

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEAL NO. 84 OF 2016
(ARISING OUT OF CIVIL SUIT NO.121 OF 2015)

JOSEPH SENABULYA ::: APPELLANT

VERSUS

1. MARIA NAKINTU
2. NAMPEERA MARIANE ::: RESPONDENTS

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

Background of the Appeal:

The Respondents/Plaintiffs instituted Civil Suit No 121 of 2015 against the Appellant/Defendant seeking a declaration that they are lawful owners of the land situate at Kyasonko, Kiseka in Lwengo measuring approximately four acres (the suit *kibanja*), an eviction order, permanent injunction, general damages and costs of the suit. The Plaintiffs' claim was that their late father Byansi Benedicto owned the suit *kibanja* and following his death, their mother remained in occupation until her death in 2003 whereon the suit *kibanja* passed on to the Plaintiffs. The Plaintiffs started tilling the suit *kibanja* without any interference until 2012 when the Defendant without their consent, descended onto the *kibanja*, grabbed the house thereon and denied the Plaintiffs access to the *kibanja* and the house. The Defendant has started erecting structures on the suit *kibanja* without the Plaintiffs' consent yet the same is also used as burial grounds.

In his Written Statement of Defense, the Defendant/Appellant denied the Plaintiffs' claim and averred that he inherited the suit *kibanja* from his father Lubowa Matiya who had inherited the same from his father Benedict Byansi. The suit *kibanja* was bequeathed to him under his late father's Will dated 25/8/2001 despite the fact that his grandmother Baseka was living in the house on the suit *kibanja*.

In their joint scheduling memorandum, the Parties agreed to the following issues for the court's determination;

1. Whether the late Byansi died testate/left behind a valid Will.
2. Whether the suit kibanja was bequeathed to the late Lubowa Matiya father of the Defendant.
3. If so, whether the Defendant rightfully inherited the kibanja from his late father Lubowa Matiya.
4. Whether the Defendant's occupation of the suit house and *kibanja* is lawful
5. Remedies available to the Parties

The Plaintiffs' case opened on the 1/2/2016 with the testimony of PW1 Mary Nampeera, the 1st Plaintiff who stated that the Defendant is her nephew and the Plaintiffs claim a *kibanja* which comprises of family *kibanja* burial grounds. The *Kibanja* is situate at Kyasonko, Kiseka in Lwengo measuring four acres and it belonged to her late father Benedicto Byansi. The late Byansi died in 1991 and bequeathed the suit *kibanja* to her. The suit *kibanja* was divided and two acres with the family house, banana plantation and burial grounds were given to the Plaintiffs. The Defendant once broke the padlocks to the house and entered therein, the Plaintiff reported to LCs and the Defendant was ordered to vacate the house but he refused. The Defendant brought his wife and children to live on the *kibanja* and they have refused to vacate.

PW2, Mariane Nakintu the 2nd Plaintiff stated that the suit kibanja was donated to her and the 1st Plaintiff by their father. The Defendant broke the padlock to the house and entered therein. Since then, they have tried to evict the Defendant but he has refused to vacate. The Defendant started building on the kibanja but the Plaintiffs reported to the LCs and he was stopped. He is cultivating their crops forcefully. The Defendant's father was the heir but he had been given his share of land before their father's death.

PW3 a one Dr. Kaggwa Lawrence testified that the late Benedicto left the suit *kibanja* to his wife Baseka who was his legal wife.

PW4 Lubowa Anthony stated that the late Benedicto left the suit *kibanja* to his wife Baseka because she had buried her mother and two children on that *kibanja*. The late Benedicto's Will was read and four acres where Rebecca was buried had been given to her. Baseka's children were to take possession after her death but when she died, the Plaintiffs and other children were dispossessed by the Defendant.

That was the Plaintiffs/Respondents' case.

The Defendant/Appellant's case opened on the 7/4/2016 with the evidence of the Defendant Joseph Senabulya who stated that the suit *kibanja* belongs to his father Lubowa Matiya and he (the Defendant) took possession in 2002 after his father's Will (DID 1) was read. His father inherited the suit *kibanja* from his grandfather Byansi. The Plaintiffs got *bibanja* when Byansi was still alive and they sold them. His father bequeathed to him a house and the *kibanja* where there is a burial ground. He used to stay in Kyengera before coming on the suit *kibanja* in 2002 where he constructed a house in 2005. He found the house open when he entered and he was authorized by a one Segirinya to enter the house in the presence of the Plaintiffs. The *kibanja* has two graves where the late Baseka and her mother were buried. He stays in the house where the late Baseka used to stay and he owns it since he inherited it from his father.

DW2 Veneranda Namiro the Defendant's mother stated that her late husband inherited the suit *kibanja* from his father the late Benedicto. After the late Benedicto's death, her husband took care of the suit *kibanja* where the late Baseka was staying. The part on which the late Baseka was residing was for her husband.

DW3 Kizito Benard stated that the late Lubowa informed him that he had given the part he inherited from his father to his son Senabulya and that is what was read in his Will.

DW4 a one Nakintu stated that the suit Kibanja belonged to Lubowa which he got as heir to the late Byansi and later gave it to his son the Defendant.

DW5 Nakigozi Joyce stated that the suit *kibanja* belongs to her husband, the Defendant. In 2001, the late Lubowa's Will was read in which the Defendant inherited the part which Lubowa had inherited from his father. They entered the house and *kibanja* in 2002 when the Plaintiffs had taken the late Baseka for treatment.

DW6 Segirinya Gerald 'Omukuza' stated that the suit *kibanja* belonged to Benedicto Byansi. After his death, Lubowa became the heir and cared for his mother who had remained in the use of the suit *kibanja*. In his Will, Lubowa stipulated that the Defendant and DW6 would take care of the suit *kibanja* and the house thereon and as caretakers, it meant that there are owners and caretakers do the caretaking on behalf of owners. Lubowa did that because the Plaintiffs could still come and take back their home. The Defendant remained in the house so the Plaintiffs can no longer use it. The Defendant should leave the house so that they use the family house.

In her Judgment, the trial Magistrate found that the late Benedicto's residential holding comprising of his family, house and *kibanja* reverted to his widow Baseka as per Section 26 of the Succession Act. The Defendant was to care take the suit property on behalf of the family of the late Benedicto and therefore the suit *kibanja* belongs to the Plaintiffs. The trial Magistrate held that the Plaintiffs are lawful owners of the suit *kibanja* and house thereon and issued a permanent injunction, and eviction order against the Defendant.

Being dissatisfied with the decision of the trial Magistrate, the Defendant/Appellant filed this appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence submitted and thus failed to acknowledge the Appellant's proprietary interest in the suit *kibanja* and house thereon;
2. The learned trial Magistrate erred in law and fact when she failed to call for the Will alleged by the Respondents/Plaintiffs to be submitted in evidence thus reaching a wrong decision;

3. The learned trial Magistrate generally misdirected herself on the law and fact and reached a wrong decision;

The Appellant prayed that the appeal be allowed.

Both Parties filed written submissions.

Counsel for the Appellant submitted that the evidence on record is so clear that the Appellant is a nephew to the Respondent and thus a member of the family of the late Byansi hence a beneficiary to his estate. The trial Magistrate treated the suit land as residential holding of the late Byansi which is not right since she had already found that this property belonged to the late Byansi. Counsel submitted that there are contradictions in the Respondents' evidence which are major and go to the root of the case in regard to ownership of the suit *kibanja*. That the fact that Benedicto was survived by Baseka does not per se give their children, the Respondents the right to the residential holding but it belongs to all the beneficiaries of the estate of the deceased. Counsel cited Section 28 of the Succession Act providing that all lineal descendants shall be entitled to the intestate's estate, and Section 191 of the Succession Act requiring for Letters of Administration.

Counsel submitted that the suit property forms part of the estate of the late Byansi and all the beneficiaries including the Appellant are entitled to the suit *kibanja*. Counsel prayed for this court to find that the Appellant is a beneficiary to the estate of the late Byansi. Counsel further submitted that there is no evidence to prove that the Respondents inherited the suit *kibanja* following statutory procedures of administration and distribution of property in succession and no Will was tendered in court to prove their assertion that they inherited the property through the late Byansi's Will. Counsel prayed that this Court finds that it was erroneous for the trial Magistrate to base her decision on the Will of the late Baseka which was never tendered before Court and, allow the appeal with costs.

In Reply, Counsel for the Respondents submitted that the Respondents submission that the suit *kibanja* forms the estate of the late Benedicto and that the Appellant and all beneficiaries are entitled to the same is a complete departure from the Appellants pleadings which bind him as per the case of *Interfreight Forwarders Uganda Ltd vs East African Development Bank SCCA No. 12 of 1995*. That the trial Magistrate rightly held that the late Lubowa had no interest in the suit *kibanja* and that the bequest to the Appellant was void since there was no evidence of the late Byansi`s Will bequeathing the same to the Appellant`s father from who the Appellant claims to derive interest.

Counsel further submitted that the contradictions mentioned by Counsel for the Appellant did not inform the trial magistrate`s decision as she took note of the fact that there was no evidence of a Will by the late Benedicto and thus he died intestate. That under the laws of succession, matrimonial property does not comprise of a distributable estate when there is a surviving spouse. Counsel cited *Section 26 of the Succession Act* and the case of *Herbert Kolya vs Ekiriya Mawemuko Kolya Civil Suit No. 150/2016* where it was held that matrimonial property passes on to the surviving spouse upon death. Counsel submitted further that upon the death of the late Benedicto, the suit *kibanja* vested in his widow the late Baseka on whose death; the Respondents became the only beneficiaries of her estate from which they derive their claim to the suit *kibanja*. Counsel invited this court to uphold the decision of the trial Magistrate and dismiss the appeal with costs.

Determination of the Appeal;

The duty of this court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. See: *Fredrick Zaabwe v. Orient Bank & 5 O`rs, S.C.C.A. No. 4 of 2006 Kifamunte Henry v. Uganda, S.C.C.A No 10 of*

1997; Banco Arabe Espanol v. Bank of Uganda, S.C.C.A No. 08 of 1998. With this duty in mind, I proceed to consider the grounds of appeal.

I will resolve the grounds of appeal in the same order as argued by the Counsel for the Parties in their written submissions.

Grounds one and three;

The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence submitted and thus failed to acknowledge the Appellant's proprietary interest in the suit kibanja and house thereon;

The learned trial Magistrate generally misdirected herself on the law and fact and reached a wrong decision;

It is the Appellant's submission that he holds an interest in the suit *kibanja* as a beneficiary to the estate of the late Byansi Benedicto.

Counsel for the Respondent raised an important submission that the Appellant has departed from his pleadings. It should be noted that according to the Appellant's pleadings and evidence in the lower court, his claim to the suit *kibanja* was allegedly derived from his bequest under the late Lubowa's Will. The Appellant adduced the said Will into evidence and brought witnesses to testify to the claim. Counsel for the Appellant on the other hand, argues that the Appellant is a beneficiary of the estate of the late Byansi and therefore holds an interest in the suit *kibanja*. I agree with Counsel for the Appellant that this is a total departure from the pleadings and Counsel is not only giving evidence from the bar but also departing from the Appellant's pleadings.

Order 6 Rule 7 of the Civil Procedure Rules prohibits departure of pleadings. It provides that, "***No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.***"

Parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record and moreover, the court itself is also bound by what the Parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings. (See *Jani Properties Ltd. vs. Dar es Salaam City Council* [1966] EA 281; and *Struggle Ltd vs. Pan African Insurance Co. Ltd.* (1990) ALR 46 – 47)

In the instant case, the Appellant's claim in the lower Court and according to his pleadings was that he is the true owner of the suit *kibanja* as it was bequeathed to him by his father, the late Lubowa. Counsel for the Appellant on appeal, raised a new claim that the Appellant derives his interest in the suit *kibanja* from being a beneficiary to the estate of the late Byansi.

The Supreme Court in *Interfreight Forwarders (U) Ltd. vs. East African Development Bank*, SCCA No. 33 of 1992, the Court held that;

“The system of pleading is necessary in litigating. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the opposite party and which will govern the interlocutory proceedings before the trial and what the court will have to determine at the trial. See Bullen & Leake and Jacobs Precedents of Pleadings, 12th Edition page 3. Thus, issues are framed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and bound to prove the case as alleged by him and as covered in the issues framed. He will not be

allowed to succeed on a case not set up by him and be not allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by the way of amendment of the pleadings.”(emphasis mine)

I associate myself with the above decision and state that the Appellant is bound by his pleadings in the lower court. I agree with Counsel for the Respondent that the Appellant is not allowed to set up a new case inconsistent with his pleadings. The Appellant cannot seek to be declared a beneficiary to the suit land yet he pleaded to have received the same under a Will.

In determination of the grounds of appeal therefore, I will consider both Parties' pleadings, evidence on record and the submissions in so far as they do not depart from the Parties' initial pleadings.

Ownership of the suit kibanja;

The Appellant faults the trial Magistrate for failing to acknowledge his proprietary interest in the suit *kibanja*. It is the Appellant's claim that he derives his interest in the suit *kibanja* as a bequest from his father the late Lubowa.

It is not in dispute that the suit *kibanja* belonged to the late Byansi, the Appellant's grandfather and Respondents' father. The Appellant claims to have acquired the suit *kibanja* as a bequest from his father while the Respondents' claim to have inherited the same from their father and taken possession following the death of their mother.

It is both parties' evidence that the late Baseka who was the late Byansi's wife and mother to the Respondents was in possession of the suit land following the death of the late Byansi until she fell ill and had to be moved from the suit *kibanja* by the Respondents. Counsel for the Appellant submitted citing Section 24 of the Succession Act that a person dies intestate in respect of all the property which has not been disposed by a valid testamentary disposition. Counsel further faults the trial magistrate for treating the suit *kibanja* as

property of the late Baseka yet she had already found that the property belonged to the late Byansi.

It is the issue of ownership of the suit *kibanja* after Byansi's death that must be decisively determined.

Whereas it is true that in accordance with ***Section 24 of the Succession Act***, a person dies intestate in respect of all the property that has not been disposed by a valid testamentary Will, it is also true that spouses hold proprietary interest in the matrimonial home.

Under ***Article 26 of the Constitution of the Republic of Uganda 1995***, every person has a right to own property individually or in association with others. This constitutional provision applies to both genders and the right therein is guaranteed to all.

According to ***Article 32 of the Constitution of the Republic of Uganda 1995***, customs, cultures and traditions that are against dignity, interests or welfare of women are prohibited. ***Article 5 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*** affirms the same principle in urging States to modify social and cultural patterns of conduct of men and women with a view to achieving elimination of prejudices, customary and other practices which are based on the idea of inferiority or superiority of either of the genders.

Article 31(1) of the Constitution of Uganda provides that Men and Women are entitled to equal rights in marriage, during marriage and at its dissolution. The decision in ***Constitutional Court Petitions 13 of 2005 and 5 of 2006*** both between ***Law and Advocacy for Women in Uganda Versus AG*** affirm the same position that women and men are the same footing in as far as succession is concerned.

I am in agreement with the decision in ***Adong Simon and others Versus Opolot David, Soroti Civil Appeal No. 46 of 2013***, where it was held that; “a widow had a right to dispose of the land she inherited from her deceased husband as surviving spouse in light of Article

31(1) of the Constitution which confers men and women equal rights at marriage, during marriage and at its dissolution.”

In the instant case, the late Byansi was survived by his widow the late Baseka who lived on the suit *kibanja* until her death in 2003. The evidence of the Plaintiffs and their witnesses and specifically Pw4 is that Byansi left the suit *kibanja* to his wife Baseka.

Also, in accordance with the different provisions of both national and international laws cited above (*Articles 26, 31, 32 of the Constitution of the Republic of Uganda 1995, Article 5 of the CEDAW*), it is important that the equality and dignity of all persons is maintained and protected and in the instant case, the equal rights enjoyed by both genders in marriage. In accordance with decision in *Adong Simon vers Opolot (supra)*, as the surviving widow, the interest in the suit *kibanja* automatically passed on to her giving her proprietary interest over the same.

As death leads to dissolution of marriage, Baseka the surviving spouse to Byansi Benedict became entitled to and inherited the suit *kibanja*. In any case, her husband according to the evidence of PW4, Lubowa Anthony the late Byansi left the suit *kibanja* to his wife because she had buried her mother and her children that did not belong to him on the land. It is my opinion that Byansi was a “he” for “she”. He sought to protect his wife from cultural practices that would deny her, her right to ownership of land and so left the suit *kibanja* to her. Dw6, the *Omukuza/ Guardian’s* evidence supports the Plaintiffs and Pw4 testimony that Lubowa was never intended to be an owner of the suit *kibanja*. He stated that as caretakers, they were meant to look after the property on behalf of the owners and that that there are owners to the property.

The Appellant further claims to derive his interest from the Will of the late Lubowa. The Will is not in the language of court. I have perused the Will of the late Lubowa (DEXH1) and he stated in paragraph 4 (ii) that he left the house where the late Baseka was living to the Appellant as a caretaker and that he has no authority over it. Having found that the suit *kibanja* devolved to Baseka after Byansi’s death, it was unlawful for the late Lubowa to

bequath the suit kibanja and such bequest was invalid as the late Lubowa had no interest in the property since it was the matrimonial home of the late Byansi and the late Baseka, and had passed on to the late Baseka as the late Byansi's surviving widow. Nevertheless, the Will upon which the Appellant seeks to rely does not give him ownership. At the time of her death, the late Baseka was the owner of the suit land and prior to that, could deal with it as she so wished.

I will therefore proceed to determine who derived ownership from the late Baseka. The late Baseka was survived by the Respondents as her children and beneficiaries.

Black's law dictionary defines a 'beneficiary' as '*a person for whose benefit property is held in trust.*'

Oxford dictionary of law, Oxford University Press, 2009, 7th Edition, p.58 defines a 'beneficiary' in the present context as a person entitled to benefit from a trust or the holder of a beneficial interest in property of which a trustee holds the legal interest.

The Appellant claims to have obtained the suit land under his later father's Will while the Respondents claim to have inherited the suit *kibanja* from their late mother. To take by inheritance is defined as "to take as heir on death of ancestor; to take by descent from ancestor; to take or receive, as right or title, by law from ancestor at his demise" (*see Black's Law Dictionary, 8th edition, 2004*).

From the above definition, I find that the Respondents took on the suit *kibanja* by descent and as of right upon the death of the late Baseka. An interest in property of an intestate can be acquired through distribution following the laws of administration or devolution as of right. In the instant case, there is no evidence of letters of administration for the late Byansi and Baseka's estate. The Respondents as the immediate descendants and beneficiaries of the late Byansi and Baseka would be entitled to the estate as of right.

It is clear from the evidence on record that the Appellant claims to have inherited property from his father the late Lubowa under a Will and since I have already found that the late

Baseka had proprietary interest in the suit *kibanja* with the Respondents being her beneficiaries, the Appellant does not have any right or interest in the suit *kibanja* and the Respondents are the rightful beneficiaries and owners of the suit *kibanja*.

I therefore find no fault in the trial Magistrate's holding that the Respondents are the rightful owners of the suit *kibanja*. The evidence on record is sufficient to support this assertion especially the testimony of DW6 who testified that the Appellant was simply a caretaker for the suit *kibanja*.

Grounds one and three therefore fail.

Ground two; The learned trial Magistrate erred in law and fact when she failed to call for the Will alleged by the Respondents/Plaintiffs to be submitted in evidence thus reaching a wrong decision;

I have had the benefit of reading the trial Magistrate's judgment and although the Respondents mentioned and claimed to have inherited the suit *kibanja* under the late Byansi's Will, the trial Magistrate in her judgment clearly stated that that Will was never tendered into evidence.

The trial Magistrate relied on the Respondents' evidence and evidence of the Appellant in DEXH1 to find that the Appellant was simply a caretaker of the suit *kibanja* and further that the late Lubowa had no interest in the suit *kibanja* as it had already devolved to the late Byansi's surviving widow.

As resolved above, the Respondents' interest accrues from their right to the suit *kibanja* as beneficiaries of the late Baseka who had an interest in the property as the late Byansi's surviving widow.

Counsel for the Appellant submitted that there is no evidence to prove that the Respondents inherited the land following the statutory procedures of administration and distribution of property. I agree with Counsel and further add that there is no evidence of a valid bequest as to support the claim of ownership by either party. However, it has been settled that the

late Baseka was the true owner of the suit kibanja and the Respondents as beneficiaries of her estate obtained that interest following her death by devolution as of right and as direct descendants. They therefore hold a proprietary interest in the suit *kibanja* as beneficiaries over the Appellant.

I find no merit in ground two of the appeal.

In the result, this appeal fails on the whole and is hereby dismissed with no costs since the parties are family. The judgment and orders of the trial Magistrate are hereby upheld as a whole.

I so order.

Dated, signed and delivered by email at Masaka this 5th day of August, 2021.

**Signed; VICTORIA NAKINTU NKWANGA KATAMBA
JUDGE**