

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL APPEAL NO. 0079 OF 2012
(ARISING FROM NABWERU CIVIL SUIT 84 OF 2010)**

**STEVEN MULERANGABO APPELLANT
VERSUS
ESTHER ALLEN NATOCHO & OTHERS RESPONDENTS**

BEFORE LADY JUSTICE EVA K. LUSWATA

JUDGMENT

This is an appeal against the judgment of Her Worship Chemeri Jesca Magistrate Grade 1, Nabweru Chief Magistrate's Court in Civil Suit No.84/2010 delivered on 12/10/12, in which she issued a permanent injunction against the appellant and demolition of his structures.

The facts as admitted at the trial are briefly that in August 2009, the respondents jointly purchased an acre of land comprised in Kyadondo block 122 plots 241 and 233 from one Bukenya Vincent. The respondents subsequently subdivided the suit land into four plots (hereinafter called the suit land) i.e. plots 440, 441, 332 & 443 and registered them in each of the respondents names respectively. The plots were fenced off until July 2010, when the appellant entered onto the suit land and started constructing a structure, making bricks and removed barbed wire and mark stones.

In defence to the claim, the appellant contended to have purchased a kibanja interest on the suit land from various bibanja holders between December 2008 and April 2009 all at a time before the respondents acquired their registered interest and used part of it for brick making. He denied removing the appellant's fences or markstones and maintained that his occupation was lawful. At scheduling, it was an agreed fact that the respondents are the registered proprietors of the suit land.

The appellant raised four grounds of appeal as follows:-

1. That the learned trial magistrate erred both in law and fact when he failed to properly evaluate the evidence adduced in court and thereby arrived at a wrong conclusion causing a miscarriage of justice.
2. That the learned trial magistrate erred both in law and fact when he declared that the appellant is a trespasser on the respondents land.
3. That the learned trial magistrate erred in law and fact when he disregarded the evidence which was to be adduced by the parties in the locus quo and the appellant contends that the proceedings at the locus in quo were bad in law and thereby vitiating the whole trial.
4. That the learned trial magistrate erred in law and fact when he failed to properly assess and interpret the meaning and implication of the act of accepting on 24th September 2009, the payment of Shs.500,000/- from the appellant by the respondents' predecessor.

Ground 1, 3 and 4 appear to be attacking the manner in which the trial magistrate evaluated the evidence and thus, I will handle them together.

As usual, I remind myself that as a first appellant court, I have power to re-evaluate the evidence and come to my own conclusions. That notwithstanding,

I caution myself that I am still bound by the findings of fact of the lower court. See for example **Banco Arabe Espanol Bank Vs Bank of Uganda SCCA No.8/98.**

The respondents' claim was in trespass and at the trial, the basis of the appellant's defence was principally that he owned a kibanja on the suit land having purchased the same from different persons and at different dates. An issue was thereby raised as to the validity of the sale agreements that he relied on to prove his interest.

The appellant raised the defence that he owned an equitable and unregistered interest on part of the suit land that was recognized by the previous registered owner and existing prior to the purchase by the appellant. I agree therefore with counsel for the appellant that under S.101 (1) and 110 of the Evidence Act, the burden lay squarely on the appellant to prove ownership of that interest and in addition, that the owners of the mailo interest were fully aware and had consented to his entry onto the suit land and did allow him to deal with it. Counsel argued that the respondents failed to make the necessary inquiries to confirm his presence, and it was thus

wrong for the magistrate to find him in trespass. Relying on the authority of **UPTC Vs Abraham Kitumba, SCCA 36/95** he argued that the appellant's occupation was sufficient, notice of his claim in the suit property to which the mailo interest would be subject. In proving his interest, the appellant put forward several pieces of evidence that I will attempt to traverse as presented.

The main bone of contention of the respondents was that they and their predecessor in title had no notice of the appellant's interest in the suit land, and that at the time of purchase, there were no physical signs of his presence. That in any case, the appellant and all his predecessors did not first seek consent of the mailo owner before dealing in their interests which would vitiate those transactions in totality. In reply, it was argued for the appellant that that argument would conversely be used against the respondents or their predecessors in title who sold the land to the respondents without having given the first option of purchase to the appellant as the existing occupant. The appellant professes to have purchased his interest from Robert Mubiru on 21/12/08, Nabanoba and others on 20/1/09 and Juma Saka on 13/4/09. None of those people were called to testify but J.B. Bukenya Saka the alleged predecessor in title to Robert Mubiru (the first vendor) appeared as DW2.

In her judgment, the trial magistrate observed that none of the vendors in those agreements was called to testify. That of the two people called to collaborate the agreements, Dirisa Sebabi (DW3) The LC1 Chairperson, confirmed that the appellant knew Bukenya Vincent, the former registered owner of the suit land. The other witness J.B. Bukenya Saka (DW2) testified that although shown as a witness, he was not present when the agreement was signed and only signed later. The Court also observed that the agreement between the appellant and J.B. Bukenya dated 24/9/09 indicated a sale of 25 decimals with no specifics of the land being sold or its location and that the Shs.500,000/-, received was not a payment for the appellant to be recognized by Bukenya as a kibanja owner but, for purchase of alternative land which had not yet been identified.

Basing herself on the above evidence, the trial magistrate concluded that no evidence was put forward by the appellant that his predecessors had ever obtained consent from Bukenya before

transacting in the kibanja with the appellant and that the appellant had also not bothered to confirm the landlord's consent which contravened section 34 (3) Land Act. She then held that without consent to enter upon the suit land, the appellant was a trespasser.

It was argued for the appellant that by nature of his acquisition of the kibanja, he is a lawful occupant within the meaning of section 29(1) (b) of the Land Act. He contended that Bukenya Vincent knew him well and had previously accepted payment of Shs.10,000/- being the 'kanzu' as per the Buganda traditions and customs, and subsequently on 24/9/09 accepted Shs.500,000/- as part payment by the appellant for the mailo interest, extending as far as the boundaries of his kibanja. It was further argued that had there been any omission to obtain Bukenya's consent, the foregoing payment would correct that omission to cement the legal relationship between the appellant and Vincent Bukenya.

According to section 29 (1) (b) Land Act (as amended) a "*Lawful occupant means a person who entered the land with the consent of the registered owner, and includes a purchaser.*" Therefore by admission, the appellant was stating that the consent of the registered owner was necessary if his occupancy was to be legitimate.

DW2 who admitted to having owned and then sold part of the kibanja, gave an extensive testimony about the history of part of the kibanja which he stated at one time belonged to his late grandfather Enock Saka who before his death in 1980, had paid 'busulu' tax to Mwebe the former registered owner. That same witness then gave a contradictory testimony by stating that the late Enock Saka was actually succeeded not by him but by his great grandchild Enock Sekamanya but the latter rejected that inheritance and moved on to another area. In that event, DW2 then took over the kibanja only as a caretaker and not owner. It was therefore in that status that he sold part of the kibanja to Mubiru, the appellant's predecessor and gave another part as a gift to Nabanoba and others, the latter who eventually also sold to the appellant.

On the above facts alone, it is doubtful that DW2 being only a mere caretaker and not owner could deal in the kibanja at all. Further, without Letters of Administration, he could not legitimately deal in it and his actions contravened S.191 Succession Act. However, even if he

did, nothing was shown by way of evidence that he had ever paid *busulu* tax to the previous owner. He also did admit that he never came to know of Bukenya Vincent as new owner of the land, and therefore could not reasonably have notified him of his existing interest or the fact that he wished to transfer it to Mubiru. Indeed his testimony was that he introduced Mubiru to the LCs (who he deemed to be the caretakers of the suit land) and not Bukenya Vincent or any of his predecessors. DW3, the LC1 Chairperson was aware that at the time Mubiru purchased from Bukenya Saka, Vincent Bukenya was the landlord

Upon the above facts therefore, I would believe the testimonial of Bukenya Vincent that there was never any consent by him or his predecessors allowing the appellant or his predecessors to deal in the kibanja on the suit land. I am also inclined to believe his testimony that he did not know the appellant up and until August 2009 when he was introduced to him by DW3 as one having a kibanja on the suit land. The contention that Vincent Bukenya likewise did not give the kibanja owner the first option to purchase will not be considered as no counterclaim was even raised by the appellant at the trial.

Much was said by counsel for both parties of and against the evidence of the transaction that took place between the appellant and Vincent Bukenya in August 2009. The date on which the appellant apparently paid Shs.10,000/- as 'kanzu' to Bukenya Vincent was not disclosed and the money was unreceipted. Counsel for the appellant argued that that payment signified that Buganda traditions and customs were thus fulfilled to qualify his client as owner of a kibanja. With respect, counsel cannot profess to be an expert on Kiganda customs and none was called to testify. This evidence was therefore rightly rejected by the trial magistrate and I hold as much.

According *PEXV*, on 24/9/09, Bukenya Peter Vincent agreed to sale to the appellant 25 decimals (along the road) for which he would survey *his* plot and obtain a title. The sum paid was only a part payment and the actual portion purchased was not specified.

Both appellant and Bukenya Vincent do agree that Shs.500,000/- exchanged hands from the former to the latter, it is the reason of its payment that was in dispute.

According to the appellant, the above agreement signified purchase of a mailo interest of 25 decimals and thereby recognition of his kibanja interest. It was with such authorization that he entered upon the suit land, grew crops, and started a bricklaying venture and actual construction. Conversely, according to Bukenya Vincent, he accepted the money from the appellant to agree on purchase of a portion measuring 25 decimals because he could not sell him what he had already sold to the respondents. He did accept that at that point he was prepared to recognize the appellant as his tenant.

According to *PEXI*, the agreement of sale between Bukenya Vincent and the respondents of one acre of land was signed on 8/8/09. He met up with the appellant one month later and sold to him 25 decimals on 24/9/09. By his own testimony, the appellant's first introduction to Bukenya was when he paid the 'kanzu' and shs.500,000/-. Therefore, there was no way Bukenya could have been alerted of the appellant's interest before then. Bukenya did mention the fact that he had heard of one Saka who owned a kibanja on part of the suit land, but he did not know the extent of the kibanja nor the fact that the appellant was Suka's successor in title. There was mention of graveyards which apparently belonged to Suka Bukenya's ancestors, but even then, the testimonies of DW1 and DW2 were contradictory on whether these graveyards were inside or outside the part that the respondents purchased and demarcated. Therefore, what I deduce on a balance of probabilities is that Bukenya Vincent sold to the respondents before he knew of Bukenya's interest.

It follows reasonably therefore that the respondents could not have known (at least not been told by Bukenya) prior to their purchase of the suit land, that the appellant had an unregistered interest in it. Therefore, I cannot find fault on the findings of the trial magistrate on that point.

By his submissions, counsel for the appellant wanted this court to believe that the only logical reason for Vincent Bukenya accepting payment of Shs.500,000/- from the appellant is that he was duly recognizing him as the owner of a kibanja and accepting that sum as an acquisition of title to the kibanja he already owned. Counsel for the respondent disagreed. He argued that this was only an invitation to treat in respect of land not yet identified in a different area from that

sold to the respondents, and at a time after a sale had been completed between Vincent Bukenya and the respondents.

My interpretation of PEX V is that it was for the sale and purchase of 25 decimals of land. The actual price and location of that land is not ascertained and it appears that the Shs.500,000/- was not the purchase price (or part of it) but a fee meant was to cover survey fees for that plot to enable the appellant obtain a certificate of title. The testimonies of both PW2 and DW1, are that they never met again to concretize that agreement. No mention was made of any previous interest of the appellant in that area. I am not persuaded that Bukenya Vincent was by that agreement accepting the appellant as his kibanja tenant and the reference to 'his plot' would be a reference to the 25 decimals that were being considered for sale at that point.

I agree with counsel for the respondent that that document represents an offer to purchase a piece of land whose location and price was yet to be agreed. In fact, consideration for its purchase has not yet flowed from the purchaser to the vendor as the sum mentioned was clearly for survey fees. It is to be remembered that the appellant claimed ownership of a kibanja of about 1 acre, and one wonders what the fate of his alleged residue of 75 decimals would be. In my view, what whatever was agreed upon by Bukenya and the appellant in that document would not in any way affect the previous sale between the Vincent Bukenya and the respondents. Therefore in my estimation the findings of the trial magistrate with regard to PEX V were correct, and I so hold.

Further, counsel for the appellant dealt extensively on the fact that the respondents did not make sufficient inquiries with respect to previous interests on the suit land. That had they done so, they would have come to know about the appellant's interest which is protected under the Land Act. Evidence led by DW1 and DW2 was that the appellant had some structures, brick laying and food crops, on the suit land and that where were grave yards belonging to the ancestors of J.B. Bukenya Saka. The trial magistrate was also faulted for not having noted down and made part of the record, her findings at the *locus in quo* thus leaving out vital evidence to support the appellant's previous presence on the suit land. This according to appellant's counsel would vitiate the entire proceedings.

To the contrary, PWI stated that the suit land was empty and bushy at the time he purchased it. DW2 appeared to support that evidence when he stated that the structures he had erected on the land all collapsed and the banana gardens perished. Even the appellant himself in cross-examination stated that Mubiru, his predecessor, never did anything on the land and that the area showed to him by Bukenya Vincent was bush with only a jack fruit tree. However, even if it were to be believed that the appellant was carrying out some activity on the land, the bone of contention still remains and I have already held that his presence there was unauthorized by the mailo owner.

The above notwithstanding, I do agree with counsel for the appellant that it was important for the trial magistrate to have recorded her findings at the *locus* and thereafter given a decision on that evidence. However, I have found much authority supporting the principle that visiting *locus in quo* is not mandatory and depends on the circumstances of each case. It will be necessary if vital evidence cannot be obtained from the witness in court without visiting the *locus*. See for example **Yaseri Waitte Vs Edisi Byandala (1982) HCB 28** quoted in **Ahmed Dauda Zziwa Ssalongo & Anor Vs Kafumbe Anthony Luyirika (Civil Appeal No.33.20120)**. I have already found that the strength of the appellant's defence succeeded or fell on the question of whether he had authority to purchase, own and utilize an interest in the suit land. This has already been decided against him. A visit at the *locus* would have probably unearthed the truth or lack of it, of his presence on the suit land, and other such pertinent issues. The testimonies of the various witnesses in court were reasonably sufficient to throw light on that particular defence. Therefore, lack of evidence from the *locus*, although procedurally wrong, that omission would not weaken or render the proceedings nugatory.

Therefore, the sum total is that grounds 1, 3 and 4 of the appeal fail. It was also argued for the appellant that the trial magistrate erred in law and fact when she declared him a trespasser on the suit land. Counsel quoting the authority of **Onegi Obel and Achwa Valley Ranch Ltd Vs AG & Anor (HCCS No.6 of 2002)** argued that the appellant having been the owner and in possession of the kibanja on the suit land, could not be stated to be a trespasser. In response,

counsel for the respondent argued that the appellant was never in possession in the suit land which was bushy and that he ignored notices requesting him to vacate.

The definition of trespass given by the Supreme Court in the case of **Justine Lutaaya Vs Stirling Civil Engineering Co. Ltd SCCA No.1 of 2002** is now well followed. It was stated that, *'Trespass to land occurs when a person makes an unauthorized entry upon and thereby interferes or purports to interfere with another person's lawful possession of that land...'*

Furthermore in Salmond Law of Torts 9th edition p.207 it is stated that, the wrong of trespass to land consists the act of entering upon land in the possession of the plaintiff or remaining upon such land or placing any material object upon it without lawful justification.

It was never in dispute that the respondents own the reversion of the suit land. According to PW1, although they purchased the suit land it was unoccupied and bushy. According to PW1 and PW2, the appellant encroached on the land by removing mark stones and the fence they had erected and building structures on it. Although no evidence was presented to support the allegation that it was the appellant who removed the fence and mark stones, he himself admitted his presence by growing crops, brick laying and some construction. The latter in my estimation would amount to an entry on the suit land by the appellant.

Evidence was led, and I have agreed that the appellant and his predecessors (at least dating back to those he purchased his interest from) had no authority of the successive mailo owners to deal in the kibanja interests on the land. I would conclude therefore that the appellant's entry on the suit land was without justification I accordingly find that the trial magistrate was correct in her finding on that aspect and ground 2 of this appeal also fails.

In summary therefore, I find that the appellant has failed to prove all four grounds of appeal on a balance of probabilities. Accordingly, I move to dismiss the appeal with costs.

I so order.

EVA K. LUSWATA
JUDGE
16th October 2014