THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL APPEAL NO. 52 OF 2010
(Arising from Civil Suit No. 384 of 2008 of Chief Magistrate's Court at Entebbe)

MUSISI GABRIEL :: APPELLANT

VERSUS

1. **EDCO LIMITED**
2. **GEORGE RAGUI KAMOI :::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR JUSTICE BASHAIJA K. ANDREW.

JUDGMENT

This is an appeal against the decision of the ***Her Worship Agnes Nkonge***, Magistrate Grade One at the Entebbe Chief Magistrate's Court *(hereinafter referred to as the "trial court")* in ***Civil Suit No. 384 of 2008,*** delivered on 2/12/2009. The Appellant was the unsuccessful plaintiff and the Respondents the successful defendants.

Background.

The Appellant's late father, one Michael Weraga, prior to his death stayed on part of *mailo* land comprised in ***Busiro Block 452 Plot 27 land at Ntabo*** *(hereinafter referred to as the "suit land").* The land belonged to the registered owner then, one Johnson Kamulegeya. The late Michael Weraga was appointed as an agent of Johnson Kamulegeya to look after his vast land of 41.30 hectares and to collect *Busulu* there from.

On 01/07/1989 Johnson Kamulegeya agreed to sell to the late Michael Weraga 18 acres out of the vast land for a price of 100,000/= per acre. This is what subsequently came to be the suit land. The late Michael Weraga made part -

payment of 100,000/= pending the survey. On completion of survey Johnson Kamulegeya increased the price per acre to 150,000/=, which the late Michael Weraga first rejected but later accepted and made payment of 2,600,000/= by cheque. However, Johnson Kamulegeya returned the cheque stating that he had already sold the whole land to the 1st Respondent.

The late Michael Weraga instituted ***Civil suit No. 808 of 1993*** against John Johnson Kamulegeya and the 1st Respondent, but it was dismissed for want of prosecution. After the death of the late Michael Weraga the Appellant as son of the deceased and beneficiary to the estate took over the occupation and management of the suit land claiming customary interest therein.

On 10/11/2008 the 2nd Respondent as an agent of the 1st Respondent tried to evict the Appellant by removing the burial grounds and demolishing the family house from the suit land. The Appellant sued the two Respondents seeking for a declaration that he is the owner of the land measuring 18 acres out of the land comprised in ***Busiro Block 452 Plot 27 at Ntabo.***

The Respondents also filed a counterclaim and averred that the 1st Respondent Company has since 15/11/1989 been the registered proprietor of the suit land having bought the same from Johnson Kamulegeya, and that it had compensated the people who were occupying the suit land. Further, that the Appellant did not take over occupation and management of the suit land as a customary tenant, and that he was a trespasser on the suit land.

The trial court found in favour of the Respondents and declared the 1st Respondent the lawful owner of the suit land. Further, that the Appellant holds a *kibanja* interest of only 2 acres thereon, and that he was a trespasser on the remaining acres

of the suit land. The Appellant was dissatisfied with the decision and filed this appeal and preferred the following grounds of appeal:-

1. ***The learned trial magistrate erred in law and fact when she failed to consider the evidence collected at the locus regarding the boundaries of the Appellant's kibanja thereby coming to a wrong conclusion that the actual size of the Appellant's kibanja is 2 acres.***
2. ***The learned trial magistrate erred in law and fact in holding that the Appellant committed acts of trespass on the part of the Respondent's other piece of land (exclusive of the 2 acres).***
3. ***The learned trial magistrate erred in law and fact in ordering for compensation of the Appellant in respect of the 2 acres decreed in favour of the Appellant against the doctrine of a willing buyer/ willing seller basis.***
4. ***The learned trial magistrate erred in law and fact in holding that the late Michael Weraga a non- party to the suit is recognized as the lawful owner of a kibanja measuring 2 acres having already answered issue number one in the affirmative that the plaintiff is a lawful or bonafide occupant of part of EDCO land.***
5. ***The learned trial magistrate erred in law and fact in failing to consider the evidence collected from locus regarding the boundaries and size of the Appellant's land and came to a wrong conclusion that the late Weraga recognized as the lawful owner of a kibanja measuring 2 aces which is within the grave yards and where his houses are situated.***
6. ***The learned trial magistrate erred in law and fact in failing to evaluate the evidence on record and as such came to a wrong conclusion that;***
    a) ***The actual size of the Appellant's kibanja is 2 acres.***
    b) ***The Appellant committed acts of trespass on the part of the Respondents' other piece of land exclusive of the 2 acres).***
7. ***The learned trial magistrate erred in law and fact in as far as:-***
    a) ***She exercised jurisdiction not vested in her in law.***

b) Failed to determine the nature of the Plaintiff's company which is a foreign company and could not own mailo land.

c) Failed to consider the period Weraga had spent on the land entitling him to a defence of limitation.

Before the hearing of the appeal, the Appellant filed an application seeking to amend the Memorandum of Appeal filed on 14/09/2010 in order to introduce new grounds. In the new grounds the Appellant raised issues in respect of the Respondents' alleged illegalities committed in respect of the acquisition of the suit land which were not raised at the trial, but which the Appellant felt could be brought at any time since they were issues of law. The application was conditionally allowed for the Appellant to argue the new grounds which raised only legal issues that had not been canvassed at the trial. As such, I will consider these particular grounds first.

Ground 7.

The learned trial magistrate erred in law and fact in as far as;

(a) She exercised jurisdiction not vested in her in law.

The main complaint by the Appellant in this ground is that the trial court entertained the case where the value of the subject matter exceeded the trial court's pecuniary jurisdiction. Counsel for the Appellant, *M/s. Kabega, Bogezi & Bukenya Advocates,* submitted that the Bill of Costs which was filed by the Respondents in the lower court (at page 283 of the record of appeal) together with the affidavit of Patrick Tumwine, a Director with the 1st Respondent, put the value of the subject matter at Ug. Shs. 900,000,000/=. Further, that the Government Valuer also put the value of the suit property at Ug. Shs. 2, 139,000,000/= (at page 216 of the record). Counsel was of the view that the failure of the parties to disclose the value of the subject matter coupled with the failure by the trial court to establish the value of

the subject matter before hearing the case perpetuated an illegality of court exercising jurisdiction not vested in it.

To support this view, Counsel cited ***Section 207 (1)(b), (3), (4) of the Magistrates Courts Act*** to the effect, *inter alia*, that the pecuniary jurisdiction of a magistrate grade 1 is limited to a subject matter whose value does not exceed Ug.Shs.20,000,000=. Counsel further cited a plethora of authorities including the cases of ***Active Auto Mobile Spares Ltd v. Crane Bank Ltd & Another, S.C.C.A. No. 21 of 2001; Makula International v. His Eminence Cardinal Nsubuga [1982] HCB 11*** to the effect that once an illegality is brought to the attention of court it cannot not be left to stand.

In reply to this particular point, Counsel for the Respondents, *M/s. Kimuli & Sozi Advocates*, submitted that the Appellant's suit and the Respondents' counterclaim in ***Civil suit No. 384 of 2008*** at the trial was based on trespass to land, and that it was not argued by Counsel for the Appellant on appeal that the trial court did not have jurisdiction with regard to trespass.

Further, that the nature of the reliefs sought by the Appellant and the Respondents in the counterclaim at the trial were such that it was not necessary or even possible to state the pecuniary value of the subject matter as those reliefs did not have a pecuniary value. Counsel relied for this view on the cases of ***Munobwa Muhammed v. Uganda Muslim Supreme Council, H.C.C.Rev. No. 001 of 2006; Joseph Kalingamire v. Godfrey Mugulusi [2003] KALR 406.***

Counsel also submitted that the estimated value of the subject matter in the Respondents' Bill of Costs and the affidavit of Patrick Tumwine the 1st Respondent's Director could not in any take away the jurisdiction which the trial

court had. Further, that the Government Valuer's figure related to the entire 41.30 hectares of the registered land and not just the 18 acres the subject of the case.

The starting point in resolving the issue as to the jurisdiction of the trial court, in my view, should be ***Section 4 and 12*** of the ***Civil Procedure Act (Cap.71).*** The provisions are to the effect that in selecting a court with particular jurisdiction over a particular type of litigation, regard must be had to the pecuniary limitation of such a court and the enabling law which empowers such a court to hear such a case.

The enabling law in this case is under ***Section 207(1) (b)*** of the ***Magistrates (Amendment) Act, 2007,*** which vests a magistrate grade 1 with jurisdiction where the pecuniary value of the subject matter does not exceed Ug.Shs. 20,000,000=. Further, ***Sub –section (2)*** thereof provides as follows;

> ***"Notwithstanding subsection (1), where the cause or matter of a civil nature is governed only by civil customary law, the jurisdiction of a chief magistrate and a magistrate grade 1 is unlimited."*** **[emphasis added]**

After re – appraising the record of evidence at the trial and the law applicable with regard to the jurisdiction of a magistrate grade 1 court, it is evident that the trial court did not exercise jurisdiction not vested in it in law. The pleadings before the trial court clearly show that the value subject matter of the suit was never pleaded. The plaint, the written statement of defence and counterclaim are all silent on the pecuniary value of the subject matter, perhaps rightly so, because the cause of action in the Appellant's case and Respondents' counterclaim was founded in the tort of trespass to land. The evidence canvassed at the trial only related to the issue as to which of the parties had trespassed on to the suit land. It was therefore not

necessary or even possible to put a pecuniary value on a cause of action founded in trespass.

My findings above are buttressed by the case of ***Munobwa Muhammed v. Uganda Muslim Supreme Council (supra)*** where the court held that under ***Section 207 (3) MCA (supra)*** the magistrate's court was competent to entertain a suit for trespass, and that it was not necessary for purposes of jurisdiction for the plaintiff to fix or to estimate the value of the subject matter of a suit. A similar position was taken in the case of ***John Sebataana (Suing through his Attorneys Sentongo Musaala & Others) v. Abainenama Yorokam & Others (supra).*** Accordingly, I would find that the trial court did not act in exercise of its jurisdiction illegally.

It is also important to note that the Appellant's main contention at the trial was that his late father was a customary tenant on the suit land. The Appellant's claim was thus based on the supposedly inherited customary interest. Even though no such customary interest existed both in law and in fact in the suit land as will be shown later in this judgment, where the claim before the trial court was grounded in civil customary law, it would be unnecessary for the parties to state the pecuniary value of the subject matter. Under ***sub –section (2)*** of ***Section 207 MCA (supra)*** where the cause or matter of a civil nature is governed only by civil customary law, the jurisdiction of a magistrate grade 1 court would be unlimited. To that extent the trial court acted well within its jurisdiction.

With regard to the issue of the value of subject matter as estimated in the Respondents' Bill of Costs and affidavit, this could not in any way confer or take away the trial court's jurisdiction. It is the established law that jurisdiction cannot be conferred on a court or taken away by consent of the parties, and that any waiver on their part cannot make up for the lack of defect of jurisdiction. See:

Assanand & Sons (U) Ltd. v. East African Records Ltd. [1959] EA 360; Joseph Kalingamire v. Godfrey Mugulusi [2003] KALR 406. Jurisdiction is conferred on court or taken away by the express provisions of a statute. See: ***David B. Kayondo v. Co – operative Bank (U) Ltd.; S.C.C.A No10 of 1991.*** Therefore, regardless of the values the Respondents stated in their Bill of Costs or affidavit, the jurisdiction of the trial court as conferred by the Act remained unaffected. Ground 7(a) of appeal lacks merit and it fails.

(b) Failed to determine the nature of the Plaintiff's Company which is a foreign company and could not own mailo land.

The main contention of the Appellant in this ground is that the 1st Respondent is a foreign company in so far as its Articles and Memorandum of Association do not contain a provision restricting the transfer of shares to noncitizens. Further, that according to ***Article 237 (2) (c) of the Constitution*** and ***Section 40 (1) of the Land Act,*** a noncitizen cannot acquire and own *mailo* land in Uganda. To buttress this proposition, Counsel relied ***Lakeside City Ltd v. Sam Engola & Others H.C.C.S. No. 281 of 2010*** where similar issue was discussed. Counsel argued that the 1st Respondent being a foreign company under the law could not lawfully own *mailo* land, and that since the suit land in question has a *mailo* title, it is an illegality that cannot be left to stand.

In reply Counsel for the Respondents submitted that the 1st Respondent acquired the suit land on 15/11/1989 long before the coming into force of the 1995 ***Constitution*** and the ***Land Act (Cap.227)*** in 1998. Further, that the ***Land Reform Decree, 1975,*** which was the law in operation at the time, abolished the *mailo* land tenure system which it converted to leasehold tenure system. That as such the 1st Respondent lawfully acquired leasehold in 1989 which it continued to hold until it disposed of to ***M/s Pearl Marine Estates Ltd.*** in July 2010, and that this was in

accordance with ***Section 40 (5)*** of the ***Land Act (supra).*** Counsel also submitted that in any event, the Articles and Memorandum of Association of the 1st Respondent now contain a provision restricting the transfer of shares to noncitizens according to the Directors' Resolution made in 2008.

I had the occasion of fully reading the 1st Respondent's Articles and Memorandum of Association registered in 1983 (pages 218 to 234 of the record of appeal). There is no provision restricting the transfer of shares to noncitizens; at least as of 1989 when the 1st Respondent acquired the suit land. As such, the 1st Respondent Company would be legally categorized as a foreign company under provisions of ***Section 40(7) (e) (supra).***For ease of reference I quote below.

> ***"(7).For purposes of this section, "noncitizen" means –***
>
> > ***(e) a company incorporated in Uganda whose articles of association do not contain a provision restricting transfer or issue of shares to noncitizens"***

Indeed ***Section 40(4)*** of the ***Land Act (supra)*** restricts noncitizens acquiring or holding *mailo* or freehold land. For ease of reference I quote it below.

> ***(4) Subject to other provisions of this section, a noncitizen shall not acquire or hold mailo or freehold land.***

Given that the 1st Respondent was a noncitizen, it would follow that it would be precluded from owning *mailo* land by the Constitutional provision cited above as operationalised by provisions of the ***Land Act (supra)*** also cited above**.** The Directors' Resolution restricting the transfer of shares to noncitizens which Counsel for the Respondents referred to (attached to the submissions as *Annexture "A")* was not passed until 2008, and hence it could not operate retrospectively to give effect to the acquisition of the suit land made in 1989.

However, the above trend must be wholly viewed against the background that the ***Constitution 1995(supra)*** *and* ***Land Act, 1998 (supra)*** were not yet enacted in 1989 when the 1st Respondent acquired the suit land. The applicable law, which was the existing law governing land at the time, was the ***Land Reform Decree 1975***. Under ***Section 2*** thereof, *mailo* land tenure system was abolished and converted to leasehold tenure system. It meant that in 1989 when the 1st Respondent Company purchased the suit land, it lawfully acquired a lessee on conversion within the meaning of the ***Land Reform Decree, 1975,*** even though the Certificate of Title (at pages 99 – 103 of the record of appeal) continued to reflect that it was *mailo* land. Ideally, the Lands Office should have recalled all such titles for rectification to bring them in conformity with the changes brought about as a result of the conversion by operation of the law, but it appears this was not done.

Having lawfully acquired a lease on conversion in 1989 under the ***Land Reform Decree, 1975,*** it would follow that the 1st Respondent continued to hold the lease with the coming into force of the 1995 ***Constitution*** which restored the *mailo* tenure system. I hasten to add that the ***Constitution***, ***1995***, principally also restricted the acquisition of *mailo* tenure by noncitizens, and the 1st Respondent Company being a noncitizen could not hold a *mailo* title on conversion, but was deemed to have continued to hold a lease on the suit land. My findings and conclusion on this point are buttressed by the post - constitution legislation, the ***Land Act, 1998 (cap.227). Section 40 (5)*** thereof provides that;

> ***"For avoidance of doubt, any noncitizen who immediately before the coming into force of the Constitution held land as a lessee on conversion within the meaning of the Land Reform Decree 1975 shall be deemed to***

have continued to be a lessee in accordance with the conditions of the lease."

On strength of the above authorities, it is clear that the 1st Respondent lawfully acquired the suit land as a lease and not *mailo* land, and as such there were no illegalities committed in the acquisition process for which the 1st Respondent's title would be impeached.

The next issue concerns the Appellant's status on the suit land. It is noted that in 1989 when the Appellant's father attempted to purchase suit land from former registered owner Johnson Kamulegeya, the purchase fell through. The father sued in breach of contract, but again did not follow through with the action which was dismissed by court as against him. As such no registarable interest in the suit property was acquired by the Appellant's father that could be passed on to the son.

Further, the Appellant's father could not be said to have acquired a customary interest in the suit land; which is the basis on which the Appellant's claim lies. The ***Land Reform Decree, 1975,*** which was the law in force in 1989, declared all land in Uganda to be public land to be administered by the Uganda Land Commission in accordance with the ***Public Land Act 1969***, subject to such modifications as may be necessary to bring that Act into conformity with the Decree. The system of occupying public land under customary tenure was to continue, but only at sufferance and any such land could be granted by the Commission to any person including the holder of the tenure in accordance with the Decree.

Section 5 of the Decree specifically restricted occupying public land by customary tenure, and under the ***Land Reform Regulations, 1976,*** any person wishing to

obtain permission to occupy public land by customary tenure had to apply to the Sub –County Chief in charge of the area where the land was situate, and such application had to be approved by Sub – County Land Committee. See also: ***Kampala District Land Board & George Mitala v. Vanansio Bamweyaka & 3 Others, S.C.Civ. Appeal No. 2 of 2007.***

I have re –evaluated the record of the trial court, but have not come across any evidence that the Appellant's father acquired customary ownership in the suit land in accordance with the above procedure of applying to the prescribed authorities. There is also no evidence that such prescribed authorities existed to receive and approve his application, if any application was ever made at all. Since the restrictions on acquisition of customary tenure under the ***Public Lands Act, 1969*** seem to have continued as the law governing all types of public land including customary tenure subject to the provisions of the Decree, I would find that the Appellant's father could not have legally acquired any customary tenure on the suit land prior to the enactment of the ***Land Act, 1998***, and hence could not pass on what he did not have to his son, the Appellant.

In my view, the Appellant's father's status was merely that of a licencee on the suit land, who had acquired some kind of implied bare licence from the former registered owner, and established usufructory interest and occupation. He was not a customary tenant. He was just an occupant who was privileged to enter and remain on the land because the owner consented to it by invitation and permission to help look after the land and collect *Busulu* on behalf of the owner. Therefore, the licence could not confer an interest or right in the land.

A licencee by invitation is a common law principle, and is defined by ***Black's Law Dictionary, 9th Edition at page 1064 a***s;

> ***"One who is expressly or impliedly permitted to enter another's premise to transact business with the owner or occupant or to perform an act benefiting the owner or occupant."***

See also: ***Eramu Mujuzi Kaggwa v. City Council of Kampala, H.C.C.S No. 737 of 2006 per Aweri Opio J*** *(as he then was).*

The cardinal principles are that a licencee is simply authorised to do a particular act or series of acts upon the other's land without possessing any estate therein. Secondly, it is founded on personal confidence and is generally not assignable or transferrable. Thirdly, no proprietary interest passes to the licencee, who is merely not a trespasser; and fourthly, it is revocable at will by the property owner. See: ***Walton Harvey Co. Ltd. v. Walker & Homfrays Ltd. [1931] 1Ch.274; Armstrong v. Sheppard& Short Ltd. [1915] 2 Q.B.384.***

The principles above appear to be crystallized in ***Section 29 of the Land Act (Cap.227)*** which defines a lawful and *bonafide* occupant. Whereas these categories of tenants are legally protected and accorded rights on the land they occupy, a licencee, on the other hand, does not seem to enjoy the same rights and protection. ***Sub – section(3)*** of ***Section 29 (supra)*** stipulates as follows as regards licencees;

> "***For avoidance of doubt, a person on land on basis of a licence from the registered owner shall not be taken to be a lawful or bonafide occupant under this section."***

In the instant case the Appellant's father was neither a "lawful" nor a *bona fide* occupant within the meaning of ***Section 29*** of the ***Land Act (supra).*** Both categories were created by the ***Constitution, 1995***, and defined under the ***Land Act, 1998***. The Appellant's late father would not fall in any of the two categories because the ***Constitution*** and the Act did not operate retrospectively to cover him. It needs to be emphasized that the two categories of "lawful" and "*bona fide*"

occupants were created by the 1995 ***Constitution*** in order to recognize the *status quo* of the various tenancies existing on land in Uganda as at 1995, and to give security to persons who fell in those particular categories by providing for their rights on the land.

The Appellant's father in this case was just an invitee who was permitted by the former registered owner of the suit land to help look after it and to collect *Busulu* from the various persons on it on behalf of the registered owner. In the process he occupied 18 acres thereof, and when attempts to purchase interest therein fell through in 1989, and he did not perfect his ownership in the land. The former registered owner sold the land to the 1st Respondent Company which lawfully acquired title to the whole land including the suit land.

Since the Appellant's father was a bare licencee, a personal relationship with the registered owner, a personal relationship had been created and the licence ceased when the Appellant's father died. Even when the licence lasted, it did not create proprietary right or interest in the land, and the Appellant's father could not pass any proprietary interest in the suit land to the Appellant. Whereas the late father was merely not a trespasser by virtue of the invitation and permission by the former owner, the Appellant continued stay on the suit land when the owners asked him to leave was unlawful, and invariably amounted to trespass for which he could be lawfully evicted at will by the registered owners.

In the circumstances the Appellant would only be entitled to compensation of his late father's property, if any, that may be on the suit land, including developments thereon, which constitute property of the estate of the late Weraga, and not the land or any part of it. For avoidance of doubt, these findings mean that the trial court erred in law and fact in decreeing the two (2) acres of the suit land to the

Appellant who had no customary or any other legally recognised interest in the land. Ground 7(b) of the appeal fails.

(c). Failed to consider the period Weraga had spent on the land entitling him to a defence of limitation.

Having found as above, the issue of limitation as regards the period late Weraga had spent on the suit land would not arise. Limitation period under the law would only apply to tenants recognized under any of the categories stipulated under ***Section 29 of the Land Act (supra).*** Since the late Weraga did not fall in any of those categories other than that of a bare licencee, the limitation period would not accrue to him in the circumstances. Ground 7(c) of the appeal also fails.

The resolution of the above grounds would, in my view, render it unnecessary to consider the remaining grounds of appeal as it would be purely an academic exercise in futility. The net effect is that the entire appeal fails. It is declared and ordered as follows:-

1. ***The Respondents are the lawful owners of the entire suit land comprised in Busiro Block 452 Plot 27 land at Ntabo.***
2. ***The Appellant is a trespasser on all the 18 acres of the suit land, part of land comprised in Busiro Block 452 Plot 27 land at Ntabo, and has no any lawful claim in the suit land or any part thereof whatsoever.***
3. ***The Appellant be evicted for unlawfully occupying the suit land.***
4. ***The Appellant pays costs of this appeal and in the court below.***

BASHAIJA K. ANDREW

JUDGE

12/02/2014.