a person who is on the land on the basis of a licence from the land owner shall not be taken to be a lawful occupant. After failing to regain possession of the suit property from Basil Bataringaya, the Mulyantis could not have expected to remain on the property indefinitely. Their occupation was a mere gesture of friendship and good will. In fact according to the Defendants between 1972 – 1997 the family went through turbulent times as their father was killed by Amin's soldiers and their mother also got murdered in 1977 when they were still minors.

Those circumstances could have contributed to the continued occupation of the Mulyantis of the suit property which they are now trying to take advantage of. In the premises I find that the claim for lawful occupancy is devoid of any legal basis. It is misplaced, if not misconceived. That could be the reason why the late Moses Mulyanti did not raise it during his good life time.

With regard to bonafide occupancy, Section 29 (2) of the Land Act defines bonafide occupant as a person who before the coming of the Constitution:-

- (a) Had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more before the coming into force of the 1995 Constitution.
- (b) Had been settled on land by the Government or an agent of Government which may include a local authority.

It was the contention of the Plaintiffs that the Plaintiffs had proved that Moses Mulyanti had occupied, utilized and developed the suit land unchallenged by the registered proprietor or his agent for over 12 years since the coming in force of the Constitution.

In **Kampala District Land Bond and Chemical Distributor vs National Housing Construction Corporation Civil Appeal No.2 of 2004** (unrepeated) a person who has been in occupation or possession of the suit land for more than twelve years at the time of the coming in force of the 1995 Constitution and utilized the land without any challenge from the Registered proprietor can claim bonafide occupancy.

The right to bonafide occupancy must be actual or real. It must be based on unchallenged right. The right which is not capable of being challenged does not bestow bonafide occupancy. In the instant case the late Bataringaya bought the suit property from Besweri Mulyanti who was the father of Moses Mulyanti. In 1970 Moses Mulyanti attempted to challenge Bataringaya's ownership of the suit property without success. After conceding defeat Moses Mulyanti approached the late Bataringaya to buy back the suit property but the request was turned down. In that case although the late Moses Mulyanti continued staying on the suit property, the Bataringaya family had no duty to levy any further claim on the suit property which was already theirs or to formally question the legality of the occupation of Moses Mulyanti whom they knew had dropped any hope of regaining ownership of the suit property and whom they were considering as a mere caretaker. In deed it was the Defendants' evidence that when they wanted to develop the suit property they informed Moses Mulyanti who requested to be given time to vacate without laying any claim for bonafide occupancy. It was after the death of Moses Mulyanti that the Plaintiffs created their claim of bonafide occupancy. In my view this claim cannot stand. It was a mere afterthought because the occupation of Moses Mulyanti was with the knowledge that the suit property had moved from his father to the family of Bataringaya and his only option was to buy time and relocate. It was because of the turbulent time the Bataringaya's family went through that enabled the status quo to arise. But I am satisfied with the defence that the late Moses Mulyanti did not enjoy bonafide occupancy. There was no actual or real right bonafide occupancy. Bona fide occupancy is a right that originates from a bona fide or real right. It is not a matter of aspiration or emotion. It must be an actual right not a sentimental right.

Issue No.5: Whether the Plaintiffs are entitled to the remedies and reliefs prayed for in the plaint.

Having found that there was no lawful occupancy or bonafide occupancy it is my finding that the Plaintiffs are not entitled to the remedies and reliefs prayed for in the plaint. The Plaintiffs should have been very grateful to the Bataringaya's family for allowing Mulyanti family to continue having their cake after eating it. The Plaintiffs do not have any claims to pursue against the Defendants.

Issue No.6: Whether the Plaintiffs have a lawful claim to the structures on the suit land and are entitled to reliefs from damages to the structures.

According to the Defendants the late Moses Mulyanti sought permission and was allowed to erect semi permanent structures on the suit land for the use of his workers. The law is trite that a building erected on a piece of land becomes part of the property of the land owner without any obligation on the land owner to compensate the builder: See **Francis v Ibitye (1936) MLR 11**.

The late Moses Mulyanti sought and was granted permission to construct semi permanent houses on the land for the use of his workers. The houses were there to serve his purpose and interest as and when he was still licensed to stay on the land. The Defendants should have ordered the Plaintiffs to demolish them at their costs if they had wanted.

Issue No.7: Whether the Defendants are entitled to the reliefs sought in their defence.

It is my conclusion that the Plaintiffs have no lawful claim or lawful occupancy of the suit land above the tenancy the Defendants had originally granted them to enable them relocate in good faith. The suit is therefore a non-starter. It is accordingly dismissed with costs. It is accordingly ordered that the Defendants are entitled to vacant possession of the suit property

and free to evict Nakato and Madina who are strangers to the Mulyanti's family and who are illegally occupying the suit property.

If I had to find for the Plaintiffs I would have been required to assess general and special damages. It is trite law that damages must be pleaded and proved.

The Plaintiffs contended that their houses were damaged extensively. However Counsel did not assist court by trying to quantify the alleged damages to enable court to make an assessment. However, considering that these were semi permanent houses; built without the consent of the land owner, I would award Plaintiffs Shillings five million by way of general damages.

With regard to special damages this has to be specifically pleaded and proved. The Plaintiffs never proved their claim for special damages and I am not going to award any.

All in all, the Plaintiffs' case is dismissed with costs, and it is ordered that the Defendants get vacant possession of the suit property and to evict the remaining occupants on the suit land.

HON. JUSTICE RUBBY AWERI OPIO

JUDGE

24/5/2009

26/8/2009

Kyazze for Plaintiffs

Ojlok Julius for Defendants.

Judgment read in Chambers as in open court.

HON. JUSTICE RUBBY AWERI OPIO

JUDGE

26/8/2009