

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)  
CIVIL SUIT NO. 252 OF 2009**

**EPAFULADITO SERWADDA ..... PLAINTIFF**

**VERSUS**

**1. KASOZI STANELY**

**2. IRENE NALUWEMBE ..... DEFENDANTS**

**JUDGMENT  
BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

The plaintiff who is the registered proprietor of land comprising Block 28 Plot 238 at Makerere (hereinafter referred to as the suit land), presents this action in trespass. He claims that he permitted the defendants' predecessors to stay on the suit land with specific conditions. That the defendants abused that permission and instead made developments thereon and refused to vacate when requested. He thereby seeks an eviction order, permanent injunction, general damages and costs against them.

The defendants conversely argue that the occupation of the suit land is lawful being a result of long occupation and inheritance from those who occupied the suit land as far back as 1918.

Evidence was adduced by oral testimony and there was a locus visit conducted on 21/5/15, at which all parties and their witnesses were in attendance. Counsel

filed their written submissions late, but nonetheless, they are considered in my judgment.

Two issues were raised in the scheduling for determination. I will address them as raised.

**Issue One:** Whether the **defendants** are **Kibanja** holders or bonafide occupants on the suit land.

It was an agreed fact that the plaintiff is the registered proprietor of the suit land and the certificate of title in respect of Block 28 Plot 238 was admitted in evidence as P.I.D.1. At the instance of the court, the parties agreed to the appointment of a joint surveyor who attended the locus visit on 21/5/15 and generated a report, which was admitted as a court exhibit. The court also generated a sketch map from her findings at the locus visit. Considerable reference to both documents is evident in this judgment. Evidence in court and at the locus indicated the presence

of the defendants' developments on both Block 28 plots 237 and 238 which are adjacent to each other.

The claim is in trespass on the suit land. However, it transpired from the evidence, in particular that of D1 and the appointed surveyor, that the 1<sup>st</sup> defendant's, developments are majorly to be found on Plot 237 with only a small portion measuring approximately 0.061 acres traversing into Plot 238. It was apparent also that the plaintiff and PW2, the plaintiff's daughter, were not sure or in fact unaware that the plaintiff owns Plot 238 and not Plot 237 albeit the fact that Plot 237 is under the management of PW2.

According to Exhibit P.I.D.1, the plaintiff is the registered owner of the plot 238 and not Plot 237. In fact, his pleadings relate to plot 238 only I would thereby agree with counsel for the defendants that without having actual or constructive occupation of Plot 237, or have powers of attorney of the registered owner of Plot 237, the plaintiff cannot possibly maintain a cause of action in trespass in its respect. Thus, for the avoidance of doubt, my judgment will be restricted only to the alleged trespass by the defendants in Block 28 Plot 238 Makerere (hereinafter referred to as the suit land) It follows that the registered owner of block 28 plot 237 may if he so wishes, challenge the occupation of the 1<sup>st</sup> defendant on his land.

Both defendants claim an interest in the suit land as owners of a Kibanja interest or due to long, uninterrupted occupation. I would agree with counsel for the plaintiff on their submissions on proof of a Kibanja interest. Customary tenure is defined in Section 1(l) of the Land Act (hereinafter referred to as the Act) as "*a system of land tenure regulated by the customary rules which are limited in their operation to a particular class of persons which are defined in Section 3*". A Kibanja is a form of a customary land tenure to be found mainly in the Buganda region and held according to long established rules developed along Kiganda customs. I do agree therefore that a Kibanja holder is a customary tenant within the meaning of section 3 of the Act. The court in **Kampala District Land Board & George Mutale Vs. Venansio Babweyala & Ors (SCCA 2/07)**, held that a customary tenancy must be proved. Such proof would entail for example long occupation, recognition of the owner of the reversion or landlord (and vice versa) and payment of ground in the case of land in Buganda in some instances payment of a type of land tax or rent.

The defendants' claim to have had long occupation of the suit land by themselves and their predecessors in title that was not denied, save that the plaintiff's contention is that he only allowed their predecessors to stay on the suit land temporarily on request. The defendants acknowledged the plaintiff as the registered owner but from their evidence, did not recognize him as their customary landlord and certainly no busulu/rent (before it was abolished) had ever been paid. By either them or their ancestors. In such circumstances, I would conclude that no Kibanja interest has been proved by either defendant in respect of the suit land.

Would the defendants therefore qualify as bonafide occupants?

For the purpose of this suit, a bonafide occupant is defined in Section 29 (2) (a) of the Act as one, before the coming into force of the constitution (1995), had occupied and utilized and developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more. (Emphasis mine). Naturally, the interests of bonafide occupants are equitable rights and not registered and can only be deduced from the facts of each case, and evidence of physical occupation.

Faced with similar facts, the Supreme Court in **George Tuhirirwe Vs Carolina Rwamuhanda SCCA 15/2007** posed a question that would be instructive to this court i.e. Did the occupants enter the suit land with the consent of the registered proprietor? Did they remain on it and utilize it with the consent of the registered proprietor within the time ambit prescribed by the law?

The plaintiff is in agreement with the fact that one Omumbejja Ezaria Nakamanya Nakirijja, a relative of the 2<sup>nd</sup> defendant was resident on the land at the time he purchased it. He also conceded that he allowed Wilson Muwonge, the 1<sup>st</sup> defendant's father and later, the 1<sup>st</sup> defendant, to occupy and work on a small portion of the suit land contending only that it was on condition that they do not put up any developments.

The plaintiff is in agreement with the fact that one Omumbejja Eria Nakamanya Nakirijja relative of the 2<sup>nd</sup> defendant was resident on the land at the time he purchased. He also conceded that he allowed Wilson Muwonge, the 1<sup>st</sup> defendant's father and later, the 1<sup>st</sup> defendant, to

occupy and work on a small portion of the suit land contending only that it was on condition that they do not put up any developments.

I noticed that, PW1 who was of advanced age could not recall much of the history of the suit land and could not tell when Muwonge sought his permission to occupy the land or when he died. PW2 stated that the 1<sup>st</sup> defendant only came to the suit land after one Nantongo died. That he and had lived on the suit land for only eight years during which time he erected numerous temporary structures which he rented out to various people some of whom were known to her. Neither she nor the plaintiff had received any rent or busulu from either defendant.

On the other hand, the 1<sup>st</sup> defendant testified that he was born in 1957 in the suit land and grew up on the suit land. That Wilson Muwonge his late father had lived and was married on the kibanja in 1955, and their occupation dated back to his grandmother Maliza Tusaba who lived there between 1918 and 1964. That there was no dispute between the plaintiff and the deceased who recognized each other as landlord and kibanja owner. That he was first introduced to the plaintiff as owner, by the deceased in 1970. He claimed that when his father died, the kibanja that measured 130ft by 220ft and covered both Plots 237 and 238 was left to him by his late father and he took control in 1986. He admitted to have made some developments after 1996 and there was evidence that him and the deceased paid KCC rates in 2002 and 2014 respectively.

On her part, the 2<sup>nd</sup> defendant claimed that her kibanja measuring 130ft by 220ft covered the entire suit land and that she had been in occupation for 48 years. That she inherited it from Omumbejja Nakamanya Nakirijja her aunt, who in turn received it from her grandfather, Yokana Gyagenda. That Gyagenda's kibanja existed even before the plaintiff purchased the suit land. She recalls to have lived on the kibanja with Omumbejja from an early age, and had stayed there uninterrupted for the last 4 years until 1995 when the plaintiff removed iron sheets from one of her houses. That before 1995, she had never met the plaintiff and had been told by Omumbejja that their landlord was one Samwiri Mukasa Muganzawongerera. Neither she nor her predecessors had ever paid busulu as none was requested. She admitted to have taken over responsibility of the kibanja in 1993 and only renovated structures originally built by the Omumbejja and her grandfather but which were all occupied by her tenants and produced receipts from KCC for rates in 1972 and 2014 respectively. They were admitted in evidence as Exhibit D4.

In addition to their testimonies, the *locus* visit indicated long occupation by the defendants. The plaintiff plainly admitted that one of the 2<sup>nd</sup> defendant's predecessors was already on occupation of the suit land when he purchased it. He also admitted having authorized the defendant's entry, at least that of their predecessors. It could be that each was allowed to occupy only a small part, but the plaintiff did not show which particular part or its size

There was no evidence that the 2<sup>nd</sup> defendant ever buried any relative on the portion he occupied on the suit land, but PW2 did testify that she witnessed him exhuming deceased persons which would mean some were buried there at some point. The 1<sup>st</sup> defendant claims most developments were put up before he was born in 1954 and there was evidence of an old structure made of mud and wattle which he claims belonged to Tusaba Maliza his grandmother. From my observation, during the locus, his structure that overstepped into the suit land but could have been built by him over the years. Again PW2 admits that she observed the presence of some of his structures when she came to live on the land in 1996.

The developments stated to belong to the 2nd defendant covered the better part of the suit land. Some are clearly old buildings that could lend credence to her testimony that they were erected by his predecessors. PW2 admitted her presence in 1996 because they shared some of the food crops grown by PW2 on the suit land. The graveyards stated to belong to the 2<sup>nd</sup> defendant's relatives were evident on the ground and prominently captured by the survey report. No evidence was adduced by the plaintiff to show that they were only recent burials.

On a balance of probabilities, and judging from what I observed at the locus, I am convinced that both defendants' presence on the land is long standing. The entry of their predecessors was authorized by the plaintiff and it appears that conflicts between them and the plaintiff only arose more recently in the mid-1990s. The 1<sup>st</sup> defendant was born there more than 50 years ago and the 2nd defendant has lived on the suit for more than 40 years. Their ancestors lived there much earlier than that. There is evidence of resistance from the plaintiff against that occupation and its expansion at different times but, it came in the mid 1990s well after the long occupation of the defendants was established.

Therefore, is strongly evident is that the defendants' occupation by themselves and their predecessors spans along time. This is a period exceeding 12 years before the promulgation of

the 1995 constitution. According to Section 29 (15), a person acquiring interest of a bonafide occupant is him/herself a bonafide occupant. Both defendants claim to have inherited their interest. That section did not exclude acquisition by inheritance and there is authority to show that they are not necessarily required to first have obtained Letters of Administration in respect of their

Predecessor's estates. This is because, that interest devolves to them merely by the fact of continued occupancy. See for example **Prof. Gordon Wavamuno Vs Sekyanzi Sempijja HCCA. 27/2010**. The defendants thus do qualify to be classified bonafide occupants within the meaning of the Land Act and are declared to be and so. The decision of the Supreme Court in **Kampala District Land Board & Anor Vs NIC SCCA 2.04** quoted in **Kampala District Land Board & Anor Vs Venansio Babweyaka & 3 Ors, SCCA No.2/07** would thus be binding on this court.

The first issue is thereby decided in favour of the defendants.

**Issue Two: Whether the plaintiff is entitled to the reliefs sought in the plaint.**

According to the plaint, the defendants are deemed to be trespassers and thereby an order for their eviction and a permanent injunction to restrain them from further interference of the plaintiff's enjoyment of the suit land is sought. Unfortunately, all those orders cannot be granted because I have found both defendants to be bonafide occupants on the suit land. They accordingly enjoy security of occupancy on the suit land and cannot under Section 31 (1) of the Land Act be evicted from it. Their occupancy can only be determined under the provisions of Section 31 (7) of the same Act. Therefore the reliefs sought are altogether denied.

In summary therefore, the suit has failed and stands dismissed. The plaintiff shall pay the costs of the suit to the defendants.

I so order.

**EVA K. LUSWATA**  
**JUDGE**

**26/02/2016**