

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA

LAND DIVISION CIVIL SUIT NO. 52 OF 2017

- 1. KYALIGAMBA MOHAMMAD**
- 2. MATOVU SWAIBU ::: PLAINTIFFS**
- 3. KASOZI HUSSEIN**
- 4. AIDA NASSALI**

VERSUS

- 1. MUWONGE JOSEPH**
- 2. KIBERU CHARLES NSUBUGA ::: DEFENDANTS**
- 3. REV. CAPT. ELIAS KIBUUKA NSUBUGA**

Before: Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGEMENT

BACKGROUND OF THE SUIT:

The Plaintiffs instituted the suit against the Defendants for recovery of land, seeking a declaration that the land situated at Gayaza Bukomansimbi measuring approx. 130 acres belongs to the estate of the late Matovu Ali, to which they are beneficiaries. The Plaintiffs further seek an order of eviction against the Defendants, a permanent injunction restraining the Defendants from utilizing the land or claiming ownership, on the order of mesne profits, general damages, and costs of the suit. The Plaintiffs' case is that they are some of the beneficiaries of the estate of the late Matovu Ali, who owned the suit land situated at Gayaza Bukomansimbi, measuring approx. 130 acres and was at all times in use and utilization of the same, including paying Busulo. The Plaintiffs aver that the Defendants entered the suit land in 2009 following the death of the late Matovu Ali, claiming to have purchased the same from the late Matovu Ali in 2001. The Plaintiffs claim to have suffered great strain and inconvenience owing to the Defendants' actions and pray for judgment on the orders sought.

In their Written Statement of Defence, the 1st and 2nd Defendants denied the allegations and averred that on the 21st day of November, 2001, the 1st Defendant purchased a kibanja on the suit land

from the late Matovu Ali vide sale agreement dated 21.11.2001, acting as an agent for the late Rev. Capt. Elias Kibuuka Nsubuga, the 3rd Defendant. They further contend that the late Matovu Ali handed over vacant possession of the kibanja to the late Capt Elias who occupied the same during the lifetime of the late Matovu without any complaint. It is further their contention that the late Capt. Nsubuga entered into a partnership with the 2nd Defendant, grandson in May 2010 to use the said kibanja as a farm for rearing animals vide a memorandum of understanding dated 12th May, 2010. They further claim that the 2nd Defendant purchased neighboring portions of the land from other persons including the widows of the late Matovu and went ahead to utilize the land without any dispute until after the late Nsubuga's death on 14th October 2015. The Defendants deny dealing in the suit land fraudulently and claim that the Plaintiffs intend to cheat the 2nd Defendant and the late Nsubuga's estate of the said kibanja. They prayed for the suit to be dismissed with costs.

Evidence:

The 1st Plaintiff, Kyaligamba Mohamma, PW1 in his evidence stated that his father, the late Ali Matovu who died on 13th May 2009 owned the suit kibanja on which he cultivated, utilized part of it for cattle rearing and had his residential house thereon. He stated that his late father paid Busuulo and Envujjo to the office of the Mutongole and that the 1st Defendant was a casual laborer on the suit kibanja. He stated that the Defendants came onto the land after his late father's death and claimed to have purchased the suit kibanja but did not avail an agreement to that effect. The family filed a criminal case vide Ref No. 043/11/MSK/2011. They later discovered an agreement sometime in 2010 that did not bear the late Matovu's signature, although the 1st Defendant denied the agreement. He further testified that part of the kibanja was distributed to the late Matovu's other wives, and one of the wives, Aidah Nassali, shares a boundary with the suit kibanja.

PW2 Sarah Naziwa stated in her evidence that she became the late Matovu's neighbor in 1985 and knows the suit kibanja to belong to the late Matovu. She stated that the late used the kibanja until he died in 2009 after which the Defendants started claiming ownership. She testified that the boundaries of the late Matovu's kibanja are from a Kitewuluzi to Mr. Farasco, to Bulegeya, to Nakibuuka and ends at Katalina. She testified that the suit kibanja is the farm on which the late reared cattle during his lifetime. She stated further that one of the wives to the late Matovu informed her that the late distributed the kibanja in his lifetime and that one of the wives sold her kibanja to the 2nd Defendant, Charles Kiberu.

PW3 Jamadah Kakooza stated that he was the Mutongole on Kabaka's land between 2006 to 2007 and he collected Busuulu and Envujjo. He stated that the late Matovu owned the suit kibanja and never sold it during his lifetime that the 1st and 2nd Defendants approached him sometime in 2011 to get a lease on Kabaka's land and when asked for a sale agreement, they presented one without the seller (late Matovu) signature. He stated that the late Matovu would give a copy of the sale agreement to the Mutongole bearing his name and signature. He stated that he was never introduced to any purchaser of the suit kibanja. That he signed documents for a kibanja bought by one Muwonge. He stated that the 2nd Defendant was rearing cows on the suit kibanja.

That was the Plaintiffs' case.

DWI Muhamad Kasozi stated in his evidence that he and the late Ali received bibanja from Kabaka's land agent Rafat Wamala. That the late Matovu bought bibanja and set up a farm separate from the kibanja from Kabaka's land agent. That the late Matovu informed him that he sold his farm to a one Faaza Mujaasi. He also stated that one of their grandsons committed suicide on the farm and was buried thereon and further that at the time of distribution of the late Matovu's estate, the farm was not part because it had been sold. He testified that he was the late Matovu's friend and that the late informed him of the sale to the priest. That the Plaintiffs were present at the late Matovu's property distribution and got their share.

DW2 Joseph Muwonge stated that Father Mujaasi sent him to buy land from the late Matovu, and a sale agreement DEXh 1(a) showing him as the buyer and the late Matovu as the seller was admitted into evidence. He stated that Damiano drafted the agreement. He further stated that the agreement with the seller's signature was taken to Mengo to process the certificate of title. He stated that he pays Busuulo for his kibanja but not for the suit kibanja because he handed it over to Father Mujaasi.

DW3 Kato Damiano stated that he made the agreement between Muwonge and Ali Matovu. He stated that he did not know that both seller and buyer were required to sign. He stated Muwonge bought the suit kibanja on behalf of Father Nsubuga. He also stated that the agreement, DEXh2 was retrieved from the widow of the Gombolola Chief.

DW4 Kalyango John that he knew the late Ali Matovu who owned a farm at Gayaza Bukomansibi. That DW4 and one Kaggwa Boniface rented the farm from Ali Matovu for cattle grazing for about

three years, but when he sought to renew the rental agreement, the late Ali Matovu informed him that he had sold the farm to Kakwaya's brother-in-law, a one Muwonge Joseph. DW4 got the authority to continue utilizing the farm from the said Muwonge and he continued grazing on the farm during the lifetime of the late Matovu.

DW5 Kiberu Charles Nsubuga, the 2nd Defendant, stated that he knew the late Ali Matovu, who owned a farm in Gayaza village, Bukomansimbi District. That he also knew Rev. Fr. Erias Kibuuka Nsubuga whom they referred to as "*Faaza Mujaasi*", who was his grandfather. Sometime in 2008, the said Fr. Nsubuga informed him that he wanted to develop the farm he had bought at Gayaza from Haji Ali Matovu through one Muwonge Joseph. The late Fr. Nsubuga introduced DW5 to the said Muwonge Joseph and later to Kato Damiano, the LC1 Chairman of the area, and one Ssembajjwe, a senior citizen of the area. He further stated that the late Fr. Nsubuga started developing the land and, in 2009, applied for the land from the Buganda Land Board. DW5 then entered a Memorandum of Understanding with Fr. Nsubuga in 2010 to utilize the land. DW5 stated that he also purchased bibanja adjacent to the suit kibanja, including one from the late Ali Matovu's widows (one being the 4th Plaintiff) vide agreement dated 24th December 2010, in which they indicated that the land he bought borders the disputed farm. DW5 further stated that he freely utilized the farm together with Fr. Nsubuga during the lifetime of the late Ali and even bought land from Nakayemba, a widow to the late Ali vide agreement dated 18.6.2010, who has never contested his occupation of the farm. He stated that a complaint was raised by some sons of the late Ali Matovu in 2012, and a council meeting was held on 15.4.2012, which found that the farm was legally sold to Fr. Nsubuga. He also stated that the Buganda Land Board issued a certificate of occupancy in favor of the late Fr. Nsubuga and DW5 to confirm their occupancy of the suit land.

That was the Defendants' case.

Locus visit:

The Court conducted a locus in quo on the 29th day of September 2023 and the evidence gathered established the boundaries of the suit land to be the kitewuluzi, Salongo frasco, mzee Bulegeya, Mukyala Nakibuuka, Munyakayanza, the road to Kyankko, Kayirikiti well, Kyaluzi Katalina, and Haji Ali.

The Parties filed a joint scheduling memorandum and agreed upon the following issues:

1. Whether the 1st Defendant acquired the suit land by means of fraud.
2. Who of the Parties is a trespasser on the suit land.
3. What remedies are available to the Parties.

Counsel for the Plaintiffs submitted for the 1st and 2nd issues that the sale agreement on which the Defendants claim to have bought the land was never signed by the 3rd Defendant nor the late Ali Matovu and does not amount to an enforceable contract. Counsel prayed for this court to find that the defendant's occupation of the suit land was obtained by fraud since the defendant was at all times aware that the family of the late Ali Matovu was in possession of the said land. Counsel further argued that the contradictions and inconsistencies in the Defendant's evidence regarding the sale agreement, the manner in which DW2 claims to have purchased the land for the 3rd Defendant, and the Defendant's failure to identify the boundaries of the suit land on the locus visit; are grave and go to the root of the dispute. To this, Counsel prayed that the court finds that the defendants fraudulently acquired the suit land and have been trespassers on the same since 2009.

Defendants Counsel submitted that the Defence brought evidence to prove that the late Haji ali Matovu sold the farm /kibanja to the 1st defendant wh purchased on behalf of the late Rev.Fr. Capt.Elias Nsubuga also known as Fr.Mujaasi. The land sale agreement was written by Dw3. Dw3 expalined that two agreements were drawn nad they were admitted in evidence asc Dexh 1a and Dexh 2a and their English translations Dexh1b and Dexh 2b respectively. That these agreements were clearly explained by the witnesses. That the farm was utilized by Dw4 who hired it from the 2nd Defendant during Haji Ali Matovu's lifetime and he Haji Ali Matovu did not object to it. That the 2nd Defendant has been in occupation of the suit farm at all material times was and according to PW1, since 2009. He concluded by submitting that since Haji Ali Matovu sold the suit kibanja to Fr. Mujaasi through the 1st Defendant, the Defendants are not trespassers.

Determination of the Court

Issue one: Whether the 1st Defendant acquired the suit land by means of fraud.

Fraud has been defined to include dishonest dealing in land or sharp practice intended to deprive a person of an interest in land, including unregistered interest (*The Supreme Court decision in Kampala District Land Board and another Vs. Venansio Babweyaka and others SCCA No. 2 of 2007, Kampala Bottlers Ltd Vs Damanico SCCA No. 22 of 1992, Ssejaka Nalima Vs Rebecca Musoke SCCA No. 2 of 1985 and Uganda Posts and Telecommunication Vs Lutaaya SCCA No. 36 of 1995*).

The subject matter of the instant case is unregistered land i.e. kibanja situate at Gayaza Bukomansimbi measuring approx. 130 acres. The Plaintiffs' claim that the Defendants' actions of claiming to have purchased the suit kibanja and utilizing the same based on an agreement that the alleged seller never signed, are fraudulent. Counsel for the Plaintiffs submitted that the purported sale agreement is unenforceable for lack of signature by the seller.

DW2 Joseph Muwonge stated in his evidence that one Kato Damiano, DW3, drafted the impugned agreement. Indeed, DW3 confirmed that he drafted the agreement but also stated that he did not know that both the seller and buyer were required to sign the agreement.

Counsel for the Plaintiffs sought to challenge the enforceability of the sale agreement between DW2 and the late Ali Matovu on the basis of lack of a signature. Section 10 of the Contracts Act 2020 defines a contract as an agreement made with the free consent of the parties with capacity to contract, for a lawful consideration, and with a lawful object, with the intention to be legally bound. The law further provides that a contract can be either oral or written or partly written or may be implied from the conduct of the parties. The sale agreement dated 26-11-2001 indeed lacks both the seller's and buyer's signature. This court would therefore have to rely on extrinsic evidence to prove or disprove the existence of the alleged agreement.

PW1 in his evidence stated that the Defendants came onto the land after the death of the late Ali Matovu. It was also his evidence that part of the suit kibanja was distributed by the late Matovu to his wives during his lifetime. PW2 also stated in her evidence that the late Matovu distributed his land during his lifetime. It was PW3's evidence that the 2nd Defendant was rearing cattle on the suit kibanja with Fr. Mujaasi. The evidence of DW3 is that he drafted the agreement for the sale of the suit kibanja between one Muwonge on behalf of Fr. Nsubuga, and the late Ali. DW3 was one of the witnesses to the agreement and confirmed that the late Ali Matovu sold his kibanja.

The Plaintiff's evidence that the late Ali Matovu distributed his kibanja during his lifetime raises questions as to why the plaintiffs seek to claim the suit kibanja that they did not receive as a gift *intervivos* or as a distribution upon succession.

PW1 stated in his evidence that his late father stopped rearing cattle on the land when PW1 was still young. It was also his evidence that he left the village in 2004 and the suit kibaja was a well-fenced farm at the time. PW2 stated that the late Ali stopped rearing cattle on the land when he died. This contradicts the evidence of PW1. PW3's evidence that the 2nd Defendant and Fr. Mujaasi were rearing cattle on the suit kibanja contradicts the evidence of PW1 and PW2 that the late Ali was using the suit Kibanja until his death and that the defendants only came onto the land after the late Ali Matovu's death.

On the other hand, the Defendants evidence that Fr. Mujaasi/Nsubuga utilized the land after purchasing the same for the late Ali is consistent. The Defendants were consistent in their evidence that the late Ali Matovu sold his land to the "priest". DW1 stated that he was the late Ali Matovu's best friend and that the late informed him that he had sold the suit kibanja to the priest i.e. Fr. Nsubuga. DW2 stated that he bought the suit kibanja for the late Fr. Nsubuga and his evidence was highly corroborated by other defence witnesses including PW3 who stated that he knew about Fr. Nsubuga's presence on the suit kibanja. DW4 stated that he had entered into a rental agreement with the late Ali and that when he sought to renew the rental agreement, the late Ali informed him that he had sold the kibanja.

Court in the case of *Oryem David v. Omory Phillip, H.C.C.S No. 100 of 2018*, held that;

"It is trite law that grave inconsistencies and contradictions unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored."

Further,

"What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e "essential" to the determination of the case. Material aspects of evidence vary from case to case but generally in a trial, materiality is determined on the basis of the relative importance between the point being offered by the contradictory evidence and its consequences to the determination of any of the facts or issues

necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central or that is only collateral to the outcome of the case.”

I have considered the evidence of both parties, and I find that the inconsistencies and contradictions in the Plaintiff’s case point to deliberate untruthfulness. PW2 did not seem sure of her evidence as she used the term, “*I think..*” often which showed that she was not aware of the case, Furthermore, the evidence of the Plaintiffs as to when the late Ali Matovu stopped utilizing the suit land and when the Defendant’s came onto the land is inconsistent. I find these to be major inconsistencies that go to the root of the instant case, in its context.

The Defendants on the other hand clearly established the conduct of the parties to the impugned sale agreement to wit the late Ali Matovu, Joseph Muwonge and one Fr. Nsubuga. The Defendants’ evidence that Fr. Nsubuga utilized the suit kibanja during the lifetime of the late Ali Matovu was not challenged by the Plaintiffs. The Defendants were also consistent in their evidence that DW2 purchased the suit kibanja for Fr. Nsubuga who proceeded to rear cattle on the suit kibanja and his estate continues to use the same.

I find that the Defendants evidence was reliable and credible in establishing the conduct of the parties to the impugned sale agreement which proves the intention to create and be bound by a contract. The evidence that the late Ali Matovu informed DW4 who had rented the land from him that he had sold the same proves the conduct of the parties and the intention to sell the land. Furthermore, the evidence of PW3 that Fr. Nsubuga utilized the suit land supports the Defendants case and further proves that there was a valid contract for sale of the suit kibanja. By the conduct of the parties following the impugned sale agreement, there was a valid contract and sale of the suit kibanja.

I therefore find that the Plaintiffs have failed to prove the existence of fraud regarding the Defendants’ utilization of the suit kibanja and the purchase from the late Ali Matovu.

Issue two: Who of the Parties is a trespasser on the suit land.

For an action of trespass to be sustained, an element of entry without permission of the owner must be proved, and the owner must prove that they were in possession at the time of the trespass.

Court held in E.M.N Lutaya versus Stirling Civil Engineering Civil Appeal No.11 of 2012, that trespass to land occurs when people makes unauthorized entry upon the land and thereby interfere with another person's lawful possession of the land.

Having resolved that the Defendants' acquired the suit kibanja by valid purchase, they are duly authorized to utilize the suit kibanja. DW5 adduced evidence of a memorandum of understanding dated the 12th day of May 2010, between himself and the late Fr. Nsubuga granting him permission to utilize the suit kibanja. He further adduced several agreements showing that he purchased bibanja from the neighbors of the suit kibanja all of which were not disputed or challenged. It was also the Plaintiff's evidence that DW5 purchased bibanja from the widows of the late Ali Matovu. Indeed, it was established at locus that only the farm i.e. the suit kibanja was in dispute and not any of the land acquired by DW5. In fact, as correctly pointed out by Defendant's counsel, it was only the 1st Plaintiff who attended court and none of the other plaintiffs testified in court.

I therefore find that the Defendants are lawfully utilizing the suit kibanja having obtained the same through the valid purchase by the late Fr. Nsubuga.

Issue two also fails.

Issue three: What remedies are available to the Parties.


Having resolved issues one and two in the negative, the Plaintiff's case wholly fails. The Plaintiffs had the duty to adduce evidence supporting the claim of trespass and fraud, and their evidence was insufficient to prove the allegations. The Defendants adduced sufficient evidence supporting the alleged sale and purchase of land by the late Fr. Nsubuga from the late Ali Matovu and their evidence was more reliable without major inconsistencies or contradictions. They were in occupation of the suitland even during Haji Ali Matovu's lifetime and he brought no claim of trespass against them.

The Plaintiff's suit is hereby dismissed with costs to the Defendants.

Dated and Delivered electronically at Masaka this 2nd day of April, 2024.

Victoria NN Katamba

Judge.

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