

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL SUIT NO.16 OF 2009**

M/S BAHESCO LIMITED ::: PLAINTIFF

VERSUS

NATIONAL FORESTRY AUTHORITY ::: DEFENDANT

AND

CIVIL SUIT NO.16 OF 2011

NATIONAL FORESTRY AUTHORITY ::: PLAINTIFF

VERSUS

UGANDA LAND COMMISSION

M/S BAHESCO LIMITED

::: DEFENDANTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The 2 unfortunate suits; M/s. BAHESCO LTD Vs NATIONAL FORESTRY AUTHORITY, C.S NO.16 OF 2009 and NATIONAL FORESTRY AUTHORITY Vs UGANDA LAND COMMISSION C.S NO.16 OF 2011, were filed in 2009 and 2011 respectively and are consolidated by court because the subject matter in the two suits as well as the question of law involved are the same.
- [2] For purposes of this judgment, M/s. BAHESCO LTD shall herein after be referred to as the plaintiff since C.S No.16 of 2009 was the first to be filed and NATIONAL FORESTRY AUTHORITY (NFA) and UGANDA LAND COMMISSION (ULC) shall hereafter be referred to as the 1st and 2nd defendants respectively. ULC was however duly served with court process but did not file a defence and as a result, court proceeded as if ULC had filed a defence; (O.9 r.10 CPR).

- [3] The plaintiff's claim is for trespass, an eviction order, permanent injunction of land comprised in **LRV 1120, Folio 10 measuring 407.8 Ha** in Masindi acquired in 1996 from the then registered proprietor **Hajji Abdunoor Kayiga**, the deceased.
- [4] That the plaintiff has been in full utilization of the suit land since 1980s for grazing, planting maize, groundnuts and other perennial crops until sometime in 2003, when the 1st defendant, **N.F.A**, acting through its official a one **Ochaya Godfrey** arbitrarily and without any right whatsoever extended the long known and certified maps and data and consequently encroached/trespassed on the plaintiff's land of about **160 ha**.
- [5] Lastly, that for the last 14 planting seasons, the plaintiff company has not cultivated its lawfully owned land and has lost earnings from the maize and other crops in the suit land assessed at **1,216,000,000/=** for which it claims special damages.
- [6] The 1st defendant, **N.F.A** on its part, denied the plaintiff's allegations and contended that the plaintiff's purported acquisition and registration of the suit land is illegal, wrongful, invalid, null and void, right from the outset and is an abuse of the due process of law as the suit land comprises a **Central Forest Reserve of Budongo** which is a preserve of its management and is restricted under the relevant or appropriate laws of Uganda.
- [7] Lastly, that the leasing and registration of the suit land by the plaintiff from the 1st defendant (**ULC**) is fraudulent and particularized fraud inter alia, as dealing with the suit land without the knowledge or notification of the Defendant (**N.F.A**), the suit land not existing in the records of the commissioner of surveys and mapping, holding a certificate of title without a plot number, the 1st Defendant (**ULC**) granting the lease without a report (inspection report), registration of the suit land without application and owning private land in a gazetted central forest reserve.
- [8] In **C.S No.016 Of 2011**, the Plaintiff therein sought the following orders against the **BAHESCO LTD** and **ULC**;

- a) A declaration that the plaintiff therein, N.F.A is the lawful and or legal entity with the mandate to manage and control Central Forest Reserve.
- b) An order for cancellation of the lease and certificate of title in the suit property.
- c) A permanent injunction restraining the **BAHESCO LTD** and **ULC** from leasing out or claiming land within **BCFR** and from any encroachment thereof.
- d) General damages and costs of the suit.

Counsel legal representation

[9] The plaintiff **BAHESCO LTD** was represented by **Mr. J.P Baingana** of **M/s Tumwesigye Baingana & Co. Advocates, Kampala** while the 1st defendant (N.F.A) was represented by **Mr. Maloba Ngobi Peter, Ms. Ruth Kisakye** and **Mr. Kwesiga Joseph**, all of **Legal Department National Forestry Authority, Kampala**. The counsel filed their respective written submissions for consideration of court in the determination of this suit.

[10] During hearing of the suit, the following issues were framed for the determination of the suit;

1. Whether the 1st defendant (N.F.A) trespassed on the plaintiff's land, i.e the suit land.
2. Remedies available to the parties.

Burden and Standard of proof

[11] **S.101 (1) of the Evidence Act** provides as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.”

S.103 of the Act provides further that;

“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.”

In the case of **Nsubuga Vs Kavuma [1978] HCB 307**, it was held that;
“In civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities.”

[12] From the foregoing, it is clear that the entire burden of proof is on the plaintiff who asserts, and must prove his or case on the balance of probabilities. The plaintiff **Bahesco ltd** in this case have therefore the burden to prove the alleged trespass by presenting evidence that they lawfully acquired the suit land and had been in full utilization until sometime in 2003 when the defendant (N.F.A) through its officials allegedly encroached/trespassed onto the plaintiff's land. At the same time, the 1st defendant (**NFA**) also bear the burden to prove that the plaintiff illegally obtained the suit land within **Budongo Central Forest Reserve (BCFR)** under its management.

Resolution of issues

Issue No.1: Whether the 1st defendant (N.F.A) trespassed on the plaintiff's land, i.e the suit land.

[13] In its bid to prove its case, the plaintiff **Bahesco ltd** simply led evidence through its Company Secretary **Barugahare Geoffrey** (PW1) and the District Surveyor, Hoima District, **Busobozi Dickson Sydney** (PW2). According to **Barugahare Geoffrey** (PW1) the plaintiff company acquired the suit land for growing crops and milling business in October, 1996 from a one **Hajji Abdunoor Kayiga**, the then registered proprietor of the suit land. The plaintiff company took possession of the suit land which neighbours **BCFR** and developed thereon a farm of maize, bananas and coffee. It was in the 1st week of December, 1999 that the Masindi District Forest Officer **Mr. Ochaya** came to the suit land and stopped the plaintiff from farming on the suit land claiming that the farm was within the forest Reserve.

[14] The plaintiff resisted the defendant's attempts to stop it from utilizing the land on grounds that the farm was outside the forest reserve and that its predecessor in title, **Hajji Kayiga** had lived on the land for over 20 years prior to 1976.

[15] According to **Busobozi Dickson Sydney** (PW2) a District Surveyor, Hoima District who by the year 2009 was working with Terrain Consult Surveyors participated in the **Joint Boundary Verification between NFA (Budongo CFR) land and Bahesco limited land**, which exercise involved a surveyor for N.F.A. A report to that effect was made and

exhibited as **P.Exh.8** wherein the shaded area shows the area encroached by N.F.A measuring approximately **186.5 ha**.

The report, **P.Exh.8**, though titled as “JOINT BOUNDARY VERIFICATION” exercise, it was endorsed by only an official of **Terrain Consult** a one **Gunze Joyce Nabaasa** with no member from N.F.A though **Tom Khabusi** (DW1) a surveyor from N.F.A was recorded to had been in attendance.

[16] The report, **P.Exh.8**, however is to the following effect;

*“The boundary being maintained by NFA Units is inside the land title for BAHESCO Limited, plot 5 Block 1, Buruli and cuts off an area approximately equal to **186.5 hectares**.”*

Then the report recommended the following;

“RECOMMENDATION

Now that it has been proved that the boundary existing on the ground and maintained by NFA cuts through land for BAHESCO plot 5 Block 1 Buruli, it is recommended that a proper boundary opening survey of the plot for BAHESCO be carried out to locate the correct boundary on the ground and also establish in detail the circumstances which could have led to the scenario existing on the ground as of now.”

Whereas **Busobozi Dickson** (PW2) interpreted the above report to mean that the net result was that N.F.A was in encroachment, **Tom Khabusi** (DW1) the N.F.A Boundary survey specialist, while confirming that he participated in the joint boundary verification with **Busobozi** (PW2), he denied that it is N.F.A in encroachment but the plaintiff **BAHESCO**. He also made his own report which was admitted and marked **D.Exh.2**. It also however, lacks the endorsement of any representative of the plaintiff and lacks the signature of the author for its ownership.

[17] However, despite the glaring deficiencies in both the plaintiff’s and the 1st defendant’s reports (**P.Exh.8 and D.Exh.2**) it is clear that whereas the plaintiff claims that the Defendant, **NFA** encroached in the plaintiff’s land by approximately **186.5 ha**, the Defendant claims that the plaintiff encroached in the forestry land by approximately **145.01 ha**.

What is the reality of the 2 reports however, in my view, is that either of the parties’ land overlapped into the other.

- [18] Counsel for the plaintiff submitted that the plaintiff bought the suit land from a one **Hajji Addunoor Kayiga** measuring **407.8 ha**. That before its registration, the said **Kayiga** had been in possession and utilization thereof since 1970s. When the plaintiff bought the suit land, he took possession and utilization thereof by growing various crops including maize, groundnuts and other perennial crops. That however, in 2003, the defendant's official a one **Ochaya Godfrey** without any authority extended the boundary of the forest reserve and entered into the plaintiff's **160 hectares of land**.
- [19] Counsel for the defendant, **NFA** on the other hand maintains that the plaintiff's acquisition of the suit portion of land was illegal and wrongful and that the plaintiff's land was in a forest reserve. The defendant allege that the acquisition of the suit land title was fraudulent.
- [20] It is however, an undisputed fact that the **Budongo Central Forest Reserve (BFCR)** was gazetted in 1932 (see **Legal Notice No.87/1932 under The Forests Ordinance 1923**) and that by virtue of the **Forest Reserves (Declaration) Order S.I No.176 of 1968** with the **Boundary plan No.1389 and 1390**, the forest was measuring **315.12 square miles** and finally, the **Forest Reserves (Declaration) Order S.I No.63 of 1998** with boundary **Plan No.1593 (D.Exh.1)** it was measuring **81,893 hectares**.
- [21] It is to be noted as per the evidence of **Opar Bernard (DW2)**, a surveyor with **N.F.A** which was not controverted at all, the initial Budongo Forest Reserve was later added on, other pieces of forest reserves notably **Kaniyo Papidi**. Though these additional forest reserves have nothing to do with the suit land because of their location, they nevertheless improved or extended the size of the entire Budongo Central Forest Reserve.
- [22] It is also an undisputed fact that the plaintiff's predecessor in title, **Hajji Kayiga** secured registration of the suit land on 23/3/1981 (**P.Exh.1**). Before the plaintiff's predecessor in title acquired registration of the suit land, boundary conflicts with **N.F.A** were glaring though nevertheless, he eventually obtained registration of the suit land. This is reflected in the following land management and Registry officials and forestry management officials' communications:

(a) Letter dated 15th July 1978 (P.Exh.1) from the District Surveyor, North & South Bunyoro addressed to the Chief Land Officer, Kampala. It is to this effect:

“Land Inspection Report

Approx.404.6 Ha AT KIDWERA NORTH BUNYORO

Please refer to your letter dated No.22/91 dated 10th July 1978.

*The above piece of land was offered to **Hajji A.Kayiga** after the approval of Uganda Land Commission under Min.No.2/77*

(a)(534) of Aug, 1977.

*An inspection of the above as per your above quoted letter has been carried out and the following points have been observed in connection with **developments made within the forest reserve:-***

1. Residence

A permanent residential house for accommodating Haji Kayiga's family...

2. Banana plantation

An area of about 10 acres is covered by a well maintained banana plantation...

3. Fenced area for grazing purposes:-

There is an area which was developed for grazing purposes and it is estimated to be as large as 400 or less acres.

(a)The perimeter was fenced with barbed wires...

(b)There is a rather small valley tank...

(c)Haji Kayiga keeps 50 indigenous and exotic head of cattle...

(d)There is cattle dip...

General remarks

...the lessee (Kayiga) did not know neither the District land committee nor anybody in the area knew the extended boundary of Budongo Forest Reserve as the line has never been demarcated on the ground.”(emphasis)

[23] The above clearly show and is proof that during the process of acquisition of registration by the plaintiff predecessor's title, **Hajji Kayiga** in 1978, the inspection of the land revealed that **410 acres** (165 ha) i.e **10 acres** of the plaintiff's predecessor in title banana plantation and **400 acres** of the grazing land as reflected in the above land Inspection Report (**P.Exh.1**) are of the forestry land, and were being occupied and utilized by the said **Hajji Kayiga**.

- [24] **(b) A perusal and careful consideration of the letter from the District Surveyor, North & South Bunyoro addressed to the Chief Land Officer dated 15/7/1978, a Land Inspection Report of the plaintiff's predecessor's land (P.Exh1) and letter dated 10/7/1978 from Chief Land Officer to the District Surveyor referring to "the change of the boundaries of Budongo Forest Reserve" (P.Exh.3), one finds that the officials concerned were referring to the statutory established boundaries as reflected in **The Forest Reserves (Declaration) Order S.I No.176/1968** which were neither known by the District land committee nor anybody in the area including applicants for leases and therefore, the forestry officials were performing their statutory duties and mandate to manage the forestry resource while enforcing clearance and or maintenance of the forestry boundaries. It is therefore not correct that there was change of boundaries of Budongo Central Reserve to the prejudice of the plaintiff's predecessor in title, **Hajji Kayiga** by the time he was in the process of acquiring registration. It is only that the District Land Committee and the plaintiff's predecessor in title, **Kayiga** did not know the updated current boundaries of the then **BCFR**.**
- [25] The burden of proof is on the plaintiff to show by way of evidence that by commencement of **The Forest Reserves (Declaration) order S.I No.176/1968**, he was already established on the suit land and the establishment of the Budongo Forest reserve boundaries under **S.I No.176/1968** extended the forest into his land. In my view, the plaintiff did not discharge the onus. There is no evidence on record by the plaintiff that by 1968, his predecessor in title was on the suit land and was therefore affected by the establishment of the Forest Reserve boundaries as established by the **S.I No.176/1968**. What is apparent is that the land inspection committee found the plaintiff's predecessor in title developments within the forestry land by approximately **404.6 ha** at the time **(P.Exh.1)**.
- [26] Though the following year, by 13/2/1979 the District Forest Officer North Bunyoro had clearly completed the opening of the forest reserve boundary in the area as per **P.Exh.2**, there is no **Inspection Report** or **Survey Report** thereafter adduced or presented by the plaintiff as proof that all issues relating to the boundary conflict between the plaintiff's predecessor in title and the 1st defendant were adequately dealt with before the land title in question was created.

- [27] The acquisition of the registration of the suit land by the plaintiff's predecessor in title has to be viewed alongside the boundaries of Budongo Forest Reserve as per **S.I No.176 of 1968** before the title in question was processed and issued and not **S.I No.63 of 1998** after the title had been made. The inspection reports enable the issuing authority appreciate whether or not the land applied for is available for leasing. In this case, the Defendant **NFA** having pleaded lack of an Inspection Report as evidence of fraud on the part of the plaintiff, the burden was on the plaintiff to show by way of evidence that this land was duly inspected by the relevant authority and an Inspection Report was issued out before the processing and issuance of the certificate of title (**P.Exh.4**). The plaintiff failed in this aspect.
- [28] As established by **Opar Bernard** (PW2), a surveyor for **N.F.A**, since the boundaries of Budongo Forest Reserve were established before the registration of the suit land into the plaintiff's predecessor in title names i.e **Hajji Kayiga**, the recent and up to-date verification of the boundaries (**P.Exh.8 and D.Exh.2**) reveal the plaintiff's predecessor in title Certificate of title overlapping in the Budongo forestry land and not vice versa.
- [29] 2ndly, **DW2** found that the **instruction No. E0528** which was given for survey of the suit land in favour of the plaintiff's predecessor in title was not submitted to Entebbe where all survey reports are taken for checking against possible overlapping of surveys or encroachments in the protected areas.
- [30] The Entebbe office of Surveys and Mappings is responsible for the establishment of survey and geodetic controls, quality checks of cadastral jobs, survey of government land and printing of topographical maps. The plaintiff did not challenge the above piece of evidence or offer an explanation as regards this omission to submit to Entebbe office of Lands, Surveys & Mappings.
- [31] A copy of the instruction to the Chief registrar of titles to prepare a lease in favour of the plaintiff's predecessor in title on record had the **Block number as 5** but the certificate of title that was issued (**P.Exh.4**) bears neither the **Block number** nor the **Plot number**. Titled lands that lack both **Block** and **plot numbers** are suspicious for the physical location on the ground is problematic if not impossible and therefore,

they may not be easily located. It is therefore not clear whether the certificate of title (**P.Exh 4**) in the names of the plaintiff company refers to the suit land in question whose titling is alleged to have overlapped in the **BCFR** area or vice versa. In her report (**P.Exh.8**) **Gunze Joyce Habaasa** of Terrain Consult referred to the plaintiff's land as comprising **Buruli Block 1, Plot 5** but it is not clear where she got such description of the land. Nowhere is the plaintiff's certificate of title (**P.Exh.4**) do we find it described as a **Buruli Block 1 Plot 5**.

[32] The plaintiff on the other hand did not bother or make any efforts to explain this anomaly. **Terrain consult** who represented the plaintiff during the "joint boundary verification" exercise as per **P.Exh.8** recommended for proper boundary opening of the plot for the plaintiff **BAHESCO** for purposes of locating the correct plot boundary on the ground. This again, in my view is evidence that the plaintiff may not even be knowing the location and boundaries of the suit land yet the plaintiff company is suing for trespass. The plaintiff's title in question (**P.Exh.4**) disclose only the LRV and FOLIO numbers. These are merely land registry numbers for location of files but cannot be used to physically locate the land in question.

[33] The conclusion that can be deduced from the survey reports relied upon by the parties (**P.Exh.8 & D.Exh.2**) is that there was an overlap during the titling of the plaintiff's predecessor's title. Where there are overlaps in titling, the latter title is considered the intruding one and therefore the holder of such title becomes the trespasser. In the premises therefore, I find that the plaintiff has not proved its case on the balance of probabilities that the Defendant (**NFA**) extended the **Budongo Central Forest Reserve** boundaries to its prejudice. The acquisition of the suit land by the plaintiff's predecessor in title from the 1st defendant (**ULC**) was illegal. The **ULC** had no powers to lease out any portion of land that formed part of the Budongo Central Forest Reserve. The plaintiff's certificate of title itself lacking the Block and Plot number, coupled with the lack of an Inspection Report before its issuance renders it suspect and therefore that is sufficient evidence that it was fraudulently issued.

[34] The land regime applicable to the instant case is the **Land Reform Decree, 1975** and the **Public Lands Act, 1969**. Under **S.1 of the Public Lands Act, 1969** and the **Land Reform Decree 1975**, all the 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 such lands; **See also Muhammed Nabende & 11 Ors Vs Islamic University of Uganda, Mbale H.C.C.S No.33/92**. All land was declared public land in accordance with the **Public Lands Act, 1969** subject to such modifications and where necessary to bring into conformity with the decree (**S.I Land Reform Decree**). However, according to **S.48 of the Public Lands Act**, the operation or their applicability to forests, minerals or National parks is not affected by the Act. **S.13 (2) of the Forests Act Cap.146** prohibits clearing, use or occupation of any land in a forest reserve except as may be permitted by the rules. It follows therefore that while all land in Uganda was public land held or administered by the **ULC** as the controlling authority, it could not legally grant leases over land gazetted to be a forest reserve.

[35] In the instant case, the **ULC** purported to lease the plaintiff's predecessor in title land which comprised **145.01 ha** that formed part of the Budongo Central Forest Reserve as clearly reflected in **D.Exh.2**.

[36] In the final analysis, I find that the plaintiff's predecessor in title, his registration on the suit land and the title thereof overlapping into the Budongo Central Forest reserve, the activities of the plaintiff in that portion of Budongo Central Forest Reserve amount to trespass within the definition of **Justine Lutaaya Vs Stirling Civil Engineering Co. Ltd, S.C Civil Appeal No. 011 of 2012**,

"The trespass to land occurs where a person makes an authorized entry upon land and thereby interferes, or portends to interfere with another person's lawful possession of that land."

[37] In the instant case, it is evident that the 1st defendant officials have all along been consistent in seriously safe guarding the boundaries of the forest and the plaintiff before purchase, is expected to have inquired about the boundaries of the forest reserve and the predecessor in title's claims. The plaintiff cannot therefore claim ignorance of the Defendant, **NFA's** consistent claims that started in 1978 (**P.Exh.1**) regarding the impugned portion of land.

[38] In the premises, I find the 1st issue in favour of the Defendant, **NFA**. The plaintiff company is found to be the trespasser.

Issue No.2: Remedies to the parties

- [39] This court having found that the plaintiff's predecessor in title's acquisition of land was unlawful for the fact that the 1st defendant (**ULC**) had no powers to lease out land that formed part of the Forest Reserve and having found the plaintiff a trespasser on the impugned portion of the Budongo Central Forest Reserve, it follows that the Plaintiff in **C.S No.16 of 2011** is instead, found to be the rightful owner of the portion of the suit land measuring **145.01 hectares** that was wrongly included in the plaintiff predecessor's title.
- [40] In the premises, the plaintiff's **Civil Suit No. 16 of 2009** is dismissed with costs to the defendant (**NFA**).
- [41] The Plaintiff in **C.S No.16/2011** is given judgment with the following orders;
1. A declaration that the Plaintiff in **C.S No.16/2011** is the lawful /legal entity with the mandate to manage and control the suit portion measuring **145.01 hectares** which are part of the gazetted central forest reserve.
 2. An order under **S.91(4) (a) of the Land Act** requiring the Commissioner Land Registration to correct **Ms. BAHESCO Ltd** Certificate of title and make such amendments as empowered by **S.91 (2) of the Act**, correct and or rectify the acreage allowable to **Ms. BAHESCO Ltd** in the circumstances to wit, curving off **145.01 ha.** in favour of Budongo Central Forest Reserve.
 3. A permanent injunction restraining the defendants from leasing out or claiming that portion of land of Budongo Central Forest Reserve and from any encroachment therefrom.
 4. General damages; In **C.S No.16/2011**, trespass is actionable *per se*, and considering the efforts the defendant, **NFA** put into the preservation of the forest against the plaintiff's activities, I grant damages of **Ugx 3,000,000/=**.
 5. Costs; Since costs follow the event and the Plaintiff in **C.S No.16/2011** is the successful party, it is entitled to costs of the suit as against both the 1st defendant **ULC** and 2nd defendant **Ms. BAHESCO**.

Signed, dated and delivered at Masindi this 22nd day of **September, 2022**.

Byaruhanga Jesse Rugyema
JUDGE.