

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CS – 0011 OF 2013

5 **KATO STEPHEN.....PLAINTIFF**

VERSUS

1. **KIRUNGI CHARLES**
2. **BUSINGE ROBERT**
3. **KAKYO** }**DEFENDANTS**

10 **BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE**

Judgment

The Plaintiff brings this action in his capacity as the biological son and customary heir/beneficiary of the estate of the late Petero Byakunaga against the Defendants seeking among others a declaration that the Plaintiff is the rightful and lawful beneficiary of the suit
15 land situate at Kasusu, Fort Portal Municipality, Kabarole District.

He avers that the late Petero Byakunaga was the owner of the suit Kibanja and that he constructed two houses on the suit Kibanja. One of the houses constructed thereon was for his late mother and that when his mother passed away, a one Anamalia Ngonzibwoha a sister to the late Petero Byakunaga and mother to Mugisa Robert occupied the house he had built for
20 her mother.

It was further stated that when she too died, the Defendants came to stay in that house. And that the Defendants who have since begun constructing permanent houses on the said kibanja as well as purporting to sell portions belonging to the Plaintiff without his consent as a beneficiary of that kibanja that belonged to his late father. That the Defendants have neither
25 legitimate right/claim of right or scintilla of evidence to back their interest, have now embarked on construction of several houses on the said kibanja in total disregard of the local

and clan leaders, thereby violating the Plaintiffs right to enjoy ownership of the kibanja as a beneficiary and heir to the late Petero Byakunaga the previous owner of the kibanja in issue.

The Defendants' case on the other hand was that the suit land was part of the bigger Kibanja which was owned by the late Petero Ngonzibwoha who was the Plaintiff's grandfather and
5 the Defendant's great grandfather. That the said Ngonzibwoha had children to wit:

1. Anasete Ntegiara;
2. Tereza Kayezu (3rd Defendant's grandmother);
3. Anamaria Ngonzibwoha (1st and 2nd Defendant's grandmother);
4. Flora Bogeza;
- 10 5. Kabonesa Fedesta;
6. Petero Byakunaga (Plaintiff's father); and
7. Yowana Mbabazi.

That the late Petero Ngonzibwoha gave his son the later Petero Byakunaga part of the Kibanja (some of which he sold as seen at the locus). And the rest was left in the care and use
15 of Anamaria Ngonzibwoha and Tereza Kayezu who stayed on the suit land and even built thereon when the original house was destroyed by an earthquake.

That the 1st and 2nd Defendant's father by the names of Mugisa Robert (Anamaria Ngonzibwoha's son) was born and lived on that land together with the Defendants who were born at a later time. That the Defendants tried to build on the said land being beneficiaries of
20 Ngonzibwoha's children but were stopped by the Plaintiff who claimed that they were not of his clan hence he sued them in this Court.

During scheduling it was an agreed fact among others that the kibanja in issue belonged to Petero Ngonzibwoha who divided it into two and gave part of it to Petero Byakunaga and other part to his daughters.

25 Also, the issues for Courts' determination were:

1. Whether the Defendants encroached on the portion that belonged to the Plaintiff as a beneficiary?
2. What remedies are available?

The law as stated under Section 101, 102 and 103 of the Evidence Act, Cap. 6 provides that
30 the burden of proof lies on the person who alleges and wants Court to believe them and grant

judgment in their favour. In civil cases like the present one, the standard of proof is on the balance of probabilities.

Issue 1: Whether the Defendants encroached on the portion that belonged to the Plaintiff as a beneficiary?

Counsel for the Plaintiff submitted that as agreed during the scheduling conference, the kibanja in issue belonged to Petero Ngonzibwoha who divided it into two, giving one part to his son Petero Byakunaga the father of the Plaintiff. He added that he also gave the lower side of the kibanja to his daughters, Anamaliya Tinkamalirwe and Kayezu.

10 Counsel for the Plaintiff further submitted that during the locus in quo, on 23/11/2018, the Plaintiff showed Court the road constructed passing through the suit kibanja dividing it into the Northern and Southern portions. He added that the Plaintiff does not claim the lower portion below the road that cuts the kibanja into two, but claims the upper side of the road that cuts across the kibanja.

15 Counsel for the Plaintiff further stated that while at the locus, the Defendants could not show Court any existing boundaries as to their claim leaving the road which was identified as Kaliba Road as the only boundary which cuts the Kibanja into two halves.

Reference was also made to the Plaintiff's witnesses, PW2 Byaruhanga Leo Kanyewera aged 78 years, PW3 Protazio Masiko aged 85 years and Zidoro Myaka aged 92 years of age.

20 Counsel added that the above named elderly relatives of the Late Petero Byakunaga who lived and saw the Kibanja transit from Petero Ngonzibwoha to Petero Byakunaga. He went on to submit that they witnessed the transition to the Plaintiff who was the rightful beneficiary of all that piece of land on the upper side of the road. Counsel concluded that the Defendants encroached recently and should be evicted and restricted to the lower portion.

25 Counsel for the Defendants on the other hand submitted that as observed at locus in quo, the portion of land given to the to the Late Petero Byakunaga was not in contention, but that it was the part where the Defendants' grandmothers stayed and were housed up to the valley that was in contention.

He disputed the evidence of PW1, Kato Stephen who was not born alone and that his testimony that the land in dispute stretched from Kasese road up to the valley called **Isekawungu**.

5 Counsel added that the road which passes in the middle of the kibanja referred to as the boundary by PW1 had not been constructed at the time. (Kaliba Road).

Counsel for the Defendants further submitted that since the Defendants' grandmothers occupied the house on the suit land without any objection from neither the Plaintiff nor his father, then that portion of the suit property was for the Defendants' grandmother and their parents who were born and lived on the same.

10 It was also maintained that the Defendants and their predecessors have been in occupation of the suit land for more than 12 years and so the claim by the Plaintiff is time barred under Sections 5 and 6 of the Limitation Act.

Counsel for the Defendants also added that Anamaria Ngonzibwoha has also built her house on the disputed land and was buried there with her sister Kayezu. It was also the Defendants' case that the Defendants' grandmother started occupying the suit land before the Plaintiff was born. Counsel for the Defendants concluded that the late Anamaria Ngonzibwoha lawfully and legally acquired her interest in the suit land like the Plaintiff's father (Petero Byakunaga) did, and Anamaria properly left her interest to the Defendants and her other children.

This Court has considered the submissions on both sides and the evidence on record. It is the finding and holding of this Court that the Kibanja in dispute originally belonged to Petero Ngonzibwoha, the grandfather of the Plaintiff and great grandfather of the Defendants. This was agreed at the Scheduling. It was also borne out of the evidence of PW1, Kato Stephen. It is clear from that testimony of PW1 that the Plaintiff's father, Petero Byakunaga was a brother to Anamaria Ngonzibwoha and that Ngonzibwoha gave part of the land to the Plaintiff's father and part to Anamaria Ngonzibwoha. Anamaria Ngonzibwoha produced Mugisa Robert who grew up on the disputed land with his children, Kirungi Charles and Robert Busingye (1st and 2nd Defendants). It is also clear therefore that whereas the Plaintiff got a portion of the kibanja through his father Petero Byakunaga, the Defendants derive their interest from Anamaria Ngonzibwoha, their grandmother and Aunt to the Plaintiff. Whereas the Plaintiff (PW1) testified on page 5 of the proceedings that Anamaria got her share of the kibanja and sold it to one Kachope, who also sold to Grace Baguma and Kiiza, on page 6 of

the proceedings under cross-examination, Kato Stephen confirms that Anamaria not only built her house on the suit land, but was also buried there. Kato Stephen also stated that the old house of Petero Byakunaga was destroyed but re-built by Anamaria and her children. He added that Kirungi Charles, 1st Defendant came to the land in question when he was 15 years
5 and has been living in Anamaria's house since then up to now. PW1 added that Businge Robert also came in a similar manner and has built a house on the suit land.

The question in the mind of this Court is if according to PW1, Kato Stephen, Anamaria got her share and sold, why did she re-build the destroyed house and started living on the suit land with her children Mugisa Robert and grandchildren, Kirungi Charles and Businge
10 Robert?

Second question is why was Anamaria buried on the suit kibanja and yet she had sold her share. The third question is why did Kato Stephen allow Kirungi Charles to stay on the suit land in Anamaria's rebuilt house since the age of 15 years till 2013 when he filed this suit against him? That was after 18 years. Why did he take so long to institute a suit against
15 Kirungi Charles and his brother, which suit is now time barred?

The other question is why did Stephen Kato not sue Mugisa Robert, the father of Kirungi and Businge and yet Mugisa Robert also lived and grew up on the suit land.

The above questions therefore raise doubts in the Plaintiff's case which has not been proved on the balance of probabilities.

20 Furthermore, whereas Counsel for the Plaintiff submitted that the Defendants recently encroached on the Plaintiff's land, evidence on record is that the Defendants' grew up on the suit land or have been there for over 15 years undisputed. This is borne out of the evidence of PW1, Kato Stephen himself, on pages 5 and 6 of the proceedings.

PW2, Byaruhanga Leo Kanyemera did not help the Plaintiff's case at all as he testified on
25 page 8 of the proceedings that he cannot tell the date when the Defendants settled on the suit land. And whereas Counsel for the Plaintiff had submitted that the Plaintiff is the Rightful owner and beneficiary of all that piece of kibanja on the upper side of the road that cuts across the kibanja, PW2 on the same page 8 of the proceedings testified that there was no road across as the existing road was recently constructed by the Fort Portal Municipal
30 Council. Even PW3, Protazio Masiko on page 12 of the proceedings confirmed that the suit

land was one kibanja from the road up to the swamp. And then that the road through the land was built by the Municipality recently.

In the circumstances, this court is inclined to believe the testimony of Businge Robert who testified as DW1. He states that he grew up on the suit land under the care of his grandmother (Anamaria) who died and was buried on the very land. PW1 concluded that the Plaintiff sued them after the death of their grandmother.

DW2, Kirungi Charles also confirmed that himself and Businge Robert are in occupation of the suit land, having been given by their grandmother, Annamaria. And that her grandmother got the same from Petero Ngonzibwoha her father. DW2 concluded that he has a plantation and two houses on the suit land built 15 years back.

Similar consistent testimony was given by DW3, Mugisa Robert, father of the Defendants. On page 24 of the proceedings, he states that;

“The Plaintiff’s father was a brother to my mother Annamaria Ngonzibwoha. My grandfather divided the land into two i.e gave to the Plaintiff’s father and my mother and other remained on the suit land.”

He concluded that his mother was buried on the suit land.

DW5, Oliver Kandole Bamura, aged 57 years, not only corroborated the Defendants’ case, that the land in question was divided by Petero Ngonzibwoha to Annamaria Ngonzibwoha and Petero Byakunaga, the father of Plaintiff. She added that currently, the land given to Petero Byakunaga is being occupied by Kiiza Angelika the sister of the Plaintiff. And this court saw all those respective pieces of land during the locus visit.

Lastly, was DW6, Ruhweza Mathew, aged 55 years and a cousin to the Plaintiff, Stephen Kato, and a son of Annamaria Ngonzibwoha. DW6 went through the history of the suit land and like DW5, reiterated that the Plaintiff’s father was as well given a portion of land which Kato’s sister, Kiiza Angelika is occupying. He also added that a boundary of a foot path separates land given to the Plaintiff’s father and that given to Annamaria Ngonzibwoha, through whom the Defendants claim as their grandmother.

During the locus in quo, this Court was showed the foot path from Kasese Road downwards, towards the valley. I was able to see the graves of the various departed people. Generally, and all in all, I shall resolve the dispute not on the basis of clans, but on the factual situation on

the ground and on the basis of developments and evidence as to how the parties acquired the same. I am more inclined to believe the consistent testimony of the Defendants and their witnesses as to how they acquired the suit land through Annamaria Ngonzibwoha, a sister to the father of the Plaintiff.

5 As already noted, and from the Plaintiff’s testimony, the 1st Defendant came on the land in dispute when he was 15 years old. He was 34 years when he testified in court. That is a clear indication that the 1st Defendant has been on the land for more than 12 years and so the Plaintiff is barred by the limitation Act. for avoidance of doubt, **Section 5 of the Limitations Act, Cap. 80**, provides:

10 *“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.”*

The Limitation Act also protects the other Defendants who acquired their interest from Annamaria Ngonzibwoha. Annamaria not only built her house on the suit land and lived
15 thereon, but was buried there with her sister. The fact that Annmaria and her sister Kayezu were buried on the suit land is clear testimony that they were entitled to a part of the part of their father’s estate as children of the later Petero Ngonzibwoha. The descendants of Annamaria cannot there be denied that inheritance.

In conclusion therefore, and in view of what I have outlined, I find and hold that the
20 Defendants are lawfully on the suit land and have not encroached on the Plaintiff’ land. The Plaintiff’s suit is accordingly hereby dismissed with costs.

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WILSON MASALU MUSENE

25 **JUDGE**

13/3/2019