

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

CIVIL APPEAL NO. 3 OF 2014
(From Mengo Chief Magistrates' Court
Civil Suit No. 150 of 2012)

DAVID BYATIKE MATOVU
(Administrator of the Estate of : APPELLANT
the Late Nalinya Ndagire)

VERSUS

RICHARD KIKONYOGO : RESPONDENT

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

JUDGMENT

The Respondent who was the Plaintiff in the original suit sued the Administrator(s) of the Estate of Late Nnaalinya Ndagire formerly of Nakulabye Zone 4, seeking Judgment declaring the Plaintiff as the owner of a Kibanja at Nalulabye Zone 4. He claimed that he bought the Kibanja from Yekoyadda Sserunkuma. He prayed for a permanent injunction to restrain the Defendants from disturbing quiet possession of the said Kibanja, General damages and costs of the suit.

The Defendants pleaded to be Administrators of the Estate of Late Irene Drussila Ndagire, and registered proprietors of the land LRV 579 Folio 20 Plot 1 at Nakulabye. They conceded that the land is situate in Nakulabye Zone 4. The Defendants denied knowledge of the Plaintiff as a Kibanja holder, lawful occupant or bona fide occupant. The Defendants contended that if the Plaintiff purchased the claimed land interests his predecessors or vendors did not obtain requisite consent from the Registered proprietor.

In Counter-claim, the Defendant/Counter-Claimants pleaded that the Plaintiff is a son of Late Kaggwa who had been a tenant in a house belonging to Late Irene Drussila Ndagire and following the death of Kaggwa the Plaintiff took over the tenancy of the house and later on illegally, without consent of the Landlord started constructing structures on the suit land. The Defendant/Counter-Claimants sued against the Plaintiff/Defendant in Counter-claim, for trespass.

The learned Principal Magistrate Grade I Mr. Ereemye James, on 8th January 2014 gave Judgment in favour of the Plaintiff and held:

- (a) The structures and the area belonging to the Plaintiff included a shop house on the road to Luby, uncompleted house at the rear and wooden structures next to the wall of the guest house.
- (b) The old structures belong to Late Nnaalinya.
- (c) A permanent injunction was granted against the Defendant not to interfere with the Plaintiff's quiet enjoyment of the Kibanja.

(d) General damages of Shs.10,000,000/=.

(e) Costs of the suit.

The Appellants were aggrieved by the trial Court's Judgment and filed the following grounds of Appeal.

1. That the learned trial Magistrate wrongly evaluated the Law and evidence on record and came to a wrong conclusion.
2. That the learned Magistrate failed to make a correct application of the Law to the evidence on record and thus coming to a wrong conclusion.
3. That the learned Magistrate erred in holding the Respondent rightly acquired protectable interest on the suit land.
4. That the learned trial Magistrate gravely erred in holding that the Respondent was a lawful occupant of the suit land .
5. That the learned trial Magistrate erred in holding that the Counter-claim did not disclose a cause of action against the Counter-Defendant/Respondent.
6. The learned trial Magistrate wrongly and erroneously exercised his discretion in awarding damages without being supported by evidence on record.

The parties' Advocates filed written submission.

M/S Mugalula & Omalla Advocates filed submissions for the Appellant on 4th March, 2015 and M/S Sekabanja & Co. Advocates filed the Respondent's submissions on 10th April, 2015. The final rejoinder by the Appellants was filed on 15th April, 2015.

Before addressing the grounds of Appeal, I wish to record that I will not necessarily follow the order in which they were preferred in the Memorandum of Appeal because most of the grounds were repeated criticisms of the trial Magistrate's alleged failure to evaluate the evidence and correctly apply the relevant Law.

However, I will address my mind to the cause by evaluating the evidence afresh and arrive at my own conclusions on the pertinent issues at the trial. The approach to this appeal will be on the settled principles of the Law settled in earlier decisions of the Court following decisions of the Superior Court which include:-

SELLE Vs ASSOCIATED MOTOR-BOAT & CO. [1968] EA 123 which stated “... **the duty of the first appellate Court is to rehear the case by considering the evidence on record, value it itself and draw its own conclusions, in deciding whether the Judgment of the trial Court should be upheld, as well of course, deal with any question of Law raised on appeal.**”

Further reference on this point include:

- Fredrick J. K. Zaabwe Vs Orient Bank Ltd. and Others (SCU) C.A. 4 of 2006.
- Pande Vs Republic [1957] EA 336.
- Uganda Breweries Ltd. Vs Uganda Railways Corporation (2002) EA

Finally, in SAMUEL KAREKYEZI Vs THE REGISTERED TRUSTEES OF CHURCH OF UGANDA H.C.C.A NO. 17 OF 2011 (at Kabale) (unreported) the High Court as the first appellate Court stated:-

“This Court being the first appellate Court has the duty to evaluate the evidence as a whole and arrive at its own conclusion. The first appellate Court does re-evaluation of the evidence on record of the trial Court as a whole weighing each party’s evidence keeping in mind that the appellate Court unlike the trial Court had no chance of seeing and hearing the witnesses while they testified and therefore, the appellate Court had no benefit of assessing the demeanour of the witness.”

In view of the above, it is important to consider the issues that the trial Court had to resolve.

The following were the issues for the trial:-

1. Whether or not the Plaintiff rightly acquired protectable interests on the suit land, and if not whether the Counter-claim discloses a cause of action against the Counter-Defendant.
2. Whether the Plaintiff is a bona fide occupant on the suit land and if not whether the Plaintiff is a trespasser on the suit land.
3. What remedies are available to the parties?

It is not contested that the suit Kibanja is situate in Nalulabye Zone 4 and formerly owned by Late Irene Drusilla Ndagire and that the Appellant is the Administrator of her Estate to which LRV 579 Folio 20 Plot 1 at Nakulabye belongs.

It is also not contested that the Respondent occupies the suit Kibanja whether the Plaintiff/Respondent acquired any protectable interest is both a matter of facts and the Law.

The Respondent's claimed interests are derived from a series of purchases. Available evidence shows the following history:-

- (i) Najjemba Jane was the Kibanja holder until 1999.
- (ii) Yekoyadda Sserunkuma bought the Kibanja from Najjemba Jane in 1999.
- (iii) The Plaintiff/Respondent purchased the suit Kibanja from Yekoyadda Sserunkuma around 18th February, 2000.

The learned trial Magistrate in examining evidence to answer whether or not the Plaintiff rightly acquired a protectable interest on the suit land, he considered Plaintiff's exhibits PE1 and PE2 which showed transfer of interests from Najjemba (deceased) to Yekoyadda Sserunkuma (deceased) to the Plaintiff/Respondent. He considered the fact that the deceased predecessors in title lived on the said Kibanja and were well known to the area LC Chairman (also deceased). In evaluation of the Plaintiff's evidence the trial Magistrate did, at the same time, examine evidence from the Defendant on this issue.

PW2 Sekaza Frank confirmed that he was on LC I Committee of the area as Chairman for the youth and he witnessed the sale of Kibanja between Najjemba and Yekoyadda Sserunkuma. Yekoyadda later sold the Kibanja to Kikonyogo Richard who developed it.

PW3 and PW4 corroborated the Plaintiff's evidence that the Respondent's parents were tenants on houses of Nnaalinya (deceased) and he purchased the suit Kibanja in the area from Yekoyadda Sserunkuma who had purchased it from Najjemba.

My understanding of this evidence is that what the Respondent bought is not what his parents previously rented. Nnaalinya's rentals means houses that Nalinya had built to rent to tenants. There is evidence that Najjemba sold the Plot/Kibanja with only one very old house. My finding is that Kikonyogo's right of claim of Kibanja interests is completely different from what his parents rented from the Appellant's predecessor in title Nnaalinya Ndagire.

The Defendant, Administrators of the Estate of Late Irene Ndagire who died in 1985 and by virtue of being Administrators of the estate became registered proprietors of the land LRV 579 Folio 20 Plot 1 at Nakulabye under Instrument No. 329424 of 2nd December, 2002.

The Letters of Administration were granted under High Court Administration Cause No. 292 of 1985 on 8th September, 1985. The Letters of Administration were granted to EDWARD NSUBUGA, ERISA KIRONDE, ISAAC MATOVU and DAVID MATOVU. By virtue of the Letters of Administration they became capable of suing or being sued in respect of the Estate of Nnaalinya Irene Drusilla Ndagire and this could be done jointly or severally.

I wish to state at this stage that the Defendant/Appellant's authority over the suit land does not start from the date of being registered on the Certificate of Title but on the date of the grant of Letters of Administration. This is because there is no specific time within which a person who acquires registrable instrument such as succession grant or Transfer deed is supposed to be registered. The dates of transfer are not material in determining whether the Plaintiff/Respondent obtained consent to purchase Kibanja. There is no evidence from the Plaintiff/Respondent to show that he failed to seek consent because of non-registration.

Kikonyogo Richard (PWI) testified that he purchased the Kibanja in 2000 and the diligent search he did was with LCs to confirm whether the Vendor was the owner of the Kibanja. He met Matovu, Appellant, in 2006 when he had a challenge of another person claiming to be the Landlord.

Therefore before Kikonyogo purchased he did not search for the Landlord. My finding is that the Purchaser, the Plaintiff/Respondent's diligent search stopped at establishing the ownership of Kibanja. This search was correct except that he omitted to ask the seller or the LC officials to lead him to the Registered proprietor for consent to sell/purchase.

Section 34 of the Land Act governs transactions with the tenants by occupancy. In my view the Plaintiff/Respondent has proved that his dealings in the suit Kibanja with Yekoyadda was a lawful transaction by virtue of the fact that there was a willing seller and willing buyer relations as permissible by Section 34 (1) of the Land Act.

However, Section 34 (3) of the said Act provides:-

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

Section 34 (9) also provides as follows:-

“(9) No transaction to which this Section applied shall be valid and effective to pass any interest in land if it is undertaken without a consent as provided for in this Section, and the recorder shall not make any entry on the record of any such transaction in respect of which there is no consent.”

Under cross-examination the Plaintiff/Respondent showed that he knew the Kibanja is an interest on a registered land and that there must be a Landlord for the Kibanja owner. He had a duty to take the essential step of obtaining the consent of the registered proprietor and there is no proof that he took this diligent prerequisite to purchasing a Kibanja and therefore the transaction between him and his purported seller offended the provisions of Section 34 (3) of the Land Act and the transaction did not transfer Kibanja holding.

Reference has been made to decisions namely;

(a) Muluta Joseph Vs Katama Sylvano S.C.C.A No. 11 of 1999.

(b) Sheik Mohamed Lubowa Vs Kitara Enterprises Ltd. C.A. No. 4 of 1987.

(c) Joy Tumushabe & Another Vs M/S Anglo-African Ltd. and Another S.C.C.A. 7 of 1999.

The principle of Law settled among others is that in selling/purchasing of a Kibanja on a titled land, the consent of the Landlord is mandatory. Therefore the answer to the first issue that was before the trial Magistrate is that the Plaintiff/Applicant did not acquire a Title to the Kibanja he paid for because he did not have the Landlord's consent. He did not acquire protectable interests on the land.

I will consider the question of whether the Counter-claim discloses a cause of action at a later stage; I prefer to deal with the question of Whether the Plaintiff is a bona fide occupant on the suit land?

Section 29 defines who qualifies to be “a bona fide occupant” of land.

Section 29 (2) states

“(2) ‘Bona fide occupant’ means a person who before the coming into force of the Constitution –

(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more;

(5) Any person who has purchased or otherwise acquired the interest of a person qualified to be a bona fide occupant under this Section shall be taken to be a bona fide occupant for the purpose of this Act.”

The trial Magistrate after evaluating the evidence stated:-

“In the instant case since the Kibanja was formerly owned and possessed by Najjemba Jane who it is presumed by the evidence of Buyondo PW4 and PW2 Sekeza Frank that the said Najjemba lived and occupied the same during the existence of Nnaalinya Irene Drusilla and was never compensated by Nnaalinya at the

time of acquiring Lease hold Title interest it can be concluded that the same Najjemba Jane could pass the said Kibanja to Sserunkuma Yekoyadda who subsequently sold the same to the Plaintiff.”

The learned trial Magistrate based the above conclusion on the provisions of Section 29 (1) (b) and (c) that sets out the elements of “lawful occupants.”

Section 29 (1) provides the definition of a lawful occupant that means

“...

(b) a person who entered the land with the consent of the registered owner and includes a purchaser; or

(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 Lease hold Certificate of Title.”

This Court, as first appellate Court has a duty to evaluate the evidence on record to come to its own conclusion on whether the Plaintiff is either a lawful occupant or a bona fide occupant.

In my view for a person to be a lawful occupant the following ingredients of that occupancy must be proved by he who claims to a lawful occupant:-

- (i) That he entered the land with the consent of the Landlord/owner of the land. OR
- (ii) That he/she occupied the land as a customary tenant before the land was leased to the registered owner; AND
- (iii) That the customary interest were never disclosed or compensated by the Lease holder at the time of acquiring the Lease.

In the instant case the Plaintiff had the burden of proof to adduce evidence to prove (a) that NAJJEMBA JANE or SSERUNKUMA YEKROYADDA had occupied the suit land with the consent of Nnaalinya Irene Drusilla Ndagire

Alternatively (b) that at the time Nnaalinya Irene Drusilla Ndagire obtained the Lease hold title, Najjemba or Sserunkuma had been in occupation of the land as customary tenants.

To answer these sub-issues which are important in resolving the main agreed issue it is important to examine the testimonies and the exhibits received at the trial.

The Lease hold Certificate of Title exhibited shows that LRV 579 Folio 20 Plot 1 at Nakulabye was issued on 21st April 1965 for 49 years with effect from 19th March, 1965 and IRENE DRUSILLA NDAGIRE of P.O. Box 14163 Mengo was the Registered owner.

The Plaintiff/Respondent's claimed rights stem from or are derived from Najjemba Jane. Her occupancy is traceable using the evidence of installation of water supply by National Water and Sewerage Corporation in her name. This evidence establishes that Najjemba occupied the suit land however the issue is whether she was a lawful occupant and if whether she had the consent to sell the Kibanja to Sserunkuma.

The trial Magistrate erred in Law when he stated “... **the Defendants acquired Letters of Administration to the Estate of Late Nnaalinya Ndagire in 1985 but entered on the register as Administrators in 2002. The purchase by PWI of the Kibanja in 2000 cannot be effect retrospectively by registration of the Administrators on the Certificate. Therefore the requirement for consent cannot be pleaded at this time.**”

With due respect to the learned trial Magistrate, the Defendant/Appellant's responsibility and powers to give consent is effective from the date of grant of Letters of Administration in 1985 and not from the date of registration with Registrar of Titles. There is no evidence that in 2000 the Plaintiff carried out a diligent search for the people in charge of Nnaalinya Estate before he purchased. The evidence available is that he traced the people in charge of the estate in 2006 when he was confronted by a third party who claimed authority. There is no explanation as to why he did not do so in 2000 and if he had he would have found the Administrators of the Estate in 2000 for they legally and factually existed since 1985.

I agree with the appellant's Advocates' submissions that pursuant to Section 134 (2) of RTA the Administrator's legal authority relates back to the date of death of the proprietor of the land. However the issue in the instant case is that the Administrators of the Estate were legally appointed by the Court in 1985 and the Respondent who purchased in 2000 never took any essential step to obtain consent to purchase the suit Kibanja.

Secondly he has failed to discharge the evidential burden to prove that the sellers namely Najjemba and/or Sserunkuma had consent to occupy or sell the suit land.

The law on this is well stated in S. 134 (2) of RTA in the following words:-

“(2) The title of every executor or administrator becoming a transferee under this section shall upon such entry being made relate back to and be deemed to have arisen upon the death of the proprietor of any land, Lease or mortgage as if there has been no interval of time between such death and entry.”

In view of the above the Appellant had powers to challenge the legality of the Respondent's occupancy of the Kibanja. There is evidence that the Appellant, on learning of the Respondent's occupancy between 2006 and 2008 challenged the claimed occupancy which gave rise to filing of this suit in 2012. From the time the Respondent occupied this land and the time his occupancy was contested is well below (12) twelve years, therefore he is not a bona fide occupant in terms of Section 29 (2) (a) of

the Land Act. I have, hereinabove, discussed the status of Najjemba and Sserunkuma and I have held that there is no proof that they entered the suit land with the consent of Nnaalinya Ndagire and their transactions were invalid for lack of consent to sell therefore the Respondent did not become a bona fide occupant under Section 29 (5) of the Land Act.

I have considered the evidence on record and I have found that the Defendant/Counter claimant at the trial had a cause of action and proved that the Plaintiff/Respondent was guilty of wrongful occupancy of the suit land and lived in trespass. He occupied the suit land without the consent of the owner.

In this Judgment, I do dismiss the Plaintiff/Respondent's suit and therefore he is not entitled to general damages. I do hereby set aside the award of Shs.10,000,000/= as general damages and I find no need to discuss whether the general damages were excessive or assessed on wrong principles.

I agree with the appellants' Advocates' submission that there was inconsistency in the trial Magistrate's evaluation of evidence while he was able to differentiate structures on the suit land, namely that the new structures had been constructed by the Plaintiff/Respondent and that the old structures belong to Nnaalinya Ndagire in which the Plaintiff had lived with his parents before the purported purchase from Yekiyadda, he should have held that these old structures belonged to the Estate of Nnaalinya Ndagire which was entitled to recover rent from whoever occupied it or

had been collecting the rent. The Counter-Claimant did not lead evidence in proof of this item and I make no award for it.

REMEDIES

(a) Having dismissed the whole of the Respondent's suit and having declared that he did validly purchase the suit Kibanja he is not a bona fide occupant or lawful occupant, I find and declare that he is a trespasser.

(b) The Respondent or anybody claiming under his name, without the consent of the Defendant/Appellant is not entitled to remain on the suit land and I grant the Defendant/Respondent vacant possession of the suit land.

(c) I grant a permanent injunction against the Respondent restraining him from dealing with the said land.

(d) General damages:

I have considered the fact that the Appellant was subjected to inconveniences. He was denied collection of rent from the old houses that had been built for rental by Late Nnaalinya Ndagire. He was inconvenienced by the suits filed by a trespasser on the suit land. I have also considered that the Respondent is found guilty of trespass to the prejudice of the estate of Nnaalinya Ndagire since 2000 now a period of about 15 years and the trespasser has benefited collection of rent from structures he built on the suit land that he occupied in

trespass. For all these I have assessed and awarded the Appellant General damages in a sum of Shs.15,000,000/= (Uganda Shillings Fifteen million only).

(e) The Appellant is granted costs both in the original suit and in this Appeal.

(f) The above decretal sums shall attract interest at 10% per annum from the date of Judgment until payment in full.

(g) An eviction Order against the Plaintiff/Respondent is granted to the Appellant.

Dated at Kampala this 14th day of May, 2015.

J. W. KWESIGA
JUDGE