

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL APPEAL NO. 071 OF 2014**

5 (Arising from Mukono Chief Magistrate’s Court Civil Suit No. 071 of 1994)

1. **HOSEA SONKO**
2. **EKIRIYA KIWENDO**
3. **KASUJJA SAMUEL**
- 10 4. **KABOYI**
5. **NAMPUUMA FRED**
6. **GOMBE CHRISTOPHER**
7. **MOSES MUKIIBI**
8. **HAJI KAYONGO**
- 15 9. **GODFREY MUKASA**
10. **MARY KIGOZI**
11. **MUSOKE S/O NTABAZI**
12. **AHAMED KABUYE:: APPELLANTS**

20 **VERSUS**

**D. K. BANOBA :: RESPONDENT**

**BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

25

**JUDGMENT**

30 This suit in the Chief Magistrate’s Court which has resulted in  
the proceedings before this Court was a claim founded on  
trespass. The Respondent who was the Plaintiff sued 23  
Defendants, some of whom are now Appellants seeking

Eviction Orders, General damages for trespass and a permanent Injunction restraining the said Defendants from trespassing on to or interfering with the suit land to which the said Plaintiff held a Certificate of Title.

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The trial Court decided against some of the Defendants who are now Appellants before this Court.

10 Judgment in the Chief Magistrate's Court was delivered on the 6/12/2012.

Between the 10/12/2012 and 18/12/2012 the Appellants filed Notices of Appeal in this Court and the said Notices were registered as Appeals and given Appeal numbers.

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Gombe Christopher filed Civil Appeal No. 152/2012, Nanpuuma Fred Civil Appeal 153/2012, Hosea Sonko Civil Appeal No.154/2012, Mary Kigozi Civil Appeal No. 155/2012, Haji Kayongo Civil Appeal No. 156/2012, Godfrey Mukasa Civil  
20 Appeal No. 160/2012, Musoke Civil Appeal No. 161/2012, Kaboyi Civil Appeal No. 162/2012, Moses Mukiibi Civil Appeal No. 166/2012, Kasajja Samuel Civil Appeal No. 167/2012, Ahamed Kabuye Civil Appeal No. 169/2012 and Ekiriya Kiwendo Civil Appeal No. 168/2012.

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Obviously, without exception, all the above 'Appeals' were in contravention of the provisions of Order 43 (1) which provides:

“Every Appeal to the High Court shall be preferred in the form of a **Memorandum signed by the Appellant or his or her Advocate...**”

5 Apparently the Registrar either oblivious to the provisions above or intentionally went ahead and without exception ordered the lower Court to forward the original records for purposes of the Appeals. Six months later on 12/6/2013, Ahmed Kabuye through his Counsel M/S J.P. Kamyā & Co.  
10 Advocates filed his Memorandum of Appeal. The rest of the Appellants save for Mary Kigozi (Civil Appeal No. 155/2012), Haji Kayongo (Civil Appeal No. 156/2012) and Moses Mukiibi (Civil Appeal No. 166/2012 filed their Memorandums of Appeal in September 2013.

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All these were without leave of Court to file outside the time limit prescribed under Section 79 of the Civil Procedure Act.

20 Appeal No. 166/2012 was struck out on 12/12/2013 for lack of a Memorandum of Appeal during a regular weeding out exercise of redundant/incompetent matters.

The Appellants were provided with copies of the original proceedings and Judgment in early 2014.

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In the meantime, in May 2013, the Respondent Israel D.K. Banoba through his Counsel filed Miscellaneous Applications 104/2013 - 115/2013 challenging the Appeals referred to, seeking orders to have the Notices of Appeal struck out for  
5 being incompetent.

The Respondents/Appellants did not file Replies to the Applications, but turned up on 17/4/2014 when the Applications came up for hearing.

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Mr. Seryazi appeared for Ahmed Kabuye (Appellant in Civil Appeal No. 169/2012). Other Appellants on that day were Hosea Sonko, Gombe Christopher, Harriet Namirembe (representing Godfrey Mukasa), Ahmed Kabuye, and Mary  
15 Kigozi.

On Application by Ms. Namutebi Alzik, Counsel for Respondent in all the Appeals and consent by Counsel Seryazi who spoke on behalf of the Appellants/Respondents in the Applications,  
20 Court ordered that instead, all the Appeals be consolidated and all issues in both the Appeals and Applications be addressed and determined once for all.

I must comment that during the pendency of these  
25 proceedings, some of the Appellants were engaged in extra-judicial communications with whoever they could address,

seeking administrative remedies and making all sorts of allegations against Court officials instead of pursuing their Appeals to which this Court takes exception.

5 The above notwithstanding, Counsel for the Appellants Mr. Fitz Patrick Furah undertook to file a Memorandum of Appeal, that consolidated all the Appeals. This was to be done by 17/7/2014 and written submissions were to be filed by both parties thereafter within two weeks thereof.

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The said Appeal was filed on 25/7/2014 as Civil Appeal No. 071/2014. (The issue of late filing does not arise as these were the issues agreed/consented upon to enable consolidation of all Appeals into one).

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I accordingly find that the only matter for consideration is Civil Appeal No. 71/2014, the prior Appeals and Miscellaneous Applications having been abandoned by Counsel for both parties.

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Unfortunately, Mr. Furah (Counsel for the Appellants) did not file written submissions despite asking for extension of time to do so which was granted, right up to the last time the matter came up before this Court and despite reminders by Court and

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Counsel for the Respondent.

Only counsel Seryazi filed submissions in respect of his client Ahamed Kabuye.

I have had to lay out the background of this matter in detail for  
5 it to be understood in its proper context.

The Memorandum of Appeal lays out 4 grounds, namely:

1. The learned trial Chief Magistrate erred in Law and in fact  
when she held that the Appellants/Defendants were  
10 trespassers on the Respondent's land.

2. The learned trial Chief Magistrate erred in law and in fact  
when she failed to hold that the Appellants/Defendants  
were lawful sitting tenants/bibanja holders on the  
15 Respondent's land.

3. The learned trial Magistrate erred in law and in fact when  
she failed to evaluate the Appellants' evidence on Court  
record who told Court that they were on the suit land  
20 before 1986 and had not entered the Respondent's land  
between 1986 and 1994 as alleged by the  
Respondent/Plaintiff.

4. The learned Chief Magistrate failed to overturn the  
25 evidence of the Respondent/Plaintiff who failed to adduce  
evidence in support of his pleadings to convince Court

that the Appellants actually/jointly and severally entered in the Respondent's land between 1986 and 1994.

Among others, the Appellants seek to have the Judgment of the lower Court set aside and they be declared Bibanja holders/owners on the Respondent's land.

Counsel Seryazi for Ahamed Kabuye filed written submissions in respect of his client and opted to submit on the ground that the trial Magistrate failed to properly evaluate the evidence on record and thereby arrived at an erroneous conclusion that Ahamed Kabuye and his deceased father trespassed on the Respondent's land.

The import of the submissions by the Appellant Ahamad Kabuye he was the son of the late Kamadi who had been in possession of the kibanja. That even his grandfather was buried on the land with a visible grave thereon.

That it cannot be true that they are trespassers on the land since they have been on the land since the 1950s.

This Appellant challenged the finding of the Magistrate that the Appellant should have provided evidence that they had been lawfully on the land since the 1950s long before the registration of the Respondent as the owner on the Title.

Further that the said Respondent even introduced himself to the Appellant's father as the new landlord in 1973.

5 He goes further to submit that the Magistrate did not consider that the Appellant's occupation and that of his predecessors was governed by Customary Law and the Law of Limitation and that there was no evidence that the Appellant and his predecessors had ever been declared trespassers under the  
10 Busuulu and Envujjo Law. He also challenges the Magistrate's claim that the grave of Damulira shown by him at the Locus visit was no more than a mound that could not be proved to be a grave.

15 It has been submitted for the Respondent in respect of Ahmed Kabuye that firstly the trial Magistrate properly evaluated the evidence and found the Appellant's claims of Kibanja holders was shaky and unreliable.

That it was upon the said Appellant to prove customary  
20 ownership. Reference was made to the case of **Ernest Kinyanyi Vrs. Muira Gikanga (1965) EA 735**, where it was held that the ones to prove customary ownership lies on the person who claims it.

25 It is also submitted that even if the Appellants' claim could stand, it is premised on the basis of the Land Reform Decree



1975 and the Land Act 1998, which were not in force at the time the Appellants' claim to have come on to the land and cannot therefore be applied retrospectively.

5 A look at the proceedings and Judgment of the trial Court reveals that indeed the Appellants' claim is premised on rights under the Land Act 1998 and the Land Reform Decree 1975 which were not in force at the time the Appellant claims to have come on to the land.

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If it is true that their occupation of the land dates back to the 1950s then the applicable Law was the **Busuulu and Envujjo Law 1928** and it was up to the Appellant to prove compliance with the said provisions of Law.

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**Section 8(1)** thereof grants a right of residence to a kibanja holder on mailo land which only extends to the wife and child of the kibanja holder, and the successor to the kibanja holder in accordance with native customs of the kibanja holder.

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Under **Section 8(1) (a) and (b)** of the said Law, any other person who wished to reside upon a kibanja recognised by the mailo owner had to first obtain consent of the mailo owner.

Under **Section 8(2)** thereof, a kibanja holder had no right to transfer or sublet the kibanja to any other person without the consent of the mailo owner.

- 5 Section 59 of the RTA clearly confirms ownership by the holder of the Title as conclusive proof.

It is upon the person claiming rights under any law to prove those rights of claim. It was cogent upon the Appellant to  
10 prove those rights of claim.

I find that the Magistrate properly evaluated the evidence on record and rightly declared the Appellant and his father trespassers on the suit land.

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As stated earlier, Counsel Furah did not file submissions in respect of the rest of the Appellants. The Court proceeded under the provisions of **Order 43 rule 20 CPR** and decided to go ahead and deal with the appeal on the basis of the  
20 Memorandum of Appeal and the submissions on record.

First it was reported earlier during the handling of the Application (Misc. Applicant No. 105/2013) on 17/4/2014 that Ekiriya Kiwendo had died and there was no evidence of a legal  
25 representative having been appointed. It would follow that in

the absence thereof, the Appeal in respect of the said **Ekiriya Kiwendo** abated as far as these proceedings are concerned.

Secondly, in the lower Court, the Plaintiff/Respondent withdrew  
5 claims against Musoke s/o Ntabazi. It follows that the said Ntabazi was not subject of the judgment of the lower Court and accordingly has no locus standi in these Appellate proceedings. His purported Appeal/participation in these proceedings is struck out with costs.

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This only leaves Hosea Ssonko, Kasujja Samuel, Kaboyi, Nampuuma Fred, Gombe Christopher, Moses Mukiibi, Haji Kayongo, Godfrey Mukasa and Mary Kigozi who were represented by Mr. Fitz Furah.

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Clearly, their appeals are based on the unsubstantiated grounds of Appeal.

Counsel for the Respondent filed submissions in respect of  
20 **Gombe Christopher, Nampuuma Fred, Hosea Ssonko, Kaboyi, Kasujja Samuel** and **Ahmed Kabuye** (whose submissions have been dealt with).

The general submission by Counsel in respect of the above  
25 Appellants is that the law applicable in these proceedings is the **Busuulu and Envujjo Law 1928 for some Appellants,**

**the Land Reform Decree 1975 for the others**, regarding the way the said Appellants acquired the suit land. The said provisions of law elaborately layout the rights/obligations enjoyed by customary and bibanja holders.

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In respect of Hosea Ssonko, Counsel submits that the trial Magistrate properly evaluated the evidence for and against the said Appellant as a whole. The said Appellant's claim was based on an Agreement that he bought the suit land in 1969.

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It is submitted that the Magistrate evaluated the evidence and her finding was that the said Hosea could not claim proprietary rights through the said Agreement.

15 That the applicable Law then would be the Busuulu and Envujjo Law and it was up to the said Appellant to prove that Section 8 (1) thereof had been complied with either by the person who sold to him or by himself.

20 A perusal of the record indicates that the matter revolves around the proprietary interests of the Title holder as against those of Bibanja/Customary holders on the suit property.

These are questions of law which clearly provides for those  
25 rights.

Given that the said Ssonko bought the land in 1969 as he claims, he was bound by the provisions of Law at the time.

The said Law did not provide for any transactions outside those  
5 provided under **Section 8 (1) (a) (i) of Busuulu and Envujjo Law**, or **Section 8 (2) of the said Law**.

It was up to him to show that those provisions were complied with and that he had the necessary rights either as a child of  
10 the kibanja holder, a customary successor, or that he had the consent of the mailo holder to reside on the suit land.

Absence of the above rendered the agreement he relied on illegal.

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It is settled law that Courts will not enforce an illegal contract or condone an illegality once brought to its attention.  
Reference:

1. **Active Automobile Spares Vrs. Crane Bank and Rajesh Pakesh.**
2. **Makula International Vrs. Cardinal Nsubuga (1982) HCB 1**

I accordingly find that the trial Magistrate's finding was proper  
25 in the circumstances. This Appellant's appeal cannot stand and is dismissed.

In respect of **Gombe Christopher**, his claims are based on an Agreement showing that he obtained the kibanja from his grandmother.

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The Magistrate in evaluating the evidence and the Law applicable found that the obtaining Law at the time did not protect him. **Section 8 (1) (a) and (b) of the Busuulu and Envujjo Law** had not been complied with.

10

I find no fault with that finding. His appeal is also dismissed accordingly.

In respect of Nampuuma Fred, his claims are based on the basis that the land was given to him in 1978 by his grandmother. The Magistrate found that if that were the case, then the provisions of the land Reform Decree 1975 were applicable.

20 Under Section 4 (1) of the said Decree, transfer of land was permitted but regulated.

The person transferring was required to give a 3 months' Notice to the prescribed authority which could accept or refuse the said transfer.

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This was not done, it was incumbent upon the Appellant to prove that the provisions of Law had been complied with.

5 In any case, if the transfer was allowed, it did not amount to transfer of the Title in the said land. The transaction in those terms would be void and of no effect.

I cannot fault the Magistrate for the findings above.

10 The claims of **Kaboyi** are also regulated by the provisions of the Law at the time i.e. **Busuulu and Envujjo Law of 1928**.

Suffice it to say there was no evidence that the said law had been complied with.

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**Kasujja Samuel** according to the record of proceedings was given the suit land by his father in law. This was during the application of the Land Reform Decree some time in 1978.

20 There was no evidence on record that Section 4 (1) of the said Land Reform Decree had been complied with. The Magistrate's findings were therefore based on law which she correctly held had not been complied with.

25 There were no submissions in respect of the rest of the Appellants.

What remains on record is the Memorandum of Appeal whose grounds are not substantiated.

5 What is clear in all the claims is that the Appellants seem to believe that their longevity of occupation of the suit land by whatever means gave them proprietary rights over the suit property.

10 This is as opposed to the Respondent's ownership based on his registration as Title holder.

**Section 59 of RTA** is very clear on the above.

15 The said Title can only be impeached within the provisions of the RTA. Those conditions are non-existent in the instant case.

Acquisition of land from a registered owner on grounds of kibanja/customary interests are clearly laid out by Law. The  
20 Appellants should have done the same instead of creating unproved interests which in any case give them no proprietary rights over the suit land.

This appeal accordingly fails and is dismissed. The Judgment  
25 and Orders of the trial Magistrate are upheld.



The Appellants will meet the costs of this appeal.

5 **Godfrey Namundi**  
**Judge**  
**06/02/2015**

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06/02/2015:

Ahmed Kabuye present

Other Appellants absent.

Ms. Namutebi Alzik for Respondent

5 Respondent present

Court:

There is an Affidavit of service on record that shows Counsel  
for the Appellants was served. Mr. Furah has not turned up  
10 and no reason is given. He also failed to file submissions as  
directed earlier on by Court.

Judgment is accordingly delivered in open Court.

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**Godfrey Namundi**

**Judge**

**06/02/2015**

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