

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI  
CIVIL SUIT NO.19 OF 2009

SETTANDA GEORGE KWEMARA :::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. KANKINDI YUDESI
2. LUKIIKO LIVING STONE
3. TUHAISE RESTITUTE
4. TUMWESIGYE JOHN BOSCO
5. BANSIGARAHU JOAB
6. BANSIGARAHU AYUB
7. BANSIGARAHU ROBERT :::::::::::::::::::::::::::::::::::::: DEFENDANTS

*Before: Hon. Justice Byaruhanga Jesse Rugyema*

**JUDGMENT**

- [1] In this unfortunate suit of 2009, the plaintiff sued the defendants for recovery of land, a declaration that the land belongs to him, vacant possession and or eviction of the defendants, permanent injunction general damages, mesne profits.
- [2] It is the plaintiff's case that on or about 11/1/2005, he purchased the suit land **comprised in Freehold Block 85, plot situate at Kasambya, Kibaale District** from the predecessor in title **Timothy Lugolobi** of which he is now the registered proprietor. The defendants without any reasonable or lawful excuse whatsoever, encroached on the suit land by grazing thereon and watering their animals in wells used for domestic water and also embarked on alienating the land by selling or hiring out portions of the land to 3<sup>rd</sup> parties and harvesting the plaintiff's trees.

- [3] The defendants denied the plaintiff's claims and vowed to put him to strict proof of his allegations. The 1<sup>st</sup> defendant's case is that she is a mere caretaker of the portion of the suit land she occupies on behalf of a one **Bansigaraho Joab, Bansigaraho Ayub** and **Robert Bansigaraho**, the customary owners of the suit land who employed her to take care of their cattle.
- [4] The 2<sup>nd</sup> defendant's case is that he is a bonafide occupant of the portion of the suit land **measuring 12 acres** which he acquired by way of purchase in 2000 and 1999 from a one **Kawuma William** and **Daniel Kigozi** respectively who were born on and occupied and used the land for over 60 years. That as a bonafide occupant, he has a right to sell his interest and the trees claimed by the plaintiff because they belong to him. That the plaintiff's purchase of the mailo interest was subject to the 2<sup>nd</sup> defendant's interest as a bonafide occupant.
- [5] The 2<sup>nd</sup> defendant counter claimed that it is instead the plaintiff who is occupying and trespassing on the defendant's kibanja. It is his case in the counter claim that in or about 2000, the 2<sup>nd</sup> defendant purchased **5 acres** of the plot of land from **Kawuma William** and **7 acres** of the plot of land from **Daniel Kigozi** and in 2009, the plaintiff without any authority and consent of the 2<sup>nd</sup> defendant entered one of the 2<sup>nd</sup> defendant's plots of land, cut his trees and crops and ploughed the land by planting maize thereon.
- [6] The 3<sup>rd</sup> defendant's case is that he is also a bonafide occupant of **1 hectare** of the suit land which he acquired by way of purchase from a one **Alozio Semugo** who had also purchased the land from persons who were born on and had occupied and used the land for over 60 years.
- [7] As for the 4<sup>th</sup> defendant, he averred that he is also a bonafide occupant of the portion of the suit land measuring **1 hectare** which he acquired by way of purchase in 1999 from a one **Kasalina Kabonesa** who was also born on and occupied and used the land for over 60 years. It is his contention that the plaintiff purchased the mailo interest subject to the 4<sup>th</sup> defendant's interest as a bonafide occupant and therefore has a right to sell his interest and trees claimed by the plaintiff because they belong to him.

## ISSUES

- [8] During scheduling conference, the following issues were framed for the determination of this suit:
1. Whether or not the plaintiff fraudulently obtained title to the suit land.
  2. Whether the defendants are trespassers or bonafide occupants of the suit land.
  3. What remedies are available to the parties.
- [9] Counsel for the plaintiff reported to court that though the suit had initially been against, in addition to the 4<sup>th</sup> defendant, **Bansigaraho Joab** as the 5<sup>th</sup> defendant, **Bansigaraho Ayub** as the 6<sup>th</sup> defendant and **Bansigaraho Robert** as the 7<sup>th</sup> defendant, these people left the suit land and in the circumstances, the suit was withdrawn against the 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> defendants.

**Issue No.1: Whether or not the plaintiff fraudulently obtained title to the suit land.**

### **Burden and Standard of proof**

- [10] Generally, in civil suits, the burden of proof lies with the plaintiff who has to prove his or her case on the balance of probabilities; **Sebuliba Vs Co-op. Bank Ltd [1982] HCB 130**. Under **S.103 of the Evidence Act**, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. He who asserts must affirm, See also **Jovelyn Barugahare Vs A.G, S.C.C.A. No.28/1993**.
- [11] In this suit, the defendants raised among other things, allegations of fraud on the part of the plaintiff. It is well settled that fraud means actual fraud or some act of dishonesty; **David Sejjaka Nelima Vs Rebecca Musoke, Civil Appeal No. 12 of 1985 (C.A)**. As per Wambuzi, C.J in **Kampala Bottlers Ltd Vs Damanico (U) Ltd, S.C.C.A No.22/92** held as follows;
- “...fraud must be attributable to the transferee...either directly or by necessary implication...the transferee must be guilty of some fraudulent act or must have known of such act by*

*somebody else and taken advantage of such act.”*

The learned Chief Justice went further as regards the standard of proof in fraud cases as follows;

*“...fraud must be proved strictly, the burden being heavier than on a balance of probabilities applied in civil matters.”*

- [12] In the instant case, though during conferencing the parties framed the first issue as regarding fraud and also the defendants alluded to it in evidence, none of the defendants pleaded it other than merely claiming that they are occupying the portions of the suit land as bonafide occupants and that it is instead the plaintiff who has encroached and trespassed on their respective bibanja.
- [13] Counsel for the defendants **Mr. Simon Kasangaki** submitted that the plaintiff fraudulently obtained title to the suit land. That the plaintiff purchased land occupied by the defendants and other persons not parties to this suit without their consent and in order to defeat their interest, registered himself thereon as proprietor. Further that such knowledge accompanied by wrongful intention to defeat such existing interest amounted to fraud and a title acquired through fraud is void *abi nitio* against all parties privy to the fraud.
- [14] In evidence however, it is clear that the plaintiff purchased legal interest of the suit land from the predecessor proprietor **Timothy Lugolobi** in 2005. His intention could not therefore be found to had been to defeat the unregistered interests thereon. The suit land was registered subject to any lawful interests thereon. As conceded by counsel for the defendants, the mere knowledge of the unregistered interests on the suit land could not be imputed as fraud. The existing interests are deemed to had already been enjoying security of occupancy on the suit land by the time of the plaintiff’s purchase of the legal interest. Any prior fraud if any, cannot be attributed to the plaintiff.
- [15] It follows therefore, in absence of any claim of fraud by the defendants in their pleadings, there is no basis for a finding that the plaintiff acquired the certificate of title for Freehold Block 85, plot 1 land at Kasambya, Kibaale District fraudulently. The 1<sup>st</sup> issue is in the premises found in favour of the plaintiff.

**Issue No.2: Whether the defendants are trespassers or bonafide occupants of the suit land.**

[16] In evidence, the plaintiff testified that he purchased the suit land from a one **Timothy Lugolobi**, a registered proprietor as per the sale agreement dated 11/1/2005 (**P. Exh1**) though the process of purchase began in 1993. Upon conclusion of the purchase, he transferred the title into his names (**P. Exh.2**). Indeed on record, there are acknowledgments of payment of monies by the plaintiff to the vendor stretching from 6<sup>th</sup>/6/1993 to 28<sup>th</sup>/3/2005 (**P. Exh3/D. Exh.6**) when he was to be introduced to the L.Cs and others who include the occupants of the land.

[17] The defendants on the other hand testified as follows;

(a) **Lukiiko Livingstone** (DW1); He testified that he purchased 7<sup>1/2</sup> **acres** of land on the suit land from a one **Daniel Kigozi** on 6<sup>th</sup>/9/1999 and another portion of **6 acres** on the suit land from a one **Kawuma William** on 9/11/2000 (**D.xh.1 & 2**). That the vendors had purchased from those who had long stayed on the land.

(b) **Restetuta Tuhaise** (DW2). She testified that she purchased her first portion of land of **5 acres** on the suit land from a one **Alozio Semuga** on 10/10/2006 and the 2<sup>nd</sup> one of **20' x 120'** from the L.C1 chairperson of the area **John Sebaka** on 8/10/2006 (**D. Exh.3 & 4**).

In her pleadings however, she pleaded purchasing **1 hectare** of land from **Alozio Semuga** and not **5 acres** as she stated in her evidence. She never pleaded any purchase of any piece of land from the chairperson L.C1 **John Sebaka**, and the purported sale agreement with him (**D. Exh.4**) did not disclose either the size or the precise date of purchase of the said kibanja. The agreement is a display of confusion. The purported date on the L.C stamp thereon, **8/11/2006** is inconceivable and contradicts the date she gave in evidence, **10/10/2006**.

The agreement of sale executed by **Alozio Semuga** in her favour also did not disclose the size of the piece of land sold. She did not reveal how she came to get the measurements which she disclosed while testifying in court.

(c) **Tumwesigye John Bosco** (DW3). On his part, he testified to had purchased from a one **Kasalina Kabonesa** who had a mud and iron sheet structure thereon who had also bought from a one **Alikanjero**

**Baguma** on 5/3/1980. She then sold her kibanja of about **3 acres** to **DW3** on 22/12/1999 (**D. Exh.5**). Though **DW3** said that the Kibanja measured **3 acres**, during cross examination, he claimed that when he later measured it, he found it to be **8 acres**. Nevertheless, he did not present any evidence to support his claims.

[18] All in all, the 2<sup>nd</sup> & 4<sup>th</sup> defendants claimed to be bonafide occupants and therefore protected by the law. **S.29(2)(a) of the Land Act** defines a bonafide occupant to mean a person who before coming into force of the Constitution of 1995, had occupied and utilized or developed any land unchallenged by the registered owner for twelve years or more. And **S.29(5) of the same Land Act** provides;

*“Any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant under this section shall be taken to be a bonafide occupant for purposes of this Act.”*

See also **David Byatike Matovu Vs Richard Kikonyogo H.C.C.A No.3/2014** regarding the status of purchasers from persons qualified as bonafide purchasers.

As was held in **Kampala Distributors Vs National Housing and Construction Corporation S.C.C.A No.2 of 2007**, a bonafide occupant was given security of tenure and his interest could not be alienated except as provided by the law, that while land occupied by a bonafide occupant could be leased to somebody else, the first option would be given to the bonafide occupant, and if it is not done, it means that the suit land would not be available for leasing.

[19] In the instant case, the plaintiff did not challenge the defendant’s purchases of their respective portions of land from the previous kibanja occupants on the plaintiff’s land. It follows therefore that the defendants would qualify to be bonafide occupants of their respective ascertained portions of land on the plaintiff’s suit land.

[20] It should however be noted that once an occupant on registered land has been qualified as a bonafide occupant, such person has a right to transact the portion of land he/she is occupying subject to consent of and or giving the 1<sup>st</sup> option of taking the assignment of the tenancy to the landlord (**Section 34(1) and 35(1) of the Land Act**).

In the instant case, the plaintiff acquired the suit land by way of purchase of the legal interest in the suit land from a one **Timothy**

**Logolobi** who got registered on the suit land on 20/4/2004. **Timothy Lugolobi** transferred his interest to the plaintiff on 31/1/2005.

- [21] The 1<sup>st</sup> defendant **Kankindi Yudesi** conceded in her defence that she does not have any interest whatsoever on the suit land save occupying the land on behalf of **Joab Bansigaraho** (previously the 5<sup>th</sup> defendant), **Ayub Bansigaraho** (previously 6<sup>th</sup> defendant) and **Robert Bansigaraho** (previously the 7<sup>th</sup> defendant) who in the due course vacated the suit land and the suit was accordingly withdrawn against each of them. As part of proof that she has no interest in the suit land, the 1<sup>st</sup> defendant never participated in the proceedings by way of offering any evidence in support of her claims. In the premises, I find her a trespasser on the suit land for she is on the land without either the permission or consent of the registered proprietor, the plaintiff; **Sheikh Muhammed Lubowa Vs Kitara Enterprises Ltd Civil Appeal No. 4 of 1987 [1987] UGSC 3.**
- [22] As regards the 2<sup>nd</sup> defendant, **Lukiiko Livingstone** and the 4<sup>th</sup> defendant, **Tumwesigye John**, both purchased their respective portions of the suit land in September 1999 and December 1991 (**D. Exhs.1 & 5**) respectively. By then, neither the plaintiff nor his predecessor, **Timothy Lugolobi** had acquired registration of the suit land. As a result, both the 2<sup>nd</sup> and 4<sup>th</sup> defendants enjoyed security of occupancy on the suit land (**S.31(1) of the Land Act**). It follows therefore, the indefeasibility of the title of the plaintiff is subject to the Bibanja interests of the 2<sup>nd</sup> and 4<sup>th</sup> defendants and therefore, none of them could be found a trespasser into the plaintiff's land. No evidence was however led that the plaintiff has interfered or trespassed on the 2<sup>nd</sup> defendant/counter claimant's land.
- [23] As regards the 3<sup>rd</sup> defendant **Restetuta Tuhaise**, she purchased her so called Bibanja interests in 2006 (**D. Exh.3 & 4**). The law would not permit the vendors **Alozio Semugo** and **John Sebaka** (DW4) to sell their bibanja interests on the registered land to the 3<sup>rd</sup> defendant without either the consent of the registered owner or giving him the 1<sup>st</sup> option to purchase; **S.34(1) and 35(1) of the Land Act**. It therefore follows that in the circumstances of this case, the transactions on the suit land by **Alozio Semugo** and **John Sebaka** are illegal and void. Land transactions undertaken in breach of a statute create no interest in land; **Tito Lukwago Vs Samwiri Mudde Kiiza & Anor S.C/.C.A No.13/1996.**

[24] In the premises, I find the 3<sup>rd</sup> defendant a trespasser on the plaintiff's land.

**Issue No.3: What remedies are available to the parties.**

[25] The 1<sup>st</sup> defendant **Kankindi Yudesi** has no interest whatsoever in the suit land and she is therefore declared a trespasser on the suit land. The 3<sup>rd</sup> defendant **Restetuta Tuhaise's** transaction of purchase of Kibanja on the plaintiff's land from **Alozio Semuga** and **John Sebaka** is illegal and void and it cannot therefore confer any interest to the 3<sup>rd</sup> defendant. As a result, she is declared a trespasser on the suit land. She has the option of reverting to the vendor for her purchase price or any other remedy.

[26] The 2<sup>nd</sup> defendant **Lukiiko Livingstone** and the 4<sup>th</sup> defendant **Tumwesigye John** are bonafide occupants of their respective bibanjas and for avoidance of doubt, their respective bibanjas measure 7<sup>1</sup>/<sub>2</sub> acres (1<sup>st</sup> portion from **Daniel Kigozi**) and 6 acres (2<sup>nd</sup> portion from **Kawuma William**) totaling to 13<sup>1</sup>/<sub>2</sub> acres for the 2<sup>nd</sup> defendant and 3 acres for the 4<sup>th</sup> defendant.

[27] Judgment is therefore generally made in favour of the plaintiffs with the following orders;

- a) The plaintiff lawfully obtained title to the suit land and his actions on the suit land do not amount to trespass.
- b) The 1<sup>st</sup> and 3<sup>rd</sup> defendants are trespassers on the suit land and orders for vacant possession do issue against each of them.
- c) The 2<sup>nd</sup> and 4<sup>th</sup> defendants are bonafide occupants on the plaintiff's land enjoying security of occupancy thereon.
- d) The 2<sup>nd</sup> defendant /counter claimant's claim of trespass is dismissed for lack of evidence in support of the claim.
- e) General damages of trespass of **Ugx 15,000,000/=** awarded against each of the 1<sup>st</sup> and 3<sup>rd</sup> defendants for depriving the plaintiff's use of the land they each illegally occupy, destruction of the plaintiff's trees and crops, psychological trauma and mental anguish inflicted on him as a result of the trespass,
- f) Permanent injunction restraining the 1<sup>st</sup> and 3<sup>rd</sup> defendants, their agents/servants from ever occupying and or trespassing on the plaintiff's land.

- g) Interest of **12% p.a** on the general damages from the date of judgment till payment in full.
- h) It is trite that costs follow the event (**S. 27(1) C.P.A** ).The plaintiff being the successful party is given costs of the suit as against the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

Signed, dated and delivered at Masindi this **16<sup>th</sup>** day of **August, 2022**.

**Byaruhanga Jesse Ruyema**  
**JUDGE.**