REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL No. 003 of 2012

ARISING FROM CIVIL SUIT/CLAIM No. 002 of 2004

1. KISORO TOWN COUNCIL
2. KISORO DISTRICT
   LAND BOARD :::::::::::::::::::::::::::: APPELLANTS

VS

CHRISTINE ZUNGU :::::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an appeal filed by the Attorney General's Chambers, on behalf of the Appellants, against the decision and orders of Her Worship Prossy Katushabe, Magistrate Grade I, Kisoro Chief Magistrates' Court, delivered on the 8th of December 2011.

Briefly, the background to this appeal is that the Respondent (Christine Zungu) filed a land claim in the Kisoro District Land Tribunal, all the way back in 2004, for the return of her land which she claimed she held customarily and which was, without her consent, taken over by the appellants herein, plotted into plots and distributed to others by them. The land is located in the Kisoro town council next to the former Bufumbira County headquarters and Kisoro prison and measures about 5 acres in area.

It is the evidence of the respondent that she had been given the land by her mother, Matilda Kanazi Mbonigaba, who had in turn obtained it from her late

husband, one John Mbonigaba, the father of the claimant. Matilda had married John Mbonigaba, who lived on this land with his mother, in the 1940s. When the claimant's grandmother passed away, again in the 1940s, she was buried on this same land. The claimants own first born sister died young and is buried in the same place. It is alleged the claimants' father had lived on the land having inherited it from his father.

At one point in his career, the claimant's father moved to Masaka for medical studies following which he was posted to work in Kabale and Kanungu. He shifted his whole family but left a caretaker, one Rwamuhunga, on the land in Kisoro. The caretaker's son, Ntamagezo, took over this role when Rwamuhunga passed away and still lives as a caretaker on the land.

In 1988 when the claimant got married, her mother gave her this land as a marriage gift (which she says is a customary practice among the Bafumbira). In 1996, the mother reduced it into writing by registering a power of attorney.

It was around this same time that the claimant learnt that Kisoro Town Council had plotted the land into plots and was giving it out. She protested against this process with the office of the Town Clerk, Kisoro. The town council refuted her ownership but never the less offered her two plots. She remained dissatisfied and despite protracted negotiations, involving a number of different persons, she was unsuccessful. This ultimately prompted her to file the suit in the lower court.

The case for the defendants (appellants) was that the Claimant was not the customary owner of this land. The land belonged to the then Bufumbira County which was succeeded by the Kisoro Town council. It is true that the claimant's parents lived on this land but only as employees of the Bufumbira County

administration where the respondent's grandmother had worked as an attendant. John Mbonigaba, the claimant's father, was also later employed by the Bufumbira County, like his mother, before he left for a medical course never returning to Bufumbira. This was how the two became connected to the land, as employees of government. It was the evidence of the appellants regarding the burial of the claimant's grandmother and sister on the land that, originally, the county was not strict on employees burying their dead on the land but banned the practice in 1949.

The respondents' family never laid claim to this land again until the Town Council sought to plot it in 1995. That it is not true there was a caretaker because he was not known to whoever lived on the land before, he was only brought to the land by the claimant after the plotting of the land commenced. Secondly, the town council had cut roads through the land and advertised the process of creating plots in the papers before starting on the process but the claimant raised no objection.

Evidence was adduced to show that the case of the respondent was contradictory. She variously claimed 5 plots of land and then on other occasions 5 acres of land indicating she did not know the land. The claimant had never lived on this land having been born in Kabale and raised in Kanungu.

All the foregoing, it is stated, goes to show that this was not a genuine claim.

The trial magistrate believed the claimants case and found in her favour. The lower court ordered the claimant be paid compensation to be determined by the government valuer. It was ordered farther that the claimant by paid general damages in the sum of five million shillings.

Being dissatisfied with this finding the appellants lodged this appeal. There are 6 grounds of appeal namely:

i. That the learned trial magistrate erred in law and fact in finding that the respondent is a customary owner of the disputed land
ii. That the learned trial magistrate erred in law and fact in failing to find that the respondent house on the land was along not there, but was only erected at the time of instituting her claim.
iii. That the learned trial magistrate erred in law and fact in holding that there is always documentary evidence concerning properties of government including public land.
iv. That the learned trial magistrate erred in law and fact in failing to find that the respondent claim for either the recovery of the land or adequate compensation against the appellants is not sustainable at law.
v. That the learned trial magistrate erred in law and fact in that the appellants violated the respondents right to the use of the land in use.
vi. That the learned trial magistrate erred in law and fact in and a miscarriage of justice was occasioned when she failed to evaluate all the evidence on record thereby arriving at an erroneous decision.

It is the prayer of the appellants that:

a. The appeal be allowed, the decision and orders of the trial magistrate be set aside/reversed.
b. All remedies prayed for by the appellant be granted by this court.
c. The respondent be ordered to pay costs of this appeal and the costs in the lower court.

d. Any more reliefs that this Honourable court may deem fit in the interest of justice.

Before determining the Appeal, I remind myself that as a first appellate Court, it is my duty, to subject the evidence as a whole, to a fresh scrutiny, and on a balance of probability come to my own conclusions based on the Law applicable and the evidence. I am mindful that I have not seen the witnesses testify and cannot draw conclusions as to veracity based on their demeanour.

Secondly, the court granted the parties leave to file written submissions. These are on record and shall not be reproduced here. I have also carefully studied the submissions of both sides in the lower court.

I shall start by dealing with grounds 1 and 2 jointly first. They are:

i. That the learned trial magistrate erred in law and fact in finding that the respondent is a customary owner of the disputed land
ii. That the learned trial magistrate erred in law and fact in failing to find that the respondent house on the land was along not there, but was only erected at the time of instituting her claim.

The plaintiff's case, as I see it, regarding her customary ownership of the land, and as can be determined from her witnesses is that in 1988 the plaintiff got married to one Mr Zungu who hails from Kisoro. At this time her mother, PW 1, Matilda Kanazi Mbonigaba, gave the claimant her (PW 1s) share of the suit land as a marriage gift (as it was done in the Kifumbira custom). The land is located at Bigina in Kisoro town council and sits on or near the former headquarters of Bufumbira County.

Matilda Kanazi Mbonigaba got married to John Mbonigaba in the early 1940s. At the time, he lived with his mother, one Nyirabarera, and brother, Fabiano

Barayacuranya, on the suit land. John Mbonigaba's father was deceased while Nyirabarera passed away in 1946 and was buried on this land. The first born child of the Mbonigaba's also died about the same time and is also buried here. Mbonigaba inherited his mothers land. She in turn had inherited from Ndarushinze, Mbonigaba's deceased father. It is the plaintiffs evidence that the workers at the Bufumbira county are said to have lived on and cultivated land near lukiiko hall which is near the suit land. It was that adjacent land which prisoners at the Bufumbira County prison tilled. Mbonigaba and his family were cultivating a different piece of land.

The county chief from the 1940s to the 1960s was Rukeribuga whose residence was between 100 and 120 meters away. It is stated that there were boundary marks between the county land and the plaintiffs land.

In 1947 John Mbonigaba, who at the time had been working as a clerk in Nyarusiza Sub County, left for a medical assistants training course in Masaka. He took his whole family along with him. He left the land in the hands of one Rwamuhunga as a caretaker. On Rwamuhunga's death his son, one Ntamagezo, PW 4, took over as caretaker and lives on it to this day.

When Mbonigaba completed his training he was posted first to Kabale and later to Kanungu where he bought land and settled with his family. It is the plaintiffs' evidence that Mbonigaba continued to inspect this land during his life time before he died in 1970 whereupon his wife Matilda inherited it.

It was also in Kanungu that the claimant was born in 1955. She has never lived on the suit land though, as noted, it was gifted to her in marriage by her mother. Later, in 1995 PW 1 made a power of attorney, P.E. 1, reducing this gift into

writing. The Power of Attorney indicated that the land was jointly held with one Fabiano Barayacurana a deceased brother of the John Mbonigaba.

The defendant learnt about the district plotting the land in 1995 and wrote to the Town Clerk Kisoro on 14 May 1995.

The appellants dispute this story. The main contention is that the plaintiff did not own this land. The technical officers like the former Town Clerk DW 3, Deo Ndimo who was in charge when the claimant first made her application stated that this was public land owned by Kisoro district. He states that it was the decision of Kisoro town council that the plaintiff did not own the land as she was not a customary tenant. He dealt with this land from 1992 up till he left Kisoro in 2002. He had opened new roads in the land without any objection from the claimant. He acknowledged allocating the claimant two plots but only because her parents had worked at Bufumbira county.

The defendants/appellants led evidence through one Ndimubanzi, DW 2, son of the county chief in charge of the area at the time that Mbonigaba lived on the land. This witness was 8 years old in 1941when his father was transferred to Bufumbira County. He stated that his family found the plaintiffs grandmother already on the land and working at the County as an attendant. Mbonigaba also later joined as a clerk. He told court that he did not know who owned the land though in his view the land was owned by government. He turned around in his evidence to say that the claimant was entitled to the land.

DW 4, Isaiah Tumwesigye, was the current Town Clerk and it was his evidence that he consulted predecessors who told him that the plaintiffs claim was not genuine. He went on to add that the county chief at the time was best placed to know whether the claim was genuine.

DW 5 Habyarimana Joseph was a former County Chief here, from 1980 - 1987 and stayed on the land. He stated that the boundaries of the land were shown to him by his predecessors but he also went on to state Kisoro had a town board in 1980 and they knew the land boundaries.

DW 6 the Secretary to the District land Board told the court that according to 'facts on the ground' the plaintiff did not own the land. To the district land board the land belongs to government.

I have reproduced these pieces of evidence on both sides to show what the court has to work with in order to establish whether the claimant was a customary tenant on this land.

The issue as to whether the respondent owned the land first arose in 1995 but the land was finally given after 1995. The operative law regarding customary land at the time was **The Public Lands Act 1969** and **the Land Reform Decree, 1975**

S. 24 of **the Public Lands Act, 1969,** which provides,

(1) Subject to the provisions of subsection (5) of this section, it shall be lawful for persons holding by customary tenure to occupy without grant, lease or licence from the controlling authority any unalienated public land vested in the commission if

(a) The land is not in an urban area

(b) No tenancy or other right of occupancy has been created in respect to that land

The Land Reform Decree, 1975 Section 1(1) of the Decree declared all land in Uganda to be public land:

1(1) *"With effect from the commencement of this Decree, all land in Uganda shall be public land to be administered by the commission in accordance with the Public Lands Act, 1969, subject to such modifications as may be necessary to bring that Act into conformity with this Decree"*

It was provided in S.3 thereof that,

(1) "The system of occupying public land under customary tenure may continue and no holder of a customary tenure shall be terminated in his holding except under terms and conditions imposed by the commission including the payment of compensation, and approved by the Minister having regard to the zoning scheme, if any, affecting the land so occupied, and accordingly, the Public Land Act, 1969 shall be construed as if subsection (2) of section 24 thereof has been deleted therefrom."

(2) "For the avoidance of doubt, a customary occupation of Public land shall, notwithstanding anything contained in any other written law, be only at sufferance and lease of any such land may be granted by the Commission to any person, including the holder of the tenure, in accordance with this Decree".

It would appear from the above provisions that at the time all land was converted into public land held by the Uganda Land Commission but the system

of holding under customary tenure was saved and it remained lawful to do so as long as that land did not fall within an urban area.

The question therefore is whether the claimant was a customary tenant. **The Public lands Act** in S.54 defined customary tenure as,

> *'a system of land tenure regulated by laws or customs which are limited in their operation to a particular description or class of persons'.*

The claimant had to show that she was holding this land according to laws and customs which regulated land holding amongst the Bafumbira people. **The Evidence Act Cap 6,** lays out the procedure for proving a custom in S.46,

> *'When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right, of persons who would be likely to know of its existence if it existed, are relevant'*

The court should be guided as to what the relevant custom is and how proof of customary holding amongst the Bafumbira is established. The manner in which evidence as to custom must be established in our courts has been dealt with in the Supreme Court case of **Kampala District Land Board and Anor Vs Venanasio Babyweyaka and Ors Civil App 2/2007** citing the East African Court of Appeal case of **Ernest Kinyanjui Kimani Vs Muira Gikanga [1965] E.A. 735** where it is held that,

'customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This ..., usually means that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case'.

Looking at the claimant's case she states that she owns the land but did not in her evidence adduce any evidence for the guidance of the court to prove her customary ownership. As it stands we only have evidence of her parents possession, their settlement on the land and the same being gifted to her. She claims to be in possession through a care taker but there is nothing more. There are several neighbours like one Serutwe who were not called to testify. Some of these are said have outstanding disputes with the town council. There must have been others in possession of neighbouring pieces. These too did not testify.

I would have expected evidence say from an elder or other expert on Kifumbira custom to tell court how the Bafumbira hold land traditionally/customarily. The plaintiff would then show that she is holding the suit land according to that custom. The defendants would be accorded an opportunity to challenge or rebut this particular evidence. In the absence of this her mere assertion that the land is customary land which she holds is inadequate.

In the same way the defendants should have shown that this land could not belong to the claimant because it was proved to be government property. Officials of the district administration have not been helpful in this regard. The

then secretary to the land board, DW 1, stated that that the town clerk had used existing records to establish ownership. The land board which has a constitutional function to hold land should have had a more conclusive proof of ownership than this. The town clerk, at the time DW 3, Deo Ndimo, states that Kisoro district owned the land and it was the decision of the Town council that the claimant was not a customary tenant. What was the basis of the town council in reaching this decision? None is given although the DW 3 said he knew the land well.

DW 2, Ndimubanzi, was a controversial and contradictory witness, at one point he states that he knew the land in question well and it belonged to the district. He later retracts to say he did not know who owned it. Initially he stated that when his family went to live on this land they found the claimants mother in possession although she was an employee. I note however that DW 3 was a young boy at the time at eight (8) years in 1941. How then could he authoritatively testify on matters of government ownership of land at his tender age? Then there is the question of his motive when he states that he prays he also returns to the land. Because of his inconsistencies, I did not find Ndimubanzi a useful witness as result.

DW 4 was the current town clerk. He told court that he relied on his predecessors to prove ownership. His predecessors here include DW3 who as seen earlier has furnished no proof of ownership. This witness states that a county chief from the disputed time was best placed to prove ownership. These

chiefs are probably long dead but not their offices. Why was there no record of previous ownership produced?

DW5 was at one stage a county chief in Bufumbira County. He too relied on information given by his predecessor. He states that at no time did he ever see the claimant or her father. The claimant's father died in 1970 while DW 5 became chief in 1980. Secondly he states it was the Town board which knew the boundaries of the land. That evidence of the then Town Board was lacking. Besides he was also relying on information given to him by predecessors who are unnamed or whose source of information remains obscure.

Lastly DW 6 is current secretary district land board he states that the 'facts on the ground' are that the claimant does not own the land. These facts presumably include, as he stated, that the Land Board knows the land belongs to government. He does not state how the land board knows this.

Secondly there is the question of whether the land falls within an urban area for purposes of Section 24(1) of the repealed Public Lands Act.

The defence produced a statutory instrument designating Kisoro a town council in 1983 with the accompanying layout plan. These were tendered for identification and never properly produced as exhibits. Secondly evidence was not adduced to show that the claimant's land fell within the boundaries stated as being the Kisoro Town Council. Court relies on evidence adduced to decide a case.

From the defence case, proof of ownership is lacking.

I shall deal next with whether there was a house on the land.

PW 4, Ntamgezo, states he lives on the land on which he has lived since his own father called Rwamuhunga died. Ntamagezo is the claimant's caretaker while Rwamuhunga is the person said to have been left behind by Mbonigaba when he went to Masaka in the 1940s for medical studies.

Each of the plaintiff witnesses testified that Ntamagezo lives on the land. When the court visited the locus his house and gardens were seen. DW 3 states Ntamagezo only came on the land during the dispute, funded by the plaintiff to do so. On the other hand DW 3 and DW 5 admit Rwubaka PW 5 is on the land. Rwubaka was a neighbour of the Mbonigaba's when they lived here. Rwubaka is however an unreliable witness as some of his testimony is outright lies. He for example told the trial court that he grew up with the claimant on the land but did not see Mbonigaba's other children. The evidence however is that the claimant was born in Kabale in 1955 and grew up in Kanungu. She has never lived on this land. Secondly according to PW 1 and PW 2 Mbonigaba had two other children by the time he left for Masaka. Rwubaka was therefore lying. DW 5 states he had never seen Ntamagezo in his time on the land though he knows Rwubaka. Ntamagezo states he and Rwubaka have all along lived on the land as neighbours. I have examined this evidence closely. I note that the other plaintiff witnesses were not discredited in cross examination on this point. The evidence therefore remained credible. Accordingly it is my finding that

Ntamagezo had a house on the land and served as a caretaker for the claimant and her mother.

This court must therefore determine who, on a balance of probability, shows a plausible possession and ownership of the land?

The evidence shows that the claimant's mother was in possession from 1970 when her husband died. On the other hand, the claimant's alleged hold on the land is by virtue of a gift to her by her mother made in 1988. Counsel for the appellant submits that this gift offends the provisions of S.4 (1) of the Land Reform Decree and as such was void. The section provides,

> *"A holder of any customary tenure on any public land may after notice of not less than three months to the prescribed authority or of any lesser period as the said authority may approve, transfer such tenure by sale or inter vivos or otherwise, subject to the conditions that such transfer shall not vest any title in the land to the transferee except the improvements or developments carried out of the land."*

This section has been dealt with and interpreted in the Supreme Court Case **Paul Saku V Adventist Church SCCU 8/1993** which observed that there appeared to be a lacuna in the law which did not define what the prescribed authority was. The court observed that

section 16 may have described what this prescribed authority may be but concluded by saying that It may well be that local chiefs and Land Committee were intended to be included as prescribed authorities for customary tenancies, but the law seems not to be clear. These institutions appear not to have been set up nor the Decree fully implemented.

The concluding remarks in that judgment are:

Before we take leave of this case we would like to express the need for the Legislation to clarify who is the prescribed authority in relation to section 4(1) of the Land Reform Decree. It is accordingly directed that the reasons for the judgment in this appeal be transmitted to the Attorney General.

In **Lukwago and Another Vs Kizza and anor (1999)2 EA 142 at 158** the Supreme Court noted that failure to obtain approval from the said authority did not vitiate a transaction as the said authority had not been properly prescribed by law.

I would therefore hold that if there was such a gift to the claimant by her mother it is not illegal for failure to obtain the required approval of the prescribed authority.

I find that the possession of Matilda Kanazi Mbonigaba, the claimant's mother, is established. Her gift to her daughter transferred her interest in the land to the claimant.

The dispute has subsisted from 1995 to date. The law on customary holding has been modified with the enactment of the **1995 Constitution of the Republic of Uganda** and the **Land Act Cap 227** and the rights of the customary owners have now been secured. I accordingly find that on as a balance of probability the claimant is the rightful owner of the suit land by virtue of her proved possession.

Ground iii

That the learned trial magistrate erred in law and fact in holding that there is always documentary evidence concerning properties of government including public land.

The resolution of this ground becomes superfluous in light of my foregoing findings.

Ground iv

That the learned trial magistrate erred in law and fact in failing to find that the respondent claim for either the recovery of the land or adequate compensation against the appellants is not sustainable at law.

The Kisoro Town Council took possession of the suit land without giving the claimant a right to be heard or to prove her ownership of the same. The right to private property is sacrosanct and protected in Art 26 of the Constitution. Where land must be acquired for the public good then the owner must be promptly paid

a fair and adequate compensation as provided for in Section S. 76(1) (a) of **the Land Act Cap 227**.

Here the land has been taken over by the Town Council and plotted. A number of third parties have now acquired interests and made developments having been given allocations by the Town Council. In light of that it is in the interest of justice the process of valuation and compensation initiated before the filing of this appeal be reinstituted and concluded.

Grounds v and vi are resolved by my findings above.

In the result this appeal stands dismissed with costs going to the respondent.

Dated at Kabale this..**04**th.. day of June 2015

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Michael Elubu

Judge