

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO.14 OF 2019
(Arising from Civil Suit No.45 of 2013)

KATENDE SAMUEL ::: APPELLANT

VERSUS

BAGANCHWERA NATHAN IGNATIUS BARUNGI ::::::::::::::: RESPONDENT

AND

CIVIL APPEAL NO. 15 OF 2019
(Arising From Civil Suit No.45 of 2013)

BAGANCHWERA NATHAN IGNATIUS BARUNGI ::::::::::::::: APPELLANT

VERSUS

KATENDE SAMUEL::: RESPONDENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] These are appeals from the decision of the Chief Magistrate Hoima at Hoima delivered vide **Civil Suit No.45 of 2013** on the 31/1/2019. The 2 appeals have been considered together because both arise from **Hoima Chief Magistrate's Court Civil Suit No.045 of 2013**.

Facts of the Appeals

- [2] The plaintiff, **Baganchwera Nathan Barungi** filed **C.S No.45 of 2013** against the Defendant, **Katende Samuel** seeking for inter alia; a declaration that the Defendant's activities on the suit land are illegal, unlawful and without claim of right, a permanent injunction to restrain the defendant and his agents, servants, employees from any dealings

with the suit property, an order to evict the defendant from the suit property, compensation for the destroyed trees, general damages for trespass, interest and costs of the suit.

- [3] It was the plaintiff's case that he is the registered proprietor of land comprised in **FRV 911 Folio 9** situate at **Bugahya, Hoima District** (the suit land). That sometime around May, 2019, a group of strangers led by the defendant, without any color of right or consent of the registered proprietor and without any legal basis entered onto the plaintiff's plantation and maliciously proceeded to cut down and uproot 11,000 pine trees and 9000 eucalyptus trees.
- [4] The defendant denied the allegations of the plaintiff. The defendant's case was that his father, the late **Henry Sajjabi** acquired the suit land by first occupation in 1950s and used the same for farming and planted thereon eucalyptus trees.
- [5] The defendant counter claimed against the plaintiff and prayed for an order for cancellation of the certificate of title held by the Plaintiff in respect of the suit land. That the Plaintiff applied for the suit land well knowing that the same belonged to the estate of the defendant's late father and fraudulently concealed to the controlling authority that there were third party claims and failed to follow the procedure governing the process of acquiring a title as provided by law.
- [6] On his part, the trial Magistrate found that it is clear, the plaintiff is the registered proprietor with a certificate of title while the defendant has an equitable interest on the said land. That the plaintiff may not have acquired the certificate of title fraudulently given the fact that the land was public land. However, that the 2 interests can co-exist, ie the registered proprietor (the plaintiff), and the equitable holder (defendant).
- [7] The Defendant in **Appeal No.14/2019** was dissatisfied with part of the judgment and filed the present appeal on the grounds contained in the Memorandum of Appeal:
- 1. The learned trial Magistrate erred in law and fact when he held that the plaintiff may not have acquired the certificate of title fraudulently when there was enough evidence pointing to the contrary.*

2. *The learned trial Magistrate erred in law ad fact when he held that the suit land was public land thereby reaching a wrong conclusion that occasioned a miscarriage of justice to the Appellant.*

[8] The plaintiff in **Civil Appeal No.15 of 2019** also, was dissatisfied with the decision of the trial Chief Magistrate where the plaintiff was declared the legal interest holder and appealed to this court on the following grounds:

1. *That the learned Chief Magistrate erred in law and fact when he held that the defendant has equitable interest in the suit land.*
2. *That the learned trial Chief Magistrate erred in law and fact when he failed to evaluate evidence and thereby coming to a conclusion that the Appellant was not entitled to any remedy for the destruction and conversion of his trees.*
3. *The trial Chief Magistrate erred in law and fact when he held that the plaintiff could only buy off the equitable interest of the defendant.*

Counsel legal representation

[10] On Appeal, the defendant **Katende Samuel** was represented by the firm of **Baryabanza & Co. Advocates, Hoima** while the plaintiff **Baganchwera Nathan Ignatius Barungi** was represented by **Ms. Ssewankambo & Co. Advocates, Kampala**. Both counsel filed their respective submissions for consideration by this court during the determination of both Appeals.

Duty of the first Appellate court

[11] It is trite that on a 1st appeal as in the present case, the parties are entitled to obtain from the Appeal court its own decision on issues of fact as well as of law. The first Appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial court and then make its own mind not disregarding the judgment appealed from but carefully weighing and considering it, taking into account the fact that it did not see the witness nor visit the locus; **Kifamunte Henry Vs Uganda S.C.Crim. Appeal No.10 of 1997** and **Begumisa & Ors Vs Tibebaga (2004) 2E.A 17**.

Consideration of both Appeals

[12] This court shall first deal with the grounds of Appeal in **Civil Appeal No.15 of 2019** together as they all rotate around how the trial court evaluated the evidence and the other grounds including those in **Civil Appeal No.14 of 2019** shall be dealt with separately.

Grounds 1(a) The Learned trial Chief Magistrate erred in law and fact when he held that the defendant has an equitable interest in the suit land.

(b) The trial Chief Magistrate erred in law and fact when he held that the plaintiff could only buy off the equitable interest of the defendant.

[13] Counsel for the defendant submitted on appeal that the defendant's father a one **Sajjabi** was staying on the suit land from 1962 till 1967 and upon his demise, **Sajjabi's** children have since been using the land.

[14] It was therefore his contention that the trial Chief Magistrate rightly found in his judgment that the defendant is or was a holder of an equitable interest. That an equitable interest is valid against the world except for a bonafide purchaser of a legal estate for value without notice; actual, constructive or imputed. He cited **Erina Lam Oto Vs Opoka Bosco & Anor H.C.C.A No.19/2019 [20202] UGHC 185** to support his proposition.

[15] According to the plaintiff **Bangachwera** (PW1), he was a former ambassador of Uganda to France. After the military camp in 1970s, he was recalled from Paris, France where he was based as an ambassador and he looked for land to establish himself by growing crops. He found land of which the late **Henry Sajjabi** had used a small portion. He contacted a one **Fred Stephen Mukiibi**, heir and son of the late **Henry Sajjabi** about its status. The said **Mukiibi** informed him that he (the family) no longer had interest in the land. The confirmatory note to that effect was dated 24.8.74 and is **P.Exh.1**.

- [16] The plaintiff was introduced to the Gombolola Chief confirming the position of **Sajjabi** family who include a widow a one **Zara Sajjabi**, about their lack of interest, by letter dated 22/11/72, **P.Exh.2** with its English translation **P.Exh.3**. The plaintiff confirmed the availability of the land for leasing from the Ministry of Lands as public land and then embarked to pursue it accordingly.
- [17] The plaintiff started working on the land by growing thereon maize, g.nuts and a banana plantation and eucalyptus trees between 1973 and 1979. In 2008, he planted 10 hectares of exotic pine and in 2009, he planted another 10 hectares of crown eucalyptus trees.
- [18] In the 1970s, the plaintiff started the process of acquiring the lease over the suit land. In the 1980s, he got a lease offer of the land (**P.Exh.5**) and with changes in the policies, he was able to eventually acquire a certificate of title in 2012 (**P.Exh.6**). The total acreage of the land is approximately **49 hectares**. It is his complaint that the defendant in 2010, came with a group of people, forcefully entered the land, and cleared it by way of cutting down his trees.
- [19] **Abifaith Nyamahunge** (PW2) and **Musinguzi Moses** (PW3) as neighbours to the suit land confirmed the plaintiff's claims of ownership of the suit land and how the defendant came in 2010 and cleared the land by cutting down the plaintiff's trees and cultivating thereon. Some of the trees had been over 10 years old and other over 5 years.
- [20] As for the defendant **Katende Samuel** (DW1), he testified that the suit land belonged to his late father **Henry Sajjabi** who died in 1964. That he was born on the suit land which his father was using for cultivation of cotton, bananas, and cotton and eucalyptus trees. However, he stated that his late father left the suit land for Buganda in 1964 and upon his death, he and his wife, **Zara Nyangoma** were buried in Luwero, their burial ground. He however, claims that his late father had left the suit land under the care of the late **Kabjweka**, the husband of **Abifaith** (PW2). He denied **Stephen Mukiibi** being the heir to his father **Sajjabi**.
- [21] From the plaintiff and the defendant's case above, it is clear that part of the suit land was occupied by the late **Henry Sajjabi**, the father of the defendant up to 1964 when he and his family left it. He eventually



died and was buried in Luwero where his wife was also later buried. The plaintiff applied to lease and eventually obtained a lease offer to the suit land during the absence of the **Sajjabi** family on the land. He eventually obtained certificate to the suit land in 1912.

- [22] I however note that from 1964 when the defendant's family left the suit land up to 2010 when the defendant returned to claim the suit land, the suit land had evolved, there have been land tenure transformation as a result of the **Public Lands Act, 1969** and **Land Reform Decree, 1975** land legal regimes.
- [23] Under **S.1 of the Public Lands Act, 1969** and the **Land Reform Decree, 1975**, all land in Uganda was declared public land vested in the Uganda Land Commission (ULC). **S.8 of the Public Lands Act** vested land to the ULC with power to sell, lease or otherwise, hold by such lands; See also **Muhammed Nabende & 11 Ors Vs Islamic University of Uganda, Mbale H.C.C.S. No. 33/92**. Under **S.1 of the Land Reform Decree, 1975** all land in Uganda was declared public land to be administered by the ULC in accordance with the **Public Lands Act, 1969**, subject to such modification as were necessary to bring the Act into conformity with the Decree.
- [24] It follows therefore in my view, that whatever interest the defendant's father **Sajjabi** had in the suit land, be it equitable or customary, was effluxed, lost and or extinguished by the absence of the **Sajjabi** family who abandoned the suit land and, by operation of the subsequent land legal regimes to wit; the **Public Lands Act, 1969** and the **Land Reform Decree, 1975** that declared all land public land and vested it in the ULC for management. As a result, the suit land became available for leasing by the Land Commission to whoever developed interest in it.
- [25] In any case, by virtue of **Stephen Mukiibi**, heir to the late **Henry Sajjabi** and the defendant's mother **Zera Sajjabi's** response to the plaintiff's inquiries about the status of the suit land (**P.Exhs.1&2**), clearly, the family of **Henry Sajjabi**, including the defendant, had no interest in the suit land.
- [26] The defendant denied that **Stephen Mukiibi** was the heir of the late **Henry Sjjabi** but did not deny the authenticity of **Mukiibi's** confirmatory notes (**P.Exhs.1&2**) about the status of the suit land. The defendant did not also provide any evidence that the heir was a one

Kahuma Erinest by for example having him as witness since he would also be one of the beneficiaries of the estate of **Sajjabi**; the suit land. In the absence of any contrary evidence to that effect, I believe and agree that **Stephen Mukiibi** was the heir and therefore successor of the late **Henry Sajjabi**. He was therefore the rightful representative of the **Sajjabi** family.

[27] 2ndly, the defendant did not explain as to why he or any other member of **Henry Sajjabi's** family, since 1964 when **Sajjabi** left or abandoned the suit land or since 1973-74 when the plaintiff sought about their interest in the suit land, never showed up but waited up to 2010 to resurface and lay claims over the land when the plaintiff had long taken over and carried out developments thereon.

[28] It is apparent that the defendant's sitting on his rights for a period of 37 years i.e, from 1973-2010, the law of limitation, **S.5 of the limitation Act** would bar him to recover his alleged equitable interest in the suit land. The section restricted the defendant to recover land before a period of 12 years. In **Badru Mbazira Vs Ababagi Nasubuga [1992-93] HCB 241**, Rajansigham J held:

"The limitation Act applied to all matters unless the Act itself made an exception; it made no exception of the customary land holding."

[29] In this case, the defendant did nothing about his claim of recovery of his father's alleged equitable interest in the land since 1973-74 when the plaintiff brought to their attention his interest in the land. The defendant waited until 2010 when the plaintiff had long entered, occupied and developed the suit land to revive his claim. I find that the defendant had forfeited his claim if at all he had one. Consequent to the above, under **O.7 r.11(d) CPR**, suits brought out of time are barred by limitation, the plaint must be rejected and suit be dismissed; **Iga Vs M.U.K [1975] E.A 65**.

[30] The defendant's claim that he had left the suit land for studies in Luwero cannot help him because he does not disclose when he concluded his education and why he failed to reclaim the suit land since the 1970's. His other claim that the suit land was left under the care of the neighbor, the late **Kabajweka**, husband to **Abifaith** (PW2) is devoid of any merit for there is no evidence to support it. This aspect was not

even put to PW2 during cross examination. It must be a mere afterthought and I accordingly reject the argument.

[31] The defendant's claim had also been caught by the doctrine of **Laches** and **Acquiescence**. These are equitable remedies that destroy the former owner's rights. They mean unreasonable delay in asserting or enforcing a right; **Henry Wabui & Anor Vs Rogers Hanns Kiyogoi Ddungu & 2 Ors H.C.C.S No.102/09**. Equity aids the vigilant and not the indolent. It is therefore apparent that the rules of equity cannot come to the aid of the defendant who sat on his alleged rights for a period of 37 years.

[32] In conclusion, I find that in this case, the trial Chief Magistrate ought to have rejected the defendant's counter claim and dismiss it under **O.7 r.11 (d) C.P.R**. The learned trial Chief Magistrate therefore erred in law and fact when he held that the defendant had an equitable interest in the suit land and that the plaintiff could therefore only buy off the equitable interest of the defendant. The **2 grounds** of the appeal are found in the negative, they are devoid of any merit.

Ground 2: The learned trial Chief Magistrate erred in law and fact when he held that the plaintiff may have not acquired the certificate of title fraudulently when there was enough evidence pointing to the contrary.

[33] The learned trial Magistrate correctly in my view addressed himself on the principles of law as regards the burden and standard of proof thus;
"The burden of proof lie on the party alleging...The standard of proof is on a balance of probabilities. As regards the first issue, whereas civil suits are determined basing on a balance of probabilities, the degree of proving fraud is higher than just a balance of probabilities."

Indeed, this is the position as held in **Fredrick J.K.Zaabwe Vs Orient Bank Ltd and Ors S.C.C.A No.4 of 2006** and **Kampala Bottlers Ltd Vs Damanico (U) Ltd, S.C.C.A No.22/92 [1993] UG SC1**.

[34] In his submissions, counsel for the defendant submitted that the plaintiff applied for lease of the suit land well knowing that the suit land was being occupied by the family of **Sajjabi**, the father of the defendant. That the trial Magistrate having found that the Appellant

was the first occupant of the suit land and a holder of an equitable interest, he should have found that the title held by the plaintiff was obtained by fraud.

[35] In the first instance, as I have already found, the defendant is not a holder of any equitable interest in the suit land. The pleading of fraud by the defendant in the counter claim after a period of 37 years cannot be used to defeat the interest of the registered proprietor who besides, has been in occupation of the suit land for over a period of 37 years. The plaintiff acquired the suit land in 1973 when he was first given an offer of the land, entered and occupied the suit land by growing maize, ground nuts, established a banana plantation and eucalyptus trees. The heir **Stephen Mukiibi**, the widow of **Henry Sajjabi** and the authorities gave him the greenlight that he enters and leases the suit land. The defendant/counter claimant's cause of action for recovery of the land arose at the date in 1973, the plaintiff/counter defendant acquired the suit land.

[36] 2ndly, **S.56 of the R.T.A** provides as follows:

"...every certificate of title issued under the provision herein contained shall be received in all courts as evidence of the particulars therein set forth and the entry thereof in the Register Book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in the land therein described in is seized or possessed of such estate or interest..."

The production of the certificate of title in the names of the plaintiff is sufficient proof of ownership of the land in question unless the case falls within the provisions of **S.184 RTA** which provides thus;

"No action of ejectment or other action for 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-

(a) ...

(b) ...

(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...and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action

against the person named in such document as the grantee, owner, proprietor or lessee of the land therein described, any rule of law or equity to the contrary notwithstanding."

[37] The interpretation of **S.56 RTA** creates a presumption that once one is a holder of a certificate of title, it is evidence that the holder complied with all the legal requirements to acquire it and can only be impeached by proof of fraud. In the instant case, apart from counsel for the defendant submitting evidence from the bar, the defendant did not adduce any evidence that the plaintiff's certificate of title was obtained by or through fraud. The defendant's counsel claim that the plaintiff's application for lease before entry and occupation of land is evidence of fraud. In my view, this is not correct. Such cannot be evidence of fraud. Also the claims that the plaintiff did not adduce any evidence of **inspection report** to prove that the land was available and free from disputes, that there is no evidence that the land was **leased to him by any controlling authority**, and also that there is no evidence of **conversion from leasehold to free hold** etc, in my view, amounted to shifting the burden of proof from the Counter claimant/defendant to the plaintiff/counter defendant yet the burden of proof lay on the counter claimant/defendant who pleaded the fraud. I find that Counter claimant/defendant failed to discharge the burden of proof that was upon him.

[38] In the premises, I find that the trial Chief Magistrate was right and justified to find that the plaintiff's certificate of title was not obtained through fraud. This ground of appeal fails accordingly.

Ground 3: The learned trial Chief Magistrate erred in law and fact when he held that the suit land was public land thereby reaching a wrong conclusion that occasioned a miscarriage of justice to the defendant.

[39] This ground of appeal is found in the negative. As I have already observed and held that the suit land was public land by virtue of operation of the **1969 Public Lands Act** and the **1975 Land Reform Decree**. The present suit land was neither mailo, freehold, nor leasehold and therefore, by the operation of **S.1 of the 1969 Public Lands Act**, it was public land which was vested in the Land Commission and **S.1 of the Land Reform Decree** rendered all land in Uganda public land. This ground of appeal in the premises fails.

Ground 4: That the learned trial Chief Magistrate erred in law and fact when he failed to evaluate the evidence and thereby coming to a wrong conclusion that the plaintiff was not entitled to any remedy for the destruction and conversion of his land.

[40] In this case, the plaintiff led evidence that he had planted 10 hectares of crown eucalyptus trees and 10 hectares of pine. This evidence was supported by the evidence of the neighbor **Abifaith Nyamahunge** (PW2) who witnessed the cutting of the trees by the defendant and his workers. She could however not tell the number of trees but estimated the trees to had been on a 30 acre coverage.

[41] The plaintiff himself merely estimated the value of the destroyed pine trees to be **Shs.110, 000,000/=** and **Shs.720, 000/=** for eucalyptus trees as he claimed that the entire trees were cut down. This is however not supported by any proof. Whereas I agree that the plaintiff's pine and eucalyptus trees were cut and destroyed and not burnt by wild fires as claimed by the defendant, it required expert evidence regarding the counting of stamps and use of any other evidence not limited to photographing, to enable court have an idea and a view of the estimation. In the absence of any such evidence, I find that the trial court was justified not to consider such special damages for the cut and destroyed trees.

[42] However, the defendant's act of waking up from his slumber since 1973 when the family of **Henry Sajjabi** were notified of the plaintiff's intention to lease and enter the suit land and invade the plaintiff's land in 2010 and destroy the plaintiff's trees amounted to trespass for which the plaintiff is entitled to damages.

[43] This is besides the torture and inconvenience the plaintiff endured in the hands of the defendant. The suit land project was his resting package as a retired civil servant. In the premises, considering the totality of the above, I find that the trial Chief Magistrate erred in law and fact when he failed to award him general damages to cater for his destroyed trees, trespass and the torture and inconvenience he has suffered. Upon consideration of the plaintiff's pain, inconvenience and loss of trees arising from the trespass, he deserved an award of **Ugx 86,000,000/=** as general damages.



- [44] In conclusion, I find that the defendant did not have any interest be it equitable or otherwise in the suit land, the plaintiff is the registered proprietor of the suit land who acquired the certificate of title over the suit land that was public land.
- [45] The defendant is a trespasser on the suit land and the plaintiff is therefore entitled to damages, a permanent injunction restraining the defendant and his agents, servants, employees from any dealings with the suit property, an order of eviction, interest on the awarded sums and costs of the appeal here and below.
- [46] In the premises the defendant's **Civil Appeal No.14 of 2019** is found not to have merit and it is accordingly dismissed in its entirety. The plaintiff's **Civil Appeal No.15 of 2019** is allowed with the following:
- a) The trial Chief Magistrate's judgment and orders in **C.S No.45 of 2013** are set aside and substituted with the following:
 - i. A declaration that the defendant/Respondent's activities on the plaintiff/Appellant's land are illegal, unlawful and without claim of right thus amount to trespass.
 - ii. A permanent injunction to restrain the defendant/Respondent and his servants, agents, employees from any dealings with the suit property accordingly issues.
 - iii. An order to evict the defendant/Respondent and his agents from the suit land accordingly issues.
 - iv. General damages for trespass and the destroyed trees totaling to **Ugx 86,000,000/=** accordingly awarded.
 - v. Interest at 10% p.a from the date of the judgment of the lower court (i.e, 31st January 2019) until full payment accordingly granted.
 - vi. The plaintiff/Appellant is entitled to costs of the appeal and of the lower court.

Order accordingly.

Signed, dated and delivered at Masindi this 16th day of **September, 2022.**



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Byaruhanga Jesse Ruyema

JUDGE