

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**

**CIVIL SUIT NO. 121 OF 2010**

1. NALUGWA HARRIET  
2. ROBINAH KATAMBA  
3. LUTALO ROBERT } ::::::::::::::::::::::::::::::::::: PLAINTIFFS

**VERSUS**

1. HAJATI AFUWA NAMULEME  
2. NAKABIRI ROY NAKIYINI DOROTHY } ::::::::::::::: DEFENDANTS

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

**JUDGMENT**

The Plaintiffs sued the Defendants in their capacity as the beneficiaries and administrators of the Estate of Late Kisaawe Mukisa Zefania, the deceased who died while he was a Kibanja owner on the Mailo Land that is comprised in Kyadondo Block 265 Plots 6223 and 6224 at Bunamwaya. The Plaintiffs were granted Letters of Administration by High Court of Uganda at Nakawa under Administration Cause No. 392 of 2011 and by virtue of this grant became the proprietors of this Kibanja.

The first Defendant and three other people are administrators of the Estate of Late Kamida Mbazalidde by virtue of the grant under High Court Administration Cause No. 510 of 1988 issued by the High Court of Uganda at Kampala. The late Kamida Mbazalidde was the registered proprietor of the said Mailo land on which the Plaintiffs' father had the suit Kibanja.

On or about the 2<sup>nd</sup> day of April 2004, an Agreement was executed between the family of Late Zefania Mikisa (the Plaintiffs) on one part and Afuwa Namuleme, Defendant, on behalf of the Estate of the Mailo owner Kamida Mbazalidde. (See Plaintiffs' exhibit P.1)

It was agreed:-

- (i) That the Plaintiff do curve a portion out of the Kibanja, measuring approximately 51 feet long and 77 feet long on the other side and 75 ft and 62 ft in width.
- (ii) The land which included the family graveyard has been given to the Plaintiffs by the 1<sup>st</sup> Defendants.
- (iii) That the small house that was on the curved off land be demolished by the Plaintiffs. (This was to form part of the Kibanja that was surrendered to the Defendant).

Lutalo Robert a 34 year old man testified this was his grandfather's Kibanja which was left to his father, where he was born 34 years ago. That they surrendered part of Kibanja on the understanding that the first Defendant would in return give them a Certificate of Title for the rest of the Kibanja.

The Plaintiffs surrendered the portion to first Defendant which she sold to second Defendant.

Under cross-examination, Lutalo stated that part of the Kibanja had been sold off to about 8 people. He stated that himself and other administrators of the

Estate are entitled to the rest of the Kibanja and they wanted the Certificate of Title for the rest of the Kibanja.

P.W.2 Nalugwa Harriet materially gave same evidence as P.W.1. She added that she was shown boundaries by Late Zefania Kisaawe. The 1<sup>st</sup> Defendant agreed to take a portion of the Kibanja and agreed to give a Certificate of Title of the balance or residue Kibanja after taking her bargained for that part.

She seeks Court Orders that:-

(a) Specific performance.

(b) She be ordered to hand over land Title or return the Kibanja she has already sold.

Under cross-examination she revealed the following:-

(a) She does not know the acreage of the Kibanja. She only knows the boundaries.

(b) The widow of her Late father sold part of Kibanja. Some of her sisters and brothers also sold parts of Kibanja, up to about 10 people who live on the sold parts of Kibanja.

(c) That 1<sup>st</sup> Defendant had agreed to give up the bigger Kibanja that remained after she took her part. She understood that her family would remain with Kibanja outside the compound, including the grave yard and what they had sold to other Kibanja holders well before the Agreement with the Defendant now in issue.

The Defence case is that the Defendant agreed to transfer to the children of Late Kisaawe Zefania (the Plaintiffs) the portion of land where they had their family house and the grave yard of their dead relatives.

That the Plaintiff had, in her absence, surveyed off land beyond the agreed area.

The parties' case as stated above leaves two issues for this Court to decide:-

1. Whether the Agreement entered between the Plaintiffs and the first Defendant referred to only the portion of land where the Plaintiffs' family house and the grave yard is situate or the entire balance of the Kibanja.
2. Remedies available to the parties.

In evidence of P.W.2 Nalugwa Harriet she stated that her Late father had sold some parts of the Kibanja. Her mother (widow) had also sold a Plot. Babirye, Nakiyingi, Late Nabosa, Sam Bwaba and Mpande had sold Plots out of the original Kibanja of her father. P.W.3 Kisiitu Christopher stated the Kibanja was approximately 2 acres. That he reconciled the parties which resulted into the Agreement that the Plaintiffs should surrender part of the land to the Defendant since they were unable to pay for the registered ownership of the land (Mailo Register Interests). The Defendant agreed to give them a Title for the remaining part.

D.W.I AFUWA NAMULEME stated that she did not know the size of the whole Kibanja but the unsold part was about 0.25 of acre. Her evidence corroborates the Plaintiffs' evidence that the family of Zefania, before and after Zefania's death sold most of the original Kibanja to other people now Bibanja owners and that the part that she took was measured off the Kibanja the family

had retained. In my assessment this is a credible explanation to the fact that a small house in the compound had to be surrendered to facilitate the measurements being surrendered.

D.W.2 HAMID MUGERWA further supported the above position. He testified that the Plaintiffs inspected the land that they accepted to surrender in lieu of payment for Mailo interest. That they specifically inspected the part that they retained and that it was small. Exhibit P.1, the Agreement defines what was surrendered in lieu of the payment for the Mailo land interests:

*“We, members of the family of the Late ZEFANIA MIKISA, have agreed with the landlord, to carve a portion out of our land (Kibanja) that measures 15 feet wide from the road going downwards and 72 feet long downwards past the compound. It measures 62 feet down from the tree stump towards the road..”*

It is clear that the portion that was agreed and surrendered is not contested or in issue.

What is in issue is whether the Defendant was supposed to give a land Title that included other Bibanja holders. P.W.I and P.W.2 testified that they had sold of some Plots. Some Plots were sold by the parents and siblings before they entered in this agreement with the first Defendant. In my view at the time of this Agreement all the other unnamed Bibanja holders became Bibanja holders on the Mailo land of the first Defendant. The only way the Plaintiff could acquire the Mailo Land Title can only be by a separate Agreement. Since the Plaintiff had sold Plots/Bibanjas they ceased to have any rights over them. The instant Agreement provides for curving out of what they owned and not what they once owned. What the Plaintiff seeks this Court to order is not legally

attainable. It amounts to seeking an Order that would change legal status to persons with equal rights, Bibanja holders which would offend provisions of Section 35 (2) of The Land Act.

*“S.35 (2) The owner of land who wishes to sell the reversionary interest in the land shall, subject to this Section, give the first option of buying that interest to the tenant by occupancy.”*

And the offer made under this Section shall be on a willing buyer willing seller. (See Section 35 (3) of The Land Act).

In view of these provisions, my view is that the Plaintiffs and the first Defendant conducted their transaction where the Defendant sold to the Plaintiffs the reversionary interests in the part of the land that the family of Zefania Mikiisa occupied which was specified as the home and the grave yard. I find that this excluded the reversionary interests of the other Bibanja holders because when they bought the Bibanja from the Plaintiffs’ family they became the Defendants’ tenants by occupancy.

I have considered the Plaintiff evidence to the effect that in respect of some Plots of Bibanja, they were sold after the Agreement in issue. I have already found that the Agreement did not give the Plaintiff the right to take the whole residue or reversionary interest in the whole Kibanja on the Mailo land. Section 34 of the Land Act applies and governs such sales.

S.34 (3) provides:-

*“(3) Prior to undertaking any transaction to which subsection (1) refers, the tenant by occupancy shall submit an application in the subscribed form to the owner of the land for his or her consent to the transaction.”*

The Plaintiffs, tenants by occupancy without prior consent of the landlord could not validly sell the Bibanja or tenancy by occupancy.

Remedies available to the parties.

- (a) Although the second Defendant did not participate in the trial, the evidence available shows that she derived her Title through purchase of the Plot that the Plaintiffs had surrendered to the 1<sup>st</sup> Defendant who sold it to the second Defendant. There was no fraud established against the first and second Defendants in this transaction. In the circumstances the interlocutory Judgment against the second Defendant is set aside and the suit against the second Defendant stands dismissed without any orders as to costs.
- (b) The Order of specific performance is hereby granted to the Plaintiffs, namely the first Defendant shall give the Plaintiffs a Mailo Land Title that covers the home of the family of Late Zefania Mikisa plus their grave yard and any other part they had not sold to other Bibanja holders.
- (c) The Reversionary interest granted to the Plaintiffs as proved by the Agreement exhibit P.1 shall exclude all parts of Zefania’s Kibanja that had been sold by the family because these reversionary interests belong to the Mailo land owner.

In view of the above this suit succeeds in part as specified above and for this reason each party shall be responsible for his or her own costs.

Dated at Kampala this ..... day of August, 2014.

**J. W. KWESIGA**

**JUDGE**