THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CIVIL SUIT NO. 129 OF 2009

FAUSTINO MBUNDU KANANURA ========== PLAINTIFF

(SUING THROUGH HIS ATTORNEY KANANURA DONATI)

VERSUS

RUCHOGOZA JOHN ==== ========= ===== DEFENDANT

Before: **HON. MR. JUSTICE WILSON MASALU MUSENE**

JUDGMENT

The Plaintiff , Faustino Mbundu Kananura brought this case against the Defendant Ruchogoza John seeking a Declaration that the Defendant trespassed on his land comprised in LRV 3538 Folio 4 Plot 11 Block 540 Singo, land at Kamugaba, Bukomero Kiboga District measuring approximately 138 hectares, Permanent Injunction to restrain the Defendant, his agents servants, and work men from further encroachment on the suit land, harassing, intimidating, threatening or in any way interrupting the Plaintiff's use and enjoyment of the suit land, General damages, interest and costs of the suit.

The case for the Plaintiff was that on or around the 10th day of March 2000, the Plaintiff through his father started looking for land to purchase in Kiboga and finally had an offer from Frank Kaka Bagyenda, the then registered proprietor of the suit land. The Plaintiff exercising due diligence did all the necessary searches in the land registry and on the 15th March 2000 paid for the land which he subsequently transferred into his names on 10th August 2007. (Attached is the photocopy of the sale agreement and certificate of Title "marked B" and "C".

The Plaintiff's case was that since the year 2000, the Plaintiff took possession and control through one of his servants, Didas Wasswa who started grazing and farming on the suit land up to today. That on or around 25/ 07/ 2008 after the Defendant had started trespassing on the Plaintiff's land, and the Defendant alleged encroachment by the Plaintiff, a survey was subsequently ordered by the District staff surveyor which showed that the Plaintiff was the rightful owner of the suit land. But despite the continued reminders by the area Local Authorities to wit RDC, the LC1 Chairman, the Defendant stubbornly continued the trespass thus this suit.

The Defendant in his written statement of defence denies the claim and avers that he has never trespassed on the suit land and asserts that he lawfully purchased the disputed land as bibanja from the period 1990-1998 from their previous owners and developed them uninterrupted with valley dams, a host of pine, Cyprus and fig trees. The Defendant also raised a counter claim against the Plaintiff that the counter claimant purchased approximately 464 acres of untitled land from their previous lawful owners from 1990-1998 and prayed that Judgment be entered in the counter claimant favour.

At the scheduling conference, they agreed on some issues and these were:-

1. Whether or not the Defendant's bibanja are comprised in the suit land.
2. If so, whether Frank Kaka Bagyenda and or Faustino Mbundu Kananura were granted a lease of the said suit land.
3. If so, whether the grant followed the due process of granting a lease on public land or land belonging to the District Land Board.
4. If not, what is the effect of non observance of the process on the lease and the Defendant's bibanja.

On all issues, both M/S Mugenyi & Co.Advocates for the Plaintiff and M/S Barya, Byamugisha & Co. Advocates for the Defendant filed detailed submissions. I have had the opportunity of reading through the written

submissions on both sides and the cases quoted. And for purposes of this Judgment, I shall summarise or deal with the pertinent points raised by either side.

Issue No.1 Whether or not the Defendant's bibanja are comprised in the suit land?

Counsel for the Plaintiff in his submissions relied on the report by Meridian Surveyors dated July 2000 (agreed document No. 1 in the joint scheduling Memorandum). **It is stated that the area in dispute is 182 acres and that it is the land that the Defendant alleges that he bought from a one Christopher Kaatabalwa. The report also suggests that the Plaintiff owns 163 acres of land that is not in dispute.**

Counsel for the Plaintiff submitted that it is premature to determine whether the stated acres are the Defendants bibanja comprised in the suit land as it needs to be ascertained whether indeed the Defendant has a Kibanja interest.

The Defendant pleaded in paragraph 5 of his written statement of defence that in totality he lawfully purchased approximately 464 acres of bibanja from their previous lawful owners. The Defendant annexed agreements (annexture A1-A4) and claimed that only 182 acres out of the Defendants 464 acres of his bibanja at Kyantamba is part of the suit land which is the subject of the dispute in this suit.

I have reviewed the submission of both Counsel on this issue and looked at the report by Meridian Surveyors dated July 2000. On page 5 of the Report it is stated that Kananura the Plaintiff owns the area A1 (163 acres) that is not disputed by anybody, Ruchogoza owns the area A3 (282 acres) that is not disputed by anybody. **The area in contention is A2 (182 acres) that is being claimed by both the Plaintiff and the Defendant and currently**

that disputed land is being used by both the Plaintiff and the Defendant.

The facts relating to this issue are very clear. A review of the report clearly shows that there was 182 acres that were in dispute. However, my finding is that 182 acres also belong to the Plaintiff having acquired a land title in respect to that.

Issue No.2: If so, whether Frank Kaka Bagyenda and or Faustino Mbundu Kananura were granted a Lease of the suit land.

Issue No. 3: If so, whether the grant followed the due process of granting a lease on public land or land belonging to the District Land Board.

In determining these issues, Counsel for the Plaintiff submitted that it is pertinent to determine first whether the Defendant owns any Kibanja on the disputed land and whether the Plaintiff fraudulently included the Dfendant's customary holding under his certificate of title.

Section 59 of the Registration of Titles Act provides that a certificate of Title shall be conclusive evidence of title and cannot be impeached on account of any informality or irregularity in the Application or in the proceedings previous to the registration of the certificate. Therefore, it is not in doubt that the Plaintiff possesses a valid certificate of title.

Counsel referred me to Sections 64 and 176 of the Registration of Titles Act which permit the cancellation of a certificate of title obtained by fraud and other grounds but not procedural irregularities leading to the issue of the certificate of title. Therefore, from the above provisions it can be ascertained that a certificate of title cannot be cancelled on mere grounds or procedural irregularities or processes leading to its issue unless on account of exceptions provided for under provisions of Section 176 and 64 of the Registration of Titles Act.

Counsel for the Plaintiff further submitted that in the Defendant's pleadings he mainly relied on fraud under paragraph 9 of his written statement of defence.

Section 176 of the Registration of Titles Act provides that:-

" No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under the provisions of this Act, except in any of the following cases:

(c) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bonafide for value from or through a person so registered through fraud.

In the case of **Kampala Bottlers Limited VS Damanico Limited Supreme Court Civil Appeal No.22 of 1992 Wambuzi C.J** as he then was held that, it is a well established law that fraud means actual fraud or some act of dishonesty.

A party relying on fraud must plead it and particularize it in the party's pleading. An allegation of fraud must be strictly proved on the part of the registered proprietor. The standard of proof does not go to the level of proof beyond reasonable doubt as is required ordinarily in criminal cases. They referred this Court to the case of **Kazoora VS Rukuba SCCA NO. 13 of 1992.**

The particulars of fraud are particularized in paragraph 9 of the amended written statement of defence and include that the land was already uninterrupted occupied by the Defendant and accordingly was not available for lease , that the area local officials who knew or recognized the Defendants above occupation and developments were not consulted , there was no inspection of the land carried to establish existing interests thereon

and claims thereon and the correct procedures were not followed among others.

The Defendant in his submissions dwells on a lot of technicalities and procedural flaws without properly bringing out dishonest dealings amounting to fraud attributed to the Plaintiff. In the particulars of fraud under paragraph 9 of the amended written statement of defence, the Defendant alleges that the proper law and procedures were not followed. However, under Section 59 of the Registration of Titles Act, procedural irregularities leading to issues of the certificate of title are not grounds of impeaching a certificate of title unless they are so grave and were committed with the connivance or knowledge of the Plaintiff.

He cited a number of irregularities which among others include;

a) He contends that there is no lease offer since the lease number is blank.

b) That the lease offer is said to be for an initial period of 5years from an unclear date and to be extended for 49 years on completion of the building covenant yet per clause 2 (e) the user of the offer is restricted to agricultural purposes.

c) The Defendant contends that in the submissions there was no lease ever executed between Frank Kaka Bagyenda and the ULC as the lease agreement was never executed and relies on the case of **Livingstone Sewanyana VS Martin Aliker (1992) V KALR 118.**

d) Further that, there is no indication that Franka Kaka Bagyenda accepted in writing the terms of the offer.

In reply to the above, Counsel for the Plaintiff submitted that (a) and (b) are mere irregularities and cannot be said to amount to fraud. And on (c) that it does not mean that although Major Frank Kaka Bagyenda (who made the Application for the lease) did not adduce the said lease

agreement and the evidence of acceptance of the terms that he did not comply with the said procedures.

It also suffices to note that Major Frank Kaka Bagyenda is a lay person who is not well versed with the technicalities or procedures pertaining the Application for lease and in his testimony/ witness statement he did not see the need to enumerate every single detail regarding his Application for the lease.

From paragraph 6-9 of his witness statement he stated that he went to Mityana land office and applied for a lease by filing in Application forms, the District Land Board inspected the land accompanied by the local council officials and he subsequently got the lease offer around 1990.

The Defendant further avers that the Plaintiff did not adduce the original Certificate of Title in evidence. It ought to be noted that the existence of the Certificate of Title was never in doubt, it is an agreed document in the scheduling memorandum and the Defendant never objected to the existence of the said Certificate of Title.

The Defendant also suggests that there was no survey ever carried out or that if it was done it was theoretically done.

Counsel for the Plaintiff in response however submitted that, there is sufficient evidence of a survey carried out. Under paragraph 19 of Frank Kaka Bagyenda's witness statement, he states that in an attempt to avert allegations that a desk survey was carried out, his lawyer made an Application to the Commissioner, Department of Lands and surveys requesting for a search on file 1.S.V 0724 Plot 11Block 540 land at Singo.

The Report attached to the witness statement of Frank Kaka Bagyenda reveals that the Survey was done by a surveyor known as Mr. Kayongo his report that is contained in a job record jacket forwarded to the District staff surveyor of Mityana / Mubende. The document attached show a

traverse computation of all coordinates picked and physically marked during the survey exercise in the field. It is the basis of the job record jacket that the deed plan showing the land that is comprised in the Certificate of Title that was produced. Therefore, the allegation of Mr. Caleb Mwesigwa that the survey done was a desk survey are false and intended to mislead this Honourable Court.

Further the evidence of Mr. Careb Mwesigwa was more narrative and academic that factual. Nowhere in his evidence did he relate the procedural guidelines with the case before Court. The burden was on him to prove to Court that in accordance with the evidence found in the documentation or file pertaining to the suit land that the procedure to obtain the Certificate of Title was not followed. This is the least to state that procedural irregularities cannot impeach a Title as exemplified above.

He did not go to the full extent to show that he inspected the file pertaining the survey and the Application which file would be located at the Survey Department and Mityana Registry Office and found all the required documents were missing or that important steps were omitted.

From the above submissions, it is clear that the Plaintiff followed proper procedure in acquiring the Certificate of Title. I have viewed the submissions of both Counsel and looked at the evidence adduced, it is quite clear that Franka Kaka Bagyenda was granted lease on land belonging to District Land Board as stated in paragraph 6, 7, & 8 of Frank Kaka Bagyenda's witness statement.

Issue No. 4 whether the Defendant possesses a Kibanja interest in the suit land.

Counsel for the Defendant submitted that the Defendant is kibanja holder having bought the same from **a one Christopher Katabalwa and**

Urochi Amula. In his witness statement he contends that he was a neighbor of the said Christopher Katabalwa who was born on the Kibanja. **This Court cannot believe so in view of the Plaintiff's long history of uninterrupted occupation of the suit premises dating as far as back as the 1980's through his predecessors that occupied and owned the suit land.**

In the testimony of D1, the Defendant was unable despite his rich experience in purchasing land to sufficiently prove that the said Christopher Katabalwa was the rightful heir to sell the land that belonged to the said Masumbuku and whether he had the right to sell it customary.

Counsel for the Plaintiff further submitted that it was strange that no acreage of the land stated in the agreement that the Defendant alleged to have bought the Kibanja , no map showing the boundaries or extent of the size of the Kibanja was attached. As such, the Plaintiff therefore contends that the Defendant claim to the suit land is intended to deny and frustrate his right and interest therein. It was further submitted that Franka Kaka Bagyenda under paragraph 3 of his witness statement states that he was the registered proprietor before he sold the same land to the Plaintiff. He further testified under paragraph 4 that he got to know of the land when it was idle land through his personal friend Sheikh Musa Lwanga and thereafter proceeded to apply for the said land.

Sheik Musa Lwanga testified that he bought the said plot of land from the late Ssetumba way back in 1987 and started working or cultivating on the Kibanja in 1989. That he used to cultivate on the said land and also built valley dams for his animals.

It suffices to note that Franka Kaka Bagyenda arrived in the area far back before the Defendant acquired that land and was able to obtain a lease offer. All evidence which points to the fact of his

interest on the land was before that of the Defendant and as such his interest is superior to that of the Defendant.

On the other hand Paskali Bagirikisa testified that the Kibanja which he claims he bought from Katabalwa is only estimated to be around 5acres. This therefore, creates doubt as to the claims of the Defendant. Further the said agreements of sale of the Defendant do not state the acreage of the land he was buying. Therefore, the Defendants claims are not supported by evidence.

Section 29(2) of the Land Act defines a bonafide occupant on the land as:-

"**A person who before the coming into force of the Constitution had occupied and utilized or developed any land un challenged by the registered owner or agent for twelve years or more.**"

Under Section 29(2) of Land Act, the use of the word "bonafide" is intended to restrict this provision to occupants of land that have extensively utilized such land, lived on it for the prescribed period of time, all with the knowledge of the registered proprietor of such land, and have done this in the honest and genuine belief that they do not have a semblance of ownership over the land.

The question of who constitutes a bonafide occupant on land was extensively addressed in the case of **Kampala District Land Board and Another VS National Housing and Construction Corporation Civil Appeal No. 2 of 2004(UGSC).** In this case the Respondent had utilized the suit land unchallenged since 1970. The Court of Appeal held that it was indeed a bonafide occupant having utilized the suit land unchallenged for 25 years. The Supreme Court upheld the position of the Court of Appeal.

The Defendant in the present case failed to show that he occupied the land uninterrupted. On the contrary, **it is the Plaintiff who has shown that previous owners whom** he succeeded occupied the land way back since 1980's and whose ownership was not challenged or interrupted.

I now revert to the issue of whether indeed the Defendant does have a Kibanja interest in the suit land as he claims.

A kibanja interest in land is not formally acknowledged as such either in the Constitution or the Land Act, but has been treated by the Courts as customary tenure which is acknowledged by both legal sources.

The question of how to determine customary tenure is extensively dealt with in the case of **Jacob Mutabazi VS Seventh Adventist Church in the High Court of Uganda at Kampala Civil Suit No. 54 of 2009,** where reference was made to the case of **Kampala District Land Board & Anor VS Venansio Babweyaka & Athers Supreme Court Civil Appeal No 2 of 2007 Odoki C.J as he then was held,**

"The Land Reform Decree 1975 declared all land in Uganda to be public land, to be administered by the Uganda Land Commission in accordance with the Public Lands Act in conformity with the Decree...Under the Land ReformRegulations1976, any person wishing to occupy public land by Customary tenure had to apply to the sub- county chief in charge of the area where the land was situated. After processing the Application, it had to be sent to the sub-county land committee for approval.

In the present case, there is no evidence led to show that the Defendant or his predecessors complied with requirement and as such it is doubtful whether the Defendant acquired a Kibanja interest.

The restrictions on acquisition of customary tenure under the Public Lands Act seem to have continued as the law (Public Land Act) continued to govern all types of Public Land subject to the provisions of the Land Reform Decree. In order to acquire fresh customary tenure, one has to apply to the prescribed authorities and receive approval of his/ her Application. I therefore agree with the submissions of Counsel for the Plaintiff that there was no evidence that such prescribed authorities existed nor that the Defendant or his predecessor acquired fresh customary tenure in accordance with the Land Reform Decree.

In the case of **Kampala District Land Board & Anor VS Venansio Babweyaka & Others (supra)**, the learned Chief Justice further held that occupation under customary tenure must be proved by the party intending to rely on it. He cited with approval the decision of **Duffus JA in the case of Ernest Kinyajui Kimani VS Muira Gikanga (1965) EA 735 at 789,** who held that:-

"**As a matter of necessity, the customary law must be accurately and definitely established... the onus to do so is on the party who puts forward the customary law... this would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.**"

The Defendant did not lead evidence to prove that they owned a Kibanja or customary holding. Furthermore, the Defendant did not lead any evidence to show that they used or utilized the suit land in accordance to any custom and as such owned a customary holding.

Issue No .5 Remedies

Counsel for the Plaintiff prayed for a declaration that the Defendant is a trespasser and therefore, should be evicted forthwith.

Counsel for the Plaintiff further prayed for a permanent injunction restraining the Defendant from further encroachment on the suit land. From the evidence above, it has been proved that the Plaintiff is the registered proprietor having acquired the same lawfully as such the Defendant ought to be evicted from the suit premises. The Defendant is also restrained from further encroachment on the suit land.

General Damages.

Counsel for the Plaintiff prayed for general damages of 100,000,000= as the Defendant deprived the Plaintiff of use of suit premises. Counsel further submitted that the Defendant constantly harassed and intimidated the Plaintiff's workers.

I have considered Counsel's submission and claim. It is trite law that general damages are a pecuniary compensation given on proof of a wrong or breach. In the **case of Dr. Denis Lwamafa VS Attorney General HCCS NO. 79 of 1983,** Court held that the Plaintiff who suffered damage due to wrongful act of the Defendant must be put in the position he would have been had he not suffered the wrong.

Considering the circumstances of the case, I find the amount of UGX. 100,000,000= prayed for by the Plaintiff is on a higher side. To my mind an award of UGX 30,000,000=would be adequately compensate the Plaintiff for the inconveniences and hardship he was subjected to by the Defendant's harassment and intimidation of the Plaintiff's workers.

On costs, the general principle is that it should follow the event unless otherwise directed by the Court. According to Section 27 of the Civil Procedure Act (Cap) 71. Since the Plaintiff is the successful party in this suit, costs are awarded to him.

In the result, Judgment is entered for the Plaintiff in the following terms:-

a) Declaration that the Defendant is a trespasser and therefore should be evicted.
b) A permanent injunction restraining the Defendant from further encroachment on the suit land.
c) General damages of UGX 30,000,000= is awarded to the Plaintiff.
d) Costs are awarded to the Plaintiff.
e) The Counter Claim is dismissed with no Order as to costs.

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WILSON MASALU MUSENE

JUDGE

7/02/2014