

CIVIL SUIT NO. 497 OF 2011

1. MARY ACHIENG
2. OKELO FRANCIS

VERSUS

1. ALI NKUBI
2. THE REGISTERED TRUSTEES OF OF NAKASONGOLA MUSLIM

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT:

Introduction:

The plaintiffs filed this suit in 2015. The suit was however dismissed for want of prosecution. This court ordered that the hearing proceeds with the counterclaim which had been filed by the defendants, Mr. Ali Nkumbi as the 1st defendant, and the Registered Trustees of Nakasongola Muslim Community.

In the counterclaim, the said defendants sought the following orders:

- 1) A declaration that all the piece of land situate in **Buruli Block 116, plot 2, land at Sabagabo, Kyalubanga Nakasongola district** (suit land) belong to the 2nd counter plaintiffs;

- 2) An eviction order to issue against the counter defendants.
- 3) A permanent injunction restraining the counter defendants and/or their agents from interfering with the 2nd counter plaintiffs' land Kyalubanga, Nakasonora district.
- 4) General damages, interest and costs of this suit.

Issues:

- 1) ***Whether the 2nd counter plaintiffs' acquisition of the suit land from the 1st counter plaintiffs was unlawful;***
- 2) ***Whether the counter defendants are trespassers on the suit land:***
- 3) ***Whether the counter plaintiffs are entitled to the reliefs sought.***

Representation:

The counter plaintiffs were represented by ***M/s Senkumba & Co. Advocates.*** The counter defendants who were represented during the trial by ***M/s Ambrose Tebyasa & Co. Advocates*** did not file any submissions.

Analysis of the evidence:

Issue No. 1: Whether the 2nd counter plaintiffs' acquisition of the suit land from the 1st counter plaintiffs was unlawful;

By virtue of ***section 101 (1) of Evidence Act, Cap. 6,*** whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist. (***George William Kakoma v Attorney General [2010] HCB 1 at page 78.***)

The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. (***Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.***)

The counter plaintiffs led their evidence through two witnesses. ***Pw1*** Mukasa Abubakari, the chairman of the Registered Trustees of Nakasongola Muslim Community, the 2nd counter plaintiff.

Consideration by court:

The dispute is centered on the question as to how each party is alleging to have acquired ownership of the land in dispute. The c/plaintiffs on their part contended that the Muslim community acquired the 25 acres of land as a gift *intervivos*.

- 5 This was confirmed by **Pw2**, Mr. Ali Nkubi, the 1st counter plaintiff who on account of his advanced age his evidence was taken on 8th February, 2019 at Koojo, Luwero district, as commissioned by court.

Pw2, a son to the late Semairi Kumenteta appears on the certificate of title tendered in court as **PExh 4** as the first registered proprietor of the disputed land. His name was entered on the title
10 on 25th January, 2005 as the administrator of his father's estate, under **AC No. 95 of 2002**.

It was an agreed fact therefore that the 2nd counter plaintiff is the current registered owner of the suit land as confirmed by the said certificate of title for the suit property. According to **Pw2**, his father Semairi Kumenteta who was the former registered owner of one square mile originally comprised in **Buruli Block 116, plot 1**, donated part of the land measuring 25 acres to the
15 Muslim Community of Nakasongola Buruli; and constructed thereon the first mosque, with his son Juma Mukiibi as the first Imam of the mosque.

A total of 60 acres of land had been bequeathed to him which included the 25 acres gifted to the Muslim community in 1938 which **Pw2**, following a survey conducted in 1987 had mutated off, obtained title which he had handed over **Pw1**, as the Chairman of the 2nd c/plaintiff.

- 20 In their reply to the counterclaim the counter defendants did not lead evidence to challenge the said claim. However in their reply to the counterclaim, *paragraph 5 (f)* thereof, they claimed that the late Zeverio Lupol their predecessor in title had given a small portion of the *kibanja* to one Musa Lusel to put up the mosque.

They accused the counter plaintiffs of conspiring to secure the title without giving them prior
25 notice yet at all material times and for over a period of 60 years they were in occupation as the lawful and rightful owners of their unregistered interest in the land and as such were entitled to protection as *bona fide* occupants.

Analysis of the law:

The principles under which a gift takes effect are well articulated in a string of authorities. Suffice
30 to state that a gift *intervivos* takes effect where there is intention to give the gift. The donor must deliver the property and the donee must accept the gift. (**Norah Nassozi & Anor vs George William Kalule HCT-CA No. 5 of 2012**).



Furthermore, the general principle under **section 59** of the **RTA** is that a certificate of title is conclusive evidence of ownership and serves as an absolute bar and estoppel to an action of ejectment or recovery of any land. (**Refer also S. 64 (1) RTA**). As such, a registered proprietor is protected from ejection, save where one is able to prove fraud against such owner. (**section 176**
5 (c).)

"Fraud" was defined in the case of **FJ K Zaabwe vs. Orient Bank & 5 Others: SCCA No. 4 of 2006 (at page 28)**. In the lead judgment, **Katurebe JSC** (as he then was) relying on the definition of "fraud" in **Black's Law Dictionary (6th Edition) at page 660** fraud was defined to mean an act of dishonesty; intentional perversion of truth for purposes of inducing another in reliance
10 upon it to part with some valuable thing belonging to him or to surrender a legal right.

An allegation of fraud against the registered proprietor is so grave and vitiates a land title of a registered proprietor. It must therefore be strictly pleaded and proved, beyond the balance of probabilities, a standard generally applied in civil matters. (**Kampala Bottlers Ltd. Vs Damaniaco (U) Ltd (supra)**).
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Among the prayers sought however by the counter defendants as noted by court, cancellation of the title was not included. They led their evidence through five (5) witnesses to prove their claim as equitable owners of the *kibanja*.

By joint agreement of both learned counsel, the sworn evidence of the last witness, **Dw5**, Mr. Ojok John Onyabo, aged 68 years who had been the area Chairman since 2001, was taken during the *locus* visit.
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Dw1, Mary Achieng born 1941 aged 78 years, a daughter of Lupol Zeverio was a key witness in this suit. She told court that her father who had 7 children some of them deceased, had bought the land from one Musa *alias* Adam Boda and had passed on in 1960 when she was only 20
25 years, buried on the *kibanja* comprising part of the suit land.

Furthermore, that she has since lived on the *kibanja* which was an inheritance from her late father. The family has over the years utilized it for cultivation, residence, burial of their deceased relatives; and deriving income from brick making.

As regards to how the family had acquired the interest, in the plaint dismissed by this court, the counter defendants relied on a sale agreement between Boda, which was marked as **PExh 5**. None of the witnesses to that agreement however was called in to testify and reasons as to why were not given. The person who had been having custody of the sale agreement was also not known.
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It was besides her evidence that her father never showed her any sale agreement. She also testified that this was kabaka's land and it is to him that they used to pay *busuulu*. None of the *busuulu* receipts were availed to court to prove that claim.

5 She also in her evidence denied ever selling any part of that land which from her own testimony had always had a mosque, from as early as 1954 when she was still young. According to *paragraph 4 (a)* of her statement, at all material times her family had always been the rightful owners thereof, and had lived on that land without any interruption.

10 Although she could not deny the fact that the mosque had always been on the land she claimed that she only saw the Moslems in 2009, after they had secured the title. Furthermore, that Okeny the heir to her father died in 1980 after distributing the property to the beneficiaries. The said distribution had been made during the funeral rites of their father.

15 **Dw1** while admitting that she did not know the actual size of the *kibanja* nonetheless estimated that each child of Lupol got an acre, making a total area of 9 acres, distributed among the 7 children and from her own stretch of imagination an acre of land at that time was bigger than what it is today.

The size given in her evidence however did not tally with the size as stated in the c/defendants' reply to the counter claim where they claimed a total of 12 acres, nearly a half of the total land as registered in the title.

20 The witness also told court that it was her father who had given one Musa Luche a portion of that land on which the mosque had been built, which claim could not however be verified by this court since it lacked proper backing. **Dw1's** evidence also fell short of explaining how without a will and without letters of administration the estate of her father could have been distributed among the beneficiaries.

25 **Dw2**, Mr. Otto Dennis, the 3rd defendant, born in 1979, aged 40 years stated that he was a grandchild to Lupol the original owner of that *kibanja* and that it had houses, mango trees and a burial ground and that he was utilizing the land for brick laying and farming.

30 **Dw2** claimed to be a son of Muhamed Odongo who died in 2015. He told court that he and his late father had filed a suit against the Muslim community which is however still pending in court. He did not explain the circumstances under which they filed the present suit when the original suit was still pending.

Since he could not provide any details in relation to that suit, it is reasonable for court to assume that it had either been abandoned or that it was never filed in the first place and therefore the **Dw2**, the 3rd defendant was not telling the entire truth.

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Dw2, claimed he did not know the owner of the land which the Moslem Community claimed to have acquired in 2005. That they never informed the counter defendants about their interest in the land.

According to him, all the children of his grandfather were living on that land. Although he challenged the ownership by the Moslems on that land, he admitted that he had no evidence that fraud had been committed by them.

Court however noted that although he called Lupol his grandfather, and Odongo Muhamad his father, his father's names did not feature among those who were named and listed by the **Dw1** as the seven children of Lupol, on *pages 18-19* of the record of proceedings.

On *page 32* of the record of proceedings, he referred to **Dw1** as his paternal aunt. During cross examination when questioned about the name of Odongo Constantino appearing in *paragraph 4* of his statement as that of his father, he conceded that his father was a Catholic and indeed called Odongo Constantino.

On *page 34* during cross examination, this same witness referred to Constantino as his uncle; and on *page 37* reverted to calling him his father. On *page 39* during reexamination, he again claimed his 'father' was a son to **Dw1**, and gave another name of Okot Sulaiman as that of his grandfather but who from his own words had no relationship with Lupol, alleged to have been the original owner of the land.

The witness who also denied the name of Sam as his, also failed to give a proper explanation on the inconsistencies in names identified by counsel for the counter plaintiffs. All these put into serious doubt the credibility of the evidence led by these two key witnesses, especially on **Dw2's** interest in the *kibanja* since he himself did not appear to know who his father and grandfather were.

Dw3, Ms Layet Veronica who was a more credible witness in her statement referred to **Dw2** as a grandson since he was a son to Konstatino Odongo. Odongo according to her was a son of her sister.

The unexplained anomalies and discrepancies above however gave this court some impression that **Dw2** was an untruthful and unreliable witness, and therefore court failed to attach much value onto his evidence. As a plaintiff/3rd counter defendant, he did not therefore come to this court with clean hands.

Further doubt was created in relation to the inconsistencies appearing as the total area covering the *kibanja*. As deduced from the c/defendants' evidence, the actual size was not known to the claimants, as it ranged from 9 to 12 acres, with each witness coming up with a different figure.

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Evidently since no measurements had been taken by any party, no sketch was availed to court and despite the claim by the c/plaintiffs that a survey had been conducted in 1987, there was nothing to prove that assertion.

5 **Dw 3**, Ms Layet Veronica aged 72 years, born in 1947 another daughter of Lupol informed court that both her parents were buried on the suit land. That it was her father who had informed her that he had bought the *kibanja* in 1943 from one Musa/Adam Boda.

She was only 13 years at the time, and therefore a minor by the time Lupol died. She too admitted that her father never showed her the sale agreement for the *kibanja*. Her estimate of its total area of the *kibanja* was also based on hearsay.

10 **Dw4**, Okello Francis, aged 43 years, a son of Odongo Constantino having born in 1976 and resided in the same *kibanja* claimed that **Dw1** was his grandmother. In reexamination he confirmed that the Moslems community had already been on the land since the time he was born.

That however, the family were utilizing the land for cultivation, which land the Moslems were not
15 utilizing and that prior to 2009, no dispute ever arose between them. According to **Dw4**, Sulaimani Okot had married Tereza Amari, one of the daughters of Lupol and also used to stay on the *kibanja*. From the evidence of **Dw4** their father Odongo Constantino never owned any house on that land. His children were staying in their grandmother's house. **Dw4** sounded more or less like a witness for the c/plaintiffs.

20 **Dw1 and Dw2** confirmed the existence of the mosque on that land and so did **Dw3** who also claimed to have seen it from the time she had been an infant, which was an acknowledgment of the presence of the 1st counter plaintiff on the disputed land, for more than 60 years. The 1st counter plaintiff not only therefore had physical possession prior to 2005, but also had acquired legal possession of the land in 2005 from a registered owner.

25 Counsel for the c/plaintiffs referred court to an affidavit by **Dw4** in **MA No. 912 of 2011** under which application **Dw4** had presented the same agreement dated 12th June, 1943 (**PEXh 5**). He however denied it at the trial but could not deny the fact that it was his signature appearing on the affidavit in support of that application onto which the agreement was affixed.

None of the witnesses as a matter of fact came out to own that agreement. As noted earlier, it is
30 not clear how they came across it. None of the c/defendants' witnesses in any case had been a party or a witness or author thereof, since it was purportedly made before any of them had been born.

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All in all, although the counter defendants were able to show that they had been in physical occupation, they did not succeed in proving how their predecessors had acquired the *kibanja*. They had no knowledge of the size of the land which they were occupying since they had no sale agreement, sketch plan or survey report to confirm the boundaries.

- 5 The only two things they were certain about was that the land originally belonged to the kabaka. It had been purchased by their father in 1943 from one Boda and it was located near a tree with white flowers. The neighbors on that land as invariably mentioned by the various witnesses were not witnesses to the purported sale agreement nor were they witnesses in court during the trial.
- Such evidence therefore created doubt about the authenticity of the mode of acquisition and
- 10 claim of actual ownership of the *kibanja*. It was not strong enough to support the contention that that fraud attributable to the c/plaintiffs had been committed.

In response to **issue No. 1**, the counter defendants therefore also failed to show how in the circumstances as highlighted, the c/plaintiffs acquisition of land could be regarded as unlawful.

Issue No. 2: Whether the counter defendants are trespassers on the suit land:

- 15 Counsel cited the case of **Shekh Muhammad vs Kitale Enterprises Ltd CA No. 4 of 1987**, that in order to succeed in an action for trespass one must prove that the disputed land belonged to his/her; that the defendant had entered upon it; and that the entry was unlawful in that it was made without permission or that the defendant had no claim or right or interest in the disputed land.
- 20 In the case of: **Justin Lutaya v Stirling Civil Engineering Company, Supreme Court Civil Appeal No. 11 of 2002**, the Supreme Court trespass was defined as an unauthorized entry upon land that interferes or portends to interfere with another person's lawful possession.

- Furthermore, in **Oala Lalobo versus Okema Jakeo Akech C.S No.20 of 2004** trespass to land is a continuous tort which cannot be affected by the **Limitation Act** or the **Land Act**. It will
- 25 occur when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere, with another person's lawful possession of that land.

Trespass is committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another. (**George Kasede Mukasa v. Emmanuel Wabende & Others, Civil Suit No. 459/1998**)

- 30 It was the counter plaintiffs' contention in this case that the counter defendants had entered that land without permission and that they had no claim of right on the suit land. The counter defendants in their reply to the counterclaim, *paragraph 5 (a)* stated that they had been lawful and rightful owners of an unregistered land neighbouring Keesi and Namuli in the north, Namata



and Sentamu in the East, Nalongo Janet, Zerizefeni Kiryabandi , Ssali Yunus and the mosque in the south and the main road in the West, which land is situated at Kyalubanga, measuring 12 acres.

In *paragraph 5 (b)*, that they inherited the suit land as beneficiaries of the estate of the late Zaverino Lupol who was at all material times the owner of the suit land, having purchased the same from one Adam Boda on or about the 12th day of June 1943.

PEXH 3, is a letter by **M/s Rugambwa & Co. Advocates** representing the c/defendants, addressed to the Moslem Community, dated 18th August, 2011. From the contents of that letter they claimed that Lupol had been a *bona fide* purchaser for valuable consideration, having acquired the *kibanja* in 1943, implying therefore that as beneficiaries, they derived protection as equitable owners by virtue of **section 29(5) of the Land Act, Cap. 227**.

Section 29(5) of the Land Act provides that any person who has purchased or otherwise acquired the interest of the person qualified to be a *bona fide* occupant under this section shall be taken to be a *bona fide* occupant for the purposes of the Act.

A *bona fide* occupant is defined under **section 29 (2) of that Act** to mean a person who before the coming into force of the Constitution had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for 12 years.

Section 29(1) (c) also defines a lawful occupant to include a person who entered the land with the consent of the registered owner. Consent or recognition of a tenancy is often signified by payment of *busuulu*. The counter defendants could not however present proof that they paid any *busuulu* even to the person known to them as the actual owner of the land.

Their evidence that this was kabaka's land was also found wanting. They failed to satisfy court that the *kibanja* had been purchased by their father Zeverio Lupol from Adam Boda, and distributed among the seven children by his heir, each obtaining an acre.

They also failed to satisfy this court that they had no prior knowledge of the legal interest of the counter plaintiffs' predecessors in title, yet from their own evidence the existence of the counter plaintiffs' property on that land had been known to them for more than 60 years. They had even filed an earlier suit which (just like the present suit) they had abandoned

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It would appear that the act of securing a certificate of title and the act of putting up a modern school on land claimed by the counter defendants created uncertainty about the c/defendants' possession and occupation on that land.

At the *locus* visit conducted by this court, the unfinished school building could be seen as an abandoned structure which neither side was utilizing.

The exact boundaries and measurements of the *kibanja* were based on speculation and court noted also that new houses were put up by the counter defendants to replace the old grass thatched huts existing at the time but whose ownership was not ascertained. The new structures which were in scattered areas were possibly intended to strengthen the c/defendants hold onto that land.

It was therefore hard to distinguish between those homesteads which belonged to the beneficiaries of Lupol from those put up by the third parties or squatters on that land. Court also noted that the area where murram soil was ferried by the road construction contractors was not in use.

There were crops in several parts of the area in dispute as well as graves that the counter defendants claimed belonged to their deceased relatives. Most of them were not marked, save for one grave which indicated that the person had been buried in 1997.

Dw5, Ojok John Onyabo knew the area well, having lived on that land since his birth in 1950. He was an area chairman from 2001. He confirmed Lupol's interest in his sworn evidence which was taken at *locus*. He also confirmed that some family members had been buried on the *kibanja*; and that the unfinished school had been built on the said *kibanja*.

It was also made clear from the c/defendants' evidence that the children of the late Lupol were the sole beneficiaries of Lupol's estate; had been in occupation for decades; and that there was encroachment beyond the boundaries of the *kibanja* as the families became larger.

They continued to live thereon even when the counter plaintiffs secured the certificate of title, and utilised the area for cultivation, brick making, burial and residences, without any interruption.

Under **section 35 (8) of the Land Act**, the principle is clear that a change of ownership of title effected by the owner by sale grant and succession or otherwise shall not in any way affect the existing lawful interests of a *bonafide* occupant. The new owner is obliged to respect the existing interest.

The original owner of the equitable interest in this case was the father of the 1st counter plaintiff, Ali Nkubi who upon his demise and after a long occupation of that land became the administrator of his father's estate and in 2005 secured his registration on the title for the suit land.

From the contents of the title, he had transferred the same to the 2nd counter plaintiff on 22nd February, 2005. The 2nd counter plaintiff as the new owner was therefore obliged to respect the later interests of the c/defendants on the land which had been acquired later and which the c/plaintiffs and predecessors in title never sought to challenge.

As noted earlier in this judgment, **section 29 of the Land Act, Cap.227**, accords protection to owners of equitable interests of provable by long occupation and utilisation and recognition of the owner of the reversion or landlord (and vice versa) and payment of ground in the case of land in Buganda, and in some instances payment of a type of land tax or rent. (See: **Kampala District Land Board & George Mutale vs. Venansio Babweyala & Ors (SCCA 2/07)**).

Thus in the case of **Kampala District Land Board & Another versus National Housing and Construction Corporation Civil Appeal No. 2 of 2004**, it was held that the respondent who had been in possession of the suit land for a long time and utilized it was entitled to have its interest recognized and protected.

The law under **section 36 of the same Act** furthermore entitles a registered owner and a tenant by occupancy to mutually agree that the land in which the tenant by occupancy has an interest be subdivided in such portions as the parties may agree, with each party having exclusive occupancy or ownership of such portions as may be agreed; or that the parties become joint proprietors of the land either as joint tenants or as tenants in common.

It is within that spirit that this court encouraged the parties to agree on how to share the disputed land; carry out a survey on the land to identify the portions claimed to have been part of the *kibanja* and those falling outside the *kibanja*. The parties however failed to reach any amicable settlement and also failed to adhere to the guidance of this court.

Accordingly, this counterclaim succeeds but only in part. Since there is no sketch or survey report to determine the size of land occupied by the counter defendants it lies within the discretion of this court by virtue of **section 98 of the CPA** to make any orders as the justice of the case may demand, so as to determine the size of the land the parties were each entitled to, given the circumstances as highlighted.

In response therefore to **issue No. 2**, trespass was committed by the c/defendants in certain sections of the land the boundaries and extent of which shall be determined through a surveyor report and recommendations to be relied on and binding by the parties.

In the premises, the following orders are made:

- 1) *An independent survey shall be conducted by the office of Nakasongola district staff surveyor to determine the actual size occupied by the children, (including the estates of the deceased children) of the late Zeverio Lupol. The findings of the surveyor in his report shall be binding onto the parties.*
- 2) *Any portion of land which is occupied by squatters or other persons who are not children of the late Zeverio Olupol shall revert to the land belonging to the Muslim Community.*
- 3) *In conducting the survey, the area currently occupied and utilized by the mosque shall, together with the unutilized portions of the land, including the area where the unfinished structure is located, form part of the land owned by the Muslim Community.*
- 4) *The children of the late Zeverio Lupol are bona fide occupants of part of the suit land and their equitable interest is determined to be only 40%, estimated to have been the land initially acquired and occupied as the kibanja of the late Zeverio Lupol and subsequently inherited by his children.*
- 5) *The survey report, in calculating the 40% entitlement, shall take into consideration the portions of land currently used and occupied by the seven beneficiaries for their residences, portions of land used for cultivation by the children and for burial for their dead; and any portion of land disposed of by them to third parties and family members who are not entitled to obtain any share out the estate of the late Lupol.*
- 6) *The 40% share out of the disputed area shall entitle the children of the late Lupol as joint owners, to a separate certificate of title to be created out of Buruli, Block 116, plot 2, land at Sabagabo, Kyalubanga, Nakasongola district.*
- 7) *The counter plaintiffs are entitled to recover from the counter defendants 60% of the land in dispute calculated to include the unutilized portions of land.*

8) *The 2nd and 3rd counter defendants in the counterclaim shall only be entitled to a share out of the estate of the children of the late Zeverio Lupol under whom they respectively claim.*

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9) *The parties shall jointly meet the costs of the survey.*

10) *Each side to meet their own costs of this counterclaim.*

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11) *For the avoidance of doubt, the counter defendants shall meet the costs of the dismissed suit.*


Alexandra Nkonge Rugadya

15 *Judge*

6th June, 2022.

Delivered by email

8/6/2022

Alexandra