

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 409 OF 2008

1. EMMANUEL NYIRINKINDI
2. PETER KASENENE
3. MICHAEL OPAGI.....PLAINTIFFS

VERSUS

1. THE NEW FORST CO. LTD.
2. NATIONAL FOREST AUTHORITY
3. THE ATTORNEY GENERAL..... DEFENDANTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiffs, in the amended plaint claim against the 1st Defendant for;

- i) An eviction order from LRV 1644 folio 69 plot 69 plot 9 Kikandwa; estate; Mubende; alternatively, the 1st Defendant pays;
- ii) Damages for the value of land of Ushs. 499,500,000/-,
- iii) Special damages of Ushs. 300,000,000/-,
- iv) General damages for trespass and;
- v) Costs of this suit.

The Plaintiffs claims for monetary compensation of the market value of the property from the 2nd Defendant; (paragraph 3).

According to paragraph 4(a), the Plaintiffs are the registered proprietors as tenants in common of land comprised in and known as **LRV 1644 folio 69 plot 69 plot 9 Kikandwa; estate; Mubende** having purchased the same from Gerald Mayombwe in January 2004. The Certificate of Title was annexed as annexure 'A'.

The said Gerald Mayombwe is, according to paragraph 4b, the successor in title to the suit property, having taken the same as Administrator of the estate of the late Anictus Mayombwe Muganywa who had been granted a 44 years lease, effective 1st December 1988, on the suit property by Uganda Land Commission under a lease agreement dated February 12, 1988.

Under paragraph 4(e), in the year 2005, the 1st Defendant, its employees, servants, agents and or persons claiming under it, unlawfully entered onto prime parties of the sui property and erected roads and graded portions of it, trespassing thereon; hence this suit. The Defendants denied the same as per the respective written statements of defences.

The issue for determination were set as forth;

1. whether the Plaintiffs who are the registered proprietors of land **comprised in LRV 1644 folio 69 plot 69 plot 9 Kikandwa estate; Mubende** are lawfully holding title in respect of the suitland.
2. If (1) above is answered in the affirmative whether the third party lawfully issued a tree planting license over land

comprised in LRV 1644 folio 69 plot 69 plot 9 Kikandwa estate; Mubende.

3. Whether the Defendant is entitled to indemnity/contribution from the third party.

4. Remedies.

The evidence adduced on record was briefly as follows:

PW1; Professor Peter Kasenene,

PW2; Michael Opagi,

PEX1 – PEX6.

The defence was through;

DW1; Alex Kyabawampi,

DW2; Nicholas Ecinu,

TPW1; Tom Rukuno,

TPW2; Opala Benard Zachary,

DEX1 – DEX9.

The parties were given schedules within which to file written submissions. The submissions are on record for the Plaintiff and the reply by the 3rd party.

I now resolve the issues as herebelow:

Issue I:

1. Whether the Plaintiffs who are the registered proprietors of land **comprised in and known as LRV 1644 folio 69 plot 69 plot 9 Kikandwa estate; Mubende** are lawfully holding title in respect of the suitland.

Counsel for the Plaintiffs gave the history of the Torren system, referring to the principles of law in *Drabo Stanley versus Jimmy Madiral HCCS No. 24 of 2013*, by J. Mubiru, as;

- (i) Indefeasibility,
- (ii) Registration,
- (iii) Exhaustive inquiry,
- (iv) Compensation.

The key principle being the recognition of all interests on land including transfers, mortgages, leases etc, he argues that the register is conclusive evidence of ownership; and there is no need to seek beyond the Certificate of Title. In order to ensure proven ownership of the land. Counsel makes an argument that there is no requirement to search the root of title to ensure that there is good root before acquiring a registered land.

That the standard of due diligence is different when dealing with a registered land.

Counsel went through the land legislation in Uganda to wit Section 11 of the PLA 1969, Section 36 PLA 1969, 1975, Land Reform Decree 1975, (Section III) and Section 2(1), the 1998 Land Act, under

Section 49(a) to argue that Uganda land Commission is empowered to hold and manage any land in Uganda which is vested in government.

He referred to Exhibit P1, (the Plaintiffs' certificate of title) which is a leasehold interest created by ULC and Minute 8/87(a)126 of 10.09.87 for a term of 44 years from 1st December 1985.

He argues that the Plaintiff purchased an interest, which terminates on November 30, 2029. He further asserts that Anictus Mayombwe Mugwanya was registered on February 19, 1988 and Mayombwe Gerald on January 28 2004 while the 3rd, jointly on September 2, 2005 and the title is for 404.4 hectares.

He refers to EXP6 (*sale agreement*) showing that the Plaintiff bought from Mayombwe Gerald on January 06, 2004. Evidence of both PW1 and PW2, according to counsel, confirms that they carried out due diligence and argues that the evidence of DW3 and TPW1 and PW2, to argue that their exhibits show that a person whose name appears on the register as holding a Certificate of Title is legally recognised as the owner of the land described in the title.

He also argues that as evidence in the statutory instruments, by law a part of what was formerly Namawasa Central Forest Reserve was excised off and the part owned by the Plaintiffs in terms of acreage, sufficiently covered by what was cut off with a balance of nearly 1000 hectares and the Plaintiff's land is part of what was excised off. He concluded that they therefore hold the portion legally according to counsel's submissions (pg.5).

Counsel argued that under Section 64(1) of the Registration of Titles Act, a title of a registered proprietor is indefeasible except for fraud. He further pointed out that under Section 59, the title is conclusive evidence of ownership. He said that under Section 176(c) of the Registration of titles Act, a registered proprietor of land is protected against an action for ejectment except on ground(s) of fraud.

It was submitted by Counsel that for those reasons, (they) Plaintiffs lawfully hold the title to the suitland.

In opposition, the third party in submission argued that according to the evidence adduced at the trial, the piece of land **comprised LRV 1644 folio 69 plot 69 folio 9 Kikandwa estate; Mubende** is part and falls inside Namwasa Central Forest Reserve. That the forest reserve was by 1968 already gazzetted under SI No.176 of 1968 and Uganda Land Commission under the same law granted a lease to the Plaintiffs on the land which is part of Namawasa Central Forest Reserve.

Counsel referred to the Court record and pointed at the survey report dated July 06, 2009 by SURVECO (Annex B to the 1st Defendant's written statement of defence), and referred to the evidence of Mr. Alex Kyabawampi (DW1), Tom Rukundo; TPW1).

That according to TPW1), Namwasa has never been degazzeted. Counsel further argued that during cross examination, PW2; Opagi had told Court that before purchasing the land, he did not open the boundaries, meaning, he did not know where the land starts or

ends. Counsel also referred to the testimony of DW2; of Mr. Mutabazi Timothy that the entire plot Kikandwa estate falls on Namwasa Forest Reserve.

To support the above, he referred to exhibit D9, the boundary opening report. The evidence of DW3, TPW2 and concludes that the Certificate of Title of the Plaintiffs is located in PL1068 which is an intergrow part of Namwasa Forest Reserve (CFR). In addition to the argument, counsel referred to the following case law;

- *National Forest Authority versus Muhereza Basaliza William & Others; COA; CA No.15 of 2019 at page 32, 35 & 36.*
- *Mugerwa Evaristo Kafeero versus National Forest Authority; HCCS No.005 of 2008 at page 11 (per late Justice Kibuuka Musoke).*
- *Mugerwa Evaristo Kafeero versus National Forest Authority; No.005 of 2008 at page 11 (per late Justice Kibuuka Musoke).*
- *COA; CA No. 0039 of 2015 at page 9.*
- *Duncan Turyatunga Rujojo & Others versus The Attorney; SCCA No.05 of 2017 at pages 22,31, and Hon. Mr. Justice Richard Buteera (JSC).*
- *Sinba(K) Ltd & Others versus Uganda Broadcasting Corporation, SCCA No. 03 of 2014 at page 15, 19 & 27.*
- *Mugerwa Evaristo Kafeero versus National Forest Authority; No.005 of 2008 at page 11 (per late Justice Kibuuka Musoke), CA Section 59 of the Registration of Titles Act Cap 230.*

- *Matovu & Others versus Sseviri & Anor; CA No. 007 of 1978 (unreported).*
- *Mugerwa Evaristo Kafeero versus National Forest Authority.*
- *Kyaggwe Coffee Curing Estates Ltd & anor versus Emmanuel Lukwajju; CA No.187 of 2014 at page 16.*

To highlight the legal position *espoused* by the said cases, Counsel insisted that it was wrong and illegal for the Uganda Land Commission to issue a lease on land which was not available for leasing. He further argues that a title can be impeached for being illegally obtained (*Mugerwa Evaristo Kafeero versus National Forest Authority*).

Therefore his argument is that the entire transaction was illegal and once such an illegality is drawn to the attention of Court, it over rides all questions of pleadings and admissions. (*per Makula International Ltd versus Cardinal Emmanuel Nsubuga Wamala*).

In addition to that, in view of the above case law, Section 59 of the Registration of Titles Act did not apply where land was granted in violation of the principle of 'natural justice'. (*Matovu & Ors versus Sseviri & anor*). He argues that;

"according to the evidence of all the witnesses, both oral and documentary which has never been rebutted at the trial, in LRV 1644 Folio 69 plot 9 Kikandwa Estate Mubende, it was obtained unlawfully and illegally. Therefore this Court should be pleased to declare it null and void, hence orders of cancellation of the same"

Having reviewed the evidence on record and submissions by counsel, I now find as follows:

It is true as argued by the Plaintiffs that they are the registered proprietors of land in issue. It is also true that they have a lease authored by Uganda Land commission. The question that must be answered is whether ULC had the authority to issue the said lease to the Plaintiffs.

I appreciate the law regarding land rights as articulated by both Counsel. It is clear from the evidence by the Plaintiff that they were made aware that the title in question was being held by ULC in trust for Namwasa Central Forest Reserve. I agree with the submission by the third party, here to the extent that all evidence on record does not show that this forest reserve has ever been degazetted by government. Following the evidence of the survey report, DW1, TPW1, TPW2, TPW3, DW3, DW2; this evidence shows that the land being claimed by the Plaintiffs falls within the boundaries of Namwasa Central Forest Reserve.

According to DW3; during cross examination, on his oral evidence supporting the finding of the report, told Court that plot 9 Kikandwa estate falls within Namwasa boundary plan attached in the report

He has never seen a degazetting instrument of Namwasa Central Forest Reserve and plot 9 Kikandwa estate means that the suit land falls inside and forms part of Namwasa Central Forest Reserve.

Also, the evidence of TPW2 (Mr. Opar Z W Benard) who is a surveyor clearly told Court that Namwasa Central Forest Reserve has never been degazetted or any part of it excused and still remains a Central Forest Reserve under the law. *See paragraph 9 of Mr. Opar Z W Bernard's witness statement. Further in his evidence, he affirmed that the Forest Reserve was gazetted and registered as a crown land No.2663 and map sheet No.59/3 (paragraph 6) of his witness statement.*

The effect of all the above is that it is not true as argued by counsel for the Plaintiff's that the area in the statutory instruments, by law, a part of what was formerly Namwasa Central Forest Reserve was excised off. The portion owned by the Plaintiffs is in terms of acreage, sufficiently covered by what was excised off with a significant balance of nearly 1,000 hectares and that unless contrary ownership is shown to vest in the third party. The correct position is that the Plaintiff's predecessor in title got a correct position, is that the Plaintiffs predecessor in title got a time-bond and therefore a non-permanent interest in 404.4 hectares being part of what was excised off.

Following the records in the public registry and abiding by the process described under the Registration of Titles Act, this interest was acquired by the Plaintiffs.

Given the wealth of cases that have considered similar situations regarding the practice of the ULC, of leasing out land handed to it in trust like in the case of;

- *Duncan Turyatunga Rujojo & Others versus the Attorney General; SCCA No.05 of 2017*
- *National Forest Authority versus Omuhereza Basaliza William & Others; COA; CA No.15 of 2019.*
- *Mugerwa Evaristo Kafeero versus National Forest Authority; HCCS No.005 of 2008*

I find that at the time the Plaintiff obtained the lease, the land was not available for leasing. I agree with counsel that the transaction was an illegality and cannot be allowed.

In the instant suit and guided by the case of Simba(K) Ltd & Others versus Uganda Broadcasting Corporation, SCCA No. 03 of 2014. That an illegality renders a transaction *null* and *void abinitio*.

This illegality once brought to the attention of Court, cannot be allowed to stand. It has been said that an illegality goes to the root of the registration and transfer. *See the case of Kyaggwe Coffee Curing Estates Ltd & Anor versus Emmanuel Lukwajju; CA No.187 of 2014.*

I agree that an illegal title cannot be left in the hands of the Plaintiffs in view of the irregularities pointed out in this case. This Court cannot sanction an illegality as per ***Makula International case*** (*supra*). In conclusion therefore, I find this issue in the negative.

Issues 2 and 3

The finding in the first issue above disposes off the second issue, whether the third party lawfully issued a tree planting license on the suit land. The third party is mandated to issue licenses for sustainable utilization and management of a forest reserve. Evidence shows that the first Defendant was issued license BO.3 to develop commercial tree plantation in the Central Forest Reserve.

The first Defendant is therefore not entitled to indemnify contribution from the third party. The third issue, all in all terminates in the negative.

In the result, this Court find that the Plaintiff fails on all issues raised. This suit is dismissed with costs to the Defendants.

I so order.

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Henry I. Kawesa

JUDGE

12/08/2021.

20/08/2021:

Kwesiga Joseph for NFA holding brief for AG

Dyna Tressy Tusiime for the Plaintiff.

Josephine Muhaise, the 1st Defendant present.

Grace - Court clerk.

Dyna:

The matter is coming up for delivery of the judgment and we are ready to receive it.

Court:

Judgment read in the presence of the lawyers mentioned above.

Sgd:

Kakooza Elias

AG. DEPUTY REGISTRAR