

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)  
CIVIL SUIT NO. 170 OF 2005**

**LUCY NAKITTO *through her lawful*  
Attorney BUNJO FRANCIS:.....PLAINTIFF  
VERSUS**

**1. PATRICK SENYONGA *aka* BUYINZA  
2. ROSE NAKITTO:.....DEFENDANTS**

**BEFORE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

The Plaintiff through his Attorney sued the Defendants jointly and severally vide a plaint dated 21<sup>st</sup> April 2006. According to paragraph 3 of the plaint (amended) and dated 2<sup>nd</sup> April 2014. Under PW3 thereof, the Plaintiff sued for declaration that the Defendants are unlawfully occupying the suit land and trespassing on the same, vacant possession, permanent injunction, general damages for trespass and costs of the suit.

The cause of action is stated in paragraph 4 of the plaint and briefly shows that the Defendants are biological children of a one Yowana Yakuze who was a onetime administrator of the estate of the late Atyeni Mukasa.

The said Yakuze had given them portions of bibanja on which they set up developments. However, Yowana Yakuze from whom the Defendants claim their rights had his proprietorship de-registered by Court order. The administration of the suit land was then placed in the hands of Victoria Nakalembe as administrator of the estate of the late Atyeni Mukasa. As a result, it is the Plaintiffs' case that the Defendants have no registrable interest in the land, and are on the land unlawfully and without authorisation by the Plaintiff.

In defence and counterclaim, the Defendants aver that their children of the late Yowana Yakuze. In paragraph 4 of the 1<sup>st</sup> Defendant's written statement of defence, he avers that Yowana Yakuze was a customary heir to the late Atyeni Mukasa. That upon his death, the

late Atyeni Mukasa willed Yowana Yakuze to be his customary heir, to hold all the land for the whole family.

The defence alleges in paragraph 4(d) that in 1997, the Plaintiff's mother Victoria Nakabembe obtained Letters of Administration to the estate of the late Atyeni Mukasa (her father) and fraudulently caused the transfer of the land that belonged to Yowana Yakuze into her names, and subsequently into the Plaintiff's names and also sold some of it to third parties.

Paragraph 5 lists the particulars of fraud. In the counter claim, the Defendants' claim for cancellation of the Plaintiff's title and for damages and costs.

In proof of the case, the Plaintiff led evidence of four witnesses and several exhibits. The defence called three witnesses and exhibited documents. During scheduling, the parties agreed on the following issues;

1. Whether the Defendants' defence and counterclaim is *res-judicata*.
2. Whether the Defendants are trespassers on the suit land
3. Whether there are any remedies available to the parties.

I noted from the submissions of the Defendants that another issue was addressed by them, which did not arise out of the scheduling. This was the issue as to whether the suit is time barred. I will address this issue lastly since it was not part of the three issues agreed above.

I resolve the issues as herebelow;

1. Whether the Defendants' defence and counterclaim is *res-judicata*

In his submission, Counsel for the Plaintiff pointed out that the Defendants had abandoned the counterclaim. However, in their defence, the defence Counsel argued to the contrary. I have examined both the defence and counter claim. Counsel for the Plaintiff points out that evidence through PW1, showed that there had been earlier litigations in Court involving the subject matter of the defence/suit land. He referred to EXP2x; a Judgment under Civil Suit No. 74 of 1984 of Masaka Chief Magistrates Court and EXP3- a Judgment of the High Court which was dismissing the appeal filed by Yowana Yakuze against Victoria Nakabembe.

Counsel referred further to Misc. Application No. 17/1993 (Ex.P4) which sought orders to have the names of the Defendant's father Yowana Yakuze cancelled from the certificate of title and be registered in her names. This was done vide EXP4.

He also referred to EXP5, whereby he referred to another application No. 353 of 1997 in the High Court between Victoria Nakabembe versus John Jones Salongo regarding Kibuga Block 1 Plot 433, Plot 1070.

Counsel argued that the Defendants have no claim on the suitland by virtue of the above facts which show that Yowana Yakuze from whom they claim the title had his name, but has been cancelled from the said title and the land reverted to Victoria Nakabembe. The land was later given to the Plaintiff as a share of her inheritance being a daughter of the late Victoria Nakabembe, a granddaughter of the late Atenyi Mukasa.

Counsel referred to evidence of PW1 both in chief and cross examination and exhibits; EXP2, EXP3, EXP4, EXP5 and EXP10, to argue that all issues regarding the administration of the estate of the late Atenyi Mukasa and proprietorship thereof had earlier on been fully litigated upon in Courts of law between the Plaintiff's mother Victoria Nakabembe and Yowana Yakuze; the Defendant's father.

Counsel further observed that no evidence in proof of the counterclaim or fraud had been adduced in Court, and basing on EXP5 and EXP6, he concluded that the Plaintiff lawfully holds the suit land and is protected by virtue of **Sections 59 and Section 176 of the Registration of Titles Act**. He also relied on the case of *Olinda D'Souza versus Kasamali Manji (1962) EA 756*, to argue that;

*'in the absence of fraud, possession of a certificate of title by the registered proprietor is conclusive evidence of ownership of the land and the registered proprietor has indefeasible title against the whole world'.*

Counsel therefore argued that the Plaintiff is the lawful owner of the land. He argued that the claims of the Defendant based on Yowana Yakuze were conclusively determined in *Civil Suit No. 73 of 1984 (EXP2x) and Civil Appeal No. 10/1986 (EXP3)*, by both *His Worship B. F. Babigumira, and Justice Byamugisha*.

The Defendants' Counsel on the other hand referred to **Section 7 of the Civil procedure Act** to argue that none of the issues in the Defendant's defence and counterclaim namely whether they are on the suit land lawfully or whether their father was the lawful proprietor of the same at the time had ever been tried in Court.'

Counsel referred to EXP2 and argued that it related to revocation of a grant, while EXP3 (appeal) was dismissed for being incompetent, EXP4 was for cancellation of names and substitution of Yowana Yakuze's names with Victoria Nakabembe's names, EXP5, was on the other issues and EXP10 is a subsequent suit. He therefore argued that in all those cases, *res-judicata* could not arise.

The law regarding *res-judicata* is contained in **Section 7 of the Civil Procedure Act** and it is provided that;

*'No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially, in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that Court'*

According to **Ponsiano Semakula versus Susan Magala (1979) HCB 89**, in determining whether or not a suit is barred by *res-judicata*, the test is whether the Plaintiff in the second suit is trying to bring before the Court in another way in the form of a new cause of action a transaction which has already been presented before a Court of competent jurisdiction in earlier proceedings which have been adjudicated upon'

Applying the above test to the facts before me, the question that is pertinent is what issues are the Defendant's/counterclaimants coming with to Court for determination?

According to the defence Counsel's submissions at page 4 the fifth paragraph, he states that;

*‘The issue of whether Yowana Yakuze was the lawful proprietor of the suit land by virtue of the succession certificate was never conclusively determined’.*

In my opinion therefore, that is the issue for investigation to determine if all the previous Civil Suits as enumerated have ever conclusively determined the same question. In his submissions in rejoinder, Counsel for the Plaintiff at page 2 reiterated his contention that the above issue was considered and conclusively determined under the cited cases, thereby rendering the defence/counterclaim *res-judicata*.

I have looked at the said Court Judgments and Rulings as exhibited and find as follows:

**PE2X – was a Judgment in Civil Suit No. 73 of 1984 between Yoana Yakuze and Victoria Nakabembe**, before His Worship Babigumira. The Judgment is very elaborate and related to claims for revoking Letters of Administration, an injunction and other alternative remedies. During the trial, the Court considered that the Plaintiff claimed that the late Atyeni Mukasa made a Will in which he named the Plaintiff (Yoana Yakuze) a heir and beneficiary of his estate; and that the Defendant had gotten Letters of Administration to the said estate of the late Yoana Yakuze on the 7<sup>th</sup> day of February 1984 and was now surveying and selling parts of the estate hence the suit (see page 1 and 2). It further stated that the Defendant’s case was simply that their father left no Will and the purported Will was a forgery hence the Defendant had to apply for Letters of Administration to administer the estate of her late father.

Court examined the evidence and concluded it in favour of the Defendant. At page 6 of the Judgment, the Court noted that though the Plaintiff raised the issue of the Succession Order, there was no evidence of the same. The Magistrate observed that;

*‘Lastly, it was submitted for the Plaintiff that the estate, having been administered under Succession Order (Buganda 1962), all the complaints about it were closed. As Counsel for the Plaintiff admitted in Court, a copy of this order was not available.’*

This meant that the issue of Succession was raised in that Court, but the Plaintiff failed to prove it and hence the matter was determined on the balance of probabilities in favour of the defence.

The effect of that is that the issue of the succession by Yoana Yakuze was already determined under this suit.

**EXP3 was Civil Appeal No.10/1986, before Hon. Lady Justice C. K. Byamugisha of the High Court between Yoana Yakuze and Victoria Nakabembe** – This was an appeal arising from the Judgment under PE2X above and it was dismissed. No further appeal is on record.

**EXPP4; Victoria Nakabembe versus Johnjones Salongo Misc. Application No. 17/1993** – before **J. W. Kityo** considered at page 3; the fact that Court had relied on, among others; Original Civil Suit No. 73/1984; High Court Civil Appeal No. 10/86, and Letters of Administration and concluded at page 4 as follows:

*“Although her late uncle Yoana Yakuze had been formerly appointed the administrator of the said estate and a trustee to the minor beneficiaries, he had grossly intermeddled with the estate and failed to distribute the same among the entitled beneficiaries ..... that since the Applicant had been appointed during Yoana Mukasa’s life time and the latter, though unsuccessfully attempted to have the appointment cancelled by Court process – the Applicant was entitled to have her name registered in the certificate of title on the land/property belonging to the suit/estate as the administrator in place of Yowana Yakuze who should be cancelled and certificate in his possession be called for cancellation.....”*

The Court was satisfied and granted the prayers. That case substantially considered the question being raised by the Defendants in the present claim.

**PE10, is Civil Suit No. 395/2012 of the High Court Land Division between Sarah Namata Semakula and Sereste Nsubuga, Cote Nakibuka and Rose Nakityo before Hon. J. Bashaija.**

In this case, the facts appear to be at par with those before me and parties are claiming under the same interests as those before me. The issues before Court involved determining the issues relating to lawful possession of the suit land, trespass and *res-judicata*.

The Court at page 4 of the Judgment made reference to the earlier cases in Masaka Chief Magistrate's Court, the Court of Appeal and other earlier litigations and concluded that this suit land had been clearly decreed by successive decision of the respective Courts as that of the Plaintiff's mother. This Court made a comment at page 11 of the Judgment that the issues raised before it, were conclusively determined by the lower Courts and superior Courts as evidenced in the exhibited decisions.

The Court found at page 10 thus;

*'This is evidenced by copies of Judgments, Rulings and Court Orders in the Plaintiffs exhibits referred to above. The Defendant's father lost all successive Court cases and all Courts decision confirmed that the Plaintiff's mother was the rightful owner of the suitland. Following the Plaintiff's mother's Court victory, she was duly registered on the title as a lawful owner of the suitland and the Defendant's father's name was then cancelled by the order of Court and substituted with that of the Plaintiff's mother'.*

*It is not true that the land belonged to Yowana Yakuze the Defendant's late father.....'*

From all the above cases, it is my finding that the defence/counterclaim as raised in this case is *re-judicata*.

The matters in issue were substantially the same as those in the quoted tried cases and the question of Yowana Yakuze being the administrator or executor of the estate of the late Atyeni Mukasa, either by the Will or otherwise was finally determined and concluded. This issue therefore terminates in the affirmative.

Issue No. 2;

Whether the Defendants are trespassers on the suit land

Having terminated issue No. 1 in the affirmative, it follows that the Defendants have no legal defence to their current occupation of this land. The Counsel for the Plaintiff rightly pointed out that the Defendants have no claim to the suitland since Yoana Yakuze, from whom they claim title had his name cancelled from the title by order of Court, and lost all appeals.

In *E. M. N. Lutaya versus Stirling Civil Engineering Civil Appeal No. 11/2012*, it was held that trespass to land occurs when people make unauthorised entry upon the land and thereby interfere with another person's lawful possession of the land. The standard of proof according to **Section 101, 102 and 103 of the Evidence Act** is that he who alleges a fact must prove it.

To prove trespass, the case of *Sheik H. Mohamed Lubowa versus Kitaka Enterprises Civil Appeal No. 4/1987*, provides that;

*'It's incumbent on the Appellant to prove that the disputed land belonged to him. That the Respondent entered upon that land and entry was unlawful in that it was made without permission or that the Respondent had no claim or interest in the land'.*

Furthermore, basing on the decided authority of *Justine E. M. N Lutaya versus Stirling Civil Engineering Co. CA NO. 11/2012*;

*'It is the law that a person who acquires a cause of action in trespass to land may subject to the **Law of Limitation** exercise the right immediately after the trespass commences, or anytime during its continuance or after it has ended. The person may also prosecute the cause of action after parting with possession of the land'. It is trite law that possession does not mean physical occupation, but the slightest amount of possession suffices.*

In *Wuta-ofei versus Danquah (1961) 3 AII ER 596* at page 600, the Privy Council held that;

*It is necessary for the claimant to take some active step in relation to the land to take possession, but such possession varies from land to land.*

*In this case, it was shown in evidence and pleadings that the Plaintiff has a certificate of title, and has been trying to take possession, but found resistance from the Defendants, yet other occupants settled with her and left.*

In the case of *Moyo Drift Farm Ltd. versus Theuri (1973) EA 114*, the Court of Appeal for *EA*, considered this issue in light of *Kenya Statutory Provisions*. The trial Court had



dismissed a suit by a registered proprietor of land on grounds that, he was not in possession. On appeal, this Common Law Principle was found to be inconsistent with the Kenyan Statutory law which recognises the certificate of title as conclusive evidence of ownership. The Judge at page 115 noted thus:

*“I find this argument irresistible and I do think it is necessary to examine the law of England. I cannot see how a person could be described as ‘the absolute and indefeasible owner’ of the land if he could not cause a trespasser on it to be evicted and”*. The Judge further noted that **Section 23 of the Kenya Statute** is similar to **Section 56 of the Registration of Titles Act of Uganda** and further opined that:

*“I think the decision in Maya’s case, represents what the law should be in Uganda. It is an authority. I therefore hold that a person holding a certificate of title has by virtue of that land title legal possession, and can sue in trespass”*.

Arising from the above authoritative discourse, I do find that the Plaintiff having a certificate of title rightly sued the Defendants who are found to be in trespass on the land.

In conclusion, I find that there is evidence that the Plaintiff is the owner of the land and has not authorised the Defendants on the same, yet they (Defendants) have no rightful claim thereon. Since the defence has failed to prove their alleged claims, I find that their continued occupation of the suit land despite several demands from the Plaintiff to vacate as shown in evidence amounts to trespass.

I did not find any error on the face of the record in Misc. Application No. 353/1997. However, even if I did, this is not an application for review. I do not have the jurisdiction to review the same as requested by Counsel for the Defence. The defence argument that they are lawful occupants of the land is also not tenable because Yakuze having been declared without rights on this land, he could not pass to the Defendants any rights. His actions were found *void* and since he lost the title, the law currently protects the successor in title who is now the Plaintiff.

The Defendants' remedy lies in them seeking to obtain the Plaintiff's permission or licence to remain on the land, failure so to do, they are in trespass thereon. This issue also is terminated in the affirmative.

ISSUE NO. 3;

Whether the suit is time barred.

This issue was raised by the defence, it was not however agreed upon at scheduling. I am inclined to agree with Counsel for the Plaintiff that this plea ought to have been pleaded and also made an issue. However, it only appears from the submissions and I agree with the observations by my sister **Justice P. Basaza's** in **United Methodist Church of Uganda versus Wabuso & Anor; Civil Suit No. 10/2010**, that;

*“Such argument ought to be rejected as it is only raised in the defence submissions not raised earlier. It was an allegation that was not subjected to test nor proved and therefore remained a mere allegation. To suggest that this Court should consider it at this late stage, is for the Defendant's Counsel to wash away the Plaintiff's right to be heard. The Plaintiff would be greatly prejudiced as it would not have been given an opportunity to be heard and counter the said allegation”*

I do agree with the above reasoning, but wish to add that I note that the action as under, paragraph 3 of the plaint is based on trespass. Trespass is a continuous tort and therefore every new action of trespass is a new cause of action. This rules out the question of being time barred. I therefore do not find this issue proved, and for those reasons, it is rejected.

ISSUE NO. 4;

Remedies available to the parties.

The Plaintiff prayed for damages to the tune of shs. 100,000,000/- only (*one hundred million*). However, there was no evidence or indication as to how this figure was arrived at.

It's trite that trespass is actionable *per se*. (*Placid Weli versus Hippo Tours & 2 Ors*) HCT Civil Suit No. 93/1996. Also cases of *James Fredrick Nsubuga versus AG*. HCT Civil Suit No. 12/1993; General damages normally compensate pain, suffering and loss of amenities. They aim at putting the party to the position before the damage. Evidence was led to prove the above vide PW1, PW2, and PW3. In *Robert Cassers versus AG SCCA No. 8/1999*; the estimate for damages must be based on the foundation of solid facts. In this case, I have considered that for all the loss, pain and suffering the Defendants occasioned to the Plaintiff, having been found to be in trespass, the Defendants should compensate the Plaintiff, the sum of shs. 20,000,000/- (*twenty million*) as general damages.

This Court will also grant costs of the suit to the Plaintiff. An order is made requiring that the Defendants, to vacate the Plaintiff's land as prayed.

Judgment is entered for the Plaintiff in terms as above.

Counter claim

The counterclaim is not proved for reasons stated above. It is accordingly dismissed with costs. I so order.

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Henry I. Kawesa

JUDGE

5/4/2018

Right of Appeal explained.

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**CIVIL SUIT NO. 170-2005 LUCY NAKITTO VERSUS PATRICK SENYONDWA aka BUYIZA & ANOR  
(JUDGMENT)**

Henry I. Kawesa

JUDGE

5/4/2018

5/4/2018:

Asiimwe Edgar & Bbale Faridah for the Plaintiff.

Bale Faridah

Buwule for the Defendant absent.

Bunjo Francis representative for Plaintiff is present.

Defendants absent.

Asiimwe: Matter for Judgment.

Court: Judgment delivered in the presence of the parties above.

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Henry I. Kawesa

JUDGE

5/4/2018