

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL NO. 35 OF 2011
(From Civil Suit No. 62 of 2010)

1. KAMBENKWINE CHRISTOPHER }
2. KAMBENKWINE FLORENCE } APPELLANTS
3. TADEO KAREKYEZI }

VERSUS

KICONCO PRUDENCE MUGYENYI RESPONDENT

Before: Hon. Mr. Justice J. W. Kwesiga

JUDGMENT

This is an Appeal from the whole decision of His Worship Okumu Jude Muwone, Grade I Magistrate at Kabale delivered on 29th November, 2011 in Civil Suit No. 62 of 2010.

The Respondent sued the Appellants alleging trespass on her property known as Plot M. 136 at Makanga, Kabale Municipality seeking Damages for trespass, a permanent injunction and Declaration that she is the lawful proprietor of the suit property. The Appellants denied the allegations and averred that they had lawfully occupied the suit land having purchased the land/Kibanja from Tadeo Karekyezi, the third Appellant.

In his judgment, the trial Magistrate found that the Defendants/Appellants were trespassers and declared the Plaintiffs/Respondent the lawful owner of the suit

land. He awarded General damages in the sum of Shs.3,000,000/= and ordered vacant possession to the Respondent.

The Defendants/Appellants were not satisfied with the whole decision and filed the following grounds of Appeal:-

1. That the learned trial Magistrate Grade I erred in law and facts when he failed to apply the law cited for the Appellants and he came to a wrong decision.
2. That the learned trial Magistrate erred in law and facts when he failed to evaluate the evidence on record thereby coming to a wrong decision in the suit to the detriment of the Appellants.
3. That the learned trial Magistrate erred in law and facts when he failed to appreciate the law that the Respondent's/Plaintiff's suit was barred by law.
4. That the decision of the lower Court cannot stand the test of time as it is tainted with so many illegalities against the Appellants. The said decision is illegal as the said decision takes away the 1st and 2nd Appellants' suit land.
5. The learned trial Magistrate misdirected himself on the law and facts thereby causing miscarriage of justice.

From the start it is clear that the several grounds of appeal do overlap on what they seek this Court to find and in my view this Appeal centres on whether the trial Magistrate appropriately evaluated the evidence on record and whether he appreciated and applied the relevant law.

I will not indulge in addressing each ground of Appeal for the reasons given above. I will subject the available evidence to fresh evaluation and arrive at my own judgment guided by the issues that were framed at the trial namely;

1. Who is a lawful owner of the suit property?
2. Whether the Defendants committed acts of trespass in regard to the suit property?
3. Remedies available?

The **Plaintiff, Pw₁** is a widow and successor or administrator of the estate of Late Enock Mugyenye who died in 2008. She was granted Letters of Administration on 14th September 2009. She obtained extension of lease of the suit Plot which Late Mugyenye had purchased from one Mary Birungi Ruzabarande on 3rd April, 1999. Under cross-examination Pw₁ stated the property was purchased in 1999 and the purchaser (her husband) died in 2008 and for a period of 9 years she had not been to the land. Birungi sold the land in 1999 when it had a running lease that was supposed to expire in November, 2009.

Pw₂ Ngabirano Rogers, Kabale Municipality Land Officer testified that before granting lease of any Plot applied for the District Land Board, among other things, makes sure that there are no customary owners of the Plot. In the instant case there was no form from the area committee confirming that the Applicant is the true owner. He told Court that the area was purely residential and it was illegal to plant trees and coffee on the land. **Dw₁ Karekyezi Tadeo** testified that he inherited the bigger part of the Plot from his parents and bought other pieces from his neighbours and this constituted the suit Plots. In proof of

the several purchases he produced agreements that were admitted as exhibits ranging from 1978 to 2003. (See DEI, II, III, IV and V). At the trial there was no objection raised by the Respondent to their admissibility.

Mujanante Patrick (DW₅) confirmed that he knew the third Appellant, Karekyezi Tadeo since 1977, he used to dig in part of the suit land. That apart from the land that belonged to his father, he bought more. The people he bought from used to dig in the land in 1976/1977.

Dw₆ Begumisa Michael confirmed he sold part of the land to the third Appellant in 1978.

Dw₇ Kambenkwine Christopher (1st Appellant) testified he purchased the Plot/land from the third Appellant after confirming that the suit land belonged to the third Appellant. This evidence was supported by the letter of LC I Chairman of Makanga where this land is located. (See DE 9). The fact that the third Appellant had been in occupation is further supported by Defence exhibits DE 8 and DE 10 which show that he had crops and residential structures which were destroyed by Kabale Town Council enforcement personnel in the name of destruction of illegal structures which in my view was malicious and high handed eviction without any Court Order. This further proves that the third Appellant had been cultivating the suit land.

Pw₂ Ngabirano's evidence that the Plot was purely residential and that it was illegal to plant trees and crops thereon is found untrue because, this Court takes notice of the fact that almost all Municipal Plots which are not wholly built have crops cultivated on today.

I must observe that seasons in and out even the little space that is surrounding the Court premises is cultivated with different crops! The Golf Course, the most conspicuous uncultivable land in Kabale Municipal Council is surrounded by residential homes and both permanent and seasonal crops, and trees are planted either around the houses or between the houses. These are the realities of the highly populated Kabale Municipality where land is scarce and this is a fact that any Court alive to this reality need not call witnesses to prove these facts. It is also a fact that Kabale township over time, in its history, developed into a municipality and expanded its boundaries that closed in what used to be customary holdings whose users were cultivators and such land cannot be free for leasing without adequate compensation.

The evidence on record shows that Karekyezi Tadeo (third Appellant) at different times purchased small pieces of land from Kedress Ngyesho, Hategyekimaana, Bagashasha, Butimbiri Serina Kisana Bagabo and Ndyabahika.

The letter of LC I Chairman to the Mayor of Kabale Municipality states he consolidated the pieces he purchased and they constitute Plot 136 now in contention. The Respondent made great deal of effort to discredit this fact by impeaching the manner in which the Sale Agreements were executed. In my view this goes to the form and not the substance of the Sale Agreements. There were witnesses to the agreement such as Mujunante LC I Chairman who confirmed the sale. Some of the sellers gave oral evidence confirming that they sold to Karekyezi the land that he eventually sold to Kambenkwine. On balance of probabilities the Appellants proved that 3rd Appellant had customary tenure that he sold to the 1st and 2nd Appellants.

Article 237 (3) (a) of the Constitution of the Republic of Uganda recognized Customary Tenure as one of the tenures in which land can be vested in the citizens of Uganda.

It follows that at all material times Karekyezi could not have been a trespasser on his own land.

In the instant case, evidence shows that the Respondent claims ownership by virtue of the purchase dated 1999. There is no evidence to show that Mary Birungi, who never testified, had been a customary holder or a registered proprietor. The Late Enock Mugenyi to whose title the Respondent succeeded had an initial lease that was supposed to expire in 2010. The initial lease was 5 years and therefore it was granted in or about 2005 well after the 1995 Constitution and the Land Act, 1998 had come in force. On the other hand, the third Appellant gave evidence that traces his customary tenure to as far back as from 1978. Customary tenure is a form of tenure in which parcels of land may be recognized as subdivisions belonging to a person, a family or a traditional institution, which is owned in perpetuity. See **Section 3 (1) (g) and (h) of the Land Act.**

While the Respondent is a holder of a Certificate of Title the third Respondent was a customary tenant and the later is a lawful occupant by virtue of **Section 29 (1) of the Land Act.**

Customary tenants have the right to develop the land and the urban authority or persons claiming to be in possession of a Certificate of Title cannot legally do away with the customary occupancy without consent and compensation of the customary tenant. The Appellant never pleaded the necessary elements under the registration of Titles Act to impeach the Respondent's Certificate of Title

and I make no pronouncements on it. I agree with the holding of the trial Magistrate that fraud cannot be proved by the advocate's submissions. A party relying on fraud must specifically plead and particulars of fraud alleged must be set out in the pleadings.

Based on the above examination I find that Karekyezi, the third Appellant was a person who occupied the suit land as a customary tenant when the Respondent acquired a lease over the same land. I have not found any evidence that before granting lease over the land the customary owners of the land were accorded appropriate hearing by the granting authorities and therefore the lease holder cannot have supremacy of ownership over the people who owned the land customarily before the area fell in the municipality under the authority of the Municipality.

Section 29 (1) (c) defines a lawful occupant to include

“(c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold Certificate of Title.”

In my view of the evidence and the law above, Karekyezi, the 3rd Appellant was a lawful occupant who sold his proprietorship of the land to the 1st and 2nd Appellant without knowledge of the Respondents or contemplation of the said Respondent since the leasing of the land was not in his knowledge.

At this stage I will provide the answer to the two issues, that whereas the Appellants are lawful occupants of the suit land as vested in them under **Section 29 (1) (c) of the Lands Act (Cap 227)**. The Appellant is a registered proprietor

who did not compensate the lawful occupants before acquiring the Certificate of Title.

The Respondent sued the Appellants for trespass. Trespass is committed when a person unlawfully enters on land in the possession of another. Trespass is an injury to a possessory right and therefore the proper Plaintiff in a suit of trespass on land is a person deemed to be in possession of the land. Land could be vacant provided the Plaintiff can prove sufficient possession because land may be empty one season while kept for cultivation or other use in future by the Plaintiff or owner.

Refer to **Yekoyasi Mulindwa vs Attorney General (1985) HCB 70.**

McPhail vs Persons Names unknown (1973) 3 ALL E. R. 393 (by Lord Denning, M. R.)

In view of the above, the Respondent did not prove that she had ever had possession of the suit land and on the contrary the Appellants proved their lawful occupancy and therefore trespass was pleaded but not proved by the Respondent. In the final analysis I find that the Respondent did not prove actual possession of the land when the Appellant occupied the land. I have held that the Appellants were lawful occupants whose customary tenure dates as far back as 1978 and were never compensated.

The Respondent did not commit any act of trespass and as such this Appeal is allowed as a whole. The trial Magistrate's Judgment and Orders are hereby set

aside. The Respondent shall pay the Appellant cost of this Appeal and costs in the lower Court. I so Order.

J. W. Kwesiga

JUDGE

15/7/2013.

This Judgment shall be read to the parties on notice to the parties by the Assistant Registrar of this Court at Kabale.

J. W. Kwesiga

JUDGE

15/7/2013.